

**AUSTRALIAN RAIL TRACK CORPORATION LIMITED**

**(“ARTC”)**

in favour of

**AUSTRALIAN COMPETITION AND CONSUMER COMMISSION**

**(“ACCC”)**

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**ACCESS UNDERTAKING**

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## PART 1

**ACCESS UNDERTAKING** dated

2001

**BY**

**AUSTRALIAN RAIL TRACK CORPORATION LIMITED** ABN 75 081 455 754 of Passenger Terminal Road, Mile End SA 5000 (“**ARTC**”)

**IN FAVOUR OF**

**AUSTRALIAN COMPETITION AND CONSUMER COMMISSION** being a body corporate established under section 6A of the TPA (“**ACCC**”)

### 1 PREAMBLE

#### 1.1 Introduction

- (a) On 14 November 1997, the Commonwealth of Australia, the State Governments of New South Wales, Victoria, Queensland, Western Australia and South Australia signed the Intergovernmental Agreement (“**IGA**”) concerning, amongst other things, the formation of ARTC and the granting of access to rail operators of the Interstate Rail Network.
- (b) One of the stated objectives of the IGA is to create a single process of access to the Interstate Rail Network consistent with the Competition Principles Agreement and the National Rail Summit Heads of Agreement.
- (c) Pursuant to clause 4 of the IGA, ARTC was established on 24 February 1998 as a company under the Corporations Law owned by the Commonwealth Government as the entity to manage the granting of access to rail operators to the Interstate Rail Network.
- (d) ARTC currently owns or leases and is responsible for the granting of access to that part of the Interstate Rail Network comprising the Network.
- (e) As a vertically separated provider of access, ARTC operates in a competitive environment where competitive pressure from other modes of transport (particularly road) place constraints on rail freight and access pricing. [Accordingly, in ARTC’s view, it is unlikely to be able to price in any of its markets at levels which will fully recover the full economic costs of its assets.]

**Commentary:** As will be apparent from comments elsewhere, in particular Annexure 1, FreightCorp and Toll have comments above the base cost of the assets of ARTC, and therefore the relevance of this statement.

- (f) As the manager of a significant part of the Interstate Rail Network, ARTC has adopted the concepts of equity and transparency as key elements of its pricing policies. ARTC will not discriminate price on the basis of the identity of the customer, the commodity being transported. By so doing, ARTC seeks to stimulate customer confidence and market growth in rail industry in an evolving environment in which government owned vertically integrated railways are being replaced by privately owned operators with access to shared track infrastructure.

**Commentary:** As noted elsewhere, FreightCorp and Toll are concerned about achieving effective transparency, without it there is doubt that “customer confidence” will be “stimulated”.

- (g) As an access provider, maintenance of the Network and Associated Facilities is a large component of ARTC's current cost structure. These services are outsourced and managed under maintenance contracts entered into on commercial terms as a result of a competitive tender process. ARTC has adopted this practice with a view to ensuring that ARTC's cost structure will reflect efficient infrastructure practice.

**Commentary:** FreightCorp and Toll note the importance of maintenance to ensure that train service entitlements are available. Continuing the theme of transparency foreshadowed above, FreightCorp and Toll consider that it would be helpful for operators to know what has been spent and what is planned to be spent on maintenance, and accordingly the basis upon which the cost of maintenance is reflected in the charging regime.

- (h) ARTC has prepared this Undertaking voluntarily in pursuance of the objectives of the IGA and to provide a framework to manage negotiations with Applicants for Access to the Network for the purpose of operating Services.
- (i) This Undertaking will be applied consistently to Access Applications [where such applications are within the scope of this Undertaking as set out in Part 2].

**Note:** The definition of Access Applications is such that the words that we have placed in square brackets are not necessary

## 1.2 Objectives

This Undertaking is [a voluntary undertaking] submitted [voluntarily] by ARTC under Part IIIA of the TPA.

**Note:** The words in squares brackets are not needed but if ARTC does want to capture the flavour that it has initiated the undertaking a more appropriate place for the word "voluntary" is as suggested.

The intent of the Undertaking is to:

- (a) establish a workable, open, non-discriminatory, efficient and inclusive process for lodging and processing Access Applications;
- (b) use transparent and detailed methodologies, principles and processes for determining access price limits, and fair and reasonable terms and conditions;

**Commentary:** Given what is said in the body of the submission, FreightCorp and Toll consider that it is appropriate to flag reasonableness, and pick up the use of "fair" from (c)(iii)(A) below.

- (c) reach an appropriate balance between:
- (i) the legitimate business interest of ARTC [being]:
- (A) the recovery of all reasonable costs associated with the granting of Access to the Network;
- (B) a fair and reasonable return on ARTC's investment in the Network and Associated Facilities (including maintenance costs) [commensurate with its commercial risk]; and

**Commentary:** The notion of “commercial risk” is something that needs to be aired to be understood. Risk allocation is the key function of negotiation of any contract, and Access Agreements are no exception. There are certain issues that are naturally infrastructure owner/operator risks, others that are naturally operator risks. Given that this will be one of the things that is taken into account on any arbitration (by virtue of clause 3.11.4(vi)(A)), it is important that Applicants have an understanding of what this means. The rate of return that is determined through the CAPM which is used to define WACC includes a measure of risk through the use of Beta!

- (C) stimulate customer confidence and market growth in the rail industry;

**Commentary:** In this context FreightCorp and Toll consider that it is helpful to have in mind the charter of ARTC:

- “Improve performance and efficiency of interstate rail infrastructure
- Increase capacity utilisation
- Listen, understand and respond to the market
- Operate on sound commercial principles
- Provide our shareholders with a sustainable return on capital invested”

- (ii) the interest of the public, including

**Note:** The addition of the word “including” is reflective of the non-exhaustive nature of section 44ZZA(3)(b) of the TPA:

- (A) increase competition ensuring efficient use of resources;
- (B) reducing the potential for abuse of market power by operators or major users of single purpose infrastructure facilities; and

**Commentary:** FreightCorp and Toll would like to understand better the intention behind this provision. Is it the intention that the Undertaking will be used for this purpose? The view of FreightCorp and Toll is that there are provisions of the TPA (other than Part IIIA) that deal with anti-trust issues. FreightCorp and Toll question whether the Undertaking should seek to address issues that are dealt with by the TPA in other more exacting, and appropriate, ways. If this provision is to remain, FreightCorp and Toll would like to understand which provisions of the Undertaking are designed to reduce the potential for abuse of market power.

- (C) promoting other relevant social objectives, such as an increase of freight traffic from road to rail;

**Commentary:** FreightCorp and Toll note that this provision is non-exhaustive in the way it defines social objectives. Consequently what this provision is intended to relate to is unclear and its extent is uncertain. FreightCorp and Toll consider that it is necessary for the extent of this provision to be drawn more clearly to achieve certainty and accordingly provide an understanding of the basis upon which ARTC may seek to contract. FreightCorp and Toll note that ARTC appears to be suggesting lower prices for some operations to make them competitive with road.

- (iii) the interests of [Applicant's wanting] Access to the Network, including:
  - (A) providing Access to the Network on fair and reasonable terms; and
  - (B) providing Access in a open, efficient and non-discriminatory manner;

**Commentary:** FreightCorp and Toll have placed square brackets around the words "Applicant's wanting" to contrast them with section 44ZZA (of the TPA) which provides amongst other things that the ACCC should have regard to "the interests of persons who might want access ...". This is not a big point, rather it is a point that reflects what the ACCC must consider in considering the Undertaking, and therefore appropriately something that should be reflected by the Undertaking.

FreightCorp and Toll consider that the interests of Applicants should not be defined on an exhaustive basis, hence the inclusion of the word "including". The interests to be considered by the ACCC and the interests of applicants for these purposes should not be defined restrictively.

- (d) provide an efficient, effective and binding resolution process in the event that ARTC and the Applicant are unable to negotiate a mutually acceptable Access Agreement; and
- (e) [operate consistently with the objectives and principles in Part IIIA of the TPA and the Competition Principles Agreement.]

**Commentary:** FreightCorp and Toll seek clarification on this issue. FreightCorp and Toll suspect that this may be a question of less being less, and as such unclear. FreightCorp and Toll consider that it would be help if those provisions of Part IIIA and the CPA that ARTC considers relevant to the Objectives of the Undertaking could be stated clearly. The TPA has provisions that relate to access undertakings, but not all of the provisions of Part IIIA are relevant. The need for clarity is starker in respect of the CPA.



## PART 2

### 2 SCOPE AND ADMINISTRATION OF UNDERTAKING

#### 2.1 Scope

- (a) This Undertaking provides for the negotiations of Access required for the operation of Train Services by Operators on the Network, with details of the specified services and sections of the Network defined during Access negotiations. Access will include, in addition to the track, the benefit of Associated Facilities required to facilitate such Access.
- (b) [This Undertaking does not extend to providing access to such parts of the Interstate Rail Network not included in the definition of “Network”. If Operators require access to such segments of the Interstate Rail Network

[**Note:** “Interstate Rail Network” is not defined. It may be helpful if it was made clear to what it relates], they should make contact with the relevant owners or managers of such segments.]

