



# Draft Decision

## **Australian Rail Track Corporation's 2024 Interstate Rail Network Access Undertaking**

26 July 2024

**Stakeholder submissions due by 5:00pm (AEST), Friday 6 September 2024**

## **Acknowledgement of country**

The ACCC acknowledges the traditional owners and custodians of Country throughout Australia and recognises their continuing connection to the land, sea and community. We pay our respects to them and their cultures; and to their Elders past, present and future.

Australian Competition and Consumer Commission

Land of the Ngunnawal people

23 Marcus Clarke Street, Canberra, Australian Capital Territory, 2601

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# Executive summary

The Australian Rail Track Corporation (ARTC) is currently subject to an access undertaking (the Existing Undertaking) for its Interstate rail network, pursuant to Part IIIA of the *Competition and Consumer Act 2010* (the Act). ARTC lodged an application for a replacement undertaking (the Proposed Undertaking) on 12 December 2023.

The ACCC's Draft Decision is to accept the Proposed Undertaking if certain amendments are made.

In forming this draft view, the ACCC consulted with stakeholders through a public consultation process from 13 December 2023 to 23 February 2024. Since then, we have also met with ARTC and stakeholders that made a submission, as well as attended two workshops hosted by ARTC for its users to discuss the Proposed Undertaking.

While most provisions under the Proposed Undertaking are drawn from, or reflected in, the Existing Undertaking, the Proposed Undertaking includes substantive changes to:

- expand the number of core regulated services from 1 to 8
- implement a standalone price cap for regulated services, due to issues with the existing Regulatory Asset Base
- change the arbitration framework so that arbitrations are conducted by a commercial arbitrator instead of the ACCC
- provide greater transparency and reporting of financial data.

The ACCC considers many of these changes represent substantial improvements to the Existing Undertaking, which for a variety of reasons has remained largely unchanged since it was first accepted in 2008.

However, based on extensive feedback from ARTC's stakeholders and having regard to the statutory criteria, we consider certain amendments should be made. Our draft view is to accept the Proposed Undertaking if certain amendments are made, including that it:

- commit ARTC to an annual stakeholder forum hosted by ARTC and attended by the ACCC, for both rail operators and other interested parties to provide feedback on ways to improve access to, and efficient operations of, the Interstate network
- recognise ARTC taking a lead role in engaging with national forums on interoperability and harmonisation of rail regulations, providing feedback on progress to its users
- provide greater clarity on the operation of the Interstate Network Development Strategy
- amend some of the factors a commercial arbitrator must consider in arbitrating a dispute to strike a better balance between the interests of access seekers and ARTC
- include additional transparency and reporting measures (including for non-Operator revenue), clarify the relationship between the performance indicator items and cost categories, and reference Schedule I in the body of the undertaking.

ARTC adopting a renewed focus on customer engagement and building a shared understanding with its users of ways to maximise the use and potential of the Interstate network is fundamental to the future efficiency of the network. In addition to certain amendments to the Proposed Undertaking, we have outlined in several chapters proposed actions we encourage ARTC to consider implementing in coming years.

# List of proposed amendments

This is a consolidated list of the proposed amendments considered in chapters 5 to 13, with corresponding numbers to those chapters.

- 5.1 The Preamble (Part 1) should include:
  - a statement recognising ARTC is a signatory to the *Memorandum of Cooperation to support National Rail System Interoperability for future major rail investments*, and specifying ARTC's positions on relevant reform committees
  - a commitment by ARTC to update its users regularly on its actions and engagement with forums related to interoperability and harmonisation.
- 5.2 Clause 2.2(b) should be amended to require a minimum of 12 months' notice of ARTC's intention whether to submit a replacement undertaking or extension.
- 5.3 Part 2 should include a commitment by ARTC to hold an annual stakeholder forum to discuss matters related to the Proposed Undertaking, also attended by ACCC.
- 7.1 Amend clause 3.12 to provide that the Arbitration Agreement be signed by the Applicant when it submits an Access Application and signed in response by ARTC when it provides the Indicative Access Proposal.
- 7.2 Amend Schedule A and the body of the Proposed Undertaking (as relevant) to reflect that the form of Arbitration Agreement included in Schedule A is a template agreement that can be negotiated and that a party should consider seeking its own independent legal advice before signing the agreement.
- 7.3 Clause 3.12.5 of the Proposed Undertaking should be amended to:
  - remove consideration of 3.12.5(a)(xii)(K)
  - include the interests of the access seeker as a factor that the arbitrator must consider under 3.12.5(a)(xii).
- 8.1 As ARTC updated its prices at 1 July 2024, an updated Schedule J should be included in the Proposed Undertaking.
- 8.2 Amend the Proposed Undertaking to clarify the interaction of clauses 4.5 (price cap) and 6.4 (additional capacity).
- 10.1 Part 6 of the Proposed Undertaking should be amended to reference all the matters the Interstate Network Development Strategy (INDS) will cover, as set out in the Explanatory Guide, including:
  - operational improvements
  - network resilience
  - actions taken by ARTC to improve interoperability and harmonisation.
- 10.2 Clause 6.2(b) of the Proposed Undertaking should be amended to require ARTC to provide reasons where a Network connection is refused in all cases.
- 10.3 Clause 6.3 should be amended to:
  - clarify the operation of 6.3(a)

- expressly provide that ARTC can, at its sole discretion, choose to agree to pay some of the capital costs of an Applicant's request for Additional Capacity.
- 10.4 ARTC should clarify in the Proposed Undertaking exactly how any price increases pursuant to clause 6.4 would work in conjunction with the CPI indexation constraints in clause 4.5 for Reference Services.
- 12.1 Amend clause 8.2 to provide that ARTC will publish all reporting data in numerical format in a timeseries, in addition to any other methods such as charts.
- 12.2 Amend clause 8.2 to confirm it requires reporting on an on-going basis.
- 12.3 Amend Schedules G and I to clarify the relationship between the performance indicator items in each schedule.
- 12.4 Amend Schedules G and I to clarify the relationship between the cost categories in each schedule.
- 12.5 Amend Schedule I to specify that the revenue reported annually will include, in addition to Access revenue, all other revenue items relating to access to the Interstate network.
- 12.6 Amend clause 8.2 so that Schedule I is referred to in the body of the undertaking.



# 1. Background

Part IIIA of the *Competition and Consumer Act 2010* (the Act) establishes a legal regime to facilitate third party access to services provided through facilities with natural monopoly characteristics.<sup>1</sup> One way is by declaration, whereby the relevant Minister 'declares' the service following an application to, and recommendation by the National Competition Council. Another way is for the owner of a facility to voluntarily give an access undertaking to the ACCC, as is the case with ARTC's Interstate network.

## 1.1. ARTC

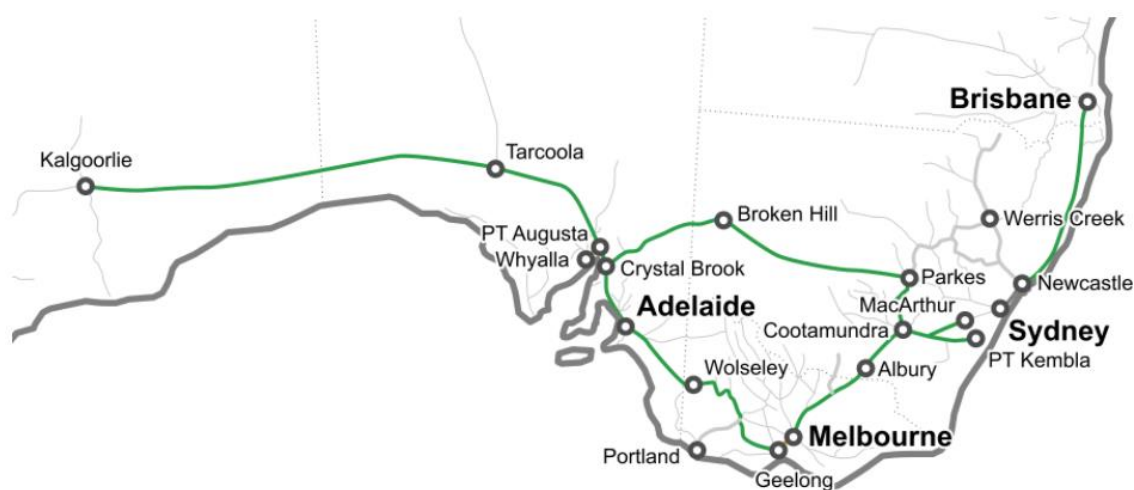
ARTC began operations in July 1998, following an Inter-Governmental Agreement between the Australian, New South Wales, Victorian, Queensland, South Australian and Western Australian Governments. ARTC was established to create a single avenue for all operators seeking access to the national interstate rail network, consistent with the National Rail Summit Heads of Agreement and the Competition Principles Agreement.

ARTC is responsible for controlling, operating, and maintaining 8,500 kilometres of standard gauge rail infrastructure in NSW, Victoria, Queensland, South Australia and Western Australia. In September 2004, ARTC entered a 60-year lease over the Interstate and Hunter Valley rail networks in NSW. Further information about ARTC can be found on its website here: <https://www.artc.com.au/>.

## 1.2. Interstate rail network

The Interstate network is approximately 8,500 km long and extends from Kalgoorlie in Western Australia to Acacia Ridge in Brisbane, via South Australia, Victoria and New South Wales (see Figure 1). A more detailed map is provided in Appendix A: Map of ARTC's Interstate network.

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



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

<sup>1</sup> Part IIIA provides mechanisms by which access to services (such as railway tracks) may be determined, including declaration/arbitration, and access undertakings. ACCC, [Part IIIA access undertaking guidelines](#), August 2016, pp 2, 5–7.

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

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

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

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

### 1.3. The undertaking

The Interstate Access Undertaking is an access undertaking that sets out the principles and processes under which ARTC is obliged to provide access to businesses wishing to run trains on the Interstate network. It is a voluntary instrument submitted by ARTC to the ACCC for approval under Division 6, Part IIIA of the Act. Voluntary access undertakings are enforceable in the Federal Court once they take effect.<sup>2</sup>

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

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

ARTC has a natural monopoly over the below-rail operation of the network, which comprises the track and related infrastructure. This creates a need for a regulatory regime relating to terms and conditions of access, dispute resolution processes and prices.<sup>3</sup>

ARTC submitted a voluntary access undertaking to the ACCC for assessment in February 2001. The ACCC ultimately accepted ARTC's first undertaking in May 2002, for a 5-year term. The first undertaking expired in May 2007 and was replaced by the current 2008 undertaking (Existing Undertaking), which the ACCC accepted on 30 July 2008 and was initially set to expire after 10 years.<sup>4</sup> Over the years there have been several extensions and minor variations to the Existing Undertaking but, overall, there has been no major change to this undertaking.

The most notable variations since 2008 were as follows:

- variation of the undertaking to include forecast capital expenditure for the period 1 July 2012 to 30 June 2018 in relation to which the undertaking was previously silent on (approved by the ACCC on 18 April 2012)

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<sup>2</sup> Subsection 44ZZJ of the Act.

<sup>3</sup> Although the need for each of these can vary across different segments of the network.

<sup>4</sup> The 2008 IAU does not include the Hunter Valley coal network, as this is covered under the Hunter Valley Access Undertaking. See <https://www.accc.gov.au/regulated-infrastructure/rail/artc-hunter-valley-access-undertaking>.

- variation of the undertaking to extend the coverage of the undertaking to incorporate the Southern Sydney Freight Line (approved by the ACCC on 10 April 2013)
- variation of the undertaking to extend the notice ARTC will give to the ACCC of its intention to submit a replacement undertaking from 3 months to 6 months prior to the expiry of the undertaking (approved by the ACCC on 28 February 2019).<sup>5</sup>

In 2018 ARTC submitted an access undertaking to the ACCC to replace the Existing Undertaking. The ACCC issued a Draft Decision not to accept that undertaking, partly due to concerns with the proposed Regulatory Asset Base and the calculated floor and ceiling charges. ARTC subsequently withdrew the 2018 undertaking proposal and the Existing Undertaking was later extended.

In July 2022 the ACCC published a Guidance Paper on ways that the ACCC considered ARTC could potentially improve the Existing Undertaking.<sup>6</sup> In that paper, the ACCC noted that it may be acceptable for ARTC to propose an undertaking that continues to include a price control but without the need for a Regulatory Asset Base.<sup>7</sup> This was due to the substantial challenges in determining an asset base for the Interstate network at the time, including difficulty assessing the efficiency of past capital expenditure, as well as the impending rollout of the Inland Rail project.<sup>8</sup>

The total cost of Inland Rail is large relative to the existing network. Initial costs were planned at \$14.5 billion, but more recently the Inland Rail Review estimated costs to be more than \$31 billion.<sup>9</sup> The ongoing rollout of the project and how it will, or will not, be incorporated into the Interstate network pose considerable uncertainties. It could mean that if a Regulatory Asset Base were to be set now it would be largely irrelevant within only a few years.

ARTC lodged the Proposed Undertaking with the ACCC on 12 December 2023. The submission included an Explanatory Guide, the Proposed Undertaking and the Proposed Indicative Track Access Agreement. Consistent with views in the ACCC's 2022 Guidance Paper, ARTC has:

- made adjustments to the dispute resolution process, including the introduction of commercial arbitration
- increased financial and performance reporting to improve transparency
- proposed a CPI-based price cap mechanism in the short term, given the uncertainty around the asset base and Inland Rail.

A range of other changes have also been proposed, such as the introduction of the Interstate Network Development Strategy.

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<sup>5</sup> Further details are on our website at <https://www.accc.gov.au/by-industry/rail-shipping-and-ports/interstate-rail-network-access-undertaking>

<sup>6</sup> ACCC, *Guidance Paper – ARTC's Interstate Access Undertaking 2023*, ACCC, 22 July 2022.

<sup>7</sup> Unless otherwise indicated, terms used in this Draft Decision have the same meaning as in Part 9 (page 34) of the Existing Undertaking. This includes terms defined and capitalised in the Undertaking, in addition to abbreviations and acronyms.

<sup>8</sup> "Inland Rail is an important project to meet Australia's growing freight task, improve road safety and help decarbonise our economy. Comprising 12 sections, Inland Rail involves upgrades or enhancement works to approximately 1,000km of existing track and construction of 600km of new track passing through regional Victoria, New South Wales and Queensland. The sections of Inland Rail between Beveridge in Victoria and Parkes in New South Wales are prioritised for completion by 2027." <https://inlandrail.com.au/what-is-inland-rail/>, accessed 8 July 2024.

<sup>9</sup> Kerry Schott AO, *The Delivery of Inland Rail: An Independent Review*, January 2023, pp 52-56.

## 2. Legislative requirements

Division 6 of Part IIIA of the Act sets out the matters the ACCC must consider when deciding whether to accept a proposed undertaking. In submitting any replacement access undertaking, ARTC should consider these matters.

If the ACCC accepts an undertaking, the access provider is required to offer third party access in accordance with the undertaking. An undertaking is binding on the access provider and can be enforced in the Federal Court upon application by the ACCC.<sup>10</sup>

### 2.1. Matters which the ACCC must have regard to

The matters that the ACCC must have regard to in deciding whether to accept an undertaking are set out in subsection 44ZZA(3) of the Act.

In particular, the ACCC may accept the undertaking if it thinks it is appropriate to do so having regard to the following matters:

- the objects of Part IIIA
  - that is, to: promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided (in this case, the Interstate rail network), thereby promoting effective competition in upstream and downstream markets, and
  - provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.
- the legitimate business interests of ARTC
- the interests of persons who might want access to the service
- the public interest, including the public interest in having competition in markets
- whether the undertaking is in accordance with an access code that applies to the service (noting that there is no access code that applies to this service)
- the pricing principles specified in section 44ZZCA, and
- any other matters the ACCC thinks are relevant.

The pricing principles relating to the price of access to a service are that:

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

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<sup>10</sup> Section 44ZZJ of the Act.

Subject to s 44ZZBD(6), in making its decision, the Commission must (in short) have regard to any submission made during the consultation process: s 44ZZBD(3). The Commission must (in short) also have regard to any information given by ARTC in response to a request for information issued by the Commission under subsection s 44ZZBCA(3).

## 2.2. Time limits

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

Following the end of the consultation period on this Draft Decision, the ACCC will make its Final Decision. If the ACCC accepts the undertaking, paragraph 44ZZBA(1)(a) of the Act provides that it will come into operation 21 days after the Commission publishes its decision or - if a person applies to the Tribunal for review of the decision within that 21-day period after the ACCC accepts the undertaking, and the Tribunal affirms the decision – the time of the Tribunal’s decision.

## 2.3. Extension to the Existing Undertaking

ARTC submitted its 2024 Interstate Access Undertaking proposal on 12 December 2023. On 20 December 2023, the ACCC published a consultation paper on the Proposed Undertaking, inviting public submissions by 23 February 2024. Due to the number of issues raised in stakeholder submissions requiring further consultation, on 17 April 2024 the ACCC sent a letter to ARTC suggesting it consider an extension of the Existing Undertaking from 30 June 2024 to 31 December 2024. This was to ensure that there is no uncertainty for users as to whether the statutory assessment processes relating to the Proposed Undertaking would be finalised before the Existing Undertaking was due to expire.

On 6 May 2024 ARTC submitted an application to extend the Existing Undertaking until 31 December 2024 or 21 days after the acceptance by the ACCC of ARTC’s Proposed Undertaking as submitted on 12 December 2023. Three submissions were received on the proposed extension which raised no objections to the extension and which supported the view that an extension would promote the interests of access seekers to allow more time to consider the Proposed Undertaking.<sup>11</sup>

The ACCC assessed the application for an extension in accordance with the Act and on 13 June 2024 published notice of its decision to extend the Existing Undertaking until the earlier of:

- 31 December 2024; or
- if a replacement of the 2008 Interstate Access Undertaking as accepted by the ACCC on 30 July 2008 (and as varied from time to time) is given to the ACCC under section 44ZZA

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<sup>11</sup> More information on this extension is on the ACCC website. <https://www.accc.gov.au/by-industry/rail-shipping-and-ports/interstate-rail-network-access-undertaking/extension-of-the-2008-interstate-access-undertaking-to-31-december-2024>

of the Act, and the Commission accepts that undertaking, the date on which that undertaking takes effect in accordance with s 44ZZBA of the Act.<sup>12</sup>

## 2.4. Indicative timeline

Following the extension, the indicative timeline for the ACCC's assessment of the Proposed Undertaking is outlined in Table 1 below.

**Table 1: Indicative timeline for assessment**

Milestone	Approximate timing
Proposed Undertaking received	12 December 2023
Consultation Paper published and consultation period commenced	20 December 2023
Consultation period closed <sup>13</sup>	23 February 2024
Draft Decision published and consultation period commenced	26 July 2024
Draft Decision consultation period ends	6 September 2024
Potential Notice of Amendment	TBD
Final Decision published	On or before Tuesday, 10 December 2024.
Operational date	If accepted, 21 days after publication of a decision (unless an appeal is lodged).

## 2.5. Amendments

Following consideration of this Draft Decision and submissions to the consultation, there are broadly two routes for ARTC to implement amendments to the Proposed Undertaking:

1. withdraw the application and resubmit an amended undertaking
2. if the ACCC issues an amendment notice under section 44ZZAAA of the Act, submit a revised undertaking in accordance with the notice.

Withdrawing and resubmitting the Proposed Undertaking would likely cause delay in the assessment process. However, if the ACCC issues an amendment notice and ARTC submits a version of the Proposed Undertaking within the response period that complies with the terms of subsection 44ZZAAA(6) of the Act, the revised undertaking will be taken to be the original undertaking given under section 44ZZA and consideration of the existing application could continue.

<sup>12</sup> Notice of Decision: <https://www.accc.gov.au/by-industry/rail-shipping-and-ports/interstate-rail-network-access-undertaking/extension-of-the-2008-interstate-access-undertaking-to-31-december-2024/decision>

<sup>13</sup> Late submissions were considered in preparing this Draft Decision, to the extent possible.

# 3. Stakeholder engagement

The ACCC consults with interested parties for the purposes of assessing whether an access undertaking is appropriate. The length of the consultation period will vary depending on factors such as the complexity of the issues, any previous consultation, and the time of the year. The minimum period for a formal consultation process under subsection 44ZZBD(2) of the Act is 14 days. The ACCC will generally publish written submissions on its website (subject to any confidentiality claims which are dealt with in accordance with subsections 44ZZBD(5)-(6)). The ACCC encourages public submissions where possible, but recognises that in some circumstances a submission (in whole or in part) may contain confidential commercial information.

## 3.1. Consultation on the Proposed Undertaking

The ACCC released a consultation paper on the Proposed Undertaking (sometimes referred to in submissions by the abbreviation 'IAU' (Interstate Access Undertaking)) on 20 December 2023. The consultation paper outlined the key differences between the Existing Undertaking and the Proposed Undertaking, including:

- pricing and services
- dispute resolution for negotiations
- annual reporting and performance indicators
- the Interstate Network Development Strategy.

Written submissions were due by Friday 23 February 2023 and 7 public submissions were received and [published](#), submitted by Aurizon, GrainCorp, Pacific National, Port of Portland, Qube, Rail Operators Group and Transport Asset Holding Entity (TAHE) NSW.

In addition to receiving written submissions, ACCC staff met with each of the stakeholders that made a written submission, participated in a workshop with key stakeholders held by ARTC, and a further ARTC workshop with stakeholders focussed on financial and performance reporting. We have also met with ARTC regularly and welcome its constructive engagement.

A total of 4 additional submissions were provided to the ACCC by GrainCorp, Port of Portland and the Rail Operators Group to clarify some of the points discussed with stakeholders in direct meetings, which have also been published.

## 4. ACCC assessment

This chapter sets out the ACCC’s assessment of ARTC’s Proposed Undertaking, and the matters that the ACCC has had regard to in reaching its Draft Decision.

The ACCC’s draft view is to accept the Proposed Undertaking if certain amendments are made.

The Proposed Undertaking makes several changes to the current framework under the Existing Undertaking, including:

- expanding the number of core regulated services from 1 to 8
- implementing a standalone price cap for regulated services, due to issues with the existing Regulatory Asset Base
- changing the arbitration framework so that arbitrations are conducted by a commercial arbitrator instead of the ACCC
- providing greater transparency and reporting of financial data.

However, based on extensive feedback from ARTC’s stakeholders and having regard to the statutory criteria against which we are required to assess the appropriateness of the Proposed Undertaking, we consider certain amendments should be made. Our Draft Decision is to accept the Proposed Undertaking if certain amendments are made, including that it:

- commit ARTC to an annual stakeholder forum hosted by ARTC and attended by the ACCC for both rail operators and other interested parties to provide feedback on ways to improve access to, and efficient operations of, the Interstate network
- state that ARTC will engage with national forums on interoperability and harmonisation of rail regulations, as well as providing feedback on progress to its users
- provide greater clarity on the operation of the Interstate Network Development Strategy
- amend some of the factors a commercial arbitrator must consider in arbitrating a dispute to strike a better balance between the interests of access seekers and ARTC
- include additional transparency and reporting measures (including for non-operator revenue), clarify the relationship between the performance indicator items and cost categories, and reference Schedule I in the body of the Undertaking.

