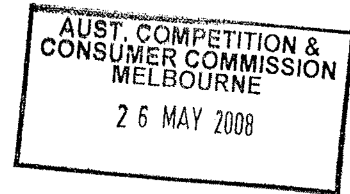
FREIGHT RAIL OPERATORS GROUP
L6/15 Blue St • Nth Syd • NSW • 2060
Ph +61 2 8484 8000 • Fx +61 2 8484 8151
www.frog.org.au

26 May 2008



AUST. COMPETITION & CONSUMER COMMISSION MELBOURNE
26 MAY 2008

Ms Margaret Arblaster
General Manager – Transport & Prices Oversight
Regulatory Affairs
ACCC
GPO Box 520
MELBOURNE VIC 3001

Dear Ms Arblaster

SUBMISSION RE: ACCC DRAFT DECISION - ARTC INTERSTATE ACCESS UNDERTAKING

The Freight Rail Operators' Group (FROG) welcomes the opportunity to respond to the Australian Competition & Consumer Commission's (ACCC) Draft Decision (DD) on the Australian Rail Track Corporation (ARTC) Interstate Access Undertaking (IAU). This letter contains no confidential information and may be published in its entirety at the ACCC's discretion.

FROG and other stakeholders have participated in the consultation and approval processes regarding the IAU since December 2006, making a number of submissions both to ARTC and the ACCC. Given the withdrawal of the ARTC July 2007 undertaking prior to the ACCC making a determination, the DD represents the first opportunity for FROG and its members to understand the ACCC's position on the wide range of issues raised.

FROG accepts that in the majority of instances, the ACCC has carefully considered all of the arguments in arriving at its decision and that this response to the DD is not an occasion for repeating previous positions. However, there are a number of issues raised in the DD that FROG believes require additional consideration. In some instances, FROG believes the reasons articulated for a decision fail to adequately address the issue or otherwise involve unjustified conclusions. Therefore this submission is directed to those areas where FROG believes that further discussion of the issue may assist in arriving at a more informed decision or in identifying areas where the Final Decision might need to provide greater clarity.

As a general comment, FROG wishes to correct assertions made with regard to ARTC's pricing of track access on its interstate network. ARTC has explained its increases in access rates on the East/West corridor (both the recent one-off increase in February 2008 and the proposed full-CPI increases) as a "catch-up" that can be made to close a perceived gap between the cost of road freight and the cost of rail freight. It should be noted, however, that this "gap" was created by competition and innovation amongst above-rail operators, not by the actions of ARTC. This gap has been opened against a continually-improving road sector and cannot be expected to remain in perpetuity.

The early access rates (set in 1995 upon the opening up of access to third-party operators) were calculated to make rail freight rates equivalent to and competitive with road freight rates and were based upon then-prevailing operating practices. At that time, road and rail had similar

market shares on the East/West corridor. Since then (and without any significant contributing factor from ARTC or its predecessors), competition has driven substantial change in above-rail operating practices. Operators have invested substantially in new equipment and systems, and changed operating practices to drive down their costs. These lower costs have then been passed through to customers through a competitive market place. Examples of these investments and changed operating practices include higher-speed/higher-axle-load capable wagons and vans; trains have become substantially longer and heavier; loading practices have developed with tall vans and double-stacking of containers; locomotives have become more powerful and recently AC power has been introduced - and rail's market share has increased substantially.

It would be wrong if ARTC is allowed to capture this value created almost solely by the investments and activities of its customers. It would run against public interest in not passing on the benefits of competition. Similarly, it would be of significant concern if, in future pricing decisions, ARTC was allowed to take advantage of any cost differential created by the introduction of a carbon tax or other any measure designed to internalise externalities. To allow this would be to defeat the purpose of the tax.

The remainder of this letter sets out the issues that FROG wishes to raise. In the interests of brevity, these issues are presented in summary only, noting that individual members of FROG intend to make more detailed submissions that are likely to cover the same ground. However, should you have any questions or require further detail, FROG members will be happy to provide the appropriate response as quickly as possible. Questions can be directed to the chairman of FROG in the first instance.

