



# Guidance paper

ARTC's Interstate network access undertaking 2023

*July 2022*

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## Executive Summary

The Australian Rail Track Corporation (ARTC) operates its Interstate network from Western Australia to Queensland, via South Australia, Victoria and New South Wales. Although ARTC faces a degree of competition from road and sea freight, it has a natural monopoly over the rail network, which comprises the track and related infrastructure. The ACCC has regulated ARTC since 2002 through voluntary undertakings under Part IIIA of the *Competition and Consumer Act 2010* (the Act).

In 2018 ARTC submitted a replacement undertaking for ACCC approval. The ACCC issued a draft decision not to accept the replacement undertaking, due to a range of concerns, in particular about the proposed regulatory asset base (RAB) and resulting initial Ceiling Limit (pricing constraint). ARTC withdrew the proposal and the existing 2008 undertaking has remained in force since then.

Between 2019 and 2022 the ACCC has undertaken work to attempt to provide greater clarity around the Interstate network's potential RAB and to consult industry stakeholders on the need and method for regulating the Interstate network. In response to our August 2021 Issues Paper there were varying views about the degree of ARTC's market power, as well as concerns about that power being used from the perspective of users that consider themselves captive customers. We also acknowledge the range of important issues raised by stakeholders, such as safety and interoperability, that are of a broader nature than the undertaking and would need to be addressed by governments.

This work showed that there are substantial challenges in determining a RAB for the Interstate network at this time. These include difficulty assessing the efficiency of past capital expenditure, the ongoing rollout of the \$14.5 billion Inland Rail project, and a lack of clarity about the intended benefits of government funding and the extent to which users should pay for the network.

For these reasons, the ACCC notes that it may be acceptable for ARTC to propose an undertaking to replace the one expiring on 30 June 2023 that continues to include a price control but without the need for a RAB. Subject to the detail of the proposal and the need for the ACCC to assess a proposed undertaking against the Part IIIA requirements, this could be a pragmatic mechanism that still provides a meaningful constraint on ARTC's market power where it exists over the course of the undertaking. However, we expect that an asset value would likely need to be established in the future to better link pricing to efficient costs of providing access to the network.

Drawing on stakeholder submissions and the discussions between the ACCC and ARTC around the time of the 2018 proposal, there are also a range of other ways ARTC could potentially update and improve its undertaking. These include improvements to the negotiate-arbitrate framework, as well as enhanced information disclosure and record keeping.

When ARTC proposes a replacement undertaking, the ACCC will commence a process to assess the proposal under Part IIIA of the Act, taking into account information available at that time and submissions made in that process. This guidance paper is intended only to provide to the infrastructure owner and its users information currently available and the ACCC's current views that can assist in the development of a proposed undertaking.

## 1. Introduction

The ACCC regulates ARTC's Interstate network through a voluntary access undertaking. ARTC has indicated that it will submit a new undertaking for ACCC assessment, to replace the current Interstate Access Undertaking (IAU), which expires on 30 June 2023.

On 25 August 2021 the ACCC published an Issues Paper to initiate a review of the regulatory framework for ARTC's Interstate network. We sought stakeholders' views on:

- the competitive environment of the Interstate network– now and in the future
- the specific need for regulation of the Interstate network
- where regulation is required, the most appropriate regulatory approach.<sup>1</sup>

This guidance paper builds on the Issues Paper by setting out ways that the ACCC considers ARTC could potentially improve the current IAU. In submitting a replacement undertaking, ARTC should consider the matters in subsection 44ZZA(3) of the Act, which sets out the matters ACCC must have regard to in assessing the undertaking.

This paper has been informed by stakeholder consultation undertaken from October 2021 to March 2022. It also refers to and draws on stakeholder submissions to both the Issues Paper and the previous consultation paper on the valuation of the Interstate network.<sup>2</sup> The ACCC thanks stakeholders for their submissions and views throughout the process.

### 1.1. Next steps

We currently understand that ARTC will submit a replacement voluntary IAU to the ACCC for assessment around October 2022. Under the Act, the ACCC may either accept or reject ARTC's proposed replacement undertaking. If ARTC decides to make amendments to its proposed undertaking, ARTC may withdraw the proposal and submit a new undertaking which incorporates the amendments.

The ACCC will engage with ARTC on its draft version of the proposed IAU to provide an opportunity to give informal feedback prior to ARTC's formal undertaking submission. We also expect that ARTC will seek feedback from stakeholders on the proposed undertaking prior to submitting it to the ACCC. We encourage stakeholders to discuss possible changes from the current IAU directly with ARTC before it lodges its undertaking with the ACCC. This process is intended to give ARTC the opportunity to consider the feedback before submitting a proposed undertaking.

While submissions are not sought on this Guidance Paper, the ACCC's undertaking assessment will include a formal consultation process seeking stakeholder submissions after the publication of an issues paper and then a draft decision. To contact the ACCC prior to the formal process you can email us at [transport@acc.gov.au](mailto:transport@acc.gov.au).

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<sup>1</sup> See the ACCC's [Issues Paper - The regulatory framework for ARTC's Interstate network](#), 25 August 2021.

<sup>2</sup> See the ACCC's [DORC valuation of ARTC's Interstate network – ACCC consultation paper](#), 15 June 2021.

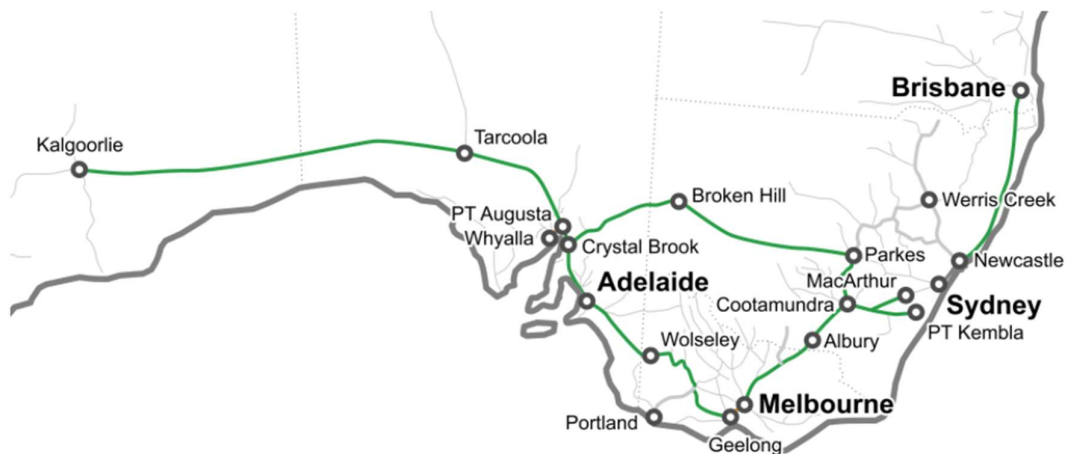
## 2. Background

Part IIIA of the Act establishes a legal regime to facilitate third party access to services provided through facilities with natural monopoly characteristics.<sup>3</sup> One way is by declaration, whereby the relevant Minister ‘declares’ the service following an application to, and recommendation by the National Competition Council. Another way is for the owner of a facility to voluntarily give an access undertaking to the ACCC, as is the case with ARTC’s Interstate network.

### 2.1. ARTC and the Interstate network

ARTC was established in 1998 to create a single avenue for all operators seeking access to the national Interstate network.<sup>4</sup> The Interstate network is approximately 8,500 km long and extends from Kalgoorlie in Western Australia to Acacia Ridge in Brisbane, via South Australia, Victoria and New South Wales (see Figure 1).

**Figure 1: ARTC’s Interstate network**



Source: <https://www.artc.com.au/customers/standards/route/access/defined-interstate/>

ARTC owns the Interstate network that it manages in SA and WA. In contrast, it leases the Interstate network in New South Wales, Victoria and Queensland.

Users of the network primarily transport intermodal freight (typically containerised freight), bulk grains, and non-bulk freight. The Interstate network facilitates the movement of freight and passengers on two key corridors:

- the North-South corridor, which connects Melbourne, Sydney and Brisbane
- the East-West corridor, which connects Melbourne and Sydney to Adelaide and Perth.