**Commentary:** FreightCorp and Toll question whether it is necessary include this clause.

- (c) Without limiting clause 2.1(b), this Undertaking does not extend to any extensions to the Network nor to the track and infrastructure of other track owners that may connect to the Network.

#### 2.2 Grant and Duration of Undertaking

ARTC undertakes to the ACCC that it will comply with the terms and conditions specified in this Undertaking in relation to the grant of Access to Operators to the Network for Services. This Undertaking takes effect one (1) month after it is accepted by the ACCC [under]

**Note:** Strictly speaking, acceptance happens “pursuant” to section 44ZZA(3) rather than “under” it. Further, and more importantly, section 44ZZA(5)(a) provides that an undertaking comes into operation at the time of acceptance by the ACCC. There is therefore an issue as to the effective start date of the Undertaking.

section 44ZZA(3) of the TPA and will continue until the earlier to occur of:

- (a) the expiry of the Term; or
- (b) [termination] of this Undertaking in accordance with its terms or the TPA

**Note:** The TPA does not anticipate “termination”, rather it anticipates “withdrawal” - see section 44ZZA(5)(a). There is therefore an issue as to effect of this provision if it is not amended to reflect the language of the TPA. Further, the Undertaking itself does not anticipate its termination. Accordingly, there is an issue of clarification as to the circumstances in which ARTC intends the Undertaking to terminate. If ARTC does not intend the undertaking to terminate FreightCorp and Toll suggest that “termination” be replaced by “withdrawal”.

### 2.3 Term

This Undertaking will continue to be binding upon ARTC until:

- (a) the fifth (5th) anniversary of the Commencement Date; or
- (b) the date upon which the ACCC consents to the withdrawal of the Undertaking by ARTC,

whichever is the earlier.

**Note:** “Withdrawal” is used here. This is consistent with the TPA. Further, this is not on all fours with clause 2.2 which seems to anticipate termination and withdrawal. This is not a big point, the drafting just needs tidying up.

### 2.4 Review of Undertaking

- (a) If, during the Term, ARTC is of the opinion that circumstances have changed such that this Undertaking is no longer [commercially viable] for ARTC, ARTC may seek the approval of the ACCC to vary this Undertaking.

**Commentary:** In addition to the issues raised in the body of the submission, there is an issue as to what “commercially viable” is intended to mean. Is this intended to mean that ARTC cannot make a profit, is making an unsustainable loss, cannot cover the marginal cost of provision of a service, and so on? Further, whatever the reason, whatever “commercially viable” is intended to mean the fact that there is a viability issue does not address the cause; viability issues may arise for any number of reasons, for example increasing costs not covered by increased revenue. This concept needs to be understood. Further, is this intended to cover a short run viability issue or a viability on a sustainable basis issue? FreightCorp and Toll would suggest that unless this is intended to be the only circumstance in which ARTC may seek a variation (which as a matter of construction it is not), this clause be deleted, but FreightCorp and Toll note that this raises an important issue worthy of further consideration, that ARTC may seek variation if commerciality viability is not maintained.

Finally, given ARTC’s Charter (see comment above on clause 1.2(c)), it would seem appropriate that commercial viability should at least in some measure be reflective of its Charter.

- (b) Prior to seeking the approval of the ACCC under clause 2.4(a), ARTC shall first consult with Operators regarding the proposed variation.

**Commentary:** Note the comments made in the body of the submission.

- (c) ARTC may only vary the Undertaking with the consent of the ACCC under section 44ZZA(6) of the TPA.

**Note:** section 44ZZA(7) provides for variation, with the consent of the ACCC. Further, given that the TPA provides for variation the Undertaking does not need to. FreightCorp and Toll suggest that this clause be corrected. Alternatively, the clause could be deleted.

## 2.5 Existing Contractual Agreements

This Undertaking applies only to the negotiations of new Access Agreements or the negotiation of Access Rights in addition to those already the subject of an Access Agreement.

**Note:** From the form of the definition it is unclear whether this is intended to relate to access agreements prior to the acceptance of the Undertaking. Further, there is a separate issue as to how access agreements executed prior to the acceptance of the Undertaking may be varied; may they be varied under their terms only

Nothing in this Undertaking can require a party to an existing Access Agreement to vary a term or provision of that agreement.

**Commentary:** Note the comments made in the body of the submission.

## 2.6 Contact Details

- (a) Persons wishing to contact ARTC for further information or to apply for Access to the Network should contact ARTC at any of the following addresses:
- (i) The Secretary  
Australian Rail Track Corporation Ltd  
Keswick Passenger Terminal Road  
(Off Sir Donald Bradman Drive)  
MILE END SA 5031  
  
Telephone: (08) 8217 4366  
Facsimile: (08) 217 4190
  - (ii) The Secretary  
Australian Rail Track Corporation Ltd  
PO Box 10343  
Gouger Street  
ADELAIDE SA 5000
  - (iii) secretary@artc.com.au
- (b) Applicants are also encouraged to search ARTC's internet web site at [www.artc.com.au](http://www.artc.com.au) on which will be published various information regarding ARTC and this Undertaking including:
- (i) a map containing a geographical description of the Network;
  - (ii) a narrative description of the Network;
  - (iii) Indicative Access Charges;
  - (iv) prices for which Access has been granted together with general description of the Services to which such prices relate;
  - (v) the Network Management Principles;
  - (vi) the standard Access Agreement; and
  - (vii) a copy of ARTC's annual report.

**Note:** There is an issue as to the status of these documents, in particular the standard Access Agreement and whether it is different from the Indicative Access Agreement.

In accessing the website it seems to be the case, by process of deduction, that the standard Access Agreement and the Indicating Access Agreement are one and the same. If this is the case there would be benefit in using consistent definitions.

Further, depending on the final position on information provision, it may be that capacity information should be published on the website.

FreightCorp and Toll note that the only access agreement available from the ARTC web site is the Track Access Agreement found in Schedule D of the ARTC Access Undertaking.

## PART 3

### 3 NEGOTIATING FOR ACCESS

#### 3.1 Introduction

[As part of ARTC’s philosophy, it seeks to encourage utilisation of the Network and as such, will not seek to frustrate the negotiation process.]

**Note:** FreightCorp and Toll question whether the first sentence adds anything to the Undertaking.

[ARTC recognises that the process needs to be flexible to suit specific circumstances and is willing to tailor the process in consultation with the Applicant. However, ARTC also recognises that the industry seeks [some] certainty and provides this framework to satisfy that need].

**Note:** Again, FreightCorp and Toll question whether the second and third sentences add anything. Comments in the body of the submission and below illustrate the importance of certainty and clarity. In the absence of a clear purpose for these words or a statement that they are intended as “motherhood” only statements FreightCorp and Toll suggest their deletion so as to avoid uncertainty of their application to the Undertaking, in particular any determination of the arbitrator.

**Commentary:** Note the comments made in the body of the submission. If the comments are accepted the clause 3.1 could be used to state the general obligations of ARTC and the Applicant.

#### 3.2 Framework

[This part of the Undertaking seeks to outline the process which will be followed to enable an Operator to gain Access to the Network. It provides for:

- (a) preliminary meetings and exchanges of information;
- (b) submission of an Access Application by the Operator;
- (c) preparation of an Indicative Access Proposal by ARTC;
- (d) negotiations to develop an Access Agreement for execution; and
- (e) dispute resolution procedures.]

**Note:** FreightCorp and Toll question whether this adds anything; “road maps” are helpful in longer documents but it is doubtful given the size of the Undertaking that one is necessary here.

#### 3.3 Parties to Negotiation

- (a) ARTC reserves the right to negotiate only with Applicants who comply with the [relevant obligations and applicable processes]

**Note:** There is an issue as to what the words placed in square brackets are intended to relate. FreightCorp and Toll consider that this should be understood set out in this Undertaking. If an Applicant does not comply with the relevant obligations and processes, and ARTC considers that such non-compliance is material.

**Note:** There is an issue as to what “material” is intended to mean. For example, is the word intended to relate to the process? Or is the word intended to relate to ARTC? The fact this question arises may be reflective of clarity as to why this right is sought in the first place. ARTC will not be obliged to continue negotiations regarding the provision of Access for that Applicant.

**Commentary:** Note the comments made in the body of the submission.

- (b) ARTC will negotiate Access with an Applicant which is not an Accredited Operator where the Applicant will procure the services of an Accredited Operator to operate the proposed Services provided that all of the terms and conditions of the Access Agreement are met by the Applicant or the Operator.
- (c) At any time, before or during the negotiation process, ARTC may require the Applicant to demonstrate to ARTC's reasonable satisfaction that it is able to meet the prudential requirements set out in clause 3.3(d). In the event the Applicant cannot meet these prudential requirements, ARTC may refuse to commence negotiations or may cease negotiations with that Applicant.

