ARTC
ACCESS UNDERTAKING – INTERSTATE NETWORK

RESPONSE TO ACCC ISSUES PAPER

February 2008

1 INTRODUCTION

The Freight Rail Operators' Group (FROG) welcomes the opportunity to provide the Australian Competition and Consumer Commission (ACCC) with comments on the revised Australian Rail Track Corporation (ARTC) Access Undertaking for the interstate network submitted tithe ACCC in December 2007 ("December Undertaking").

FROG is a group of Australian rail freight operators comprising:

FreightLink

Genesee & Wyoming

Independent Rail

Pacific National

QRNational

SCT

South Spur Rail

In the interests of transparency and to aid discussion amongst stakeholders, FROG regards this submission as a public document.

2 EXECUTIVE SUMMARY

FROG is concerned with the absence of significant improvement in the December Undertaking. FROG accepts and welcomes a small number of improvements, in particular:

- A return to a 'standard' ceiling test to determine the maximum allowable revenue;
- Recognition that ARTC will need to obtain ACCC approval for pricing on the Southern Sydney Freight Line (SSFL) once it is brought into service); and
- Clarification of how the ENOC charge will be applied.

However, significant problems with the December Undertaking remain. FROG and its members have committed significant resources to the process and it is disappointing that a large range of issues raised have not been addressed by the ARTC. We would not expect the ARTC to agree with all our points but would expect a discussion and explanation of why they rejected our position. The appendix to the this submission lists all the issues raised by FROG and the responses, or lack thereof, by ARTC.

The next section provides FROG's responses to the questions raised in the ACCC discussion paper in detail. However, it is important to highlight the areas where the December Undertaking is seriously deficient and would in themselves warrant a rejection of the December Undertaking in its current form. These concerns are:

- There is insufficient clarity on how access for non-indicative will be treated, in particular there are no controls over pricing and no detailed access agreement. This creates significant uncertainty for operators. Non indicative services are a significant proportion of ARTC's traffic (estimated by ARTC at 40%) and this proportion would be expected to grow over the ten years of the undertaking.

- Access prices for indicative services can be varied more than once in a year

- ARTC are allowed to maintain real access prices thereby reducing their incentive to improve productivity

- The ENOC charge introduces significant uncertainty into access charges payable and delivers no efficiency benefits

- There is no clear indication of the process to determine the ARTC investment program and no formal mechanism to allow operators input into investment decisions

3 ACCC ISSUES FOR COMMENT

The Issues Paper identifies areas on which the ACCC is requesting specific comment. These issues are discussed in the same order below as they appear in the Issues Paper.

ARTC'S APPROACH OF EXTRAPOLATING OUT SEGMENT REVENUE AND COSTS FROM YEARS 6 OF THE UNDERTAKING

It is FROG's view that this is a reasonable approach to adopt, subject to a degree of care being taken in drawing conclusions on any generalised application of a simple linear extrapolation of costs and revenues

There is insufficient detail provided to allow for any informed comment as to the appropriateness of the extrapolation methodology. However, it is noted that ARTC's costs are substantially fixed for any given quantum of infrastructure. Thus any extrapolation ought to hold a substantial proportion of costs constant as volumes increase. However, fixed costs will increase on a step basis as new capacity is installed. This makes simple generalised extrapolation unreliable except for the broadest review.

ARTC'S AMENDMENTS REGARDING THE SOUTHERN SYDNEY FREIGHT LINE

It is helpful for ARTC to include an express requirement to seek ACCC approval for new indicative access charges for the SSFL.

However, this approach serves to emphasise the inconsistent treatment being proposed by ARTC for changes to the network covered by the December Undertaking. The adoption of a 10 year term increases rather than diminishes the need to recognise that other significant changes to the network may occur during the life of the December Undertaking. It therefore remains a concern that the December Undertaking expressly excludes any other inclusion within its scope.

ARTC has previously indicated that two other sections of the New South Wales rail network are likely to be acquired by ARTC in the near future:

- the RailCorp 'Metropolitan Freight Network' (MFN) once the SSFL is commissioned; and
- the track from Werris Creek to Narrabri.

It is far from clear why the SSFL should receive special treatment when it would be a simple matter to extend the requirement to any addition to the network.

