



Australian  
Competition &  
Consumer  
Commission

## **Final Decision**

Australian Rail Track Corporation's  
proposed variation of the Interstate  
Access Undertaking to include the  
Southern Sydney Freight Line

10 April 2013



Australian Competition and Consumer Commission  
23 Marcus Clarke Street, Canberra, Australian Capital Territory, 2601

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# Glossary of terms and abbreviations

Capitalised terms used in this paper and not listed in this glossary are terms as defined in Part 9 of the accepted access undertaking for ARTC's interstate rail network (July 2008), which is available on the ACCC's website.

ACCC	Australian Competition and Consumer Commission
ARTC	Australian Rail Track Corporation
Asciano	Asciano Limited
CCA	Competition and Consumer Act 2010 (Cth)
IAU	ARTC's Interstate Access Undertaking accepted by the ACCC on 30 July 2008
IPART	Independent Pricing and Regulatory Tribunal (NSW)
Proposed Variation	ARTC's proposed variation to the IAU to include the SSFL, submitted on 4 September 2012
NSWRAU	NSW Rail Access Undertaking
Qube	Qube Logistics Holdings Limited
RAB	Regulatory Asset Base
SSFL	Southern Sydney Freight Line
Sydney Ports	Sydney Ports Corporation

# Summary

The Australian Competition and Consumer Commission's (**ACCC's**) decision is to consent to the Australian Rail Track Corporation's (**ARTC's**) proposal to extend the coverage of its existing Interstate Access Undertaking (**IAU**) to include the Southern Sydney Freight Line (**SSFL**) and associated Indicative Access Charge. The ACCC also consents to ARTC's proposed drafting amendments to the IAU.

The ACCC's decision responds to the proposal submitted by ARTC on 4 September 2012 (the **Proposed Variation**) pursuant to subsection 44ZZA(7)(b) of the *Competition and Consumer Act 2010* (CCA). The ACCC has made its decision having regard to the matters listed in subsection 44ZZA(3) of the CCA.

In forming this view to consent to the Proposed Variation, the ACCC has considered three key issues:

- whether the SSFL should be covered by the IAU;
- whether the Indicative Access Charge is appropriate; and
- whether the drafting amendments are appropriate.

## The ACCC's preliminary views

The ACCC initially invited submissions from stakeholders on these issues in its Consultation Paper. The ACCC subsequently released a Draft Decision that set out its preliminary views on these issues, taking into consideration the views submitted by stakeholders. The ACCC's preliminary views were as follows:

- Due to an agreement between ARTC and the NSW Government, the SSFL is required to be subject to access regulation. The ACCC considered that it would be anomalous for the whole of ARTC's interstate rail network in NSW, aside from the SSFL, to be covered by the IAU, and for the SSFL to be covered by alternative access arrangements. As such, the ACCC's preliminary view was that the SSFL should be covered by the IAU.
- The Indicative Access Charge complies with the revenue floor and ceiling limits determined in accordance with the IAU. The ACCC noted, however, that the SSFL service offered by ARTC is likely to be contestable due to the availability of road and rail-based alternatives and, therefore, it is the market rather than regulation that will set the efficient price for the service. That is, given the competitive dynamics of the relevant market, access seekers may be able to negotiate a charge for the SSFL that is lower than the Indicative Access Charge. The ACCC also noted that it had not undertaken a prudency assessment or approved the \$1 billion cost of the SSFL for inclusion in the Regulatory Asset Base (RAB) of the IAU.
- The proposed drafting amendments provide for the SSFL to be included in the IAU and set out the Indicative Access Charge, including the service characteristics, for the SSFL. In light of the ACCC's aforementioned views on the coverage of the IAU and the appropriateness of the Indicative Access Charge, the ACCC's preliminary view was that the drafting amendments were likely to be appropriate.

## The ACCC's final views

In response to the Draft Decision, the ACCC received two submissions from stakeholders—one from Asciano Limited and one from Sydney Ports Corporation (Sydney Ports).

Neither submission raised any concerns with the ACCC's views that the SSFL should be covered by the IAU and that the drafting amendments were appropriate. However, the submissions did raise concerns regarding the level of the proposed Indicative Access Charge, re-iterating previous submissions that it is too high in comparison to the adjacent RailCorp line. The submissions stated that, as RailCorp's line becomes congested, access seekers will have no other option but to utilise the SSFL. At the same time, however, it was also submitted that parties would move to road-based transportation at the proposed level for the Indicative Access Charge. Finally, the submissions also re-iterated previous concerns regarding the prudence of the \$1 billion cost for the SSFL.

***The SSFL should be covered by the IAU and the drafting amendments are appropriate***

In light of the support from stakeholders, the ACCC maintains this view for the reasons set out in the Draft Decision.

***The Indicative Access Charge for the SSFL complies with the revenue limits in the IAU***

The ACCC notes that it previously assessed and accepted the principles set out in the IAU for determining the revenue floor and ceiling limits as well as pricing structure for rail track that is covered by the IAU. Therefore, in assessing the proposed Indicative Access Charge for the SSFL, the ACCC has considered whether it complies with those principles set out in the IAU. In this regard, the ACCC has conducted analysis using the financial model provided by ARTC that has included testing and adjusting the assumptions surrounding the capital expenditure and activity forecasts. Based on this analysis, the ACCC remains of the view that the Indicative Access Charge complies with reasonable revenue limits determined in accordance with the IAU. That said, the revenue limits for the SSFL may be satisfied by a wide range of charges, but not all of these would be supported by the market.

The ACCC reiterates, however, that this view does not amount to an approval of the \$1 billion cost of the SSFL for inclusion in the RAB of the IAU. ARTC would need to seek a prudence assessment of this expenditure by the ACCC if it wished to include the cost of the SSFL in the RAB in the future.

***The SSFL appears to be subject to some degree of competition, which will provide incentives for ARTC to negotiate on price for the SSFL***

In relation to the contestability of the service, the ACCC specifically notes Sydney Ports' submission that, at the proposed level for the Indicative Access Charge, parties would be likely to move to road-based transportation instead of using the SSFL due to the former having a lower effective charge. Sydney Ports submitted that this modal shift would contribute to increased road congestion and is counter to the NSW Government's objectives of increasing rail modal share.

