



Consultation Paper

Australian Rail Track Corporation's 2018 Interstate Rail Access Undertaking

26 March 2018

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1. Introduction

The Australian Rail Track Corporation Limited (**ARTC**) has submitted an access undertaking to the Australian Competition and Consumer Commission (**ACCC**) for assessment under Part IIIA of the *Competition and Consumer Act 2010* (Cth) (**the Act**). The undertaking is in relation to the provision of access to the Interstate Rail Network owned or leased by ARTC in New South Wales, Victoria, Queensland, South Australia and Western Australia (**2018 IAU**).

The ACCC previously accepted access undertakings in May 2002 and July 2008 in accordance with Part IIIA of the *Trade Practices Act 1974*. The 2008 IAU expires on 21 August 2018.

ARTC intends that the 2018 IAU will come into operation when the 2008 IAU expires so that there is no ‘regulatory gap’ under Part IIIA. While the ACCC will meet its statutory timeframes, whether the 2018 IAU is accepted prior to the expiry of the 2008 IAU depends on the complexity of any unresolved issues that remained at the time of the 2018 IAU’s submission to the ACCC for assessment.

1.1. Request for submissions

The ACCC, by publication of this Consultation Paper, is inviting submissions on the 2018 IAU.¹

Section 3 of this paper outlines a range of matters to which the ACCC wishes to draw your attention. The structure of this paper generally follows the chapters of the 2018 IAU.

The matters in section 3 do not represent a comprehensive summary of all aspects of the 2018 IAU, nor do you need to comment on all of those matters. ARTC has advised the ACCC that it has engaged in its own consultation process in 2017 and 2018 in its development of the 2018 IAU. Stakeholders are welcome to provide submissions on any relevant aspect of the 2018 IAU including, issues that you consider outstanding (if any), or insights gained from stakeholder’s experience operating under the 2008 IAU.

In making your submission, please include detailed reasons to support your views. If you consider that an aspect of the 2018 IAU is *not* appropriate, please provide suggestions of changes that could be made to address the relevant concerns, including to the level of drafting amendments where possible.

1.1.1. Invitation to make a submission

Submissions should be addressed to:

Mr Matthew Schroder
General Manager
Infrastructure & Transport — Access & Pricing Branch
Australian Competition and Consumer Commission
GPO Box 520
Melbourne VIC 3001
Email: transport@accc.gov.au

¹ Section 44ZZBD(1) of the Act.

1.1.2. Due date for submissions

Submissions to this Consultation Paper are due by 23 April 2018. It is in your interest that the submission is lodged by this date, as section 44ZZBD(3)(b) of the Act allows the ACCC to disregard any submission made after this date.

1.1.3. Confidentiality

The ACCC strongly encourages public submissions. Unless a submission, or part of a submission, is marked confidential, it will be published on the ACCC's website and may be made available to any person or organisation upon request. If you are providing a confidential submission the ACCC asks that you provide a full copy of the document, and a public version with the information to be excluded from the ACCC website omitted.

Sections of submissions that are claimed to be confidential should be clearly identified. The ACCC will consider each claim of confidentiality on a case by case basis. If the ACCC refuses a request for confidentiality, the submitting party will be given the opportunity to withdraw the submission in whole or in part. Submissions that are withdrawn will not be considered in the assessment of the 2018 IAU.²

For further information about the collection, use and disclosure of information provided to the ACCC, please refer to the ACCC publication '[*Australian Competition and Consumer Commission / Australian Energy Regulator Information Policy: collection and disclosure of information*](#)' available on the ACCC website.

1.2. ACCC assessment

The test the ACCC applies in deciding whether to accept an access undertaking is set out in subsection 44ZZA(3) of the Act. Essentially, the ACCC may accept the undertaking if it thinks it appropriate to do so, having regard to various matters. The full test is set out in section 4 of this paper.

The ACCC has not yet formed a view on the appropriateness or otherwise of the 2018 IAU, and statements in this Consultation Paper should not be taken as indicative of the ACCC's view of the appropriateness of the 2018 IAU under the Act, nor the likelihood of its acceptance.

The ACCC will consider submissions and if necessary engage in further consultation with stakeholders and ARTC in order to clarify and obtain further details on any issues raised.

1.3. Indicative timeline for assessment

Under subsection 44ZZBC(1) of the Act, the ACCC must make a decision on an access undertaking application within the period of 180 days starting at the start of the day the application was received (referred to as 'the expected period'). The Act also provides for 'clock-stoppers', that mean certain time periods are not taken into account when determining the expected period.³

Table 1 below provides an indicative timeline for the ACCC's assessment of the 2018 IAU. This timeline is indicative only and may be subject to change during the assessment process.

² Section 44ZZBD(6)(c)(iii) of the Act.

³ See section 4 of this paper for further information on these provisions of the Act.

Table 1: Indicative timeline for assessment of 2018 IAU

Date	Milestone
6 March 2018	Lodgement of 2018 IAU
26 March 2018	Consultation process begins
23 April 2018	Closing date for submissions to Consultation Paper
June 2018	Draft decision
June/July 2018	Consultation on draft decision
August 2018	Final decision
21 August 2018	The 2008 IAU expires

1.4. Further information

ARTC submitted the 2018 IAU to the ACCC on 6 March 2018. The ACCC published the 2018 IAU on its website on 7 March 2018 and circulated the documents to all relevant parties. The 2018 IAU and other relevant material, including supporting submissions from ARTC, are available on the ACCC's website at:

<https://www.accc.gov.au/regulated-infrastructure/rail/artc-interstate-rail-access-undertaking/interstate-rail-access-undertaking-2018>

Alternatively, you can go to the ACCC's homepage at www.accc.gov.au and follow the links to 'For regulated industries' and 'Rail' and 'ARTC Interstate Rail access undertaking'.

Public submissions made during the current process will also be posted at this location.

The current 2008 IAU is available on the ACCC's website at the following link.

<https://www.accc.gov.au/regulated-infrastructure/rail/interstate-rail-access-undertaking-2008/undertaking-application>

If you have any queries about any matters raised in this document, please contact:

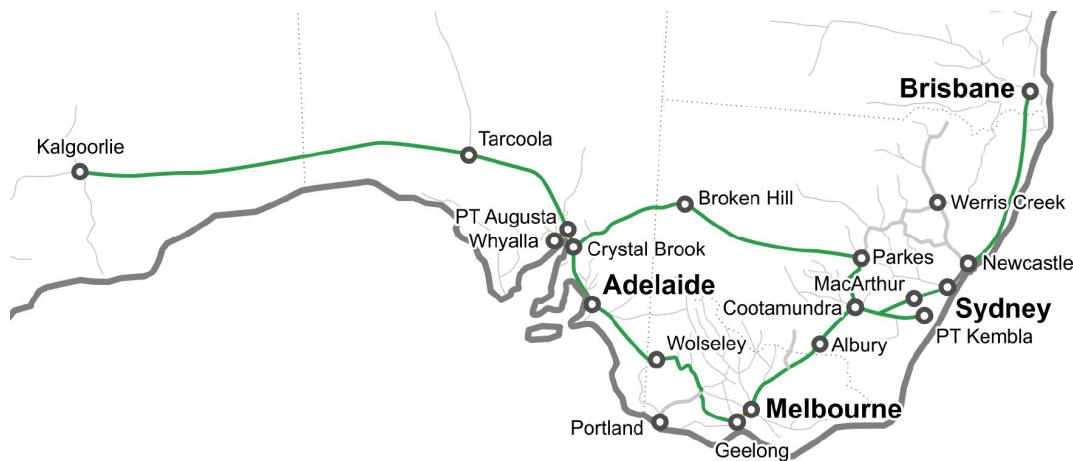
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2. Background

2.1. 2008 IAU

ARTC manages around 8500 kilometres of track in New South Wales, Victoria, Queensland, South Australia and Western Australia.⁴ In broad terms, the Interstate network managed by ARTC consists of the track between Kalgoorlie in Western Australia to Acacia Ridge in Queensland. Figure 1 shows the extent of ARTC's Interstate network.⁵

Figure 1: ARTC's Interstate network⁵



The regulatory arrangements governing the Interstate rail network are set out in the 2008 IAU. The 2008 IAU covers the terms and conditions of access to standard gauge tracks along the Interstate network.