ARTC'S PROPOSAL TO SUBMIT A SUBSEQUENT FIVE-YEAR CAPITAL PROGRAMME BY 31 DECEMBER 2011

Stakeholders have previously suggested that, rather than putting forward a 'locked down' capital expenditure program, a better way to manage the network is for ARTC to include in the December Undertaking a process for working with network users to determine an annual program.[1]

The value Schedule H holds is questionable given that the ability of the ACCC or network users to judge the necessity of network investments against the criteria nominated by ARTC in the December Undertaking cl 6.3, is limited except through the information provided by ARTC. The process of consideration of the December Undertaking demonstrates ARTC's unwillingness to provide a complete evaluation of the proposed investments.

ARTC'S REVISED PRUDENTIAL CRITERIA IN CLAUSE 3.4(D)

ARTC has not responded to the concerns raised with respect to the prudential requirements in the June Undertaking. The changes proposed in this area in the December Undertaking do little to 'clarify' the issue, nor to give any confidence that the matter will be appropriately dealt with.

It seems unduly onerous that ARTC can refuse to negotiate an access agreement with a party that does not have the capability of demonstrating:

"that it has or has access to ... a sufficient capital base and assets of value resources, (including without limitation assets and insurance) to meet the actual or potential liabilities under an Access Agreement, including without limitation timely payment of access charges and payment of insurance premiums and deductibles under the required policies of insurance." (December Undertaking cl 3.4(d) emphasis added)

Taken literally, this means that a company entering into a 10 year access contract has to demonstrate that it has all 10 years of access charges to hand (or assets to that value). This is an extraordinary obligation and would create a barrier to entry. To FROG's knowledge, no other rail network owner places any obligation even remotely as onerous as this on access seekers.

It is also of particular concern that resolution of a refusal by ARTC to negotiate an access agreement is by resort to arbitration. Arbitration is a lengthy and expensive process and likely to significantly deter a party from pursuing access to the rail network if it is not already a participant in the rail business. This also must be seen as a potential barrier to entry.

The changes also fail address the problem previously raised that an operator is open to ARTC forming a negative view on its prudential quality without any means of knowing the case against it, nor the opportunity of putting a contrary view to ARTC, except through the onerous course of arbitration. It is not difficult to imagine a circumstance where ARTC is led to believe that a party fails the prudency test due to a misunderstanding or misinterpretation and the failure to hear the affected party would be a offend against procedural fairness.

[1] An investment process was described in Pacific National's response to the June Undertakings along with detailed drafting suggestions.

THE ADDITION OF CLAUSE 3.11(B), WHICH OBLIGES ARTC AND AN APPLICANT TO EXERCISE AN ACCESS AGREEMENT IF THE APPLICANT ACCEPTS THE TERMS AND CONDITIONS IN THAT AGREEMENT

The Indicative Access Agreement (IAA) is drafted as being specific to "Indicative Services".[2] This severely, and in FROG's view unnecessarily, restricts the utility of the standard agreement to only 60% of ARTC's business at most. In fact it is likely that this restriction would reduce the use of the indicative agreement to almost nothing as most operators are likely to have a mix of traffics, and under the December Undertaking that would take them out from under a pure "indicative service" model.

Had the IAA been crafted as a general platform for negotiation, it would have provided a good basis for negotiations. However, for reasons that are obscure, ARTC has effectively removed a very large part of its business from the ambit of the IAA (at least 40% and potentially 100%).

As an alternative to the IAA, ARTC intends to offer "market terms and conditions". However, there is no regulatory scrutiny of what these are. The whole premise of an Undertaking under Part IIIA of the *Trade Practices Act 1975* is that the market has failed and requires regulatory intervention. ARTC's proposition flies in the face of this premise and assumes that a market based solution is readily available.

A simple and significantly better outcome would be to make the IAA applicable as the basis for negotiation of all access agreements, not just the Indicative Service. This would bring all traffics within the ambit of the Undertaking and would remove the need to create a spurious reference to "market terms and conditions" where such a market is not freely operating.

ARTC'S CLARIFICATION THAT IT WILL NEGOTIATE AN ACCESS AGREEMENT ON ANY TERMS AND CONDITIONS OUTSIDE THE IAA PROVIDING BOTH ARTC AND THE APPLICANT AGREE

FROG agrees with the intention that, where possible, the best outcome is that the parties are able to negotiate a mutually acceptable outcome. To this end, it is helpful that the December Undertaking expressly provides for a negotiated outcome.