**Table 2: Summary of ACCC assessment**

Criteria	Assessment
<b><u>Overall assessment</u></b>	The ACCC’s Draft Decision is to accept the Proposed Undertaking if certain amendments are made.
<b><u>Objects of Part IIIA</u></b> <b>Promote efficient operation of, use of, and investment in infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets</b>	<p>The Proposed Undertaking (if certain amendments are made) would build on the regulatory regime established by the Existing Undertaking that has been broadly supported by the rail industry in the past.</p> <p>The Proposed Undertaking (if certain amendments are made) would provide for efficiency through:</p> <ul style="list-style-type: none"> <li>▪ regulatory certainty via an evolution of the Existing Undertaking</li> </ul>



	<ul style="list-style-type: none"> <li>▪ better coverage through Reference Services for 8 train types, increased from the 1 Indicative Service (Super Freight)</li> <li>▪ retention of current prices as the base price for Reference Services</li> <li>▪ protection from price shocks through the maximum increase for Reference Services of cumulative CPI</li> <li>▪ increased financial annual reporting, performance measures and transparency</li> <li>▪ greater engagement with stakeholders, including the Interstate Network Development Strategy and the ACCC's proposal for an annual stakeholder forum.</li> </ul>
<b>Provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry</b>	The Proposed Undertaking is an evolution of the longstanding Existing Undertaking, which provides for the broad continuation of a well-understood framework for the Interstate network subject to certain changes.
<b>The legitimate business interests of the provider</b>	We assume ARTC considers the Proposed Undertaking is in its interests and do not see reason to disagree. We also note that ARTC appears to cover its incremental costs.
<b>The interests of persons who might want access to the service</b>	The Proposed Undertaking (if certain amendments are made) would be in the interests of persons who might want access to the Interstate network. Greater transparency, an updated negotiation and dispute resolution framework, caps on price increases and better consultation on capex strikes an appropriate balance between the interests of ARTC and access seekers, and is generally supported by stakeholders.
<b>The public interest, including the public interest in having competition in markets (whether or not in Australia)</b>	Certainty regarding prices and greater transparency and consultation is beneficial for the freight industry over the regulatory period.
<b>Whether the undertaking is in accordance with an access code that applies to the service</b>	Not applicable, as no access code currently applies to the services.
<b><u>Pricing principles specified in section 44ZZCA</u></b>	
<b>Revenue is at least sufficient to meet efficient costs</b>	While no explicit price floor is included in the Proposed Undertaking, the principle suggests that revenue should be "at least" sufficient to meet costs. It appears the prices in the Standing Offer for Reference Services adequately cover the incremental costs of providing the services. We also note that attempting to recover the full economic cost of the infrastructure would likely result in inefficient underuse.
<b>Return is commensurate with commercial risk</b>	Due to the amount of government equity funding necessary for such a large rail network and the price constraints that the Interstate network faces from competition from road, it is currently unlikely that prices could include a return on investment commensurate with the regulatory and commercial risks involved. In these circumstances, we consider this aspect of the pricing principles will not be met.
<b>Multi-part pricing</b>	The Proposed Undertaking (if certain amendments are made) would provide scope for multi-part pricing and price

	discrimination where it aids efficiency. ARTC's Reference Services have flagfall and variable components in its access charges. ARTC and customers can negotiate in respect of non-Reference Services (charge differentiation).
<b>Not allow vertically integrated access providers to favour own operations</b>	Not applicable, as ARTC is not vertically integrated.
<b>Incentives to reduce costs and improve productivity</b>	The Proposed Undertaking (if certain amendments are made) would provide a regime that creates incentives for ARTC to reduce costs and improve productivity. A standalone price cap provides incentives to maximise volume and reduce costs. ARTC has also committed to improved transparency and reporting, while working with its users to provide requested data and negotiate on potential new services.
<b><u>Any other matters that the Commission thinks are relevant</u></b>	The ACCC considers that the approach to pricing as set out in the Proposed Undertaking is appropriate at this time, given the current challenges in calculating an appropriate regulatory asset base. The Proposed Undertaking provides sufficient clarity and certainty to users for the regulatory period. However, we expect ARTC to consider a return to a cost-based approach to pricing in the future, particularly once the scope and cost of Inland Rail is known.

## 4.1. Objects of Part IIIA of the Act

Clause 44AA provides the Objects of Part IIIA of the Act are to:

- (a) promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
- (b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

The ACCC's draft view is that, overall, the Proposed Undertaking (if certain amendments are made) would promote the economically efficient operation of, use of, and investment in ARTC's Interstate rail network, thereby promoting effective competition. It provides a framework and guiding principles to encourage a consistent approach to access regulation to help ensure access seekers and ARTC can engage on reasonable terms.

Specifically, the Proposed Undertaking provides:

- regulated Reference Services for 8 train types, increased from 1 Indicative Service (Super Freight)
- increased financial annual reporting, performance measures and transparency
- mechanisms for improved engagement with stakeholders
- a cap on prices to avoid price shock for users
- regulatory certainty.

Each of these matters is discussed separately below.

## Reference Services

The provision of 8 Reference Services in the Proposed Undertaking provides greater certainty and coverage compared to a single Indicative Service in the Existing Undertaking.

The ACCC's draft view is that the approach to pricing for Reference Services that the Proposed Undertaking covers is appropriate. The Proposed Undertaking lists the starting prices to be applied, which encourage efficient use of the network as they:

- start from the current prices applied to the services
- reflect continuation of prices familiar to users
- have a price cap mechanism in place, to protect users from price shocks.

The price cap mechanism in the Proposed Undertaking covers nearly all ARTC's services, whereas the Existing Undertaking prescribes prices for only one Indicative Service (Super Freight). The price caps therefore provide broader protection for captive customers.

## Increased clarity, transparency, timeliness and administrative improvements

The Proposed Undertaking introduces a new requirement for ARTC to report annually on a set of financial and volume measures. This includes access revenue, operating costs, capital expenditure and volumes.

Transparency is key to fair negotiations between a monopoly infrastructure owner and its users. The improved measures should aid access seekers in their negotiations with ARTC regarding path availability, service standards and prices, and help users and the ACCC to identify where services are deteriorating. Transparency also provides greater accountability to ensure the Interstate rail network is operating efficiently.

Following the submissions, ARTC held a data workshop on 23 May 2024 to discuss stakeholders' requests. We understand that ARTC is subsequently considering how it can make additional information available as requested within the constraints of cost and confidentiality.

## Greater engagement with stakeholders

The Proposed Undertaking would be significantly enhanced by requiring ARTC, at least once per calendar year, to convene an Interstate Network Rail Access Forum at which stakeholders could discuss general access issues and the operation of the Proposed Undertaking, with the ACCC in attendance. This proposed amendment would create a platform for a more constructive dialogue between ARTC and its customers on ways to improve the efficient operation of, and use of, the Interstate rail network—which appears to have been lacking at times in the past.

A major new element in Part 6 of the Proposed Undertaking is the introduction of the Interstate Network Development Strategy (INDS). This provides for ARTC to develop the strategy setting out options for capacity expansion, with objectives, costs and benefits, and requirements to consult Operators.

The ACCC welcomes this commitment, which should help to address the previous lack of transparency on capital investment and promote efficient investment in the Interstate network. Stakeholders also welcomed the introduction of the INDS but suggested broadening and strengthening it in several ways, some of which are also the subject of proposed amendments to the Proposed Undertaking.

## Regulatory certainty

The Proposed Undertaking has a proposed expiry date of 30 June 2029, which would result in a term of about 4.5 years. The ACCC's draft view is that this term is appropriate in part because it will allow a revised undertaking to be considered before Inland Rail results in major changes to the network. The Proposed Undertaking also allows for the evolution of a regulatory framework that has been in use since 2008, therefore providing continuity (with necessary improvements) for ARTC and users.

The ACCC notes that both ARTC and stakeholders prefer regulatory certainty. Certainty provides reduced risks for both ARTC and stakeholders when making business plans and investments, thus reducing costs for individual investments. It also encourages long-term solutions rather than short-term fixes, improving efficiency over time.

Some stakeholders sought greater certainty over the pricing of Inland Rail so that they can plan their own investments in trains and facilities to make use of the new track. Inland Rail sections between Melbourne and Parkes are scheduled for completion by 2027 – within the term of the Proposed Undertaking. These are mainly within the existing segments of Melbourne to Macarthur and Cootamundra to Parkes. Prices on the existing segments are prescribed in the Proposed Undertaking, regardless of whether they are subject to Inland Rail upgrades.

## 4.2. Other considerations

Paragraph 44ZZA(3)(a) of the Act requires the ACCC to have regard to the **legitimate business interests of the provider**, in this case ARTC. We assume ARTC would lodge an undertaking that is in its business interests and do not see a reason to disagree. Moreover, it provides ARTC with regulatory certainty and appears to satisfy its lease conditions regarding an undertaking. We also note that ARTC appears likely to cover its incremental costs over the term of the Proposed Undertaking.

Paragraph 44ZZA(3)(c) of the Act requires the ACCC to have regard to the interests of persons who might want access to the service. The ACCC considers the Proposed Undertaking (if certain amendments are made) is generally **in the interests of persons who might want to access the service**, both current and future.

Many of the matters discussed above on the objects of Part IIIA of the Act are also relevant to the interests of access seekers. Their interests are promoted by:

- greater transparency
- a cap on price increases
- a more accessible and clear negotiation and dispute resolution process
- improved consultation on capital expenditure through the INDS
- enhanced engagement through the ACCC's proposed annual stakeholder forum.

Paragraph 44ZZA(3)(b) of the Act requires the ACCC to have regard to the **public interest**, including the public interest in having competition in markets (whether or not in Australia).

The ACCC considers the Proposed Undertaking, if certain amendments are made, is in the public interest. In particular, the certainty regarding prices and increase in transparency and consultation will be beneficial for the Australian freight industry over the regulatory period. In addition, there are likely to be broader benefits through optimising use of efficient rail transport such as lower emissions and road congestion.

## 4.3. Pricing principles

The ACCC considers that the Proposed Undertaking is broadly consistent with the pricing principles set out in the Act. Section 44ZZCA provides that the pricing principles relating to the price of access to a service are:

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

While no explicit price floor is included in the Proposed Undertaking, the principle indicates that revenue should be at least sufficient to meet costs. The ACCC considers that the prices in the Standing Offer for Reference Services are likely to cover the incremental costs of providing the services. This is appropriate in the circumstances, as attempting to recover the full economic cost of the rail infrastructure may result in inefficient underuse.

The ACCC considers that it is unlikely that ARTC will be able to generate a return on investment that approaches full economic cost, due to the high cost of rail infrastructure (generally provided through government equity funding) and the fact the Interstate network faces substantial competition from road, and to a lesser extent coastal shipping. This has been factored into the ACCC's overall assessment.

ARTC's Reference Services have flagfall and variable components in its access charges. ARTC and customers can negotiate with respect to non-Reference Services (charge differentiation). The ACCC considers that this multi-part pricing structure and the general ability to negotiate prices in ARTC's Proposed Undertaking is consistent with the pricing principles.

The ACCC considers that the Proposed Undertaking (if certain amendments are made) provides a regime that creates incentives for ARTC to reduce costs and improve productivity. ARTC has committed to improved transparency and reporting and is working with its users to provide requested data and potentially accommodate new train paths. The standalone price cap should also incentivise ARTC to maximise volume and reduce costs.

## 4.4. Any other matters that the Commission thinks are relevant

The ACCC considers there are benefits to accepting the approach to pricing as set out in the Proposed Undertaking, given the recent challenges in calculating an appropriate asset base and current uncertainty about the scope and cost of Inland Rail. While a cost-based approach would be preferred, these issues plus the nature of the competition the network faces from road makes a pragmatic assessment appropriate.

# 5. Preamble, Scope, Definitions and the Network

Part 1 of the Proposed Undertaking is the Preamble, which sets out the introduction and objectives. It maintains the core provisions of the Preamble from the Existing Undertaking, which, in the ACCC's draft view, remains appropriate.

The main inclusion to the Preamble is the insertion of new requirements for ARTC to provide information in response to ACCC requests for information during the term of the Proposed Undertaking. The ACCC's draft view is that this will aid the efficient administration of the undertaking, allowing the ACCC to optimally discharge the functions and powers provided to it in relation to the undertaking.

Part 2 covers the Scope and administration of the Proposed Undertaking. It provides for the negotiations of Access required for the operation of Train Services by Operators on the Network (the set of railway lines described in Schedule E, which traverse 5 states).

The Proposed Undertaking maintains the core features of the Scope and administration sections from the Existing Undertaking, with the expiry date set at 30 June 2029, resulting in a term of approximately 4.5 years. The ACCC's draft view is that this term is appropriate, as it provides some certainty for investment decisions for ARTC and access seekers, while allowing a timely opportunity to assess any proposed new undertaking to consider developments in Inland Rail.

The ACCC's draft view is that the Proposed Undertaking would be enhanced by requiring ARTC to, at least once per calendar year, convene an Interstate Network Rail Access Forum at which stakeholders could discuss general access issues and the operation of the Proposed Undertaking, with the ACCC in attendance.

GrainCorp proposed that stakeholders such as grain loaders that require access to the network but are not train operators should have similar protections in negotiating access. While the ACCC considers this issue warrants further consideration, any such changes would broaden the scope of the Proposed Undertaking and require further consultation between ARTC and relevant users.

ARTC proposes to add 2 sections to the Network as covered by the Proposed Undertaking – the Metropolitan Freight Network Lease, and Queensland Border Loop to Acacia Ridge. The ACCC's draft view is that this is appropriate as the new sections are important parts of the Interstate network and warrant the same protection for users as the existing parts.

The Portland to Maroona line is managed by ARTC but is not currently part of the Interstate network. The Port of Portland submitted that it should be covered to gain the same protections as existing segments. Noting the recent Budget funding of \$150 million to upgrade the line, the ACCC considers that once the Portland to Maroona line has been upgraded, ARTC should consider including it within the scope of the undertaking, either by variation to an undertaking on foot, or inclusion in a future undertaking.

## 5.1. Preamble (Part 1)

### Background

Part 1 of the Existing Undertaking is a preamble that provides background information, context and objectives. Clauses 1.1 and 1.2 are important to understanding the overall intent, purpose and context, as well as providing guidance to the interpretation of the provisions. The key objective is to provide a framework to manage negotiations with Applicants for Access to the network, while operating consistently with the objectives and principles in Part IIIA of the Act and the Competition Principles Agreement.

### Proposed Undertaking

The introductory provisions of the Proposed Undertaking are substantially the same as the Existing Undertaking, with some minor changes. These are largely updates to legal references and ARTC's address. Clause 1.1 retains historical information such as how ARTC was formed, the objectives for why it was created and that it is owned by the Australian Government. It is vertically separated, meaning ARTC provides below rail services and does not compete in above rail services. The preamble also states in clause 1.1(e) that ARTC will not discriminate on price based on a customer's identity.

Clause 1.2 covers the objectives of the Proposed Undertaking. It is a voluntary undertaking under Part IIIA of the Act as the service has not been declared. It is a requirement of some of ARTC's state leases that an undertaking be put in place. The intent of the Proposed Undertaking is to provide a framework to manage negotiations, establish a process for lodging access applications, use transparent and detailed principles and processes for determining access, and provide an effective resolution process. It intends to provide an appropriate balance between the legitimate business interests of ARTC, the interest of the public and the interests of the applicants wanting access to the network, as well as to operate consistently with the objectives of Part IIIA of the Act and the Competition Principles Agreement.

In clause 1.2(c), ARTC proposes to remove the words 'methodologies' and 'revenue limits' consistent with changes made in the Proposed Undertaking to the pricing framework (see chapter 8.4).

1.2 ... The intent of the Undertaking is to:... (c) use transparent and detailed ~~methodologies~~ principles and processes for determining access ~~revenue limits~~ terms and conditions;

ARTC has introduced clause 1.3, which allows the ACCC to request information from ARTC in relation to the Proposed Undertaking. This sets out the procedure and timeframes for the ACCC making requests and for ARTC providing the information.

#### 1.3 Request for Information

- (a) The ACCC may, by written notice to ARTC, require ARTC to provide information or documents required by the ACCC in relation to this Undertaking.
- (b) The written notice must set out:
  - (i) in reasonable detail;
    - (A) the information or documents required by the ACCC; and
    - (B) the reasons why the ACCC requires the information or documents,
  - (ii) the form in which the information or documents must be provided; and



(iii) the deadline for ARTC to provide the information or documents, which must be no less than 14 days from the date of ARTC's receipt of the notice.

If ARTC receives a request for information or documents which it considers is unreasonable, ARTC must provide the ACCC with reasons why ARTC considers the request is unreasonable and potential modifications to address ARTC's legitimate concerns. The ACCC will notify ARTC of its decision and if applicable, allow a minimum of 14 days for ARTC to provide the required information.

## Stakeholder submissions

Aurizon submitted:

The Preamble (in clause 1.1(e)) should recognise that seeking to stimulate customer confidence, competition and market growth in the rail industry requires not only that ARTC adopt concepts of pricing equity and transparency, but also:

- recognising that as ARTC usually only provides a component of the access required by operators for their total journey, it must operate and contract in a way that assists operators in efficiently negotiating and managing access across multiple RIMs [Rail Infrastructure Managers]; and
- more generally, that ARTC manage its rail infrastructure in a way that promotes improved inter-operability and harmonisation across the national rail network.<sup>14</sup>

Further, Aurizon submitted "the Proposed IAU be amended where this can improve national consistency and harmonisation in the access negotiation frameworks, the standard terms and conditions for access, and in access management methods applied".<sup>15</sup> In this regard, Aurizon submitted several specific amendments aiming to achieve this.

The NSW Transport Asset Holding Entity (TAHE) submission "strongly supports improved engagement and co-ordination between rail networks leading to greater harmonisation across these networks", submitting that "the ability of different rail networks to co-ordinate their operations and allow rail operators to efficiently operate across multiple networks is a major issue in the Australian rail industry, particularly the freight rail industry". TAHE also submitted that "the challenges of harmonisation across networks will not be resolved by the proposed ARTC IAU, but ... seeks that the ACCC and ARTC remain mindful of the benefits...and seek to ensure that the IAU is consistent with a move towards increased harmonisation."<sup>16</sup>

Pacific National submitted that the Proposed Undertaking "fails to meet the social objective test referenced in the Preamble", including "the social and public interest objective of increasing traffic from road to rail".<sup>17</sup> Pacific National submitted that the Proposed Undertaking:

... contains a pricing structure ... that is prohibitive to strengthening freight on rail, particularly on the north-south corridor. Across this corridor rail freight mode share has halved since 1995 and is currently only 2% on the Melbourne to Sydney route.

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<sup>14</sup> Aurizon, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), ACCC, 23 February 2024, pp 8-9.

<sup>15</sup> Aurizon, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), p 9.

<sup>16</sup> Transport Asset Holding Entity (TAHE), [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), ACCC, 20 February 2024, p 3.

<sup>17</sup> Pacific National, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), ACCC, 23 February 2024, p 18.

Over the same time, freight mode share on the east-west corridor has only increased slightly.

The proposed 2024 IAU fails to recognise that the Australian Government's highest priority is lowering inflation and reducing cost pressure on households. Rather than helping households, the 2024 IAU is inflationary and will hurt them through higher freight costs and higher grocery and commodity prices.

Some stakeholders suggested including ARTC's Charter or Statement of (Shareholder) Expectations<sup>18</sup> into the Proposed Undertaking.<sup>19</sup> Aurizon suggested this be added as a matter for an arbitrator to consider under clause 3.12.5(a)(xii).<sup>20</sup> This is discussed in chapter 7.4. Pacific National suggested ARTC's progress in meeting its Charter objectives could be measured by creating suitable metrics and reporting regularly.<sup>21</sup> This is discussed in chapter 12.1.

## Discussion

The Preamble section is beneficial in framing the Proposed Undertaking and highlights the need to balance the legitimate business interests of ARTC, the interest of the public and the interests of the applicants wanting to use the network. These introductory provisions do not impose direct obligations on either ARTC or access seekers. However, they are relevant to the interpretation of other provisions, such as the pricing principles in Part 4.

In its 2018 Draft Decision the ACCC considered that the undertaking should include provisions setting out information gathering powers for the ACCC. ARTC has included clause 1.3 *Request for Information* in the Proposed Undertaking. This is distinct from the power the ACCC already has under section 44ZZBCA of the Act to request information relevant to making a decision on an access undertaking application it is assessing at the time. We consider this new clause is appropriate to allow the ACCC to optimally discharge the functions and powers provided to it under and in relation to the Proposed Undertaking if it is accepted.

Clause 1.1(g) states that ARTC has prepared the Proposed Undertaking voluntarily in pursuance of its charter objectives. ARTC is expected by the government to act in accordance with its Charter and Statement of Expectations.<sup>22</sup> It is open to ARTC whether it proposes to repeat any aspect of these documents in its Proposed Undertaking. If the government wishes to give legal effect to the Charter and Statement of Expectations, that is a separate matter and would need to balance broader considerations than those covered by an access undertaking. While it is appropriate for the Proposed Undertaking to be consistent with the Charter and Statement of Expectations, the ACCC does not consider the Proposed

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<sup>18</sup> ARTC's Charter <https://www.artc.com.au/about/our-charter/> accessed 3 April 2024. Australian Rail Track Corporation Limited Statement of Expectations 2023 <https://www.infrastructure.gov.au/department/media/publications/australian-rail-track-corporation-interim-statement-expectations> accessed 3 April 2024.

<sup>19</sup> Aurizon, Qube, ROG, Pacific National referred to ARTC's charter and Statement of Expectations in submissions, which covered multiple issues. Aurizon, *Submission to Consultation Paper – ARTC's Proposed 2024 IAU*; Qube, *Submission to Consultation Paper – ARTC's Proposed 2024 IAU*, ACCC, 23 February 2024; Rail Operators Group, *Submission to Consultation Paper – ARTC's Proposed 2024 IAU*, ACCC, 28 February 2024; Pacific National, *Submission to Consultation Paper – ARTC's Proposed 2024 IAU*,

<sup>20</sup> Aurizon, *Submission to Consultation Paper – ARTC's Proposed 2024 IAU*, p 27.

<sup>21</sup> Pacific National, *Submission to Consultation Paper – ARTC's Proposed 2024 IAU*, pp 29-31.

<sup>22</sup> ARTC's Charter <https://www.artc.com.au/about/our-charter/> accessed 3 April 2024. Australian Rail Track Corporation Limited Statement of Expectations 2023 <https://www.infrastructure.gov.au/department/media/publications/australian-rail-track-corporation-interim-statement-expectations> accessed 3 April 2024.

Undertaking is an appropriate vehicle to give general and court-enforceable legal effect to the commitments in them.

Interoperability and harmonisation across rail networks were raised in many submissions by rail operators as a key issue that affects the efficient use of rail infrastructure. Stakeholders observed that the National Cabinet has established rail interoperability as a priority for all Australian governments to maximise investments in rail. The National Rail Action Plan is led by the National Transport Commission to bring network owners, investors, builders and educators together, with particular focus on train control and signalling, systems standards and working rules, rollingstock approval regimes and rail industry skill recognition and credentials. Stakeholders submitted that ARTC, as a Commonwealth-owned entity focussed on establishing an interstate network, is uniquely placed to provide leadership across the networks. They also submitted that there may be opportunities for ARTC to progress interoperability with other networks unilaterally (for example, by aligning its reporting with that of other networks where appropriate), bilaterally (working with adjoining networks to coordinate and communicate maintenance windows) or to lead broader multi-party discussions (for example, identifying ways to work with other networks to improve origin to destination pathing).<sup>23</sup> The submission by TAHE indicates that ARTC is viewed as a leader with an important role to play in championing interoperability among the networks.

After considering stakeholder feedback on the ACCC's Consultation Paper, ARTC provided a public written response.<sup>24</sup> ARTC acknowledges stakeholders' broad range of concerns resulting in inefficiency in the rail industry – interoperability, resilience, information transparency, modal shift and regulatory harmonisation.<sup>25</sup> ARTC has stated it is working with the industry on these issues.

One of ARTC's key strategic objectives is to adopt a leading role with the National Transport Commission to develop a National Approach for interoperability of rail systems and it is a signatory to the Intergovernmental Memorandum of Understanding that commits to work to address issues around rail interoperability.

ARTC is proposing to include a recital in the IAU that states it is aware of the importance of this issue and is a signatory to the Intergovernmental Memorandum of Understanding that commits to work to address issues around rail interoperability.<sup>26</sup>

The ACCC considers ARTC's role as a national rail network is key in furthering interoperability and harmonisation. Given ARTC's commitments in these areas, we expect that ARTC will keep stakeholders informed on progress and should recognise this role in the Preamble.