The ACCC supports efficient supply chains, including the efficient use of road and rail infrastructure. However, the ACCC notes that this requires appropriate incentives, including clear price signals, for users of both road- and rail-based transportation. The ACCC is aware that, while the rail track covered by the IAU is required to at least recover its incremental costs, road-based transportation does not necessarily recover its equivalent costs from freight traffic.<sup>1</sup> While the ACCC is required to assess the Indicative Access Charge to determine whether it complies with the IAU, any decision regarding the price and cost recovery for road-based transportation and the signal that it sends to users is a matter for government and is beyond the scope of the ACCC's current assessment.

The ACCC maintains the view that the submissions outlining the availability of road-based transportation as well as RailCorp's network provides some degree of competition to the SSFL.

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<sup>1</sup> The Council of Australian Governments (COAG) has recognised that there is a weak link between the revenue collected from heavy vehicle road charges and the expenditure on roads. A Regulatory Impact Statement for the feasibility of alternative pricing for heavy vehicles in which charges better reflect cost drivers is expected for public comment in 2013. For more information, see footnote 26 on p. 19.

The ACCC considers that competitive pressures from these alternatives may provide an incentive for ARTC to negotiate further with access seekers on the price for the SSFL.

***The Indicative Access Charge is the starting point for further negotiations on price for the SSFL***

The ACCC reiterates that, while the Indicative Access Charge complies with the revenue limits of the IAU and the ACCC has therefore decided to accept the proposed charge, the ACCC's decision does not imply that it is the single 'right' charge for the service. In practice, the Indicative Access Charge will form the 'upper limit' on what ARTC may offer parties seeking to run trains with the Indicative Service characteristics on the SSFL. The ACCC notes that it remains open to access seekers to further negotiate with ARTC on the charge for the SSFL. In particular, given the competitive dynamics of the relevant market, access seekers may be able to commercially negotiate an effective charge for the SSFL that is lower than the Indicative Access Charge.

**The effect of the decision to consent to the Proposed Variation**

The ACCC's decision is to consent to ARTC's Proposed Variation. The effect of the ACCC's decision is as follows:

- the scope of the IAU extends to include coverage of the SSFL—that is, the Network as defined in Schedule E of the IAU now includes the SSFL;
- the terms and conditions contained in the IAU apply to access seekers negotiating for access to the SSFL with ARTC;
- the Indicative Access Charge for the SSFL in clause 4.6(b) of the IAU will apply to the SSFL; and
- ARTC may annually vary the Indicative Access Charge in accordance with clause 4.6(d) of the IAU (i.e. with reference to increases in the CPI).

# 1 Introduction

This document sets out the reasons for the Australian Competition and Consumer Commission's (ACCC's) decision to consent to the Australian Rail Track Corporation's (ARTC's) application to vary its existing Interstate Access Undertaking (IAU) that was submitted on 4 September 2012 (the Proposed Variation). The Proposed Variation sought to incorporate the Southern Sydney Freight Line (SSFL) and associated Indicative Access Charge into the IAU. ARTC also proposed a number of drafting amendments to the IAU.

The ACCC's consideration of ARTC's Proposed Variation has included a two-stage public consultation process. In the first stage, the ACCC released a Consultation Paper that invited submissions from stakeholders on the key issues relevant to ARTC's Proposed Variation. In the second stage, the ACCC released a Draft Decision that set out the ACCC's preliminary views on ARTC's Proposed Variation, taking into account the submissions received in response to the Consultation Paper. Therefore, this document should be read in conjunction with the Consultation Paper and Draft Decision, which are available on the ACCC's website at [www.accc.gov.au](http://www.accc.gov.au) > Regulated infrastructure > Rail.<sup>2</sup>

## 1.1 The ACCC's decision

The ACCC has decided to consent to ARTC's Proposed Variation. The ACCC's view is that the Proposed Variation is appropriate having regard to the matters in subsection 44ZZA(3) of the CCA as it:

- facilitates consistent regulation of ARTC's interstate rail network (having regard to the objects of Part IIIA pursuant to subsection 44ZZA(3)(aa));
- complies with the pricing provisions of the IAU (which is a matter that the ACCC considers relevant pursuant to subsection 44ZZA(3)(e)); and
- provides certainty for access seekers and ARTC by stipulating an 'upper limit' on the price ARTC must offer access seekers (having regard to the legitimate business interests of the provider and the interests of persons who might want access pursuant to subsections 44ZZA(3)(a) and (c)).

The ACCC's reasons for this decision are set out in this document.

## 1.2 The effect of the ACCC's decision

The effect of the ACCC's decision to consent to ARTC's Proposed Variation is as follows:

- the scope of the IAU extends to include coverage of the SSFL, that is, the Network as defined in Schedule E now includes the SSFL;
- the terms and conditions contained in the IAU apply to access seekers negotiating for access to the SSFL with ARTC;
- the Indicative Access Charge for the SSFL in clause 4.6(b) of the IAU apply to the SSFL; and

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<sup>2</sup> Content relating to the Proposed Variation for the SSFL is available via the following link: <http://transition.accc.gov.au/content/index.phtml/itemId/1077623>.



- ARTC may annually vary the Indicative Access Charge in accordance with clause 4.6(d) of the IAU (i.e. with reference to increases in the CPI).

## 1.3 Structure of this document

The remainder of this document is structured as follows:

**Chapter 2 – Background** provides an overview of ARTC’s IAU and the SSFL as well as a summary of ARTC’s Proposed Variation.

**Chapter 3 – Decision making framework** sets out the legislative framework under Part IIIA for the ACCC’s assessment and also details the public consultation process that the ACCC has conducted, including details of stakeholders that provided submissions.

**Chapter 4 – Assessment of the Proposed Variation** outlines the ACCC’s analysis of issues, including issues raised by stakeholders, and the reasons for the ACCC’s decision.