However, given the nature of the agreement and the circumstances of the parties, it should not be assumed that this provision will necessarily lead to agreements that are more reflective of the parties' requirements. FROG expects, and indeed the ARTC has already indicated, that the IAA represents ARTC's base position and it is unlikely that it will be willing to move significantly from that position.

ARTC'S AMENDMENTS TO THE UNDERTAKING'S ARBITRATION PROVISIONS

Concerns surrounding the appropriateness of these provisions remain. It is unclear to FROG whether by adopting the procedures of Division 3 Subdivision D of the TPA the penalties will apply. If they do then it would seem inappropriate to have penalty of imprisonment as a possibility in an access dispute arbitration and this may prove a significant disincentive to go to arbitration. In addition there is significant overlap between the provisions of Subdivision D and the December Undertaking (for example the clauses around joint arbitrations). It is very unclear what would happen where there is a conflict in the provisions.

ARTC'S AMENDMENTS TO CLAUSE 3.12.4 ON HOW THE COSTS OF ARBITRATION WOULD BE MET SHOULD A DISPUTE ARISE

FROG is comfortable with this amendment.

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[2] See front cover of the Indicative Access Agreement.

ARTC'S AMENDMENTS TO THE DISPUTE RESOLUTION PROCEDURES OUTLINED IN 3.4(F) AND 3.8(E)

In the context of the proposed suite of dispute resolution procedures available, FROG accepts the logic that resolution of these issues would best be achieved by a move directly to arbitration, without the intervening processes of negotiation and mediation. FROG arrives at this view from the assumption that ARTC would not lightly:

- refuse to commence or continue negotiations (cl 3.4); or
- unreasonably (or more particularly, deliberately) delay provision of an Indicative Access Proposal (IAP) (cl 3.8) to an access seeker.

Notwithstanding this view, it is noted that the dispute resolution process is an unwieldy tool and is particularly ill-suited to determine a matter such as whether ARTC has unreasonably delayed provision of an IAP. Any matter that prevents the timely negotiation of an access agreement is likely to be detrimental to an access seeker's commencement (or continuation) of operations. Hence a much more speedy resolution process is required than is afforded by arbitration.

ARTC'S AMENDMENTS REGARDING APPEAL RIGHTS FOR ARBITRATION

The clarification provided is useful.

ANY ISSUES THAT MAY ARISE FROM ARTC'S USE OF A BUILDING BLOCK METHODOLOGY FOR THE INTERSTATE NETWORK

FROG welcomes the adoption of a more traditional building block approach and believes the ARTC's approach is appropriate with the exception of the treatment of gifted assets. There is no mention that gifted assets will be excluded from the asset base – a traditional regulatory approach. This is extremely important in the ARTC's case given the high level of direct government funding they receive for major capital projects.

ARTC'S CHANGES TO THE CAPITAL EXPENDITURE PROVISIONS

FROG welcomes the intent of changes to the capital expenditure clause. However, the drafting is unclear. In particular 4.4 e v reads "capital expenditure would be limited to that which may result from….whether expenditure is incurred efficiently in implementing the capital or renewals project, in the context of prevailing operating requirements and input costs". Presumably the purpose of this clause is to ensure that only efficient expenditure is included in the regulated asset base. However, the use of the word 'whether' does not make sense with when read in conjunction with the beginning of the clause. In additional, this efficiency clause should apply to all the other categories of expenditure set out in the other subclauses (eg the additional of renewals projects supported by the Industry).

ARTC'S REVISED WACC PARAMETER VALUES

The ARTC has made improvements to its WACC estimate, namely moving the market risk premium and Gamma to more standard assumptions. However, these improvements have almost been completely offset by a significant increase in the debt margin. We note the ARTC has used a nominal credit rating of BBB in calculating its debt margin. This rating would seem to be artificially low when compared with other regulated industries. As the ARTC is charging below the ceiling, the WACC estimate is not relevant for current prices. However, FROG is not supportive of ARTC's WACC value and it should not be considered a precedent for other regulatory decisions.

ARTC'S USE OF A POST TAX REVENUE MODEL

FROG is comfortable with the use of a post tax revenue model.

ARTC'S COMMITMENT IN THE UNDERTAKING TO PUBLISH CHARGES FOR NON-INDICATIVE SERVICES

In the issues paper the ACCC neatly captures FROG's concerns regarding non-indicative services. In essence there is insufficient information in the Undertaking on how non-indicative services would be treated particularly regarding price. There would be no regulator scrutiny and as a result no price certainty. ARTC's proposal to publish the non-indicative prices does not deal with any of these issues. All publication does is give operators information on how their own prices compare with the published prices on the ARTC website.