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<sup>23</sup> Actions with other network operators within the bounds of competition law. Pacific National, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#); Aurizon, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#); Qube, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#); Rail Operators Group, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#).

<sup>24</sup> Australian Rail Track Corporation (ARTC), [Response to stakeholder submissions – ARTC's Proposed 2024 Interstate Access Undertaking](#), ACCC, 13 June 2024.

<sup>25</sup> Interoperability – A term used to mean the possibility of uninterrupted movement of trains from differing states across state borders. (RISSB.com.au)  
Resilience – the capacity to withstand or to recover quickly from difficulties.  
Information transparency – information needed to make decisions accessible to its stakeholders.  
Modal shift – shifting freight from road to rail.  
Harmonisation - the act of bringing into agreement so as to work effectively together. (RISSB.com.au)  
Regulatory harmonisation – harmonising the regulatory frameworks across the rail owners.

<sup>26</sup> ARTC, [Response to stakeholder submissions – ARTC's Proposed 2024 Interstate Access Undertaking](#), p 1.

### **ACCC draft views**

The ACCC considers the Proposed Undertaking's Preamble and the proposed information-gathering power for the ACCC are appropriate.

We do not consider an access undertaking to be the appropriate vehicle to give legal effect to ARTC's Charter or Statement of Expectations.

Regarding interoperability and harmonisation, the ACCC considers ARTC should amend the Preamble to recognise and report on its actions and engagement with national reform forums to its users.

### **Proposed amendment 5.1**

The Preamble should include:

- a statement recognising ARTC is a signatory to the *Memorandum of Cooperation to support National Rail System Interoperability for future major rail investments*, and specifying ARTC's positions on relevant reform committees
- a commitment by ARTC to update its users regularly on its actions and engagement with forums related to interoperability and harmonisation.

## **5.2. Scope and administration of undertaking (Part 2 & Schedule E)**

### **Background**

Part 2 provides the boundaries and focus of the Proposed Undertaking and establishes the term and renewal process. It mirrors many of the clauses of the Existing Undertaking.

The scope of the Proposed Undertaking covers negotiations of Access for the operation of train services on the network, which is defined in detail in Schedule E. Access includes the benefit of associated facilities required to facilitate access to the track but excludes extension to the network or adjoining infrastructure.

The Proposed Undertaking applies to negotiations for new Access Agreements or additional rights. It cannot require a variation to an existing Access Agreement. ARTC agrees to maintain a liability insurance policy with a limit of not less than \$250 million.

Clause 2.2(b) outlines the steps ARTC will take if it intends to submit a new voluntary access undertaking, including that it will write to the ACCC no later than 6 months prior to the expiry of the Proposed Undertaking (if accepted by the ACCC) and apply for an extension of the expiring undertaking to allow for the assessment of the new undertaking.

## Proposed Undertaking

Many of the provisions are the same as those of the Existing Undertaking, with the only significant changes to the Proposed Undertaking being:

- the Proposed Undertaking is set to expire on 30 June 2029. This makes a term of approximately 4.5 years if the ACCC accepts it by 10 December 2024.
- there is no requirement for a mid-term review of the Proposed Undertaking (as now it has a 4.5-year term rather than the original 10 years)
- ARTC has removed the forecast capital expenditure section.

There are minor updates to ARTC's contact details and amendments to the resources ARTC is to publish on its website to align with new concepts in the Proposed Undertaking (on the Standing Offer for Reference services and the INDS).

## Stakeholder submissions

Generally, stakeholders were silent on the proposed changes to the Scope and administration sections of the Proposed Undertaking. GrainCorp was supportive of the approximate 5-year term.<sup>27</sup>

GrainCorp questioned the definition of an Access Seeker. This is discussed substantively in chapter 5.4 below. Multiple stakeholders raised Inland Rail as relevant for planning purposes. This is discussed in chapter 10.1 below (INDS).

## Discussion

The ACCC considers the term of approximately 4.5 years is appropriate. It provides some certainty for investment decisions for ARTC and access seekers, while allowing a timely opportunity to assess any proposed new undertaking to consider developments in Inland Rail.

However, we propose ARTC increases the notice it provides regarding a replacement undertaking. Under clause 2.2(b) ARTC will notify the ACCC if it intends to submit a new undertaking. These provisions are valuable in encouraging ARTC to make a timely application for a replacement undertaking to avoid a regulatory gap where there would otherwise be no statutory protections for access seekers. While the Proposed Undertaking requires ARTC to notify the ACCC no later than 6 months prior to the undertaking expiring, that timeframe would require at least one extension to that expiring undertaking, creating some administrative cost for all parties.

The ACCC considers the Proposed Undertaking should require ARTC to notify the ACCC of its intentions and to consult its stakeholders at least 12 months prior to the expiry of the Proposed Undertaking. This would provide a reasonable opportunity for stakeholders and the ACCC to assess a proposed undertaking without the necessity of an extension.

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<sup>27</sup> GrainCorp, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), ACCC, 23 February 2024, p 7.

### **ACCC draft views**

The ACCC considers the 4.5-year term of the Proposed Undertaking is appropriate. However, we consider ARTC should increase the notice it provides the ACCC about its intention regarding replacement or extension to 12 months.

### **Proposed amendment 5.2**

Clause 2.2(b) should be amended to require a minimum of 12 months' notice of ARTC's intention whether to submit a replacement undertaking or extension.

## 5.3. A stakeholder forum

### Background

On 30 April 2024 ARTC hosted a workshop with its customers (rail operators), stakeholders that had made a public submission, and the ACCC. The purpose of the workshop was for ARTC to better understand key issues in submissions made to the ACCC in response to the December 2023 consultation paper. This forum allowed stakeholders to raise a range of access concerns with senior representatives of ARTC. Stakeholders provided positive feedback to the ACCC about the forum as a mechanism to raise and deal with concerns, and that having the ACCC present was also beneficial.

### Discussion

The ACCC considers that the Proposed Undertaking would be considerably strengthened by the inclusion of a new clause in Part 2 that provides for an annual forum for ARTC to engage with stakeholders on access issues, with the ACCC in attendance. This would provide for regular engagement between ARTC and its users to discuss and resolve issues regarding access and the operation of the Proposed Undertaking—which is in the interests of both ARTC and users. It would also assist the ACCC's understanding of the interests of access seekers, of ARTC, and more broadly the public interest.

Following the stakeholder workshop and the ACCC raising the possibility of an annual forum, ARTC provided a written response stating:

ARTC notes ACCC's suggestion of holding an annual stakeholder meeting (similar to the IAU Roundtable at end April 2024). ARTC is happy to facilitate this meeting and looks forward to continuing to discuss matters relevant to the Undertaking in a proactive setting.<sup>28</sup>

We welcome ARTC embracing this proposal. A new provision could be along the lines of:

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<sup>28</sup> ARTC, [Response to stakeholder submissions – ARTC's Proposed 2024 Interstate Access Undertaking](#), p 1.

## Interstate Network Rail Access Forum

- a) ARTC will, at least once per calendar year, convene an Interstate Network Rail Access Forum for access seekers (both rail operators and other stakeholders) and the ACCC for access seekers to raise issues relating to access and discuss:
  - the general operation of the undertaking and Indicative Track Access Agreement (ITAA)
  - other issues of relevance to users of the Interstate network relating to the efficient use of the network, such as interoperability, network resilience or transparency
  - general issues relating to access.
- b) A Terms of Reference with procedural arrangements will be agreed between ARTC and the ACCC and published by ARTC within 6 months after the Proposed Undertaking commences.
- c) ARTC will use best endeavours to maximise attendance but will meet the requirement to hold a meeting despite any party or parties (other than the ACCC) being unable to attend.
- d) The Interstate Network Rail Access Forum will not be for discussion of individual negotiation processes or to discuss any matters that would otherwise require authorisation under the *Competition and Consumer Act 2010* (such as discussions involving individual access seekers' terms and conditions, volumes, individual pricing arrangements, or collective bargaining).

### Proposed amendment 5.3

Part 2 should include a commitment by ARTC to hold an annual stakeholder forum to discuss matters related to the Proposed Undertaking, also attended by ACCC.

## 5.4. Scope of 'Access'

### Background

The Existing Undertaking provides for the negotiations of Access required for the operation of Train Services by Operators on the Network.<sup>29</sup>

"Access" means access to use the Network, or any part thereof, for the purpose of running a Service.

"Services" means a Train run by the Operator using the Network which provides railway freight or passenger services including work Trains.<sup>30</sup>

<sup>29</sup> Australian Rail Track Corporation (ARTC), [ARTC's 2008 Interstate Access Undertaking](#), ACCC, 30 July 2008, clause 2.1(a)

<sup>30</sup> ARTC, [ARTC's 2008 Interstate Access Undertaking](#).

## Proposed Undertaking

The Proposed Undertaking maintains the definitions for Access, Services, Trains, Train Paths and Operators from the Existing Undertaking. ARTC has proposed a clarification to the definition for an Applicant.

“Applicant” means the person seeking Access from ARTC and seeking to become a Customer and, to avoid doubt, includes an existing Customer seeking new or additional Train Paths (rather than variations) to those Train Paths already contracted under an Access Agreement.<sup>31</sup>

## Stakeholder submissions

GrainCorp submitted that entities require access to ARTC’s rail network for purposes other than requiring train paths but this is not covered by the Existing or Proposed Undertaking.

One of the constraints of the current ... IAU is that while the network is broadly described as “the track and related infrastructure” but the IAU clearly focuses on the track and its use by Accredited Operators. With this focus the IAU doesn’t adequately recognise the interests of other significant access seekers with rail & rail related infrastructure, such as GrainCorp.<sup>32</sup>

ARTC stated that instead it has commercial contracts with these third parties to access the network when train paths are not required. This is for contractor access to the network for rolling stock recovery and access to connected infrastructure, such as sidings, which are currently excluded from the undertaking.<sup>33</sup> ARTC has stated individual agreements are executed every time access is required.<sup>34</sup>

In response to GrainCorp’s submission and the stakeholder workshop on 30 April 2024, ARTC has proposed to streamline the process for third-party access.

ARTC ... believes that a more efficient approach can be achieved through the development of pro forma terms and bilateral negotiation, if required, and inclusion of the agreed terms as a schedule to individual Track Access Agreements. This will reduce the administrative burden of requiring separate execution for every event, but without changing the terms of that access. This does not require expansion of the IAU to address such access.

In respect of access to connected facilities, such as sidings, they are effectively dedicated to single customers and in many cases not leased or controlled by ARTC. They are not subject to third party access and it is therefore not appropriate for them to be governed by access regulation but rather governed by bilateral agreements, as is currently the case. ARTC has listened to the concerns of stakeholders and commits to increasing transparency on its approach to the terms relating to use of those sidings leased or controlled by ARTC which will assist with bilateral negotiation with counterparties.<sup>35</sup>

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<sup>31</sup> ARTC, [Track changes Interstate Access Undertaking – ARTC’s Proposed 2024 Interstate Access Undertaking](#), ACCC, 12 December 2023.

<sup>32</sup> GrainCorp, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 8.

<sup>33</sup> Australian Rail Track Corporation (ARTC), [Response to Information request #2 – ARTC’s Proposed 2024 Interstate Access Undertaking](#), ACCC, 7 June 2024, p 2.

<sup>34</sup> ARTC, [Response to Information request #2 – ARTC’s Proposed 2024 Interstate Access Undertaking](#), p 2.

<sup>35</sup> ARTC, [Response to Information request #2 – ARTC’s Proposed 2024 Interstate Access Undertaking](#), pp 2-3.



## Discussion

The ACCC notes these other types of access are outside the scope of the Proposed Undertaking. However, the ACCC welcomes ARTC's proposal to streamline the process and provide more transparency on third-party contracts. We expect ARTC to continue discussions with GrainCorp and stakeholders to resolve the issue that has been raised regarding access for purposes other than train paths.

The ACCC notes that substantially changing the scope of the Proposed Undertaking currently before it, during the assessment process, would require substantial additional time for both ARTC and the ACCC to consider any such changes. We consider it is preferable that any such changes regarding other types of access that may be covered be considered as part of a separate access undertaking or a future undertaking and will revisit it at that time.

### **ACCC draft view**

The ACCC does not consider the Proposed Undertaking should be amended to significantly change the scope of the access it covers during this assessment process. However, ARTC should work with stakeholders to better recognise other forms of access through transparency measures and further discussion, including whether to consider broadening the undertaking's scope in the future.

## 5.5. Definitions and interpretation (Part 9)

The Proposed Undertaking introduces some new terms while removing others when compared to the Existing Undertaking. Discussion on individual items is contained in the relevant chapter – there are no specific comments in this chapter. Below is a summary for reference.

### New terms

These are the new definitions in the Proposed Undertaking with reference to the relevant chapter in this document where they are considered:

- 'Arbitration Agreement' – refer to chapter 7.2 and see Schedule A.
- 'Commencement Date' – refer to chapter 5.2 and see clause 2.2 for full definition.
- 'Interstate Network Development Strategy' – refer to chapter 10.1 and see clause 6.1 for full definition.
- 'Reference Service' – refer to chapter 8.6 and see Schedule J.
- 'Standing Offer' – refer to chapter 8.6 and see Schedule J.

### Deleted terms

These are definitions that have been excluded from the Proposed Undertaking:

- Terms associated with calculations of revenue floor and ceiling.
- 'Indicative Access Charge' and 'Indicative Service', discussed in chapter 8.6.1.
- 'Third Party Works' refer to schedule D (ITAA), discussed in chapter 13.

## Updated terms

The definition of Applicant has been updated for clarity. The underlined text is the new text.

“Applicant” means the person seeking Access from ARTC and seeking to become a Customer and, to avoid doubt, includes an existing Customer seeking new or additional Train Paths (rather than variations) to those Train Paths already contracted under an Access Agreement

## 5.6. Network and Segments (Schedules E and H)

### Background

Schedule E in the Existing Undertaking defines the Network and lists the railway lines and various components in detail, grouped by area or state. It distinguishes components in South Australia, Western Australia and New South Wales owned by ARTC, and components leased by ARTC in Victoria and New South Wales. It is supported by 4 annexed maps showing a geographical description of part of the Network.

Schedule I in the Existing Undertaking lists 10 segments which broadly comprise the Network. The segments do not define the coverage of the Network but are distinguished for the purposes of applying Charges. Segments broadly accord with the sections listed in ARTC’s pricing schedule.

### Proposed Undertaking

Schedule E of the Proposed Undertaking includes the following additional components in New South Wales and Queensland which ARTC has leased more recently and were not listed in the Existing Undertaking:

- Metropolitan Freight Network Lease
  - Freight Corridors*
    - Sefton Park Junction – Chullora Junction
    - South Flemington – North Enfield
    - North Enfield – South Enfield via main lines
    - South Enfield – Loftus Street Campsie
    - Marrickville Junction – Port Botany
  - Shared Corridor*
    - Loftus Street Campsie – Marrickville Junction
- Queensland Lease
  - Border Loop to Acacia Ridge

The Metropolitan Freight Network and Border Loop to Acacia Ridge are new components that ARTC had earlier applied to include in its proposed 2018 Undertaking. However, at the time the ACCC did not accept ARTC’s initial valuations, and its Draft Decision was to not accept the undertaking.

Segments listed in Schedule I in the Existing Undertaking are now listed in Schedule H of the Proposed Undertaking, with some additional or amended segments as shown in Table 3.

**Table 3: Comparison of segments in Existing and Proposed Undertaking**

<b>2008 Existing Undertaking Schedule I</b>	<b>2024 Proposed Undertaking Schedule H</b>
Adelaide (Dry Creek) – Parkeston	Dry Creek – Parkeston (1)
	<u>NEW</u> : Tarcoola – Asia Pacific (2) Interface
Adelaide (Dry Creek) – Melbourne (Spencer Street)	Dry Creek – Spencer St (Melbourne) (3)
Melbourne (Tottenham) – Macarthur	Melbourne (Tottenham) – Macarthur (4)
Newcastle (Islington Junction via mains) - Queensland Border (Border Tunnel)	Newcastle - Acacia Ridge (adds Queensland Border – Acacia Ridge) (5)
Crystal Brook – Parkes	Crystal Brook – Parkes (6)
Cootamundra – Parkes	Cootamundra – Parkes (7)
Adelaide (Dry Creek) – Pelican Point	Dry Creek – Pelican Point (8)
Port Augusta – Whyalla	Port Augusta – Whyalla (9)
Moss Vale – Unanderra	Moss Vale – Unanderra (10)
Southern Sydney Freight Line	Southern Sydney Freight Line incl Sefton Park Junction – Flemington South (11)
	<u>NEW</u> : Metropolitan Freight Network Chullora Junction – Port Botany (12)

As shown in Table 3, the following two segments are additional:

- Tarcoola – Asia Pacific Interface
- Metropolitan Freight Network Chullora Junction – Port Botany

Tarcoola to Asia Pacific Interface was not listed separately as a segment in the Existing Undertaking, although it has always been part of the definition of the Network in Schedule E.

The Southern Sydney Freight Line has been part of the Network since it was added by a variation to the undertaking in 2013. It was also added as a new segment at the time, but the Proposed Undertaking further specifies that it includes Sefton Park Junction – Flemington South.

The Newcastle (Islington Junction via mains) – Queensland Border (Border Tunnel) segment in the Existing Undertaking has been extended to include Queensland Border to Acacia Ridge. It is now called Newcastle – Acacia Ridge.

The Proposed Undertaking also amends some location names which still represent the same location; for example, Adelaide is changed to Dry Creek.

## Stakeholder submissions

Stakeholders did not express any concern about the inclusion of new segments or other minor name changes. There is a separate discussion below in chapter 5.6.1 regarding the Maroona to Portland line.

## Discussion

The ACCC accepts the inclusion of the new components in the Network. The ACCC had concerns with including these components for the 2018 Undertaking due to the validity of the initial valuations. However, these concerns no longer apply since the Proposed Undertaking has no asset values and cost base for pricing. We consider that the efficiency of the network will be enhanced by extending the protections of the Proposed Undertaking to the new sections.

We also accept the new Segments listed in Schedule H, noting that they bring all parts of the Network into the defined segments.

The ACCC notes that Segments would not be needed in the Proposed Undertaking insofar as they were previously relevant for the Ceiling Limit and Floor Limits, but they may still be distinguished for pricing purposes. However, the segments listed in Schedule H are expressed differently from those set out in ARTC's pricing schedule. For example, the segment Dry Creek – Parkeston in Schedule H is divided into 2 sections in the pricing schedule effective from 1 July 2024– that is, Adelaide - Port Augusta and Port Augusta – Parkeston.

### 5.6.1. Maroona to Portland line

#### Background

The Maroona to Portland line is a 173 km branch from Maroona on the East-West interstate line south to Portland. It is leased by ARTC from the Victorian Government but is not currently under the scope of the Existing Undertaking or Proposed Undertaking. The Port of Portland's submission expressed significant concern about the deterioration of the line and resulting capacity.<sup>36</sup>

The Port submitted that ARTC is not maintaining the line at the standard required in the lease and that this "has the effect of distorting competition – in particular, between the Port [of Portland] and the Port of Geelong".<sup>37</sup>

The Port also submitted that ARTC's lease shows that the parties intended that the line would be subject to an access undertaking or access code approved by the ACCC. The Port referred to news items on that point. The Port submitted that the ACCC should ensure that the line is clearly covered by the Proposed Undertaking.<sup>38</sup>

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<sup>36</sup> Port of Portland, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), ACCC, 23 February 2024, p 3.

<sup>37</sup> Port of Portland, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), paragraph 37, paragraph 7.

<sup>38</sup> Port of Portland, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), paragraph 10.

GrainCorp acknowledged the pivotal role the Maroona to Portland rail line plays in facilitating trade and economic development and expressed its full support for an upgrade to the line.<sup>39</sup>

In the 2024-25 Budget in May 2024, the Australian Government announced funding of \$150 million to upgrade the line.<sup>40</sup>

We note the Port's submission came before the announcement. However, in a follow-up letter, the Port maintained that the line should be covered by the Proposed Undertaking for the benefit of the investment to be realised.<sup>41</sup>

## Discussion

We note ARTC's commitment in its response to our Information Request to limit prices charged for the Maroona to Portland line to no higher than those charged for comparable services on the Port of Geelong – North Geelong – Wolseley line.<sup>42</sup> The latter section has to be traversed by users of the Maroona to Portland line and is covered by the terms and conditions as well as pricing of the Proposed Undertaking or Track Access Agreement.<sup>43</sup> We therefore consider that users of the Maroona to Portland line are unlikely to be disadvantaged by its exclusion from the Proposed Undertaking at this time.

The Port of Portland's main concerns may be alleviated if the track is upgraded with the new government funding, regardless of whether the line is included in an access undertaking. The line has been used recently only for seasonal grain traffic to the port but proposed mineral sands projects could create larger and more consistent volumes of freight.

ARTC has stated in response to the ACCC's Information Request 2 that it is happy to reassess its inclusion once the upgrade is completed.<sup>44</sup>

### **ACCC draft view**

The ACCC considers the proposed components of the Network and Segments set out in the Proposed Undertaking are appropriate.

After the Maroona to Portland line is upgraded to an appropriate standard, ARTC should consider its inclusion, either by variation to an undertaking on foot, or inclusion in a future undertaking.

<sup>39</sup> GrainCorp, [GrainCorp Support for Maroona to Portland Rail Line Upgrade](#), letter dated 2 April 2024, p 1.

<sup>40</sup> <https://minister.infrastructure.gov.au/brown/media-release/investment-deliver-future-made-australia> accessed 14 June 2024.

<sup>41</sup> Port of Portland, [Additional submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), ACCC, 9 July 2024, p 2.

<sup>42</sup> ARTC, [Response to Information request #2 – ARTC's Proposed 2024 Interstate Access Undertaking](#), p 11. ARTC refers to clause 20.4 in ARTC's Victorian lease which says: "ARTC acknowledges that it will not impose access charges for services operated on the Maroona - Portland line which are in excess of the access charges imposed for comparable services on the Port of Geelong - North Geelong - Wolseley line."

<sup>43</sup> ARTC, [Response to Information request #2 – ARTC's Proposed 2024 Interstate Access Undertaking](#), p11.

<sup>44</sup> ARTC, [Response to Information request #2 – ARTC's Proposed 2024 Interstate Access Undertaking](#), p12.

## 6. Negotiating for access (Part 3)

Train pathing services on the Interstate network are covered by the Proposed Undertaking, as either a Reference Service or a negotiated service. The prices of Reference Services are specified in the Proposed Undertaking, but access seekers can negotiate the price and non-price terms of other services. Should negotiations fail, the Proposed Undertaking sets out a dispute resolution process. This includes executive negotiation, mediation and as a final resort, arbitration (dealt with in chapter 7).

The ACCC is supportive of executive negotiation being brought forward in the dispute resolution process in the Proposed Undertaking. The ACCC notes that ARTC providing clarity on executive negotiation and mediation steps will help ensure smaller users of the Interstate network feel more able to engage in the negotiation framework. The addition of the executive negotiation step prior to mediation aligns with the interests of stakeholders outlined in submissions by providing an additional process for smaller users to attempt to resolve disputes prior to formal mediation or arbitration under the Proposed Undertaking.

Though some stakeholders proposed shorter timeframes for aspects of dispute resolution in submissions, stakeholders at ARTC's stakeholder workshop appeared comfortable with retaining the timeframes outlined in the Proposed Undertaking. As a result, the ACCC is comfortable no change to timeframes is required.

The ACCC considers the other changes to dispute resolution are appropriate and add clarity to the dispute resolution process. These changes are:

- referring certain matters to dispute resolution under clause 3.12 instead of straight to arbitration as in the Existing Undertaking
- removing the requirement for parties to first engage in reasonable negotiation prior to seeking to resolve the dispute in accordance with clause 3.12
- minor changes to update the guidelines for mediation in the ITAA to "Ethical Guidelines for Mediators" issued by the Law Council of Australia.