## 2 Background

This chapter provides background to ARTC's IAU (section 2.1), the SSFL (section 2.2) and also summarises the Proposed Variation (section 2.3).

### 2.1 ARTC's Interstate Access Undertaking

ARTC's IAU covers the access terms and conditions for all rail services on the Interstate Rail Network that is owned or leased by the ARTC. The Interstate Rail Network covers the mainland standard gauge track linking Kalgoorlie in Western Australia; Adelaide, Wolseley and Crystal Brook in South Australia; Melbourne and Wodonga in Victoria; Cootamundra, Albury, Macarthur, Moss Vale, Unanderra, Newcastle (to the Queensland border) and Parkes in New South Wales. The IAU took effect on 20 August 2008 for a ten-year period.<sup>3</sup>

### 2.2 The Southern Sydney Freight Line

The SSFL is a 35 kilometre bi-directional, non-electrified, dedicated freight line that runs between Sefton and Macarthur in southern Sydney. The SSFL was constructed by ARTC to assist in alleviating the major bottleneck in the rail freight network in Sydney that is caused by freight trains sharing the existing rail lines with the Sydney metropolitan passenger services operated by RailCorp. The SSFL was under construction at the time the IAU took effect and, therefore, was not included in the IAU. The SSFL was commissioned for operations in January 2013.<sup>4</sup>

### 2.3 ARTC's Proposed Variation

The ACCC accepted ARTC's IAU under Part IIIA of the then *Trade Practices Act 1974* (now known as the CCA) on 30 July 2008. The IAU came into operation on 20 August 2008.

ARTC's application to include the SSFL under the IAU was foreshadowed by clauses 2.1(c) and 2.4(b) of the IAU. Clause 2.1(c) of the IAU states:

the Undertaking will extend to include the Southern Sydney Freight Line when (i) the line is completed and commissioned for rail operations and (ii) the applicable Indicative Access Charge has been accepted by the ACCC in accordance with clause 2.4(b).

Clause 2.4(b) of the IAU states:

at least six (6) months prior to commissioning for operations of the Southern Sydney Freight Line, ARTC intends to develop and submit to the ACCC the Indicative Access Charge that will apply to the Southern Sydney Freight Line.

During the assessment of the IAU, the ACCC considered that including provisions for the future coverage of the SSFL in the IAU was 'reasonable as they provided certainty for access seekers about the process for covering the line, and do not protect the SSFL against declaration unless the ACCC is satisfied that the charges proposed for the line are appropriate'.<sup>5</sup>

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<sup>3</sup> More detailed information on ARTC's interstate rail network is available in the IAU and the ACCC's decision documents relating to the IAU, which are available on the ACCC's website at <http://transition.accc.gov.au/content/index.phtml/itemId/789738>.

<sup>4</sup> More detailed information on the SSFL is available in ARTC's variation application and the ACCC's Consultation Paper and Draft Decision, which are available on the ACCC's website at <http://transition.accc.gov.au/content/index.phtml/itemId/1077623>.

<sup>5</sup> ACCC, *Final Decision; Australian Rail Track Corporation; Access Undertaking – Interstate Rail Network*, July 2008, p. 22.

The ACCC also considered that the inclusion of the SSFL in the scope of the IAU was appropriate 'given that the SSFL was already under construction at the time the Undertaking was submitted and that ARTC will own and control the SSFL upon its completion'.<sup>6</sup>

In line with clauses 2.1(c) and 2.4(b) of the IAU, ARTC submitted the Proposed Variation to the ACCC on 4 September 2012. The Proposed Variation sought to include the SSFL and associated Indicative Access Charge under the IAU and to make a number of drafting amendments to the IAU.

The proposed Indicative Access Charge for the SSFL comprises a flagfall and variable component as shown in Table 2.1. While clause 4.5 of the IAU requires that ARTC set access charges that also comprise an excess network occupancy component, ARTC proposed not to include such a component at this time (which also relates to the proposed drafting amendments discussed further below).

**Table 2.1: ARTC's proposed Indicative Access Charge for the SSFL**

Flagfall \$/km (exclusive of GST)	Variable \$/kgtkm <sup>7</sup> (exclusive of GST)
3.426	8.564

The Indicative Access Charge is proposed to be based on the following Indicative Service characteristics:

- maximum axle load of 21 tonnes;
- maximum speed of 110 km/h; and
- length not exceeding 1800 m.<sup>8</sup>

The Indicative Access Charge will be able to be revised annually by ARTC in accordance with clause 4.6(d) of the IAU.

The proposed drafting amendments to the IAU are to include the SSFL under the IAU and to give effect to the Indicative Access Charge applicable to the SSFL. In addition, ARTC proposed several other minor drafting changes to address consequential matters. The proposed drafting amendments can be viewed in the marked up version of the IAU at Appendix B to ARTC's Supporting Submission, which is available on the ACCC's website at [www.accc.gov.au](http://www.accc.gov.au) > Regulated infrastructure > Rail.<sup>9</sup>

<sup>6</sup> *ibid.*, pp. 22-23.

<sup>7</sup> 'kgtkm' refers to one thousand gross tonne kilometres.

<sup>8</sup> ARTC, *Application by ARTC to vary the ARTC Interstate Access Undertaking to include the Southern Sydney Freight Line (SSFL)*, 4 September 2012, pp. 3-4.

<sup>9</sup> Content relating to the Proposed Variation for the SSFL is available via the following link: <http://transition.accc.gov.au/content/index.phtml/itemId/1077623>.

## 3 Decision making framework

This chapter sets out the legislative framework for assessing applications under Part IIIA (section 3.1) and the public consultation process that the ACCC has conducted in relation to the Proposed Variation (section 3.2).

### 3.1 Legislative framework under Part IIIA

ARTC's IAU was accepted by the ACCC on 30 July 2008. Under subsection 44ZZA(7)(b) of the CCA, an access provider may withdraw or vary an access undertaking at any time after it has been accepted by the ACCC, but only with the consent of the ACCC.