<sup>3</sup> Part IIIA provides mechanisms by which access to services (such as railway tracks) may be determined, including declaration/arbitration, and access undertakings. ACCC, [Part IIIA access undertaking guidelines](#), August 2016, pp 2, 5–7.

<sup>4</sup> This was done in accordance with the National Rail Summit Heads of Agreement and the Competition Principles Agreement.

ARTC currently has around 25 IAU access holders (direct customers), which provide a range of freight, passenger, and heritage rail services. The major operators using the network are listed on ARTC's website.<sup>5</sup> ARTC usually contracts directly with entities that operate their own trains.

### 2.1.1. Inland Rail

The Inland Rail project is expected to provide an improved rail freight connection between Melbourne and Brisbane via regional Victoria, NSW and Queensland. Inland Rail will be 1,700 km in length and will consist of new rail line and upgrades of existing rail infrastructure. ARTC has begun construction activity and it is expected that this work will be completed by 2027.<sup>6</sup> Inland Rail is likely to eventually form part of ARTC's Interstate network.

The Federal Government previously stated that it will be providing equity injections toward the capital cost of Inland Rail of \$14.5 billion.<sup>7</sup> Further, ARTC has reported expected capital expenditure in NSW on Inland Rail of \$16.4 billion.<sup>8</sup> However, these costs are yet to be finalised.

## 2.2. The undertaking

The IAU is an access undertaking that sets out the principles and processes under which ARTC is obliged to provide access to businesses wishing to run trains on the Interstate network. The IAU is a voluntary instrument submitted by ARTC to the ACCC for approval under Division 6, Part IIIA of the Act. Voluntary access undertakings are enforceable in the Federal Court once they take effect.<sup>9</sup>

The New South Wales and Victorian governments' leases to the ARTC include requirements for an access undertaking with the ACCC:

- the New South Wales lease requires that ARTC lodge an undertaking with the ACCC as soon as practicable after the commencement of the lease
- the Victorian lease requires ARTC to use all reasonable endeavours to ensure an access undertaking or code with the ACCC is always active.

ARTC has a natural monopoly over the below-rail operation of the network, which comprises the track and related infrastructure. This creates a need for a regulatory regime relating to terms and conditions of access, dispute resolution processes and prices (although the need for each of these can vary across different segments of the network).

ARTC submitted a voluntary access undertaking, under Part IIIA of the Act, to the ACCC for assessment in February 2001. The ACCC ultimately accepted ARTC's first IAU in May 2002, for a 5-year term.

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<sup>5</sup> ARTC, [Our Customers](#), ARTC website, accessed 30 June 2022.

<sup>6</sup> ARTC, [What is Inland Rail](#), accessed 11 July 2022.

<sup>7</sup> ARTC, <https://inlandrail.artc.com.au/what-is-inland-rail/funding-inland-rail/> accessed 27 June 2022.

<sup>8</sup> ARTC, *2020/2021 NSW Lease Annual Condition Report July 20 to June 21*, p 34. [https://www.artc.com.au/uploads/NSW-Lease-Annual-Condition-Report-20-21\\_FINAL.pdf](https://www.artc.com.au/uploads/NSW-Lease-Annual-Condition-Report-20-21_FINAL.pdf)

<sup>9</sup> Subsection 44ZZJ(1) of the Act.

The first IAU expired in May 2007 and was replaced by the 2008 IAU, which the ACCC accepted on 30 July 2008 and was initially set to expire after 10 years.<sup>10</sup> Over the years there have been several extensions and minor variations to the 2008 IAU but, overall, there has been no substantive change to this undertaking.<sup>11</sup>

Under the IAU, ARTC is obliged to negotiate with access seekers who meet minimum prudential requirements.<sup>12</sup> Such negotiations are supported by the processes set out in Part 3 of the IAU, the indicative access agreement (which specifies the standard terms and conditions for access to the network), prices for the indicative services that are specified in clause 4.6 of the IAU, and additional information provided on ARTC's website. ARTC has also published charges for other train types not specified in clause 4.6 of the IAU on its website. Parties to a negotiation also have recourse to the dispute resolution processes outlined in clause 3.12 of the IAU, with the ACCC as the arbitrator if required.

### 2.2.1. Current IAU expiry and recent regulatory framework review

The current IAU is set to expire on 30 June 2023. The Interstate network will be largely unregulated if ARTC does not seek an extension of the current IAU or submit a replacement IAU to the ACCC for assessment, except in NSW, where the default NSW Rail Access Undertaking would apply.<sup>13</sup> If the IAU does expire, access seekers would retain the option to seek national declaration of the Interstate network under other provisions of Part IIIA of the Act.

ARTC most recently submitted a replacement undertaking for consideration in March 2018.<sup>14</sup> The ACCC considered that several components of the proposal were not appropriate, particularly the method for rolling forward the RAB and insufficient records to allow detailed assessment of the capital expenditure. Regarding ARTC's proposed RAB roll-forward, the ACCC had significant concerns relating to the treatment of capital expenditure for assets with perpetual lives, the initial RAB values for new segments, prudence of past capital expenditure, the classification of capital expenditure funded by government grants, the approach to the disposal of assets and the allocation of capital expenditure to asset types.

The ACCC Draft Decision, released in December 2018, was to not accept ARTC's proposed undertaking. In January 2019 ARTC withdrew its proposed undertaking. ARTC and the ACCC agreed that the ACCC would undertake a revaluation of its Interstate network rail assets using the Depreciated Optimised Replacement Cost (DORC) methodology.

On 21 October 2021 the ACCC published a valuation of the Interstate network using the DORC method. In an accompanying paper, the ACCC raised concerns that, based on the experience from the valuation work, the DORC methodology may be unsuitable for the Interstate network.<sup>15</sup> On 25 August 2021 the ACCC published the broader Issues Paper described in chapter 1 above.

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<sup>10</sup> The 2008 IAU excludes the Hunter Valley coal network, as this is covered under the Hunter Valley Access Undertaking. See <https://www.accc.gov.au/regulated-infrastructure/rail/artc-hunter-valley-access-undertaking>

<sup>11</sup> Changes made in IAU variations relate to inclusion of additional segments for pricing purposes and extension of a notification period. Further details are on our website at <https://www.accc.gov.au/regulated-infrastructure/rail/artc-interstate-access-undertaking>.

<sup>12</sup> See clause 3.4(d) of the IAU for prudential requirements.

<sup>13</sup> In other states, governments could bring local portions of the Interstate network under their respective state access regimes. However, this would not occur by default, as it would in NSW.

<sup>14</sup> At that time, the IAU was due to expire on 21 August 2018. In July 2018 the ACCC accepted ARTC's June 2018 application to extend the IAU expiry date to 21 December 2018.

<sup>15</sup> ACCC, [DORC valuation of ARTC's Interstate network: ACCC supplementary paper to GHD's valuation report](#), 21 October 2021, p 1.

## 2.3. Legislative requirements for considering a new IAU

Division 6 of Part IIIA of the Act sets out the matters the ACCC must consider when deciding whether to accept a proposed undertaking, variation to an undertaking or an extension in the operational period of an undertaking. Any replacement IAU ARTC submits should consider these matters.

### *Matters the ACCC must consider*

In deciding whether to accept an undertaking, the ACCC considers:

- the objects of Part IIIA of the Act
- the pricing principles specified in section 44ZZCA of the Act
- the legitimate business interests of ARTC
- the public interest, including the public interest in having competition in markets (whether or not in Australia)
- the interests of access seekers, both current and future
- whether the undertaking is in accordance with an access code that applies to the service (note that there is no access code that applies to this service)
- any other matters the ACCC thinks are relevant.<sup>16</sup>

The objects of Part IIIA of the Act are to:

- promote the economically efficient operation of, use of and investment in the infrastructure (in this case, the Interstate network), thereby promoting competition in upstream and downstream markets
- provide a framework and guiding principles to encourage a consistent approach to access regulation.<sup>17</sup>

The pricing principles are set out as follows:

- regulated access prices should:
  - be set so as to generate expected revenue that is at least sufficient to meet the efficient costs of providing access to the regulated service, and
  - include a return on investment commensurate with the regulatory and commercial risks involved
- multi-part pricing and price discrimination should be allowed when it aids efficiency
- vertically integrated access providers are not allowed to favour their own operations, except to the extent that the cost of providing access to other operators is higher<sup>18</sup>
- pricing regimes should provide incentives to reduce costs and improve productivity.<sup>19</sup>

Further information on undertaking applications can be found in the ACCC's [Part IIIA access undertaking guidelines](#).