### 6.1. Negotiation framework

As with the Existing Undertaking, the Proposed Undertaking sets out a framework for applicants seeking access to the network to negotiate with ARTC regarding that access. This provides for:

- preliminary meetings and exchanges of information (including provisions that deal with confidentiality)
- submission of an Access Application by the Applicant
- preparation of an Indicative Access Proposal by ARTC
- negotiations to develop an Access Agreement for execution
- dispute resolution procedures
- both ARTC and the Applicant to negotiate in good faith.

Clause 3.4 of the Proposed Undertaking (which mirrors that of the Existing Undertaking) sets out conditions that Applicants must satisfy, such as meeting prudential and other

requirements. Applicants will either be an Accredited Operator or, if not, the Applicant must procure the services of an Accredited Operator to operate the proposed Services.

The following schedules support the negotiation process:

- Schedule A - Access Application (including Arbitration Agreement)
- Schedule B - Information to Accompany Access Application
- Schedule C - Essential Elements of Access Agreement
- Schedule D - Indicative Track Access Agreement.

Arbitration is discussed separately in chapter 7 below.

## 6.2. Executive negotiation and mediation steps

### Background

In the Existing Undertaking, the dispute resolution process for access seekers begins with notification of a dispute, progressing to negotiation between senior representatives to resolve the dispute, then mediation or arbitration by the ACCC to resolve the dispute.

Under both the Existing and Proposed Undertakings, contractual disputes under an existing Track Access Agreement are dealt with under a different process set out in clause 17 of the ITAA.

### Proposed Undertaking

The dispute resolution process under clause 3.12 of the Proposed Undertaking similarly begins with notification of a dispute, progressing to negotiation between senior representatives to resolve or narrow the dispute, followed by executive negotiation between the chief executive officers of each party (or their authorised delegates) to resolve or narrow the dispute, then if required, either mediation or arbitration by a commercial arbitrator to resolve the dispute.

#### Negotiation

The Proposed Undertaking requires that negotiation between senior representatives to resolve or narrow the dispute occurs within 5 Business Days of a party giving the other a Dispute Notice, unless a longer period is agreed by the parties in writing.

The ability of parties to agree to a longer period and the use of negotiation to not only resolve but to narrow a dispute are elements that are new to the Proposed Undertaking.

#### Executive negotiation

The Proposed Undertaking provides for executive negotiation as a separate step, prior to mediation (see clause 3.12.3). Executive negotiation under the Existing Undertaking occurs later in the dispute resolution framework as part of the mediation process, and only after parties have agreed to attempt to resolve the dispute by mediation. As with negotiation, executive negotiation is intended to resolve or narrow the dispute.

Clause 3.12.3(ii) of the Proposed Undertaking provides that if the Dispute cannot be resolved by negotiation, the chief executive officers of each party will seek to agree whether the parties will attempt to resolve the Dispute by mediation. Pursuant to clause 3.12.4(a)(ii),

if the parties do not agree to mediation, either party may refer the dispute to be determined by arbitration.

## Mediation

Clause 3.12.4 of the Proposed Undertaking proposes an updated mediation process. In its Explanatory Guide, ARTC stated that including mediation as a preliminary step in the arbitration process is intended to allow smaller users to resolve the dispute prior to requiring formal arbitration.<sup>45</sup> The ACCC notes that the provisions of the Proposed Undertaking provide that mediation remains an optional step and requires agreement of both parties, otherwise either party can refer the dispute straight to arbitration.

The changes to the mediation process compared to the Existing Undertaking are mainly updates for clarity and on timelines, including:

- The period between the service of a Dispute Notice and when mediation can occur has been extended from 10 to 20 Business Days or longer if agreed to by both parties.
- The requirement that the first step of mediation is that it is referred to the chief executive officers of both parties has been moved earlier into the new executive negotiation step of the dispute resolution framework.
- If the dispute remains unresolved 35 Business Days after the appointment of a mediator, then either party may terminate the mediation and refer the dispute to arbitration (clause 3.12.4(e)). Under the Existing Undertaking, a dispute not resolved at any time after the appointment of a mediator can be referred to arbitration.

## Stakeholder submissions

Stakeholders were generally supportive of the changes to executive negotiation and mediation.

Pacific National submitted that executive negotiation being brought forward prior to mediation would “streamline the dispute resolution process and ensure all internal negotiation and dispute resolution options are tried before continuing to other external dispute resolution options” and “provides a more consistent approach that aligns with processes in other jurisdictions”.<sup>46</sup>

GrainCorp stated “it is important that executive negotiation occur prior to any escalation under the dispute resolution arrangements, specifically, prior to the dispute reaching mediation or arbitration”.<sup>47</sup>

GrainCorp proposed the time before referring disputes to mediation, if not resolved by executive negotiation, should be reduced from 20 to 10 Business Days:

GrainCorp does not see the benefit for access users of extending the period for which any dispute should then be referred to mediation following unsuccessful negotiation discussions. That is, it should be retained at 10 Business Days. Access to the rail network is often time critical and can have great consequences for access users monetarily and practically if a dispute is not dealt with swiftly. Given the nature of what is in dispute, 20 Business Days notice to refer to mediation (or to arbitration

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<sup>45</sup> Australian Rail Track Corporation (ARTC), [Explanatory Guide – ARTC’s Proposed 2024 Interstate Access Undertaking](#), ACCC, 12 December 2023, p 18.

<sup>46</sup> Pacific National, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 19.

<sup>47</sup> GrainCorp, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 4.



with the ACCC) is too long a period to wait for the next step in the dispute resolution process to be triggered.<sup>48</sup>

Aurizon submitted that the embedded timeframes in the dispute resolution process should be reviewed to “ensure that access to arbitration cannot be unnecessarily delayed”.<sup>49</sup>

## Discussion

### Executive Negotiation

The ACCC is supportive of executive negotiation being brought forward in the dispute resolution process in the Proposed Undertaking, particularly because it is in the interests of persons who might want access to the service.<sup>50</sup> We note stakeholders supported the change in submissions. Providing clarity on executive negotiation and mediation steps will help ensure smaller users of the Interstate network are able to engage in the negotiation framework.

Bringing forward the executive negotiation step also aligns the mechanism in the Proposed Undertaking with the Queensland Rail Access Undertaking, as the Queensland Rail Undertaking includes a dispute resolution mechanism for chief executives of the parties to a dispute prior to referral to the Queensland Competition Authority for potential mediation. This change would reflect a more uniform approach to aspects of the dispute resolution frameworks between the Proposed Undertaking and Queensland, which is beneficial for users that are operating across both the Interstate network and adjoining Networks regulated in other jurisdictions.

### Timeframes

Though some stakeholders proposed shorter timeframes in their submissions, stakeholders at ARTC’s stakeholder workshop appeared comfortable with retaining the timeframes outlined in the Proposed Undertaking. As a result, the ACCC considers no change to timeframes is required for the Proposed Undertaking.

#### **ACCC draft views**

The ACCC considers the arrangements for negotiation, executive negotiation and mediation are appropriate, having regard to both submissions and discussions at ARTC’s stakeholder workshop.

## 6.3. Other changes to dispute resolution

### Proposed Undertaking

ARTC proposes the following amendments to negotiating for access in the Proposed Undertaking:

- referring certain matters to dispute resolution under clause 3.12 instead of straight to arbitration as in the Existing Undertaking – clauses 3.4(f) and (g), and clause 3.8(b)

<sup>48</sup> GrainCorp, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 5.

<sup>49</sup> Aurizon, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), ACCC, 23 February 2024, p 26.

<sup>50</sup> Section 44ZZA(3) of the Act.

- removing the requirement for parties to first engage in reasonable negotiation prior to seeking to resolve the dispute in accordance with clause 3.12 – clause 3.10(e).

Clause 17 of the Existing ITAA sets out the procedure to settle disputes for existing access holders. The first stage of the process is negotiation between senior representatives from each party, followed by informal mediation between chief executive officers, and finally formal mediation. Formal mediation is conducted in South Australia by a single mediator in accordance with clause 17.3. The dispute resolution process in the Proposed ITAA is largely the same as the Existing ITAA, with minor changes proposed to update the guidelines for mediation from the “Guidelines for Legal Practitioners Acting as Mediators” to “Ethical Guidelines for Mediators” issued by the Law Council of Australia.

No stakeholder submissions discussed these other amendments.

## Discussion

The ACCC considers these minor amendments add clarity to the dispute resolution framework and are appropriate as the amendments appear to be in the interests of access seekers under section 44ZZA(3).<sup>51</sup>

The ACCC understands access holders have primarily used dispute resolution in the Existing ITAA in relation to track incidents, whereas disputes under the Existing Undertaking are more likely to relate to access for new services or prices.<sup>52</sup> The ACCC does not have visibility on the disputes that arise between access holders and ARTC but does not have any concerns with the updates to the dispute resolution section in the ITAA.

### **ACCC draft view**

The ACCC considers the other changes to dispute resolution are appropriate and add clarity to the dispute resolution process.

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<sup>51</sup> Subsection 44ZZA(3) of the Act.

<sup>52</sup> Incidents refers to accidents or problems on the network, such as collisions, derailment or breach of safe-working rules.

## 7. Arbitration (Part 3 cont'd)

A major change in the approach in the Proposed Undertaking compared to the Existing Undertaking is to use a commercial arbitrator rather than the ACCC. The Proposed Undertaking specifies that this section covers existing access holders seeking new or additional train paths, as well as new access seekers. It does not apply to disputes arising from existing Track Access Agreements with operators.

The ACCC supports the use of a commercial arbitrator in the Proposed Undertaking, as it will provide an efficient mechanism for access seekers to resolve what are essentially commercial disputes on the terms of services.

However, for clarity and to improve the process, the ACCC has proposed an amendment to provide that the Arbitration Agreement is to be signed by the Applicant when it submits an Access Application and signed in response by ARTC when it provides the Indicative Access Proposal. ARTC should also consider moving clause 3.12.5(a)(ix) into the Arbitration Agreement template itself to allow parties to negotiate the extent of the remedies the Arbitrator can grant.

The Proposed Undertaking should also reflect that the arbitration agreement included in Schedule A is a template agreement that can be negotiated and that a party should consider seeking its own independent legal advice before signing the agreement.

The ACCC views the use of the ACICA Rules, as amended, to be appropriate for the Proposed Undertaking. However, we will assess how the process has operated in practice during the consideration of any future undertaking.

Regarding the factors an arbitrator must consider:

- Factor K (factors relating to the industry) should be removed, as it may bias the arbitrator's consideration towards ARTC and the matters may be covered under other listed considerations.
- We agree with submissions from users that the interests of the access seeker should be a matter the arbitrator considers.
- We do not support consideration of the objectives and principles of Part IIIA of the Act, or competition generally, as matters a commercial arbitrator must take into account. These are unnecessary for resolving a commercial dispute about terms and conditions and would be inappropriate and time consuming for a commercial arbitrator to consider. Competition concerns are also considered in the overall assessment of the Proposed Undertaking.

The ACCC does not consider the provisions for the making of an award should be amended to allow the commercial arbitrator to require the provider to bear some or all of the costs of extensions or interconnections, consistent with the limits on ACCC arbitration awards in the Act.

## 7.1. Commercial arbitration

### Background

Under the Existing Undertaking the ACCC is the arbitrator, and adopts the arbitration procedures in Division 3, Subdivision D of Part IIIA of the Act (with some modification). The determination of the arbitrator is final and binding.

A major change in the approach in the Proposed Undertaking compared to the Existing Undertaking is to use a commercial arbitrator rather than the ACCC. The Proposed Undertaking specifies that arbitration is available to existing access holders seeking new or additional train paths, as well as new access seekers. It does not apply to disputes arising from existing Track Access Agreements with operators, as these are dealt with in accordance with the provisions of the Access Agreement.

In its Explanatory Guide, ARTC notes “the benefits of a commercial arbitration-based framework to deliver the commercial agility required for rail volume to grow and to drive modal shift.”<sup>53</sup> The ACCC indicated in its 2022 Guidance Paper that ARTC considered a commercial arbitration process is the most efficient method to create an access framework that provides timely dispute resolution and constrains the use of market power.<sup>54</sup> We considered a negotiate-arbitrate framework would be an appropriate part of a replacement undertaking and were open to considering using a commercial arbitrator.<sup>55</sup>

### Proposed Undertaking

In the Proposed Undertaking, ARTC has proposed the use of a commercial arbitrator. This is set out in clause 3.12.5, which outlines, among other things:

- The party referring the Dispute to arbitration must include an executed Arbitration Agreement.
- If the referring party is ARTC, the Applicant must execute and return the Arbitration Agreement to ARTC within 20 Business Days and, if it fails to do so, then ARTC will be entitled to cease negotiations and will not be obliged to comply with this Undertaking in respect of the request for access.
- If the referring party is the Applicant, ARTC must execute and return the Arbitration Agreement to the Applicant within 20 Business Days.
- The arbitration will be conducted in accordance with the rules of arbitration of the Australian Centre for International Commercial Arbitration (ACICA).
- The seat of arbitration will be Adelaide, South Australia.
- The number of arbitrators will be 1, with the arbitrator agreed to by the parties. If the parties cannot agree on an arbitrator within 10 Business Days of the referral of the dispute to arbitration, either party may notify ACICA and request that ACICA make that appointment.
- The Arbitrator will observe the rules of natural justice.
- The Arbitrator will have power to grant all legal, equitable and statutory remedies.
- The Arbitrator will give reasons on which the award is based.

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<sup>53</sup> ARTC, [Explanatory Guide – ARTC’s Proposed 2024 Interstate Access Undertaking](#), p 9.

<sup>54</sup> ACCC, [Guidance Paper – ARTC’s Interstate Access Undertaking 2023](#), p 18.

<sup>55</sup> ACCC, [Guidance Paper – ARTC’s Interstate Access Undertaking 2023](#), p 19.

- The arbitration will not mimic court proceedings and the practices of those courts will not regulate conduct of proceedings before the arbitrator.

## Stakeholder submissions

One stakeholder raised concern on the proposed change to a commercial arbitrator. GrainCorp stated:

GrainCorp understands that there may be a cost imperative involved for the parties to a dispute in circumstances where a commercial arbitrator and commercial arbitration process were to replace the ACCC as arbitrator. The removal of ACCC intervention in a dispute between the access seeker and ARTC is a concern ...

In the event this option leads the access seeker applicant to choosing arbitration to finally resolve the access issue in dispute, GrainCorp submits that the expertise and specialist lens of the ACCC performing the arbitration should be retained.<sup>56</sup>

Aurizon, Pacific National, and TAHE provided support for the change to a commercial arbitrator.

Aurizon submitted:

Aurizon has no concern with this change – in our view provided that binding arbitration is available to resolve disputes, we are satisfied that this be undertaken by a commercial arbitrator rather than the ACCC, provided that the guidance to that arbitrator remains appropriate ...<sup>57</sup>

Pacific National submitted:

Pacific National is supportive of the requirement to use a commercial arbitrator and for parties to abide closer to the rules of arbitration as set out by the Australian Centre for International Commercial Arbitration (ACICA).<sup>58</sup>

## Discussion

Noting the change to a commercial arbitrator, the Proposed Undertaking now sets out more detail around the arbitration process and the considerations and rules surrounding arbitration as a dispute resolution method. The Proposed Undertaking would contain 8 Reference Services with price caps.

Having regard to stakeholder submissions, the efficient operation of the network, and the interests of the parties, the ACCC is supportive of the use of a commercial arbitrator. Although GrainCorp proposes to retain the “expertise and specialist lens of the ACCC”, we consider that the likely efficiency benefits for commercial disputes support the proposed change to commercial arbitration for the Proposed Undertaking.

We note that ARTC is unlikely to deny access to services, so disputes are primarily going to be commercial in nature and judgements on what reasonable prices or terms are for negotiated services, suiting the use of a commercial arbitrator.

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<sup>56</sup> GrainCorp, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 5.

<sup>57</sup> Aurizon, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 25.

<sup>58</sup> Pacific National, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 20.

### **ACCC draft view**

The ACCC supports the use of a commercial arbitrator, as it will provide an efficient mechanism for access seekers to resolve what are essentially commercial disputes on the terms of services.

## 7.2. Arbitration Agreement

### Proposed Undertaking

The Arbitration Agreement, included in Schedule A of the Proposed Undertaking, is a new aspect of the dispute resolution process for the Interstate network. In clause 3.12.5(a)(i), ARTC stated that the party referring the Dispute to arbitration must include with the notice an executed Arbitration Agreement.

In its Explanatory Guide, ARTC outlines that the Arbitration Agreement, under which parties agree to be bound by the arbitration process, must be entered into prior to referring a dispute to Arbitration,<sup>59</sup> and ensures there are no questions regarding jurisdiction of the arbitrator.<sup>60</sup>

Schedule A also incorporates a template Arbitration Agreement that all parties will have to execute as part of referring a dispute to arbitration.

ARTC stated in its Explanatory Guide:

Prior to referring a dispute to arbitration, the parties must enter into an Arbitration Agreement under which they agree to be bound by the arbitration process.

This form requires both parties to enter into an Arbitration Agreement to ensure there are no questions of jurisdiction for the arbitrator.

Given that the IAU is an undertaking by ARTC in favour of the ACCC (as opposed to an agreement between ARTC and the Applicant), Schedule A now requires acknowledgement from the Applicant that when submitting an Access Application it agrees to be bound by the dispute resolution procedures in the IAU.<sup>61</sup>

### Stakeholder submissions

GrainCorp raised one issue regarding the Arbitration Agreement.

Whilst it may be usual to have an agreed and executed Arbitration Agreement in normal commercial arbitrations, progressing the execution of such a document where if the terms of the agreement cannot be finalised, ARTC can unilaterally cease negotiations and not be obliged to comply with the IAU in relation to a request for access is a concern.<sup>62</sup>

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<sup>59</sup> ARTC, [Explanatory Guide – ARTC’s Proposed 2024 Interstate Access Undertaking](#), p 20.

<sup>60</sup> ARTC, [Explanatory Guide – ARTC’s Proposed 2024 Interstate Access Undertaking](#), p 29.

<sup>61</sup> ARTC, [Explanatory Guide – ARTC’s Proposed 2024 Interstate Access Undertaking](#), p 36.

<sup>62</sup> GrainCorp, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 5.

## Discussion

The ACCC considers the inclusion of a template Arbitration Agreement in Schedule A is appropriate, as such an agreement is essential to provide a basis for a commercial arbitration process where there may be no existing contractual relationship between the parties and they are negotiating for access.

However, we consider the Proposed Undertaking should be clearer as to whether the agreement must be signed by the parties prior to negotiating access or at the time a dispute is notified.

Clause 3.6(a) provides that 'Requests for Access are to be submitted to ARTC in the form of an Access Application and in accordance with the form requirements of Schedule A.' Relevantly, Schedule A provides that, in submitting an Access Application, the Applicant agrees that the dispute resolution framework and Arbitration Agreement under clause 3 of the undertaking applies to this application and any dispute arising from it. This could be taken to mean that the arbitration agreement (which is in Schedule A) must be signed at the time of submitting an Access Application. However, clause 3.12.5(i) states that 'The party referring the Dispute to arbitration must include with the notice an executed Arbitration Agreement', and clauses 3.12.5(ii) and (iii) include specific timeframes by which an Arbitration Agreement is to be executed, which seem to suggest that the arbitration agreement could be made at the time a dispute is notified.

We suggest it is preferable that such an agreement is entered into early in negotiations (which would require amendment to clauses 3.12.5(a)(i)-(iii)), given the contents of the form of the Arbitration Agreement in Schedule A and so as not to hold up any dispute resolution. This would be in the interests of certainty for both parties as to how disputes will be resolved. However, ARTC has explained in discussions with the ACCC that it often responds to informal requests for pathing where it is unwarranted to complete an Arbitration Agreement in that circumstance.

Having regard to this, the ACCC considers it may be more practical for the Arbitration Agreement to be signed by the Applicant when it submits an Access Application (clause 3.2(b)) and signed in response by ARTC when it provides the Indicative Access Proposal (clause 3.2(c)).

In addition, the ACCC notes that, as per clause 3.12.5(a)(ix), "the Arbitrator will have the power to grant all legal, equitable and statutory remedies". This will enable the Arbitrator to grant a very broad range of remedies. Given this, and particularly for the benefit of smaller users, ARTC should consider moving clause 3.12.5(a)(ix) into the Arbitration Agreement template itself to make clear that parties can negotiate this term.

Further, we consider the Proposed Undertaking should be amended to state that the arbitration agreement is a template agreement that can be negotiated and that a party should consider seeking its own independent legal advice before entering into the agreement.

### **ACCC draft views**

The ACCC considers it may be more practical for the Arbitration Agreement to be signed by the Applicant when it submits an Access Application (clause 3.2(b)) and signed in response by ARTC when it provides the Indicative Access Proposal (clause 3.2(c)).

The Arbitration Agreement template and the body of the Proposed Undertaking (as relevant) should be amended to include a statement that it is a template agreement that can be negotiated and that a party should not sign the agreement without seeking its own independent legal advice. ARTC should also consider moving clause 3.12.5(a)(ix) into the Arbitration Agreement template itself to make clear that parties can negotiate the extent of the remedies the Arbitrator can grant.

### **Proposed amendment 7.1**

Amend clause 3.12 to provide the Arbitration Agreement be signed by the Applicant when it submits an Access Application and signed in response by ARTC when it provides the Indicative Access Proposal.

### **Proposed amendment 7.2**

Amend Schedule A and the body of the Proposed Undertaking (as relevant) to reflect that the form of Arbitration Agreement included in Schedule A is a template agreement that can be negotiated and that a party should consider seeking its own independent legal advice before signing the agreement.

## **7.3. ACICA Rules**

### **Proposed Undertaking**

The Proposed Undertaking provides that arbitrations will be conducted in accordance with the ACICA Rules. The ACICA states that its Rules and model clauses facilitate best practice and efficient resolution of commercial arbitration.<sup>63</sup> Using ACICA Rules provides a framework for commercial arbitration which can then be tailored to the dispute and parties involved in the dispute.

<sup>63</sup> Australian Centre for International Commercial Arbitration, [ACICA Rules 2021](#), ACICA website, accessed 9 February 2024.



However, some items in the Proposed Undertaking differ from the ACICA Rules:

- the Arbitrator will observe the rules of natural justice (not referenced in the ACICA Rules)
- there are differences in the timelines for various actions to be completed
- if an Applicant does not enter into an Access Agreement consistent with an award of the Arbitrator within 20 Business Days of the award or such later time provided in the award, the Applicant or any associate of the Applicant must not give a Dispute Notice about the same or substantially similar Service the subject of the award for a period of one year from the date of the award
- except where the award is subject to an appeal or application to set aside in a court of law, if an Applicant does not comply with the award, then ARTC will no longer be obliged to continue negotiations regarding the provision of Access for that Applicant
- neither party will have a right of appeal under section 34A of the Commercial Arbitration Act 2011 (SA) on a question of law arising out of an award made under clause 3.12. To avoid doubt, this does not affect other appeal rights the parties may have under the Commercial Arbitration Act 2011 (SA) or at law. In the ACICA Rules, the parties will be taken to have waived any right of appeal to a decision made by ACICA to any State court or other judicial authority to the extent permitted by the seat of arbitration.
- ARTC will notify the ACCC of Disputes referred to arbitration at the time of referral and will provide the ACCC, on a confidential basis, with a copy of any award made by an Arbitrator pursuant to clause 3.12.5.