DD Recommendations

FROG agrees with the recommended changes to the IAU suggested by the ACCC in the DD. These materially improve the IAU.

No further comment is made regarding the recommendations, however, this should not be taken as representing any lack of support for them. FROG believes that the reasons provided in each case in the DD justify the recommended change. Should the ACCC intend to withdraw any of the recommended changes, FROG would seek the opportunity to re-present a case in support of retaining the recommendation.

Process Issues

The DD indicates a process going forward that requires ARTC to withdraw the December 2007 Undertaking and replace it with an amended IAU containing the recommended changes. The DD also indicates that the ACCC expects to make a Final Decision with respect to the IAU in mid July. It is unclear from the DD whether this means that, if ARTC is willing to accept the recommendations as they stand, the Final Decision would approve a revised IAU, or whether the process necessarily involves a further round of review prior to the ACCC accepting the IAU. Notwithstanding any further changes that the ACCC may be minded to seek once it has received the current round of submissions, FROG is concerned that the process should not be unduly extended if there are no further changes contemplated.

FROG members are acutely aware that ARTC has used the period during which there has been no undertaking in place to significantly increase prices for indicative services, above any increase that would have been allowed under either the 2002 Undertaking or the December 2007 Undertaking. The members of FROG remain concerned that a process that requires ARTC to withdraw one draft document and formally submit another, as though it were a new

document, will lead to a substantial further period during which ARTC is free to introduce further price increases, unconstrained by the CPI limitations currently contemplated.

If the ACCC is persuaded that additional changes have merit, FROG suggests that it is open to the ACCC to communicate these to ARTC and seek the amended document to include them without necessarily going through the process of first publishing a final decision and then having ARTC submit a revised document as though it were a new one. The ACCC could then seek a rapid response from stakeholders, limited to the changes made, before proceeding to a final decision. Given the extensive previous submissions, such an abbreviated process should not raise concerns regarding lack of opportunity to comment and would hopefully short-circuit the potential for an open-ended approval process.

Public Interest

Throughout the approval process, FROG members have indicated a concern that the IAU fails to adequately meet the public interest criteria set out in IAU paragraph 1.2(c)(ii). While some issues regarding the balancing of the interests between ARTC and access seekers have been addressed in the DD, there is little to recognise that the public has a strong interest in seeing the IAU provide an effective framework to promote "economically efficient use and operation of the Network". Nor does the IAU promote "other relevant social objectives, such as an increase of traffic from road to rail". Instead the IAU is focussed very narrowly on ARTC's perceived self-interest while providing a minimal framework for the negotiation of a modest portion of the services it might provide on a limited portion of its network. So, for example:

- the scope of the IAU (discussed further below) excludes the majority of its protections for nearly half of the traffic that the public has an interest in continuing to be conveyed by rail.
- the IAU fails in fulfilling the role as a model undertaking, as set out for it by the Council Of Australian Governments (COAG) (discussed below).
- the IAU is deliberately biased in favour of one traffic (interstate intermodal), to the detriment of other traffics that the public would expect to be on rail (see IAU paragraph 4.2).
- the IAU does nothing to promote above rail investment, a crucial component in any increase in the use of rail as a preferred mode of transport. For example the pretence that ARTC is a commercial organisation, and hence an emphasis on ARTC's returns (even though the DD recognises the conflicting objectives of ARTC and the fact that it will not make full economic returns), fails to have regard to the necessity for access seekers to have sufficient incentive to invest in rollingstock, terminals etc to make rail a viable alternative.
- the IAU fails to address any of the interconnectivity issues that the DD itself suggests are "imperative" (discussed below).

FROG members have consistently argued that the IAU needs to be considered differently to an undertaking relating to a privately owned facility given the extensive public interest and expectations with regard to having an efficient and effective rail industry in Australia. These considerations lead to the need for the IAU to reflect the underlying public policy requirements that, while alluded to in the IAU preamble, are missing from the substantive part of the document.

The IAU As A Model Undertaking

COAG has nominated the IAU to be a model undertaking for all rail access regulation around Australia. As such the IAU has a broader purpose than a normal access undertaking. In FROG's opinion, this additional role requires that the IAU represents the preferred regulatory model.