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<sup>16</sup> See subsection 44ZZA(3) of the Act.

<sup>17</sup> See section 44AA of the Act.

<sup>18</sup> Not applicable here, as ARTC is not vertically integrated.

<sup>19</sup> See section 44ZZCA of the Act.



If the ACCC accepts an undertaking, the access provider is required to offer third party access in accordance with the undertaking.

The Act allows the ACCC only to either accept or reject the submission. Once the ACCC approves the undertaking, it does not have the ability to require changes to the terms of the undertaking. Before deciding whether to accept an undertaking, the ACCC may request an amendment to the undertaking by issuing ARTC with an amendment notice.<sup>20</sup>

### *Time limits*

Under subsection 44ZZBC(1) of the Act, the ACCC must make a decision in relation to the application within a period of 180 days, commencing at the start of the day the application is received. Subsection 44ZZBC(2) of the Act also provides for 'clock-stoppers', meaning that some days will not count towards the 180 days in certain circumstances. In particular, the clock stops when the ACCC publishes a notice inviting public submissions in relation to an undertaking application, or when the ACCC gives a notice requesting information in relation to an application.

Paragraph 44ZZBA(1)(a) of the Act requires 21 days to lapse after publication of the ACCC decision for the undertaking to become operational. Thus, to have the undertaking operational from 1 July 2023, the ACCC must approve ARTC's undertaking application and publish its decision by 9 June 2023. To enable the ACCC to publish a final decision by 9 June 2023, ARTC would need to submit an undertaking application by around October 2022.

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<sup>20</sup> See section 44ZZAAA of the Act.

### 3. Key considerations for ARTC's IAU 2023

Following the 2018 draft decision, the ACCC and ARTC continued to discuss improvements that could be made to a future replacement undertaking, while the existing undertaking was extended. Broadly, the improvements related to asset values and pricing, the negotiate-arbitrate framework, and reporting and transparency. This chapter sets out our understanding of some of the main potential improvements, as well as some initial views that ARTC and its users can consider prior to ARTC submitting the replacement undertaking.

As a general view, the drafting of a proposed replacement IAU should use 'plain English' drafting as far as possible. Complex and technical documents like the 2008 undertaking do not promote accessibility, understanding or engagement by users of the infrastructure facility, particularly smaller users.

#### 3.1. Market power and captive customers

In our August 2021 Issues Paper, we sought stakeholder views on the need for regulation on the Interstate network. This included seeking views on whether ARTC currently has the ability to exercise market power, whether ARTC could exercise power to a greater extent in some areas of the network than others, which customers are captive customers, and how likely it is that ARTC would exercise market power over these customers in the absence of regulation.

Stakeholders provided contrasting views on the ability of ARTC to exercise market power.

ARTC and Arc Infrastructure, both below-rail operators, submitted that ARTC faces significant competitive pressures from road and sea transport.<sup>21</sup> Arc Infrastructure considered that air transport and other methods, such as slurry pipelines and conveyer belts, also provide competition for rail in some areas. Arc Infrastructure submitted that these pressures constrain any ability to exercise market power and that no party in the supply chain had an incentive to price participants out of the market.

On the other hand, several stakeholders, including Qube Logistics (Qube), Transport for NSW (TfNSW), GrainCorp Limited (GrainCorp) and Yancoal, were concerned about ARTC's use of market power, particularly if high ceiling prices were allowed.<sup>22</sup> Pacific National (PN) submitted that it considers ARTC will seek to increase assess charges as much as possible, even on the North-South corridor, where it is most subject to road competition.<sup>23</sup>

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<sup>21</sup> Arc Infrastructure, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 22 October 2021, p 1.

<sup>22</sup> Pacific National, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 26 October 2021, pp 2, 5-8; Qube Logistics, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 21 October 2021, pp 9-10; Transport for NSW, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 17 February 2022, p 6; GrainCorp, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 22 December 2021, p 8; Yancoal, [Submission to ACCC consultation paper: DORC valuation of ARTC's Interstate network](#), 28 July 2021, p 1.

<sup>23</sup> Pacific National, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 26 October 2021, pp 6-8.

Stakeholders pointed out that monopoly power can be used in non-pricing ways, especially regarding technical and operational decisions. TfNSW noted that ARTC's market power could be exercised through technical standards as well as prices.<sup>24</sup> Graincorp submitted that ARTC exercises power in its prioritisation of trains and scheduling of maintenance, or lack of maintenance.<sup>25</sup> The National Road Transport Association (NatRoad) considered that ARTC could exercise power over road users through its level crossings.<sup>26</sup>

A number of stakeholders identified themselves as 'captive customers' of ARTC, including GrainCorp Limited (GrainCorp) and East Coast Heritage Rail (ECHR).<sup>27</sup> TfNSW identified NSW Trains as a captive customer of ARTC.<sup>28</sup>

Qube identified several types of freight as captive customers, as the volume and mass of the freight being transported makes road transport unviable. These include steel, export and domestic grains, coal, export containerised agricultural commodities (e.g., cotton, grains, meat and timber), and bulk materials (e.g., aggregates and cement). Qube stated that rail operators are also captive customers with significant sunk investments having been made in locomotives and rollingstock.<sup>29</sup>

Aurizon stated there could be a hold-up problem with potential to exercise market power in areas with lower exposure to intermodal competition.<sup>30</sup>

ARTC is constrained in much of the Interstate network by strong competition from road and other modes of transport. The ACCC understands that its government owners' wider policy objectives may also have moderated its approach to pricing and profit maximisation. This may suggest a need for a light form of regulation for ARTC, with considerable room for commercial negotiation.

However, we accept that ARTC has a degree of market power in some areas, including over a range of customers who would find it costly or are unable to switch to other transport modes. We consider that this warrants some protection in negotiation for rail access, including regarding pricing and terms and conditions of access. Therefore, the ACCC considers below the use of price control mechanisms and information disclosure are appropriate to protect such customers in a negotiate-arbitrate framework.

### 3.2. Pricing under the IAU

This section discusses how prices are set under the current IAU and ways in which prices may potentially be set under the IAU 2023, subject to the undertaking ARTC offers.

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<sup>24</sup> Transport for NSW, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 17 February 2022, pp 5-6.

<sup>25</sup> GrainCorp, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 22 December 2021, pp 8-10.

<sup>26</sup> National Road Transport Association, [Submission to ACCC issue paper: The regulatory framework for ARTC's Interstate network](#), 6 October 2021, pp 2, 5, 9.

<sup>27</sup> GrainCorp, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 22 December 2021, p 9; East Coast Heritage Rail, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 15 October 2021, p 3.

<sup>28</sup> Transport for NSW, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 17 February 2022, p 6.

<sup>29</sup> Qube Logistics, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 21 October 2021, pp 11-12.

<sup>30</sup> Aurizon, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 22 October 2021, p 7.

### 3.2.1. Pricing and ARTC's regulatory asset base

#### *The 2008 (current) undertaking*

The current IAU set specific charges for Indicative Services (Super Freight) on each segment in 2008 (clause 4.6), with provision for adjustment in line with the CPI in subsequent years. Charges for other train types are not specified in the IAU and could potentially be negotiated with customers, but in practice ARTC has determined them and publishes the charges for all services on its website.<sup>31</sup>

The initial charges in the IAU were largely based on historical and market factors. Charges have changed little in real terms since 2002, as ARTC has applied the CPI adjustment to all train types, except for a price freeze in 2020-21.