Subsection 44ZZA(7) allows the ACCC to consent to a variation of an accepted access undertaking if it thinks it appropriate to do so, having regard to the matters contained in subsection 44ZZA(3).<sup>10</sup> If the ACCC consents to the variation, the access provider is required to offer third party access in accordance with the varied access undertaking.

Under subsection 44ZZBC(1) of the CCA, the ACCC must make a decision in relation to an access undertaking (including a variation to an accepted access undertaking) within 180 days of the day the application is received (referred to as 'the expected period'). The CCA also provides for 'clock-stoppers', meaning that some days do not count towards the 180 days of the expected period in certain circumstances. For example, the clock is stopped where the ACCC publishes a notice inviting public submissions in relation to an application (subsection 44ZZBD(1)).

As set out in section 3.2, the ACCC's assessment process has included two consultation periods that have had the effect of extending the timeframe by which the ACCC is required to make a decision on the Proposed Variation pursuant to subsection 44ZZBD(1). Taking into account these 'clock-stoppers', the ACCC is required to make a decision on the Proposed Variation by 17 April 2013.

### 3.2 Public consultation process

The CCA also provides for the ACCC to invite public submissions in its consideration of a proposed variation to an accepted undertaking. Accordingly, the ACCC published a Consultation Paper inviting submissions on key issues in relation to ARTC's Proposed Variation on 18 September 2012. The ACCC received submissions from the following parties:

- Asciano Limited (Asciano);
- Qube Logistics Holdings Limited (Qube);
- QR National; and
- Sydney Ports Corporation (Sydney Ports).

The ACCC subsequently published a Draft Decision inviting further submissions on ACCC's preliminary views on the Proposed Variation on 6 February 2013. The ACCC received submission from the following parties:

- Asciano; and

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<sup>10</sup> The matters contained in subsection 44ZZA(3) are set out in Appendix A of this document.

- Sydney Ports.

A more detailed outline of the legislative framework under Part IIIA is provided in Appendix A of this document and in Chapter 3 of the ACCC's Draft Decision. A summary of submissions received in response to the Consultation Paper is provided in Appendix B of the ACCC's Draft Decision. All submissions received in response to the Consultation Paper and Draft Decision are available on the ACCC's website at [www.accc.gov.au](http://www.accc.gov.au) > Regulated infrastructure > Rail.<sup>11</sup>

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<sup>11</sup> Content relating to the Proposed Variation for the SSFL is available via the following link: <http://transition.accc.gov.au/content/index.phtml/itemId/1077623>.

## 4 Assessment of the Proposed Variation

In its assessment of the Proposed Variation, the ACCC has considered three key issues:

- whether the SSFL should be covered by the IAU (**section 4.1**);
- whether the Indicative Access Charge is appropriate (**section 4.2**); and
- whether the drafting amendments are appropriate (**section 4.3**).

The following sections set out a summary of the ACCC's preliminary view on each of these issues (which were set out in more detail in the ACCC's Draft Decision), stakeholders' submissions to the ACCC's Draft Decision, and the ACCC's final view.

### 4.1 Should the SSFL be covered by the IAU?

A key consideration for the ACCC in assessing the Proposed Variation is whether it is appropriate for the SSFL to be included in the IAU and, therefore, subject to access regulation. This is because, given that the SSFL is adjacent to RailCorp's Main South Line, access seekers have alternative rail-based transportation available to them. Further, access seekers also have the option of utilising road-based transportation. It is therefore unclear that there is a market failure creating the need for access regulation to apply to the SSFL. The contestability of the SSFL is discussed in more detail in the ACCC's Draft Decision.<sup>12</sup>

#### 4.1.1 ACCC's preliminary view

Due to an agreement between ARTC and the NSW Government, the SSFL is required to be subject to access regulation. That is, the SSFL is required to be covered by either the IAU, which is overseen by the ACCC, or the NSW Rail Access Undertaking (NSWRAU), which is overseen by the NSW Independent Pricing and Regulatory Tribunal (IPART). Notably, the SSFL will be covered by the NSWRAU unless and until the SSFL becomes subject to an access undertaking accepted by the ACCC.<sup>13</sup>

The ACCC's preliminary view was that it is appropriate to include the SSFL in the IAU. The ACCC considered that it would be anomalous for the whole of ARTC's interstate rail network in NSW, aside from the SSFL, to be covered by the IAU, and for the SSFL to be covered by alternative access arrangements. In forming this preliminary view, the ACCC had regard to the object of providing a framework and guiding principles to encourage a consistent approach to access regulation in each industry in accordance with subsection 44ZZA(3)(aa) of the CCA. Further, the ACCC considered that coverage of the SSFL under the IAU would promote certainty for both access seekers and ARTC regarding the process for negotiating the terms and conditions of access in accordance with subsections 44ZZA(3)(a) and (c) of the CCA.<sup>14</sup>

#### 4.1.2 Stakeholders' response

Submissions to the ACCC's Draft Decision did not raise any concerns with the ACCC's preliminary view that it was appropriate to extend the coverage of the IAU to include the SSFL. Notably, Asciano's submission specifically supported the ACCC's view, stating:

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<sup>12</sup> ACCC, *Draft Decision; Australian Rail Track Corporation's proposed variation of the Interstate Rail Network Access Undertaking to include the Southern Sydney Freight Line*, 6 February 2013, pp. 15-16.

<sup>13</sup> *ibid.*, p. 5

<sup>14</sup> *ibid.*, pp. 5-6.

Overall, Asciano supports the ACCC decision to extend the Interstate Access Undertaking to include SSFL, the mechanism to vary the Indicative Access Charge proposed for the SSFL and the other general drafting changes associated with including the SSFL in the Interstate Access Undertaking.<sup>15</sup>

### 4.1.3 ACCC's final view

In light of the requirement for the SSFL to be subject to access regulation and the support from stakeholders for the SSFL to be covered by the IAU, the ACCC remains of the view that it is appropriate that the coverage of the IAU be extended to include the SSFL. As set out in the Draft Decision, the ACCC considers that this is consistent with the object of providing a framework and guiding principles to encourage a consistent approach to access regulation in accordance with subsection 44ZZA(3)(aa) of the CCA and will promote certainty for both access seekers and ARTC regarding the process for negotiating the terms and conditions of access in accordance with subsections 44ZZA(3)(a) and (c).

