



Australian
Competition &
Consumer
Commission

Australian Rail Track Corporation

Application to Vary Access Undertaking – Interstate Network

Issues Paper

31 October 2008



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Appendix A – Part IIIA of the TPA and Access Undertakings

Appendix B – The ARTC’s Application to Vary the 2008 Interstate Rail Access Undertaking

List of Abbreviations and Terms

2002 Undertaking	The Interstate Rail access undertaking submitted by ARTC and accepted by the ACCC in 2002
ACCC	Australian Competition and Consumer Commission
Act	Trade Practices Act 1974
ARTC	Australian Rail Track Corporation
COAG	Council of Australian Governments
December Undertaking	The access undertaking submitted by ARTC to the ACCC on 20 December 2007
IAA	Indicative Access Agreement
June Undertaking	The access undertaking submitted by ARTC on 8 June 2007 and withdrawn by ARTC on 15 October 2007
The Undertaking	The Interstate Rail access undertaking submitted by ARTC and accepted by the ACCC in July 2008
TPA	Trade Practices Act 1974

1. Introduction

On 9 October 2008, the Australian Rail Track Corporation Ltd (ARTC) lodged an application to vary its 2008 Interstate Undertaking (the Undertaking) with the Australian Competition and Consumer Commission (ACCC). The proposed variation relates to the indemnity and loss regime in clause 15 of the Indicative Access Agreement (IAA) of the Undertaking so that the liability of either party to third parties for loss or damage is limited in certain circumstances.

Under s. 44ZZA(7) of Part IIIA of the *Trade Practices Act 1974* (TPA), a service provider may vary an undertaking at any time, but only with the consent of the ACCC. The ACCC may consent to the variation if it thinks it appropriate to do so having regard to the specified statutory criteria. Accordingly, the ACCC must now assess the variation application to determine whether the variation is appropriate and consent should be given.

The purpose of this Issues Paper is to assist interested parties in preparing submissions to the ACCC on ARTC's proposed variation. It provides information on the details of the proposed variation, the issues likely to be relevant to the ACCC's decision and the assessment process to be followed.

1.1 Background – ARTC's Interstate Rail Network Undertaking

In May 2002, the ACCC accepted an Access Undertaking (2002 Undertaking) from ARTC in respect of open access to tracks on the interstate network managed by ARTC in Victoria and South Australia, extending to Broken Hill in New South Wales and to Kalgoorlie in Western Australia. The 2002 Undertaking expired on 1 June 2007.

On 8 June 2007, ARTC lodged an Access Undertaking application with the ACCC for tracks covered by the 2002 Undertaking and also for tracks in New South Wales (June Undertaking).¹ The June Undertaking set out the terms and conditions upon which ARTC will negotiate access to interstate rail tracks in South Australia, Victoria, New South Wales and Western Australia.

On 22 June 2007, the ACCC released an Issues Paper seeking views on the June Undertaking. Seven submissions were received from stakeholders in response to that Issues Paper.

Drawing on submissions received from stakeholders, the ACCC sought further information and clarification from ARTC on its June Undertaking. On 15 October 2007, ARTC withdrew the June Undertaking.

¹ In September 2004, ARTC commenced a 60 year lease of certain parts of the New South Wales rail network, including the interstate rail network outside of the Sydney metropolitan commuter network from Macarthur to Newcastle, the Hunter Valley coal network, and some parts of the regional rail network. The New South Wales interstate rail lines are incorporated into ARTC's most recent Access Undertaking.

On 20 December 2007, ARTC submitted a revised access undertaking (December Undertaking). The December Undertaking contained a number of changes to the June Undertaking. ARTC provided more information and further clarification on its approach in some areas and proposed some changes to that approach. It also made changes to improve the clarity of the drafting in the Undertaking.

On 29 April 2008, the ACCC released its Draft Decision on the December Undertaking for public comment. The Draft Decision was to accept the Undertaking subject to ARTC addressing a number of issues raised by the ACCC. Six submissions were received by stakeholders in response to the Draft Decision.

In response to the issues raised in the ACCC's Draft Decision, ARTC withdrew its December Undertaking on 15 July 2008 and resubmitted the 2008 Interstate Undertaking, which adopted the ACCC's Draft Decision recommendations. On 30 July 2008, the ACCC released its Final Decision to accept ARTC's Interstate Undertaking. The Undertaking came into operation on 20 August 2008 and will remain operative until 2018 (unless withdrawn earlier).

On 9 October 2008, ARTC applied to the ACCC for consent to vary the Undertaking under Part IIIA of the TPA.

