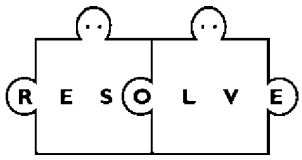

PROCESS DESIGN, CONFLICT MANAGEMENT STRATEGIES, DISPUTE RESOLUTION AND TRAINING

Summary of Recommendations

Draft Report on Dispute Resolution Provisions in ARTC Undertaking and Access Agreement

October 2001

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2 Dispute Resolution Under the Undertaking

We recommend that any dispute resolution mechanism needs to have the capacity to:

- effectively deal with the institutional factors tending to delay of issue resolution in the context of an access regime;
- recognise and address the interests of third parties in resolving or not resolving access disputes.

2.1.2 Disputes about identified issues

- The Undertaking provides that the dispute resolution mechanisms set out in 3.11 applies to any dispute arising under the Undertaking. The Undertaking also identifies a number of specific matters for dispute resolution in a particular manner.

☐ We recommend that the catchall provision in clause 3.11.1 renders specific references unnecessary and that they be deleted.

Several of the issues specifically referred to are more appropriately characterised as issues about the conduct of negotiations, rather than issues which would lend themselves to dispute resolution. Most relate to the obligation to negotiate in good faith.

☐ We recommend that the obligation to negotiate in good faith be addressed by including in the Undertaking specific obligations as to the proper conduct of negotiations, non compliance, with which should be dealt with by the mechanism set out in section 44ZZJ of the TPA.

2.1.3 Disputes that may arise out of the terms of the Undertaking itself

In our view, a number of potential dispute triggers could be eliminated with redrafting.

☐ We recommend that the issues set out in Attachment B to the Report be considered in redrafting the Undertaking.

2.2 Dispute Resolution Framework

- We recommend establishing a framework where one party is able to keep the process moving towards a speedy determination while, *at the same time*, a formal process is activated which allows all options for resolution to be available.

2.2.1 Negotiation

- We recommend that the Undertaking not require a formal negotiation process until after one party has served a notice of dispute.

- We recommend that on the serving of a notice of dispute the chief executive officers of the parties become involved with the assistance of a Conflict Manager.

2.2.2 Mediation

- We recommend that the ACCC maintain a list including mediators with relevant broad- based qualifications, from which mediators can be selected.

2.2.3 Arbitration

- We recommend the activation of the arbitration process at the same time as consensual resolution options to enhance the advantage of the availability of compulsory arbitration.

2.3.1 Criteria for arbitration

The criteria specified in clause 3.11.4(b)(v) are appropriate

We recommend two qualifications:

- First, a consideration of whether subparas (F) and (G) of paragraph 3.11.4(b)(v) establish a more limited field of consideration than the criterion at paragraph (f) of section 44X(1) of the Act.

- Second, that the rights and obligations of the access seeker under an access agreement which relates to a network that is connected to the ARTC network be considered in an arbitration of an access dispute.

2.3.2.1 ACCC as arbitrator under the Undertaking

- We recommend that that arbitrations of disputes under the Undertaking be conducted by the ACCC in accordance with the rules set out in Division 3 of Part IIIA of the TPA.

- We recommend that the following factors be considered to ensure consistency of decisions over time:

- **Relatively detailed decision making criteria**. In this respect, we consider the criteria specified under paragraph 3.11.4(b)(v) to be adequate.
- **A single appellate or review body.**
- **Publication of arbitration decisions.**

2.3.4 Other issues: non party interests

Clause 4.3(b) of the Undertaking is a "like for like" clause. The effect of a like for like clause is that a decision made under the Undertaking with respect to the pricing principles applicable to a particular access seeker has the potential to affect the prices paid by all other operators on the network.

Clause 5.6 of the Access Agreement allows an incumbent operator, who believes ARTC has sold a train path to another operator for a price that is less than the price the operator is presently paying for a train path, to apply to the ARTC to have the price paid for that path reduced. All incumbent operators therefore have a potential interest in the outcome of any dispute between the access provider and an access seeker over the terms of access.

- We recommend that the ACCC consider another option for achieving the policy objective sought to be achieved by a like for like clause, and have suggested an alternative.

- If the like for like provision is to be retained we recommend that a mechanism needs to be included in the Undertaking for a non-party to join into a dispute and protect its interests.

- We recommend that at the point of a dispute notice being issued there be an obligation that requires the ARTC to consider whether there are affected or potentially affected non parties, and if appropriate to invite them to participate in the dispute.

- We recommend ensuring the ACCC as arbitrator has the mechanism for joining non parties to the dispute under section 44S of the TPA.

2.3.5.1 Time frames

- We recommend setting indicative benchmarks times for the finalisation of arbitrations.

2.3.5.2 Appeals from arbitrations

- We recommend that appeals be limited to errors of law and not involve a hearing de nova as presently provided for.

3. Disputes Under The Access Agreement

3.2 Dispute Resolution Framework

- We recommend that disputes about the amount of an Input Cost Variation for the purposes of calculating GST be determined by binding expert determination

3.3.1 Criteria for arbitration

- We recommend that resolution of disputes under the Agreement should have regard to the rights of the parties as identified in the Agreement, and not to any overriding policy framework.

3.3.2 Appropriateness of the commercial arbitrator

- We recommend to the extent possible, parties should endeavour to agree on an arbitrator, with the assistance of the Conflict Manager. To the extent such agreement cannot be reached, this should be referred to the ACCC for appointment of an arbitrator.

- We recommend that the ACCC maintain a list of arbitrators with relevant broad based qualifications, from which to appoint an arbitrator.

3.3.3 Appropriateness of the Commercial Arbitration Act

- We recommend the Commercial Arbitration Act ('CAA') is entirely appropriate for disputes under the access agreement.

- We recommend clause 27 of the CCA that allows for an arbitrator to act as a mediator be deleted. This is an unfortunate blurring of the roles of consensual facilitator/ mediator and decision maker.

4. Recommended Dispute Resolution Model

4.1 The need for a different approach

Given this is the core of our recommendations, we have set out the model below.

In summary, our recommended model involves the following elements:

- a compulsory meeting, at an early stage of a dispute, with a Conflict Manager whose role it is to manage the dispute on a consensual basis.

- The flexibility for parties to choose how their dispute is to be resolved co-operatively, utilising a mix of consensual processes like mediation (where the parties make a decision) and determinative processes (where an independent expert makes a decision.)

- if consensus breaks down at any time after that initial meeting, either party can proceed to arbitration;

- a mechanism to document and monitor agreed processes through the use of a dispute resolution contract;
- The ability to ensure quick decisions where a parties cannot reach such agreement.

A diagramatic summary of the process is set out in the charts below.

Summary for Access Agreement

MEDIATION	BINDING EXPERT	ARBITRATION	
Dispute Notice 7 days			
CEO's meet with Conflict Manager 7 days			
By agreement in a resolution contract **Appointment of Mediator** 7 days	By agreement in a resolution contract notice for **Binding expert evaluation without reasons unless otherwise agreed** 7 days	With or without agreement in a resolution contract **Notice to Arbitrate** 7 days	
		Parties Agree on choice of arbitrator 7 days	
Mediation 14 days	**Appointment of Expert** 14 days		Arbitrator appointed by ACCC from a pre-agreed list of arbitrator 14 days
Termination of Mediation Max: 25 days from Notice of Dispute	**Submissions to Expert** 14 days	Arbitration to be conducted under Commercial Arbitration Act on time frames directed by arbitrators (see also clause 2.3.5.1 of this report)	
	Termination: Binding Decision Max: 49 days from Notice of Dispute	↓	
		Award ↓ **Appeal**	

Summary of Recommended Dispute Resolution Process for Undertaking

MEDIATION	BINDING EXPERT	ARBITRATION
Dispute Notice 7 days		
CEO's meet with Conflict Manager 7 days		
By agreement in a resolution contract **Appointment of Mediator** 7 days	By agreement in a resolution contract notice for **Binding expert evaluation without reasons unless otherwise agreed** 7 days	With or without agreement in a resolution contract **Notice to Arbitrate** 7 days
Mediation 14 days	**Appointment of Expert** 14 days	**Appoint ACCC arbitrator (ACCC or ACCC appointee)** 14 days
Termination of Mediation Max: 25 days from Notice of Dispute	**Submissions to Expert** 14 days	Arbitration to be conducted by ACCC on time frames directed by arbitrators (see also clause 2.3.5.1 of this report)
	Termination: Binding Decision Max: 49 days from Notice of Dispute	↓
		Award ↓ **Appeal**

4.2 Overview of the key steps

4.2.1 Role of the Conflict Manager

☐ We recommend the conflict manager be a facilitator, and therefore has no power to bind the parties, only to assist them in agreeing on a process for resolution of the dispute.

☐ We recommend if agreement by the parties on a resolution contract cannot be reached, either party may issue a notice to arbitrate.

4.2.2 Profile of the Conflict Manager

☐ We recommend the Conflict Manager should be a person who:

- understands the rail industry and the needs of industry participants;
- is familiar with ADR processes and their strengths and weaknesses;
- is purpose appointed;
- is capable of either conducting any mediation process themselves or assisting the parties in the selection of a suitable mediator;
- have the skill and knowledge to dovetail all ADR processes where appropriate and disseminate information on the processes available;
- have knowledge of and access to appropriately qualified persons to appoint as arbitrators or experts if the parties agree to a determinative process.

4.2.3.1 Who engages the Conflict Manager

☐ We recommend the Conflict Manager can be engaged either by an industry body, the ARTC (provided that the industry is comfortable that the person is independent and not conflicted), or the ACCC.