It should be remembered that these non indicative services are:

- a significant proportion of ARTC services (40%)
- standard long standing services that do not change characteristics eg steel, industrial products such as limestone; and
- are all covered by the six charging categories already published by the ARTC.

Thus the usual reasons for having an indicative service/reference train approach, namely that other services are numerous, complex and constantly changing do not apply in this case.

In its Explanatory Document in supporting their approach ARTC incorrectly characterises the NSW regulatory regime. Under the NSW regime, all access price changes are put in place only by agreement with the operators. If agreement cannot be reached then the regulator acts as an arbitrator. The proposed ARTC approach for non-indicative services would not give operators recourse to a regulator as arbiter and as such it is a diminution of the access seekers rights rather than an improvement as suggested by the ARTC.

ARTC'S METHODOLOGY FOR CALCULATING THE ENOC

ARTC'S INTENTION TO APPLY THE EXCESS NETWORK OCCUPANCY CHARGE ONLY WHEN A BETTER PATH IS NOT AVAILABLE

THE INCORPORATION IN THE INDICATIVE ACCESS AGREEMENT OF A COMMITMENT TO NOT APPLYING THE ENOC IF ARTC IS NOT ABLE TO PROVIDE THE CONTRACTED TRAIN PATH

ARTC's revised undertaking and accompanying documents provide more clarity on the calculation and application of the ENOC. This clarity is welcomed and certainly improves FROG's understanding. However, three major concerns remain with the ENOC:

- Despite the charge based on flagfall there is still significant uncertainty on its impact on operators access costs over time given that ARTC can unilaterally alter the key parameters (eg the indicative section run times, allowances for crosses etc.). For example, if the ARTC was to decrease the sectional run time then the ENOC charge per hour would increase and also the number of minutes an operator used above the nominal section run time. This could result in a significant increase in the ENOC.
- Adds significant complexity to the charging regime; and
- As stated in our previous submission it is unclear what problem ENOC is designed to address and how it does this.

ARTC'S PROPOSAL TO PROVIDE FOR ACCUMULATION OF PRICE INCREASES OVER A PERIOD NOT EXCEEDING FIVE YEARS

FROG believes that this amendment delivers little improvement. It is our expectation that ARTC would just increase rates in year 5 by the total allowable amount negating the impact of the reset.

THE ABSENCE OF AN EFFICIENCY DISCOUNT FACTOR OR AN ALTERNATIVE MECHANISM TO AN EFFICIENCY DISCOUNT FACTOR

ARTC in its Explanatory Guide (p16) argue that the CPI-2 or 2/3 CPI prices escalation in the 2002 ARTC Undertaking was not intended to drive productivity. However, this is at odds with the ACCC's view contained in the 2002 Decision on ARTC's Access Undertaking which placed great weight on the efficiency aspects of ARTC's escalation mechanism.

It is vital that ARTC has the incentive to improve productivity. FROG recognises that ARTC does not receive full regulated economic cost recovery but this does not mean ARTC should escape the requirement to secure operational efficiency. In the recent past, no transport related business will have been able to maintain anything near real price parity and the productivity improvement would be expected to continue over time. FROG strongly believes that the ARTC should be subject to CPI minus price escalation.

ARTC'S PROPOSAL TO REGULARLY PUBLISH DETAILS OF PRICE RISES APPLIED AND PRICE RISES THAT COULD BE APPLIED UNDER THE PRICE ESCALATION FORMULA

This is helpful for new entrants but existing players could easily monitor their increase in access charges versus changes in the CPI.

The major ongoing concern with the price rise regime is that prices rises are no longer restricted to once a year. Currently industry, both the rail operators and its customers, are geared to a single annual access price change. In this way rail operators can manage their customer contracts appropriately and customers are able to make modal decision for the year based on known costs. The additional uncertainty of a prices rise at any time of the will create unnecessary additional contractual complexity and uncertainty making rail a less attractive modal option.

THE PROPOSED CHANGES TO THE CEILING TEST

FROG welcomes this reversion to a more traditional regulatory approach.