**Commentary:** Note the comments made in the body of the submission.

- (d) For the purposes of clause 3.3(c), the Applicant will be required to meet the following prudential requirements:
  - (i) the Applicant must be Solvent;
  - (ii) the Applicant, or a Related Party of the Applicant, must not be currently, or have been in the previous (2) years, in Material Default of any agreement with ARTC, or any agreement in accordance with which access to rail infrastructure not managed by ARTC, has been provided to the Applicant or a Related Party of the Applicant.

**Commentary:** Note the comments made in the body of the submission.

- (e) If ARTC refuses to negotiate Access with an Applicant in accordance with clause 3.3(c), it shall provide the Applicant with written [reasons] **[notice]** for its refusal.

**Note:** If the comment made in the body of the submission is accepted, “reasons” should be deleted and replaced with “notice” because there will only be one reason.

- (f) If the Applicant considers that ARTC has unreasonably refused to commence

**Note:** This raises a question as to whether ARTC may refuse to commence negotiations at all. If ARTC wants to have this right, FreightCorp and Toll suggest that the basis upon which it may refuse to commence negotiation should be stated clearly. The Queensland Competition Authority (QCA), in its Draft Decision on Queensland Rail's Draft Undertaking (**QCA's Draft Decision**), has suggested an approach that it considers to be appropriate for QR to refuse to negotiate. (See Chapter 4.5 of Volume 2 of the QCA's Draft Decision.)

or subsequently unreasonably ceased negotiations in accordance with clause 3.3, then the Applicant may refer the matter to the arbitrator in accordance with clause 3.11. If the arbitrator determines that ARTC has unreasonably refused to commence or subsequently unreasonably ceased negotiations, ARTC will recommence negotiations immediately.

**Commentary:** Note the comments made in the body of the submission.

- (g) If at any time, ARTC is of the view that an Applicant's request for Access is frivolous in nature, ARTC may refer the request to the arbitrator in accordance with clause 3.11 for determination. If the arbitrator determines that the request is in fact frivolous, then ARTC will be entitled to cease negotiations and will not be obliged to comply with this Undertaking in respect of the request.

**Commentary:** Note the comments made in the body of the submission.

### 3.4 Confidentiality

- (a) ARTC and the Applicant will, at all times, keep confidential and, subject to clause 3.4 (c), not disclose to any other person and not to use for any purpose other than the Permitted Purpose, any Confidential Information provided to it exchanged as part of the negotiation for Access under in respect of, in relation to or in connection with this Undertaking, without the approval of the party who provided it, it, except where disclosure is in accordance with clause 3.4(c). If required by either party, the parties shall enter in appropriate confidentiality arrangements to reflect this obligation.

**Note:** It is unclear whether this is an additional requirement, this should be clarified. FreightCorp and Toll consider that it should be an additional requirement.

- (b) [Both ARTC and the Applicant will ensure that all Confidential Information provided by the other party is used only for the purposes for which the information was provided.]

**Note:** Rather than using this formulation the effect of which is uncertain, unless the party disclosing the information specifies the purpose as the time of disclosure, FreightCorp and Toll suggest the use of a definition of Permitted Purpose. See clause 3.4 (a).

- (c) Disclosure of Confidential Information may be made if: Clauses 3.4(a) and (b) shall not apply to disclosure of Confidential Information in any of the following circumstances

**Note:** FreightCorp and Toll do not consider that the obligation to use information only for the Permitted Purpose should be released in these circumstances - in both of the circumstances set out below disclosure only is relevant.

- (i) ~~any disclosure~~ required by law, but only to the extent so required, the listing requirements of a stock exchange or the lawful requirements of any Authority ;

- (ii) disclosure it is made to recipient's advisers under a duty of confidentiality

**Note:** To whom is the duty to be owed?

- (iii) ~~where~~ such Confidential Information was obtained lawfully from a third party without restriction on use or disclosure~~↓~~

**Note:** Information of this kind could not be Confidential Information in the first place, and therefore will not be subject to clause 3.4(a). This is dealt with in the suggested definition of Confidential Information.

- (iv) reasonably necessary to be disclosed by the Applicant to customers or potential customers in the course of and for the purpose of furthering its business.

**Commentary:** This is consistent with the approach of the QCA in the QCA's Draft Decision. (See Chapter 3.4, Volume 2, p. 110.)

### 3.5 Access Application

**Commentary:** Note the comments in the body of the submission addressing the potential time that the process may take, and suggestions for foreshortening the time.

- (a) Requests for Access are to be submitted to ARTC in the form of an Access Application.
- (b) In order for ARTC to consider the requests for Access, the information set out in Schedule B must accompany the Access Application.
- (c) Prior to submitting the Access Application, the Applicant may seek initial meetings with ARTC to discuss the Access Application and to seek clarification of the process as outlined in this Undertaking and in particular, the information requirements set out in Schedule B.

**Commentary:** Note the comments in the body of the submission.

### 3.6 Acknowledgment

- (a) Upon receiving an Access Application from an Applicant, ARTC must acknowledge receipt of the Access Application in writing (or electronically) to the Applicant within five (5) Business Days of its receipt, or such longer period as specified in accordance with clause 3.6(b).
- (b) Prior to acknowledging the Access Application, ARTC may seek:
  - (i) additional information where ARTC can reasonably demonstrate the need for such information for the purpose of preparing an Indicative Access Proposal; or
  - (ii) clarification of the information that has been provided in the Access Application.

In such circumstances, ARTC will advise the Applicant of the additional information or the clarification required within five (5) Business Days of receipt of the Access Application.

Upon receiving the required information or clarification from the Applicant, ARTC must provide written acknowledgment of the receipt of the completed Access Application within five (5) Business Days.



### 3.7 Indicative Access Proposal

- (a) Subject to clause 3.7(b), ARTC will use reasonable efforts to provide the Indicative Access Proposal to the Applicant within thirty (30) Business Days of the acknowledgment given under clause 3.6.
- (b) In assessing an Access Application, ARTC may consider that, due to the complexity of the Access Application or due to other extenuating circumstances, it is not reasonable for it to provide an Indicative Access Proposal within the thirty (30) Business Days referred to in clause 3.7(a). In these circumstances, ARTC will advise of such in its acknowledgment and within a further five (5) Business Days will advise the Applicant of its estimate of the time required to deliver the Indicative Access Proposal. Where the Applicant is of the view that the time estimated for preparation of the Indicative Access Proposal under this clause 3.7(b) is excessive, then the Applicant may refer the matter to the arbitrator for a determination in accordance with clause 3.11. ARTC will use reasonable efforts to provide the Indicative Access Proposal within the estimated time period provided by ARTC or as otherwise determined by the arbitrator pursuant to that clause.
- (c) The Indicative Access Proposal will set out, amongst other things:

- (i) the results of a Capacity Analysis determining whether there is sufficient Available Capacity to accommodate the requested Access Rights or, **[Note: This is not defined. It would be helpful if it were defined] if there is not, suggestions as to Access Rights that can be accommodated;**

**Note:** Access Rights is not defined

**Note:** FreightCorp and Toll note that clause 3.7(f) anticipates something similar but note, critically, that clause 3.7(f) does not provide a clear statement as to when the IAP offering alternative access must be provided.

- (ii) in the event the Access Application requires the Applicant to have recourse to Additional Capacity, an outline of the works and an indicative estimate of the cost of such works required to provide the Additional Capacity or an outline of the requirements for an investigation into the provision of Additional Capacity for the requested Access Rights;

**Commentary:** In respect of both Available Capacity and Additional Capacity, FreightCorp and Toll consider that greater definition is required - see clause 8.1 below.

- (iii) advice in respect of the existence of other operators who have submitted an Access Application (where negotiations are continuing in accordance with this Undertaking) in respect of Access which, if it were to be provided, would limit the ability of ARTC to provide Access in accordance with the Indicative Access Proposal;

**Commentary:** Leaving to one side the matter of principle of whether there should be an auction process, there is an issue as to how this provision is intended to interrelate with the confidentiality provisions. FreightCorp and Toll consider that it would be helpful for the Undertaking to make it clear that the existence only, neither the identity of other operators nor the Access sought be them, should be disclosed.

- (iv) a copy of ARTC's standard terms and conditions of Access;

**Note:** Are these intended to be the same as the Indicative Access Agreement or different? Are these terms and conditions of Access the same as the standard Access Agreement referred to in clause 2.6(b)(vi)? Further, consistent with comments contained in the body of the submission, may these standard terms and conditions be different from the Indicative Access Agreement? (This is important because time should not be wasted by the provision of standard terms and conditions of Access that are different from the Indicative Access Agreement or inconsistent with Schedule C.) This question is not answered by reference to clause 3.10(b) which relates to the final form of the Access Agreement, not the first or any intervening draft of it.