1.2 Procedure

In terms of process, it is the ACCC's view that the legislative provisions that apply to an original application for an undertaking under s. 44ZZA(1) apply in relation to a variation application. Accordingly, in deciding whether or not to consent to a variation request, the ACCC will adopt a similar process to that which it applies when a service provider lodges an original application for an undertaking.

In this regard, s. 44ZZBD provides that the ACCC may undertake a public consultation process to assist it to assess an access undertaking. This Issues Paper forms part of the public consultation process. Unlike an original undertaking application, however, this process focuses on the changes that the ARTC is proposing to make to the Undertaking and IAA rather than the undertaking in general. The Issues Paper is intended to provide interested parties with the opportunity to comment on the proposed changes.

Following the receipt and consideration of submissions to this Issues Paper, the ACCC may release a Draft Decision that provides the ACCC's preliminary assessment of the variation application. The ACCC may then seek submissions on the conclusions reached in the Draft Decision before making its final decision on the variation application. Alternatively, the ACCC may proceed straight to its Final Decision if the proposed variation does not raise any substantive concerns.

1.3 Stakeholder Submissions

In assessing the application for variation to the Undertaking, the ACCC will have regard to any submissions made.

However, because this is an application to vary an operative undertaking, only the matters sought to be varied are capable of being varied as part of this process. All other terms and conditions of the Undertaking remain in operation and are not subject to variation as part of this process. In determining whether the variation is appropriate, the ACCC will consider the variation proposal in the context of all relevant provisions. Ultimately, however, only the variations proposed can be accepted or rejected by the ACCC.

Accordingly, interested parties should focus their submissions on the issues arising from the proposed variation. Within that context, the Issues Paper is provided for guidance only. Interested parties making submissions to the ACCC need not limit their comments to the specific questions raised in the Issues Paper, but are welcome to comment more generally on the proposed changes.

In responding to this Issues Paper, the ACCC encourages interested parties to support their views by providing as much information as possible.

Submissions received will be made available to any person or organisation on the ACCC's webpage (www.accc.gov.au) unless confidentiality is claimed in respect of all or part of a submission and such claim of confidentiality is accepted by the ACCC. The sections of submissions for which confidentiality is claimed should be clearly identified and reasons provided for the claim of confidentiality.

Timing for decision

Under s. 44ZZBC of the TPA, the ACCC is required to use its best endeavours to make a final decision on the (variation) application within six months of receiving a (variation) application, that is, by 9 April 2009. In this case, it may be possible to complete the process well within this timeframe given that the proposed variation is confined to a specific issue. However, an expeditious process will depend on parties providing complete information in a timely way.

The remainder of the Issues Paper is structured as follows. Background to Part IIIA, access undertakings and an overview of the considerations relevant to assessing a variation application is presented in section 2. Section 3 describes the assessment process the ACCC will apply to the variation application. Section 4 summarises the proposed changes to the Undertaking and identifies some issues on which interested parties may wish to comment. Details of the ACCC's mailing and electronic mail addresses for lodging submissions are in section 5.

2. Part IIIA of the Trade Practices Act and Access Undertakings

Part IIIA was introduced in 1995 as part of the competition policy reforms adopted by the Council of Australian Governments (COAG). The purpose of Part IIIA is to promote the efficient provision and use of a limited class of infrastructure facilities by establishing a statutory basis for users to gain access to the services provided by those facilities.

One mechanism under Part IIIA for dealing with access issues is for the owner or operator to offer an undertaking to the ACCC stipulating the terms and conditions upon which it is willing to provide access to third parties.²

Access undertakings have the advantage that they ‘provide a means by which the owner or operator of a facility can obtain certainty about access arrangements, before a third party seeks access.’³ Once accepted, the services covered by the undertaking cannot be declared. Undertakings thus avoid the possibility of time consuming and expensive processes about whether to declare a service and then establishing the terms and conditions of access through arbitration. Further, an undertaking is enforceable through the courts.

Once an access undertaking is in operation, a service provider may withdraw or vary the undertaking at any time, but only with the consent of the ACCC. The ACCC may consent to a variation of the access undertaking if it thinks it appropriate to do so having regard to the matters in s. 44ZZA(3) of the TPA.

2.1 Assessment of Proposed Variations to Access Undertakings

If the ACCC accepts the variation to the Undertaking from the ARTC then the terms and conditions in the varied form of undertaking will form the basis on which rail operators can obtain access to ARTC’s rail network. Accordingly, in considering the variation to the Undertaking, the ACCC will be concerned to ensure that the proposed changes provide a clearly enforceable basis by which third parties can gain access to such services on reasonable terms and conditions (whether set out in the undertaking or to be negotiated).