4.2.3.2 One person or more

- We recommend having one person or organisation as the Conflict Manager to ensure consistency of approach and the ability to identify any issues that are causing repeat problems. (review of the system).

4.2.4 Incentives for Conflict Management Process

- We recommend that the initial meeting of the Conflict Manager and the CEOs be compulsory for the parties. However, from then on, any participation of the Conflict Manager must be with the agreement of the parties only.

- We recommend that the failure by either the access seeker or the ARTC to attend a meeting with the Conflict Manager be a breach of the Undertaking and that the Undertaking reflect the parties' recognition of that consequence.

4.2.5 Optional Step – Mediation (By Agreement)

- We recommend that where the parties agree that some or all of the matters can be resolved through consensual process, mediation can be used.

4.2.6 Optional Step – Binding Expert Determination (By Agreement)

- We recommend Binding Expert Determination be used if both parties agree. This will be done on the basis of written submissions, without written reasons.

- We recommend the process be confined to determining issues identified by the parties, rather than making orders generally affecting the parties

4.2.7 Indemnity of neutrals

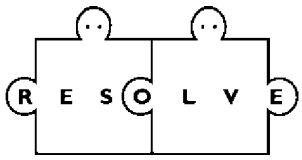
- We recommend that the parties provide an indemnity to any conflict manager, mediator, expert adjudicator or arbitrator in a standard format.

4.2.8 Joinder of interested parties

- We recommend that the process have a safeguard to protect the interests of any interested non-parties.

- We recommend that at the point of a dispute notice being issued there be an obligation that requires the ARTC to consider whether there are affected or potentially affected non parties, and if appropriate to invite them to participate in the dispute.

- We recommend that in the event that interested non party participation was unable to be agreed the issue of joinder of parties will be left to the consideration and determination of an arbitrator appointed pursuant to a Notice to Arbitrate. The issue of joinder must in those cases be specified in the Notice to arbitrate.



PROCESS DESIGN, CONFLICT MANAGEMENT STRATEGIES, DISPUTE RESOLUTION AND TRAINING

Draft Report On Dispute Resolution Provisions In ARTC Undertaking And Access Agreement

October 2001

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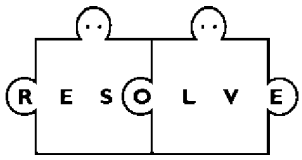

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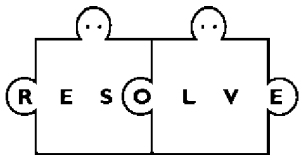

1. Background

1.1 Introduction

The Australian Rail Track Corporation ("ARTC") is the owner of the interstate main line standard gauge track linking Kalgoorlie in Western Australia, Adelaide, Wolsey and Crystal Brook in South Australia, Broken Hill in New South Wales, Melbourne and Wodonga in Victoria ("the Network").

In accordance with the provisions of section 44ZZ of the *Trade Practices* Act 1974, the ARTC has submitted an Undertaking proposing the terms and conditions upon which access will be provided to third parties ("the Undertaking"). ARTC has also submitted, with the Undertaking, an indicative access agreement which sets out the terms on which ARTC proposes to grant access to the Network ("the Access Agreement").

The ACCC seeks an analysis and evaluation of the dispute resolution provisions of Part 3 of the Undertaking, relating to disputes arising out of negotiations between the ARTC and applicants for access to the ARTC service, and of clause 17 of the Agreement, relating to disputes arising under the Agreement.

Specifically, the ACCC seeks comment on:

- the appropriateness of the dispute resolution procedures set out in the Undertaking and the Agreement;
- whether the processes and time-frames are clearly defined;
- whether the number of steps in the processes, and the time-frames involved at each step, are appropriate;
- whether the criteria which an arbitrator must take into account in conducting arbitration under the Undertaking and the Access Agreement provide sufficient clarity and guidance for the arbitrator to reach a decision;
- whether the dispute resolution provisions in the Undertaking should differ from those in the Access Agreement;

- whether the arbitration criteria and processes are likely to result in consistent outcomes over time;
- whether the use of a commercial arbitrator in relation to the negotiation of an access agreement is appropriate, particularly in relation to the likely expertise of arbitrators and consistency of arbitration decisions over time;
- whether reference to the *Commercial Arbitration Act 1986* (SA) is appropriate; and
- any other issues considered to be relevant.

In conducting this review we have:

- reviewed the terms of the Undertaking and the Agreement (in the form provided with the consultancy brief); and
- considered the comments of industry made in response to the dispute resolution procedures, as expressed in various submissions made to the ACCC with respect to the Undertaking (These comments are summarised in Attachment A);
- had regard to a range of other documents and materials that have a bearing on the Undertaking, including the ARTC Explanatory Guide, and Mediation Guidelines published by the Law Society of South Australia.

The terms used in the report are those as defined, where relevant, in the documents and materials identified.

It is useful at the outset to examine the statutory framework in which the Undertaking is given the purposes and objectives of the Undertaking as articulated by ARTC in the explanatory guide to the Undertaking. These issues are dealt with, respectively, in Sections 1.2 and 1.3 of this Report.

1.2 The legislative framework: Part IIIA of the Trade Practices Act

Part IIIA of the *Trade Practices Act* is said to be based on: 'the notion that competition, efficiency and public interest are increased by overriding the exclusive rights of the owners of monopoly facilities to determine terms and conditions on which they will focus their services' (*Re Australian Union Student* (1997) ATPR 41-573 at 43,596). The assumption underlying Part IIIA is that where facilities or services of national significance are such that it would be uneconomic to duplicate or replicate them, it is necessary to establish access arrangements in order to promote competition.

Under Division 3 of Part IIIA the Minister can declare a service a monopolistic utility to be open to access applications by third parties. The declaration will set out the terms and conditions upon which access to third parties is provided. In the event of access disputes the ACCC will conduct an arbitration and make a determination.

Alternatively, Division 6 of Part IIIA provides for the owner of a facility to register an Undertaking with the ACCC pursuant to which it will negotiate and agree access arrangements with third parties who want to obtain access to the facility. (s. 44ZZA)

An Undertaking is given for a fixed period and must therefore specify its expiry date. The ARTC Undertaking purports to be for five years from one month after it is accepted by the ACCC. Section 44ZZA(3) of the Act provides that, in determining whether to accept an Undertaking, the ACCC must have regard to the following matters:

"(a) the legitimate business interests of providers;

(b) the public interest, including the public interest in having competition in markets (whether or not in Australia);

(c) the interests of persons who might want access to the service;

(d) whether access to the service is already the subject of an access regime;

(da) whether the Undertaking is in accordance with an access code that is in applies to the service

(e) any other matters that the ACCC thinks that are relevant."

Subdivision B of Division 3 of Part IIIA of the *Trade Practices Act* establishes a framework for the resolution of disputes that may arise where a third party is unable to agree with the provider of one or more aspects of access to a declared service under which the ACCC is empowered to arbitrate the dispute. That framework does not apply to a dispute that may arise under an Undertaking. However, the Act provides that, if an Undertaking provides for the ACCC to resolve disputes about the Undertaking, or to perform a function or exercise powers in relation to the Undertaking, the ACCC may resolve such disputes and may perform those functions and exercise those powers. (s. 44ZZA(6) and (6A)). It is assumed for the purposes of this report that these provisions empower the ACCC to resolve and arbitrate disputes in relation to the Undertaking.

Section 44ZZJ of the Act provides further that, if the ACCC thinks that the provider of an access Undertaking has breached any of its terms, the ACCC may approach the Federal Court for an order, inter alia, directing compliance, and even compensation to any other person who has suffered loss or damage as a result of the breach.

1.3 Framework of Part 3 of the Undertaking

In the Introduction to its Undertaking the ARTC states that it:

"seeks to encourage utilisation of the network and as such, will not seek to frustrate the negotiation process."

The Undertaking itself provides for a four stage process to reach a signed access agreement:

- preliminary meetings and exchanges of information;
- submission of an access application by an operator;
- preparation of an indicative access proposal by ARTC;
- negotiations to develop an access agreement for execution.

It expresses a willingness to tailor the negotiation for access process in consultation with the applicant and sets out the proposed framework in Part 3 to provide some certainty to industry.

In its explanatory guide the ARTC states that its approach in this proposal for negotiating access contained in Part 3 of the Undertaking is 'to encourage access' and that 'the process has been developed to be sufficiently flexible to meet applicant's needs'.

The explanatory guide is stated by the ARTC to be a 'companion to the Access Undertaking' but does not form part of the Undertaking. Its purpose is expressed to be 'to aid understanding through provision of supplementary information and clarification'.

In the explanatory guide, the ARTC acknowledges the following factors that relevant to the development of the Undertaking:

- the competitive environment in which ARTC and retail operators exist;

- the obligations of the ARTC and operators to meet the needs of shareholders;
- ARTC's charter to encourage growth of rail freight on interstate rail network;
- ARTC's income is reliant on operators running the above rail services;
- ARTC's intention to:

- provide certainty to access seekers;
- positively encourage network use;
- retain flexibility to adapt to varying requirements;
- reflect industry efficient practice for infrastructure maintenance.

The ARTC also states in the explanatory guide that the dispute resolution process in 3.11 has been designed to put in place a quick, non expensive and effective means for resolving disputes whereby disputes can be readily resolved before escalating to an arbitration level.

2. Dispute Resolution Under The Undertaking

2.1 Disputes likely to arise under the Undertaking

The Undertaking provides that the dispute resolution mechanisms set out in clause 3.11 are to apply to 'any dispute arising under the Undertaking' or in relation to the negotiation of access. To assess the appropriateness of the proposed dispute resolution mechanism, it is necessary to consider the nature and type of disputes that are likely to arise in the context of rail access negotiations.