The 2008 IAU was accepted on 30 July 2008 and applies for a term of 10 years. The 2008 IAU includes the following key features:

- **Negotiating for access framework:** The framework outlines the process and information required during a negotiation process. The framework also includes a dispute resolution process that allows the ACCC to be the arbitrator if the parties are unable to come to an agreement. This framework allows operators to negotiate terms which reflect their particular needs while providing certainty through the Indicative Access Agreement which outlines ARTC's current market terms and conditions.
- **Access pricing principles:** These principles restrict access charges levied by ARTC and are subject to floor-revenue limits on each track segment. The access charge for each indicative service is based on the Indicative Access Charges published by ARTC. The 2008 IAU allows ARTC to annually adjust the Indicative Access Charges within a limit at its discretion and publish the result on its website.
- **Management of capacity:** There is a mechanism that allows ARTC to undertake a network capacity analysis to determine whether an applicant's requirements can be met within existing capacity constraints. The 2008 IAU also provides for ARTC to withdraw assigned access rights to specific train paths where these have been under-utilised.
- **Network connections and additions to capacity framework:** This framework allows ARTC to build extra capacity to meet access seeker demand or at its own initiative for

⁴ ARTC, Adelaide, 2016, viewed 23 March 2018,
<https://www.artc.com.au/customers/standards/route/access/defined-interstate/>.

⁵ *Ibid.*

the benefit of the rail industry. The 2008 IAU also provides for owners of other tracks to connect to ARTC's network.

- **Network transit management:** These principles provide objectives for ARTC to exit trains according to their contracted exit time. The principles also apply if there is a conflict between trains in transit.
- **Performance indicators:** These provide guidance on how ARTC must maintain the network and how the indicators will be part of its annual internal audit processes.

Since the acceptance of the 2008 IAU, ARTC has submitted three variations and conducted a five year review (Table 2). See **Attachment A** for further details on these variations and review.

Table 2: Variations to the 2008 IAU

Matter	Finalisation Date	Status
Indicative access agreement variation 2008	9 October 2008	Withdrawn
Forecast expenditure variation 2012	18 April 2012	Accepted
Southern Sydney Freight Line 2013	10 April 2013	Accepted
Five year review 2014	9 May 2014	Finalised

ARTC has in the 2018 IAU maintained the general structure and features of the 2008 IAU, with the following key changes:

- amendments to the negotiate-arbitrate model including the removal of indicative tariffs and the definition of the floor and ceiling by segment and their ongoing escalation over the term of the 2018 IAU
- the rate of return
- a 5 year term (and the removal of the mid IAU review)
- amendments to the Indicative Track Access Agreement (**ITAA**) to align with standard customer agreements negotiated under the 2008 IAU and to simplify the operation of various clauses.

2.2. Interstate Rail Network

The Interstate network transports bulk freight (including grain, sand, limestone and iron ore), non-bulk freight (e.g., containers), and passengers. It should be noted the volume of rail freight and train journeys are typically presented in tonnes, Train Kilometres (**Train Km**) and Gross Tonne Kilometres (**GTK**). Where Train Km reflects the length of the train journey (the product of the number of journeys and distance travelled in kilometres), and GTK reflects the length of the train journey and the weight of the train and freight (the product of Train Km and gross weight in tonnes).

In 2016–17, the Interstate network generated \$285.7 million and accounted for around 36 per cent of total access revenue.⁶ ARTC notes that a '6.3 per cent increase in Interstate GTK volume contributed to a 5.4 per cent increase in Interstate revenues against' the previous year.⁷

⁶ ARTC, *2017 Annual Report*, p. 10.

⁷ ARTC, *2017 Annual Report*, p. 4.

Between 2012–13 and 2015–16, the East–West corridor hauled a higher volume of freight compared to the North–South corridor (Table 3). In addition, ARTC estimates that rail accounts for 70 per cent of the total freight market on the East–West corridor and 24 per cent on the North–South corridor.⁸

Table 3: Total freight hauled by corridor (million tonnes)⁹

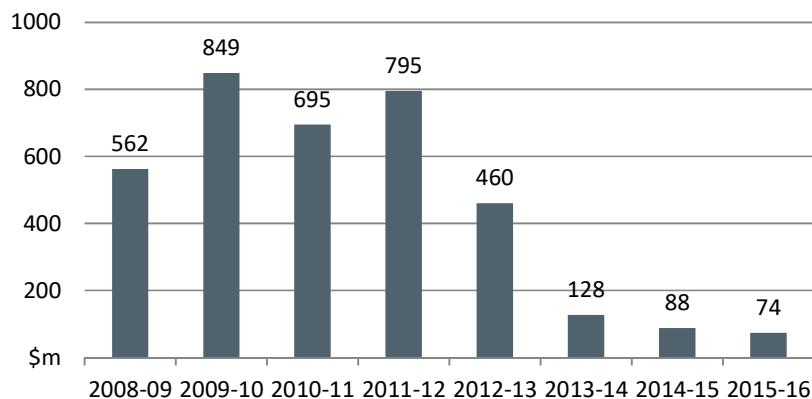
Financial year	North–South corridor	East–West corridor
2012–13	147.5	310.1
2013–14	141.0	339.3
2014–15	144.4	346.3
2015–16	157.6	329.7

Note: North–South corridor is between Tottenham (Melbourne) and Acacia Ridge (Brisbane). East–West corridor is between Kalgoorlie and Cootamundra and Melbourne. The volume hauled includes freight in both directions (that is, from North to South and South to North) and represents the total weight hauled on the corridor. It does not represent the volume of freight hauled from Melbourne to Brisbane as single journey, as some freight may depart and enter at any point along the corridor.

The two main above-rail operators on the Interstate network are Pacific National and SCT Logistics. Previously Aurizon was one of the main above-rail operators on the Interstate network. In August 2017, Aurizon announced its intention to close its intermodal business.¹⁰ Aurizon's intermodal business outside Queensland closed in December 2017.¹¹

Between 2008–09 and 2015–16, ARTC undertook almost \$3.7 billion of capital expenditure on the Interstate network (Figure 2). However, between 2008–09 and 2012–13, annual capital expenditure averaged \$672 million per year. This compares to capital expenditure since 2013–14 which has averaged \$97 million per year.¹²

Figure 2: Capital expenditure on Interstate network (\$ million)¹³



⁸ J McNamara (ARTC), *Rail, Road or Sea? – The Great Freight Debate*, Presented at ARA Understand Rail Course, Melbourne, 24 May 2016.