Following the receipt of submissions and other information, the ACCC will analyse the proposed variation to the Undertaking, having regard to the legislative criteria and the comments of interested parties. In deciding whether to accept or reject the proposed variation to the undertaking, the ACCC is required under s. 44ZZA to have regard to the following:

- the objects of Part IIIA (box 1);

² For a more detailed explanation of Part IIIA, please see Appendix A.

³ Second Reading Speech accompanying the Competition Policy Reform Bill 1995.

- the pricing principles specified in s.44ZZCA (box 1);
- the legitimate business interests of the service provider;
- the public interest, including the public interest in having competition in markets (whether or not in Australia);
- the interests of the persons who might want access to the service;
- whether the undertaking is in accordance with an access code that applies to the service;
- whether access to the service is already the subject of an access regime that the Commonwealth Minister has decided is an effective regime under s. 44N; and
- any other matters that the ACCC thinks relevant.

To assist the ACCC in its assessment of the proposed variation to the Undertaking, submissions from interested parties should, as far as practicable, include references to the legislative criteria.

Box 1 – Criteria to apply in assessing variations to undertakings

Section 44AA - Objects of Part IIIA

The objects of this Part are to:

- (a) promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
- (b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

Section 44ZZCA - Pricing principles for access disputes and access undertakings or codes

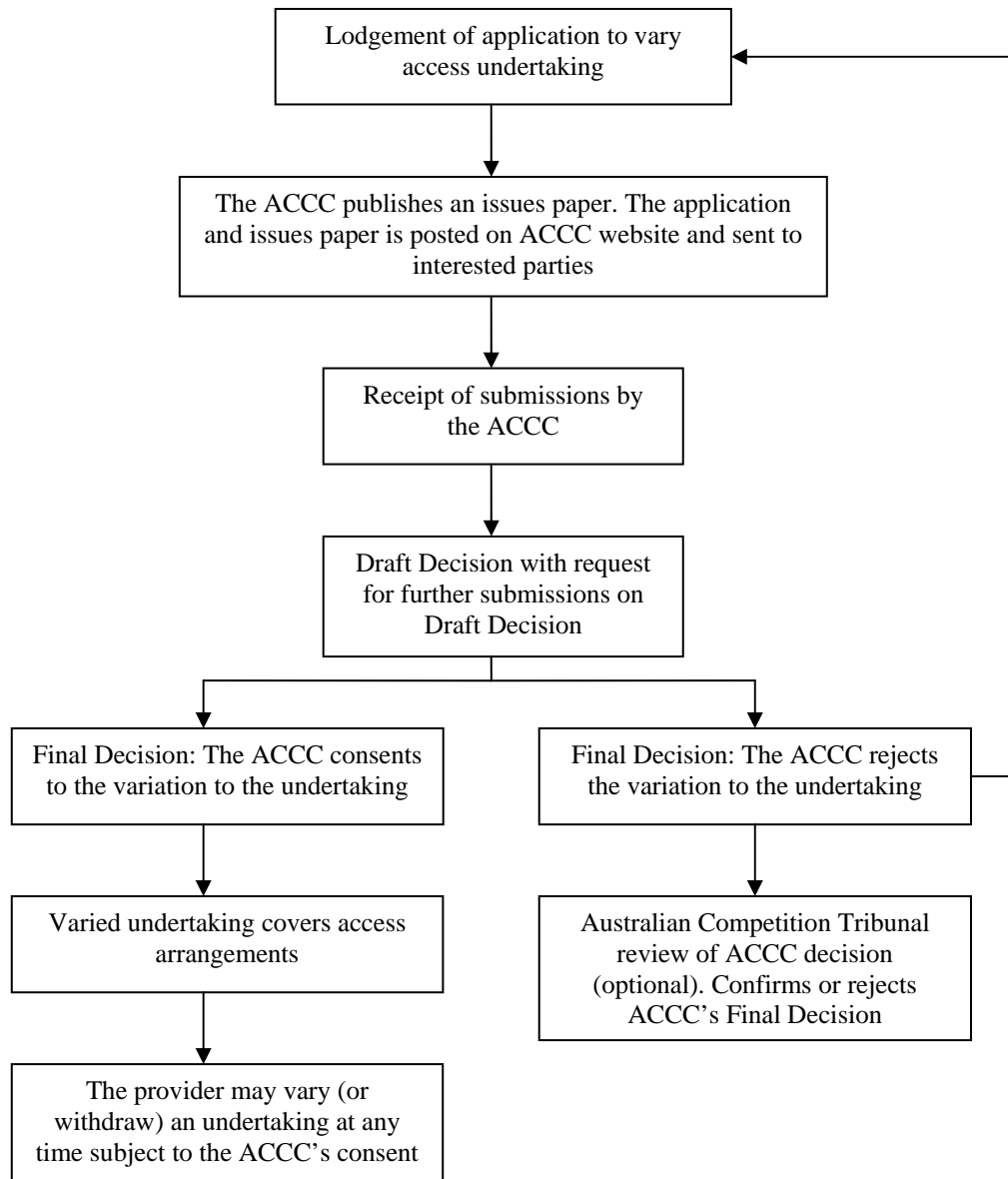
The pricing principles relating to the price of access to a service are:

- (a) that regulated access prices should:
 - (i) be set so as to generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and
 - (ii) include a return on investment commensurate with the regulatory and commercial risks involved; and
- (b) that the access price structures should:

- (i) allow multi-part pricing and price discrimination when it aids efficiency; and
 - (ii) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and
- (c) that access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.

3. Assessment Process for Application to Vary the ARTC Undertaking

The following figure summarises the general procedure for the ACCC's assessment of the proposed variation to the Undertaking. The process, which is indicative only, is designed to be transparent and public, relying on input from interested parties as well as the provider making the application.



3.1 ACCC Time Lines

The legislative regime provides for the ACCC to use its best endeavours to complete the assessment and make a decision on the variation application within six months of receipt of the application. The ACCC received the variation application on 9 October 2008. For the purposes of the variation application, the ACCC has developed the following indicative timetable:

- publication of the Issues Paper on 31 October 2008;
- receipt of submissions by 21 November 2008 (3 weeks)
- ACCC final decision required by April 2009 (best endeavours).

3.2 Interested Parties

At the commencement of consideration of the December Undertaking, the ACCC compiled a list of parties who may have an interest in the Undertaking. Copies of this Issues Paper have been sent to those parties to assist them to prepare submissions. The Issues Paper, ARTC's variation application, supporting submission, the Undertaking, and other documents relevant to the proposed variation are available on the ACCC's web site at **www.accc.gov.au** under Regulated Industries. The ACCC can provide hard copies of other documents on request.

Copies of submissions will be made available on request to interested parties and posted on the ACCC's website, unless the author of the submission has sought confidentiality for the submission and the ACCC has accepted such confidentiality. ARTC may be asked to comment on submissions where this would assist the ACCC's assessment of the proposed variation.

In addition to submissions, the ACCC may seek information through meetings with interested parties and others who may be able to provide information to assist its assessment of the variation to the Undertaking.

4. Issues

This section describes the key features of the proposed variation to the Undertaking and identifies issues that may assist interested parties in presenting their views about the application for variation.

The objective is to highlight for comment and discussion the areas in which the ACCC would like to receive feedback from stakeholders. It is not intended, however, for the questions raised to limit feedback. Comments on other matters relevant to the proposed variation are welcome. To assist parties to identify the issues they wish to raise, the following sections:

- note the ARTC's proposed changes to the Undertaking and ARTC's comments on the issues raised; and
- identify issues for comment, which interested parties may wish to consider in developing their submissions.

4.1 Amendments to the indemnity regime in clause 15 of the IAA

4.1.1 Clause 15 of the IAA

Schedule D of the Undertaking is an IAA which forms an essential part of the Undertaking. The IAA is a *Track Access Agreement* that is used as the basis for the terms and conditions on which the ARTC agrees to grant a rail operator access to the ARTC rail network.

The IAA sets out the clauses that must be offered in an access agreement for indicative services. Clause 15 of the IAA establishes a regime to allocate liability between the ARTC and the rail operator for loss or damage arising out of incidents on the rail network.

Clause 15 has been reproduced in its entirety below:

15. INDEMNITIES/LOSS OR DAMAGE ARISING FROM AN INCIDENT

15.1 General

- (a) *The purpose of this clause 15 is to establish a regime in which the liability of ARTC and the Operator to each other for loss or damage arising out of an Incident is clearly defined, and is determined only by reference to this clause 15.*
- (b) *ARTC and the Operator release each other from all Claims for loss or damage resulting from an Incident, including where the Incident is caused or contributed to by the negligence of one or both parties, except Claims that each party to this Agreement may make against the other pursuant to this clause 15.*