## Stakeholder submissions

GrainCorp and Pacific National were the only stakeholders to comment on the use of the ACICA Rules in the Proposed Undertaking. GrainCorp raised concerns about the amendments made to the ACICA Rules in the Proposed Undertaking. GrainCorp submitted:<sup>64</sup>

The accepted position is that the arbitration will be conducted in accordance with the ACICA Rules, however ARTC has sought to have a number of them amended in the IAU in a manner which prioritises ARTC in the SA jurisdiction and fails to retain the competition law lens that any arbitration should have. The jurisdiction for any dispute should be the jurisdiction in which the relevant services are based and provided. Any references to the jurisdiction of SA should therefore be removed and broader jurisdiction applied.

Pacific National raised different matters in its submission relating to the ACICA Rules.<sup>65</sup>

Pacific National is supportive of the requirement to use a commercial arbitrator and for parties to abide closer to the rules of arbitration as set out by the Australian Centre for International Commercial Arbitration (ACICA).

...

The ACICA Arbitration rules allow for the arbitral tribunal to be composed of either 1 or 3 arbitrators. Pacific National is comfortable with there being a sole arbitrator instead of 3, as this ends up being more cost effective.

- We note the discrepancy in the 2024 IAU and ACICA rules between the number of days that need to pass during which the parties cannot agree on

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<sup>64</sup> GrainCorp, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), p 5.

<sup>65</sup> Pacific National, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), p 20.

an arbitrator – 10 Business Days versus 40 days. Pacific National is comfortable with the shorter timeframe.

Pacific National is “supportive of the various joinder / additional provisions in the ACICA that will be incorporated into the 2024 IAU, including that under ACICA rules clause 29, a Statement of Claim is required to be served on the respondent by the claimant”.<sup>66</sup>

## Discussion

The ACCC considers the use of the ACICA Rules is appropriate for arbitrations in the Proposed Undertaking. The ACICA Rules provide a uniform and known framework for the arbitration of disputes.

Although GrainCorp raised concern over ARTC being prioritised in the South Australian jurisdiction in the ACICA Rules in the Proposed Undertaking, the ACCC views the change to a South Australian jurisdiction is acceptable. The ACCC understands that the seat of arbitration being South Australia does not indicate where the dispute is held but only determines that South Australian laws and courts will have jurisdiction over the dispute. The consideration of competition as a matter the arbitrator must consider is dealt with separately in chapter 7.4 below.

### **ACCC draft view**

The ACCC views the ACICA Rules, as amended, to be appropriate for the Proposed Undertaking. However, we will assess how the process has operated in practice during the consideration of any future undertaking.

## 7.4. Matters for an Arbitrator to take into account and the making of an award

### Background

The factors a commercial arbitrator must consider, as well as providing what they may do or not do in making an award, are broadly based on the Existing Undertaking where the ACCC is the arbitrator.

### Proposed Undertaking

The Proposed Undertaking includes changes to remove factors not relevant to a commercial arbitration, as well as some additions proposed by ARTC.

#### Matters for an arbitrator to take into account

Clause 3.12.5(a)(xii) of the Proposed Undertaking sets out the matters which the Arbitrator must take into account when making a determination. Section 44X of the Act applies to Part IIIA arbitrations by the ACCC but has been used as a guide by ARTC in determining the appropriate factors the proposed commercial arbitrator must consider.

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<sup>66</sup> Pacific National, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), p 20.

The list of matters is largely the same as clause 3.12.4(b)(vi) of the Existing Undertaking. ARTC has included 4 additional items in the Proposed Undertaking:

- (H) the commercial and logistical impacts on ARTC's business of the Services requested compared to the Standing Offer for Reference Services
- (I) formal offers tabled and rejected by the parties
- (J) the factors listed in clause 4.2 (as applicable):
- (K) factors relating to the industry, including:
  - (aa) comparative rates of return;
  - (ab) risks to the rail industry; and
  - (ac) relativity of price to overall supply chain costs.

Unlike the Existing Undertaking, the Proposed Undertaking does not include the following matters:

- the objectives and principles in Part IIIA of the [Act] and the Competition Principles Agreement
- 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
- the benefit to the public from having competitive markets.

### The making of an award

Clause 3.12.5(a)(xiii) of the Proposed Undertaking lists the actions the Arbitrator may do or must not do in making an award. In the Explanatory Guide, ARTC outlines that this affords procedural transparency to users and provides them with an ability to assess the strength of their position prior to triggering the process.<sup>67</sup>

The items in the Proposed Undertaking largely mirror the matters from the Existing Undertaking in that they reflect provisions in the Act. In particular:

- clauses 3.12.5(a)(xiii) (A) – (E) of the Proposed Undertaking largely mirror the matters in subsection 44V(2) of the Act (things the ACCC may deal with in a determination)
- clauses 3.12.5(a)(xiii) (F) – (K) largely mirror the matters in section 44W of the Act (the ACCC must not make a determination that would have certain effects).
- the matters in section 44X of the Act are largely covered by the matters the arbitrator must take into account in making a final determination as part of clause 3.12.5(a)(xii).

The only item in the Existing Undertaking that is not reflected in the Proposed Undertaking is that an award may require the third party to accept, and pay for, access to the service.

## Stakeholder submissions

### *Aurizon*

Aurizon outlined concerns with the matters to be considered by the arbitrator in clause 3.12.5(a)(xii).

As a general statement, Aurizon considers that the factors that the arbitrator should take into account should reflect the overarching intent of the Proposed IAU, and directly align with the Proposed IAU provisions where relevant. While we are satisfied that the Proposed IAU refers disputes to a commercial arbitrator rather than the

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<sup>67</sup> ARTC, [Explanatory Guide – ARTC's Proposed 2024 Interstate Access Undertaking](#), p 4.

ACCC, we do not consider that this justifies a requirement that an arbitrator consider a narrower (or different) set of criteria in resolving a dispute than ARTC is required to consider when negotiating for access.<sup>68</sup>

Aurizon proposed specific changes to the factors to be considered by an arbitrator in clause 3.12.5(a)(xii), as follows:

- including the objectives of the Undertaking and the objectives in ARTC’s Charter and Statement of Shareholder expectations
- including the Applicant’s legitimate business interests and investment in the Services
- considering the ‘avoidable’ costs of providing the Services requested, rather than just costs
- removing the commercial and logistical impacts on ARTC’s business of the Services requested compared to the Standing Offer for Reference Services
- removing sub-clause (K) [factors relating to the industry].<sup>69</sup>

In proposing to remove sub-clause (K), Aurizon stated that it is “unclear why ARTC has called out the specific issues listed in this subparagraph, with a range of other issues also likely to provide relevant industry context”.<sup>70</sup> Aurizon further outlines that listing the three factors in (K) “appears to elevate the importance of these matters for an unclear purpose”.<sup>71</sup> Aurizon instead proposes that “factors relating to the rail industry would be considered by the arbitrator as a matter of course under subparagraph (L)” [any other matters].<sup>72</sup>

Aurizon is supportive of the matters on which the arbitrator may make an award.<sup>73</sup>

#### *Pacific National*

Pacific National is “largely comfortable” with the arbitration process in the Proposed Undertaking, provided there are adjustments made to clauses 3.12.5(a)(xii) and 3.12.5(a)(xiii).

Given the monopoly position of the ARTC, it is reasonable that greater weight should be given in clause 3.12.5(xii) to the impact on the Applicant and the public interest, to make the factors for determination more balanced during an arbitration.<sup>74</sup>

Pacific National proposes the following changes to what the arbitrator must take into account in clause 3.12.5(a)(xii):

- retaining clause 3.12.5(a)(xii)(A) from the Existing Undertaking which requires the arbitrator to take into account the objectives and principles of the Act and Competition Principles Agreement as the principles remain relevant to arbitrating disputes
- adding “the Applicant’s legitimate business interests and investment in the Network” clause 3.12.5(xii)(B)

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<sup>68</sup> Aurizon, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 26.

<sup>69</sup> Aurizon, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), pp 26-27.

<sup>70</sup> Aurizon, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 28.

<sup>71</sup> Aurizon, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 28.

<sup>72</sup> Aurizon, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 28.

<sup>73</sup> Aurizon, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 28.

<sup>74</sup> Pacific National, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 21.

- adding “the benefit to the public from having competitive markets” after clause 3.12.5(xii)(F).<sup>75</sup>

In relation to the things the arbitrator can make an award about (clause 3.12.5(a)(xiii)), Pacific National submitted:<sup>76</sup>

Pacific National is not comfortable that the arbitral award cannot require ARTC to bear some of the costs of maintaining extensions or interconnections, particularly when there may [be] an occasion where these are firmly in the public interest.

Government-owned enterprises, such as ARTC, are often expected to operate at higher standards of corporate social responsibility than private equivalents, including giving a higher weight to long-term national and community interests. This balancing of commercial and non-commercial priorities is reflected in clause 1.2 of the 2024 IAU, which explains the intent of the Undertaking includes reaching an appropriate balance between:

- the legitimate business interest of ARTC
- the interest of the public
- the interests of Applicants wanting access to the Network.

To align with clause 1.2, Pacific National recommends amending clause 3.12.5(a)(xiii) by removing subsections (I), (J), (K).

Pacific National is supportive of the use of a commercial arbitrator in place of the ACCC, and the use of the ACICA rules of arbitration.

### *GrainCorp*

GrainCorp raised concerns on the proposed change to a commercial arbitrator in the Proposed Undertaking.

... appropriate guard rails should be included in the arbitration framework to ensure that an arbitrator provides due weight to the imbalance of power between ARTC and the access seeker and that, depending on the nature of the dispute, 1 to 3 arbitrators be appointed with a comprehensive understanding of the competitive landscape in which access users are operating in and to ensure that the principles and objectives of the IAU are being met and employed in any access dispute and resolution of such a dispute takes such factors into consideration.<sup>77</sup>

## Discussion

### Matters for an arbitrator to take into account

#### *Clause 3.12.5(a)(xii)(K) – factors relating to the industry*

In Information Request 1, we asked ARTC to provide additional information on how the matters in sub-clause (K) could affect pricing. ARTC stated:

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<sup>75</sup> Pacific National, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 21.

<sup>76</sup> Pacific National, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 21.

<sup>77</sup> GrainCorp, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 5.

The factors framed in (K) reflect a commercial reality that rail competes with road and sea for the provision of freight services. The competitive pressure, provided by these competing modes, places pressure on the service offering of all aspects of the supply chain, of which rail is just one portion. In the circumstance of a hypothetical dispute, it is possible that an applicant may consider that aspects of the proposed service offered by ARTC, including its pricing, are not set at a level or sufficient to allow the applicant to provide a competitive service.

... clause 3.12.5(xii)(K) highlights the importance of taking a holistic approach, which considers overall industry factors related to the dispute and how each factor bears on a dispute and the appropriate pricing and risk allocation on the below rail component. It is critical that these issues are not considered in isolation, so are not separable, but rather reflect a need for the Arbitrator to consider relevant industry factors in their determination ...<sup>78</sup>

The ACCC is not convinced the factors listed in (K) should be specifically considered by the arbitrator. The relevance or importance of the factors is unclear and may be in contrast with the section 44ZZA criterion (the interests of access seekers) due to the potential for ARTC's interests to be given greater weight over access seekers' interests. Further, the factors are arguably broadly covered within existing factors under clause 3.12.5(a)(xii), including:

- (B) ARTC's legitimate business interests and investment in the Network
- (H) the commercial and logistical impacts on ARTC's business of the Services requested compared to the Standing Offer for Reference Services
- (J) the factors listed in clause 4.2 (which include the market value of the Train Path sought)
- (L) any other matter the arbitrator considers relevant.

#### *The interests of access seekers*

In response to stakeholder feedback on the Applicant's legitimate business interests being included as a factor in clause 3.12.5(a)(xii)(B), ARTC has stated that "the draft IAU will be amended to reflect the interests of the access seeker be included in the arbitrator's considerations."<sup>79</sup>

The ACCC supports stakeholders' suggestion to include the Applicant's legitimate business interests as a factor in clause 3.12.5(a)(xii)(B) in addition to the existing consideration of ARTC's legitimate business interests. If ARTC's interests are included as a factor the Arbitrator must take into account in arbitrating a dispute, then the interests of access seekers should be given equal consideration by the arbitrator.

We welcome ARTC's indication that it will include this factor; its inclusion would be consistent with considering the interests of access seekers in undertaking assessments under section 44ZZA of the Act.

#### *Competition and the Act*

In submissions, 3 stakeholders raised concerns about not carrying over clause 3.12.5(xii)(A) of the Existing Undertaking—that an arbitrator be required to take into account the objectives and principles of Part IIIA of the Act. Stakeholders considered the objects and principles in

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<sup>78</sup> Australian Rail Track Corporation (ARTC), [Response to Information request #1 – ARTC's Proposed 2024 Interstate Access Undertaking](#), ACCC, 18 March 2024, response to 2.2.

<sup>79</sup> ARTC, [Response to stakeholder submissions – ARTC's Proposed 2024 Interstate Access Undertaking](#), p 2.

Part IIIA remain relevant to the arbitration process, and the removal of these considerations could result in ARTC having an imbalance of power in disputes.

The ACCC does not agree and considers it is appropriate to exclude consideration of the objectives and principles of Part IIIA of the Act, or competition generally, as matters a commercial arbitrator must take into account. These are unnecessary for resolving a commercial dispute about terms and conditions.

Competition is a factor which has been accounted for as a general consideration in our assessment of the Proposed Undertaking as a whole. Moreover, including the principles and objectives of Part IIIA as a matter for consideration would add to the complexity of, and time required for, the arbitration process.

In addition, including competition issues as a mandatory consideration for a commercial arbitrator with unknown experience or knowledge in competition issues raises unnecessary risks to the arbitration process and the making of an award. Although these may be a relevant consideration for a competition regulator, a commercial arbitrator should primarily be directed towards balancing the interests of the parties to the dispute in the context of the provision of a service.

### Bearing the costs

Pacific National raised an issue with clauses 3.12.5(a)(xiii)(I)-(K) which provide that in making an award, the arbitrator must not require ARTC to bear some or all of the costs of maintaining extensions or interconnections.<sup>80</sup> Pacific National stated it “is not comfortable that the arbitral award cannot require ARTC to bear some of the costs of maintaining extensions or interconnections, particularly when there may an occasion where these are firmly in the public interest.”<sup>81</sup>

In relation to ACCC arbitrations under Part IIIA of the Act, paragraphs 44W(1)(e)-(f) state:

(1) The Commission must not make a determination that would have any of the following effects:

...

(e) requiring the provider to bear some or all of the costs of extending the facility (including expanding the capacity of the facility and expanding the geographical reach of the facility);

(ea) requiring the provider to bear some or all of the costs of maintaining extensions of the facility (including expansions of the capacity of the facility and expansions of the geographical reach of the facility);

(f) requiring the provider to bear some or all of the costs of interconnections to the facility or maintaining interconnections to the facility.<sup>82</sup>

...

The ACCC considers maintaining this limitation is appropriate. Requiring extensions or interconnection goes beyond access to infrastructure. If the Act specifically prevents the

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<sup>80</sup> Pacific National, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 21.

<sup>81</sup> Pacific National, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 21.

<sup>82</sup> Paragraph 44W(1)(e)-(f) in Part IIIA of the Act.

ACCC from ordering something in an arbitration, it would be inconsistent to allow a commercial arbitrator to do it.

### **ACCC draft views**

The ACCC broadly supports the matters the arbitrator is to consider and the types of awards they can make in the Proposed Undertaking.

However, in relation to the factors the arbitrator must consider, we are of the view that ARTC should:

- remove proposed consideration 3.12.5(a)(xii)(K) on factors relating to the industry
- add the interests of the access seeker as a factor the arbitrator must take into account under clause 3.12.5(a)(xii)
- not amend the provisions to include factors relating to competition or the public interest where a commercial arbitrator is to be used.

We also do not consider the making of an award should be amended to allow the arbitrator to require the provider to bear the cost of extensions or interconnections, consistent with the restriction on ACCC arbitrations in the Act.

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### **Proposed amendment 7.3**

Clause 3.12.5 of the Proposed Undertaking should be amended to:

- remove consideration 3.12.5(a)(xii)(K)
- include the interests of the access seeker as a factor that the arbitrator must consider under 3.12.5(a)(xii).



## 8. Pricing principles (Part 4)

The Proposed Undertaking does not contain a floor limit or ceiling limit; it provides a constraint on prices through a Standing Offer with specified price caps for a set of 8 Reference Services. The maximum allowable prices are those currently set by ARTC, to be adjusted on 1 July each year in line with the Consumer Price Index.

The price cap mechanism covers nearly all ARTC's services, whereas the Existing Undertaking prescribes prices for only one Indicative Service (Super Freight). The price caps therefore provide broad protection for captive customers and against potential price shocks.

The ACCC considers that a revenue ceiling based on conventional measures of capital cost is currently impractical, given that market competition prevents ARTC from recovering full costs on the Interstate network. However, data provided by ARTC indicates that prices are likely to be above incremental cost, and therefore satisfy the principle behind a floor limit. We consider the prices are consistent with the objective of promoting the economically efficient operation of and use of the infrastructure.

The Standing Offer in the Proposed Undertaking maintains the same relativities between prices of different services and the same 2-part structure of flagfall and variable charges as in ARTC's current pricing schedule.

The Proposed Undertaking maintains the same objective and factors for differentiating charges for different services as in the Existing Undertaking, with minor additions. It also maintains the commitment to charge the same price for like services. There is also some scope for variation through negotiation.

Nevertheless, the mechanism for varying prices for a sub-set of a Reference Service from the prescribed price caps is unclear in the Proposed Undertaking, and the ACCC considers that ARTC should clarify this in an amended undertaking.

Stakeholders expressed some concern about the feasibility of publishing negotiated charges while de-identifying the parties involved. The ACCC is satisfied that the proposed wording achieves a reasonable balance between transparency and confidentiality.

### 8.1. Objectives

Clause 4.1 of the Proposed Undertaking provides that ARTC will develop its charges with a view to achieving the objectives set out in clause 1.2(d), which seeks to reach a balance between the legitimate business interest of ARTC, the interest of the public, and the interests of applicants wanting access to the Network. This mirrors the Existing Undertaking.

## 8.2. Charge differentiation

### Proposed Undertaking

Clause 4.2 of the Proposed Undertaking lists a range of factors which ARTC will have regard to in formulating its charges. These include the Standing Offer, the particular characteristics of the relevant service, the commercial and logistical impacts on ARTC's business, the cost of additional capacity, and capital or other contributions by an applicant to ARTC's costs.

The changes from the Existing Undertaking are only minor:

- referring to Reference Services rather than Indicative Services
- changing references to 'capacity' to 'relative capacity consumption'
- adding 'changes requested by the Applicant to the Indicative Track Access Agreement' to the list of factors that may indicate a commercial impact on ARTC's business
- removing the provision that ARTC will have regard to the predominant use of the network being for Indicative Services.

ARTC had previously proposed to add the factor listed in the third dot point above in its proposed 2018 Undertaking. The ACCC considered in its 2018 Draft Decision that this inclusion was appropriate as it is in ARTC's legitimate business interests and provides greater clarity and certainty in the operation of the undertaking for access seekers.<sup>83</sup>

Stakeholders generally did not comment on this section in our 2024 consultation.

### Discussion

The ACCC considers that the charge differentiation factors in the Proposed Undertaking generally remain appropriate, as they are factors affecting ARTC's costs and returns which justify efficient cost-reflective price differentials. Appropriate charge differentiation factors are in the interests of both ARTC and users.

## 8.3. Limits on charge differentiation

### Proposed Undertaking

Clause 4.3 in the Proposed Undertaking provides that, in setting charges, ARTC will not have regard to the identity of an Applicant and will not differentiate between Applicants in circumstances where:

- the characteristics of the Services are alike
- the Applicants are operating within the same end market.

The Proposed Undertaking retains this provision from the Existing Undertaking, with a minor addition that requires ARTC to have regard to 'the applicable non-price terms' in comparing two services.

Clause 4.3 restricts certain price discrimination by ARTC and is generally supported by users. For example, it may prevent ARTC from charging lower prices to an incumbent

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<sup>83</sup> ACCC, [Draft Decision – ARTC's 2018 Proposed Interstate Access Undertaking](#), ACCC, 20 December 2018, p 173.

operator with greater market power than it charges for the same service to a new entrant with less market power. However, clause 4.3 should be considered in conjunction with the pricing principle in the Act which states that access prices should allow multi-part pricing and price discrimination when it aids efficiency.

The ACCC considers the Proposed Undertaking provides sufficient flexibility to allow such price differentials when they aid efficiency, given the range of factors in clause 4.2 which could differentiate a service. The factor ‘the market value of the Train Path sought’ may allow price discrimination between otherwise similar services but could aid efficient use where it allows ARTC to recover more of its costs from services with greater ability to pay. However, it should not be used to exercise market power, such as through unexpected price increases directed at captive customers. We note, however, that many of the other factors in clause 4.2 reflect differences in the service provided or its cost, which justify different cost-reflective prices to promote efficient use of the services.

## Stakeholder submissions

In the context of the Indicative Track Access Agreement, Pacific National objected to ARTC’s changes to clause 5.6(a)(ii) to include “the applicable non-price terms”, which is equivalent to the change in 4.3 of the Proposed Undertaking. It submitted that this “is a vague, non-defined term that would potentially allow ARTC greater autonomy over the matters they choose to consider when determining whether two services are alike”.<sup>84</sup>

## Discussion

The ACCC considers that non-price terms could affect ARTC’s costs and returns in a similar way to the other factors, and therefore are appropriate to include as a differentiating factor. As with the other factors, ARTC should have evidence that supports a difference in charges.

## 8.4. Revenue limits

In the Existing Undertaking, revenue is constrained through a Floor Limit and Ceiling Limit in clause 4.4. In the Proposed Undertaking this clause has been removed, such that revenue is no longer constrained by floor and ceiling limits. The floor and ceiling each have different justifications in terms of economic efficiency and are discussed separately below.

### 8.4.1. Ceiling Limit

#### Background

The Existing Undertaking includes a Ceiling Limit for revenue. This is equal to Economic Cost, which is defined to include the sum of operating costs, depreciation and return on capital. The latter 2 components are both capital charges based on the Regulatory Asset Base (RAB) which was supposed to be rolled forward annually. The Ceiling Limit is intended to prevent monopoly providers from charging prices above its efficient costs. Prices above efficient costs could result in above-normal profits while usage of the infrastructure could be less than the efficient level.

In its proposed 2018 Undertaking ARTC proposed an asset value of approximately \$10 billion. This resulted in a Ceiling Limit several times higher than ARTC’s revenue and

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<sup>84</sup> Pacific National, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 34.

ARTC's proposed floor and ceiling prices with a wide gap between them. ARTC submitted that prices could be negotiated within this range. The ACCC noted the substantial difference between the minimum and maximum tariffs, and that users may be subject to large increases in charges. The ACCC considered the inputs to setting the minimum and maximum tariffs did not provide sufficient clarity and certainty to users.<sup>85</sup>

The ACCC further considered that the proposed RAB roll-forward was inappropriate, due to significant concerns with ARTC's approach to the treatment of capex for assets with perpetual lives, the initial RAB values for new Segments, prudence of capex, capex funded by government grants, the approach to the disposal of assets and the allocation of capex to asset types.<sup>86</sup> The ACCC engaged consultants in 2020 to undertake a new study to update the estimate of the asset base using the Depreciated Optimised Replacement Cost (DORC) method. This again yielded a value of \$10 billion—still resulting in too high a ceiling to be a relevant and effective constraint. This means that the ceiling would have little use despite the administrative burden of calculating and rolling it forward.<sup>87</sup>

In its subsequent Guidance Paper in 2022, the ACCC noted that calculating a cost-based revenue Ceiling Limit for the Interstate network is currently problematic due to the difficulty in assessing an efficient value for the asset base.<sup>88</sup> Problems include difficulty assessing the efficiency of past capital expenditure, the ongoing rollout of the Inland Rail project, and a lack of clarity about the intended benefits of government funding and the extent to which users should pay for the network.<sup>89</sup> Therefore, in the interim and subject to our assessment of the full terms of the next undertaking, it may be acceptable for ARTC to offer a pricing mechanism such as stand-alone price caps that do not require the calculation of a Regulatory Asset Base. However, the ACCC stated that, for future access undertakings, the feasibility of returning to a cost build-up approach to price constraints would be reviewed.<sup>90</sup>

## Proposed Undertaking

The Proposed Undertaking, in line with the views expressed by the ACCC in the Guidance Paper, removes the Ceiling Limit, and clause 4.4 (Revenue Limits) more generally. The Proposed Undertaking retains price caps in clause 4.5.