Charges are potentially constrained by the Ceiling Limit, or maximum allowable revenue, which is provided for in clause 4.4 of the IAU. This is equal to Economic Cost, which is calculated by a building block model, adding ARTC's operating costs, return on assets and return of assets, insofar as the ACCC accepts them as efficient. This requires the calculation of a RAB with an initial asset base and an annual roll-forward to add new capital expenditure and CPI indexation, as well as deduction of depreciation and disposals.

The initial asset base in 2008 of \$3.7 billion was derived using a DORC methodology.<sup>32</sup> This resulted in a Ceiling Limit which was well above ARTC's forecast revenue from charges for all types of train for each segment. The ACCC therefore accepted the indicative charges in the 2008 IAU and did not review annual price increases in subsequent years.

#### *Proposed 2018 replacement undertaking*

In 2018 ARTC submitted a replacement undertaking for ACCC approval. This proposal included:

- a much higher RAB of approximately \$10 billion, which rolled in considerable capital expenditure since 2008 and resulted in a substantial increase in the revenue ceiling
- removal of fixed Indicative Charges from the IAU and introduction of an Indicative Access Charges Range, with floor and ceiling charges per GTK
- a 'banded negotiate-arbitrate model', under which ARTC and its customers could negotiate charges within the band between floor and ceiling.

The ACCC issued a draft decision not to accept the replacement undertaking, partly due to concerns about the proposed RAB and resulting wide gap between the floor and ceiling charges.

The ACCC subsequently undertook a separate DORC valuation of the Interstate network. In October 2021 the ACCC published a paper providing a conclusion to the ACCC's DORC valuation of the ARTC's Interstate network.<sup>33</sup> The DORC valuation derived a RAB value of over \$10 billion, which is similar to the valuation outcome proposed by ARTC in 2018.

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<sup>31</sup> ARTC, [Access Charges](#), ARTC website, accessed 30 June 2022.

<sup>32</sup> Booz Allen Hamilton, *Final report, ARTC Standard Gauge Rail Network DORC*, Sydney, January 2007, p 23 (accepted by ACCC for ARTC's 2008 IAU).

<sup>33</sup> ACCC, [DORC Valuation of ARTC's Interstate network: ACCC Supplementary paper to GHD's valuation report](#), 21 October 2021.

However, we indicated that the DORC methodology may be unsuitable for the Interstate network, as the resulting asset base includes historical non-commercial assets (assets that an efficient commercial operator would not have invested in). This would result in high ceiling limits which could allow ARTC to significantly increase prices in the future and earn a return on the non-commercial assets.

### *Submissions to the August 2021 Issues Paper*

In the 2021 Issues Paper we sought views on what the best approach to setting prices might be under the new IAU. We asked whether stakeholders thought a cost-based approach would be appropriate, with options for asset valuation such as DORC and discounted cash flow (also known as 'line in the sand'), or other approaches such as price controls without a RAB, or a negotiate-arbitrate model.

ARTC had earlier proposed a DORC revaluation of its Interstate network in order to ensure the accurate representation of the asset base and provide a consistent asset model approach across ARTC's regulated rail networks.<sup>34</sup> In its subsequent response to the DORC valuation, ARTC indicated that the actual value of the DORC had no role to play in future IAU regulation as its pricing is independent of an economic ceiling based on the traditional building block approach.<sup>35</sup>

Arc Infrastructure supported asset valuation by DORC within a negotiate-arbitrate framework.<sup>36</sup>

TfNSW favoured a cost-based revenue cap, noting that the NSW Rail Access Undertaking uses a DORC-based RAB valuation. However, TfNSW also noted the benefits of a discounted cash flow asset valuation. These benefits included reduced information requirements relative to a DORC and avoidance of any unexpected price changes.<sup>37</sup>

Other stakeholders that were concerned about market power and captive customers generally favoured a more direct regulatory constraint on prices. Most users, including Qube, TfNSW, PN and ECHR, opposed a negotiate-arbitrate system without regulatory constraints on pricing.<sup>38</sup> However, they had varying preferences for price controls based on costs or linked to existing access prices or prices of competing road options.<sup>39</sup>

Qube supported moving away from a DORC-based RAB, in favour of price controls aligned with road pricing.<sup>40</sup> Qube also expressed concern about the large gap between the floor and ceiling limits under the IAU.<sup>41</sup>

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<sup>34</sup> ARTC Proposal to ACCC re Methodology for Revaluation of the Interstate Network, August 2019, p 4. [ARTC did not provide a submission to the Issues Paper as it had provided relevant views in its response to the DORC valuation.]

<sup>35</sup> ARTC, [Response To ACCC IAU DORC And Framework Consultation](#), July 2021, p 6.

<sup>36</sup> Arc Infrastructure, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 22 October 2021, p 2.

<sup>37</sup> Transport for NSW, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 17 February 2022, p 8.

<sup>38</sup> Pacific National, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 26 October 2021; Qube Logistics, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 21 October 2021; Transport for NSW, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 17 February 2022, p 8; East Coast Heritage Rail, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 15 October 2021, p 4.

<sup>39</sup> Arc Infrastructure, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 22 October 2021, p 2.

<sup>40</sup> Qube Logistics, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 21 October 2021, pp 15-16.

<sup>41</sup> Qube Logistics, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 21 October 2021, pp 10, 19.

PN favoured a pricing approach similar to what IPART adopted in its review of WaterNSW's rural bulk water services in 2017. This involved a pricing band, lying between an upper limit (representing customers' willingness to pay for services) and a lower limit (the service provider's estimated avoidable cost). PN also considered an appropriate proxy for a rail operator's willingness to pay could be a road equivalent linehaul price, less the costs of an efficient rail operator.<sup>42</sup>

Several stakeholders supported a pricing framework that better aligns rail and road pricing:

- PN stated that discrepancies between the pricing approaches applied to road and rail freight industries over the last decade have created significant economic, productivity and competitive imbalances.<sup>43</sup> PN submitted that increased use of rail would reduce the negative externalities associated with road transport, including accidents, carbon emissions, pollution and congestion.<sup>44</sup>
- Graincorp similarly considered that the significant societal costs arising from increased road traffic should be considered as part of any rail network review.<sup>45</sup>
- Qube submitted that a rail charging framework that is more comparable with road user charging would enable greater alignment between government policy (including government road safety, environmental outcomes and rail mode share objectives) and the broader market.<sup>46</sup>

ECHR favoured a pricing model that ensures certainty for planning operations.<sup>47</sup>

#### *Preliminary ACCC views on ARTC's asset base and pricing*

The ACCC considers that a price control mechanism without a RAB could be acceptable for the 2023 IAU.

#### **Asset base**

Calculating a cost-based revenue ceiling for the Interstate network is currently problematic due to the difficulty in assessing an efficient value for the asset base. The ACCC considered that neither the roll-forward of capital expenditure proposed by ARTC in 2018, nor the DORC valuation were satisfactory. Further, significant capital expenditure is currently underway for the Inland Rail project, which will increase the asset base by at least \$14.5 billion.<sup>48</sup>

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<sup>42</sup> Pacific National, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 26 October 2021, p 21.

<sup>43</sup> Pacific National, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 26 October 2021, p 3.

<sup>44</sup> Pacific National, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 26 October 2021, p 10.

<sup>45</sup> GrainCorp, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 22 December 2021, pp 5-6.

<sup>46</sup> Qube Logistics, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 21 October 2021, pp 9,12.

<sup>47</sup> East Coast Heritage Rail, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 15 October 2021, p 4.

<sup>48</sup> The ACCC notes that the Inland Rail project may be reviewed by the new Government.

Regarding ARTC's receipt of government funding, the ACCC has previously noted the inability to clearly delineate between investments that are commercial (broadly, that a private profit-seeking business would undertake) and non-commercial (government expenditure for broader social, environmental or economic reasons). Including the full cost of such investments in ARTC's RAB likely results in commercial rail users being charged for benefits that accrue to other parts of the nation and may be more appropriately funded by government. Further, charging the full cost to users would likely result in underuse of the rail network and run counter to the objectives of government funding to promote use of rail.