- (c) *The provisions of this clause should be interpreted to give effect to the intention that where ARTC and/or the Operator are in breach of this Agreement, and any such breach is the cause or a contributing factor to loss or damage arising from an Incident;*
 - (i) *any party in breach should bear responsibility for such loss or damage to the extent of such cause or contribution, and;*
 - (ii) *where the acts or omissions of a party other than ARTC or the Operator (as defined in this clause) has caused or contributed to such loss or damage, neither ARTC or the Operator will be responsible to the other for loss or damage to the extent that the loss or damage is caused by or contributed to by the acts or omissions of that other party.*

15.2 Definitions

In this clause 15:

- (a) *'Claim Period' means each and every twelve month period during the Term of this Agreement, such that the first Claim Period commences on the Commencement Date and expires at midnight on the day before the first anniversary of the Commencement Date, the second Claim Period commences on the first anniversary of the Commencement Date and expires at midnight on the day before the second anniversary of the Commencement Date, and so on;*
- (b) *'loss or damage' includes loss or damage to property belonging to a party to this Agreement, any liability to or claim made by a third party, and the costs of recovery of any property damaged or affected by the relevant Incident and legal expenses on a full indemnity basis;*
- (c) *'Prohibited Claim' means, subject to clause 15.5(b), a Claim arising from an Incident where the total value of the loss or damage suffered by a party to this Agreement is less than \$50,000.00;*
- (d) *A reference to ARTC or the Operator includes a reference to any servant, agent, employee, contractor, supplier to, or volunteer of or associated with, or a related entity (as defined in the Corporations Act 2001) of ARTC or the Operator;*
- (e) *A reference to a "breach" includes a breach arising from the acts or omissions of a servant, agent, employee, contractor, supplier to, or volunteer of or associated with or a related entity (as defined in the Corporations Act 2001) of, ARTC or the Operator.*

15.3 Indemnity

Where ARTC and/or the Operator suffer loss or damage as a result of an Incident, and:

- (a) *if:*

(i) *there is a breach of this Agreement by ARTC or the Operator; and*

(ii) *the breach is the sole cause of the Incident,*

then the party in breach will:

(iii) *be responsible for its own loss or damage arising from the Incident; and*

(iv) *completely and effectually indemnify the other party in respect of loss or damage suffered by the other party as a result of the Incident;*

(b) *if:*

(i) *there is a breach or are breaches of this Agreement by ARTC or the Operator;*

(ii) *there is no breach of this Agreement by the other party; and*

(iii) *the breach or breaches contributed to the Incident but was or were not the sole cause of the Incident:*

then,

(iv) *the party in breach is to be responsible for its own loss or damage arising from the Incident;*

(v) *the party in breach is to indemnify the other party (that is, the party not in breach) in respect of the loss or damage suffered by the other party as a result of the Incident to the extent that the breach or breaches contributed to the Incident;*

(vi) *the other party (that is, the party not in breach) is to be responsible for its own loss or damage arising from the Incident to the extent that the breach or breaches did not contribute to the Incident;*

(c) *if:*

(i) *there has been a breach of the Agreement by ARTC and the Operator; and*

(ii) *breaches by both parties contribute to the Incident,*

then each of ARTC and the Operator will:

(iii) *indemnify the other party in respect of the loss or damage suffered by the other party as a result of the Incident to the extent that the breach or breaches of that party contributed to the Incident;*

(iv) *be responsible for their own loss or damage arising from the Incident to the extent that the loss or damage was not*

contributed to by the breach or breaches of the other party;

- (d) *if there has been a breach or breaches of the Agreement by both ARTC and the Operator, but the breach or breaches of one of them has not or have not caused or contributed to the Incident, then (whether or not there is any other person or party who has caused or contributed to the Incident) the party whose breach has caused or contributed to the Incident will bear their own loss and damage and indemnify the other party in respect of the loss or damage suffered by that other party as a result of that Incident to the extent that the breach or breaches contributed to the Incident.*

15.4 No Claim for Consequential Loss

Notwithstanding:

- (a) *how an Incident is caused;*
- (b) *that ARTC and/or the Operator is in breach of any duty of care or in breach of this Agreement;*
- (c) *any other rights that ARTC and/or the Operator may have under this Agreement;*
- (d) *that ARTC and/or the Operator may be liable to the other for other loss or damage other than Consequential Loss,*

ARTC and the Operator will not make a Claim against the other, and hereby release the other from any Claim, in respect of any Consequential Loss they suffer arising out of any Incident. For the avoidance of doubt, it is agreed that Consequential Loss does not include any liability of ARTC or the Operator to a third party.