FROG believes that the ACCC has the appropriate power under the *Trade Practices Act 1974* (TPA) s 44ZZA(3)(b) and (e) to take into account the model role of the IAU in its consideration of whether to approve it or not. In FROG's opinion, there is significant public interest in having effective rail access regulation in Australia and therefore the IAU should be assessed on its ability to perform that role. Such an assessment would, in FROG's opinion impact on a number of areas throughout the IAU and lead to different decisions regarding the suitability of the IAU.

There are a number of areas within the IAU where it fails to recognise its model status and it is therefore deficient in that role. In particular the IAU fails to cover a large proportion of both the ARTC network and the traffics on the network that is included. This is not appropriate given the model status of the IAU. FROG suggests that for the ACCC to accept an undertaking that fails to meet the higher standard of a model regulatory instrument will result in a significant detriment to the aims of COAG and the regulation of access to rail infrastructure in Australia.

Scope

While the DD does address some of the issues of scope raised by stakeholders, there are a number of other issues that the DD does not adequately resolve, in particular how those issues are properly dealt with by the IAU. The outstanding issues are:

- Provision for inclusion of the SSFL, but exclusion of the MFN. As the MFN represents an integral part of the Sydney freight access strategy, along with the SSFL, it is incomprehensible why one should be included but the other ignored. It is noted that the NSW Network Lease clearly intends for the SSFL to be part of the MFN and for them both to be dealt with by ARTC on a consistent basis. As it stands, an operator would need a separate access contract with ARTC to run on the SSFL (once included in the IAU) and one for the MFN which would remain under the NSW Rail Access Undertaking. The Final Decision needs to explain why this would be more efficient than provision for the inclusion of the MFN along with the SSFL.
- The failure to explain how the IAU will interact with ARTC's own network under the proposed Hunter Valley undertaking. FROG's understanding is that it is likely that most operators will require two separate access contracts to operate in the Newcastle region regardless of the traffics they carry. This again appears needlessly complex and inefficient.
- The failure to include sidings and yards, particularly where there is a potential requirement for access to privately owned terminals (including future terminals). Again the prospect is raised that sidings and yards would remain under a the NSW Rail Access Undertaking. If this is not correct, then the Final Decision should provide an appropriate explanation.

The absence of a reasonable explanation from ARTC for these omissions raises stakeholder concerns that the omissions are deliberate and for reasons that are detrimental to access seekers.

Charges For Other Services

A substantial deficiency in the IAU is with regard to the scope of its coverage of the services provided. The issue of the exclusion of non-indicative train services is discussed separately below. In addition to this problem, the failure of the IAU to cover other services is of concern. It is clear that ARTC is gradually seeking to increase its revenue base through creating charges for services that have previously been seen as integral to the main train capacity that is catered for (at least with regard to indicative services).

An obvious example of this intent to "unbundle" services to increase revenue opportunities is the introduction of the new extended network occupancy charge. While this particular charge is included in the IAU, it represents the narrowing of the previous service covered by the indicative charge. Another example is the previously withdrawn "Prime Path Charge" included in the initial consultation draft of the IAU.

More recently ARTC has sought to separately introduce charges for storage of rollingstock on its network, a matter that is not addressed at all by the IAU and clearly it is ARTC's intention that such matters should not receive any of the protections of the IAU. It is a concern to FROG members that ARTC will continue to seek out ways of further restricting the basic service covered by the IAU and place what it considers ancillary services outside of any regulatory scrutiny. Over time this has the potential to severely undermine the intent of an undertaking, to provide reasonable protection and certainty to users of a monopoly service. The IAU already, on ARTC's own admission, covers at most 60% of its revenue base on a division of ARTC's network that is designed to segregate out a substantial proportion of traffics that do not conform to the indicative service. FROG members believe this coverage is likely to further decrease through the life of the IAU.

Exclusion Of Non-Indicative Services

The DD provides a number of reasons to justify accepting the exclusion of non-indicative services. However, when these reasons are closely examined, they do not, in fact, justify the exclusion of non-indicative services.

The DD (at page xii) states that:

"ARTC must have regard to indicative prices in setting non-indicative prices, meaning that there should be an identifiable link between these prices and that indicative prices should provide a benchmark for non-indicative prices."