ARTC'S AMENDMENTS TO THE CAPACITY RESERVATION FEE

THE APPROPRIATENESS OF THE CAPACITY RESERVATION FEE INCLUDING A FLAGFALL AND VARIABLE COMPONENTS

The ability to negotiate access ahead of time is important given that there is a time lag in delivering investments required to provide a service (eg acquiring rolling stock, terminals, and maintenance facilities). Thus it is important for an operator to know at the time of investment that it can secure appropriate train paths. However, this does not necessitate a reservation fee. The ARTC is still able to sell the paths in advance of the start up of the service.

ARTC has justified the capacity reservation fee in terms of recompense for operational inflexibility from reserved paths, but any constraint placed by these paths will not occur until the paths are actually utilised. They also refer to the anti–hoarding incentive effect but there are sufficient anti hoarding provisions in the access agreement. Any access seeker reserving

capacity will be signing an access agreement which commits them to pay access fees whether or not they run the services and includes anti–hoarding provisions (ie use it or lose it).

The fee cap proposed by the ARTC indicates that capacity reservation charges will be significant. These costs will add to the costs of starting up the rail service, affecting modal share and potentially discouraging smaller rail provider entry.

The charges cap is not fixed for the term of the undertaking and ARTC has discretion to change the cap at any time. Although ARTC made the comment in the Explanatory Document that the "cap would not vary substantially over the Term" there is no commitment in the binding documents to this nor any definition of "significant".

THE INCLUSION IN SCHEDULE C OF A REQUIREMENT THAT ACCESS AGREEMENT SHOULD HAVE PROVISIONS CONSISTENT WITH CLAUSE 2.9 OF THE INDICATIVE ACCESS AGREEMENT

The introduction of consistency is useful. However, FROG does not believe that clause 2.9 provides any benefit to an access seeker. Although the IAA gives the Operator the right to renegotiate an existing access agreement 120 days before expiry, it places the ARTC under no obligation to provide the paths even if the conditions in clause 2.9c are met. The current drafting state "ARTC ***may*** consent to the Scheduled Train Path renewal" (emphasis added). In its current form the clause is worthless to operators.

ARTC'S AMENDMENTS TO CAPACITY ADDITIONS

The objective of the clause, that is the ARTC should be able to recover additional capacity from all operators not just the incremental operator is appropriate. However, there are a number of important problems with the current drafting, namely:

- The clause does not explicitly exclude gifted assets – this is important as a considerable amount of ARTC funding is from Government gifts;
- The clause should only deal with incremental capital investment to that already planned and outlined in Schedule H. The Schedule H expenditure has already been planned to be funded through existing access charges or government grants and no change to access charges should be required; and
- There is no materiality threshold, that is only significant necessary increases in capital expenditure should be allowed to impact on access prices. Otherwise there will be significant uncertainty around future access prices;

THE EXCLUSION OF SIDINGS AND YARDS FROM THE DEFINITION OF ASSOCIATED FACILITIES

Whilst noting ACCC's comments regarding the voluntary nature of the undertaking, FROG believes that it is in no parties' interests for yards and sidings to be excluded. If yards and sidings are excluded from the ARTC undertaking they will remain under the NSW Access Undertaking. Thus access seekers would have rights to access these facilities but under a separate access undertakings. This would cerate unnecessary complexity and would be contrary to COAG's stated intention to simplify and streamline rail access regulation.[3]

[3] February 2006 COAG Communiqué Attachment B Appendix E

ARTC'S PROPOSAL FOR CHANGING THE DEFINITION OF PRUDENT

ARTC'S PROPOSAL FOR CHANGING THE DEFINITION OF CAPITAL EXPENDITURE

FROG is comfortable with the changed definitions. However, the use of a capitalised "Capital Expenditure" in clause 4.6 would seem to be inappropriate.

CLAUSE 9.5(B) — WHETHER THIS CLAUSE WOULD BE HARSH IF THE OPERATOR COULD NOT OPERATE BECAUSE OF AN ACTION BY ARTC, TAKING INTO ACCOUNT THAT A PARTY TO A CONTRACT CANNOT ACT IN A WAY THAT WOULD FRUSTRATE THAT CONTRACT.

In reality there are a number of reasons that an operator may not be able to present a train or operate to its full journey that are out of its control. For example, there may be an incident either caused by the ARTC (eg infrastructure failure) or another operator (eg locomotive failure or accident). It would be inappropriate to count a failure to operate a service by the operator in these circumstances against the use it or lose it provisions. The purpose of this clause is to prevent hoarding and so should be amended to count only when the operators does not run a service due to its own actions or decisions.