⁹ BITRE, *Trainline 4*, 22 November 2016, pp. 12–16; BITRE, *Trainline 5*, 21 November 2017, pp. 13–15.

¹⁰ Aurizon, Brisbane, 2017, viewed 23 March 2018, <https://www.aurizon.com.au/news/news/aurizon-announces-outcome-of-freight-review>.

¹¹ Aurizon, *2016-17 annual report*, 14 August 2017, p. 1.

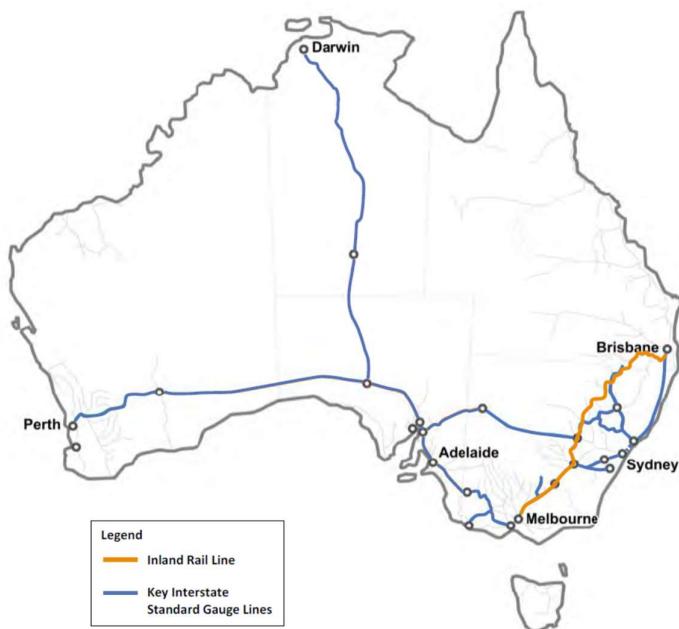
¹² ARTC, *2016 Annual Report*, p. 25.

¹³ ARTC, *2016 Annual Report*, p. 25.

2.3. Inland Rail

The Inland Rail project will connect Melbourne and Brisbane via regional Victoria, New South Wales and Queensland (Figure 3). Inland Rail will be 1,700 km in length consisting of new line and upgrades of existing rail infrastructure and is expected to be completed by 2024–25.¹⁴

Figure 3: Proposed Inland Rail route and the existing standard gauge network¹⁵



The Inland Rail Business Case projects a construction cost of \$10.7 billion.¹⁶ As part of the 2017–18 Budget, the Australian Government announced its commitment to the full delivery of Inland Rail with an additional \$8.4 billion equity investment in ARTC.¹⁷

In addition, the Australian Government indicated that it will use a Public Private Partnership for remaining construction costs. This partnership will focus on the most technically complex sections between Toowoomba and Brisbane.

The Inland Rail Business Case identifies the following benefits of the project:

- reduced transit times by up to 10 hours by allowing trains to bypass the Sydney rail network
- improved reliability of trains between Melbourne and Brisbane
- lower rail freight costs
- reduced congestion on highways
- increased passenger rail services in the Sydney network.¹⁸

¹⁴ ARTC, Adelaide, 2017, viewed 23 March 2018, <https://inlandrail.artc.com.au/programme>.

¹⁵ ARTC, *Inland Rail Business Case*, p. 10.

¹⁶ ARTC, Adelaide, 2017, viewed 23 March 2018, <https://inlandrail.artc.com.au/programme>.

¹⁷ Ibid.

¹⁸ Ibid.

ARTC submits that the announced Inland Rail project will have a substantial impact on the operation and utilisation of the Interstate network, the precise nature of which is difficult to estimate at the start of the project.¹⁹ With project completion forecast by 2025, any changes reflecting the full operation of the Inland Rail project will need to be reflected in a future IAU.²⁰ The ACCC will continue to monitor developments for the Inland Rail project and any implications for a future IAU.

¹⁹ ARTC, 2018 IAU Explanatory Guide, p.7.

²⁰ Ibid, p.107.

3. Key issues

This section outlines various matters on which the ACCC seeks stakeholder views. The issues raised and questions posed in this paper are not, however, designed to limit stakeholders' submissions. As noted above, the ACCC has not formed any final views on any of the matters set out in this paper and stakeholders are welcome to make comments on any aspect of the 2018 IAU.

3.1. Term

The 2018 IAU is proposed to expire on 30 June 2023, reflecting approximately a 5 year term, compared to the 10 year term for the 2008 IAU.²¹ ARTC submits that the proposal for a fixed date expiry is to align the term with financial years.

ARTC considers that the shorter term will allow for any changes reflecting the full operation of the Inland Rail project to be reflected in a future IAU. As noted above, ARTC submits that the announced Inland Rail project will have a substantial impact on the operation and utilisation of the Interstate network that cannot be determined at this stage.²² ARTC intends to take into account Inland Rail in a future IAU.

Questions

1. Is a proposed undertaking term of 5 years, with an expiry date of 30 June 2023, an appropriate duration for the 2018 IAU?
2. Is the alignment of the 2018 IAU term with the financial year appropriate?

3.2. Pricing Principles

Part 4 of the 2018 IAU sets out ARTC's pricing principles and financial model. Access prices are developed to achieve the objectives of the 2018 IAU set out in section 1.2(d). That is, an appropriate balance between:

- i. *the legitimate business interests of ARTC:*
 - A. *the recovery of all reasonable costs associated with the granting of Access to the Network;*
 - B. *a fair and reasonable return on ARTC's investment in the Network and Associated Facilities commensurate with its commercial risk; and*
 - C. *stimulate customer confidence, competition, and market growth in the rail industry;*
- ii. *the interest of the public:*
 - A. *increase competition ensuring efficient use of resources;*
 - B. *the promotion of economically efficient investment, use and operation of, the Network; and*
 - C. *promoting other relevant social objectives, such as an increase of traffic from road to rail;*
- iii. *the interests of Applicants wanting Access to the Network, including:*
 - A. *providing Access to the Network on fair and reasonable terms; and*
 - B. *providing Access in an open, efficient and non-discriminatory manner.*

²¹ Section 2.3(a) of the IAU.

²² ARTC, 2018 IAU Explanatory Guide, p.7.

3.2.1. Revenue Limits

Section 4.4 of the 2018 IAU outlines the process of calculating the Floor and Ceiling Limits for the revenue generated by ARTC for a Segment or group of Segments. The 2018 IAU outlines that:

...the Floor Limit means revenue for ARTC sufficient to cover the incremental cost of that Segment or group of Segments.²³

While,

...the Ceiling Limit means revenue sufficient to cover the Economic Cost of that Segment or group of Segments.²⁴

Sections 4.4(a) and 4.4(b) outline the process of calculating the Incremental and Economic Cost of the Segment or group of Segments.

3.2.2. Regulated Asset Base

The Regulated Asset Base (**RAB**) is the value of assets for the Interstate network. It is used to calculate the return on assets and depreciation, which form key components of the Economic Costs of a Segment or group of Segments. In addition, the RAB changes from year to year, increasing due to capital expenditure (**capex**) and decreasing due to depreciation.

Table 4 sets out the initial RAB accepted by the ACCC for each segment under the 2008 IAU. As at 1 July 2008, the total RAB for the Interstate network was \$4.8 billion.