## Stakeholder submissions

None of the submissions opposed the removal of the Ceiling Limit. The only submission to comment further on ceiling limits was from the NSW Transport Asset Holding Entity (TAHE). It supports the principles underlying floor and ceiling limits as in the NSW Rail Access Undertaking but saw "limited benefit in establishing a ceiling" in this case.<sup>91</sup>

## Discussion

The calculation of the asset base, which is a key input to the ceiling, is challenging in the context of the Interstate rail network. The previous estimates of the asset base resulted in a ceiling that was too high to provide any actual constraint on prices. This highlights a tension in the way government-owned large scale rail networks such as ARTC's Interstate network

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<sup>85</sup> ACCC, [Draft Decision – ARTC's 2018 Proposed Interstate Access Undertaking](#), ACCC, 20 December 2018, pp 187-188.

<sup>86</sup> ACCC, [Draft Decision – ARTC's 2018 Proposed Interstate Access Undertaking](#), p v.

<sup>87</sup> ACCC, [Supplementary paper to GHD's concluding DORC valuation of the Interstate network](#), ACCC, 21 October 2021.

<sup>88</sup> ACCC, [Guidance Paper – ARTC's Interstate Access Undertaking 2023](#), p 14.

<sup>89</sup> ACCC, [Guidance Paper – ARTC's Interstate Access Undertaking 2023](#), p 3.

<sup>90</sup> ACCC, [Guidance Paper – ARTC's Interstate Access Undertaking 2023](#), p 15.

<sup>91</sup> Transport Asset Holding Entity, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), p 3.

are funded, being very capital intensive to build and funded by equity that likely cannot be fully recovered from users.

Government investments can be partly directed at a range of other social, regional and environmental goals, not just meeting the needs of commercial users. Costs required to meet non-commercial goals should be recovered from the other beneficiaries or the public more broadly.

The ACCC considers that it is acceptable that the Proposed Undertaking does not contain a ceiling if the proposed prices are constrained to an appropriate level. Prices continue to be constrained by price caps and are subject to competition from road freight. We assess in chapter 8.6.2 whether the prices prescribed in the Standing Offer are consistent with the objects and pricing principles of Part IIIA of the Act.

## 8.4.2. Floor Limit

### Background

In the Existing Undertaking, clause 4.4(a) specifies that revenue cannot be lower than the Floor Limit, where clause 4.4(b) defines the Floor Limit as the revenue sufficient for ARTC to cover its incremental costs.

The floor is intended to reflect the economic principle that, if the price charged to a user is below the incremental cost of using the service, it can result in inefficient usage. That is, the marginal value will be below the cost, so there is a net loss to society from providing the service and the user may be cross-subsidised by other users. This can be extended from price to revenue – that is, revenue for a service should not fall below its incremental cost which is the ‘floor’.

In its 2018 submission, ARTC stated that the Floor Limit:

...represents the direct costs of operating the segment of the network. It is calculated as the sum of all of the forecast direct costs (i.e., volume related) for that segment plus a proportion of network control costs allocated to that segment which reflects the traffic intensity of that corridor.<sup>92</sup>

ARTC provided data with its 2018 submission showing its estimated incremental costs and the assumptions underlying it. The proportion of different cost categories taken as incremental varied between segments. For example: for Melbourne (Tottenham) – Macarthur: 80% of maintenance, 30% of maintenance overheads, and 70% of network control.<sup>93</sup> ARTC’s data showed that revenue was above the floor for most segments and years from 2007-08 to 2017-18, although close or below for some years for Dry Creek to Pelican Point, Tarcoola to API and Appleton Dock to Footscray – all shorter segments.

The ACCC queried the proportions used by ARTC to derive incremental costs in its 2018 Draft Decision, noting that ARTC provided no evidence as to why the proportions used were based on cost causation and that ARTC’s public documentation for the Floor and Ceiling Limits did not provide a reasonable degree of transparency for stakeholders.

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<sup>92</sup> Australian Rail Track Corporation (ARTC), [Explanatory Guide – ARTC’s Proposed 2018 Interstate Access Undertaking](#), ACCC, 6 March 2018, p 33.

<sup>93</sup> The incremental cost allocators submitted by ARTC are set out in ARTC, [Explanatory Guide – ARTC’s Proposed 2018 Interstate Access Undertaking](#), p 33; ACCC, [Draft Decision – ARTC’s 2018 Proposed Interstate Access Undertaking](#), ACCC, 20 December 2018, table 20, p100 - Charts comparing revenue with floor and ceiling by segment - pp103-106.

## Proposed Undertaking

The Proposed Undertaking does not include the Floor Limit and has removed clause '4.4 Revenue Limits'. ARTC's Explanatory Guide stated that:

ARTC has provided historical data in Attachment 4 which demonstrates that the current pricing level has exceeded the direct cost of segments. ARTC does not anticipate any step change in either revenues or costs that would impact on this trend in relation to the CCA pricing principles. As such, the pricing should be considered efficient.<sup>94</sup>

## Discussion

The ACCC considers that it is acceptable that the Proposed Undertaking does not contain an explicit floor limit, if we are satisfied that the actual prices proposed are likely to be above incremental cost to be generally consistent with the pricing principles and objectives of Part IIIA in the Act. This issue is considered below in chapter 8.6.2 on the Standing Offer.

## 8.5. Structure of charges

Clause 4.5(a) of the Proposed Undertaking provides that 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).<sup>95</sup>

The structure is essentially unchanged from the Existing Undertaking; however, the excess network occupancy component has been removed.

### 8.5.1. Two-part charges – flagfall and variable

The structure of charges can have an important effect on the efficiency of use of the network. The approach for most efficient usage is generally to have:

- a variable charge which equals the marginal cost of usage, and
- a fixed (flagfall) component that recovers fixed costs with minimal effect on usage.

For the Interstate network, both the flagfall and variable charges are based on measures of usage – flagfall on train km and the variable charge on Gross Tonne Kilometres.<sup>96</sup> For example, the flagfall is calculated by an amount multiplied by train kms, rather than a set amount per trip. However, the flagfall is a fixed charge in that an access holder must pay for each path held, regardless of whether its train runs.

The balance between the flagfall and variable components in ARTC's charges has changed little since the beginning of the Existing Undertaking in 2008. ARTC stated that there had only been 4 changes in relative rates, including in relation to Express Passenger rates in

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<sup>94</sup> ARTC, *Explanatory Guide – ARTC's Proposed 2024 Interstate Access Undertaking*, p 19.

<sup>95</sup> This is based on Train Km; that is, the distance in kilometres travelled by the train (not Track Km).

<sup>96</sup> Train Km is the distance travelled by the train in kilometres.  
GTK (gross tonne kilometres) is effectively Train Km x gross tonnes carried.

2011 and a heavy mineral rate in 2012.<sup>97</sup> Given the long period since 2008, the ACCC asked ARTC if it had any concerns or evidence that the current pricing no longer reflects the charge differentiation factors such as opportunity costs to ARTC and market value of the train path sought listed in clause 4.2(c) of the Proposed Undertaking. ARTC responded that it “does not have concerns in respect of the relationship between pricing and the differentiation and therefore no evidence is required”.<sup>98</sup>

ARTC described its approach to two-part pricing as follows:

ARTC has consistently set its flag fall rate at a relatively low proportion of overall freight costs to ensure that pricing structure is not a barrier to new entrants and hence overall rail competitiveness. ARTC has set the flag fall part of its pricing relatively low to ensure that new entrant Operators are not disadvantaged in their entry to the market as they seek to maximize per train freight efficiency. That is, incumbent Operators are likely to be in a position to maximize the weight per train compared to new entrants. This ensures any fixed path cost is spread over maximum weight and therefore delivers the lowest cost per tonne of freight. As a new entrant builds volume and service capability, it is assumed that it would operate at lower levels of per train freight density, spreading fixed costs over a lower volume of freight and potentially impacting on its ability to compete for new loads.

Subject to ARTC’s commitment to non-discriminatory tariffs and its published pricing structure, ARTC is open to negotiate specific service requirements to meet Operator needs where the published tariffs and Reference Services are not sufficient for those needs.<sup>99</sup>

ARTC provided data showing that on the Interstate network for 2021-22 and 2022-23, revenue from flagfall was only about 25% of total revenue, whereas fixed maintenance costs were around 67% of total maintenance costs.<sup>100</sup> As overhead costs are largely fixed, all fixed costs are a much higher percentage of total operating costs (about 85%).<sup>101</sup>

Conversely, the variable charge accounts for about 75% of revenue which is considerably greater than the variable costs which are closer to 15% of total operating costs.<sup>102</sup>

The current balance of charges – with a relatively low flagfall component – is less likely to disadvantage new entrants. However, this structure places greater emphasis on GTK charges (based on distance and gross mass), which may discourage heavier loads. The ACCC notes that maximising tonnage would be of greater importance for efficient use of the network if there are general capacity constraints on the network.

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<sup>97</sup> Australian Rail Track Corporation (ARTC), [Response to Information request #1 – ARTC’s Proposed 2024 Interstate Access Undertaking](#), ACCC, 18 March 2024, response to 5.3.

<sup>98</sup> ARTC, [Response to Information request #1 – ARTC’s Proposed 2024 Interstate Access Undertaking](#), response to 5.4.

<sup>99</sup> ARTC, [Response to Information request #1 – ARTC’s Proposed 2024 Interstate Access Undertaking](#), response to 3.1.

<sup>100</sup> ARTC, [Response to Information request #1 – ARTC’s Proposed 2024 Interstate Access Undertaking](#), response to 3.2.

<sup>101</sup> ARTC, [Explanatory Guide – ARTC’s Proposed 2024 Interstate Access Undertaking](#), p 44. For this calculation, business unit overheads, shared maintenance, network control and corporate overheads were considered fixed costs.

<sup>102</sup> ARTC, [Response to Information request #1 – ARTC’s Proposed 2024 Interstate Access Undertaking](#), response to 3.2; ARTC, [Explanatory Guide – ARTC’s Proposed 2024 Interstate Access Undertaking](#), p 44.

### **ACCC draft view**

In the absence of clear evidence about the need for a different charge structure for the Interstate network, the ACCC considers that the proposed charge structure is currently appropriate having regard to the efficient use of the network. However, we recommend that during the term of the Proposed Undertaking, if accepted, ARTC consult its shareholders and users about whether the charging structure remains appropriate to maximise the efficient use of the network.

## **8.5.2. Excess network occupancy charge**

The Proposed Undertaking has no excess network occupancy component. ARTC reported that it has not applied the excess network occupancy charge under the Existing Undertaking, and that there have been no cases of excess occupancy since 2008. It stated that it will negotiate dwells on the network to facilitate customer requirements and operating needs.<sup>103</sup>

Stakeholders did not oppose the removal of the excess network occupancy component and its removal is also consistent with the ACCC's 2018 Draft Decision.<sup>104</sup>

## **8.6. Standing Offer and Schedule J**

### **8.6.1. Services**

#### **Background**

In the Existing Undertaking, clause 4.6(a) specifies one type of service –Indicative Services– for which maximum prices are listed as Indicative Access Charges in clause 4.6(b).

Indicative Services are those that have the following characteristics:

- a maximum axle load of 21 tonnes
- a maximum travelling speed of 110km per hour
- a train length that does not exceed 1500 metres when east of Adelaide and Parkes, or 1800 metres on all other parts of the network.

Indicative Services correspond to the 'Super Freight' service category in ARTC's pricing schedule.<sup>105</sup> Other services do not have regulated prices prescribed in the Undertaking, but clause 2.7(b) requires ARTC to publish prices on its website. Prices for the Indicative Service and 7 other services have been published on ARTC's website. The 7 non-Indicative Services are as follows:

- Express Freight
- Regular Freight

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<sup>103</sup> ARTC, [Response to Information request #1 – ARTC's Proposed 2024 Interstate Access Undertaking](#), response to 3.3 and 3.4.

<sup>104</sup> ACCC, [Draft Decision – ARTC's 2018 Proposed Interstate Access Undertaking](#), ACCC, 20 December 2018, p 173.

<sup>105</sup> ARTC's latest pricing schedule, covering all 8 service categories, is available at: <https://www.artc.com.au/customers/access/access-interstate/access-charges/>



- Standard Freight
- Heavy Freight
- Passenger
- Express Passenger
- Ad-hoc Grain.

## Proposed Undertaking

The Proposed Undertaking removes the definition and charge schedule for Indicative Services (a single service type) and replaces it with a Standing Offer for 'Reference Services' under clause 4.5. The 'Reference Services' are the 8 services listed above – Super Freight and the 7 non-Indicative Services – for which ARTC sets out current prices on its website. The services are listed in Schedule J of the Proposed Undertaking which includes the Standing Offer Table and the ARTC Pricing Schedule – Applicable rates – Effective from 1 July 2023.

## Stakeholder submissions

Stakeholders generally supported the proposed Standing Offer provisions.

Aurizon recommended that ARTC's proposed reference services be accepted by the ACCC, but ARTC should confirm its willingness to negotiate access charges for a service that differs from a standing offer for a reference service, in the circumstances set out in clause 4.2, which provides for charge differentiation in some circumstances.<sup>106</sup>

Pacific National supported the 8 Reference Services.<sup>107</sup> GrainCorp partially supported the services but sought more clarity on definitions, as well as a commodity-based service category.<sup>108</sup>

## Discussion

In recent years the Super Freight service has contributed about 60% of ARTC's revenue for the Interstate network. However, by expanding price regulation to the 8 Reference Services, the coverage would increase to about 95% of total Interstate revenue.<sup>109</sup>

The ACCC considers the approach of 8 Reference Services is appropriate because non-Indicative train services, such as heavy freight and grain, could also be subject to the exercise of ARTC's market power. The greater certainty is in the interests of access seekers. Further, extending price caps to the great majority of ARTC's services provides more certainty for Access Seekers and greater coverage of the Proposed Undertaking.

The prices for the Reference Services can still be used as a basis for negotiation for other services, taking account of the matters listed in clause 4.2 for charge differentiation. This issue is discussed further in chapter 8.26.3 on differential pricing.

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<sup>106</sup> Aurizon, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), pp 21-22.

<sup>107</sup> Pacific National, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), p 23.

<sup>108</sup> GrainCorp, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), p 4.

<sup>109</sup> ARTC, [Response to Information request #1 – ARTC's Proposed 2024 Interstate Access Undertaking](#), response to 5.1. ARTC data for 2021-22 and 2022-23. ARTC reported that in addition, the Interstate network receives access revenue from coal traffic that utilises the Interstate Network (ARTC's response to 5.2).

Regarding GrainCorp's suggestion for commodity-based service categories, we note that there is one commodity-based category (existing and proposed), which is Ad hoc grain. We understand that grain traffic generally uses ad hoc paths. However, ARTC's current schedule applies the same price for ad hoc grain as for standard freight in all sections except Melbourne (Tottenham) – Macarthur on which the price for grain is about 5.8% higher than for standard freight.

The ACCC notes that the Proposed Undertaking allows scope for users to negotiate lower prices for services, including commodities, subject to the charge differentiation factors listed in clause 4.2.

#### **ACCC draft view**

The provision of 8 Reference Services in the Proposed Undertaking provides more comprehensive coverage of ARTC's service offerings to Operators, promoting the interests of access seekers.

## **8.6.2. Price level and adjustment**

### **Background**

Clause 4.6(b) in the Existing Undertaking prescribes the access charges (exclusive of GST) for Indicative Services for 10 original segments as at 1 February 2008, and for the Southern Sydney Freight Line as at 1 March 2013. They are split into 2 components – Variable (\$/000 gtk) and Flagfall (\$/Train Km).

The ACCC noted in our 2022 Guidance Paper that ARTC could consider whether applying price controls to all services would give greater transparency and certainty to Access Holders and Access Seekers.<sup>110</sup>

Clause 4.6(d) in the Existing Undertaking sets out a formula by which ARTC may vary the prices for Indicative Services annually by up to an amount in line with total inflation over the period since the base date (March quarter 2007). Inflation is measured by the ABS's All groups Consumer Price Index, Weighted Average of Eight Capital Cities (CPI). Although the prices of other services are not prescribed under the Existing Undertaking, ARTC has varied them in the past by the same CPI adjustment as for Indicative Services.

The price indexation formula specifies a base index at the start of the regulated period and the maximum allowed price is provided by the accumulated inflation from that base. If the prices were not increased in one year by the full value of inflation for that year, in a later year ARTC could choose to increase prices by more than that year's inflation to 'catch up'.

The formula in the Existing Undertaking also specifies that in the case of deflation (negative inflation), there is no downward adjustment to charges. With deflation, charges would remain constant and could only increase once total inflation over the period has increased sufficiently and the formula provides a price cap that is above existing prices.

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<sup>110</sup> ACCC, [Guidance Paper – ARTC's Interstate Access Undertaking 2023](#), p 15.

## Proposed Undertaking

Schedule J (Standing Offer) sets out the prices for Reference Services with a brief description of the corresponding train characteristics for those services. Schedule J shows the current prices charged, as of 1 July 2023. These provide carry-over from existing prices, as there has been no price reset or changes in the relativities of the price of services by ARTC.

Clause 4.5(b) in the Proposed Undertaking sets out the formula by which Standing Offer prices may be adjusted annually. The formula is the same as the formula under clause 4.6(d) of the Existing Undertaking (which allows for price increases in line with the CPI), except for the following changes:

- There is no constraint preventing downward variations in prices when the CPI falls.
- The times at which ARTC may vary prices is specified as 1 July each year, rather than 'annually'.
- The base date for the CPI is for March quarter 2023, rather than March quarter 2007.

## Stakeholder submissions

Stakeholders generally accepted the initial level of prices, which have remained the same for some years, and the proposed CPI-based price cap but some had views on the method of adjustment and ability to negotiate variations.

GrainCorp supports the adjustment mechanism, stating that CPI provides good forecasting predictability for access seekers.<sup>111</sup> Aurizon supported the CPI cap but submitted there should be no ability to 'catch up' any less-than-CPI escalation at future price reviews.<sup>112</sup> Pacific National submitted that price increases should be capped to a maximum of 50% of CPI, particularly on the north-south corridor.<sup>113</sup>

## Discussion

### Cost recovery

In the absence of an explicit floor and ceiling, the ACCC is still required to consider whether it is appropriate to accept the Proposed Undertaking with regard to the pricing principles in the Act. The pricing principle in paragraph 44ZZCA(a) of the Act provides that regulated access prices should:

- (i) be set so as to generate revenue that is at least sufficient to meet efficient costs of providing access to the regulated service, and
- (ii) include a return on investment that is commensurate with the regulatory and commercial risks involved.<sup>114</sup>

We also consider the objects of Part IIIA, which include promoting the economically efficient operation of, use of and investment in the infrastructure by which services are provided.<sup>115</sup>

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<sup>111</sup> GrainCorp, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), p 4.

<sup>112</sup> Aurizon, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), p 23.

<sup>113</sup> Pacific National, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), p 22.

<sup>114</sup> Section 44ZZCA in Part IIIA of the Act.

<sup>115</sup> Section 44AA in Part IIIA of the Act.

The ACCC estimates that ARTC's revenue on the Interstate network in recent years has been sufficient to recover its operating costs but not its capital costs.<sup>116</sup> We therefore consider that ARTC is charging prices below the upper limit the pricing principles might allow. Although ARTC may be able to increase prices in some markets to improve its cost recovery if not constrained by regulation,<sup>117</sup> it is also constrained by road competition in many areas. ARTC's government ownership may also impose constraints on its pricing practices.

The Standing Offer prices and CPI adjustment mechanism in the Proposed Undertaking are price caps that will be maintained in real terms. Accordingly, a separately calculated revenue ceiling is not necessary, given prices are already well below full economic cost.

In the Interstate context, there are large sunk costs in the network and to significantly raise usage prices with the aim of recovering capital costs would result in inefficiently low use of the infrastructure. Efficient use of the infrastructure would generally require that the price charged to a user should at least cover the incremental cost of using the service, which is the principle underlying the floor test.

The principle can be considered over different time periods. For example:

- in the short run, the costs attributable to a one-off train service may only be the maintenance costs that vary with traffic load – for instance, variable maintenance cost
- in the medium term, for regular services over several years, an intermediate concept of incremental costs is relevant which would include a wider range of operating costs and even some capital for asset replacement
- in the long term, efficient costs for all services should include capital as well as operating costs – the full economic cost.

The historical data provided by ARTC demonstrates that revenue has comfortably exceeded the direct cost, as measured by variable maintenance cost, for every segment in each of the 5 years to 2022-23.<sup>118</sup> The average ratio of revenue to direct cost ranged from 4.5 to 24.5 for different segments.

Over the longer period of 5 years subject to the Proposed Undertaking, more costs will be variable due to extra traffic and the passage of time, while prices are unlikely to change in real terms. Therefore, we consider whether prices and revenue should reflect the costs that are incremental over the medium term.

There is no single objective way of measuring the incremental cost from use of the network; the Interstate and Hunter Valley undertakings have applied different versions of it.<sup>119</sup>

However, for one approach, we have tested the floor using the method submitted by ARTC for its 2008 and 2018 undertakings and applying it to data for the 5 years to 2022-23. ARTC took a certain percentage of each of 3 cost categories as incremental, assessed separately for each segment.<sup>120</sup> Using a weighted average across the segments, the amount taken as incremental was 84% for maintenance costs, 25% for maintenance overheads, and 72% for network control. On that basis, the ratio of revenue to incremental costs ranged from the

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<sup>116</sup> This conclusion is based on confidential data provided by ARTC for depreciation and asset values for the interstate business in its corporate accounts (ARTC response to question 5.8 in Request for Information No.1).

<sup>117</sup> In 2019 ARTC sought to escalate prices on its Adelaide to Kalgoorlie segments by CPI + 2%, but withdrew the proposal in the light of stakeholder opposition. (<https://www.accc.gov.au/by-industry/rail-shipping-and-ports/interstate-rail-network-access-undertaking/january-2019-variation-of-the-2008-interstate-access-undertaking>)

<sup>118</sup> ARTC, *Explanatory Guide – ARTC's Proposed 2024 Interstate Access Undertaking*, Attachment 4.

<sup>119</sup> The HVAU (version 8) defines 3 types of 'Floor Contribution' – one is just Variable Maintenance Cost (VMC) which sets the price for non-coal users; another is VMC plus Incremental Capital Cost, for coal customers in Pricing Zones 1 and 2.

<sup>120</sup> ACCC, *Draft Decision – ARTC's 2018 Proposed Interstate Access Undertaking*, ACCC, 20 December 2018, p 100.