FROG believes that this conclusion is unjustified. IAU clause 4.2 provides that, in setting its charges ARTC will "have regard to" a range of factors, one of which in paragraph (b) is the Indicative Access Charges for Indicative Services set out in clause 4.6. In a statutory context, the courts have recognised that this phrase can convey different meanings depending on the context – from merely considering something (in the sense of not failing to consider it) on the one hand to giving it weight as a fundamental consideration on the other (see ***Re Michael***).

Given that the context in IAU clause 4.2 is to list a range of factors which impact on ARTC's business, one could not confidently justify a conclusion that there is any obligation to use indicative prices as a disciplining factor in setting non-indicative prices as suggested in the DD.

Notwithstanding any legal interpretation, this sub-clause was also in the 2002 ARTC Undertaking and so it is reasonable to expect that ARTC will give it the same weight that it has in the past. ARTC has never explained any link that might exist between indicative and non-

indicative prices and the uniform experience of FROG members in dealing with ARTC since 2002 suggests that there is no such link.

Without this link, the chain of reasoning in the DD fails completely. Further evidence of the lack of any link is the change in ARTC's prices in February 2008. It may not have been readily appreciated by the ACCC, but there is absolutely no correlation between the changes in the indicative (intermodal) prices and those applying to the other traffics in the new rating structure. No explanation has been given by ARTC as to how these differences were arrived at and again, no linkage or recognition of consideration of the relativity between indicative and non-indicative prices was even suggested. FROG believes that it is critical that the ACCC review this issue in the light that there is no real link between indicative and non-indicative prices.

Further, although this issue is one that has been raised throughout the consultation and approval process, ARTC has not once provided any logical explanation why non-indicative traffics should not have the benefit of the protections given to indicative traffics in the IAU. If the ACCC retains its current position, the Final Decision should clearly discuss why the relatively simple act of including all traffics is less appropriate than adopting the current exclusion of a significant part of the traffic on the network.

While the above discussion has focussed on price, the exclusion of non-indicative services goes to a number of matters throughout the IAU. These matters have been canvassed in previous submissions and therefore these are not repeated here, but it is important to recognise that price is not the only issue affected by the exclusion of non-indicative services.

ACCC Powers In An Arbitration

The ACCC has placed heavy reliance on the dispute resolution provisions in the draft Undertaking. For example, the ACCC has stated in its draft decision that:

> "It is the ACCC's view that it can arbitrate on the substance of any dispute arising under the Undertaking, including indicative and non-indicative price and non- price terms and conditions of access. In addition, s.44ZZA(6) of the Act requires the ACCC to resolve disputes in accordance with the Undertaking. However, the ACCC believes compliance with s.44ZZA(6) involves more than simply examining ARTC's compliance with its obligations in its Undertaking. Rather, the Undertaking provides for the ACCC to consider a range of factors in deciding a dispute. These include the objects of Part IIIA and the economically efficient operation of the network. Therefore, in arbitrating a dispute, the ACCC is not obliged to conclude that a disputed price is acceptable just because it complies with the Undertaking and is below the ceiling."

FROG members believe this view is not sustainable in practice. The key issue is that the IAU gives ARTC many discretions. For example, ARTC has express discretions in relation to mutually exclusive access claims (clause 3.10(d)(ii)); entering into access agreements more than 6 months prior to commencing services (clause 5.2); capacity allocation (clause 5.3); and the provision of additional capacity (clause 6.2). Once these provisions are approved by the ACCC, the ACCC as an arbitrator in a dispute may not easily substitute its own discretion for a discretion granted to ARTC in the IAU.

In particular there is discretion under IAU Part 4 (Pricing Principles) permitting ARTC to set charges between the floor and ceiling limits (and in conformance with other prohibitions such as non discrimination), other than for Indicative Services. As previously mentioned, this discretion is tempered by the requirement to "have regard to" a non-exhaustive list of factors in IAU clause 4.2 which include subjective matters such commercial business impacts on ARTC.