Including the full cost of such investments in the RAB results in high revenue ceilings and, accordingly, a very large range of possible outcomes between the floor and ceiling. This would provide no practical constraint on ARTC's future prices, and therefore no clarity and certainty for stakeholders.<sup>49</sup>

In the interim, ARTC offering a pricing mechanism such as stand-alone price caps might be acceptable, subject to the undertaking's full terms and the ACCC's assessment against the statutory requirements. However, for future access undertakings the feasibility of returning to a cost build-up approach to prices will be reviewed. Use of a cost-based approach will depend on greater understanding of the benefits and effects of major public investments. This is needed to enable a proper assessment of the efficient costs of providing access, including the extent to which users should be expected to pay as distinct from portions that should be considered funded by the government budget, which will also be relevant in the rollout of Inland Rail. The information should also allow a fuller assessment of constraints on pricing from government policy and competition, as well as users' capacity and willingness to pay.

### **Price controls**

Price controls (without reference to a cost basis) over the period of the undertaking require:

- a set of acceptable initial prices or price caps
- a mechanism for adjusting the price caps over time.

Although the current IAU specifies charges only for the Indicative Service, ARTC could consider whether applying the price controls to all services would give greater transparency and certainty to users.

The ACCC is not recommending any particular form at this stage but expects it would accept only modest price increases and look to avoid sharp price increases that could result in under-use of the network or disadvantage users who have made substantial investments on the basis of historical price paths.

### **Initial prices**

The initial prices proposed by ARTC for the undertaking could be based on pre-existing prices, or a new schedule that could be the result of prior negotiations.

The undertaking could specify how the price ceilings would be subsequently adjusted, while leaving room for negotiation and lower actual prices. Several methods for adjustment are outlined below.

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<sup>49</sup> The ACCC expressed similar concerns about the wide range between floor and ceiling prices in the proposed 2018 IAU. ACCC, [Draft Decision, Australian Rail Track Corporation's 2018 Interstate Access Undertaking](#), 20 December 2018, p 187.

### ***Indexed-based adjustment (CPI – X)***

CPI – X models allow prices to increase by the percentage increase in a price index such as the CPI, minus an efficiency factor of X. The IAU currently restricts increases in the Indicative Access Charge to CPI without an X factor. Alternative indexes, such as the Producer Price Index, could also be used.

Similarly, the price control could be CPI plus a set percentage, allowing an increase in real terms (that is, a negative X). For example, ARTC has previously proposed to increase access charges on the Adelaide to Kalgoorlie section by CPI plus 2% each year from 2018 to 2023.<sup>50</sup> Increases in real terms would need to be justified against the assessment criteria in the Act.

### ***Average price control***

This option would allow ARTC to increase some prices and reduce others, provided the average price increase remains below a set percentage. The average price could be calculated by weighting the price for each service in the schedule by that service's share of total volume.

This approach would prevent ARTC from increasing overall revenue by means of price changes, while encouraging increased revenue through increased volumes. However, it would not necessarily protect all customers, as large increases in price for some customers could still occur while keeping the average price within the allowed limit. Any control on average prices would need to be supported by limits on price increases for individual services (side constraints).

### ***Aligning road and rail prices***

One approach to aligning road and rail prices is 'competitive imputation pricing'. This has been defined as pricing with regard to the price of another mode of transport for transporting similar freight, adjusted for service quality differences between rail and the competitive alternative and reduced by the efficient above-rail cost of providing the relevant freight service.<sup>51</sup> In other words, the price for the regulated service (for example, rail transport of steel) would be set by reference to the price for a competitive service (such as road transport).

However, the ACCC notes that the pricing calculations and service quality adjustments would vary for different freight tasks in a complex way, and it is unlikely to be a simple approach. It would be mirroring competitive factors that constrain rail prices and, on the North-South corridor, for example, could yield prices similar to the current prices. It could have similar results to setting ceiling prices according to customers' willingness to pay and could also allow large price increases in areas where there is little competition. We understand ARTC already takes road prices into account when setting its prices, but a formulaic approach is unlikely to capture all other relevant factors.

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<sup>50</sup> As part of its 2018 IAU proposal, ARTC proposed standing offer charges with a 2% real increase year-on-year until 30 June 2023 on the Adelaide to Kalgoorlie section (<https://www.artc.com.au/uploads/2018-IAU-Standing-Offer.pdf>).

<sup>51</sup> [WA Treasury, Final Decision Paper, Review of the Western Australian Rail Access Regime](#), February 2020, p 34.



### 3.2.2. Pricing structure

ARTC's price schedule sets out access charges for 8 train types across 23 segments, comprising a flagfall per train km and a variable charge per GTK.<sup>52</sup> Super Freight is one of the 8 train types and, being the Indicative Service, is the only service for which charges are specified in the IAU.

ARTC's position is to not discriminate on pricing between customers requiring the same service, in line with clause 4.3 in the IAU. It considers this promotes market confidence in equitable treatment, enhancing above-rail competition.<sup>53</sup> However, clause 4.2 allows ARTC to take account of a range of technical and commercial factors which could result in different prices for services with different characteristics.

Several stakeholders proposed more flexible pricing models that would encourage innovation and investment. Aurizon was concerned that boilerplate or 'standard agreements' do not allow for, or incentivise, innovation or investment in initiatives that might improve productivity (including mutual above- and below-rail investment). TfNSW suggested preferential pricing to encourage higher-value rail users to use Inland Rail. DTV suggested a flexible pricing structure for intrastate freight operations that may utilise the ARTC network for its whole journey or be linked with intrastate networks.<sup>54</sup>

The ACCC's understanding is that the price structure for the Interstate network has not been reviewed or amended since at least 2008. As such, the ACCC supports a review of ARTC's price structure, number of segments and set of services at an appropriate time. The ACCC considers that the IAU should be flexible enough to allow negotiation of new price structures for new innovative or tailored services.

## 3.3. Negotiate-arbitrate framework

### 3.3.1. Current and potential provisions

Part 3 of the IAU establishes a negotiate-arbitrate framework and outlines the process to enable an access seeker to gain access to ARTC's network. This includes information sharing requirements, timing, steps to be undertaken while negotiating and, in the event of a dispute, provision for mediation and, as a last resort, arbitration by the ACCC.

These provisions cover negotiation over access, including prices of the services. They do not relate to negotiation over the development of the undertaking itself or the methodology for how Indicative Access Charges (Super Freight) are determined.

In 2018 ARTC proposed only minor amendments to the negotiate-arbitrate framework in the IAU by:

- removing the requirement for ARTC to provide access seekers with DORC values and the incremental cost and Economic Cost for the segments they are seeking access to

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<sup>52</sup> See ARTC, [Access Charges](#), ARTC website, accessed 30 June 2022. Note there is also a flat charge for entry to Port Botany.

<sup>53</sup> ARTC, [2018 Interstate Network Access Undertaking Renewal – Explanatory Guide](#), 6 March 2018, p 11.

<sup>54</sup> Aurizon, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 5 November 2021, p 7; Transport for NSW, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 17 February 2022, p 7; Department of Transport Victoria, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 29 November 2021, p 1.

- committing to publishing 'charges for similar Services requested' for subsequent agreements between ARTC and access holders (for transparency and to illustrate no price discrimination).<sup>55</sup>

While the ACCC rejected the proposed 2018 IAU due to concerns around other matters, we did not raise any major concerns with the proposal for the negotiate-arbitrate framework.<sup>56</sup>

ARTC subsequently stated in response to the DORC consultation that commercial negotiation for access drives the most efficient outcome for the industry by allowing an exchange of rights and risks, resulting in the most competitive freight offering for rail. It also provides the flexibility to negotiate pricing within the term of the undertaking, based on constantly changing market dynamics.<sup>57</sup>

Regarding arbitration, ARTC submitted that an independent commercial arbitration process is the most efficient method to create an access framework that provides both timely dispute resolution and constrains the use of market power.<sup>58</sup>

### *Submissions to the August 2021 Issues Paper*

In the August 2021 Issues Paper the ACCC sought views on whether a negotiate-arbitrate model, among other regulatory frameworks, is suitable for the new IAU.