- (v) an initial estimate of the Charges for the Access Rights, based on the pricing principles set out in Part 4;
- (vi) details of the additional information **(if any)** required for ARTC to progress the proposal and further develop the Charges and terms and conditions for acceptance.

**Note:** Do we want to make the point that no other further information should be required?; and

- (vii) the indicative Train Path availability.
- (d) The Indicative Access Proposal will, unless it contains specific provisions to the contrary, contain indicative arrangements only and does not oblige ARTC to provide Access in accordance with specific terms and conditions, including Charges, contained within it.

**Commentary:** Note the comments made in the body of the submission.

- (e) If, after thirty (30) Business Days following ARTC's acknowledgment of the Access Application, or if applicable, after expiration of the time estimated by ARTC or determined by the arbitrator in accordance with clause 3.7(b), the Applicant believes that ARTC is not making reasonable progress in the preparation of the proposal, then the Applicant may refer the matter to the arbitrator for a determination in accordance with clause 3.11(f) In the event that ARTC is unable to provide an Indicative Access Proposal based on the Access Application, ARTC will, if possible, submit to the Applicant an Indicative Access Proposal offering alternative Access which it reasonably believes may meet the Applicant's Access requirements.

**Commentary:** Note the comments made in the body of the submission.

- (f) In the event that ARTC is unable to provide an Indicative Access Proposal based on the Access Application, ARTC will, if possible, submit to the Applicant an Indicative Access Proposal offering alternative Access which it reasonably believes may meet the Applicant's Access requirements.

**Commentary:** FreightCorp and Toll note that there is no statement as to when, temporally, this clause applies or whether it is intended to apply for the time being.

### 3.8 Negotiation

- (a) If the Applicant intends to progress its Access Application under the negotiation process set out in this Undertaking on the basis of the arrangements outlined in the Indicative Access Proposal, the Applicant must notify ARTC of its intention to do so within thirty (30) Business Days of the date it receives the Indicative Access Proposal (or such other period of time that the parties agree). In the event that a notification is given after this period of time, ARTC will review the Indicative Access Proposal and, if considered necessary by ARTC, prepare a revised Indicative Access Proposal in accordance with clause 3.7 and the negotiation process outlined in this Part 3 will recommence from that point.
- (b) If the Applicant is of the view that the Indicative Access Proposal has not been prepared in accordance with this Undertaking and would therefore not be an appropriate basis for continuing with the negotiation process under this Undertaking, then the Applicant shall notify ARTC of its concerns within thirty (30) Business Days of the date of receipt of the Indicative Access Proposal.
- (c) ARTC will respond to these concerns including, where appropriate, the making of revisions to the Indicative Access Proposal, within a reasonable time frame. If the Applicant is satisfied with the response received from ARTC, including any revision to the Indicative Access Proposal, it must notify ARTC of its intention to proceed with negotiations within thirty (30) Business Days of receiving ARTC's response.
- (d) If the Applicant is not satisfied with the response from ARTC, including any revision to the Indicative Access Proposal, the Applicant may seek to resolve the dispute in accordance with the dispute resolution process outlined in clause 3.11. The Applicant must commence this dispute resolution process within thirty (30) Business Days of receiving ARTC's response.

**Commentary:** Note the comments in the body of the submission.

### 3.9 Negotiation Process

- (a) If the Applicant indicates its willingness to progress negotiations under clause 3.8, then both parties shall commence negotiations as soon as reasonably possible to progress towards an Access Agreement.

**Commentary:** Consistent with points made elsewhere, both in this annotated copy of the Undertaking and the body of the submission, FreightCorp and Toll consider that it would be helpful if the Undertaking stated which document ARTC and the Applicant are to start to negotiate. Are the standard terms and conditions of Access (referred to in clause 3.7(c)) to be the starting point?

- (b) The negotiation period shall commence upon the Applicant providing a notification pursuant to clause 3.8 and shall cease upon any of the following events:
  - (i) execution of an Access Agreement in respect of Access sought by the Applicant;
  - (ii) written notification by the Applicant that it no longer wishes to proceed with its Access Application;

- (iii) a reduction in Available Capacity as a consequence of another operator finalising an Access Agreement where that reduction in Available Capacity impacts upon ARTC's ability to offer Access to the Applicant under the terms of the Indicative Access Proposal;

**Note:** Does this mean that the Applicant has to start the process again?

- (iv) the expiration of three (3) months from the commencement of the negotiation period, or if both parties agree to extend the negotiation period, the expiration of the agreed extended period;
- (v) if ARTC is of the view that the negotiations are not progressing in good faith towards the development of an Access Agreement within a reasonable time period and ARTC refers the matter to the arbitrator under clause 3.11 for a determination on this issue and such determination is found in ARTC's favour;  
or

**Note:** Given the comment in the Submission, this is inappropriate.

- (vi) ARTC receives evidence confirming that the Applicant no longer satisfies the prudential requirements of clause 3.4(d).

**Commentary:** Note the comments in the body of the submission. If those comments are accepted this clause should be amended to reflect that the obligation to negotiate ceases if notice referred to in clause 3.9(b)(ii) is given, and possibly, subject to acceptance of what the QCA suggests in the QCA Draft Decision 3.9(b)(vi) but not otherwise.

- (c) [Upon cessation of the negotiation period, ARTC will be entitled to cease negotiations with the Applicant.]

**Note:** If the amendment suggested above is made, this clause is no longer required.

**Commentary:** Note the comment made in the body of the submission.

- (d) In circumstances where two or more Applicants are seeking mutually exclusive Access Rights:
  - (i) each Applicant will be so notified as soon as practicable after the relevant conflict arises;
  - (ii) Access will be granted to the Applicant who accepts an Access Agreement with ARTC which, in the opinion of ARTC, is most favourable to it. Ordinarily, but without limiting ARTC's discretion in this regard, ARTC would make such a decision based on the Access Agreement that represented the highest present value of future returns to ARTC after considering all risks associated with the Access Agreement.

Failure by ARTC to provide such notification shall not constitute a breach of the Undertaking where such failure was not willful and ARTC acted in good faith.

**Commentary:** Note the comment made in the body of the submission.

- (e) If, at any time during the negotiation period, a dispute arises between the parties which, after reasonable negotiation.

**Note:** Is this intended to help define “good faith” or is it intended to be in addition to the implied “obligation” of the Applicant to negotiate in good faith if it wants to be able to proceed to arbitration], the parties are unable to resolve to their mutual satisfaction, then either party may seek to resolve the dispute in accordance with the dispute resolution process outlined in clause 3.11.

**Commentary:** Note the comment made in the body of the submission.

### 3.10 Access Agreement

- (a) The granting of Access will be [finalised] ~~effected~~.

**Note:** This implies that the granting of access involves something before finalisation. FreightCorp and Toll suggest the use of “effected”

by the execution of an Access Agreement.

The parties to the Access Agreement will be ARTC and:

- (i) If the Applicant is an Accredited Operator, that Applicant; or
- (ii) If the Applicant is not an Accredited Operator, that Applicant or the Accredited Operator or both (as the case may be).
- (b) The Access Agreement must, unless otherwise agreed between ARTC and the Applicant, be consistent with the principles outlined in the indicative Access Agreement and must address at least the matters set out in Schedule C. The details of Schedule C do not provide an exhaustive list of the issues that may be included in an Access Agreement.

**Commentary:** Note the comments in the body of the submission.

- (c) Once the Applicant has notified ARTC that it is satisfied with the terms and conditions of the Access Agreement as drafted, ARTC will, as soon as reasonably practicable, provide a final Access Agreement (or, if applicable, an amendment to an existing Access Agreement) to the Applicant for execution.

**Note:** FreightCorp and Toll question the need for this provision other than to impose the temporal obligation on ARTC.

- (d) The parties will use reasonable endeavours to [duly].

**Note:** FreightCorp and Toll note that this implies a qualification to due execution of the Access Agreement. FreightCorp and Toll note that this is in all probability unintentional.

execute the final Access Agreement as soon as practicable after its completion by ARTC.

### 3.11 Dispute Resolution

#### 3.11.1 Disputes

- (a) If any dispute arises under this Undertaking or in relation to the negotiation of Access between an Applicant and ARTC (“**Dispute**”) then, unless otherwise expressly agreed to the contrary by both parties, such dispute shall be resolved in accordance with this clause 3.11 and either party may give to the other party to the Dispute notice in writing (“**Dispute Notice**”) specifying the Dispute and requiring it to be dealt with in the manner set out in this clause 3.11.
- (b) Disputes in relation to an Access Agreement once executed shall be dealt with in accordance with the provisions of that Access Agreement and are not dealt with under this Undertaking.

#### 3.11.2 Negotiation

Within seven (7) days of a party notifying the other party to the Dispute of the Dispute, senior representatives from each party must meet and use reasonable endeavours acting in good faith to resolve the dispute by joint discussions.