There are a number of potential disputes that may arise out of the Undertaking. They can be considered under 3 broad categories, namely:

- disputes likely to arise in the context of access negotiations generally;
- disputes about issues that are specifically identified in the Undertaking for resolution in a particular manner;
- disputes that are likely to arise out of the drafting of the Undertaking itself.

2.1.1 Disputes likely to arise in the context of access negotiations

Such disputes are likely to relate to one or two questions:

- Is there capacity on the network to accommodate the operator's access requirements?
- Is access being offered on terms which are fair, particularly in relation to price?

The question of capacity essentially relates to whether it is possible for the operator to run trains on the paths sought, having regard to the condition of the network and the interests of other operators. Dispute resolution will need to have regard to:

- the master timetable in operation at the time access is sought;
- protocols for producing a daily timetable, including provision for track possessions, special events and so on;
- network operating protocols;
- priorities required (possibly under statute) to be given to particular types of operators (eg passenger operators);
- track condition, and its ability to handle the proposed operations; and
- the potential for strategic or gaming behaviour of existing operators and access seekers.

Disputes over access price will involve consideration of the difference between the base costs and revenues to the access provider and the likely costs and revenues to the access provider if access is provided. This may involve a judgment based on technical issues such as:

- the cost of providing and maintaining the network;
- traffic levels and forecasts;
- information about comparable services;
- assessment of base track condition;
- allocations for major periodic maintenance;
- method of assessing changes in network condition;
- method of calculating charges.

Clearly, each of these issues is likely to involve a high level of operational and/or technical content. However, each goes to a more fundamental question of whether the access provider is being fair and reasonable in its offer of access, or the terms and conditions on which it is prepared to provide access. This is likely to be the

issue at the heart of most disputes arising under the Undertaking. It suggests that any dispute resolution mechanism needs to have the capacity to:

- deal with the technical and operational issues;
- identify and define acceptable standards for access and the terms of access.

It is also necessary to understand the dynamic underlying typical disputes about access. At its most basic level, this involves three potentially conflicting sets of interests:

- the interest of the access seeker to secure access to the network quickly and efficiently and at the lowest cost;
- the interest of the access provider to facilitate an access seeker's access to the network quickly, but on terms which maximise the return to the access provider; and
- the interest of incumbent operators in delaying the entry of a new operator as long as possible.

This suggests that the dispute resolution mechanism must:

- effectively deal with the institutional factors tending to delay of issue resolution in the context of an access regime;
- recognise and address the interests of third parties in resolving or not resolving access disputes.

2.1.2 Disputes about identified issues

Notwithstanding that the Undertaking provides that the dispute resolution mechanisms set out in 3.11 apply generally to any dispute arising under the Undertaking, the Undertaking also identifies a number of specific matters for dispute resolution in a particular manner. The issues are:

- 3.3(f) - unreasonable refusal by ARTC to commence negotiations;
- 3.3(g) - frivolous negotiation by an applicant;
- 3.7(b) - time delay by ARTC in provision of indicative access proposal;
- 3.7(e) - ARTC not making reasonable progress;
- 3.8(d) - ARTC response to query and advice in indicative access proposal considered inadequate by applicant;
- 3.9(b)(v) – negotiations not progressing in good faith;

- 3.9(e) - unresolved disputes after reasonable negotiation.

In our view, the catchall provision in clause 3.11.1 renders such specific references unnecessary. In any case, several of the issues specifically referred to are more appropriately characterised as issues about the conduct of negotiations rather than disputes which would lend themselves to the dispute resolution mechanisms suggested. Most relate to the obligation to negotiate in good faith, an issue which is typically likely to arise where an access seeker is seeking to obtain access to the network in the face of what it feels is delay or unreasonable terms being offered by the access provider.

Such disputes would, in our view, be would more appropriately addressed by including in the Undertaking specific obligations as to the proper conduct of negotiations, non compliance with which should be dealt with by the mechanism set out in section 1.44ZZJ of the Act.

2.1.3 Disputes that may arise out of the terms of the Undertaking itself

The drafting of the Undertaking itself gives rise to the potential for dispute, in three areas:

- **The negotiation process.** Unspecified time frames and the failure to particularise certain matters (such as publication by the ARTC of material) create uncertainty as to the obligations of one or other parties, which may be exploited for the purposes of prolonging or escalating a dispute.
- **Confidential information.** There are conflicts within the Agreement as to the party's obligations with respect to confidentiality.
- **Publication by ARTC.** There is a lack of clarity as to the information that may or must by published by ARTC.

In our view, a number of potential dispute triggers could be eliminated with redrafting. These issues are identified and addressed in detail in Attachment B to this Report.

2.2 Dispute Resolution Framework

Clause 3.11 of the Undertaking establishes a four step 'negotiate -negotiate - mediate - arbitrate' dispute resolution process.

As currently drafted, it takes a linear approach to dispute resolution, requiring the parties to work through one dispute resolution step at a time in a process that could see the dispute taking 98 days from notice of dispute to the appointment of an arbitrator.

In our view this is its fundamental shortcoming. A consistent theme that emerges from industry comments in relation to the dispute resolution mechanism is concern about the length of time that can elapse from commencement to conclusion of a dispute resolution process. Industry believes that that the time required to work through to a determination is so great as to potentially negative the competitive benefits that an operator can gain by a decision, say, to switch a particular freight task to rail. As one industry representative told the ACCC sponsored seminar on the Undertaking in Melbourne on 22 August:

"In many ways we would prefer a quick decision to a correct decision."

We therefore regard the need to reduce the overall time required to complete dispute resolution processes as the critical objective in reviewing the procedures set out in the Undertaking. In Section 4 of this Report, we recommend an alternative model. In essence, it involves a compulsory meeting, at an early stage of the dispute, with a conflict manager whose role it is to manage the dispute on a consensual basis. However, should the consensus break down at any time after that initial meeting, either party can quickly proceed to arbitration.

Our aim in proposing this model is to establish a framework where one party is able to keep the process moving towards a speedy determination while, *at the same time*, a formal process is activated which allows all options for non determinative resolution to be available.

The following analysis of the process proposed to be established in the Undertaking seeks to identify the strengths and weaknesses of each stage of the process. Our proposed model seeks to adopt the strengths and overcome the weaknesses.

2.2.1 Negotiation

Negotiation is the first step in the process set out in the Undertaking. Clause 3.11.2 states that senior representatives from the ARTC and the applicant must meet within

seven days from receipt of a Notice of Dispute (as defined) and use their reasonable endeavours acting in good faith to resolve the dispute by joint discussions.

In our view, it is unnecessary to specify this step in the Undertaking. It is highly unlikely that a party to access negotiations would wish to activate formal dispute resolution processes without first having expended considerable resources and energy in seeking to find a resolution through discussion and negotiation. We therefore think that it is unnecessary to specify a formal negotiation process until after one party has activated the formal mechanism by giving notice of dispute. At that point, we believe, it is appropriate for the chief executive officers of the parties to become involved in a formal manner as soon as possible, and with the assistance of a Conflict Manager.

2.2.2 Mediation

The mediation regime proposed in 3.11.3 commences by imposing on the chief executive officers of each party an obligation to attempt, within 21 days from notification that the negotiation between senior representatives has not succeeded, to resolve the dispute, including by 'informal mediation'.

'Informal mediation' is an imprecise term which does not refer to any recognised ADR process. A mediation, by its nature, involves the participation of a neutral third party to assist parties in dispute to identify the issues, to explore issues and options for resolution and to facilitate the achievement by the parties of a consensual resolution. If, by 'informal mediation', it is intended to refer to a process without a mediator, that is not mediation in any recognised sense. It is simply discussions.

The Undertaking goes on to provide that if the chief executive officers do not resolve the dispute within 14 days after the 'informal mediation', then the dispute is to be referred to 'formal mediation in South Australia' to be mediated by 'a single mediator' appointed by agreement of the parties or by the President of the Law Society of South Australia.

The generally accepted elements of mediation include:

- commitment by parties to participate with each other and the mediator in good faith;

- agreement that the contents of the mediation remain confidential;
- the ability for private conferencing between the mediator and any party;
- the opportunity for each party to address the comprehensive range of issues that, in that party's mind, have given rise to the dispute;
- a negotiation process based on a spirit of compromise;
- the capacity of the mediation to deliver to the parties resolution of the dispute in the form of a signed agreement;
- a capacity for the parties to agree, having distilled various issues of the dispute, the manner in which those issues may be resolved, (including by way of expert determination where appropriate);
- the opportunity for an integrated approach to resolving the dispute using a range of dispute resolution mechanisms.

In the Undertaking the mediation is to be conducted, unless otherwise agreed, by a mediator under the "*Guidelines for Legal Practitioners Acting as Mediators*" of the Law Society of South Australia.

There are no universally accepted guidlelines or standards for mediation in Australia (see NADRAC Report 2001). As with selection of arbitrators, we recommend that the ACCC maintain a list from which mediators can be selected. The reason is that the list can include mediators with relevant broad- based qualifications whereas external bodies are often confined to the qualifications of their members.

Further, we see no reason why the processes intended to be embraced within the mediation stage under the Undertaking should not be conducted in parallel with the preliminaries for the determinative process of arbitration if required by either party. On that basis, our preferred model involves the appointment of a suitably qualified Conflict Manager. The role of the Conflict Manager is discussed in section 4 of this Report.