Whilst these matters could form an access dispute under the IAU, the mere fact that IAU clause 3.12.4(b)(vii)(A) permits the arbitrator to deal with any of the matters referred to in TPA s 44V (a statutory provision dealing with the powers of the ACCC in an arbitration) does not automatically give the ACCC power to override an ARTC discretion properly exercised in accordance with an approved undertaking.

The ACCC will be aware of the case law relating to ACCC powers under similar access regimes (such the Gas Code and Part IXC) - for example ***EAPL v ACCC*** [2007] HCA 44, ***Re Michael; ex parte Epic Energy*** [2002] WASCA 231 and ***Re GasNet Australia*** [2003] ACompT 6. There is a serious issue as to whether the courts would require ARTC to be acting outside the proper scope of a discretion given to it in the IAU before the ACCC could exercise its dispute resolution powers to set different pricing or access terms (for example, if ARTC based pricing on one of the prohibited factors in IAU clause 4.3 or priced above the ceiling in IAU clause 4.4).

There is a genuine legal concern that simply referencing TPA s 44V would not allow the ACCC to override ARTC pricing discretion within the floor to ceiling permissible range. Given the importance of this issue, if the ACCC has a legal view that it can do so, it should make that legal analysis available in the Final Decision and indicate whether ARTC agrees with that position - otherwise, it is hard to imagine that there won't be lengthy legal challenges, as have occurred in gas and telecommunications.

Even where there is power to set pricing and terms in an arbitration, the matters which the ACCC, as arbitrator, must take into account in IAU clauses 3.12.4(b)(vi) and 3.12.4(b)(vii)(C) create fertile ground for more litigation, based on the case law dealing with similar requirements relating to the exercise of ACCC's regulatory powers. For example, there is scope for dispute as to the weight to give each matter where they are in conflict (see ***Re Michael*** and ***EAPL v ACCC***).

In addition, IAU clause 3.12.4(b)(vii)(C) incorporates by reference the matters referred to TPA s 44X which includes the pricing principles in TPA s 44ZZCA. These principles would place significant obstacles to the ACCC overruling ARTC's pricing discretion unless the proposed price was outside the permitted discretion. One reason s 44ZZCA was introduced into Part IIIA was to ensure full cost recovery plus a commercial return. While s 44ZZCA is only one of the criteria that the ACCC is required to take into account, for the ACCC to rule in favour of a lower price that did not meet this criteria would require compelling justification to avoid further litigation.

Given the foregoing, FROG maintains its view that the IAU effectively sets the limits of any decision that is available to the ACCC in an arbitration and that, unless other factors have vitiated the ACCC's approval of the IAU, the ACCC would not be able to usurp a validly exercised discretion previously granted to ARTC. If this is correct, then the current position adopted in the DD to rely on arbitration to resolve a number of matters that are uncertain, unresolved or at ARTC's discretion will place access seekers at considerable disadvantage. FROG members believe that for the IAU to be an effective regulatory instrument (both with regard to the ARTC network and those other undertakings subsequently modelled on the IAU), these matters need to be resolved in the document, in particular by the inclusion of matters that are currently left to ARTC's discretion where such discretion cannot reasonably be justified, eg the exclusion of non-indicative services and the outstanding matters in the Indicative Access Agreement (IAA).

Insurance

The DD fails to explain why ARTC should arbitrarily increase the insurance costs of all operators. The only explanation for the increase that has been given suggests that this is purely for administrative simplicity. This is not sufficient to justify such a global imposition. Again, given the model status of the IAU, it is not difficult to see this arbitrary choice to increase insurance coverage being simply adopted by all track owners regardless of the circumstances.

Consistency Across Undertakings

The DD addresses the issue of consistency across different networks but suggests that it is not appropriate for the IAU to deal with this issue and that it should be left to another process, presumably associated with the Competition and Infrastructure Regulation Agreement (CIRA).

While some members of FROG are public sector organisations and may have some limited involvement in that process, most are not and are not privy to the processes that the DD alludes to. Neither do FROG members generally have any input into those processes as they currently stand. As far as FROG members are aware, the CIRA process is not close to delivering any form of national regulation that would address the issue of consistency between networks.