15.5 Prohibited Claim

- (a) *Subject to sub-paragraph (b) hereof, ARTC and the Operator agree that they will not make a Claim against the other if the Claim is a Prohibited Claim.*
- (b) *Where, in any Claim Period, the total value of all Prohibited Claims exceeds \$250,000.00, then no further Claims arising from Incidents that occur during that Claim Period will be Prohibited Claims.*

15.6 No Other Limitations

Nothing in this clause 15 is intended to remove, limit, restrict, or otherwise prejudice the right of ARTC or the Operator to recover loss or damage or a contribution from a third party.

15.7 Obligation to Mitigate/ Betterment

- (a) *Each party to this Agreement will take reasonable steps to mitigate that party's losses, damages, liabilities, costs*

and expenses, and a party's entitlement to recover losses, damages, liabilities, costs and expenses will be determined on the basis that the party should have observed the obligation to mitigate.

- (b) Where a party restores or repairs a damaged asset and that repair or restoration results in improved functionality of an asset, such improved functionality will not be regarded as a betterment and no reduction or adjustment of the costs of repair or restoration will be made on that account.*

15.8 Obligation to Pay

- (a) In this sub-clause, a party liable to indemnify the other is called the "Responsible Party" and a party who is entitled to be indemnified is called an "Indemnified Party".*
- (b) An Indemnified Party will, as soon as practicable after an incident, give written notice to the Responsible Party of any claim to indemnity including:*
 - (i) the date of the incident;*
 - (ii) brief details of the loss or damage suffered or which might be suffered; and*
 - (iii) a brief description of the grounds upon which indemnity is claimed.*
- (c) An Indemnified Party may deliver notices requesting reimbursement of costs or expenses incurred, or payment of other loss and damage, on an ongoing basis, as and when such costs and expenses are incurred or such other loss and damage is identified and quantified.*
- (d) The Responsible Party will*
 - (i) reimburse the indemnified party all costs or expenses incurred by the Indemnified Party in repairing or reinstating plant, equipment or other assets, and*
 - (ii) pay any other loss or damage which is the subject of the indemnity,*

within fourteen days (14) of being requested in writing by the Indemnified Party to do so.
- (e) Where a Responsible Party has not complied with sub-clause (d) above, the Responsible Party will also be liable to pay interest to the Indemnified Party from the time that such monies should have been paid as requested, until that amount or any outstanding balance is paid in full. The interest rate will be determined in the*

same manner as the interest rate is determined under clause 4.8 hereof.

- (f) *The making of any progress or part payment by a Responsible Party to the Indemnified Party will not relieve the Responsible Party of its obligation to indemnify the Indemnified Party for all loss or damage arising out of the same incident to the full extent to which it is liable to do so under this clause 15, unless the Indemnified Party has given the Responsible Party a release in writing to that effect.*
- (g) *The making of any payment by a party under this clause 15.8 may be made without prejudice to any rights of that party to contest its liability to indemnify.*

15.9 Defence of Claims

- (a) *The parties will render to each other all reasonable assistance in the defence of any Claim made against the other party by a third party arising out of any Incident.*
- (b) *To the extent that a party ('Responsible Party') is obliged to fully indemnify the other party ('Indemnified Party') against a Claim by a third party against the Indemnified Party, the Responsible Party;*
 - (i) *may, subject only to the terms of any applicable insurance which the Indemnified Party may have, at its own expense, defend and settle any action or proceedings in the name of the Indemnified Party and execute such documents in the action or proceedings as the Responsible Party sees fit.*
 - (ii) *will indemnify the Indemnified Party in respect of all costs, expenses and losses that the Indemnified Party may incur or have incurred on account of the action or proceedings.*

4.1.2 Proposed variation and ARTC's submission in support of the variation

ARTC is proposing to vary two aspects of the IAA by way of changes to clauses 15.1 and 15.2 as follows:

- Clause 15.1(b) – delete the words 'for loss or damage':

15.1 General

...

- (b) *ARTC and the Operator release each other from all Claims ~~for loss or damage~~ resulting from an Incident, including where the Incident is caused or contributed to by the negligence of one or both parties, except Claims that each party to this Agreement may make against the other pursuant to this clause 15.*

...

- Clause 15.2(b) – amend the definition of ‘loss or damage’ as follows:

15.2 Definitions

...