2.2.3 Arbitration

The Undertaking as drafted provides that if, within one month from appointment of a mediator, the dispute remains unresolved, either party may refer the dispute to arbitration. It provides that arbitration will be conducted in accordance with the *Commercial Arbitration Act* 1986 (SA) and the arbitrator must provide reasons for the determination.

Clause 3.11.4(b)(vii) of the Undertaking provides that the decision of the arbitrator is final and binding on the parties, but if a party believes that there has been a manifest error, it may refer the matter for a determination. If the ACCC agrees that there has been a manifest error, the parties may agree to refer the dispute to another arbitrator, or failing agreement, one party may refer the dispute to the ACCC for determination in accordance with clause 3.11.5. That clause essentially provides that if a dispute is referred to the ACCC, Division 3 of Part IIIA of the *Trade Practices Act* applies to the dispute.

The benefits of an arbitration in the context of an access dispute are that:

- it can take place at the convenience of the parties with the adjudicator of their choice;
- all relevant evidence can be presented and tested;
- the parties have the opportunity to answer questions put by the arbitrator, to consider a draft award and to make submissions on the draft prior to a final award;
- the award contains reasons;
- there is an appeal in the event of manifest error;
- an award can make orders arising out of its determination and as formulated in the terms of reference by the parties.

However, there are a number of disadvantages of arbitration in the context of the Undertaking.

- It can be costly (costs include legal advice and representation and expert witnesses, as well as the cost of the arbitrator and whatever administrative support that may be required and upon which the parties agree).
- Any arbitration will only occur following the unsuccessful steps of negotiation, informal mediation and a mediation conducted by a mediator.
- There is significant potential for the arbitration process itself to become protracted, particularly given the requirement to observe the rules of procedural fairness.
- There is the possibility of a virtually endless set of re-runs of the dispute because of the ability of seek an arbitration by another arbitrator on the grounds of manifest error. As drafted, the Undertaking provides for no finality.
- The possibility of a number of different arbitrators determining disputes under the *Commercial Arbitration Act* model is not likely to be conducive to consistent decisions or the development of a coherent set of principles.

This time delay issue is critical. However, this is not an inherent disadvantage of the arbitration process. On the contrary, in our view, the activation of the arbitration process at the same time as consensual alternative options can be explored enhances the advantages of the availability of compulsory arbitration. This is a key element of our preferred model.

2.3 Specific issues relating to arbitration under the Undertaking

The terms of reference for this review require us to consider a number of issues in relation to the arbitration process:

- whether the criteria which an arbitrator must take into account in conducting arbitration under the Undertaking provide sufficient clarity and guidance for the arbitrator to reach a decision;
- whether the use of a commercial arbitrator in relation to the negotiation of an access agreement is appropriate, particularly in relation to the likely expertise of arbitrators and consistency of arbitration decisions over time; and
- whether reference to the *Commercial Arbitration Act 1986* (SA) is appropriate; and
- other issues considered relevant.

2.3.1 Criteria for arbitration

Clause 3.11.4(b)(v) of the draft Undertaking specifies a number of matters which the arbitrator must take account in deciding a dispute. They are:

"(A) the principles, methodologies and provisions set out in this Undertaking;

(B) the objectives and principles enunciated in Part IIIA of the TPA and the Competition Principles Agreement;

(C) ARTC's legitimate business interests investment in the facility;

(D) all costs that ARTC incurs in providing Access, including any costs of extending the Network, but not costs associated with losses arising from increased competition in upstream or downstream markets;

(E) the economic value to ARTC of any additional investment that the Applicant or ARTC has agreed to undertake;

(F) the interests of all persons holding contracts for use of the Network;

(G) the firm and binding contractual obligations of ARTC or other persons (or both) already using the Network;

(H) the operational and technical requirements necessary for the safe and reliable operation of the Network;

(I) the economically efficient operation of the Network;

(J) the benefit to the public from having competitive markets;

(K) any other matters that the arbitrator thinks are appropriate to have regard to."

As noted above, the ACCC has power under the Act to determine disputes in relation to access to declared services. Section 44X(1) of the Trade Practices Act provides that the ACCC must take certain matters into account in making determination in such disputes. The criteria are very similar to the criteria specified in clause 3.11.4(b)(v) of the Undertaking:

"(a) the legitimate business interests of the provider, and the provider's investment in the facility;

(b) the public interest, including the public interest in having competition in markets (whether or not in Australia);

(c) the interests of all persons who have rights to use the service;

(d) the direct costs of providing access to the service;

(e) the value to the provider of extensions whose cost is borne by someone else;

(f) the operational and technical requirements necessary for the safe and reliable operation of the facility;

(g) the economically efficient operation of the facility."

(Section 44X(2) provides that the Commission may take into account any other matters that it thinks are relevant.)

The effect of this is likely to be that in situations where the ACCC is required to determine a dispute (that is, as the Undertaking is drafted, pursuant to clause 3.11.5) broadly similar criteria will be applied. Those criteria are, moreover, consistent with the overarching framework for the determination of access disputes established under the Act. This, in our view, makes the criteria specified in clause 3.11.4(b)(v) appropriate, subject to two qualifications.

- First, we query whether the criteria in sub-paragraphs (F) and (G) of paragraph 3.11.4(b)(v) may establish a more limited field of consideration than the criterion at paragraph (f) of section 44X(1) of the Act. The former appears to allow the decision maker to consider the interests of those who have current contractual

rights in relation to the service, while the latter appears to contemplate that the decision maker should also be able to consider the interests of those with rights other than under contract, for example rights that arise under the Act. We have not sought to form any concluded view on this issue, but raise it for consideration by the ACCC.

- Second, we note that the issue of interface with other networks and other access regimes appears to be a concern for industry. The terms on which access is granted to an operator on a rail network that connects with the ARTC Network may be a relevant matter in an access dispute under the Undertaking. An option for managing that issue is to specify, as one of the considerations which must be taken into account in the arbitration of an access dispute, the rights and obligations of the access seeker under an access agreement which relates to a network that is connected to the ARTC network.

2.3.2 Appropriateness of using commercial arbitrators - consistency of decisions

We have reservations about the appropriateness of commercial arbitrators for the resolution of disputes arising out of negotiation for access pursuant to the Undertaking. This stems from the fact that such disputes involve a broad discretionary component, in that they require the arbitrator to determine the fairness and reasonableness of terms in the context of commercial negotiations. This is a significant policy formulation role, as it involves setting terms which are likely to have direct and indirect implications for other existing and prospective industry players. In situations where the access provider adopts a policy of applying terms and conditions entered into with one operator to all other operators ('like for like'), the effect of a determination is quasi legislative.

2.3.2.1 ACCC as arbitrator

In our view, a commercial arbitrator may not be the most appropriate person to play that role. The obvious alternative is to have disputes determined by the ACCC. The ACCC should have the power to conduct the process themselves or they should be able to appoint an approved privately qualified arbitrator to sit alone or with the ACCC. We believe that the ACCC has an advantage in that it is well qualified and experienced at weighing the criteria referred to in section 44X(1) of the Act, which are essentially the same considerations that arise under the Undertaking.

On the other hand, the ACCC is likely to have an established policy position on the issues likely to arise in a dispute under the Undertaking, and so will not be

approaching the dispute with the impartiality that would be brought to a dispute by a commercial arbitrator. This is not a significant concern in our view. A known policy position about the appropriateness or otherwise of terms of access to a rail service, consistent with the Competition Principles Agreement and the Act, is not contrary to the public interest in the same way as would be, for example, a pre judgement about the expert evidence of a particular party.

A number of factors need to be present to ensure consistency of decisions over time. They include:

- **Relatively detailed decision making criteria**. In this respect, we consider the criteria specified under paragraph 3.11.4(b)(v) to be adequate.
- **A single entity determining all disputes.** As noted above, we consider that this to be a major drawback of the commercial arbitration model.
- **A single appellate or review body.** Also as noted above, while the ACCC has a role in determining a dispute where there is a manifest error on the part of the arbitrator, involvement of the ACCC can be avoided if the parties agree to a rehearing by another arbitrator.
- **Publication of arbitration decisions.** We have suggested in Attachment 2 that the further consideration needs to be given to confidentiality and publication issues.

We consider, on balance, that arbitration of all disputes by the ACCC in accordance with the rules set out in Division 3 of Part IIIA is likely to produce better and more consistent decisions in relation to access disputes under the Undertaking than arbitration by a commercial arbitrator.

2.3.3 Appropriateness of Commercial Arbitration Act (SA)

We note that this has now been dealt with in the amended Undertaking and have deleted this paragraph.

2.3.4 Other issues: non party interests

As noted above, a critical issue in the context of access disputes arises out of the potential need for persons other than the access provider and the operator to be involved in the dispute resolution process. In the rail context, an application by an operator for access to a network can impact, operationally as well as economically,

on all other operators on the network. In its present form, the Undertaking requires an arbitrator to have regard to:

- the interests of all persons holding contracts for use of the Network;
- the firm and binding contractual obligations of ARTC or other persons (or both) already using the Network.

However, there is no procedural mechanism through which the interests of third parties that might be affected by a grant of access can be represented, and no requirement for those interests to be considered at an earlier stage of the process than arbitration. Moreover, the arbitrator has the power to call evidence from non parties, but not to join non-parties.

In this context we note clause 4.3(b) of the undertaking provides:

"In formulating its charges, ARTC will not differentiate between Applicants in circumstances where:

(i) the characteristics of the services are alike; and

(ii) the Applicants are operating within the same end market.

For the purposes of this clause, ARTC shall determine whether the characteristics of two Services are alike having regard to matters including but without limitation location, duration and quality of the Train Path, nature of Train consist, characteristics of the Service, longevity of Access, arrival and departure times of the day and week."