Table 4: Initial RAB for Segments in the Interstate network, as at 1 July 2008²⁵

Segment	Value (\$ million)	Share (%)
Dry Creek— Parkeston	1043.5	21.9
Dry Creek— Spence St (Melbourne)	497.5	10.4
Melbourne (Tottenham)—Macarthur	1450.7	30.4
Newcastle—Queensland Border	1060.2	22.2
Crystal Brook—Parkes	501.0	10.5
Cootamundra—Parkes	78.5	1.6
Dry Creek—Pelican Point	8.3	0.2
Port Augusta—Whyalla	54.9	1.2
Moss Vale—Unanderra	75.0	1.6
Interstate network	4769.6	100.0

²³ Section 4.4(b) of the IAU.

²⁴ Section 4.4(c) of the IAU.

²⁵ ARTC, Adelaide, 2006, viewed 23 March 2018, <https://www.artc.com.au/library/DORC%20by%20ARTC%20Segment.pdf>.

Section 4.4(d)(ii) of the 2018 IAU sets out that the RAB is annually rolled forward using the following:

$$RAB_{t,start} = RAB_{t-1,end} = (1 + CPI_{t-1}) * RAB_{t-1,start} + Net_Capex_{t-1} - Depreciation_{t-1}$$

where

- *RAB_{t,start} is the RAB at the start of the relevant year (t) (which, for the first year following the Commencement Date, would be the Initial RAB).*
- *RAB_{t-1,end} is the RAB at the end of the preceding year (t-1) as applicable.*
- *RAB_{t-1,start} is the RAB at the start of the preceding year (t-1) as applicable.*
- *CPI_{t-1} is the inflation rate for the preceding year (t-1), determined by reference to the All Groups Consumer Price Index Statistics published for the March quarter of that year.*
- *Net_Capex_{t-1} is the net additions to the RAB in year t-1 (that is out-turn Capital Expenditure by ARTC less any disposals during period t-1) on a Prudent basis.*
- *Depreciation_{t-1} is the Depreciation applicable to the RAB in year t-1.²⁶*

ARTC's proposed method for determining the RAB at the start of the 2018 IAU for Segments in the Interstate network depends whether the Segments are existing or new.

Existing segments

For existing segments, ARTC proposes rolling forward the RAB between 2008 and 2018 as per section 4.4(d)(ii) so that the RAB at the commencement of the 2018 IAU is equal to the RAB_{t-1,end} at the expiry of the term of the 2008 IAU. Where capex is that 'arising from projects commissioned (or near completion) during the term of the 2008 IAU' and 'reflects an ex-post capital addition based on actual project cost'.²⁷

New and altered Segments

ARTC proposes including the following new segments into the Interstate network as part of the 2018 IAU:

- the Sydney Metropolitan Freight Network (**MFN**)
- Queensland Border to Acacia Ridge (incorporated into an expanded segment from Newcastle to Acacia Ridge).

In addition, ARTC proposes to alter its segments by:

- reallocating the line from Sefton Park to Flemington Junction, currently part of the MFN, to the Southern Sydney Freight Line (**SSFL**)
- including the line from Chullora to Port Botany as part of the MFN.²⁸

In 2013, the ACCC approved a variation application for ARTC to incorporate the SSFL into the 2008 IAU.

²⁶ Section 4.4(d)(ii) of the 2018 IAU

²⁷ ARTC, 2018 IAU Explanatory Guide, p.18.

²⁸ Ibid, p. 23.

In valuing Segments, section 4.4(d)(i) of the 2008 and 2018 IAU state the initial RAB for a Segment or group of Segments will be ‘initially valued using the Depreciated Optimised Replacement Cost (**DORC**) method’.

For the MFN, ARTC states it ‘has not undertaken a formal valuation’ and ‘has developed an indicative value for these assets with reference to RAB benchmarks for similar assets previously accepted for regulatory purposes in other jurisdictions including other parts of the ARTC network’.²⁹

For the Queensland Border to Acacia Ridge, ARTC has referenced in its confidential spreadsheet a 2014 DORC assessment, which has then been rolled forward as per section 4.4(d)(ii) of the 2018 IAU.

For the SSFL, ARTC states the valuation of this Segment ‘is consistent with ARTC’s September 2012 submission to the ACCC’.³⁰ The ACCC notes that its 2013 Final Decision approving the variation to include the SSFL, that its approval, did ‘not amount to an approval of the \$1 billion cost of the SSFL for inclusion into RAB of the IAU’.³¹

3.2.3. Access price structure and range

For the 2018 IAU, ARTC proposes introducing a ‘banded negotiate–arbitrate model’, where ‘access pricing will be the result of direct negotiation between ARTC and its customers’.³² Within this proposed model access prices will be negotiated within a band created by the floor and ceiling prices. These prices are determined by dividing the floor and ceiling revenue limits by demand. To improve transparency for negotiation, ARTC proposes publishing:

- floor prices for each Segment
- ceiling prices for each Segment
- historical prices
- commercially agreed terms and conditions (including access price).³³

The 2018 IAU continues the two-part pricing as used under the 2008 IAU. Section 4.5(a) of the 2018 IAU sets out that access prices will comprise:

- i. *a variable component, which is a function of distance and gross mass (\$/gtkm), and*
- ii. *a flagfall component, which is fixed and specific to each Train service type and segment (\$/km).*

ARTC notes ‘the ceiling price will be defined with the flagfall (\$/Tkm) set at zero’.³⁴

The 2018 IAU uses an Indicative Service for determining the floor and ceiling prices for each Segment. Section 4.6(a) of the 2018 IAU states and Indicative Service has the following characteristics:

- i. *an axle load of 21 tonnes;*
- ii. *capability to operate at least at 110 km/h; and*

²⁹ ARTC, 2018 IAU Explanatory Guide, p. 31.

³⁰ Ibid.

³¹ ACCC, *Final Decision Southern Sydney Freight Line*, 2013, p. 6.

³² ARTC, 2018 IAU Explanatory Guide, p.6.

³³ Ibid.

³⁴ Ibid, p. 24.

iii. length not exceeding:

- A. 1800 metres west of Adelaide and Parkes;
- B. 1500 metres east of Adelaide and Parkes (until Capital Expenditure is commissioned on the Segments Melbourne – Macarthur and Parkes - Cootamundra);
- C. 1800 metres on the Segments Melbourne – Macarthur and Parkes – Cootamundra (following commissioning of Capital Expenditure on the Segments Melbourne – Macarthur and Parkes - Cootamundra) and Southern Sydney Freight Line,
and does not include the use of ATMS

Given this definition of Indicative Service, section 4.6(b) of the 2018 IAU sets out the floor and ceiling prices for Segments (Table 5). Section 4.6(d) states these floor and ceiling prices will escalate each year based on CPI.