**Commentary:** Note the comments in the body of the submission.

#### 3.11.3 Mediation

- (a) Unless otherwise agreed by both parties, if the Dispute is not resolved under clause 3.11.2 within twenty one (21) days after notification, the Dispute will be referred to the chief executive officers of both parties who will attempt to resolve the dispute, including by informal mediation.
- (b) If the Dispute is not resolved within fourteen (14) days after being referred to the chief executive officers under clause 3.11.3(a), the Dispute will be referred to formal mediation in South Australia to be mediated by a single mediator appointed by agreement of the parties or if they fail to agree within fourteen (14) days, a mediator appointed by the President of the Law Society of South Australia acting on the request of either party.
- (c) Unless the parties agree otherwise:
  - (i) the mediation shall be conducted by a mediator under the “Guidelines for Legal Practitioners Acting as Mediators” of the Law Society of South Australia (whether or not the mediator is a legal practitioner);
  - (ii) the parties may appoint a person, including a legally qualified person to represent it or assist it in the mediation;
  - (iii) each party will bear their own costs relating to the preparation for and attendance at the mediation; and
  - (iv) the costs of the mediator will be borne equally by the parties.

**Commentary:** Note the comments in the body of the submission.

3.11.4 Arbitration

- (a) If the Dispute is not resolved within one (1) month of the appointment of the mediator under clause 3.11.3, either party may by notice in writing to the other terminate the mediation proceedings and refer the dispute to be determined by arbitration under this clause 3.11.4.

**Commentary:** Note the comments made in the body of the submission

- (b) Where a Dispute is referred to arbitration under this clause 3.~~10~~<sup>11</sup>.4, the following shall apply:

- (i) The parties shall appoint an arbitrator, or where the parties cannot reach agreement within fourteen (14) days, by the President of the Institute of Commercial Arbitrators.
- (ii) The arbitrator so appointed shall have no interest or duty, direct or indirect, which conflicts or may conflict with his or her functions as an arbitrator, he or she being required to disclose fully any such interest or duty both before and after his or her appointment. If an individual discloses any such interest or duty prior to appointment as arbitrator, that individual may not be appointed as an arbitrator. If an individual discloses or it is discovered to have any such interest after his appointment that individual may not continue to act as arbitrator. It follows from the above that no employee of the Applicant, ARTC or a Related Party of either of them, may be appointed as an arbitrator.
- (iii) The arbitration will be conducted in accordance with the Commercial Arbitration Act 1986 (SA) except that:
- (A) the arbitrator must observe the rules of natural justice but is not required to observe the rules of evidence;
- (B) the parties may appoint a person, including a legally qualified person, to represent it or assist it in the arbitration;
- (C) the arbitrator does not have the power conferred by section 25 of the Commercial Arbitration Act 1986;
- (D) the arbitrator must include in the arbitration award the findings on material questions of law and fact, including references to evidence on which the findings of fact were based;
- (E) the arbitrator shall be required to undertake to keep confidential all matters coming to his or her knowledge by reason of the appointment and performance of his or her duties.

**Commentary:** Note the comments made in the body of the Submission. If the comments are accepted this clause will need to be reworked, in particular clause 3.11.4(b).

- (iv) The arbitrator will when conducting the arbitration:
- (A) proceed as quickly as is possible and consistent with a fair and proper assessment of the matter;

- (B) while having the right to decide on the form of presentations, encourage a written presentation by each party with exchange and with rebuttal opportunities and questioning by the arbitrator;
- (C) call on any party the arbitrator believes necessary to give evidence;
- (D) decide how to receive evidence and consider the need to keep evidence confidential and the need to protect the confidentiality of the arbitration process;
- (E) present his or her award in a draft form to the parties and hear argument from the parties before making a final award; and
- (F) hand down a final award in writing which includes all his or her reasons for making the award.

**Commentary:** Note the comments made in the body of the submission, in particular the suggestion for the process to be adopted by the arbitrator.

- (v) The arbitrator may at any time terminate an arbitration (without making an award) if it thinks that:
  - (A) the notification of the Dispute is vexatious;
  - (B) the subject matter of the Dispute is trivial, misconceived or lacking in substance; or
  - (C) the party who notified the Dispute has not engaged in negotiations in good faith.

- (vi) In deciding a dispute the arbitrator must take into account:

- (A) the principles, methodologies and provisions set out in this Undertaking;

**Note:** There is an issue as to what this is intended to relate. FreightCorp and Toll are concerned to ensure that there is certainty and clarity as to which parts of this Undertaking are relevant for these purposes.

- (B) the objectives and principles enunciated in Part IIIA of the TPA and the Competition Principles Agreement;

**Note:** Consistent with comments made in respect of clause 1.2(e), there is an issue as to whether reference to the entirety of Part IIIA, or the CPA at all, is appropriate.

- (C) ARTC's legitimate business interests and investment in the Network;
- (D) all costs that ARTC incurs in providing Access, including any costs of extending the Network, but not costs associated with losses arising from increased competition in upstream or downstream markets;



**Commentary:** Three issues arise: [FRC and Toll to review]

First, “Access” refers to access by all those entitled. The possible practical effect of this needs to be understood.

Secondly, it is not clear how “extension” in this context appears to be a matter covered by the Undertaking, yet clause 2.1(c) of the Undertaking provides that “... this Undertaking does not extend to any extensions to the Network ...”. This is incongruous.

Thirdly, and the author has to confess to struggling on this - on what basis could ARTC incur costs associated with losses arising upstream or downstream?

- (E) the economic value to ARTC of any additional investment that the Applicant or ARTC has agreed to undertake;

**Commentary:** There is an issue as to what this is intended to relate to.

- (F) the interests of all persons holding contracts for use of the Network;

**Commentary:** There is an issue as to whether the legitimate interests of the Applicant should be taken in account. On balance this is probably appropriate. There is precedent for this. Section 120 (1)(b) of the Queensland Competition Act 1997 requires the “legitimate business interests of persons who have, or may acquire, rights ...” to be taken into account.

- (G) the [firm and] binding contractual obligations of ARTC or other persons (or both) already using the Network.

**Note:** Firm contractual obligations is not a legal term of art, binding contractual obligations is.

**Note:** Clarification is sought as to which obligations or other persons may be relevant.

- (H) the operational and technical requirements necessary for the safe and reliable operation of the Network;
- (I) the economically efficient operation of the Network;
- (J) the benefit to the public from having competitive markets;
- (K) any other matters that the arbitrator thinks are appropriate to have regard to.

**Commentary:** Note the comments made in the body of the submission, in particular the decisions that the arbitrator may make and that the Applicant has a period of time within which to accept the decision and enter in to an Access Agreement.

- (vii) In the absence of manifest error, the decision of the arbitrator shall be final and binding on the parties. If a party believes that there has been a manifest error, it may refer the matter to the ACCC for a determination. If the ACCC determines that there has been a manifest error, then the parties may agree to refer the Dispute to another arbitrator in accordance with clause 3.11.4, or failing

agreement, either party may refer the Dispute to the ACCC for resolution in accordance with clause 3.11.5.

**Note:** Given the comments in the body of the submission there is an issue as to whether this process is appropriate.

- (viii) The costs of the arbitrator and any advisers shall be borne by the parties in such proportions as determined by the arbitrator.

### 3.11.5 Determination by the ACCC

- (a) [If a Dispute is referred to the ACCC in accordance with clause 3.11.4, then Division 3 of Part IIIA of the TPA shall apply subject to any determination by the ACCC being consistent with the provisions of this Undertaking.
- (b) Except in the circumstances described in clause 3.11.4(b)(vii), if an Applicant does not comply with a decision of an arbitrator pursuant to clause 3.11.4, then such Applicant will not be entitled to refer that Dispute to the ACCC and ARTC will no longer be obliged to continue negotiations regarding the provision of Access for that Applicant.
- (c) If an Applicant does not comply with a decision of the ACCC pursuant to this clause 3.11.5, then ARTC will no longer be obligated to continue negotiations regarding the provision of Access for that Applicant.
- (d) In making its determination, the ACCC:
  - (i) may deal with any matters referred to in section 44V of the TPA;
  - (ii) must not make a determination that would have any of the effects described in section 44W of the TPA;
  - (iii) must take into account the matters referred to in section 44X of the TPA;
  - (iv) comply with the procedures described in Subdivision D of Part IIIA of the Act.

**Note:** Consistent with what is stated above, and in the body of the submission there is an issue as to whether this process is appropriate.

**Commentary:** Given the comments in the body of the submission, there is an issue as to the inclusion of clause 3.11.5.