Therefore the most tangible mechanism currently available to promote the outcome of consistency between track owners is the access undertakings of the relevant track owners themselves. To the extent that the IAU is supposed to be the national model, this places a special obligation on it to address this issue. FROG suggests that there is significant public interest in having this matter dealt with effectively and that absent any other effective instrument, the IAU, as the model undertaking, provides the most appropriate method to address this.

It is also clear that ARTC committed itself in the NSW Network Lease to address the consistency issue at least with the other NSW network owners. Clearly the IAU has not even addressed this obligation.

FROG requests the ACCC to reconsider its view that it is appropriate to rely on as yet unseen mechanisms to address what the ACCC itself recognises as a significant issue.

Removal Of Flexible Pathing

FROG does not believe that provision of ad hoc paths instead of the current flexible pathing approach offers a viable alternative. The approach suggested by ARTC is impractical, in some instances unaffordable and potentially anti-competitive and thus fails to meet the stated objectives of the IAU. In support of this view the following should be considered:

- The traffics are often not suited to fixed path arrangements as they typically run to eccentric cycles (eg due to shipping patterns or locations serviced). For the same reason, they are not suited to a "regular" ah hoc path approach.
- Traffics using flexible paths will lose any certainty of access by accepting an ad hoc path. Alternatively if purchasing a fixed path to attempt to gain certainty, these traffics will almost certainly trigger the "use it or lose it" test at some time, a test that does not contemplate intermittent use of a path as the norm.
- Some of the traffics have deliberately been priced in the past to retain them on rail as a matter of government policy eg grain traffics, bulk fuel. The increase in pricing to fixed

paths will almost certainly drive some of these traffics back onto road transport. (Note that this is clearly contrary to ARTC's commitment in the NSW Network Lease).

- Forcing individual operators to lock in paths, say for grain trains, forecloses the option of other operators servicing that business as the number of paths available is constrained. Thus one operator may have an inflexible assignment of a path for which it must pay while another operator cannot access that path. The IAU makes no provision for any short term transfer (the transfer arrangements contemplate a permanent arrangement). Thus by securing certainty that grain trains can run by adopting fixed paths causes potential competition to be locked-out. This is not necessary if ARTC adopted the "industry path" approach for such traffics that has been raised in previous submissions.

FROG requests the ACCC to undertake a more detailed study of this issue as it threatens the viability of long standing rail based traffics. The ARTC proposal is contrary to government policy, the stated aims of ARTC and in particular the NSW Network Lease that looks to promote all forms of rail based freight, not merely one sector of that business.

Use It Or Lose Rule

The DD suggests that access seekers will be able to negotiate away the perceived faults with the "use it or lose it" mechanism. It is the experience of FROG members that once an indicative access agreement has been approved by the regulator, there is effectively no meaningful negotiation possible. To rely on the dispute resolution process, as suggested by the DD, does not readily improve this outlook as it is expensive and resource intensive to take a matter through the arbitration process. Note also the previous discussion regarding the effectiveness of arbitration.

Given that the ACCC is the body that will resolve any dispute, it appears to be an unnecessarily circular process for the ACCC, instead of determining the matter now, to suggest that the parties go through a negotiation process only to come back to it at a later date after expenditure of significant time and effort for the ACCC to resolve the matter through an arbitration - even if one could have confidence that a successful outcome could be achieved. FROG members would strongly encourage the ACCC to resolve the matter in the IAU approval process.

Indicative Access Agreement

The DD suggests that there is no need to resolve the numerous issues raised by stakeholders with regard to the IAA, that instead access seekers should rely on negotiation at a later date to overcome the offending provisions. As noted above, FROG members believe that this relies on an overly optimistic view of the manner in which negotiations with ARTC are carried on. In particular, it is noted that:

- Once the ACCC has approved the IAU and the IAA that forms part of the IAU, ARTC has no incentive to negotiate an inferior position (from its perspective). ARTC will have a substantial advantage in any arbitration where it relies on an access agreement previously approved by the regulator (who is also the arbitrator). Notwithstanding anything to the contrary in the DD, it is not a tenable proposition that the ACCC could rule in an arbitration contrary to a matter that it has previously approved, without some other factor intervening to vitiate the initial approval.
- Access seekers negotiate bilaterally with ARTC for an access agreement. Even if ARTC was minded in a particular instance to negotiate away from the standard terms and conditions, the fact that it will want to have substantially identical terms and conditions

with all operators will make ARTC reluctant to move away from the IAA for any one particular operator.