This provision is a "like for like" clause. The effect of a like for like clause is that a decision made under the Undertaking with respect to the pricing principles applicable to a particular access seeker has the potential to affect the prices paid by all other operators on the network. Clause 5.6 of the Access Agreement allows an incumbent operator, who believes ARTC has sold a train path to another operator for a price that is less than the price the operator is presently paying for a train path, to apply to the ARTC to have the price paid for that path reduced. All incumbent operators therefore have a potential interest in the outcome of any dispute between the access provider and an access seeker over the terms of access.

Like for like provisions are intended to promote competition, by preventing the access provider favouring one operator over others, and by ensuring that participants who have obtained access rights to a network obtain the benefit of favourable price movements. However the effect of like for like provisions in the context of dispute resolution procedures is to give one or more non-parties a real interest in what otherwise would be a bilateral dispute. A similar provision in the US regulatory framework for telecommunications has meant that a "tariff" is reset in every new agreement. This means that any dispute over price affects all participants on the network, making it necessary to have the facility for multi-party dispute procedures. This is complex, time-consuming and expensive.

We therefore raise for the ACCC's consideration another option for achieving the policy objective sought to be achieved by a like for like clause. The alternative would involve:

- publication of the prices paid by and relevant conditions of access of each operator; and
- an annual review of access charges.

In this way certain terms, can be reviewed annually allowing participants access to the information in conducting their individual negotiations. Negotiations would be conducted on the basis of pricing transparency, obviating the need for an automatic flow on.

In the event ARTC was not reasonable in taking into account any reductions in negotiation prices at that point of the dispute, the dispute resolution procedures could be invoked on a bilateral basis.

The advantage of this approach is that disputes under the Undertaking can remain private, and bilateral. This would allow them to be quicker and more cost effective without the delay caused by the need to consider joinder of parties.

If the like for like provision is to be retained, the lack of a procedural mechanism through which the interests of incumbent operators can be represented is, in our view, a significant concern. We note that the Undertaking requires the access provider to have regard to the operational impacts on other operators from the point at which it formulates its proposal for access. However, there is no formal

mechanism under the Undertaking for a non-party to join into a dispute and protect its interests.

This position is to be contrasted with the position in relation to ACCC arbitrations about declared services under section 44S(2) of the *Trade Practices Act*, which provides that, on receiving notification of an access dispute, *'the Commission must give notice in writing of the access dispute to:*

(a) the provider, if the third party notified the access dispute;

(b) the third party, if the provider notified the access dispute;

(c) any other person whom the Commission thinks might want to become a party to the arbitration.'

- In our view, a mechanism needs to be included in the Undertaking. In our recommended model, the issue of third party interests would be raised at two points in the dispute resolution process: There should be an obligation that requires the ARTC to consider whether there are affected or potentially affected non parties and if appropriate to invite them to participate in the dispute.
- In addition to requiring an arbitrator to consider the interests of other operators on the network, it would be desirable to ensure the ACC has the mechanism for joining non parties to the dispute under section 44S.

This is discussed further at 4.8 below.

2.3.5 Other Issues

2.3.5.1 Time frames

It has already been outlined that a key component of the system must be resolution within a short time frame. It will be very important to ensure that there are proper case management and tracking processes within the ACCC.

In processes such as arbitration we note that the parties are reliant on arbitrators to keep the process moving. It is important that there is depth of experience in understanding what is an appropriate time frame. This may mean using experienced arbitrators from within the ACCC or elsewhere, until indicative timing benchmarks can be established.

2.3.5.2 Appeals from arbitrations

3.11.4(b)(vii) of the revised Undertaking makes the determination final and binding "subject to any rights of appeal granted under the TPA".

This brings the appeals into line with appeals under declared services. While there is a certain logic in this proposed course it has the consequence of an appeal being a hearing de nova.

It would seem that the preferable course is to limit appeals to errors of law and not a hearing de nova, to save time, cost and ensure closure.

3. Disputes Under The Access Agreement

3.1 Nature of Disputes likely to arise under the Agreement

The Agreement provides that the dispute resolution mechanisms set out in clause 17 are to apply to 'a dispute arising under this Agreement'. As in the case of the Undertaking, to assess the appropriateness of the proposed dispute resolution mechanism, it is necessary to consider the nature and type of disputes that are likely to arise under the Agreement.

A potentially wider class of disputes is likely under an access agreement. Broadly, those disputes are likely to arise in the following areas:

- pricing and the collection of access charges;
- changes to train paths;
- exercise of train control;
- network control functions;
- safety obligations.

In relation to pricing and collection of access charges, disputes are likely to arise around the following questions:

- adequacy or accuracy of mechanisms for assessing usage for the purpose of calculating charges;
- requests for, or adequacy of, security for payment of access charges;
- method of calculation of input cost variation for GST purposes.

Disputes relating to availability of train paths are likely to arise around the following questions:

- whether there is sufficient network capacity for the access provider to grant an operator's request for additional train paths;
- whether the operator's existing train paths may be varied either temporarily or permanently; eg to accommodate a new operator on the network or for a special event;
- whether it is appropriate for the access provider to suspend access rights for track possessions;
- whether the access provider is acting in a discriminatory manner;
- whether it is appropriate to excise a line from the network on the grounds that it is uneconomic to maintain;
- whether it is appropriate to remove an operator's train path for under-utilisation.

Disputes that are likely to arise in the context of train control and/or network control are likely to involve the following questions:

- adequacy of train manifest information provided by an operator;
- the appropriateness of a direction given to an operator in relation to a train or a train movement;
- whether a decision to suspend access rights on safety grounds is appropriate;
- whether a direction to an operator to use rolling stock to clear an incident is appropriate, and whether compensation should be paid as a result;
- whether the operator and/or access provider is meeting required communication standards for communications equipment.

Disputes that may arise in the context of access providers' and operators' safety obligations include:

- compliance by either party with safety standards or safe working rules;
- adequacy of either party's incident management, environment management and safety manuals and procedures;
- the appropriateness of any safety direction given that affects an operator's access rights.

Breaches of contractual requirements in relation to any of the above may give rise to a claim for compensation. Such claims are likely to form part of any dispute.

There are therefore some essential differences between the nature of disputes arising under the Undertaking and those arising under the Agreement.

- Disputes under the Agreement involve determination of the rights of parties as defined in the Agreement itself, whereas disputes under the Undertaking to a certain extent involve determination as to what is a fair and reasonable basis for the provision of Access.

- Unlike under the Undertaking, there are unlikely to be strong institutional factors tending to make one party to the Agreement more interested than the other in speedy resolution of the dispute. The likely issues are more diverse. In some disputes (for example, disputes relating to non payment of access charges) it may be more in the access provider's interest to expedite resolution of a dispute. In others (for example, disputes about the lawfulness of a direction given to the operator) it may be more in the operator's interest to expedite resolution.

- The potential impact on other operators of disputes under an Access Agreement is very different. Disputes under an Undertaking involve the prospect of a new entrant, which potentially has significant economic implications for incumbent operators, as well as operational impacts due to the presence of another operator's trains on the network. The operational impact of the issues likely to arise under an Access Agreement is much greater than the economic impacts simply because the operator is already there. Nevertheless, the third party impacts can be significant.

3.2 Dispute Resolution Framework

Clause 17.1 of the Agreement establishes a four step 'negotiate - negotiate - mediate - arbitrate' dispute resolution process. The elements of each of those stages is essentially the same as the corresponding stages under 3.11 of the Undertaking, each of which is discussed above.

The essential steps are:

- Parties are under an obligation to use reasonable endeavours to settle a dispute as soon as practicable after it arises.

- Within 7 days of one party notifying the other of a dispute, senior representatives must meet and 'use reasonable endeavours acting in good faith to resolve the dispute by joint discussions'.

- If the dispute is not resolved within 21 days of being notified, it is referred, in the first instance to the chief executive officers, and if not resolved in 14 days to formal mediation by a mediator appointed by agreement, or if they fail to agree, by the president of the Law Society of South Australia. If the dispute is not settled within one month of the appointment of a mediator, a party may terminate the mediation and refer the dispute for arbitration in accordance with the Commercial Arbitration Act 1986.

- The mediator is required to be chosen by the parties, but if the parties are unable to agree, the arbitrator shall be the ACCC or, if the ACCC is unwilling or unable to act as arbitrator, a person appointed by the President of the Law Society of South Australia.

The proposed dispute resolution regime is essentially the same as the regime established under the Undertaking.

Clause 4.10(b) provides that disputes about the amount of an Input Cost Variation for the purposes of calculating GST must be determined by expert determination by a firm of accountants. The technical nature of the issue means that the role of the expert is essentially to supply one of the parameters for the calculation of an amount payable under the Agreement. This is, in our view, an appropriate matter for the prescription of binding expert determination.

3.3 Specific issues relating to arbitration under the Agreement

The terms of reference for this review require us to consider the same set of issues in relation to the arbitration under the Agreement as well as under the Undertaking:

- whether the criteria which an arbitrator must take into account in conducting arbitration under the Agreement provide sufficient clarity and guidance for the arbitrator to reach a decision;
- whether the use of a commercial arbitrator is appropriate, particularly in relation to the likely expertise of arbitrators and consistency of arbitration decisions over time;
- whether reference to the *Commercial Arbitration Act 1986* (SA) is appropriate; and
- any other relevant issues.

3.3.1 Criteria for arbitration

The Agreement does not specify criteria which the arbitrator must take account in determining a dispute. In our view, this is appropriate, given that resolution of disputes under the Agreement should essentially have regard to the rights of the parties as identified in the Agreement, and not to any overriding policy framework.