Table 5: Proposed ceiling and floor prices by Segment for 2018-19³⁵

Segment	Floor	Ceiling
	\$ per '000 GTK	\$ per '000 GTK
Dry Creek—Parkeston	\$0.979	\$7.959
Tarcoola— Asia Pacific Interface	\$1.225	\$29.158
Dry Creek—Spencer St (Melbourne)	\$2.363	\$14.666
Appleton Dock Jct—Footscray Rd	\$2.226	\$212.166
Melbourne (Tottenham)—Macarthur	\$1.493	\$15.987
Newcastle—Acacia Ridge	\$1.648	\$17.629
Crystal Brook—Parkes	\$1.343	\$15.561
Cootamundra—Parkes	\$0.878	\$21.878
Dry Creek—Pelican Point	\$6.040	\$37.908
Port Augusta—Whyalla	\$0.230	\$134.208
Moss Vale—Unanderra	\$3.983	\$40.963
Southern Sydney Freight Line (inc Sefton Park Jct—Flemington South)	\$0.880	\$85.728
Metropolitan Freight Network (Chullora Jct—Port Botany)	\$7.655	\$70.991

An error was identified in relation to the structure of charges in the IAU and the Explanatory Guide, where ‘ARTC acknowledges that the pricing limits identified in Section 4.4 of the IAU and 10.1.7 of the Explanatory Guide reflect pricing units of \$/'000 GTK not \$/GTK. This was an oversight arising from the general industry practice of using \$/GTK in place of \$/'000 GTK.’ ARTC notes it has removed the Excess Network Occupancy Charge component which was previously included in the 2008 IAU. ARTC submits that this charge has never been applied in the operation of the IAU.³⁶

³⁵ Section 4.6(b) of the 2018 IAU

³⁶ ARTC, 2018 IAU Explanatory Guide, p.25.

3.2.4. Capital expenditure

For the 2018 IAU, ARTC proposes removing section 4.4(e) and Schedule H of the 2008 IAU. Section 4.4(e) of the 2008 IAU states in relation to forecast capital expenditure:

ARTC will obtain the approval of the ACCC, having regard to the factor in this clause, for any increase to Capital Expenditure exceeding 20% of Capital Expenditure on the Network in any single year.

Where forecast capex for each segment is set out in Schedule H of the 2008 IAU.

ARTC submits that it has removed this section and schedule as it does not propose to review and adjust the proposed ceilings during the course of the IAU.³⁷ Rather, as outlined above, the floor and ceiling prices will escalate each year based on CPI.

3.2.5. Operating expenditure

ARTC states that forecasts for the following two types of operating expenditure (**opex**) are incorporated into the 2018 IAU financial model:

- maintenance expenditure
- other opex incurred by ARTC operational and corporate divisions.³⁸

ARTC states the reason for this differentiation is:

... the Maintenance Expenditure includes all expenditure that has been directly identified with a part of the physical infrastructure such as a segment of track. Operating Expenditure cannot be identified with particular parts of the infrastructure, but in many cases can be identified with a location or region. The sum of Maintenance Expenditure and Operating Expenditure is all ARTC working expenditure (non-capital related).³⁹

The 2018 IAU allocates opex into Segment Specific Costs and Non-Segment Specific Costs. Where Segment Specific Costs are those that can be directly identified to a Segment, and Non-Segment Specific Costs cannot be directly identified to a Segment. Importantly, the 2018 IAU financial model requires that all costs (including opex) are allocated to Segments. This is needed to determine the Floor and Ceiling prices for Segments.

Maintenance expenditure includes Routine Corrective Reactive Maintenance (**RCRM**) and Major Periodic Maintenance (**MPM**).

RCRM involves activities:

...normally completed more often than once a year and include different track inspection cycles, track patrolling, fettling (replacing broken track components), corridor maintenance, fence maintenance and signal testing.⁴⁰

ARTC states:

...RCRM costs incur a 10% margin reflecting the efficient market price of maintenance services. This is consistent with the previous Alliancing cost

³⁷ ARTC, 2018 IAU Explanatory Guide, p. 110.

³⁸ Ibid, p. 29.

³⁹ Ibid.

⁴⁰ Ibid.

arrangement which formed the basis of the 2008 IAU maintenance services and regulatory decisions in other infrastructure networks.⁴¹

MPM refers:

to activities which restore the infrastructure facilities to retain functional condition. MPM is completed on segments on a cyclical basis with intervals of generally greater than one year.⁴²

Both RCRM and MPM are directly identifiable to a Segment or Group of Segments.

ARTC identified the following three categories forming other opex:

- asset management
- network control
- corporate overheads.⁴³

These expenditures are not directly identifiable to a Segment and are Non-Segment Specific costs. As such, they need to be allocated to Segments based on appropriate cost drivers. Table 6 sets out ARTC's description of these other opex categories and its proposed cost allocator.

Table 6: ARTC's proposed cost allocators for other opex⁴⁴

Other opex type	Description	ARTC's proposed cost allocator
Asset management	This includes: <ul style="list-style-type: none">• maintenance contract management and administration.• maintenance support, administration and corridor management.• project management, strategic infrastructure planning and infrastructure performance management.⁴⁵	GTK
Network Control	This includes labour related costs associated with ARTC's train control, path scheduling, customer and access contract management functions. ⁴⁶	Train Km

⁴¹ ARTC, 2018 IAU Explanatory Guide, p. 29.

⁴² Ibid.

⁴³ Ibid, p. 30.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

Overheads	This include:	Train Km
	<ul style="list-style-type: none"> • labour related costs associated with ARTC's IT, property management, legal services, human resources and training, billing/credit and financial management, security and property management, safety and risk management, executive, research and regulation and Board. • non-labour related costs such as insurance and external consultancies.⁴⁷ 	

The ACCC notes that ARTC has not provided details on the forecasted opex by category for the term of the 2018 IAU in its public documents.

3.2.6. Rate of return

The rate of return, otherwise known as the weighted average cost of capital, is the risk-adjusted rate of return on capital required by debt and equity providers to a benchmark firm. It reflects the return investors could expect to earn by investing in the next best investment of equivalent risk (or the opportunity cost of capital).

Section 4.4(h) of the 2018 IAU proposes a nominal post-tax rate of return of 8.97 per cent applies. Table 7 sets out the rate of return parameters and variable values proposed by ARTC in the 2018 IAU and that accepted by the ACCC for the 2008 IAU.

Table 7: Rate of return parameters and variable values

Parameter	2008 IAU ⁴⁸	2018 IAU ⁴⁹
Risk free rate (nominal)	6.39%	2.78%
Debt	50%	52.5%
Equity	50%	47.5%
Debt to equity	1.00	1.11
Debt risk premium	2.85%	1.73%
Debt raising costs	0.125%	0.095%
Market risk premium	6.00%	7.00%
Inflation	2.50%	2.45%
Gamma	0.50	0.40
Tax rate	30%	30%
Asset beta	0.65	0.75
Equity beta	1.29	1.572
Return on equity	14.14%	13.79%
Return on debt	9.37%	4.61%

⁴⁷ ARTC, 2018 IAU Explanatory Guide, p. 30.

⁴⁸ ACCC, *Final Decision – Australian Rail Track Corporation Access Undertaking – Interstate Rail Network*, July 2008.

⁴⁹ ARTC, 2018 IAU Explanatory Guide, p. 27.