CLAUSE 15.8 — WHETHER THERE SHOULD BE A PROCESS FOR THE RESPONSIBLE PARTY TO OBJECT TO THE CLAIM, OR IS THIS UNNECESSARY GIVEN THAT THE CLAUSE APPLIES MUTUALLY AND ASSUMES THAT THE PARTY HAS ALREADY ACCEPTED RESPONSIBILITY FOR THE CLAIM.

Clause 15.8 does not only apply where a party has already accepted responsibility and thus is completely inappropriate. Clause 15.8g indicates that it applies to situations where the party has not accepted liability. Clause 15.8 is also inconsistent with clause 15.7a containing obligations to mitigate.

FROG has wider concerns around Clause 15 and in particular clause 15.7. This clause negates the common law principle that an "injured" party is entitled to be compensated for the value of the asset at the time of its destruction and it obliges rail operators to meet, if necessary, the full cost of replacing the (old) destroyed asset with a brand new one. That the common law principle should be applied was recently reaffirmed in the strenuously contested Victorian Supreme Court case between SCT and ARTC.[4]

Both these approaches (15.7 & 15.8) are inconsistent with Industry practice and FROG is unaware of any other Australian rail access agreement that contains these provisions

4 PREVIOUS SUBMISSIONS

It is noted that the Issues Paper requested submissions not repeat matters previously raised. While FROG recognises the wisdom of this approach, it is helpful to reflect how the December Undertaking has recognised and dealt with matters previously raised. FROG suggests that a responsive approach to the regulatory process would require, as a minimum, that the ARTC address any matters raised by respondents and demonstrate:

- That the ARTC understands the issues raised;
- Whether the ARTC accepts each issue, or if not, why the proponent disagrees with the argument raised; and
- How the new document has addressed the issue.

[4] See clause 28 http://www.austlii.edu.au/cgibin/sinodisp/au/cases/vic/VSC/2006/500.html?query=^artc%20sct

To this end, Table 1 attempts to set out, in a highly summarised way, those significant matters raised by FROG in previous submissions and the status of that issue in December Undertaking.

TABLE 1: TABLE OF ISSUES

FROG Submission To ACCC July 2007	ARTC December 2007 Undertaking (December Undertaking)
General & Part 1: Preamble	
AU2 should recognise that ARTC is not a 'traditional' commercial entity but is a public entity provider of rail infrastructure that is a key economic enabler.	× Not referred to or discussed. × No recognition of government contributions or ARTC's role in securing these.
Pricing on basis of efficient costs	× No explicit recognition of efficient costs. The previous reference to "industry efficient basis" with regard to operating expenditure (former cl 4.4(d)) has been removed in the change in the ceiling limit. It could be argued that cl 3.12.4(b)(vi)(H) requiring the arbitrator to consider the "the economically efficient operation of the Network" does bring efficient costs into play, but this is tenuous at best. There is no unequivocal commitment that the revenue limits will be based on efficient costs. The failure to acknowledge this principle explicitly is unhelpful. By contrast the definition of "Prudent" in relation to capital expenditure appears to endorse the efficient cost principle.
Part 2: Scope	
Definition of the network – lack of clarity and consistency	✓ Diagrams for all parts of the network now included, not just NSW. ✓ Diagrams are clearer about what is included but these remain at odds with the text. × Status of diagrams (maps) and Schedule 1 of the IAA is confused and confusing. There is reference to the NSW maps in IAA Schedule 1. There is no reference to the diagrams/maps in the December Undertaking. The Additional Explanatory Guide suggests that the maps are not part of the December Undertaking but this is at odds with IAA Schedule 1. ? Textual description is confusing and appears to be inconsistent: examples Tullamarine (Victoria) – sidings appear to be included in diagram but given the diagram has no status, impossible to discern from text as to whether they are included or excluded. Given the exclusion of sidings and yards from "Associated Facilities" and the lack of status of diagrams in the December Undertaking, impossible to know which lines are covered at locations such as Dry Creek. × Some inconsistency in text between IAA and December Undertaking remains (though some has been remedied since AU2.1).