(b) *'loss or damage' includes:*

- (i) *loss or damage to property belonging to a party to this Agreement;*
- (ii) *any liability to ~~or claim made by~~ a third party, arising from the negligence or breach of statutory duty of ARTC or the Operator to such third party (as the case may be) but excluding any liability of ARTC or the Operator to a third party arising under an Agreement with that party (whether by way of indemnity or otherwise) or arising from a breach of an agreement with that third party;*
- (iii) *the costs of recovery of any property damaged or affected by the relevant Incident;*
- (iv) *and legal expenses on a full indemnity basis;*

...

A summary of ARTC’s rationale for the proposed variation is provided in Box 2 below. A full explanation of ARTC’s position is available in its supporting submission of 9 October 2008 (**Appendix B**).

Box 2 – ARTC’s rationale for and views on the proposed amendments

- Clause 15 was drafted on the assumption that operators do not accept liability to third party claims, however, ARTC now believes this practice has changed.
- Under the changed practice, if an operator enters into a contractual arrangement with its customer that causes the operator to be liable to its customer irrespective of negligence or breach of statutory duty by the operator, there is the potential for that liability to be passed on to ARTC in circumstances where such liability was never contemplated.
- The proposed amendments remove contractual liability to third parties from the clause 15 liability allocation regime. This is necessary to ensure that an operator cannot contractually accept liability to a third party and then seek to pass on that liability to ARTC under clause 15.
- These changes arose following discussions with an operator, where ARTC was provided for the first time with extracts from agreements allegedly in place between an operator and its consignors which suggest that the operator accepts the risk of loss in respect of all goods it carries, regardless of the cause of the loss.

- This was the first evidence that ARTC had of this behaviour by operators and caused concern because under the IAA, the operator could potentially pass this loss on to ARTC. Further, given competition between operators in above rail services, ARTC was concerned that such provisions could become industry standard for large consignors.
 - ARTC is of the view that this risk also applies in the reverse – ARTC could contractually accept liability to third parties and then seek to pass it on to operators.
- Clause 15 was originally based on past industry practice. ARTC did not become aware of this new practice until after the ACCC had accepted the final undertaking.
- The actions of an operator in accepting liability, in the absence of negligence or breach of statutory duty, creates a circumstance where, in the absence of a third party proving negligence or breach of statutory duty against either the operator or ARTC, the liability for consignor claims may be effectively transferred to ARTC in circumstances where it would be quite unfair for ARTC to bear that liability.
- As clause 15 currently stands, ARTC has no ability to manage that risk and could be liable for third party losses claimed through an operator even though ARTC would have no direct liability to the third party under general law. This was never the intention of clause 15.
 - Further, the rate of return approved by the ACCC in the undertaking did not envisage the ARTC taking on the risk exposures arising from the change in circumstances.
- ARTC considers this change in circumstances makes the 2008 Undertaking (namely clause 15):
 - (a) no longer commercially viable for ARTC; and
 - (b) inconsistent with the objectives set out at clause 1.2 of the 2008 Undertaking.

4.1.3 ARTC criteria for varying the Undertaking

As part of the consultation process relating to the Undertaking, the ACCC sought comment from interested parties on the appropriateness of the *Indemnities / Loss or Damage* provisions of the IAA in the then proposed undertaking. No relevant comments were received in response to the ACCC's request.

Under clause 2.4(a) of the Undertaking, before the ARTC can change the Undertaking, it must be of the opinion that there has been a change of circumstances such that the Undertaking is no longer commercially viable for the ARTC or it has become inconsistent with the objectives prescribed at clause 1.2 of the Undertaking. Clause 1.2 describes similar criteria to that which the ACCC must apply in assessing an undertaking (or variation) – for example, the legitimate business interests of the ARTC and the interests of the operators.

Further, under clause 2.4(d) of the Undertaking, the ARTC may only request a variation of the Undertaking following consultation with operators regarding the proposed variation. The ACCC understands that the ARTC are currently consulting with operators regarding the proposed variation.

Box 3 - Issues for Comment:

The ACCC is interested in any submissions in relation to the proposed variation to the operation of clause 15 of the IAA. Some of the issues on which the ACCC would like to receive comment are as follows:

- 1. To what extent are the “changed circumstances” standard industry practice?
 - (a) to what extent are train operators seeking to include such terms into their contracts?*
 - (b) to what extent have similar clauses previously been written into contracts?**
- 2. Do you agree with the ARTC proposed changes?*
- 3. If not, why not? Please provide a detailed explanation as to why you do not agree with the proposed changes with particular regard to:
 - (a) the perceived effect of the changes on ARTC’s (and operators) liability to third parties under the proposed clause 15.*
 - (b) the effect of the proposed amendments on ARTC’s legitimate business interests and the interests of operators wishing to access ARTC’s services.**
- 4. If so, do the ARTC amendments as drafted have the intended effect?*
- 5. Do the proposed changes have any possible unintended effects? If so, please explain what unintended effect they have.*
- 6. Are other changes required in order to achieve the desired result? If so, please explain what further changes are required and why.*
- 7. Are there any other related matters which the ACCC should take into account in deciding whether or not to consent to the proposed variation?*