Nominal post-tax rate of return	11.76%	8.97%
Real post-tax rate of return	9.03%	6.36%
Nominal pre-tax rate of return	13.00%	10.40%
Real pre-tax rate of return	10.24%	7.76%

ARTC engaged Synergies Economic Consulting (**Synergies**) to provide a review of the applicable rate of return.⁵⁰ Synergies' report proposes an applicable rate of return of 9.86 per cent for ARTC's Interstate network. ARTC submits that while it accepts the logic of the Synergies proposal, it has amended certain key parameters to arrive at its proposed nominal post-tax rate of return of 8.97 per cent. The key differences in ARTC's proposal are:

- a market risk premium of 7.0 per cent. ARTC submits that this is consistent with the most recent regulatory benchmark as determined by the Queensland Competition Authority.⁵¹
- an asset beta of 0.75. ARTC submits this reflects the 10 year average (as compared to median) value of the comparator set comprised of North American Class I railroads and Aurizon.⁵²
- a gamma of 0.40 based on recent decisions by the Australian Competition Tribunal and Federal Court of Australia on gamma.⁵³

Questions

Pricing objectives

3. Does the proposed approach to access pricing in the 2018 IAU achieve the stated objectives of balancing the business interests of ARTC, access seekers and the general public?
4. Does the proposed level and structure of access prices encourage the efficient operation, investment and use of the Interstate network by above-rail operators, for all train traffic types?
5. Does the proposed level and structure of access prices promote effective and sustainable competition among above-rail operators, road freight operators and sea freight operators?
6. Does the proposed level and structure of access prices promote effective and sustainable competition in downstream markets?

Revenue limits

7. Is the 2018 IAU sufficiently clear on how revenue floor and ceilings are defined?

Regulated Asset Base

8. Is the inclusion of the MFN segment in the 2018 IAU appropriate? Is using a benchmark approach for determining the value of the MFN appropriate? Is the inclusion of the Queensland Border Loop to Acacia Ridge segment in the 2018 IAU appropriate?
9. Has ARTC provided sufficient transparency on how the RAB for Segments has been valued and rolled forward?
10. Is it appropriate that actual capex, that has not undergone a prudence assessment, be used to roll forward the RAB for Segments between 2008 and 2018

Access price structure and range

11. Is ARTC's banded negotiate–arbitrate model appropriate?
12. Will ARTC's banded negotiate–arbitrate model improve transparency?

⁵⁰ ARTC, 2018 IAU Explanatory Guide, Attachment 1.

⁵¹ ARTC, 2018 IAU Explanatory Guide, p.26.

⁵² Ibid, p.26.

⁵³ Ibid, p.27.

13. Will ARTC's banded negotiate–arbitrate model enable more flexible negotiation between access seekers and ARTC?
14. Is the two-part pricing approach, with a variable component charges on GTK and flagfall component charged on Train Km, appropriate?
15. Is the definition of the Indicative Service set out in section 4.6(a) of the 2018 IAU representative of the current train configuration operated by access seekers?
16. Is it appropriate that the ceiling price is determined with the flagfall set at zero?
17. Are the floor and ceiling prices appropriate?
18. Has sufficient transparency been provided by ARTC on how the floor and ceiling prices have been determined?
19. Is it appropriate that the floor and ceiling prices are escalated by CPI each year?
20. Is it appropriate that the Excess Network Occupancy Charge be removed?

Capital expenditure

21. Is there sufficient detail in the 2018 IAU on ARTC's approach to capex?
22. Does the 2018 IAU contain sufficient incentives to encourage ARTC to undertake efficient capex and pursue efficiency gains?
23. Is it appropriate that forecasts of ARTC's capex on the Interstate network are not included in the 2018 IAU?

Operating expenditure

24. Is there sufficient detail in the 2018 IAU on ARTC's approach to opex?
25. Does the 2018 IAU contain sufficient incentives to encourage ARTC to undertake efficient opex and pursue efficiency gains?
26. Are the proposed cost allocators for asset management, network control and overheads appropriate?

Rate of return

27. Is the proposed rate of return appropriate?
28. Does the proposed rate of return represent a return to investment commensurate with the regulatory and commercial risks faced by ARTC in operating the Interstate network?

3.3. Advanced Train Management System

The Advanced Train Management System (**ATMS**) is a modern communications-based train management system that uses a digitally controlled network to manage train operations. This is in comparison to the current traditional system of fixed physical trackside infrastructure like signals.⁵⁴ ARTC submits that ATMS is targeted to ultimately replace the existing signal and communication systems, providing significant safe working, network capacity and Above Rail operational benefits through the efficiencies which it brings.⁵⁵

ARTC notes that a live run deployment of the ATMS system on a test section of the network (Tarcoola to Parkeslon) is planned for implementation in parallel with the existing signalling and train control systems. This will occur during the term of the 2018 IAU.⁵⁶

While the 2018 IAU does not apply to the ATMS, ARTC submits that the implementation of the ATMS will potentially require an adjustment in the access charges paid by above-rail operators, which ARTC will negotiate with its customers within the constraints of the

⁵⁴ ARTC, 2016 Annual Report, p. 27

⁵⁵ ARTC, 2018 IAU Explanatory Guide, p.20.

⁵⁶ Ibid, p.20.

proposed revenue ceilings.⁵⁷ This is outlined in section 4.7 of the 2018 IAU, and has been included in the preamble at section 1.1(g).

The preamble of the 2018 IAU also states that ARTC reserves the right to seek a variation to the undertaking to incorporate the development and implementation of capital associated with ATMS.

Questions

29. Are the terms of section 1.1(g) and 4.7 of the 2018 IAU in relation to ATMS appropriate?

3.4. Performance indicators

The performance indicators in the 2018 IAU remain unchanged from the 2008 IAU. Part 8 of 2018 IAU outlines the performance indicators for the term of the undertaking.

Section 8.1 states that:

ARTC undertakes during the Term to maintain the Network (but only insofar as the Network is relevant to the Operator's scheduled Train Paths) in a condition which is fit for use by the Operator to provide rail transport services having regard to the terms of the Access Arrangements.

Section 8.2 outlines ARTC's reporting obligations in relation to performance indicators. Section 8.2(a) of the Undertaking specifies that ARTC will publish the performance indicators set out in Schedule G of the 2018 IAU on its website. The frequency of reporting is also specified in Schedule G. The performance indicators aim to track industry performance over time but do not monitor the performance of individual operators.

Section 8.2(b) of the 2018 IAU specifies that ARTC will incorporate into its annual internal audit process a review of performance indicator reporting. The internal audit will be conducted by an independent internal auditor who will prepare a written report on the process and the reporting of the Part 8 performance indicators. ARTC is required under section 8.2 to publish the auditor's findings on its website and provide the report to the ACCC upon request. The 2018 IAU also states that ARTC's audit obligations will commence 6 months after the ACCC accepts the 2018 IAU.

ARTC's current performance indicator reporting and reviews are available on ARTC's website at the following link:

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

Questions

30. Do the proposed performance indicators outlined in Schedule G remain appropriate? For example, the performance measures, frequency of reporting, format of reporting etc.
31. Does ARTC's proposed internal audit process remain appropriate? Is the timeframe for commencement of ARTC's audit obligations appropriate for the 2018 IAU?

⁵⁷ ARTC, 2018 IAU Explanatory Guide, p.7.

3.5. Indicative Track Access Agreement

The ITAA sets out the terms and conditions of access for indicative services. ARTC submits that the amendments to the ITAA ‘reflect a combination of administrative changes and clarification of risk between each party.’⁵⁸

The key amendments proposed by ARTC to the 2018 ITAA are listed in Table 8 below.