## PART 4

### 4 PRICING PRINCIPLES

#### 4.1 Objectives

ARTC will develop its Charges with a view to achieving the objective set out in clause 1.2(c). As part of achieving that objective, ARTC has a legitimate business interest in recovering all of its reasonable costs associated with granting Access to the Network

**Note:** FreightCorp and Toll consider that it would be helpful to understand in general terms which costs ARTC is referring to.

and obtaining a fair and reasonable return on ARTC's investment in the Network (including maintenance costs) [commensurate with its risk and its competitive environment]

**Note:** The meaning of the words placed in square brackets is uncertain and unclear.

The Charges are also developed with a view to stimulating customer confidence and market growth in the rail industry and also promote efficient use and investment in the Network.

**Commentary:** FreightCorp and Toll question whether this clause adds anything, but given clause 3.11.4(b)(vi)(A) if the clause is to be included it is important that it is clear.

#### 4.2 Charge Differentiation

In formulating its Charges, ARTC will have regard to a range of factors which impact on its business including, but not limited to, the following:

- (a) the particular characteristics of the relevant Service, which without limitation include, axle load, speed, wheel diameter, Train length, origin and destination (including number and length of intermediate stops) departure and arrival times and days of the week;

**Note:** FRC and Toll to consider whether these matters should be relevant.

- (b) the Indicative Access Charges set out in clause 4.6;
- (c) the [commercial impact] on ARTC's business, which without limitation includes factors such as:

**Note:** As noted elsewhere in comments on this Undertaking, the use of the word commercial gives rise to uncertainty.

- (i) the proposed term of the Access Agreement;

**Note:** The term does not come into existence until the Access Agreement is executed, the Access Agreement will not be executed until the Charges are agreed.

- (ii) [the potential for growth of the business;]

**Note:** There are fundamental issues as to what this is intended to mean or might mean in practice.

- (iii) [the opportunity costs to ARTC;]

**Note:** There are fundamental issues as to what this is intended to mean or might mean in practice.

- (iv) [the consumption of ARTC's resources;]

**Note:** There are fundamental issues as to what this intended to mean or might mean in practice.

- (v) [the credit risk associated with the business;]

**Note:** There are fundamental issues as to what this is intended to mean or might mean in practice.

- (vi) [the market value of the Train Path sought;]

**Note:** How is it intended that market value will be determined?

- (vii) [the segments of the Network relevant to the Access being sought]; and

**Note:** Is this a quantitative or a qualitative assessment? This needs to be clarified before full comment if possible

- (viii) [previously negotiated Charges agreed under the terms of this Undertaking, where relevant, as published by ARTC as set out in clause 2.6(b)]

**Note:** It is unclear why this is relevant as such given other provisions, ie is this relevant for the purposes of clause 4.3 or in all circumstances? Also this raises the issue of the information that ARTC will publish. FreightCorp and Toll note that for clause 4.3 to work publication is necessary.

- (d) [logistical impacts on ARTC's business which without limitation include:

- (i) the impact on other Services and risk of failure of the Operator to perform;
- (ii) reduced Capacity and system flexibility.]

**Note:** There are fundamental issues as to what this is intended to mean or might mean in practice.

- (e) capital or other contributions by the Applicant to ARTC's costs; and
- (f) the cost of any Additional Capacity.

#### 4.3 Limits on Charge Differentiations

- (a) In formulating its Charges, ARTC will not have regard to:

- (i) the identity or characteristics of the Applicant; and
- (ii) whether or not the Applicant is a Government Authority.

**Note:** The non-differentiation provisions relate only to Charging. Discrimination may result from differential treatment on other terms.

- (b) In formulating its Charges, ARTC will not differentiate between Applicants in circumstances where:
- (i) the characteristics of the Services are [alike]

**Note:** FreightCorp and Toll consider that it is important for there to be a clear understanding of what factors will be taken into account in determining whether Services are alike, and that they must go beyond the items listed below to relate to the terms agreed in other areas of key risk allocation; and

- (ii) [the Applicants are operating within the same end market]

**Note:** There is a threshold issue as to whether the non-differentiation obligation should be qualified in this way, there is also an issue as to what this means. This needs to be resolved is a matter of principle before the practical issues of how a provision of this kind might work in practice.

For the purposes of this clause, ARTC shall determine whether the characteristics of two Services are alike having regard to matters including but without limitation location, duration and quality of the Train Path, nature of Train consist, characteristics of the Service, longevity of Access, arrival and departure times of the day and week.

**Commentary:** As noted above, there is an issue as to the matters to be taken into account in determining whether there is differentiation, and whether the obligation not to differentiate should relate to other terms. FreightCorp and Toll consider that other matters and terms are relevant. As a general principle, any differentiation should be consistent and transparent. It may be helpful for this principle to be stated.

#### 4.4 Revenue Limits

- (a) Notwithstanding any other clause within this Part 4, the Charges formulated by ARTC for the Services will be such that the revenue generated by ARTC for the Segment or group of Segments (applicable to the Service as the case may be) will:
- (i) not be lower than the Floor Limit (unless otherwise agreed by ARTC); and
- (ii) not be higher than the Ceiling Limit (unless otherwise agreed by the Applicant).
- (b) The Floor Limit means the Charges which, if applied to all Operators on a Segment or a group of Segments, would generate revenue for ARTC sufficient to cover the incremental cost of that Segment or group of Segments. For the purpose of this clause, incremental costs means the costs that could have been avoided if a Segment was removed from the Network excluding Depreciation and a return on assets employed, such return being an amount determined by applying to WACC to the DORC associated with the assets.
- (c) The Ceiling Limit means the Charges which, if applied to all operators of a segment or a group of segments would generate revenue for ARTC sufficient to cover the Economic Cost of that segment or group of segments.
- (d) In calculating the Economic Cost for the purposes of the Ceiling Limit, the Network and Associated Facilities will be:
- (i) valued using the depreciated optimised replacement cost method of valuing assets (“**DORC**”);

- (ii) revalued annually by CPI;

**Note:** As noted in Annexure 1, FreightCorp and Toll have a fundamental issue with CPI escalation

and

revalued every five (5) years by estimating the depreciated optimised replacement cost.

**Note:** Given that the Term is five years there is a question as to whether this clause is required. The only circumstances in which it will be required is if the revaluation is to take place within the Term. This should be clarified.

For the purpose of this clause, the optimised replacement cost means the cost of replacement by commercially efficient application of best known currently available technology based on reasonably forecasted demand characteristics for the asset.

- (e) For the purposes of this Part 4, Economic Cost means:
  - (i) costs specific to a Segment;
  - (ii) the costs of Additional Capacity;
  - (iii) Depreciation;
  - (iv) Return on Segment specific assets; and
  - (v) an allocation of non-Segment specific costs including Train control, Depreciation and a Return on non-Segment specific assets and other overheads of ARTC.
- (f) For the purposes of clause 4.4(e), non-Segment specific costs will be allocated to Segments in proportion to:
  - (i) gtkm with respect to 60% of the track maintenance cost;
  - (ii) track kilometres with respect to 40% of the track maintenance cost; and
  - (iii) Train kilometres with respect to all other costs.

Where possible, costs will be directly attributable to a Segment. All costs shall comprise ARTC's reasonably anticipated costs over a reasonable future timeframe.

- (g) The Rate of Return for the purposes of this Part shall be equivalent to ARTC's weighted average cost of capital ("**WACC**") after consideration of all risks with the commercial environment in which ARTC operates, the elements of which shall comprise:
  - (i) a capital asset pricing model ("**CAPM**") method of determining the cost of equity;
  - (ii) a debt to equity ratio which would be considered prudent for ARTC by reputable lenders; and
  - (iii) an appropriate adjustment (beta) factor to the equity risk margin appropriate for investment in railway infrastructure.

#### 4.5 Structure of Charges

- (a) Access charges will comprise:
- (i) a variable component, which is a function of distance and gross mass (\$/gtkm); and
  - (ii) a flagfall component, which is fixed and specific to each Train service type and Segment (\$/km).
- (b) Except as otherwise provided in the Access Agreement, the flagfall component of the Charges is levied from the date the Train Path vests in the Operator until the expiry of that Train Path irrespective of whether such Train Path is utilised.
- (c) Notwithstanding the structure described above, both elements of the Charge are open to negotiation.

**Commentary:** FreightCorp and Toll wish to emphasise the importance of condition of the Network (see paragraph 4 of the comment on Schedule C) and consider that greater definition is needed of the quality of service by reference to which the Indicative Access Charge is determined.