## 4.2 Is the Indicative Access Charge appropriate?

The ACCC previously assessed the IAU under Part IIIA of the CCA and accepted the principles set out in the IAU for determining the revenue floor and ceiling limits as well as pricing structure for rail track that is covered by the undertaking. Therefore, in assessing the proposed Indicative Access Charge for the SSFL, the ACCC has considered whether it complies with those principles set out in the IAU. This is a matter that the ACCC considers relevant pursuant to subsection 44ZZA(3)(e) of the CCA.

Clause 2.4(b) of the IAU requires ARTC to submit an Indicative Access Charge for the SSFL to the ACCC for approval where the coverage of the IAU is extended to include the SSFL. In its assessment of the proposed Indicative Access Charge, the ACCC has had particular regard to whether it complies with the following provisions of the IAU:

- the revenue floor and ceiling limits contained in clauses 4.4(a) to 4.4(c) (**section 4.2.1**); and
- the principles for the structure of charges in clause 4.5 (**section 4.2.2**).

### 4.2.1 Compliance with the revenue floor and ceiling limits

The revenue limit provisions are set out in clause 4.4(a) of the IAU and require that charges:

not be lower than the Floor Limit for that Segment or group of Segments (unless otherwise agreed by ARTC); and

not be higher than the Ceiling Limit for that Segment or group of Segments.

The floor limit is defined in clause 4.4(b) of the IAU as the revenue that is sufficient to cover the incremental cost (that is, the costs that could have been avoided if the segment or group of segments was removed from the network). The ceiling limit is defined in clause 4.4(c) of the IAU as the revenue that is sufficient to cover the economic cost of the segment or group of segments.

ARTC provided the ACCC with a confidential financial model to demonstrate that the proposed Indicative Access Charge complies with the revenue floor and ceiling limits determined in accordance with clauses 4.4(a) to (c) of the IAU. However, ARTC has not sought a prudency assessment of the project cost, submitting that the results of a prudency assessment would be unlikely to impact the ceiling limit to such an extent that it would affect the proposed Indicative Access Charge.

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<sup>15</sup> Asciano, *Asciano submission to ACCC Draft Decision on ARTC's Proposed Variation to its Interstate Access Undertaking to include the SSFL*, 20 February 2013, p. 3.

#### 4.2.1.1 ACCC's preliminary view

ARTC advised that the actual cost of investment in the SSFL was approximately \$1 billion, while the original forecast cost contained in Schedule H of the IAU was \$242 million. Based on confidential modelling provided by ARTC, which assumed the actual \$1 billion cost of investment, the Indicative Access Charge was forecast to recover revenues that at least met the incremental cost of the SSFL (i.e. the revenue floor) and recover less than the revenue ceiling. The ACCC also conducted further analysis using the model provided by ARTC. The ACCC found that the Indicative Access Charge was also forecast to recover revenues that were well below even a conservative revenue ceiling based on the original forecast cost of \$242 million.<sup>16</sup>

For these reasons, the ACCC's preliminary view was that the proposed Indicative Access Charge complies with the floor and ceiling limits pursuant to the IAU, which is a matter that the ACCC considered relevant pursuant to subsection 44ZZA(3)(e) of the CCA.<sup>17</sup> The ACCC considered that it was unnecessary to assess the prudence of the \$1 billion cost of the SSFL given that the forecast revenue was likely to be substantially below even a conservative revenue ceiling for the SSFL. That said, the ACCC noted that its view did not amount to an approval of the \$1 billion cost of the SSFL for inclusion in the Regulatory Asset Base (RAB) for the IAU. ARTC would need to seek a prudence assessment of this expenditure if it wished to include the cost of the SSFL in the RAB.<sup>18</sup>

The Draft Decision noted that a main concern expressed by stakeholders in their response to the Consultation Paper was the level of the proposed Indicative Access Charge. In particular, stakeholders submitted that the Indicative Access Charge is too high relative to the charge for access to the adjacent RailCorp line and compared to the effective price for utilising road-based transportation. A number of stakeholders also indicated that they would not utilise the SSFL if they were required to pay the Indicative Access Charge at the level proposed by ARTC. However, the ACCC considered that the submissions served to support the ACCC's view that the service offered by ARTC is likely to be contestable and that it is the market, rather than regulation, that will set the efficient price for the service.<sup>19</sup>

For these reasons, the ACCC's Draft Decision noted that, in practice, the Indicative Access Charge will essentially provide an 'upper limit' on the price that ARTC will offer parties wishing to use the SSFL. In this respect it will offer certainty to ARTC and access seekers in accordance with subsections 44ZZA(3)(a) and (c) of the CCA. The ACCC noted that it remains open to access seekers to further negotiate with ARTC on the charge for the SSFL. In particular, given the competitive dynamics of the relevant market, access seekers may be able to negotiate a charge for the SSFL that is lower than the Indicative Access Charge.<sup>20</sup>

#### 4.2.1.2 Stakeholders' submissions

Submissions in response to the Draft Decision raised concerns regarding the level of the Indicative Access Charge proposed by ARTC, the prudence of the cost of the SSFL and the contestability of the market.

Asiciano and Sydney Ports both reiterated their concerns that were raised in response to the Consultation Paper that the proposed Indicative Access Charge is too high in comparison to the adjacent RailCorp line. Sydney Ports submitted that RailCorp will reclaim freight paths in the next two years to expand its passenger operations:

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<sup>16</sup> ACCC, *Draft Decision; Australian Rail Track Corporation's proposed variation of the Interstate Rail Network Access Undertaking to include the Southern Sydney Freight Line*, 6 February 2013, p. 6.

<sup>17</sup> *ibid.*, p. 6.

<sup>18</sup> *ibid.*, p. 7.

<sup>19</sup> *ibid.*, p. 6.

<sup>20</sup> *ibid.*, p. 6.