Table 8: Key amendments to the 2018 ITAA

Clause	Title	Proposed change
Definition and Interpretation		
1.1	Definitions	<p>The contracted maximum axle load and maximum speed capability characteristics of an ‘Indicative Service’ have been adjusted to 21 tonnes and a minimum of 110km/h, respectively. ARTC submits that this change gives greater specificity to the Indicative Service (being the Freightliner Service).⁵⁹</p> <p>As the 2018 IAU does not apply to the ATMS, the meaning of ‘Indicative Service’ does not include the use of the ATMS.</p>
Track Access Rights		
2.7	Manner of Control of the Network by ARTC	ARTC has amended its commitments as to the manner in which it will control the Network to an extent that is ‘reasonably practicable’, to ensure that this clause is not construed as a warranty. ⁶⁰
Charges and Payment		
4.3	ATMS	If either party requests that ATMS forms part of the services to be provided under the Agreement, both parties are obliged to negotiate in good faith to amend the Agreement to include ATMS and an adjustment in the relevant Charges and, in doing so, will have regard to any increase in the top end of the Indicative Access Charges Range resulting from the ATMS.
4.3	Excess Network Occupancy Charges	ARTC has elected to remove the provision for an Excess Network Occupancy Charge on the basis that this charge has not been applied by ARTC during the operation of the 2008 IAU. ⁶¹ Subsequent references in the Indicative Track Access Agreements to this charge are also removed.

⁵⁸ ARTC, 2018 IAU Explanatory Guide, p.27.

⁵⁹ Ibid, p.124.

⁶⁰ Ibid, p.126.

⁶¹ Ibid, p.127.

Clause	Title	Proposed change
4.5	Variation of Charges – Consumer Price Index	<p>The date on which ARTC may vary its charges (the Review Date) is 1 July of each year. There is to be no provision for varying some or all of the Indicative Access Charges otherwise than on the Review Date.</p> <p>The formula for varying charges will incorporate an adjustment for 100 per cent of the CPI change from the previous year, in place of an adjustment that takes into account the maximum variation that may be applied to Indicative Access Charges.</p>

Control and Management of Access to the Network

5.4	Rolling Stock	In addition to its present obligations under the 2008 IAU, the Operator further undertakes to maintain each Train that it operates so that at all times it is operated by properly trained and qualified personnel who exercise due diligence and care during the operation of each Train on the Network.
5.6	Conduct of ARTC	<p>Non-price terms are expressly included in the non-exclusive list of matters to which regard should be had by the ARTC when it determines whether the characteristics of two Indicative Services are alike.</p> <p>The Operator, in making submissions under clause 5.6(b), is to act reasonably with reference to the matters in clause 5.6(a) in considering whether a Third Party Train Path is a like train path when compared to a Train Path for an Indicative Service.</p>
5.7	Removal of Rolling Stock from Network	If an Operator does not remove a Train that is obstructing the Network, and of which they have received notice under clause 5.7(a), then ARTC, or its servant, agent, employee, contractor or volunteer, may access the Network to remove the Train from the Network or move it to another part of the Network.

Repairs and Maintenance of the Network

6.1	ARTC to Repair and Maintain the Network	ARTC limits its obligation to repair and maintain the network at all times to the extent that doing so is in accordance with all proper restrictions and instructions issued from time to time by ARTC. ARTC submits that this revision is to ensure that restrictions and instructions, particularly in relation to safety, are recognised. ⁶²
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Emergencies and Incidents

11.4	Investigation of Incidents	Parties are required, on request, to co-operate reasonably with investigations of incidents.
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⁶² ARTC, 2018 IAU Explanatory Guide, p.132.

Clause	Title	Proposed change
Environmental Requirements; Dangerous Goods		
13.8	Environmental Manual	The provision requiring Operators to implement and comply with the ARTC's environmental management system manual is removed to reflect that, in practice, Operators provide their own plan for dealing with the environmental effects of its operations on the Network to ARTC. ⁶³
Indemnities/Loss or Damage Arising from an Incident		
15.1	General	This clause, which defines the liability of ARTC and the Operator to each other for loss or damage arising from Incidents, is amended to define only the liability of each party to the other for loss or damage to their own property, whether that property belongs to or is leased by the party. Any liability to, or claim made by, a third party is removed from the definition of 'Loss or Damage'. ARTC submits that these changes will streamline claims between ARTC and operators in cases of incidents, and are consistent with changes agreed with a number of interstate operators and the Hunter Valley Indicative Access Holder Agreement. ⁶⁴
15.2	Definitions	A definition of 'third party liability' is added at clause 15.2(e).
15.6	Third Parties Liabilities	<p>A third party liability clause is inserted which seeks to:</p> <ul style="list-style-type: none"> • Require the ARTC and the Operator, should any third party seek to recover a third party liability from either party, to take the benefit of any statute, law or contractual provision that limits the liability of either party for loss and damage suffered. • Limit the entitlement of ARTC and the Operator to seek contribution from each other in respect of any third party liability to the extent that the liability is due to negligence or breach of statutory duty only, but not due to breach or alleged breach of the Agreement. • Require the ARTC and the Operator to release each other from all claims for contribution in respect of any third party liability, except to the extent that the liability was caused or contributed to by negligence or breach of statutory duty. • Require the ARTC or the Operator to indemnify each other for legal costs incurred in defending a claim by a third party arising out of an incident caused by the other party breaching the Agreement, to the extent that those costs are not recovered by the party defending the claim where they have taken all reasonable steps to recover the same.

⁶³ ARTC, 2018 IAU Explanatory Guide, p.132-133.

⁶⁴ ARTC, 2018 IAU Explanatory Guide, p.134.

Clause	Title	Proposed change
Insurance		
16.1	Operator's Insurance Policies	<p>The limit of the liability insurance policy to be taken out by the Operator is to increase to \$350,000,000. ARTC submits that this is the appropriate limit for the industry.⁶⁵</p> <p>The discretion of ARTC to authorise a reduction of this liability limit is removed.</p>
16.2	ARTC's Insurance Policies	<p>The requirement for ARTC to annually publish the amount of premiums paid for the liability insurance policy that it takes out under clause 16.2(a) is removed.</p> <p>The requirement for ARTC to apply any savings in the amount of premiums paid towards repairs, maintenance or upgrading of the Network, or as otherwise agreed between the parties, is removed. ARTC notes that it takes out insurance for all its networks and does not separate by reference to networks.⁶⁶ ARTC submits that with an ex post opex regime, actual insurance costs including decreases will be passed through to customers of its networks.⁶⁷</p>
Force majeure		
20.3	"Force majeure"	Amendments remove the requirement that a circumstance must occur without negligence in order to constitute a 'Force Majeure'. ARTC submits that this amendment ensures that the clause will prevent parties seeking to incorporate arguments about negligence. ⁶⁸
Notices		
24	Notices	Amendments permit a party to notify another party by email rather than by post or fax.
Schedule 1		The list of Networks in Schedule 1 has been updated to include new Segments.

Questions

32. Are the amendments to the ITAA appropriate?
33. Are any further amendments to the ITAA necessary?

⁶⁵ ARTC, 2018 IAU Explanatory Guide, p.136.

⁶⁶ Ibid, p.136.

⁶⁷ Ibid, p.136-137.

⁶⁸ ARTC, 2018 IAU Explanatory Guide, p.137.