#### 4.6 Indicative Access Charge

- (a) As part of this Undertaking, ARTC will offer the Indicative Access Charges described in clause 4.6(b) below for Applicants seeking Access for a Service with the following characteristics:
- (i) axle load of 21 tonnes;
  - (ii) maximum speed of 110 km/h and average speed of 80km/h; and
  - (iii) length not exceeding Adelaide 1500 metres east of Adelaide and 1800 metres west of Adelaide.
- (b) The Indicative Access Charge will be the sum of the flagfall and variable components as follows:

| Segment                     | Variable<br>\$/gkkm | Flagfall<br>\$/km |
|-----------------------------|---------------------|-------------------|
| Adelaide – Parkeston        | 2.056               | 2.605             |
| Crystal Brook – Broken Hill | 2.325               | 1.642             |
| Port Augusta – Whyalla      | 3.633               | 1.644             |
| Adelaide – Pelican Point    | 3.234               | 1.917             |
| Adelaide – Melbourne        | 2.365               | 1.766             |
| Melbourne – Albury          | 2.156               | 1.527             |

- (c) The Indicative Access Charges may be varied annually by ARTC. If a variation is to occur, the Indicative Access Charges will be varied by multiplying them by the greater of:
- (i) CPI less 2%; or

- (ii) 2/3 thirds of CPI.

Such variations, if made, will be effective as from 1 July in each year the variation occurs.

**Note:** As noted above, FreightCorp and Toll have a fundamental issue with CPI escalation. Further, FreightCorp and Toll note that through discussion at IROG meetings with ARCT that any CPI would be a “lesser of” formulation.



## PART 5

### 5 MANAGEMENT OF CAPACITY

#### 5.1 Capacity Analysis

- (a) [A Capacity Analysis will be undertaken by ARTC as part of the preparation of the Indicative Access Proposal. The Capacity Analysis will identify whether there is sufficient Available Capacity to meet the Applicant's requirements and, if not, the extent to which Additional Capacity is required.
- (b) Where it is believed that there are major impediments to the provision of Additional Capacity to meet the requirements of the Applicant, and that the Capacity enhancement that might be necessary would have a significant bearing on the economics of the proposed operation, the Capacity Analysis may be done in more detail which may require more time for the preparation of the Indicative Access Proposal (see clause 3.7(b)).
- (c) The finalisation of the Capacity Analysis will enable the finalisation of the resultant Capacity Entitlement, Train Paths, Charges and terms and conditions of the resultant Access Agreement.]

**Commentary:** Consistent with comments made in the submission, FreightCorp and Toll consider that the basis of analysis should be publicly available, and information necessary to enable each Applicant to undertake its own analysis.

#### 5.2 Capacity Allocation

- (a) [Subject to clause 5.2(b), Access Rights will be allocated to the first Customer with whom ARTC can negotiate and execute an Access Agreement which, in the opinion of ARTC, is most favourable to it.
- (b) As previously stated in this Undertaking, if, at any time, two or more Applicants are seeking access with respect to mutually exclusive Access Rights, each of the Applicants who have received an Indicative Access Proposal with respect to those mutually exclusive Access Rights will be so advised. In such circumstances, ARTC is entitled to seek to finalise an Access Agreement in respect of such Access with the Applicant with whom ARTC can agree terms and conditions, including Charges, which are considered in the opinion of ARTC, to be most favourable to it. Ordinarily, but without limiting ARTC's discretion in this regard, ARTC would make such a decision based on the Access Agreement that represented the highest present value of future returns to ARTC after considering all risks associated with the Access Agreement. Failure to give notification in accordance with this clause 5.2(b) will not constitute default under this Undertaking or invalidate or prejudice any Access Agreement which may have been entered into by ARTC provided such failure was not willful and ARTC has acted in good faith.]

**Commentary:** FreightCorp and Toll restate their comments, in the body of the submission and elsewhere in the Undertaking, on the "auction" process.

#### 5.3 Capacity Transfer

- (a) Where a Customer has under-utilised its Capacity Entitlement granted to it under the Access Agreement, the terms of the Access Agreement will provide that ARTC may reduce such Train Paths by removing particular Train Paths. Any decision by ARTC in this regard is subject to the dispute resolution provision in the Access Agreement.

- (b) A Customer may also reduce its Capacity Entitlement by cancelling Train Paths in accordance with the terms of the Access Agreement.

**Commentary:** FreightCorp and Toll consider that this clause needs to be amended to reflect the comments made in the body of the submission in respect of Schedule C.

- (c) Train Paths may be assigned by a Customer to a third party with the approval from ARTC in accordance with the assignment provisions of that Access Agreement.

## PART 6

### 6 NETWORK CONNECTIONS AND ADDITIONS

#### 6.1 Network Connections

In the event that other owners of track wish to connect such track to the Network, ARTC will consent to such a connection provided:

- (a) all relevant approvals from all relevant Government Authority have been obtained;
- (b) the configuration of the connection to the Network is such that the connection will not, by virtue of its existence, reduce Capacity;
- (c) procedural and physical interface arrangements are in compliance with ARTC's existing interface arrangements and there is no impact on the safety of all users of the Network;
- (d) the other track owners ensures that all users of such track comply with the directions of ARTC's Train controllers regarding entry to and exit from the Network;
- (e) the connection meets ARTC's engineering and operational standards; and
- (f) the other track owners meet the initial and continued costs associated with constructing and maintaining the connection.

#### 6.2 Additional Capacity

- (a) As indicated in clauses 3.7 and 5.1, ARTC will consider as part of the negotiation process, any requests by Applicants for Additional Capacity. ARTC will consent to the provision of Additional Capacity if:
  - (i) in ARTC's opinion, such provision is [commercially viable] to ARTC having regard to the relevant Access Agreement and ARTC's [total business activity]; or
  - (ii) the Applicant agrees to meet the [cost] of the Additional Capacity; and
  - (iii) [the [extension] to the Network is, in the opinion of ARTC, technically and [economically feasible], consistent with the safe and reliable operation of the Network, will not impact on the safety of any user of the Network, does not reduce Capacity, meets ARTC's engineering and operational standards and does not compromise ARTC's legitimate business interests.]

**Commentary:** A number of issues arise. First, the use of "commercially viable" again gives rise to uncertainty. Secondly, there is a threshold issue of an Applicant being required to find the cost (presumably capital) of Additional Capacity on a straight pass-through basis; it will be the case that Additional Capacity will benefit all operators, present and future. To recover the capital cost of Additional Capacity from one operator is an odd approach. Thirdly, the use of "economically feasible" give rise to uncertainty.

- (b) In the event ARTC agrees to the creation of Additional Capacity, ARTC's costs of providing that Additional Capacity may be met by the Applicant:
  - (i) reimbursing the relevant costs as and when they are incurred by ARTC; or

- (ii) through increased Charges, or making other periodic payments, reimbursing ARTC for recurring costs, plus an annuity in advance calculated by application of WACC to ARTC's capital outlay.

**Commentary:** In addition to the comments made above, FreightCorp and Toll consider that costs should be recovered through Charges.

- (c) The option of increasing Charges or making periodic payments including an annuity as set out in clause 6.2(b)(ii) is only available to an Applicant if arrangements are made which satisfy ARTC that the risk of the Applicant failing to make such payments is commercially acceptable and is at ARTC's discretion.

**Commentary:** FreightCorp and Toll do not believe that this is appropriate. This is an issue that should be subject to negotiation with ARTC to seek security in negotiation if it is concerned about creditworthiness of the Applicant/Operator. If the issue is not agreed, it may be arbitrated ultimately.

- (d) Any Additional Capacity, once created, shall be owned and managed by ARTC.

## **PART 7**

### **7 NETWORK TRANSIT MANAGEMENT**

ARTC's objective in Train management is to exit Trains according to their contracted exit time. Where conflicts arise between Trains in transit, Train management will be conducted according to the Network Management Principles.

**Commentary:** Note the comments in the body of the submission in respect of Schedule F.

## PART 8

### 8 DEFINITIONS AND INTERPRETATION

8.1 The following terms shall have the meaning set out below unless the context otherwise requires:

“**Access**” means access to and use of the Network, or any part thereof, for the purpose of running a Service;

“**Access Agreement**” means an access agreement entered into between ARTC and the Customer, the current indicative terms and conditions of which are set out in Schedule D;

**Note:** As defined, it is not clear whether this includes contracts existing at the date of acceptance of this undertaking. This is important for the operation of subsequent definitions.

“**Access Application**” means ~~the~~ an application for Access as described in clause 3.4;

“**Accredited**” means in relation to an Operator, having accreditation as an operator under the Rail Safety Act of each State in which such Operator runs its Services on the Network;

“**Additional Capacity**” means additions to the Network or other [enhancement]

**Note:** Is “enhancement” intended to mean “increased”. Further, it is not clear how this differs from extensions

of Capacity;

**Commentary:** It follows from what is said elsewhere, that this definition needs to be more clearly drawn.

“**Applicant**” means the person seeking Access from ARTC and seeking to become a Customer;

“**Available Capacity**” means Capacity that is not Committed Capacity (including Committed Capacity in instances where it will cease being Committed Capacity prior to the time in respect of which Capacity is being assessed);

“**Associated Facilities**” means all associated track structures, over and under track structures, supports (including support for equipment or items associated with the use of the Network), tunnels, bridges, train control systems, signaling systems, communication systems and associated plant, machinery and equipment related to or connected with use of the Network;

**Commentary:** FRC and Toll to consider whether this should relate to outcomes

“**Business Day**” means a day which is not a Saturday, Sunday or public or bank holiday in the State of South Australia;

“**Capacity**” means the capability of the Network for Services, including Additional Capacity, after taking the account:

- (a) possessions of the Network reasonably required by ARTC for maintenance, repair or enhancements; and
- (b) the operation of work Trains.