This contestability for potential SSFL traffic will dissipate as RailCorp reclaims freight paths for expanding its own passenger operations over the next 2 years and moves its rates in line with the SSFL.<sup>21</sup>

Sydney Ports also raised concerns that parties would move to road-based transportation at the proposed level for the Indicative Access Charge:

As RailCorp withdraws from providing freight paths and rail operators face increased charges, the impact will be felt most keenly on metropolitan freight traffics, presently 98% of imports from Port Botany ... Increasing end customer rail freights by 15% will render proposed rail intermodal terminals in Sydney's south west unviable, metropolitan freight will move to road and government rail modal targets become unachievable.<sup>22</sup>

Asciano submitted that as RailCorp's line becomes congested access seekers will have no other option but to utilise the SSFL:

The current ACCC position is predicated on the assumption that Railcorp continue to offer access services. This assumption is not guaranteed due to the potential for the Railcorp main south route to become congested in the future. If this occurs then any new freight traffics will have to use the SSFL as there is no longer any feasible alternative route.<sup>23</sup>

Asciano and Sydney Ports also re-iterated previously raised concerns regarding the prudence of the \$1 billion expenditure for the SSFL. For example, Asciano submitted that 'the access charge should be based on capital and operational expenditure that has been deemed as prudent and efficient.'<sup>24</sup> Asciano also submitted that:

the ACCC should recognise that any ACCC approved indicative access charge will be viewed by both the access provider and access seeker as a price that has been set by an independent body and which will be the price if there is any dispute between parties as to the access charge for the SSFL.<sup>25</sup>

Sydney Ports provided some calculations challenging the ACCC's preliminary view that ARTC's proposed Indicative Access Charge is below even a conservative ceiling and consequently making it unnecessary to assess the prudence of the asset base. Sydney Ports outlined calculations that assumed a RAB of \$150 million and 60 trains per day as opposed to ARTC's forecast of 17 to 22 trains per day and RAB of \$1 billion. Sydney Ports stated that the figure of 60 trains per day was outlined in ARTC's *South Sydney Freight Line Environmental Statement*, which sets forecasts for 2018. Sydney Ports RAB of \$150 million excludes the cost of the 'Casula bridge flyover and other cost items directly related to the accommodation of RailCorp's assets and their operations during and post SSFL'. Sydney Ports submitted that, based on these adjusted assumptions, the proposed Indicative Access Charge would provide revenues that breached the ceiling limit.<sup>26</sup>

#### 4.2.1.3 ACCC's final view

As set out above, in its consideration of the proposed Indicative Access Charge, the ACCC has considered whether it complies with the revenue floor and ceiling limits pursuant to the IAU.

The ACCC notes the concerns reiterated by stakeholders in their submissions to the Draft Decision regarding the prudence of the \$1 billion capital expenditure and traffic forecasts used by ARTC in its financial modelling for the SSFL and the revenue floor and ceiling limits that these assumptions imply. Notably, ARTC has not sought a prudence assessment of the \$1 billion capital expenditure for the SSFL for inclusion in the RAB of the IAU.

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<sup>21</sup> Sydney Ports, *Variation to the Interstate Rail Network Access Undertaking: Submission in response to ACCC Draft Decision*, 26 February 2013, p. 1.

<sup>22</sup> *ibid.*, p. 1.

<sup>23</sup> Asciano, *Asciano submission to ACCC Draft Decision on ARTC's Proposed Variation to its Interstate Access Undertaking to include the SSFL*, 20 February 2013, p. 2.

<sup>24</sup> *ibid.*, p. 2.

<sup>25</sup> *ibid.*, p. 2.

<sup>26</sup> Sydney Ports, *Variation to the Interstate Rail Network Access Undertaking: Submission in response to ACCC Draft Decision*, 26 February 2013, p. 2.

The ACCC is cognisant of the fact that, absent a prudency assessment and necessarily relying on forecast traffic volumes, there remains a degree of uncertainty regarding the appropriate revenue floor and ceiling limits for the SSFL. Therefore, as set out in the Draft Decision, the ACCC has conducted analysis using the financial model provided by ARTC that has included testing and adjusting the assumptions surrounding the capital expenditure and activity forecasts. Based on this analysis, the ACCC is satisfied that the Indicative Access Charge is likely to at least recover a reasonably determined revenue floor for the SSFL.

In relation to the ceiling limit, the ACCC specifically notes Sydney Ports' submission to the Draft Decision that a 'conceivable' RAB of \$150 million and traffic of 60 trains per day for the SSFL would breach the limit. As set out above, the ACCC previously established that the Indicative Access Charge was forecast to recover revenues that were well below a revenue ceiling based on the original forecast cost of \$242 million. The ACCC believes that this original forecast cost is a reasonable basis for assessment in the absence of a prudency assessment of the actual \$1 billion expenditure.

Nevertheless, the ACCC has conducted further analysis using the financial model provided by ARTC in light of the submission from Sydney Ports. In particular, the ACCC has considered whether a lower cost estimate for the SSFL and an increase in the number of trains per day would result in ARTC receiving revenues that would be likely to breach an equivalently determined ceiling limit. Importantly, as part of this analysis, the ACCC has also taken into account the effect of Sydney Ports' further submission that parties would likely move to alternative road-based transportation at the proposed level for the Indicative Access Charge. The ACCC considers it important to note that the outcome of this modal shift would be a reduction in the number of trains using the SSFL and a resulting reduction in revenues received by ARTC. The ACCC has found that, even adjusting for these variables, the Indicative Access Charge is unlikely to recover revenues in excess of a reasonably determined ceiling limit.

As such, the ACCC remains of the view that the Indicative Access Charge proposed by ARTC complies with the revenue limits determined in accordance with clauses 4.4(a) to (c) of the IAU, which is a matter that the ACCC considers relevant pursuant to subsection 44ZZA(3)(e) of the CCA. The ACCC reiterates, however, that it has not assessed the prudency of the \$1 billion cost of the SSFL and has not approved the cost for inclusion in the RAB of the IAU. In order to include the cost of the SSFL in the RAB in future, ARTC would need to seek a prudency assessment of the expenditure by the ACCC.