FROG Submission To ACCC July 2007	ARTC December 2007 Undertaking (December Undertaking)
No information about interface with the proposed Hunter Valley undertaking.	× Not referred to or discussed. The December Undertaking is still region based. × No recognition of the substantial issues raised nor any answers to specific questions raised.
Need for explicit recognition of interfaces with other track providers and obligation to work to minimise these.	× Not referred to or discussed.
Need for recognition of terminal access.	× Not referred to or discussed.
Recognition of transitional issues with take-up of SSFL.	✓ Clarification that ARTC will seek ARTC approval of indicative rate for SSL. × No reference or discussion regarding take-up of other parts of the Metropolitan Freight Network. × No reference or discussion regarding transitional issues (eg dealing with existing access rights under RailCorp agreements).
Clarification sought as to why other network extensions are excluded.	× Not referred to or discussed. No clarification provided.
Treatment of existing contracts.	? No discussion as to how ARTC intends to deal with differential pricing (if contrary to the "no discrimination" clauses particularly 4.3(b)) that may arise under a continuing contract negotiated under AU1 (or prior to approval of the December Undertaking), if this arises.
Increase in insurance obligation to $250m.	? Explanation of rise to $250m unconvincing (by ARTC at Rail 2007 – not mentioned in Additional Explanatory Guide) – unclear who is dictating this requirement, but even aside from "NSW issue", imposes costs on others without reason except for consistency even when not operating in NSW. Even though raised repeatedly, no comment from ARTC.
Publication of existing access prices.	✓ Reinstated previous obligation to publish committed prices. ✓ New obligation to publish "reference" prices, though not as "indicative" prices. × Most prices, even though published, remain outside of the regulatory structure × No explanation why ARTC refuses to place other prices within regulation, despite repeated requests.
Broadening of material change to apply to operators as well as ARTC.	× Not referred to or discussed. No change – still only applies to ARTC's position (December Undertaking cl.2.4(a)). Note that this substantially removes ARTC's risk in the longevity of the term.
Part 3: Negotiation Process	
Substantially inferior obligation to provide detailed information compared to NSW Rail Access Undertaking information pack (Schedule 5).	× Not referred to or discussed. No recognition of loss of information compared to NSW Undertaking.
Prudential requirements and extension to require proof of ability to meet access obligations.	× Some modifications to the prudential requirements, but these merely beg more questions than they resolve.

FROG Submission To ACCC July 2007	ARTC December 2007 Undertaking (December Undertaking)
Reduction in time to respond with Indicative Access Proposal (IAP) to 20 business days (from 30).	✗ Not referred to or discussed.
Clarification why ARTC wants arbitrary cessation of access negotiations after 3 months.	✗ Not referred to or discussed.
No opportunity to refute allegation of failure to meet prudential requirements (alleged history of material default on any access contract) and extension to related entities.	✗ Not referred to or discussed.
Dispute resolution as an inclusive model and therefore numerous specific inclusions are redundant.	✓ Clarified that intention is to bypass some elements of process in some circumstances and move straight to arbitration.
Renegotiation of scheduled train paths. ARTC has reduced provision in IAA clause 2.9 to point of meaninglessness. Need for transparent path allocation process. No process provided for dealing with irreconcilable train path applications. Need for ARTC to provide capacity to meet demand – this would obviate the need for other mechanisms such as roll-over of access rights.	✗ Not referred to or discussed. ✗ Matters relating to provision of capacity, investment and transparent path allocation process not addressed. ✗ Reinstated previous NPV based evaluation. This provides no visibility to the applicants and does not address the underlying issues.
Need to address different forms of train path and contractual obligations eg fixed paths for grain or minerals & contracting for whole of the period – one size does not fit all.	✗ Not referred to or discussed.
Redundant (and inappropriate) inclusion of standard terms and conditions in the IAP.	✓ Redundancy removed.
Part 4: Pricing Principles	
Concerns regarding use of unusual revenue limits. Clarification sought regarding use of unusual definitions in revenue limits.	✓ "Standard" ceiling approach adopted in place of "capitalised loss" approach. ✗ No response to questions regarding use of a mezzanine (segment avoidable cost "floor") rather than a true floor based on marginal costs imposed by an operator. This places a higher floor than arises under the NSW Rail Access Undertaking. ✗ Incremental cost floor includes non-segment specific costs which, by definition can't be avoidable to a segment. This has been pointed out in a number of previous submissions and the issue has not even been acknowledged let alone remedied!