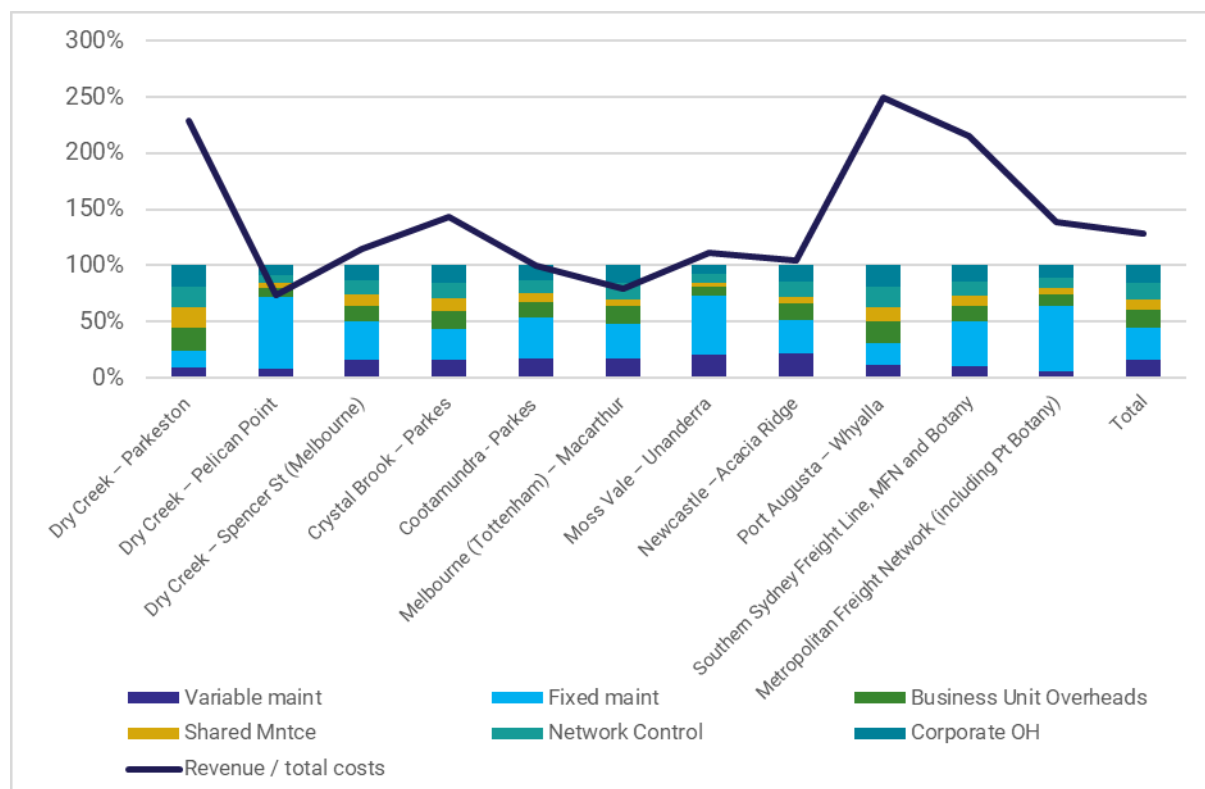
lowest of 1.4 (Tottenham – Macarthur) to the highest of 23.2 for Port Augusta – Whyalla. By this test, all segments pass the floor test.

The ACCC noted in its 2018 Draft Decision that ARTC did not provide evidence and explanations for such allocations so it could not be certain these proportions are based on cost causation.<sup>121</sup> However, short of obtaining a full independent assessment of incremental cost for this Proposed Undertaking, we consider this method provides some guide to incremental costs.

ARTC’s data indicates that revenue has covered incremental costs in the 5 years to 2022-23, and ARTC does not anticipate any step change in either revenues or costs that would impact on this trend.<sup>122</sup> Therefore, we consider that actual prices are likely to satisfy the principle underlying the floor, and to promote efficient use of the infrastructure.

Separately, Figure 2 below shows how revenue compares with all categories of operating costs.<sup>123</sup> It shows that revenue comfortably covered all operating costs for most Interstate segments including Dry Creek to Parkeston, Dry Creek to Spencer St, Crystal Brook to Parkes, Port Augusta to Whyalla, Southern Sydney Freight Line and MFN. For Dry Creek to Pelican Point and Melbourne to Macarthur, revenue covered maintenance costs but not all overhead cost categories.

**Figure 2: Operating cost composition and Revenue as % of total cost, by segment, average 2019-2023**



Source: ARTC, Explanatory guide for the 2024 interstate access undertaking, Attachment 4, & ACCC analysis.<sup>124</sup>

<sup>121</sup> ACCC, *Draft Decision – ARTC’s 2018 Proposed Interstate Access Undertaking*, ACCC, 20 December 2018, p 109.

<sup>122</sup> ARTC, *Explanatory Guide – ARTC’s Proposed 2024 Interstate Access Undertaking*, p 19.

<sup>123</sup> These are ARTC’s full operating costs, without explicitly estimating an incremental portion, such as for the 2018 Undertaking.

<sup>124</sup> The ACCC has allocated a share of overhead costs to each segment as follows—shared maintenance in proportion to GTKs; business unit overheads, network control and corporate overheads in proportion to Train kms.

Schedule I in the Proposed Undertaking commits ARTC to publish annual data for revenue and several categories of operating costs. If revenue does fall below incremental costs during the Proposed Undertaking's term, there is no concrete way to adjust prices for Reference Services in the short term, given the CPI price cap. However, if there is a clear shift in cost-price relationships, it can be reviewed in consideration of a future undertaking or variation.

#### **ACCC draft views**

The ACCC considers the current prices are appropriate starting prices for the Proposed Undertaking, as they:

- are below the economic cost of providing the service, in large part due to competition from other freight types
- are likely to be sufficient to recover the efficient costs of operating the service over the medium term
- reflect continuation of prices familiar to users
- have a price cap mechanism in place, to protect users from price shocks.

We also consider that the prices in the Standing Offer for Reference Services are likely to cover the incremental costs of providing the services and are appropriate, noting that attempting to recover the full economic cost of the infrastructure may result in inefficient underuse.

#### **Inland Rail**

Some stakeholders sought greater certainty over the pricing of Inland Rail so that they can plan their own investments in trains and facilities to make use of the new track.<sup>125</sup>

Inland Rail sections between Melbourne and Parkes are scheduled for completion by 2027 – within the term of the Proposed Undertaking. These are mainly within the existing segments of Melbourne to Macarthur and Cootamundra to Parkes. Prices on these existing Interstate segments are prescribed in the Proposed Undertaking, regardless of whether they are subject to Inland Rail upgrades.<sup>126</sup>

There is also one planned greenfield site south of Parkes – a 39 km section between Illabo and Stockinbingal in NSW, joining up two existing sections in the Proposed Undertaking. ARTC has stated:

The Australian government has only provided a commitment for Inland Rail to be built to Narromine by 2027. All greenfield sections of Inland Rail will therefore be contained in the State of NSW and are therefore automatically subject to the NSWRAU. Given the ACCC reserved its rights to reconsider the regulatory framework once Inland Rail is complete, ARTC believes an approach that does not include greenfield sites in the IAU is appropriate.<sup>127</sup>

<sup>125</sup> Qube, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), pp 11-12; GrainCorp, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), p 4.

<sup>126</sup> ARTC, [Response to Information request #2 – ARTC's Proposed 2024 Interstate Access Undertaking](#), response to 8.2(c).

<sup>127</sup> ARTC, [Response to Information request #2 – ARTC's Proposed 2024 Interstate Access Undertaking](#), response to 8.2(a, c)

Therefore, greenfield sections, including Illabo – Stockinbingal, will be regulated under the NSW Rail Access Undertaking (NSWRAU) during the term of the Proposed Undertaking. However, IPART does not give ex ante approval of the terms and conditions for access under the NSWRAU. Instead, we understand that ARTC will use its standard access agreements (either under the interstate or Hunter Valley undertakings) for access to paths requested by access seekers that are regulated by IPART under the NSWRAU.

Several Inland Rail sections north of Parkes have already been completed. These are mostly upgrades of existing track and are currently regulated by IPART. Plans for other greenfield sections have not yet been finalised but are likely to be regulated by IPART when first commissioned. However, it is possible that these sections could become part of the Interstate network regulated by the ACCC at some point in the future.<sup>128</sup>

The ACCC will consider its approach to pricing at such time as these sections are proposed for coverage under an access undertaking. This may entail consideration of whether or how the costs of Inland Rail can be accounted for in any future cost-based pricing approach.

The extent to which users should (or would be willing to) pay for Inland Rail is unclear at this time. If Inland Rail is funded primarily by government equity it would create challenges for a future regulatory pricing assessment. Charging the full cost of Inland Rail to users could result in underuse of the network and run counter to the government's objectives to promote the use of rail. In any case, strong competition from road freight will also have an impact on ARTC's ability to recover the costs from user charges.

### Price adjustment

The use of the CPI to index ARTC's prices can be viewed in two lights:

- (i) preserving the real value of the prices to shareholders – that is, their command over a given set of consumer goods and services
- (ii) as an approximation of the average rate of increase of ARTC's costs.

There are inevitably differences in the rate of inflation between consumer prices and ARTC's costs but we expect that over the long term they will rise and fall broadly in line. The CPI has the advantage of being well-understood and is used for similar reasons for price adjustment across many industries.

The only clear alternative from stakeholders was Pacific National's suggestion that price increases should be capped to a maximum of 50% of CPI increases, particularly on the north-south corridor where it competes most with road freight. The ACCC does not accept that this would be preferable for services already priced below-cost, as 50% is an arbitrary figure and the Proposed Undertaking provides some downwards price flexibility to meet competition, due to the options for negotiation below the price caps for different services.

The ACCC does not agree with Aurizon's view that there should be no ability to 'catch up' any less-than-CPI escalation at future price reviews. We recognise that this could result in larger than normal increases for users in some future year. However, we consider that preventing such a catch-up may be counter to a core aim of the CPI mechanism, as ARTC would be unable to maintain cost recovery and align price growth with inflation over the longer term. Providing ARTC the discretion to catch up allows it to manage the increase in years where inflation may be particularly high, rather than seeking the maximum CPI escalation every year.

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<sup>128</sup> ARTC expects that the ACCC may reconsider the regulatory framework once Inland Rail is complete. ARTC, [Response to Information request #2 – ARTC's Proposed 2024 Interstate Access Undertaking](#), response to 8.2(c)

The ACCC also endorses the proposed formula providing that a decline in the CPI can result in a reduction in access charges. We consider there is no economic justification for adjusting prices for CPI movements only when they are upwards, which would favour the interests of ARTC at the expense of customers.

As ARTC has posted updated prices at 1 July 2024, and the Existing Undertaking has been extended to 31 December 2024, we expect that ARTC will submit a revised Schedule J prior to the ACCC accepting the Proposed Undertaking. These would be the prices at 1 July 2024, which are the prices at 1 July 2023 indexed by the increase in the CPI between March quarter 2023 and March quarter 2024, as allowed in the Existing Undertaking.

#### **ACCC draft views**

The ACCC considers the standalone CPI-indexed cap in the Proposed Undertaking an appropriate approach to ARTC's pricing of the 8 Reference Services. However, we expect ARTC to consider a return to a cost-based approach to pricing in the future, particularly once the scope and cost of Inland Rail is known.

The ACCC recommends the government consider what share of the cost of Inland Rail future users should pay versus other broader benefits funded by the government and ensure that the funding arrangements are clear and transparent. ARTC could then incorporate clear government policy direction into future proposals for the Interstate rail network regulatory framework.

#### **Proposed amendment 8.1**

As ARTC updated its prices at 1 July 2024, an updated Schedule J should be included in the Proposed Undertaking.

### **8.6.3. Differential pricing**

#### **Stakeholder submissions**

Some operators sought greater flexibility via differential prices for paths with greater or lesser perceived value, such as preferred times of day or off-peak services.

Aurizon suggested that, for example, "there is a strong demand from freight customers for rail services that depart in the evening, and arrive at their destination early morning, allowing efficient distribution to store networks, with the limited number of paths able to be scheduled within these windows generally described as premium paths." Aurizon has "contemplated whether there would be merit in separate reference services being defined for premium and non-premium paths, with the standing offer for premium paths not only reflecting the higher market value of those paths, but also ... imposing greater accountability on operators in terms of their utilisation of those paths."<sup>129</sup>

However, Aurizon acknowledged that "this would represent a significant change to ARTC's approach to defining and contracting paths for intermodal/landbridging freight, and that

<sup>129</sup> Aurizon, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), p 21.



there would be a need for ARTC to work closely with the relevant rail operators both in defining what would constitute a premium path, and in differentiating the standing offers between the two types of services. As such, we do not propose that this be pursued for the Proposed IAU. ... Accordingly, CI 4.2 should be amended to confirm ARTC's willingness to negotiate away from standing offer rates to reflect the circumstances in CI 4.2."<sup>130</sup>

ARTC summarised the views expressed during consultation as follows:

Some operators feel that access to what they regard as premium paths (those with an efficient transit time combined with a late evening departure and an early morning arrival) is limited. This is as a result of another customer having contracted these paths.<sup>131</sup>

ARTC stated that it does not price differentiate between individual train paths, noting the following:

..... ARTC notes the difficulties of time of day of pricing given the value of that time differs between commodities and the definition of peak times can also change for segments depending on the origin-destination pairing of the freight. ARTC is always willing to engage on commercial requests of its customers and has developed this IAU framework to support that process. In particular, ARTC has allowed for a chapter within the INDS [Interstate Network Development Strategy] to incorporate suggested commercial innovations by customers and provide for broader industry engagement to help improve transparency across all stakeholders.<sup>132</sup>

## Discussion

The ACCC understands that the Proposed Undertaking would not impose any specific constraints on negotiating such price differentials (apart from any constraint on raising the price of Reference Services). The network may be used more efficiently if higher value uses migrate to the premium paths, which will also require flexibility in path allocation. We note that ARTC would need to balance the advantages of reallocating paths to higher value uses as demand changes, and the advantage of longer-term security of paths so operators can invest in appropriate services with confidence.

We asked ARTC in Information Request 1 whether ARTC could set different prices for sub-categories of existing Reference Services (such as time of day or duration), and if it considers the Proposed Undertaking (in particular, the definition of Reference Services and the associated price caps) would allow this.

ARTC responded stating:

ARTC considers that the 2024 IAU allows for these negotiations to occur and has been developed to help facilitate such commercial innovation. As stated on p2 of ARTC's Explanatory Guide which accompanied its 12 December 2023 submission on the proposed IAU, the basis for the change in the regulatory framework for the IAU is to promote increased commercial flexibility and agility for access to the Interstate Network (emphasis added):

The 2024 Interstate Access Undertaking (IAU) has been developed in accordance with these expectations and objectives. It creates a regulatory framework that delivers stakeholders with regulatory certainty on the access

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<sup>130</sup> Aurizon, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), pp 21-22.

<sup>131</sup> ARTC, [Response to Information request #1 – ARTC's Proposed 2024 Interstate Access Undertaking](#), response to 8.1, p 19.

<sup>132</sup> ARTC, [Response to Information request #1 – ARTC's Proposed 2024 Interstate Access Undertaking](#), response to 5.5, p 14.

framework whilst providing increased transparency on the cost and performance of the network and future opportunities for growth across the network. It also provides the commercial flexibility required to meet the goal of driving modal shift and supporting the investment needed to deliver a resilient network that supports that growth. ARTC believes that the proposed IAU therefore not only supports the approach to contract different services but has been specifically designed to facilitate them.<sup>133</sup>

ARTC further stated that a critical aspect of the Proposed Undertaking is:

...a commitment to the maintenance of real prices on current services, subject to an ability to negotiate prices for the recovery of increased investments to improve reliability and service (including resilience), and increased capacity;<sup>134</sup>

ARTC stated that it can vary the Standing Offer for each Reference Service individually under Clause 4.5(b). However, ARTC has never exercised this discretion and has always treated all services equally in the application of this clause.<sup>135</sup>

The ACCC considers the price caps under the Standing Offer provides certainty for customers but we support flexibility of prices where it promotes efficiency. However, the Proposed Undertaking does not appear to provide for a price increase for Reference Services, agreed or otherwise (other than as provided for in clause 6.4 – see discussion on additional capacity in chapter 10.3). This is in light of clause 4.5 providing that ARTC can only vary the Standing Offer by up to an amount in line with the CPI.

#### **ACCC draft view**

Given the difficulties in defining appropriate premium services and the time period for assessment of the Proposed Undertaking but also the potential benefits available, we expect that ARTC and stakeholders will need to work together further to investigate any feasible definitions of premium and non-premium paths.

We also consider that the Proposed Undertaking should clarify the circumstances under which prices for Reference Services may be allowed above the constraint set by clause 4.5, in particular by amending clause 4.5 to refer to clause 6.4.

#### **Proposed amendment 8.2**

Amend the Proposed Undertaking to clarify the interaction of clauses 4.5 (price cap) and 6.4 (additional capacity).

<sup>133</sup> ARTC, [Response to Information request #2 – ARTC's Proposed 2024 Interstate Access Undertaking](#), response to 3, p 4.

<sup>134</sup> ARTC, [Explanatory Guide – ARTC's Proposed 2024 Interstate Access Undertaking](#), p 3.

<sup>135</sup> ARTC, [Response to Information request #1 – ARTC's Proposed 2024 Interstate Access Undertaking](#), response to 3.6.

## 8.7. Publication of charges

### Background

In the Existing Undertaking, clause 2.7(b)(iii) provides that ARTC will publish on its website:

- prices for the Indicative Service
- prices for other services for which Access has been granted, together with a general description of those services.

### Proposed Undertaking

The Proposed Undertaking updates clause 2.7(b)(iii) to refer to the 8 Reference Services, rather than the 1 Indicative Service. Clause 4.6 provides that ARTC will publish the prices of all services on its website, including Reference Services.

Clause 4.6(b) adds a new provision that, if ARTC cannot de-identify a Customer from the pricing information for a non-Reference Service, then ARTC will publish the pricing information or equivalent information that it can reasonably do so in the circumstances.

### Stakeholder submissions

Aurizon did not consider that ARTC's proposed approach to publish negotiated prices for non-reference services provided the service can be de-identified is feasible. It recommends allowing access seekers to request from ARTC an independent assessment of whether its access charge is consistent with the access charges applied by ARTC for like train services.<sup>136</sup>

Pacific National supported the principle of improved transparency resulting from publishing individual prices but was concerned about how effectively ARTC would de-identify the Customer. It proposed adding: 'The description will not include identifying terms and conditions'.<sup>137</sup>

GrainCorp stated ARTC may be able to publish the pricing information on an industry wide basis or publish the pricing information with a summary of the negotiated outcome and the price without providing identifying information.<sup>138</sup>

### Discussion

The ACCC supports the publication of prices with as much transparency as possible. We recognise that there may be a conflict between transparency and the interests of the negotiating parties to keep certain details confidential.

Any new offer negotiated by ARTC would ideally then be available to a general service or class of customer rather than restricted to a particular customer. Publication would help stakeholders assess if they could benefit from the offer. It would also help show that prices are not differentiated for reasons beyond the charge differential factors listed in clause 4.2 and that prices discrimination does not occur between like services and operators in the same market.

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<sup>136</sup> Aurizon, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), pp 24-25.

<sup>137</sup> Pacific National, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), p 25.

<sup>138</sup> GrainCorp, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), p 4.

We understand that balancing transparency and confidentiality may be a difficult exercise. While Aurizon's proposal for an independent assessment could help stakeholders' confidence about the fairness of ARTC's decision, it would involve substantial additional administrative burden and cost that may not result in sufficient benefits. We also do not consider any further amendment to exclude identifying information is necessary, as it is adequately covered by clause 4.6(b).

**ACCC draft view**

The ACCC accepts the proposed provisions and supports greater transparency. However, the need for any stated additional parameters should be revisited in the future once there is greater experience of negotiated prices.

# 9. Management of capacity (Part 5)

The ACCC notes that the Proposed Undertaking provides for ARTC to analyse available capacity to meet applicants' pathing requirements and to allocate the available capacity in the event of competing requests from different applicants. ARTC was intentionally established as an entity that is not vertically integrated to not have a vested interest in any particular users' access to the network.

However, as access to paths is key to competition in downstream markets, ARTC should consider how it can respond to stakeholder calls for increased transparency around its path analysis and allocation decisions to ensure the network is used efficiently. This could include greater guidance on capacity allocation, new methods to allocate capacity, better visibility of availability, or more transparent processes for dealing with stakeholders when existing pathing agreements are expiring.

It is reasonable for access seekers to expect active management by ARTC of the capacity available in the infrastructure and to be identifying and monitoring under-utilisation and maximising use of the network. Under the Proposed Undertaking and alongside the INDS, the ACCC recommends ARTC consult its stakeholders and shareholders on ways to optimise capacity allocation and provide greater transparency around capacity and network utilisation.

It also appears that ARTC Customers, including end-users<sup>139</sup>, seek further information for existing capacity to be used efficiently. As a first step, the ACCC recommends that within 12 months of the Proposed Undertaking coming into effect (if accepted), ARTC publish a short guidance paper outlining in plain English the opportunities for Operators and non-Operators to seek, manage, resume or transfer capacity on the Interstate network, including discussion of risk allocation and insurance requirements.

## Background

Part 5 of the Proposed Undertaking sets out rules and procedures for analysing available capacity and allocating and transferring access rights to those seeking them, described as 'capacity management'. No changes have been proposed by ARTC between the Existing Undertaking and the Proposed Undertaking to these rules and procedures.

The Proposed Undertaking is drafted so that ARTC continues to use administrative mechanisms to undertake capacity management rather than using market mechanisms such as an auction. Part 5 sets out a 3-step process for developing and considering access rights for an Applicant that can be summarised as follows:

1. Capacity Analysis – identifies whether, indicatively, there is sufficient Available Capacity to meet the Applicant's requirements and, if not, indicatively, the extent to which Additional Capacity is required.

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<sup>139</sup> In this chapter we use the term "end-user" to mean a party that is accessing a freight service to move goods and is part of a 'downstream' market. Usually the end-user is purchasing rail services from a Customer/Operator.

2. Capacity Allocation – in the event of multiple Applicants, Access Rights will be allocated to the Applicant with whom ARTC can negotiate and execute an Access Agreement which, in the opinion of ARTC, is most favourable to it.
3. Capacity Transfer – the terms of the Access Agreement will provide that ARTC may reduce Train Paths by removing particular Train Paths where a Customer has under-utilised its Capacity Entitlement, while a Customer may also reduce its Capacity Entitlement by cancelling Train Paths or assigning Train Paths to a third party with approval from ARTC.

The Proposed Undertaking would continue to provide for two types of train paths – scheduled and ad hoc. Scheduled train paths are designed for regular services with a planned origin, destination and time. They can be routinely timetabled and are purchased for a set period and suit passenger services and certain types of freight. However, freight such as bulk or seasonal commodities (including coal, grain and minerals) may have variable demand and draw on ad hoc services, which are purchasable subject to availability to all Operators. Both types of path must be purchased through an Access Application process that includes the capacity analysis and allocation stages.

## 9.1. Capacity analysis

### Proposed Undertaking

Under clause 5.1, 'Capacity Analysis' is undertaken by ARTC as part of the preparation of an Indicative Access Proposal. The analysis will identify, indicatively, if there is available capacity to support the Applicant's access requirements, and if not, indicatively, the extent to which Additional Capacity is required. Under clause 5.1(b), ARTC may charge a fee where a detailed capacity analysis is required based on reasonable cost and agreed with the Applicant.

### Stakeholder submissions

Operators have noted in submissions that greater visibility of surplus capacity would allow them to identify pathing opportunities that suit their end-users and put forward access proposals that are more likely to be accepted by ARTC. It would also allow them to identify paths that align with availability on other networks. Pacific National stated:

To support efficient capacity utilisation, the 2024 IAU should incentivise ARTC to implement a system that highlights where there is surplus capacity on the network. Doing this would:

- Reduce information asymmetry and increase pathing transparency for rail operators
- Support capacity utilisation and management for seasonal or uneven demand profiles
- Provide longer-term benefits. Knowing where there's surplus capacity on the network would allow rail operators to fulfil growth opportunities with end customers."<sup>140</sup>

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<sup>140</sup> Pacific National, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), p 25.