Arc Infrastructure, like ARTC, supported a negotiate-arbitrate approach rather than full price regulation, in keeping with their views that ARTC has little monopoly power. Arc Infrastructure supported the negotiate-arbitrate model in the Western Australian Rail Access Regime. Arc submitted that this model facilitates efficient market outcomes that are reflective of the particular task:

*The parties (who are usually sophisticated commercial entities in their own right) are free to make commitments to one another regarding the provision and use of infrastructure, against a background of competing alternatives, which allows them to achieve their commercial objectives to their satisfaction and, where that is not possible, parties have recourse to regulatory mechanisms including arbitration with binding outcomes on both parties.*<sup>59</sup>

Aurizon favoured a negotiate-arbitrate model comparable to the proposed strengthening of the negotiate-arbitrate model in Part 23 of the National Gas Rules. It also submitted:

- the regulatory framework needs an accompanying set of arbitration guidelines to ensure that it has adequate information
- a collective bargaining model could work for the Interstate network
- an effective information disclosure regime should seek to improve transparency and accountability regarding past and projected costs and performance standards to reduce information asymmetries.<sup>60</sup>

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<sup>55</sup> Clause 3.8(c)(iv), ARTC, [2018 Interstate Network Access Undertaking Renewal – Access Undertaking \(clean\)](#), 6 March 2018, p 14.

<sup>56</sup> ACCC, [Draft Decision, Australian Rail Track Corporation's 2018 Interstate Access Undertaking](#), 20 December 2018, p 35.

<sup>57</sup> ARTC, [Response To ACCC IAU DORC And Framework Consultation](#), July 2021, p 13.

<sup>58</sup> ARTC, [Response To ACCC IAU DORC And Framework Consultation](#), July 2021, p 4.

<sup>59</sup> Arc Infrastructure, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 22 October 2021, p 2.

<sup>60</sup> Aurizon, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 5 November 2021, pp 9-11.

Most other users, including Qube, TfNSW, PN and ECHR, opposed a pure negotiate-arbitrate system without a regulatory constraint on prices. This was based on their concerns about market power and captive customers.<sup>61</sup> Qube submitted that, given the market structure, rail freight operators are essentially price-takers in the current model and this would be unlikely to change, even in a negotiate-arbitrate model. ECHR considered that small operators have limited resources to negotiate effectively with ARTC and, accordingly, any negotiate-arbitrate model would likely favour ARTC over small operators.<sup>62</sup>

In PN's view, a negotiate-arbitrate model would introduce unnecessary complexity, inefficiency and uncertainty, based on PN's experience in other contexts. PN considers that the model makes it more difficult to predict future pricing and for above-rail operators to plan pricing for their customers. ECHR also emphasises the advantage of certainty, with agreed published pricing to give it a known basis to plan.<sup>63</sup>

### *Preliminary ACCC views on the negotiate-arbitrate arrangements*

The ACCC considers a negotiate-arbitrate framework would be an appropriate part of a replacement IAU and is open to considering the use of a commercial arbitrator as the backstop for resolving disputes. Negotiation and, if required, arbitration, can help deliver more flexible pricing to meet particular commercial needs. The reforms to non-scheme gas pipelines may provide some useful reference points for ARTC to consider.<sup>64</sup> While negotiations would allow for some flexibility in price structure and movements, they would be guided by the context of the price controls discussed above. Provisions for information disclosure and non-discrimination would also provide constraints on the potential use of market power and impacts on captive customers described by stakeholders in section 3.1 above.

The following points provide some general views on desirable attributes of the negotiate-arbitrate framework.

#### **3.3.2. Information disclosure**

A key to successful negotiate-arbitrate frameworks is mandating upfront reporting and sharing of key information in a timely manner. The exact form of this information will be dependent on the nature of the guidelines for resolving pricing or other disputes, and stakeholder requirements regarding technical and operational requirements. Confidential information may be provided only to access seekers on application, if appropriate.

The undertaking should be clear on exactly which terms and conditions of access, including price, for which services are within scope. In general, most would be negotiable unless there is a practical reason they cannot be.

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<sup>61</sup> Pacific National, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 26 October 2021; Qube Logistics, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 21 October 2021, p 17; Transport for NSW, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 17 February 2022, p 8.

<sup>62</sup> East Coast Heritage Rail, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 15 October 2021, p 4.

<sup>63</sup> For example, Pacific National, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 26 October 2021, p 14; East Coast Heritage Rail, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 15 October 2021, pp 2, 4.

<sup>64</sup> See Department of Climate Change, Energy, the Environment and Water, [Energy Ministers agree final package of gas pipeline regulatory amendments](#), energy.gov.au website, accessed 20 July 2022.

The publication of negotiated outcomes, including prices, would ensure that potential users can access this information in considering their own negotiations. The greater the transparency, the less the disadvantage faced by infrastructure users when negotiating terms of access.

### 3.3.3. Procedural clarity and mediation

Uncertainty around process, rights and responsibilities can be a disincentive for users to make full (or any) use of the framework. A negotiate-arbitrate framework should ensure clear rules for process and timelines, including trigger to start a formal negotiation, mediation, appointment of commercial arbitrator, trigger for arbitration, and the considerations and rules for arbitral decision-making. By ARTC ensuring clarity and certainty in these matters, it will help ensure smaller users feel comfortable to engage with the negotiation framework.

## 3.4. Reporting and transparency

### 3.4.1. Financial reporting and record keeping

The 2008 IAU has no general provision for reporting of financial information, but requires ARTC to report annually on the following unit cost items:

- infrastructure maintenance cost (per '000 GTK and per track km)
- train control (per train km)
- operations (including train control and operations planning and management) (per train km).

The undertaking does not require ARTC to report on other items, such as volumes, revenue, total operating costs or the roll-forward of the RAB.<sup>65</sup>

In its 2018 IAU ARTC did not propose any material changes to the reporting and compliance approach from the 2008 IAU. However, in its draft decision the ACCC requested that ARTC provide the ACCC with actual values for revenue, capex and opex annually for each Segment.<sup>66</sup>

The ACCC further recommended an annual compliance assessment process to ensure that ARTC is incurring prudent capital expenditure and efficient operating expenditure, and to be able to assess whether ARTC revenue is approaching the ceiling limit.<sup>67</sup>

### *Submissions to the August 2021 Issues Paper*

Several stakeholders emphasised the importance of transparency. In particular, Aurizon submitted that there has been a lack of information regarding the costs of providing the below rail service, and there should be sufficient information to support the negotiation of efficient commercial solutions.<sup>68</sup> TfNSW also suggested a need for greater transparency, both in terms of costs and charge setting by ARTC.<sup>69</sup>

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<sup>65</sup> Clause 4.4(e) required ARTC to obtain the approval of the ACCC 'for any increase to Capital Expenditure exceeding 20% of Capital Expenditure on the Network in any single year', but ARTC did not report on these increases.

<sup>66</sup> ACCC, [Draft Decision, Australian Rail Track Corporation's 2018 Interstate Access Undertaking](#), 20 December 2018, p 195.

<sup>67</sup> ACCC, [Draft Decision, Australian Rail Track Corporation's 2018 Interstate Access Undertaking](#), 20 December 2018, p 196.

<sup>68</sup> Aurizon, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 5 November 2021, p 10.

<sup>69</sup> Transport for NSW, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 17 February 2022, p 8.

ARTC has previously stated that transparency on ARTC's operations and performance should be a key element in the IAU.<sup>70</sup>

### *Preliminary ACCC views on reporting and record keeping*

If the next undertaking does not require the calculation of a RAB and revenue ceiling as discussed in section 3.2, the ACCC would expect to maintain general oversight on matters such as the movements in price schedules and expenditure on the network. However, there will not be a requirement for a detailed annual compliance process as is the case under ARTC's Hunter Valley network undertaking. Nevertheless, the ACCC considers that ARTC should report regularly on financial variables. The reports would provide an information base for informed negotiation or arbitration and allow monitoring of ARTC's profitability and progress on the Interstate network. In providing appropriate performance indicators and financial reporting, ARTC will need to keep sufficient records. Some of these records might be public, some supplied to the ACCC, and others supplied to negotiating parties.