5. Submissions

Submissions should be forwarded by AEDST 5:00pm on **21 November 2008** to:

David Salisbury
A/g General Manager – Transport
Regulatory Affairs Division
ACCC
GPO Box 520
MELBOURNE VIC 3001

(03) 9290-1919

Electronic versions should be emailed to:

transport@accc.gov.au

All submissions will be made available to any person or organisation on request unless the submission or part thereof are claimed as confidential and the ACCC accepts such claim of confidentiality. The sections of submissions that are considered confidential should be clearly identified and reasons given supporting the claim. The ACCC will consider each claim of confidentiality on a case by case basis. If the ACCC refuses a request for confidentiality, the submitting party will be given the opportunity to withdraw the information. The ACCC will then assess the undertaking in the absence of that information.

Information sharing provisions in the TPA allow the ACCC in certain circumstances to disclose protected information it receives with other government agencies.⁴

For further information about the collection, use and disclosure of information provided to the ACCC, please refer to the ACCC publication “*Australian Competition and Consumer Commission / Australian Energy Regulator Information Policy – the collection, use and disclosure of information*”, available on the ACCC website.

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⁴ Section 155AAA, TPA.

Appendix A – Part IIIA of the Trade Practices Act and Access Undertakings

Part IIIA was introduced in 1995 as part of the competition policy reforms adopted by the Council of Australian Governments (COAG). The purpose of Part IIIA is to promote the efficient provision and use of a limited class of infrastructure facilities by establishing a statutory basis for users to gain access to the services provided by those facilities. Facilities covered by Part IIIA generally exhibit the following features:

- natural monopoly characteristics;
- a strategic position in an industry with the potential to affect competition in upstream or downstream markets; and
- national significance.⁵

The service defined in Part IIIA is a service provided by means of a facility. Part IIIA provides third-parties the legal right to negotiate terms and conditions of use of such services but does not guarantee that access would be granted, nor does it give third-parties the right to the facility itself. Included in the definition of an infrastructure facility is the use of a railway line.

Part IIIA contains three main avenues for dealing with access issues:

- *Declaration, arbitration and enforcement.* Applications for a service to be declared, that is to be made available for access, can be lodged with the National Competition Council (NCC) by any person. The NCC recommends to the relevant Minister whether or not the facility should be declared. The final decision on declaration rests with the relevant Minister. Once declared, the facility owner is obliged to negotiate access with the access seeker. If the facility owner and access seeker cannot agree on terms and conditions for access, then the matter may be referred for arbitration to the ACCC or another arbitrator. Arbitration determinations by the ACCC are enforceable through the courts.
- *Undertakings.* The owner of a facility, or prescribed industry body, can offer an undertaking to the ACCC stipulating the terms and conditions upon which it is willing to provide access to third parties. Once an undertaking is accepted by the ACCC, the service covered by the undertaking cannot be declared and the undertaking is enforceable through the courts.
- *Effective regimes.* Part IIIA allows for States and Territories to have their own access regimes recognised as “effective” and thus exempted from the further provisions of Part IIIA. To clarify whether the national regime or a State regime governs access to a particular service, the TPA permits State and Territory governments to ask the NCC to recommend to the Federal Treasurer that their regimes be certified effective.

⁵ Under s.44G in Part IIIA, the concept of national significance encompasses matters such as size, and importance to trade, commerce and the national economy.

Access undertakings provide an alternative mechanism to declaration of a service under Part IIIA. Undertakings have the advantage that they ‘provide a means by which the owner or operator of a facility can obtain certainty about access arrangements, before a third party seeks access.’⁶ Once accepted, the services covered by the undertaking cannot be declared. Undertakings thus avoid the possibility of time consuming and expensive processes about whether to declare a service and then establishing the terms and conditions of access through arbitration.

Once an access undertaking is in operation, a service provider may withdraw or vary the undertaking at any time, but only with the consent of the ACCC. The ACCC may consent to a variation of the access undertaking if it thinks it appropriate to do so having regard to the matters in s. 44ZZA(3) of the TPA.

⁶ Second Reading Speech accompanying the Competition Policy Reform Bill 1995.

Appendix B – The ARTC’s Application to Vary the 2008 Interstate Rail Access Undertaking