- ARTC has shown no interest in responding to the issues raised by access seekers regarding the IAA during the extended consultation and approval process for the IAU - generally ARTC has not seen fit to even recognise that the issues have been raised. It is inconceivable that ARTC, having gained ACCC approval for the IAA will then adopt a substantially different position with regard to those issues during any negotiations. ARTC, by its actions to date, has effectively demonstrated its negotiating position on these matters.

Thus, FROG believes that the proposal in the DD cannot resolve the problem and will merely leave access seekers subject to ARTC's superior bargaining position.. FROG holds the strong view that the issues raised during the consultation and approval process need to be considered in detail and resolved prior to the ACCC formulating its Final Decision.

Again, this is particularly pertinent given the model nature of the IAU. Even if ARTC was minded to change individual access agreements through the negotiation process, the IAA as part of the IAU would hold a universal status beyond even the influence of ARTC to moderate. If this is the model for all future access agreements then one would expect these provisions to be replicated across all track access agreements in future.

As discussed in some detail earlier, there is little reason to have confidence that an access seeker can rely on the dispute resolution process to restore any bargaining power or that the ACCC would be able to override any discretion exercised by ARTC.

Betterment

A particular example of a problem in the IAA is the new inclusion of a "betterment" clause, (IAA clause 15.7(b)). This clause was not included in the 2002 Undertaking IAA. The problem generated by this new clause was raised by several stakeholders in previous submissions but the matter has not been addressed in the DD (nor has been alluded to at all by ARTC).

Under IAA clause 15.7(b), a party that is liable to pay for the restoration of the other party's assets is liable for the cost associated with the improvement that results from the work carried out. This is known as "betterment". As an example, if an above-rail operator damages ARTC's track, the operator could be required to pay for the full cost of new track even if the old track was nearly worn out and due for immediate replacement and/or wooden sleepers were nearing the end of their life.

This runs contrary to the Common Law principle that an "injured" party is entitled only to be compensated for the value of the relevant asset at the time of its destruction - in other words, the "injured" party should not be better off as a result of the accident.

Several members of FROG have had past experience with this issue in negotiations/arguments with ARTC and, in instances where courts have been asked to rule, the principle of betterment has been applied, disqualifying ARTC's position that it should be allowed to benefit from the relevant incident rather than merely being "made whole". With clause 15.7(b), ARTC seeks to overturn this and obtain a benefit that it would not otherwise be allowed.

It is of considerable concern to FROG members that the ACCC is suggesting in the DD that this is something that a party could negotiate out of the access agreement. FROG seeks the ACCC to require the removal of clause 15.7(b).

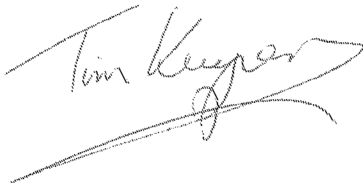
FREIGHT RAIL OPERATORS GROUP

Third Party Works

Another example is the new inclusion of IAA clause 9.4 dealing with third party works. This clause also was not included in the 2002 Undertaking IAA. The clause, inter alia, removes any claim against ARTC where third party works are involved. In essence, this clause removes ARTC's responsibility with regard to providing the track in a safe, fit for purpose manner whenever third party works are involved. Stakeholders raised concerns at the breadth and inappropriateness of this carve out of ARTC's responsibility - no mention has been made of these concerns either by ARTC or in the DD. Clearly this is a matter that requires addressing, either to explain why the concerns are ill-founded or to remedy the problem.

As the foregoing shows, the members of FROG still have significant concerns with the IAU. The IAU will have long term implications for the viability of rail and it is incumbent upon all participants to get achieve the best undertaking possible. FROG would welcome further dialogue with the ACCC in achieving this aim.

Yours sincerely



Dr Tim Kuypers
Chairman,
Freight Rail Operators Group