FROG Submission To ACCC July 2007	ARTC December 2007 Undertaking (December Undertaking)
Adoption of a single traffic reference tariff approach inconsistent with a posted price approach and fails to recognise many traffics on the network.	✗ Not referred to or discussed despite numerous concerns raised in previous submissions. ✗ ARTC has published a set of other prices but excluded them from the undertaking. No explanation of any substance has been put forward for excluding 40% of the traffic from coverage under the December Undertaking.
Changes to capital expenditure program.	✗ Although this is a new provision (December Undertaking cl 4.4(e)), FROG and others have previously raised the need for a different approach to the capital expenditure program whereby network users are able to participate in decisions. ARTC has again chosen to ignore such an approach and not even recognised the alternative has been suggested. Adoption of suggested approach would remove the necessity for the form of drafting in cl 4.4(e).
Gifted assets should be excluded from the asset base.	✗ Not referred to or discussed.
Inappropriate general allocation of non segment specific costs	✗ Issue of allocation between different undertakings not referred to or discussed despite being raised numerous times.
Lack of linkage between provision of path and enforcement of flagfall.	✗ Not referred to or discussed.
Excess network occupancy charge (ENOC)	✓ Clarification provided. ✗ Drafting still remains open to adoption of charging that is not reflective of the purpose articulated in Additional Explanatory Guide, eg who determines what a 'reasonable allowance' for crossing and clearing is? Why formulate the criteria in this manner which is totally in ARTC's hand (contrary to the Additional Explanatory Guide). ✗ Explanation still fails to identify a fundamental rationale for charge that is entirely new and unprecedented. ✗ ENOC is not constrained to Indicative Access Charge for non-IAC traffics (40% of ARTC's business), so is left totally at large. Published non-IAC rates do not show what the non-IAC ENOC is intended to be. × No link back to investment.
Escalation includes a banking provision to allow recoupment of any amount not taken previously. Potential for multiple price variations in the one year. No recognition that on-going real price decreases are expected to occur in the rail freight business.	✓ Explanation of intended operation of escalation provision provided along with example. ✓ A justification for adoption of full CPI provided. This is not to suggest that FROG accepts the justification, but at least the matter has been addressed. ✗ Operators remain exposed to discretion of ARTC – significant increase in exposure that is unlikely to be covered by being able to pass through effectively to customers. Reliance on ARTC to 'judge the market' is a particular concern. The 'reset' of the banking provision at Year 5 is something, but does not address the core problem.
Part 5: Capacity Management	

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Imposition of capacity reservation fee. Inclusion of a proportion of a variable cost in the fee is obscure.	× Capping of this provision does not address the fundamental concerns previously raised about the inappropriateness of a reservation fee. Those concerns not referred to or discussed. × The inclusion of a proportion of a variable fee for a service that does not run and therefore imposes no variable costs demands a full explanation – none provided. 'Average train length' for an indicative service is also a peculiar measure to apply – on what basis is this to be determined and what has this to do with the capacity purchased?
Indiscriminate application of 'use it or lose it' model inappropriate (IAA cl 9.5).	× Not referred to or discussed.
Part 6: Network Connections & Additions	
No provision for how the investment program is to be determined. No mechanism for stakeholders to influence the investment process. No consultation process even mentioned.	× ARTC proposal is directed to expressly excluding any participation in the capacity requirement or investment determination process by network users. This is in direct contrast to proposals put forward by FROG and others for a more inclusive process. ARTC has offered no discussion as to why is has chosen to adopt the course it proposes nor has it acknowledged that stakeholders have a substantially different view as to how these things should be managed.
Lack of obligation on ARTC to invest at user request, even if conditions in the undertaking are met (December Undertaking cl 6.2).	× Not referred to or discussed.
Matters Previously Raised But Not Addressed In December Undertaking (other than matters identified elsewhere in this table.)	
Service objectives, ie ARTC's purpose in providing the network for use by train operators.	× Not referred to or discussed.
The undertaking and IAA are silent on ARTC's obligations with respect to occupational health and safety matters for train operator employees. Given that much of an operator's workforce works on ARTC property for most of the time this is a significant omission.	× Not referred to or discussed.
Need for a specific Possession Planning Process to effectively manage maintenance.	× Not referred to or discussed.
Assistance to operators to make above rail investments. The undertaking places obligations on the access seeker, but none on ARTC to assist the access seeker.	× Not referred to or discussed.

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Arrangements for recovery from network incidents. The undertaking and IAA are silent on the arrangements that should apply when the network is disrupted by an incident.	× Not referred to or discussed.
The storage of rolling stock on the network and any associated charges is not dealt with.	× Not referred to or discussed.