4. Legal test for accepting an access undertaking

In assessing an access undertaking under Part IIIA of the Act, the ACCC must apply the test set out in subsection 44ZZA(3), which provides that the ACCC may accept the undertaking if it thinks it appropriate to do so, having regard to the following matters:

- the objects of Part IIIA of the Act, which are to:
 - promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
 - provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry;
- the pricing principles specified in section 44ZZCA of the Act (see further below);
- the legitimate business interests of the provider of the service;
- the public interest, including the public interest in having competition in markets (whether or not in Australia);
- the interests of persons who might want access to the service;
- whether the undertaking is in accordance with an access code that applies to the service; and
- any other matters that the ACCC thinks are relevant.

In relation to the pricing principles, section 44ZZCA of the Act provides that:

- regulated access prices should:
 - be set so as to generate expected revenue for a regulated service that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and
 - include a return on investment commensurate with the regulatory and commercial risks involved; and
- access price structures should:
 - allow multi-part pricing and price discrimination when it aids efficiency; and
 - not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and
- access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.

4.1. Timeframes for ACCC decisions and clock-stoppers

Subsection 44ZZBC(1) of the Act provides that the ACCC must make a decision on an access undertaking application within the period of 180 days starting at the start of the day the application is received (referred to as ‘the expected period’).

If the ACCC does not publish a decision on an access undertaking application under section 44ZZBE of the Act within the expected period, it is taken, immediately after the end of the expected period, to have:

- made a decision to not accept the application; and

- published its decision under section 44ZZBE and its reasons for that decision: see subsection 44ZZBC(6).

The Act contains ‘clock-stoppers’ that mean certain time periods are not taken into account when determining the expected period (see subsection 44ZZBC(2)). In particular, the clock may be stopped:

- by written agreement between the ACCC and the access provider (in this case, ARTC), and such agreement must be published: subsections 44ZZBC(4) and (5);
- if the ACCC gives a notice under subsection 44ZZBCA(1) requesting information in relation to the application;
- if a notice is published under subsection 44ZZBD(1) inviting public submissions in relation to the application;
- if a decision is published under subsection 44ZZCB(4) deferring consideration of whether to accept the access undertaking, in whole or in part, while the ACCC arbitrates an access dispute.

4.2. Information requests

Subsection 44ZZBCA(1) provides that the ACCC may give a person a written notice requesting the person give to the ACCC, within a specified period, information of a kind specified in the notice that the ACCC considers may be relevant to making a decision on an access undertaking application.

As noted above, the period within which the ACCC requests information constitutes a clock-stopper.

Attachment A — Variations and reviews of 2008 IAU

Since the acceptance of the 2008 IAU, ARTC has submitted three variations to the undertaking and conducted a five year review. These are listed below:

Table 9: Variations to the Interstate Rail Access Undertaking

Matter	Finalisation Date	Status
Indicative access agreement variation	9 October 2008	Withdrawn
Forecast expenditure variation	18 April 2012	Accepted
Southern Sydney Freight Line	10 April 2013	Accepted
Five year review 2014	9 May 2014	Finalised

Indicative access agreement variation 2008

On 9 October 2008, ARTC applied to the ACCC for consent to vary the 2008 IAU under Part IIIA of the *Trade Practices Act 1974*.⁶⁹ The variation application relates to the indemnity and loss regime in clause 15 of the indicative access agreement (IAA) of the 2008 IAU so that the liability of either party to third parties for loss or damage is limited in certain circumstances.

The ACCC did not consent to ARTC's proposed variation to the 2008 IAU in its Draft Decision. The ACCC considered that the proposed variation to the liability and indemnity clause in the IAA was not justified as drafted. This is because the proposed indemnity clause would prevent a rail operator (or ARTC) from being indemnified for loss arising out of a contract between a rail operator and a third party (or ARTC and a third party) in circumstances where ARTC (or the operator) has breached the IAA and caused an Incident which has resulted in loss to that third party.

ARTC withdrew its application on 15 January 2009. At the time ARTC indicated it planned to consult with operators about amending the wording and submitting a new application in the near future. ARTC did not submit another application for variation on the indicative access agreement.

Forecast expenditure variation 2012

On 6 January 2012, ARTC submitted its forecast capital expenditure for the period 2012-13 to 2017-18 to the ACCC as envisaged under section 2.4(c) of the 2008 IAU. The variation provides for the inclusion in Schedule H of the Undertaking which involves ARTC's estimates of capital expenditure proposed for the period 1 July 2012 to 30 June 2018.

On 18 April 2012, the ACCC made the final decision to accept the variation.

Prior to the decision, Schedule H was silent on the capital expenditure that could be incurred by ARTC during the period 1 July 2012 to 30 June 2018, thus providing no guide in the 2008 IAU on ARTC's proposed investments over the period.

After the decision ARTC could roll into its RAB all capital expenditure it prudently incurs each year in this period up to the estimates set out in Schedule H plus 20 per cent without further ACCC approval.

⁶⁹ Now the *Competition and Consumer Act 2010* (Cth).

Southern Sydney Freight Line 2013

On 4 September 2012, ARTC submitted to the ACCC a proposed variation to the 2008 IAU to incorporate the SSFL and applicable access charges into the 2008 IAU. This variation was foreshadowed under section 2.1(c) and 2.4(b) of the 2008 IAU.

On 10 April 2013, the ACCC made its final decision to accept the variation to extend the coverage of the 2008 IAU to include the SSFL. As part of its decision the ACCC stated that its decision does not amount to an approval of the \$1 billion cost of the SSFL for inclusion in the RAB of the 2008 IAU. The ACCC considered that ARTC would need to seek a prudency assessment of this expenditure by the ACCC if it wished to include the cost of the SSFL in the RAB in the future.

Five year review 2014

Section 2.4(f) of the 2008 IAU required ARTC to undertake a review after the fifth anniversary of the commencement date. The review was to consider any material impact that changes to industry circumstances or legislation, rules or regulations may have on the extent to which the 2008 IAU reasonably meets its intent.

On 30 April 2014, ARTC provided the ACCC a letter stating that it has consulted with Operators, potential Operators and other stakeholders and reviewed a number of responses. In light of the responses ARTC decided that it's not its 'intention to seek to vary the [2008] IAU as a consequence of the section 2.4(e) (sic) review'⁷⁰. This is because 'whilst ARTC accepts that there could be some technical adjustments made, ARTC considers that the costs associated with seeking a variation will substantially outweigh any benefits that might be achieved'⁷¹. Table 10 summarises the issues raised by stakeholders as part of the five year review consultation.

Table 10: Five year review of undertaking—stakeholder views

Issue	Details
Material industry changes	Asciano highlighted two industry changes: increased competitive pressure from roads, increased congestion on the East/West corridor Suggestions include changes to pricing levels, pricing structures and pricing escalation factors. However ARTC believes that aggressive competition between road and rail freight sets pricing constraints. Asciano encouraged ARTC to be involved in road charging reform
Rail safety law (WA)	The Government of Western Australia Department of Transport wanted to have early consultation if the access regime is varied
Specific clauses in the IAU	ARTC claims that they were outside the scope and intent of clause 2.4(e) or were minor definitional adjustments
Updated freight and logistics plan (Vic.)	The Victorian Government wanted to take steps to review access charges in the ARTC Network in inner Melbourne. ARTC considers this to be outside the scope or intent of Clause 2.4(e) review

⁷⁰ ARTC, *Letter to the ACCC — Interstate Access Undertaking — Five year review*, 30 April 2014, p. 2

⁷¹ Ibid, p. 2