The ACCC also notes the concerns reiterated by stakeholders in their submissions to the Draft Decision that the level of the Indicative Access Charge is too high. As was noted in the Draft Decision, the revenue floor and ceiling limits for the SSFL may be satisfied by a wide range of charges. The ACCC has not sought to determine a single 'right' charge for the SSFL, but to assess whether the proposed Indicative Access Charge complies with the IAU. That said, the ACCC specifically notes Sydney Ports' concerns that, at the proposed level, parties would be likely to move to road-based transportation instead of using the SSFL due to the former having a lower effective charge. Sydney Ports noted that this modal shift would contribute to increased road congestion and is counter to the NSW Government's objectives of increasing rail modal share.

The ACCC supports efficient supply chains, including the efficient use of road and rail infrastructure. However, the ACCC notes that for this to occur there needs to be in place the appropriate incentives, including clear price signals, for users of both road- and rail-based transportation. For example, a modal shift from road to rail would need to be supported by a pricing policy for both modes of transport that encouraged users to make the move. The ACCC is aware that, while the rail track covered by the IAU is required to at least recover its incremental costs, road-based transportation does not necessarily recover its equivalent costs from freight traffic.<sup>27</sup> While the ACCC is required to assess the Indicative Access Charge to

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<sup>27</sup> According to the National Transport Commission's *Heavy Vehicle Pricing Options: Development and Assessment Framework Discussion Paper*, the Council of Australian Governments (COAG) on 13 April 2007 set out an agenda for road infrastructure pricing reform to unlock more productivity from the road network and deliver more efficient pricing and investment through a market based approach. COAG

determine whether it complies with the IAU, any decision regarding the price for road-based transportation and the signal that it sends to users is a matter for government and is beyond the scope of the ACCC's current assessment.

The ACCC remains of the view that the submissions outlining the availability of road-based transportation as well as RailCorp's network provides some degree of competition to the SSFL. The ACCC considers that competitive pressures from these alternatives will provide an incentive for ARTC to commercially negotiate further with access seekers on the price for the SSFL.

The ACCC reiterates that, while the Indicative Access Charge complies with the revenue limits of the IAU and the ACCC has therefore decided to accept the proposed charge, the ACCC's decision does not imply that it is the single 'right' charge for the service. In practice, the Indicative Access Charge will form the 'upper limit' on what ARTC may offer parties seeking to run trains with the Indicative Service characteristics on the SSFL. The ACCC notes that it remains open to access seekers to further negotiate with ARTC on the charge for the SSFL. In particular, given the competitive dynamics of the relevant market, access seekers may be able to commercially negotiate an effective charge for the SSFL that is lower than the Indicative Access Charge.

## 4.2.2 Compliance with the structure of charges

Clause 4.5 of the IAU requires that the Indicative Access Charge for a service comprises: (i) a variable component; (ii) a flagfall component; and (iii) an excess network occupancy component. While ARTC's Indicative Access Charge comprises (i) and (ii), ARTC proposed that it not include (iii). ARTC provided the following reasoning for the exclusion of the excess network occupancy component:

an excess network occupancy component already applies to the Melbourne – Macarthur Segment and the inclusion of this component for the SSFL is unlikely to result in any significant intended incentives, and there is little opportunity or reason for spending excess time on this part of the Network.<sup>28</sup>

### 4.2.2.1 ACCC's preliminary view

The ACCC's preliminary view noted that stakeholders supported the exclusion of an excess network occupancy component, particularly in light of the fact that it would be unlikely to provide any significant incentives for increased efficiency given the short distance travelled on the SSFL.<sup>29</sup>

As such, the ACCC's preliminary view was that it was appropriate for ARTC to have discretion in whether or not to apply an excess network occupancy component depending on whether or not it would assist the efficient operations or use of the network. The ACCC considered that this was consistent with the pricing principles in section 44ZZCA of the CCA, which provides that access price structures should allow multi-part pricing when it aids efficiency. The ACCC also

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recognised that the current charging framework, which consists of the combination of registration fees and fuel-based road user charge, does not reflect the actual usage of the road network by an individual vehicle. COAG also recognised that there was a weak link between the revenue collected from heavy vehicle road charges and the expenditure on roads. In light of this, COAG asked that the Australian Transport Council (subsequently renamed the Standing Council on Transport and Infrastructure) investigate the feasibility of alternative pricing for heavy vehicles in which charges better reflect cost drivers and in which the revenues from these charges are better linked to road expenditure. An integrated package of investment, funding and charging reforms is being developed by the Heavy Vehicle Charging and Investment Reform Board in preparation for a Regulatory Impact Statement for public comment in 2013. More information is available on the National Transport Commission's website at <http://www.ntc.gov.au/ViewPage.aspx?DocumentId=02114> and the Heavy Vehicle Charging and Investment Reform website at <http://www.roadreform.gov.au/Home.aspx>.

<sup>28</sup> ARTC, *Application by ARTC to vary the ARTC Interstate Access Undertaking to include the Southern Sydney Freight Line (SSFL)*, 4 September 2012, p. 5.

<sup>29</sup> ACCC, *Draft Decision; Australian Rail Track Corporation's proposed variation of the Interstate Rail Network Access Undertaking to include the Southern Sydney Freight Line*, 6 February 2013, p. 20.

noted that this is also consistent with the principles of the IAU based on the proposed drafting amendments to the undertaking outlined below.<sup>30</sup>

#### 4.2.2.2 Stakeholders' response

Submissions to the Draft Decision did not raise any concerns with the ACCC's preliminary view that it is appropriate for ARTC not to apply an excess network occupancy charge to the SSFL. Notably, Asciano's submission explicitly supported the ACCC's view:

The ACCC Draft Decision is to approve:

- the inclusion of the SSFL in the network covered by the Interstate Access Undertaking;
- the Indicative Access Charge proposed for the SSFL; and
- the mechanism to vary the Indicative Access Charge proposed for the SSFL.