3.3.2 Appropriateness of the commercial arbitrator

For similar reasons, we consider that arbitration of disputes under the Agreement is likely to involve matters which are appropriate for arbitration by a commercial arbitrator. The justification for our recommendation that disputes under the Undertaking be arbitrated by the ACCC does not apply to the same extent to disputes under the Agreement. The normative role of determining and applying potentially subjective standards as to what are fair and reasonable terms does not arise to the same extent under the Agreement as it does under the undertaking.

To the extent possible, parties should endeavour to agree on an arbitrator, with the assistance of the conflict manager to the extent such agreement cannot be reached, this can be referred to the ACCC or an external body. We recommend that the ACCC maintain a list from which it appoints an arbitrator. The reason is that they can include arbitrators with relevant broad based qualifications whereas external bodies are often confined to the qualifications of its members.

3.3.3 Appropriateness of the Commercial Arbitration Act

In light of the issues identified in 3.1 and the general diversity of disputes that may arise under the Access Agreement, coupled with the stable relationship between the parties established by the execution of the Access Agreement, there are different factors that drive an arbitration under the Access Agreement as compared with the Undertaking. Because rights and obligations are not being created, or in the process of being created, disputes are of a fundamentally more commercial nature. In those circumstances a commercial process such as that provided by the Commercial Arbitration Act ('CAA') is entirely appropriate.

Accordingly, the regime relating to arbitration identified in clause 17.4 of the Access Agreement is a regime overarched and consistent with the CCA.

There is, however, one clause in the CAA that we would recommend be ousted by the Access Agreement, namely clause 27 that allows for an arbitrator to act as a mediator. It is most undesirable for the parties to have a decision maker moving from that transparent role, where rules of natural justice prevail to a role that has the capacity for one-sided discussions. This is particularly so where s.27(2) permits an arbitrator who has acted as a mediator to return to acting as an arbitrator. This is

an unfortunate blurring of the roles of consensual facilitator/ mediator and decision maker. Accordingly, the Access Agreement ought be amended to exclude the operation of section 27.

3.3.4 Other issues – third party disputes

As noted above, while disputes that are likely to arise under an Access Agreement have the potential to affect other operators at the operational level, the extent to which a third party operator's interest may be affected by the entry of a new operator is likely to be much greater than the impact of any dispute that is going to arise under the Access Agreement. *Prima facie,* there is not as strong a case for formalising mechanism to either recognise third party interests of give third parties rights to participate in disputes under the Agreement than there is for disputes under the Undertaking.

However, the like for like mechanism, to which clause 5.6 of the Agreement gives effect, provides that where an operator believes ARTC has sold a train path to another operator for a price that is less than the price the operator is paying for a like train path, the operator may apply to the ARTC to have the price it pays for that path reduced. In those circumstances, the effect of any price charged for a train path has a flow on impact for third parties.

As noted above, the commercial reality of a like for like clause is that parties cannot enter into bi-lateral agreements in relation to the pricing aspects of access. In effect, every pricing determination is a regulatory decision that affects the industry as a whole. A bilateral mediation and arbitration framework may not be appropriate in such circumstances. We have suggested an alternative approach of the ACCC's consideration at 2.3.4 above.

We also suggest, at 4.8 below, measures for ensuring the proper recognition of non party interests at both the consensual and non consensual stages of a dispute.

(See also 2.3.5.1 Timeframes).

4. Recommended Dispute Resolution Model

4.1 The need for a different approach

In our view, the four-step process for resolution of disputes contained in the Undertaking and the Agreement could be improved. As noted above, the dispute resolution regime provides a linear approach to dispute resolution, which would see the dispute taking 98 days to the appointment of an arbitrator. From our review of industry submissions it is clear that the duration of the dispute resolution process is a critical concern. In our view, it is also essential that the process:

- be flexible
- provide parties with choice about appropriate means of resolving aspects of the dispute
- be clear and easy to use; and
- to the extent that it is unfamiliar, provide parties with appropriate guidance.

In summary, our recommended model involves the following elements:

- a compulsory meeting, at an early stage of a dispute, with a Conflict Manager whose role it is to manage the dispute on a consensual basis.
- the flexibility for parties to choose how their dispute is to be resolved co-operatively, utilising a mix of consensual processes like mediation (where the parties make a decision) and determinative processes (where an independent expert makes a decision.)
- if consensus breaks down at any time after that initial meeting, either party can proceed to arbitration;
- a mechanism to document and monitor agreed processes through the use of a dispute resolution contract;
- the ability to ensure quick decisions where a parties cannot reach such agreement.

The rationale behind this process is to ensure that the parties have the opportunity and expert assistance to choose an appropriate process for their dispute, and to allow for processes to be run simultaneously and therefore reduce the delay associated with the dispute resolution. It preserves maximum flexibility for dealing with disputes while both parties remain committed to consensual resolution, but

ensures certainty of process and time-frames if consensus breaks down and one or other party wishes to move to compulsory determination of the issues in dispute.

We see the key advantages of this approach as being:

- All options for consensual resolution of the dispute (negotiation, mediation, binding and non-binding expert determination) are retained.
- Duplication of effort is minimised, as a party's preparation for mediation or other consensual element of the process will serve as preparation for arbitration if and when a party elects to move to the compulsory process.
- The parties are assisted by a qualified Conflict Manager in their choice of the most appropriate consensual option for the dispute or an aspect of the dispute.
- Where consensus does not exist or breaks down, a party who has an interest in a speedy resolution can move quickly to arbitration. In the absence of any consensus, a party can have commenced arbitration within 14 days of notice of dispute.

A summary of the process is set out in the charts below. Each step is then outlined in detail.

4.1.1 Summary of Recommended Dispute Resolution Process for Access Agreement

MEDIATION	BINDING EXPERT	ARBITRATION	
Dispute Notice 7 days			
CEO's meet with Conflict Manager 7 days			
By agreement in a resolution contract **Appointment of Mediator** 7 days	By agreement in a resolution contract notice for **Binding expert evaluation without reasons unless otherwise agreed** 7 days	With or without agreement in a resolution contract **Notice to Arbitrate** 7 days	
		Parties Agree on choice of arbitrator 7 days	
Mediation 14 days	**Appointment of Expert** 14 days		Arbitrator appointed by ACCC from a pre-agreed list of arbitrator 14 days
Termination of Mediation Max: 25 days from Notice of Dispute	**Submissions to Expert** 14 days	Arbitration to be conducted under Commercial Arbitration Act on time frames directed by arbitrators (see also clause 2.3.5.1 of this report)	
	Termination: Binding Decision Max: 49 days from Notice of Dispute	↓	
		Award ↓ **Appeal**	

4.1.2 Summary of Recommended Dispute Resolution Process for Undertaking

MEDIATION	BINDING EXPERT	ARBITRATION
Dispute Notice 7 days		
CEO's meet with Conflict Manager 7 days		
By agreement in a resolution contract **Appointment of Mediator** 7 days	By agreement in a resolution contract notice for **Binding expert evaluation without reasons unless otherwise agreed** 7 days	With or without agreement in a resolution contract **Notice to Arbitrate** 7 days
Mediation 14 days	**Appointment of Expert** 14 days	**Appoint ACCC arbitrator (ACCC or ACCC appointee)** 14 days
Termination of Mediation Max: 25 days from Notice of Dispute	**Submissions to Expert** 14 days	Arbitration to be conducted by ACCC on time frames directed by arbitrators (see also clause 2.3.5.1 of this report)
	Termination: Binding Decision Max: 49 days from Notice of Dispute	↓
		Award
		↓
		Appeal

4.2 Overview of the key steps

4.2.1 Role of the Conflict Manager

A dispute notice is issued and the chief executive officers meet with a "Conflict Manager" within 7 days. The Conflict Manager is a facilitator, and therefore has no power to bind the parties. His/her role is to assist the parties in agreeing how best to manage the dispute. Where possible this will involve reaching agreement for the resolution of the dispute and embodying the terms of that agreement in a 'dispute resolution contract'. A dispute resolution contract may provide for such matters as:

- the use of mediation, and binding, non-reviewable expert determination for the whole dispute or aspects of it;
- processes for exchange of material;
- critical time lines in progressing the dispute;
- Possible participation of non parties in the dispute (see 4.2.6 below).

If agreement by the parties on a resolution contract cannot be reached, either party may issue a notice to arbitrate.

4.2.2 Profile of the Conflict Manager

The proposed role of Conflict Manager would be taken by a nominated person or organisation. Alternatively it is possible to have a panel approved by the ACCC (see further below). It should be a person or body who:

- understands the rail industry and the needs of industry participants;
- is familiar with ADR processes and their strengths and weaknesses;
- is purpose appointed
- is capable of either conducting any mediation process themselves or assisting the parties in the selection of a suitable mediator
- would have the skill and knowledge to dovetail all ADR processes where appropriate and disseminate information on the processes available to ARTC and industry generally;
- should also have knowledge of and access to appropriately qualified persons to appoint as arbitrators or experts if the parties agree to a determinative process.

4.2.3 Choosing a Conflict Manager – Options

As is evident from above, the key requirements of the Conflict Manager is that the person has a detailed understanding of ADR and the ability to assist parties in facilitative processes and also in matching issues in dispute with a process for resolution. There are a number of issues that need to be considered and decided before the Conflict Manager is engaged:

- Who engages the Conflict Manager
- Who pays for the Conflict Manager,
- Is it one person, an organisation or a panel?