ARTC provides some information in its audited financial accounts, which are published annually in accordance with relevant legislation. However, additional information would be preferable for regulatory purposes. Information relating to the Interstate network should be separate from other business units, with an appropriate allocation of common costs or overheads. ARTC already allocates common costs between the Hunter Valley network, Interstate network and Inland Rail for the purposes of its *Hunter Valley Coal Network Access Undertaking*. For transparency, the information should be published as far as possible unless there is clear justification of adverse commercial effects.

The ACCC expects it would be reasonable for ARTC to publish, by a set time following the end of financial year, actual data for the previous financial year for each pricing segment on the following:

- revenue
- operating expenditure
- capital expenditure (corridor and non-corridor)
- volume information
- changes to price schedules
- audit assurance for the information provided.<sup>71</sup>

We note that similar reporting is required under energy rules for non-scheme pipelines, which are lightly regulated under primarily a negotiate-arbitrate framework.<sup>72</sup>

In addition to the published information, future consideration of the regulatory framework would be assisted by ARTC providing additional information to the ACCC, including:

- supporting information for capital expenditure, including
  - any project evaluation/cost-benefit analysis/consultation undertaken
  - any information pertinent to whether an investment is commercial or non-commercial

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<sup>70</sup> ARTC, [Submission to ACCC consultation paper: DORC valuation of ARTC's Interstate network](#), July 2021, p 4.

<sup>71</sup> ARTC has stated it "is committed to increasing transparency of its information as per the discussions with the ACCC over this regulatory period" (ARTC, [Submission to ACCC consultation paper: DORC valuation of ARTC's Interstate network](#), July 2021, p 14).

<sup>72</sup> AER, [Non-scheme Pipeline - Financial Reporting Guidelines](#), accessed 30 June 2022.

- whether expenditure was brought forward due to government requirements or decisions
- the nature of the funding (grant, equity, forgone dividends, etc.)
- asset disposals
- audit assurance for the information provided.

These records will be important in assessing a future asset value as an input to any future IAU and pricing models, to avoid the situation in 2018 where there was insufficient information to assess the efficiency of the proposed roll-ins to the RAB.

### 3.4.2. Performance indicators

ARTC has multiple existing reporting requirements for the Interstate network. Some are provided to federal and state governments, others provided directly to above-rail operators, and some metrics are published online. Performance standards may form part of a negotiated agreement with access seekers. Expectations of service standards can be weighed against proposed charges so there is a stronger link between expenditure and prices. Existing reporting requirements and further possibilities are outlined below.

Under clause 8.2(a) and Schedule G of the undertaking, ARTC commits to publishing quarterly Performance Indicators on the following items.<sup>73</sup>

- reliability
- network availability
- transit time
- temporary speed restrictions
- track condition.

Clause 8.2(b) requires ARTC to incorporate a review of its Performance Indicator reporting into its annual internal audit process and publish the findings on its website.<sup>74</sup> The most recent such audit available on ARTC's website is the one for 2014-15.

ARTC's leases with the NSW and Victorian Governments also require it to report on specified key performance indicators (KPIs) annually (NSW) or quarterly (Victoria). These are also reported on ARTC's website.<sup>75</sup>

In 2018 ARTC did not propose any material changes to the performance indicator provisions from the 2008 IAU. The ACCC made several observations and sought further submissions from stakeholders.<sup>76</sup>

Several stakeholders commented on the use of performance data.

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<sup>73</sup> Published on ARTC's website <https://www.artc.com.au/customers/access/access-interstate/performance-indicators/reporting/> accessed 25 February 2022.

<sup>74</sup> <https://www.artc.com.au/customers/access/access-interstate/performance-indicators/reporting/>

<sup>75</sup> NSW: <https://www.artc.com.au/about/reports/nsw-lease/>; Victoria: <https://www.artc.com.au/about/reports/victorian-lease/>.

<sup>76</sup> ACCC, *Draft Decision, Australian Rail Track Corporation's 2018 Interstate Access Undertaking*, 20 December 2018, p 209.

- TfNSW suggested the ACCC consider direct linkages between ARTC's level of access pricing and KPIs for the level of service it provides.<sup>77</sup> TfNSW noted that ARTC has been operating for over 20 years, yet its progress has not been formally evaluated against the policy objectives for which it was established.<sup>78</sup>
- DTV stated that effective regulation may need appropriate service standards (track standards) for passengers and freight.<sup>79</sup>
- Aurizon submitted that there needs to be a more substantive cross-jurisdictional review that examines the performance and productivity of the rail industry.<sup>80</sup>

#### *Preliminary ACCC views on performance indicators*

We note that there is some overlap between KPIs for the IAU and the state leases, such as in transit times delays. However, the KPIs for the leases are mainly concerned with the condition of the leased assets, such as track quality and capability, while KPIs for the IAU focus more on measures related to service for users, such as reliability and transit times.

The ACCC is satisfied that the current indicators remain appropriate but recommends that ARTC explores indicators more specific to passenger services.<sup>81</sup> We also encourage ARTC to explore rationalisation of the various reported indicators if it could provide greater clarity and reduce administrative burden. Consistent with our 2018 IAU decision, we propose stakeholders put forward their requirements for performance indicators to ARTC. This will assist stakeholders in their negotiations with ARTC.

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<sup>77</sup> Transport for NSW, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 17 February 2022, p 5.

<sup>78</sup> Transport for NSW, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 17 February 2022, p 8.

<sup>79</sup> Department of Transport Victoria, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 29 November 2021, p 2.

<sup>80</sup> Aurizon, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 5 November 2021, p 12.

<sup>81</sup> This is consistent with the ACCC's views on ARTC's 2018 undertaking. (ACCC, [Draft Decision, Australian Rail Track Corporation's 2018 Interstate Access Undertaking](#), 20 December 2018, p 212.)

## 4. Other issues raised by stakeholders

In their submissions to the Issues Paper, several stakeholders provided their views on broader rail issues, including:

- the administrative burden faced by access seekers in negotiating with multiple network providers in respect of a single train journey
- a lack of harmonisation of rail safety and operational requirements across Australian jurisdictions
- national reform of the rail sector
- the implications of ARTC being privatised.

Stakeholders' submissions provide substantial information on the difficulties they face with fragmented networks. The ACCC notes that each of the above issues is beyond the scope of the current IAU renewal process. Nonetheless, this chapter seeks to summarise stakeholders' comments and encourage ongoing discussions in these areas to address concerns raised.

### *Complying with multiple rail access regimes*

In their submissions to the Issues Paper, ECHR, Aurizon, Qube and GrainCorp highlighted the issue of train operators having to negotiate with multiple network providers for a single train journey. For example, Qube noted that it operates trains across both ARTC's and Transport Asset Holding Entity of New South Wales' networks and faces a regulatory burden in complying with the different requirements under the IAU and NSW Rail Access Undertaking.<sup>82</sup>

The ACCC notes that it does not have the power to compel network providers to align the terms on which they offer access to their respective networks. The ACCC encourages ARTC to engage with stakeholders regarding this issue and, where possible, devise solutions to help reduce the transaction costs faced by access seekers in negotiating with multiple network providers.

### *Lack of harmonisation of rail safety and operational requirements*

During meetings with the ACCC, several industry representatives highlighted that a lack of harmonisation of safety and operational requirements in the rail industry across Australian jurisdictions has hindered the efficient operation of the Interstate freight rail market. For example, that rail drivers are subject to different accreditation requirements across Australian jurisdictions for operating trains, which imposes an administrative burden on drivers and train operators. Furthermore, in its submission to the Issues Paper, Aurizon stated that 'there are limitations regarding the interoperability of rollingstock across different networks', which can arise due to:

- the diversity of infrastructure capability limiting higher mass operations and operational flexibility, with underutilisation of rollingstock
- a lack of alignment in operating performance requirements between adjacent network providers

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<sup>82</sup> Qube Logistics, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 21 October 2021, p 2.