“**Capacity Analysis**” means the assessment by ARTC as to the Available Capacity of the Network and whether or not there is sufficient Available Capacity to accept the Access Application and, if not, an assessment of the Additional Capacity required to accept the Access Application as described in Part 5;

“**Capacity Entitlement**” means the Capacity granted to the Operator under the Access Agreement in the form of Train Paths;

**Note:** It follows from the note on the definition of Access Agreement there is an issue as to whether this definition relates to capacity under contracts existing at the date of acceptance of this undertaking.

“**Ceiling Limit**” has the meaning described in clause 4.4(c);

“**Charges**” means the charges payable by the Operator to ARTC for the provision of Access under the Access Agreement;

“**Committed Capacity**” means that portion of the Capacity that is required to meet the Capacity Entitlement of Operators;

“**Competition Principles Agreement**” means the agreement entered into by the Commonwealth of Australia and each State and Territory of Australia in 1995 to implement the national competition policy of Australia;

“**Confidential Information**” means any ~~commercial sensitive~~ information or data in whatever form (as reasonably determined) given by one party to the other ~~together with information or data specifically marked confidential by a party when disclosed to the other other than information or data that:~~

- (i) is in the public domain;
- (ii) was in the lawful possession, without any duty of confidence or obligation as to use, of the relevant party prior to being given to it; or
- (iii) is given to the relevant party by a third party where that third party was not subject to any duty of confidence or any obligation as to use.

[“**CPI**” means the CPI All Groups, Weighted Average of Eight Capital Cities index number published by the Australian Bureau of Statistics;]

**Commentary:** It follows from what FreightCorp and Toll state above that this definition should be deleted.

“**Customer**” means an Applicant who has been granted Access and, where such Customer is also the Accredited Operator to operate the Trains relating to such Access, the expression “Customer” shall also mean “Operator”;

“**Depreciation**” means matching asset cost, valued by the depreciated optimised replacement cost method (“**DORC**”) on a straight line basis over the useful life of the asset;

“**Economic Cost**” means the cost described in clause 4.4(e);

“**Floor Limit**” has the meaning described in clause 4.4(b);

“**Government Authority**” means any Commonwealth, State or Local government department or other body exercising an executive, legislative, judicial or governmental function;

**“Indicative Access Charges”** mean the Access Charges described in clause 4.6 as varied from time to time;

**“Indicative Access Proposal”** means the preliminary Access proposal submitted by ARTC under clause 3.6;

**“kgtkm”** means a thousand gross tonnes multiplied by kilometres travelled;

**“Material Default”** any breach of a fundamental or essential term or repeated breaches of any of the terms of the agreements referred to in clause 3.2(d)(ii);

**Commentary:** It follows from what is said in relation to clause 3.2d(ii) that FreightCorp and Toll do not consider this definition is needed.

**“Network”** means the network of railway lines delineated of defined in Schedule E;

**“Network Management Principles”** means the principles set out in Schedule F;

**“Operator”** means the Accredited Operator that will operate the Trains in accordance with the Access Agreement;

**Permitted Purpose means the making of an Access Application, the consideration of an Access Application the development of an Indicative Access Proposal and negotiation of an Access Agreement.**

**“Rail Safety Acts”** means the Acts passed by the Commonwealth, the States and Northern Territory regarding rail safety as contemplated in the Intergovernmental Agreement;

**“Rate of Return”** has the meaning described in clause 4.4(g);

**“Related Party”** has the meaning given to Related Body Corporate in the Corporations Law;

**“Rolling Stock”** means a locomotive, carriage, wagons or other vehicle for use on a railway;

**“Segment”** means a component of the Network as defined in Schedule G and distinguished for the purposes of applying Charges and is the smallest component for which the Ceiling Limit and Floor Limits apply;

**“Services”** means a Train run by the Operator using the Network which provides railway freight or passenger services including work Trains;

**“Solvent”** means none of the following events have happened to the Applicant:

- (a) the Applicant is unable to pay all its debts as and when they become due or it has failed to comply with a statutory demand under section 459F(1) of the Corporations Law;.
- (b) a meeting is convened to place it in voluntary liquidation or to appoint an administrator **unless that resolution is withdrawn within 14 days or the resolution is not passed;**
- (c) an application is made to a court for it to be wound up and that application is not dismissed within one month;
- (d) the appointment of a controller (as defined in the Corporations Law) of any of its assets **if that appointment is not revoked within 14 days after it is made;** or



- (e) the Applicant proposes to enter into or enters into any form of arrangement with its creditors or any of them, including a deed of company arrangement.

**Commentary:** The changes reflect the findings of the QCA in the Draft Decision, and are included for information.

**“Term”** means the term of this Undertaking as described in clause 2.3;

**“TPA”** means the Trade Practices Act, 1974;

**“Train”** means a single unit of Rolling Stock or two or more units coupled together, at least one of which is a locomotive or other self-propelling unit;

**“Train Path”** means the entitlement of the Operator to use the Network between the times and between the locations as specified in an Access Agreement entered into between ARTC and the Operator (whether being scheduled or on an ad hoc basis);

**“Undertaking”** means this undertaking as amended from time to time in accordance with clause 2.4.

8.2 In this Undertaking unless the context otherwise requires:

- (a) singular words will also have their plural meaning and vice versa;
- (b) a reference to one gender includes all genders;
- (c) a reference to a person includes companies and associations;
- (d) a reference to a consent of a party means the prior written consent of that party;
- (e) headings are for convenient reference only and do not affect the interpretation of this Undertaking;
- (f) a reference to a clause or a Schedule is a reference to a clause or Schedule in this Undertaking;
- (g) a reference to a party includes its successors and permitted assigns;
- (h) notices that are required to be given in writing to ARTC may, if so agreed by ARTC, be provided in electronic form.

**SCHEDULE A**

(Access Application)

Any Electronic or written form is acceptable providing it clearly states:

“This is an application made in accordance with the ARTC Access Undertaking of [ *Date undertaking becomes effective* ]”.

## **SCHEDULE B**

### (Information to Accompany Access Application)

The Applicant shall furnish ARTC with the following information:

1. Applicants details including:
  - (a) Business Name of Applicant
  - (b) ACN and ABN of Applicant
  - (c) Business Address of Applicant
  - (d) Telephone contact details
  - (e) Fax contact details
  - (f) Email contact details
  - (g) Contact person for progression of Access Application
  
2. Access Requirements including:
  - (a) Required entry and exit locations to and from Network
  - (b) Frequency and times of entry and exit
  - (c) Term of access requirement including approximate commencement date
  - (d) Service category (maximum speed) of train or if not applicable alternative proposed train characteristics for path schedule required
  - (e) Maximum intended axle load of Service
  - (f) Physical Length of Service in metres
  
3. Details of all Rolling Stock and vehicles to be used.

|   |
|---|
| <b>Commentary:</b> Note the comments made in the body of the submission |
|---|

## SCHEDULE C

### (Essential Elements of Access Agreement)

- non-exclusive access to Network and use of Associated Facilities;
- contracted Train Paths subject to the matters outside ARTC's control, safety and Network Management Principles;
- each party warranting the accuracy of information provided;
- Customers paying an access charge based on flagfall and gtkm;
- charges varying annually by greater of 2/3 CPI or CPI minus 2%;
- payment by the Customer of charges and premiums to the Transport Accident Commission in respect of the Network in Victoria;
- the right of ARTC to seek security from the customer;
- ARTC to conduct Train Control, issue Instructions, maintain and operate the Network in a non-discriminatory manner;
- the Customer providing warranties regarding Rolling Stock, complying with the Code of Practice and Instructions issued by ARTC;
- the party operating the Trains relating to the contracted Train Paths having appropriate Accreditation and insurance (for \$200,000,000.00);
- ARTC having the ability to vary (temporarily or permanently), remove and review contracted Train Paths in appropriate circumstances and to take possession of the Network for repairs, maintenance and upgrades;
- the ability of ARTC to conduct audits on the Operator;
- compliance by the Customer with plans dealing with Incidents and environmental requirements;
- compliance by the Operator with applicable and appropriate safety standards;
- contracted capacity not utilised seven out of twelve times may be withdrawn by ARTC
- appropriate termination and suspension provisions;
- indemnities by the Operator and ARTC; and
- dispute resolution procedures.

**Commentary:** Note the comments made in the body of the submission

## SCHEDULE D

(Indicative Track Access Agreement as at Commencement Date)

**Commentary:** Note the comments made in the body of the submission in particular Annexure 2 to the submission

(see attached fifty one (51) pages