4.2.3.1 Who engages the Conflict Manager

The Conflict Manager can be engaged either by an industry body, the ARTC (provided that the industry is comfortable that the person is independent and not conflicted), or the ACCC. These arrangements are commercial arrangements and can be done by way of a retainer, or a final fee for engagement. There are a number models around, including the NECA advisor, the Nemmco Circuit Breaker (which is an internal more ombuds position), and the office of the mediator for the franchise code.

4.2.3.2 One person or more

It is useful for a number of reasons to have one person or organisation as the Conflict Manager. The reasons being:

- Consistency of approach
- The ability to identify any issues that are causing repeat problems and recommend a systematic approach to those issues (review of the system)

However, it is also necessary for the Conflict Manager to be available at short notice. For this reason it may be advantageous to use an industry body or private organisation which can, while providing the advantages, also substitute Conflict Managers should the need arise.

These bodies can be engaged either by ARTC on terms which ensure that they are paid for their services by all parties to the dispute therefore maintaining their

independence. Alternatively, they could be engaged by the ACCC on similar arrangements.

4.2.4 Incentives for Conflict Management Process

The initial meeting of the Conflict Manager and the CEOs will be compulsory for the parties. However, from then on, any participation of the Conflict Manager would be with the agreement of the parties only. If there is no agreement as to the future involvement of a Conflict Manager in seeking to resolve a dispute following the initial meeting, including the future conduct of dispute resolution processes, then either party would be entitled to provide the other party with a Notice to Arbitrate.

The failure by either the access seeker or the ARTC to attend a meeting with the Conflict Manager would be a breach of the Undertaking. The Undertaking should reflect the parties' recognition of that consequence.

4.2.5 Optional Step – Mediation (By Agreement)

Where the parties think that some or all of the matters can be resolved through a consensual process a mediation can be agreed. The essential components of mediation are set out in 2.2.2 above.

4.2.6 Optional Step - Binding Expert Determination (By Agreement)

Expert determination is a process for resolution under which an appropriately qualified expert selected by the parties gives a determination (to which the parties agree to be bound) on specific questions agreed by the parties. Unless otherwise agreed, the expert determination proceeds on the basis of written submissions only and without written reasons.

The process will be confined to determining issues identified by the parties, rather than making orders generally affecting the parties (as in the case of arbitration). However, the determination of properly framed issues should provide their own solution. For example, a dispute arising out of the Undertaking may relate to the timing of the provision of certain information or documents – the issue identified for determination would what that time frame should be.

There could be no order as such on the parties to that effect. By participating in the process and agreeing that any determination is binding the desired result is achieved.

The benefits of this process are:

- it is significantly more cost effective than arbitration in that the only costs involved would be these incurred in the preparation of submission and the cost of the expert (which, in the absence of having to provide reasons, should be confined to the time involved in reading the submissions, considering the material and making the determination);
- the process is capable of completion within a short period of time.

Binding Expert Determination is a process that could only operate if both parties agreed that it was the appropriate mechanism to resolve their dispute. It would need the parties to agree:

- on the formulation of the issues requiring expert determination;
- on the appointment of the expert (otherwise appointed by the Conflict Manager in consultation with the CEOs);
- to the provision of submissions and other material for consideration in writing only;
- whether the determination will include reasons,
- that there will be no appeal from any determination

The timing of the process should provide for submissions and all other materials to be provided to the expert within 14 days of appointment and determination should be provided 14 days thereafter. If the parties wanted reasons, perhaps another longer period should be allowed.

4.2.7 Indemnity of neutrals

An indemnity should be provided by the parties to any conflict manager, mediator, expert adjudicator or arbitrator. This can be included in the terms of their engagement and should be in standard form.

4.2.8 Joinder of interested parties

As noted above, disputes under the Undertaking, and to a lesser extent under the Agreement, are likely to impact persons other than the immediate parties in dispute. This is particularly so in the case of disputes about access prices, because of the effect of the 'like for like' principles in the Undertaking and the Agreement.

It is important to ensure that the process has a safeguard to protect the interests of any interested non parties. We suggest that this needs to happen at two stages in the dispute resolution process.

In the consensual phase of the process, ARTC should be obliged by the Undertaking to take into account non party impacts, and to raise such impacts in the course of discussions with the access seeker. For example, if the agreement on access to services affects a third parties' timetable, it may be appropriate for interested non party(ies) to participate in a consensual process for resolution, and the ARTC should be under an obligation to turn its mind to that issue. Provided there is agreement between the ARTC and the access seeker, other potentially affected parties could be invited to participate in negotiation, mediation or expert determination processes.

In the event that interested non party participation was unable to be agreed upon, the issue of joinder of parties will be left to the consideration and determination of an arbitrator appointed pursuant to a Notice to Arbitrate. The issue of joinder must in those cases be specified in the Notice to arbitrate.

Attachment A – Summary of industry comment received by ACCC relating to dispute

Party making the Submission	Clause Ref	Issue	Submission
NSW Government	3.11 (general)	Dispute process too long	General comment that the detailed approach taken by the ARTC in setting out very specific steps to be taken at each stage of the negotiation and dispute resolution processes may have the effect of making those processes slower and more cumbersome. No suggested amendments to address this issue are offered.
National Rail Corporation Limited	3.11 (general)	Dispute process too long	General comment that the dispute resolution process is potentially very lengthy, which could deter some potential Applicants from commencing the process. The process seems very cumbersome and potentially drawn out. There are two issues: • There is no means to progress directly to Arbitration unless agreed by the parties. Unless otherwise agreed by the parties, they must undertake Mediation. If unsuccessful, the process of Mediation can incur a delay of up to eleven weeks before progressing to Arbitration. • After Mediation is exhausted, the process provides an excessive number of decision 'branches' before appointment of an Arbitrator. Unless the parties agree to appoint the ACCC to 'determine' the dispute, a further two weeks can be wasted before the process moves automatically to commercial arbitration. The selection and appointment of a commercial Arbitrator would then require more

Party making the Submission	Clause Ref	Issue	Submission
			time. The Queensland Competition Authority ("QCA") has sanctioned a simpler process for dispute resolution in the Queensland Rail Access Undertaking. As in the proposed ARTC Undertaking, it is a three-tiered process commencing with attempted resolution by chief executives or their nominees. However, failing agreement at that point (three weeks from notification of a dispute), either party can refer the dispute for determination by the QCA. An intermediate step, referral to an Expert, is available, but is not required. There is no option for referral of the dispute to commercial arbitration. This portion of the proposed Undertaking should be reconsidered, with a view to providing a more direct path to Arbitration, and determination of all unresolved disputes by the ACCC.
Freight Rail Corporation and Toll Rail	3.11.1(a)	Issues/disputes that may be subject to arbitration	There is no detail on the nature of issues that may be the subject of dispute resolution. Certain terms should be non-negotiable and, as such, not capable or being matters the subject of arbitration (see Freight Rail Corporation and Toll Rails' submission in relation to clause 3.10(b) and Schedule C).
Queensland Rail	3.11.1(a)	Issues/disputes that may be subject to arbitration	QR believes that ARTC's undertaking clearly identifies the disputes covered by its terms stating that its scope extends to a dispute arising under the undertaking or in relation to the negotiation of access between an applicant and ARTC. Therefore, it has a broad application, making it not necessary to specify all issues that can be referred to disputes resolution. Disputes in relation to an access agreement (once executed) are to be dealt with in accordance with the provisions of that access agreement and not under the undertaking.

Party making the Submission	Clause Ref	Issue	Submission
Freight Rail Corporation and Toll Rail	3.11.2	Period for negotiation by CEOs	Negotiations between CEOs should last a maximum of seven days after which either party may notify the other of the intention to proceed to arbitration. This will ensure that the dispute is resolved as quickly as possible.
Freight Rail Corporation and Toll Rail	3.11.3	Referral to a mediator	Mediation should not be compulsory. Mediation should occur if agreed to by ARTC and the Applicant or if the ACCC considers it appropriate. This will ensure that the dispute is resolved as quickly as possible.
Freight Rail Corporation and Toll Rail	3.11.4(b)(i)	Arbitrator to be the ACCC	The ACCC should be the arbitrator. This ensures that one entity or the office of one person becomes the repository for determinations and the basis upon which they are made. This approach will lead to a consistent view of the arbitrator on the matter that the arbitrator must take into account in making a determination.
NSW Government	3.11.4(b)(iii)	Jurisdiction of arbitration	Arbitration is to be conducted in accordance with the Commercial Arbitration Act 1986 (SA). However, the South Australian jurisdiction may not be suitable to all applicants, and may result in an arbitration being carried out some distance from an area of track that may be in dispute. It may be better to have some flexibility in the jurisdiction for arbitration.
SCT	3.11.4(b)(iv)	Factors arbitrator to take into account	The Access Undertaking does not expressly provide for the arbitrator to take into account the legitimate business interests and investments by operators already using the network

Party making the Submission	Clause Ref	Issue	Submission
			where these operators do not have current contracts.
Great Southern Railway	3.11.4(b)(iv)	Factors arbitrator to take into account	The Access Undertaking does not require the arbitrator to take into account either the legitimate business interests of an operator or a person seeking access to the network when resolving a dispute. This would appear to be inequitable.
National Rail Corporation Limited	3.11.4(b)(iv)	Factors arbitrator to take into account	The arbitrator should be required to take into account: - the interests of persons who want access; - the importance of uniformity with inter-connecting networks and the need for seamless service; and - the direct costs of providing access.
SCT	3.11.4(b)(iv)	Standards arbitrator to	The Access Undertaking does not expressly set out the actual standards (eg AS4292 if this

Party making the Submission	Clause Ref	Issue	Submission
		refer to	is applicable) that an arbitrator must refer to when resolving a dispute.
WA Transport[1]	3.11.4(b)(iv) and (vi)	Application of the Commercial Arbitration Act (SA)	It is unclear as to the degree to which the ARTC undertaking can impose requirements on the Arbitrator (eg. Section 3.11.4(b)(iv) and (vi) of the undertaking) and overrule the Commercial Arbitration Act (eg. Section 3.11.4(b)(iii)(C) of the undertaking).
WA Transport	3.11.4(b)(iv)(C)	Arbitrator to seek expert assistance where required	The arbitrator in the WA regime can seek the assistance of the WA Rail Access Regulator. As there are potentially complex disputes which may require the arbitrator to have regard to such issues as economically efficient operation of the facility or the benefit to the public of having competitive markets, we believe this additional measure is necessary to assist the arbitrator. While Section 3.11.4(b)(iv)(C) of the proposed ARTC undertaking allows the arbitrator to call on any party to give evidence, we feel that specific guidance to the arbitrator on access to expert assistance would be desirable.
WA Transport	3.11.4(b)(vii)	Inconsistency between access regimes re binding	The decision of the arbitrator is not binding on the access seeker in the WA regime. Following a determination by an arbitrator which does not achieve an outcome acceptable to an access seeker, the access seeker is free to reopen negotiations with the track owner.