- different wheel profile standards.<sup>83</sup>

Qube noted that attempts to harmonise rail safety regulation have not reduced the administrative burden faced by operators:

*Even with the creation of [the Office of the National Rail Safety Regulator] [ONRSR] and the vision of the Rail Industry Safety and Standards Board (RISSB), rail operators must now demonstrate the safe performance of rolling stock with more network managers than in the mid-1990s when private operators started to compete and vertically integrated railways were being broken up.<sup>84</sup>*

Issues relating to the harmonisation of rail safety and operational standards across Australia are beyond the scope of this IAU renewal process. However, the ACCC supports reform in these areas insofar as they improve the efficiency of, and promote competition in, the rail sector and the industries it supports, while minimising the regulatory burden on stakeholders.

#### *National review of the regulatory framework for the rail sector*

Aurizon, PN, Qube and GrainCorp expressed concern about the effectiveness of the current regulatory framework for the rail sector. In addition, Aurizon, Qube and GrainCorp support a national review of the regulatory framework for the rail sector.

- Aurizon supports a 'more substantive cross-jurisdictional review that examines the performance and productivity of the rail sector and within that context, the need for, and design of, economic regulation to address identified market failures and improve the sector's performance in supporting the economy.'<sup>85</sup>
- Qube 'supports reform of the broader regulatory framework supporting the national rail freight industry, rather than the ARTC Interstate Access Undertaking being addressed in isolation. Qube does not support further regulator intervention without broader regulatory and market reform. The regulatory framework for rail in Australia needs to provide surety of train paths across multiple networks, with a consistent regulatory framework, while enabling confidence to support long term investment in rolling stock and terminals. Access pricing arrangements should support investment cycles and should be consistent with those in competing markets.'<sup>86</sup>
- GrainCorp 'believes a broader regulatory review of the national rail network is required, to reduce complexity, create greater alignment between networks, and deliver end-to-end supply chain efficiency.'<sup>87</sup>

A national review of the regulatory framework for the rail sector is beyond the scope of this IAU renewal process and a uniform approach to rail regulation across Australia would require the agreement of state and territory governments.

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<sup>83</sup> Aurizon, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 5 November 2021, p 6.

<sup>84</sup> Qube Logistics, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 21 October 2021, p 7.

<sup>85</sup> Aurizon, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 5 November 2021, p 12.

<sup>86</sup> Qube Logistics, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 21 October 2021, p 14.

<sup>87</sup> GrainCorp, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 22 December 2021, pp 7-8.

## Ownership of ARTC

ECHR, Aurizon and Qube expressed concern about ARTC being privatised in the future.

Qube highlighted the importance of having adequate regulatory controls in place if ARTC is privatised:

*A major concern is the potential sale of ARTC without significant market reform, modal competitive neutrality and proven enforceable performance standards being established. Without suitable protections in place, this would impact all of Qube's rail services including those moving export commodities through the ports at Melbourne, Newcastle, Botany and Port Kembla...*

*The current ARTC Interstate Access Undertaking is not fit for purpose should the Commonwealth government decide to sell ARTC.<sup>88</sup>*

Aurizon expressed the following view regarding the possibility of ARTC being privatised:

*Aurizon also considers that a change in ARTC's ownership could alter the incentive for it to exercise market power. It agrees with the ACCC that the "regulation should ensure ARTC is adequately constrained from exercising market power, irrespective of ownership structure." Aurizon also notes the recent comments by the ACCC Chair, Rod Sims, that governments should not agree to privatise assets unless there has been a prior regulatory and competition assessment.<sup>89</sup>*

As with the privatisation of any major infrastructure, the ACCC considers governments must ensure adequate regulatory controls are in place to constrain the market power of a new owner if ARTC were to be privatised in the future.

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<sup>88</sup> Qube Logistics, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 21 October 2021, p 14.

<sup>89</sup> Aurizon, [Submission to ACCC issues paper: The regulatory framework for ARTC's Interstate network](#), 5 November 2021, p 8; ACCC Chair Rod Sims' speech referenced in Aurizon's submission available at: <https://www.accc.gov.au/media-release/privatise-for-efficiency-or-not-at-all>.

## 5. Abbreviations, acronyms and glossary

<b>Above-rail operator</b>	Operators of trains and rollingstock
<b>the Act</b>	<i>Competition and Consumer Act 2010 (Cth)</i>
<b>ACCC</b>	Australian Competition and Consumer Commission
<b>AER</b>	Australian Energy Regulator
<b>ARTC</b>	Australian Rail Track Corporation
<b>Bulk freight</b>	Freight that is relatively non-perishable and generally involves large quantities of homogenous product (such as oil, gas, mineral ores, cement and sand). These are usually transported as a whole, and without packaging.
<b>Captive customers</b>	Users who do not have road or coastal shipping services (or other transport options) as an effective substitute for rail in the event that rail prices increase significantly <sup>90</sup>
<b>Ceiling Limit</b>	The ceiling limit is set by calculating how much revenue is required for ARTC to recover the Economic Cost of one or a group of its Segments <sup>91</sup>
<b>CPI</b>	Consumer Price Index
<b>DORC</b>	Depreciated Optimised Replacement Cost (methodology for valuing assets)
<b>ERA</b>	Economic Regulation Authority Western Australia
<b>Floor limit</b>	The floor limit is set by calculating how much revenue is required for ARTC to recover costs that are deemed to be 'incremental', meaning costs that could be avoided if a Segment was removed from the Interstate network <sup>92</sup>
<b>GTK</b>	Gross Tonne Kilometres, measured by gross tonnes of coal carried multiplied by the number of kilometres travelled
<b>IPART</b>	Independent Pricing and Regulatory Tribunal
<b>IAU</b>	Interstate Access Undertaking
<b>Intermodal freight</b>	Freight that is transferred between modes of transport (such as road, rail and/or coastal shipping). For example, road transport provides local pickup and delivery to and from a rail terminal
<b>Non-bulk freight</b>	Freight that is generally freight packed in containers or other units. These vary in density, perishability and fragility (such as live animals, motor vehicles and trailers)
<b>NSW</b>	New South Wales
<b>RAB</b>	Regulatory Asset Base

<sup>90</sup> [Australian Competition and Consumer Commission v Pacific National Pty Limited](#) [2020] FCAFC 77 [10], para 107–109.

<sup>91</sup> Clause 4.4(c) and 4.4(d) of ARTC, *Interstate Access Undertaking*, 15 July 2008 (as varied on 18 April 2012, 10 April 2013, 25 July 2018, 12 December 2018, 28 February 2019, 26 September 2019, 19 June 2020 and 15 June 2021).

<sup>92</sup> Clause 4.4(b) of ARTC, *Interstate Access Undertaking*, 15 July 2008 (as varied on 18 April 2012, 10 April 2013, 25 July 2018, 12 December 2018, 28 February 2019, 26 September 2019, 19 June 2020 and 15 June 2021).

<b>Segment</b>	A component of the Interstate network as defined in Schedule I of the 2008 Interstate Access Undertaking. <sup>93</sup> It is distinguished for the purposes of applying charges to the services carried out on the track segments within the East-West and North-South corridors
<b>Super Freight</b>	A train type defined by ARTC as having maximum speed of 110 km/hour and maximum axle load of 21 tonnes. It is typically used for intermodal freight and is the basis for the Indicative Service defined in clause 4.6 of the IAU.

This Guidance Paper uses capitalised terms throughout, in addition to the abbreviations and acronyms above. These terms are defined terms in part 9 (page 34) of the current IAU.

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<sup>93</sup> ARTC, *Interstate Access Undertaking*, 15 July 2008 (as varied on 18 April 2012, 10 April 2013, 25 July 2018, 12 December 2018, 28 February 2019, 26 September 2019, 19 June 2020 and 15 June 2021), p 47.