Of these decisions Asciano only has concerns relating to the decision to approve the Indicative Access Charge proposed by ARTC for the SSFL.<sup>31</sup>

#### 4.2.2.3 ACCC's final view

In light of the fact that it is unlikely to assist efficient operation or use of the network and the general support from stakeholders, the ACCC remains of the view that it is appropriate for ARTC not to apply an excess network occupancy charge for the SSFL. As set out in the Draft Decision, the ACCC considers that this is consistent with the pricing principles in section 44ZZCA of the CCA that provides some discretion in the application of multi-part pricing when it aids efficiency. This issue is also relevant to the ACCC's consideration of ARTC's proposed drafting amendments set out below, which seeks to change the IAU to explicitly allow such discretion.

### 4.3 Are the drafting amendments appropriate?

ARTC proposed a number of drafting changes to the IAU in order to include the SSFL under the IAU and give effect to the proposed Indicative Access Charge applicable to the SSFL. In addition, ARTC proposed several other minor drafting changes to address consequential matters, including:

- removal of the process for determination of the SSFL from the IAU;
- SSFL definitions:
  - inclusion of the network boundaries of the SSFL and illustrative map in Schedule E of the IAU;
  - inclusion of the SSFL network boundaries into the Indicative Access Agreement;
- clarification of the discretion in applying an excess network occupancy charge; and
- recognition of the SSFL for the purposes of Performance Indicator reporting.

The details of the proposed drafting amendments can be viewed in the marked up version of the IAU at Appendix B to ARTC's Supporting Submission, which is available on the ACCC's website at [www.accc.gov.au](http://www.accc.gov.au) > Regulated infrastructure > Rail.<sup>32</sup>

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<sup>30</sup> *ibid.*, p. 20.

<sup>31</sup> Asciano, *Asciano submission to ACCC Draft Decision on ARTC's Proposed Variation to its Interstate Access Undertaking to include the SSFL*, 20 February 2013, p. 1.

### 4.3.1 ACCC's preliminary view

In relation to the drafting changes to include the SSFL under the IAU and give effect to the associated Indicative Access Charge, the ACCC's preliminary view was that the amendments were likely to be appropriate in light of the views outlined in chapter 5 of the Draft Decision. In particular, the views that it was appropriate for the SSFL to be covered by the IAU and that the proposed Indicative Access Charge was appropriate pursuant to the principles set out in IAU.<sup>33</sup>

In relation to the other minor drafting changes, the ACCC's preliminary view was that they were also likely to be appropriate as they provide clarity and transparency to stakeholders about ARTC's obligations pursuant to subsection 44ZZA(3)(c) of the CCA. The ACCC did note, however, that ARTC's drafting changes in relation to the removal of the process for determination of the SSFL contained one minor oversight in the renumbering of clause 2.4. Specifically, clause 2.4(b) need not be included as part of the Proposed Variation as it was deleted as part of ARTC's previous variation to include the capital expenditure forecasts in Schedule H of the IAU.<sup>34</sup>

The ACCC also noted that the proposed drafting changes to clause 4.5, which provide ARTC with the discretion to not apply an excess network occupancy component to the Indicative Access Charge, was appropriate giving consideration to the views on this outlined in section 5.1.1.2 of the Draft Decision. Specifically, that it is appropriate that ARTC not apply a network occupancy component for the SSFL segment as the component already exists on the Melbourne to Macarthur Segment and would not result in any significant incentives to increase efficiency.<sup>35</sup>

### 4.3.2 Stakeholders' response

Submissions in response to the Draft Decision did not raise concerns with the proposed drafting amendments, with Asciano specifically supporting the ACCC's view:

Overall, Asciano supports the ACCC decision to extend the Interstate Access Undertaking to include SSFL, the mechanism to vary the Indicative Access Charge proposed for the SSFL and the other general drafting changes associated with including the SSFL in the Interstate Access Undertaking.<sup>36</sup>

### 4.3.3 ACCC's final view

In light of the ACCC's final view set out in sections 4.1 and 4.2 that the SSFL should be covered by the IAU and that the Indicative Access Charge complies with the principles set out in the IAU, the ACCC remains of the view that it is appropriate that the proposed drafting amendments are appropriate. The ACCC notes that no stakeholders raised concerns with the ACCC's preliminary view on this matter. The ACCC considers that the drafting amendments will provide clarity and transparency to stakeholders in accordance with subsection 44ZZA(3)(c) of the CCA.

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<sup>32</sup> Content relating to the Proposed Variation for the SSFL is available via the following link: <http://transition.accc.gov.au/content/index.phtml/itemId/1077623>.

<sup>33</sup> ACCC, *Draft Decision; Australian Rail Track Corporation's proposed variation of the Interstate Rail Network Access Undertaking to include the Southern Sydney Freight Line*, 6 February 2013, p. 23.

<sup>34</sup> *ibid.*, p. 24.

<sup>35</sup> *ibid.*, pp. 24-25.

<sup>36</sup> Asciano, *Asciano submission to ACCC Draft Decision on ARTC's Proposed Variation to its Interstate Access Undertaking to include the SSFL*, 20 February 2013, p. 3.

# Appendix A: Legislative framework under Part IIIA

Under subsection 44ZZA(7)(b) of the *Competition and Consumer Act 2010* (CCA), an access provider may withdraw or vary an access undertaking at any time after it has been accepted by the ACCC, but only with the consent of the ACCC.

If the ACCC consents to the variation, the provider is required to offer third party access in accordance with the varied access undertaking. An access undertaking is binding on the access provider and can be enforced in the Federal Court upon application by the ACCC.<sup>37</sup>

Subsection 44ZZA(7) allows the ACCC to consent to a variation of an accepted access undertaking if it thinks it appropriate to do so, having regard to the matters contained in subsection 44ZZA(3), which are:

- the objects of Part IIIA of the CCA,<sup>38</sup> 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 CCA (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;<sup>39</sup> and
- any other matters that the ACCC thinks are relevant.

In relation to the pricing principles, section 44ZZCA of the CCA 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

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<sup>37</sup> Section 44ZZJ of the CCA.

<sup>38</sup> Section 44AA of the CCA.

<sup>39</sup> There is currently no access code that applies to services covered by ARTC's Interstate Access Undertaking.

- 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.