[1] The WA Transport Department has focused on providing comments on issues of compatibility of the proposed ARTC undertaking with:

- The ARTC-Westrail Infrastructure Owner Agreement; and

- The WA Rail Access Regime (in situations where an access seeker may wish to negotiate access with ARTC to Kalgoorlie, and with WestNet Rail, the rail infrastructure management arm of the Australian Railroad Group, from Kalgoorlie to Perth).

Party making the Submission	Clause Ref	Issue	Submission
		nature of decision of arbitrator	Again, this is an area of incompatibility between the two regimes.
National Rail Corporation Limited	3.11.4(b)(vii)	Enforcement provisions	The draft Undertaking simply states that "the decision of the arbitrator shall be final and binding on the parties" (paragraph 3.11.4 (viii)). Although no specific mechanism for enforcement is provided, the final and binding nature of decisions should be sufficient. For instances where there is refusal or unreasonable delay in complying with arbitral decision, the aggrieved party should be able to seek an order for specific performance by the ACCC.

Great Southern Railway	New clause required	ARTC to publish information re capacity and provide certain undertakings re utilisation of capacity	The Undertaking should provide that ARTC should:
			• Publish details of all available capacity on the network (both current and for the next 5 years
			• Undertake to accept any proposal to utilise that capacity form an operator which:
			  • fulfilled the criteria set out in clause 3.3(d); and
			  • agreed to ARTC's standard published contractual terms.
			Great Southern Railway believes this will improve the process for negotiation and dispute resolution which appears to be "somewhat unwieldy in practice."

Freight Rail Corporation and	New clause required	Publication of decisions	All determinations of the arbitrator should be published. However, the arbitrator should be empowered by the arbitration provisions (to be developed) to determine that certain parts

Party making the Submission	Clause Ref	Issue	Submission
Toll Rail			of its decision should not be published, but only where the information the subject of the sensitivity is truly confidential and proprietorial in nature. Publication provides context to the negotiation of access agreements and allows parties to assess whether it is appropriate to proceed to arbitration. It is inappropriate for the ARTC to become the repository for determination of arbitrators.
National Rail Corporation Limited	New clause required	Arbitrator to have access to relevant information held by the parties	The draft Undertaking does not contain explicit provisions for the Arbitrator to obtain access to relevant information held by the parties, but it does contain adequate provision for protection of confidential information. The power of the Arbitrator to obtain information should be clearly stated.
WA Transport	New clause required	Appointment of arbitrator where two access regimes apply	Where the proposed rail operations relate both to railways covered by the ARTC rail access regime and railways covered by some other access regime, the ARTC Undertaking should require the appointment of an arbitrator who is qualified and acceptable to conduct an arbitration under both access regimes. This is another aspect of establishing an

Party making the Submission	Clause Ref	Issue	Submission
			appropriate interface with access regimes covering adjoining railways.
SRA - NSW[2]	New clause required	Operation of train path's to continue even if there is a dispute	The ARTC Undertaking should include a provision that, in the event of a dispute over any issue other than safety, the operator's train paths will continue to be available during the process of resolving the dispute.

[2] The comments made by SRA - NSW are in relation to the State Rail's Countrylink operations in Victoria.

Attachment B – Disputes that are likely to arise out of the drafting of the undertaking

Disputes that are likely to arise out of the drafting of the undertaking

3.9 Negotiation Process

Under clause 3.9(b)(iv) and (vi), the ARTC reserves to itself the right to negotiate only with applicants who comply with the obligations and processes set out in the Undertaking. (3.3(a))

Negotiations cease under the Undertaking, inter alia, in the event of:

- The expiration of three months, or such longer period as may be agreed; *[It is unclear whether the three month period for negotiation to be completed stops in the event of the invoking of the dispute resolution process in 3.11. There is only provision for the period to be extended by agreement. What if the applicant wishes to extend the period in order to engage in a dispute resolution process and the ARTC will not agree and the three month period is due to expire – perhaps this needs greater certainty to ensure that time is extended for the duration of a dispute from Dispute Notice to resolution or determination.]*

- The ARTC is of the view that negotiations are not progressing in good faith towards the development of an access agreement within a reasonable time period; in which case the ARTC can refer the matter to an arbitrator for determination and if such determination is found in ARTC's favour, then negotiations cease; *[Is arbitration the proper mechanism for resolution of this type of dispute? Perhaps this is the sort of conduct on the part of the ARTC that ought to be prevented by approaching the Court for an appropriate order pursuant to s. 44ZZ5.]*

3.9(d)(ii) Notification of Other Applicants

Where there are two or more applicants seeking access the ARTC will notify each of the other access providers and grant access to the operator whose access agreement is most favourable to the ARTC (3.9(d)(ii). Any failure to notify is not a breach of the Undertaking where such failure was not wilful or in bad faith on the part of the ARTC. Again, any dispute during the negotiation period is to be resolved by means of 3.11.

[Perhaps the ARTC should be obliged to notify the applicant within a specified timeframe provided for in the Undertaking. We are not clear about the policy reason for the carve-out of the ARTC's responsibility in respect of notification and would suggest that the notification obligation should form part of the Undertaking together with a specified timeframe to ensure certainty thereby minimising a potential area for dispute.]

3.10 Access Agreement

3.10(c) Providing Final Agreement

Once the applicant has notified the ARTC that it is satisfied with the terms and conditions of the access agreement as drafted, then the ARTC will provide a final access agreement as soon as reasonably practicable.

[This obligation to provide a final access agreement should be the subject of a specific timeframe or at least an outer limit to prevent disputes erupting or the necessity to approach the Court for a compliance order.]

Confidential Information

The ARTC identifies its commitment to providing confidence in the market place by openness of information as long as it does not breach confidentiality. Confidential information is defined in Part 8 of the Undertaking:

> "any commercially sensitive information or data (as reasonably determined) given by one party to the other together with information on data specifically marked confidential by a party which disclosed to the other".

Part 3.4 of the Undertaking acknowledges the protection of confidential information. According to the Undertaking, disclosure is only permissible if required by law or if it is obtained lawfully from a third party without restriction on disclosure (3.4). However, pursuant to Part 3.7©(iii) of the Undertaking an

indicative access proposal must advise the applicant of the existence of other operators who have submitted an application that could potentially limit the ability of the ARTC to comply with the indicative access proposal (3.7©(iii).

A number of questions arise for consideration in relation to this issue:

- How does the ARTC comply with each obligation to advise of other applications given the express clause in the Undertaking relating to confidentiality in 3.4?
- Can ARTC disclose obviously confidential information simply because it was lawfully obtained from a third party?
- Could ARTC use any information gained in this way where it knows that the confidential information belongs to the applicant and that the applicant does not agree to its disclosure?
- Can the Undertaking circumvent the applicant's right to protect its confidential information this way?
- If Yes to the previous question, then does the compromise in respect of the applicant's confidential information need to be spelled out to any applicant before embarking on negotiating for access under Part 3?
- What effect would such a compromise on use of the applicant's confidential information have on applications by operators generally?
- Isn't a dispute about confidential information the very sort of dispute that

3.11 Scope of the Dispute resolution regime

- How does protection of confidential information fit with 3.7©(iii), where the ARTC will advise in its indicative access proposal the existence of other operators who have submitted applications where those other applications may limit the ability of the ARTC to provide access in accordance with the indicative access proposal?

[The information necessary to be disclosed ought to form part of the agreement in the Undertaking. Again, clarity and certainty will minimise the opportunity for the emergence of disputes. Where possible rights and obligations are best addressed in the Undertaking.]

Publication of Information

ARTC also states that it will consider ad hoc requests for additional information on a case by case basis.

This gives rise to the question of the sort of information that the ARTC ought to have accessible on its website. For example, the ARTC standard terms and conditions for access agreements (which are provided pursuant to the Undertaking upon receipt by the ARTC of an access application and prior to delivery by the ARTC of any indicative access proposal.

It also raises the issue of any publication by the ARTC of the following:

- Any executed access agreements.
- Any determinations made by any duly appointed expert.
- Report or determination of any arbitration, including reasons.
- The result of and determination of the ACCC.

[Once again, it would be desirable for the ARTC to identify with particularity in the Undertaking the material to which applicants will have ready access, either by information on the ARTC website or otherwise. Further it imposes an obligation on the ARTC that is capable of enforcement if expressed appropriately.]