... Rail operators could potentially flex and divert trains to utilise available pathing.  
...The 2024 IAU should include a goal of publishing available train paths and allowing operators to book them online.<sup>141</sup>

Aurizon seeks opportunities for paths and for ARTC to provide “all operators on its network with real time data on the actual operation of all train services compared to schedule ... via a software format that allows the data to be readily dissected and analysed by all recipients”.<sup>142</sup> Aurizon has stated that:

On the interstate network, the low reliability of existing operators’ path utilisation is apparent from ARTC’s quarterly performance reports ... over the last two years:

- Only ~60% of East-West services and ~62% of Melbourne-Brisbane services enter ARTC’s network on time; and
- Only ~64% of East-West services and ~52% of Melbourne-Brisbane services operate in a healthy manner (i.e. running on time or late only due to causes outside the operator’s control).<sup>143</sup>

Anecdotally, Aurizon understands that there are numerous paths where the trains rarely run to schedule. ... ARTC does not currently report on train cancellations, and so there is no public data showing the level of operator cancellations on the interstate network. Again, anecdotally, Aurizon understands that there are some paths that are operated on an irregular basis. ...While it may not be the case that a new entrant could directly use a path that is not consistently or reliably used by an existing operator, the removal or adjustment of paths in the [master train plan] can create opportunity for significant improvements to the paths available.<sup>144</sup>

## Discussion

The optimisation of paths on the network is a key driver of network efficiency and competition in the rail industry. ARTC’s Customers have noted in submissions that they require more information about pathing opportunities to effectively negotiate connections with other networks, align paths with access to ports and intermodals, and plan how to allocate crew and assets like locomotives. Operators also indicated in their submissions to the ACCC that they play a key role in optimising interstate freight movements between networks and that they require robust data to undertake this function. Their ability to construct and gain ownership of viable paths for their end-users may also be critical for their ability to compete as a rail service provider.

Given the network capacity is finite, optimising the existing capacity is likely to promote the objects and considerations under Part IIIA of the Act, particularly:

- the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets
- the legitimate business interests of the provider of the service
- the public interest, including the public interest in having competition in markets

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<sup>141</sup> Pacific National, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), pp 25-26.

<sup>142</sup> Aurizon, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 18.

<sup>143</sup> Aurizon, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 10.

<sup>144</sup> Aurizon, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), pp 11-12.

- the interests of persons who might want access to the service.

In a Response to Stakeholder Submissions, ARTC identified that:

Some customers have expressed an interest in receiving more information, and with greater regularity. The provision of information must be managed in line with the confidentiality of the Indicative Track Access Agreement. ... opportunities for enhanced transparency [were] identified across possessions, delays and network performance. ARTC will report back to stakeholders about what is possible to provide under its current scope of resourcing whilst balancing customer confidentiality requirements.<sup>145</sup>

In addition to transparency measures, the ACCC notes that stakeholders also offered alternative suggestions to improve efficiency in the allocation of paths. These include:

- allowing operators to “signal their desire to acquire a new or varied train path if it were able to be made available as a result of path rescheduling or resumption”<sup>146</sup>, presumably including on an ad hoc basis and without resubmitting a new access proposal
- “publishing available train paths and allowing operators to book them online”.<sup>147</sup>

ARTC investigating viable options could benefit Customers seeking to access the service, promote economic efficient use of the network by enabling operators to use spare capacity at short notice to move their goods by rail. However, we note that paths inherently vary, particularly in their starting and finishing locations. Further, ARTC may require additional resources, new capability or technology to implement the stakeholder suggestions. ARTC should consider such options over the term of the Proposed Undertaking.

## 9.2. Allocation

### Proposed Undertaking

Clause 5.2 ‘Capacity Allocation’ in the Proposed Undertaking is substantially the same as the Existing Undertaking. Where multiple Applicants are seeking access that is mutually exclusive, ARTC would seek to finalise the Access Agreement which is most favourable to it.

Clause 2.9 ‘Renegotiation of scheduled train paths’ of the Proposed Indicative Track Access Agreement broadly provides that:

- an Operator with existing paths can notify ARTC it wishes to renew them prior to expiry
- ARTC may consent to such a renewal
- there is no automatic right of renewal.

### Stakeholder submissions

Aurizon stated that the contracting model on the Interstate network potentially creates a barrier to competition in the rail haulage market because:

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<sup>145</sup> ARTC, [Response to stakeholder submissions – ARTC’s Proposed 2024 Interstate Access Undertaking](#), p 2.

<sup>146</sup> Aurizon, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p18.

<sup>147</sup> Pacific National, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 25.



... the existing rail operator holds the paths ... and even at the expiry of its access agreement, Cl 2.9 of the ITAA provides it with the ability to renegotiate access to those paths. The only way that the incumbent rail operator can be required to release these paths (and allow them to be contracted by the new rail operator) is through the path resumption process, which requires the incumbent to fail to operate the service on 7 out of 12 consecutive occasions and would take a minimum of three months to finalise.<sup>148</sup>

Pacific National suggested ARTC “should be incentivised to allocate capacity based on economic value, not purely on financial return”.<sup>149</sup>

In place of net present value, Pacific National suggests the 2024 IAU should include a documented decision process with well-defined steps for allocating capacity when there is more than one Applicant. This would enhance transparency and provide greater certainty about how ARTC is making its decisions. Improved process transparency would also allow rail operators to hold ARTC accountable to the allocation mechanism if a matter was brought to arbitration.<sup>150</sup>

Access to the network is not only about pathing and price but is also tied to the terms and conditions. Insurance was raised an issue that impacts Customers when they are at the stage of contracting for a path. A number of concerns have been raised in submissions about insurance requirements in the Proposed Indicative Track Access Agreement, which are listed in chapter 13 and Appendix B: List of proposed changes to the ITAA. Public liability is an example: Aurizon sought an amendment to clause 16.1(b)(ii) to reduce the standard limit of liability amount from \$250 million to \$150 million, to bring the Interstate network more in step with other rail network providers.<sup>151</sup>

Both Pacific National and Aurizon sought amendments to bring the Indicative Track Access Agreement to what they say reflects contemporary insurance arrangements. For example, Pacific National suggested an amendment in recognition that “rail operators do not have readily available liability insurance and cannot confirm ahead of time that any additional limits are reasonably procurable”.<sup>152</sup>

## Discussion

In its 2008 decision the ACCC considered the options of market based and administrative mechanisms for allocating capacity and noted that it is difficult to utilise market mechanisms for the allocation of capacity because of practical difficulties. This included the complicated ways in which train paths can be put together, and that passenger services have legislated priority and frequently use network capacity that is sought by freight operators. Consequently, the ACCC considered the administrative mechanisms adopted by ARTC under the Existing Undertaking to allocate capacity did not raise any objections under Part IIIA.<sup>153</sup>

However, it appears there is scope for ARTC to work with Customers to improve the process for allocating paths.

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<sup>148</sup> Aurizon, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 19.

<sup>149</sup> Pacific National, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 28.

<sup>150</sup> Pacific National, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 28.

<sup>151</sup> Aurizon, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 39.

<sup>152</sup> Pacific National, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 38.

<sup>153</sup> ACCC, [Final Decision – ARTC’s 2008 Interstate Access Undertaking](#), ACCC, 30 July 2008, p 189.

While we note that incumbent Customers do not have any automatic or enforceable rights of renewal or extension of any scheduled train paths under the standard ITAA, it appears they still have a substantial advantage over other Customers, as they are able to notify ARTC that they wish to renew before the expiry of their train paths, and ARTC must enter into negotiations with the Customer in relation to the possibility of such renewal. It is not clear to the ACCC that there is a transparent process in place that gives new market entrants or competitors an opportunity to compete for a path that is subject to a renegotiation process. Nor is it clear that parties other than ARTC and an incumbent Customer would have knowledge of the expiry of a path and opportunity to seek to access a path that might otherwise not be available to it due to that incumbent Customer's pathing rights. The ACCC notes that paths are not a static concept, and operators require certainty around pathing to make long term investments in capital and other capability, but this certainty for the incumbent operators limits access to the paths for others and must be balanced carefully.

The terms and conditions of the template contract also have the potential to limit opportunities for potential access seekers. The Indicative Track Access Agreement has, for example, a requirement for the Customer to have a limit of liability of not less than \$250 million, regardless of the number of services, size or type of train or scale of operation. This imposes upfront costs that can create a barrier to entry if the costs are too high. The ACCC also notes that the Indicative Track Access Agreement allocates operational risk to the Customer and has no mechanism for separating this from the risk of the Operator, which may be problematic for Customers who are end-users but not the Operator.

#### **ACCC draft views**

The ACCC notes that the Proposed Undertaking provides for ARTC to analyse available capacity to meet applicants' pathing requirements and to allocate the available capacity in the event of competing requests from different applicants. It was also established as an entity that is not vertically integrated to not have a vested interest in access to the network.

However, access to paths is key to competition in downstream markets, ARTC should consider how it can respond to stakeholder calls for increased transparency around its path analysis and allocation decisions to ensure the network is used efficiently. This could include greater guidance on capacity allocation, new methods to allocate capacity, better visibility of availability, or more transparent processes for dealing with stakeholders when existing pathing agreements are expiring.

During the Proposed Undertaking and alongside the Interstate Network Development Strategy (INDS), the ACCC recommends ARTC consult with its stakeholders and shareholders about ways to optimise capacity allocation and provide greater transparency around path availability and utilization, including non-price barriers to entry such as insurance costs and risk.

## 9.3. Ad hoc pathing

### Stakeholder submissions

Several stakeholders have commented on the challenges of accessing ad hoc paths.

Pacific National currently services grain and other bulk end customers largely via ad hoc paths on the Interstate Rail Network, with no guarantee that capacity will continue to be available. Grain traffic can vary based on the harvest size and shipping schedules, and there can be late grain changes and adjustments due to weather. Inconsistent pathing and arrangements for access creates complexity and increases costs for grain producers and rail operators.... Given a large proportion of business is based on commodities with uneven demand profiles such as grain, access to paths must improve to prevent grain and other bulk traffic being lost to road.<sup>154</sup>

The Pacific National submission discussed the need to improve access for ad hoc paths to provide competitive services. Pacific National suggested that more information about unused paths and capacity in the network could improve the ability of operators to identify paths at short notice that can provide capacity for seasonal bulk commodities, and that the Proposed Undertaking should also look at opportunities to maximise capacity through better coordinated track possessions, closures and maintenance with other networks to further free up capacity.<sup>155</sup> It further suggested that “the 2024 IAU should include a goal of publishing available train paths and allowing operators to book them online”.<sup>156</sup>

GrainCorp has stated that ARTC’s capacity allocation process reinforces a gradual reduction in the availability of capacity for ad hoc paths.

The seasonality inherent to grain leaves the grain industry exposed to loss in network capacity over time, as ARTC preferences other industries that can be more consistent in operation. Historically there was sufficient “spare” capacity in the network to allow grain movements through the network. Over time this capacity that is critical to grain has been at risk of being eroded as it is sold to other users that can sustain higher rail costs, like coal.<sup>157</sup>

GrainCorp is concerned that this will be further exacerbated with the future commissioning and operation of Inland Rail and with passenger rail growth, if adequate protections are not considered in the Proposed Undertaking.<sup>158</sup>

## Discussion

Bulk traffic (such as coal, grain and minerals) that may require intermittent or less regular services, which cannot be readily timetabled, can be well-suited to an ad hoc path. Stakeholder submissions do not raise concerns about the concept of an ad hoc path—more the availability, visibility, and reliability of those paths, particularly at peak times.

If there is sufficient capacity to support peak demand, it appears that the concerns about ad hoc pathing would be minimal. Given stakeholders are concerned that there does not appear to be sufficient capacity at peak times, then the suggestions for optimisation of the existing infrastructure should be considered alongside the INDS and other optimisation strategies, as discussed in preceding sections of this chapter.

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<sup>154</sup> Pacific National, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 25.

<sup>155</sup> Pacific National, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 26.

<sup>156</sup> Pacific National, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 25.

<sup>157</sup> GrainCorp, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 9.

<sup>158</sup> GrainCorp, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 9.

## 9.4. Capacity transfer

### Proposed Undertaking

Clause 5.3 of the Proposed Undertaking provides levers to cancel or reallocate paths, including: (a) where a Customer has under-utilised its Capacity Entitlement; (b) where a Customer reduces its Capacity Entitlement by cancelling Train Paths; or (c) where Train Paths may be assigned by a Customer to a third party with approval from ARTC in accordance with the assignment provisions of that Access Agreement.

Clause 9.5 “Removal of Train Path for under-utilisation” of the ITAA, broadly, provides ARTC the ability to remove an Operator’s path if a service on the path does not run on 7 out of 12 consecutively scheduled occasions.

### Stakeholder submissions

The Aurizon submission discussed the risk of anti-competitive behaviour through path hoarding and drew a parallel with slot hoarding in the airline sector.

... an incumbent may have an incentive to maintain contracted access to premium paths simply to prevent a competitor from gaining access to them ... Most Australian rail access regimes, including ARTC’s Proposed ITAA, include mechanisms to address the risk of path hoarding. However, ... the utilisation requirement can be quite low (with utilisation requirements ranging from 50% to 75%) compared to the 80% use-it-or-lose-it requirement applied to airlines.<sup>159</sup>

Aurizon went on to discuss the opportunity for this trigger to be gamed by an Operator periodically running short trains if a path is measured as ‘utilised’ and suggests an alternative formula in clause 9.10 of ARTC’s Proposed ITAA to:

- modify the resumption utilisation threshold to be either at least 50% utilisation over 3 months or at least 75% utilisation over 6 months, with a path only measured as ‘utilised’ where it is used for a train service of at least 50% of its usual length/weight;
- add a new resumption trigger, being the loss of a connecting path on an adjoining network, except only if the operator has continued to operate a modified train service not reliant on that connecting path;
- allow ARTC the option of either resuming a path or rescheduling it to the nearest otherwise available time.<sup>160</sup>

Some stakeholders commented that it is challenging for end-users to manage pathing arrangements with Operators, for example GrainCorp stated that “the IAU clearly focuses on the track and its use by Accredited Operators. With this focus the IAU doesn’t adequately recognise the interests of other significant access seekers with rail & rail related infrastructure, such as GrainCorp”.<sup>161</sup> Qube submitted that operators that are successful in winning new contracts from another operator (i.e., not new tonnes to rail, but potentially a new service) face issues associated with transferring capacity.<sup>162</sup> Aurizon stated:

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<sup>159</sup> Aurizon, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 16.

<sup>160</sup> Aurizon, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 17.

<sup>161</sup> GrainCorp, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 8.

<sup>162</sup> Qube, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 12.

Aurizon considers that the Proposed IAU should include additional tools to facilitate path access to support competition in the haulage market for bulk freight. Bulk freight services, such as for coal and mineral products, are provided for a single customer with access rights usually held specifically to provide services for that customer. ... Aurizon recommends that, ARTC's Proposed IAU be amended to [i]nclude in the Proposed ITAA a customer initiated transfer provision to apply where services on specified contracted paths are provided for a single end customer.<sup>163</sup>

Clause 5.3(a) of the Proposed Undertaking is supplemented by clause 9.6 of the ITAA, which enables ARTC to review the preceding 3-month performance of trains against stated departure and arrival times for the scheduled train paths and where this materially differs, provides that parties will negotiate in good faith to amend the scheduled train paths to better reflect that 3-month history.

Aurizon referred to this clause as the 'use it or lose it' rule and recommends that, to improve opportunities for ARTC to optimise its Master Train Plan and introduce new services if required, the Proposed ITAA be amended to:

- Modify Cl 9.6 of ARTC's Proposed ITAA, which provides for ARTC to reschedule train paths where an operator has consistent poor reliability performance, to provide that in doing so,
  - ARTC has greater flexibility around what the alternate path needs to reflect, while preserving the principle that it intended to not disadvantage the existing operator given its typical actual practice; and
  - a rail operator should have an obligation to use its best endeavours to negotiate variations to agreements defining network entry and exit times to accommodate that varied schedule;
- Time limits should be included in Cl 9.6 (similar to those applied in Cl 9.2) in order to limit the opportunity for an operator to frustrate the process through delay.<sup>164</sup>

## Discussion

The Proposed Undertaking and Proposed ITAA should promote efficient use of the infrastructure. It is reasonable for access seekers to expect active management by ARTC of the capacity available in the infrastructure and monitoring of under-utilisation.

The ACCC originally noted in 2008 that clause 5.3(c) of the Existing Undertaking (which is the same as that under the Proposed Undertaking) is likely to promote efficient use of, and investment in, the network in three key respects. First, it will place pressure on above-rail operators to lower service costs and improve cost efficiencies. Second, it will provide more direct indications of network capacity demand and of the value placed upon network capacity by the users of above-rail services. Third, end-user-initiated capacity transfers reduces transaction costs and facilitates entry by access seekers who are able to provide more efficient services than incumbent operators.<sup>165</sup>

However, as outlined in the stakeholder submission extracts above, the ACCC notes some stakeholders have flagged that the capacity transfer clause is not well utilised. The scope for a Customer that is not an Operator to apply for a path and control it does not seem to be

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<sup>163</sup> Aurizon, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), pp 18-20.

<sup>164</sup> Aurizon, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), p 15.

<sup>165</sup> ACCC, [Final Decision – ARTC's 2008 Interstate Access Undertaking](#), ACCC, 30 July 2008, p 60.

straightforward. The ACCC found it difficult to clearly determine on the face of the Proposed Undertaking and Proposed Indicative Track Access Agreement whether stakeholders who were not train operators, but may be interested in acquiring paths, could easily identify an established process that they could follow using the existing template contract to own a path, nominate a train operator at a future time, or change operators later if appropriate.

In response to an information request by the ACCC, ARTC stated it is:

...willing to negotiate with Applicants who are not Accredited Operators on the understanding that the Applicant will procure the Operator's services consistent with the terms and conditions of the Access Agreement. This does not require the contracting of the Accredited Operator to occur ahead of the request and negotiation for Access.<sup>166</sup>

On the basis that 3.4(b) imposes a future obligation to procure the services of an Accredited Operator, and Schedule B imposes an obligation for the Applicant to understand the details of the Rolling Stock it will procure, ARTC believes these obligations can be met without the requirement of specifying the Accredited Operator at the time of negotiating the paths.<sup>167</sup>

ARTC stated that it would need to have details of the Accredited Operator before the entitlement to the path becomes effective.<sup>168</sup>

The ACCC understands a Customer who is not an Operator can negotiate for a path but would need detailed knowledge of the proposed rolling stock in order for ARTC to determine an appropriate path (for factors such as speed, etc.). However, we also understand that if these details can be provided, the Customer would not have to nominate an Operator when applying for access, noting the Indicative Track Access Agreement is currently drafted on the assumption that an Operator will be the signatory. We understand a Track Access Agreement could be constructed to be between ARTC and a Customer that is not an Operator; however, that has not been done to date.

The ACCC considers end-users negotiating access directly with ARTC may increase above rail competition by giving end-users greater control over their access arrangements and more flexibility in who they eventually contract to provide haulage services. ARTC should provide more guidance to prospective Applicants about how they can become a Customer without being an Operator, an option available under the Proposed Undertaking, and improve clarity in the contracting arrangements, which currently do not provide a viable pathway for Customer that is not an Operator to control a path.

Aurizon has noted that "Large bulk customers will often directly contract for the capacity necessary for their freight task."<sup>169</sup> A typical contracting arrangement for ARTC's Hunter Valley coal network, Aurizon Network's central Queensland coal network and much of the bulk traffic operating on Arc Infrastructure's WA rail network is a split contracting model with a separate 'capacity agreement' (held by the end customer) and 'operating agreement' (held by the rail operator).<sup>170</sup> Aurizon stated that these "contracting structures, while more complex ... support greater flexibility and competition in the rail haulage market, enabling the end customer to switch rail operators, or to split their freight task between multiple rail

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<sup>166</sup> ARTC, [Response to Information request #2 – ARTC's Proposed 2024 Interstate Access Undertaking](#), response to 1.1.

<sup>167</sup> ARTC, [Response to Information request #2 – ARTC's Proposed 2024 Interstate Access Undertaking](#), response, to 1.1.

<sup>168</sup> ARTC, [Response to Information request #2 – ARTC's Proposed 2024 Interstate Access Undertaking](#), response to 1.2.

<sup>169</sup> Aurizon, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), p 19.

<sup>170</sup> Aurizon, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), p 19.

operators, while retaining security over their access entitlement.”<sup>171</sup> Aurizon considered it may not be necessary for ARTC to move to the more complex split. Rather, another option that could be implemented under the single agreement model of the Proposed Indicative Track Access Agreement would be to include a ‘tap on the shoulder provision’. The ‘tap on the shoulder provision’ “has long been a feature of the QR and Aurizon Network access frameworks ... [and under this model] the end customer has the right to request the access provider to transfer those paths to a different rail operator from a defined date.”<sup>172</sup>

Finally, if amendments to clause 9.6 of the proposed Indicative Track Access Agreement provide ARTC with a more effective means of fostering competitive tension between rail operators and enable new entrants to enter the above rail market, this could promote economic efficiency and is worth further consideration.<sup>173</sup>

ARTC has stated:

ARTC is committed to maximising the efficient utilisation of its available paths and will work with all customers to develop pathing solutions that grow freight volumes. The ITAA sets out conditions under which ARTC can remove a train path for under-utilisation and review train paths based on an operator’s performance. ARTC understands that a change to these conditions would have a varying impact on operators and may not be an area where consensus could be readily achieved. Nonetheless, ARTC is happy to engage with operators in the 2024-2029 period to attempt to arrive at a set of utilisation rates that satisfy all operators.<sup>174</sup>

The ACCC acknowledges that ARTC is committed to maximising efficient utilisation of the network. Given the importance of this work to ARTC’s customers and the efficient operation of downstream markets, this work should be given priority.

#### **ACCC draft views**

It is reasonable for access seekers to expect active management by ARTC of the capacity available in the infrastructure and to expect ARTC to be monitoring under-utilisation and maximising use of the network.

However, it appears that end-users need further information for capacity to be used efficiently.

As a first step, the ACCC recommends that within 12 months ARTC publish a short guidance paper outlining in plain English the opportunities for Operators and non-Operators to seek, manage, resume or transfer capacity on the Interstate network, including discussion of the rationale for its risk allocation and insurance arrangements.

<sup>171</sup> Aurizon, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 19.

<sup>172</sup> Aurizon, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 20.

<sup>173</sup> Aurizon, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 15.

<sup>174</sup> ARTC, [Response to stakeholder submissions – ARTC’s Proposed 2024 Interstate Access Undertaking](#), p 2.

# 10. Network connections and additions (Part 6)

A major new element in Part 6 of the Proposed Undertaking is the introduction of the Interstate Network Development Strategy (INDS). This provides for ARTC to develop the strategy setting out options for capacity expansion, with objectives, costs and benefits, and requirements to consult Operators.

The ACCC welcomes this commitment, which should help to address the previous lack of transparency on capital investment and promote efficient investment in the Interstate network. Stakeholders also welcomed the introduction of the INDS but suggested broadening and strengthening it in several ways.

The ACCC considers the Proposed Undertaking should be amended to be clear that the INDS covers all the matters specified in ARTC's Explanatory Guide, including operational improvements, network resilience and actions taken by ARTC to improve interoperability and harmonisation.

In addition, we recommend that ARTC:

- specify the funding source (including government equity vs grant) in the INDS in cases where it is known at an early stage, or otherwise be in close-out reports
- ensure the INDS and its annual updates are clear about any likely interactions between its volume and capacity forecasts and Inland Rail
- incorporate post-implementation reviews as part of the outcomes of INDS projects and consider how best to incorporate the needs of non-Operators in its planning.

Part 6 also includes provisions for network connections, additional capacity sought by a user, and additional capacity sought by ARTC for the benefit of the rail industry.

The ACCC considers these clauses with the proposed changes are broadly appropriate but that the Proposed Undertaking should be amended to:

- require ARTC to always provide reasons where a Network connection is refused
- clarify the operation of clause 6.3, including to ensure it does not preclude the possibility for ARTC to, at its sole discretion, agree to share the costs of Additional Capacity sought by an Applicant if it wishes to do so
- clarify exactly how a price increase following an application by ARTC to the ACCC for Additional Capacity would interact with the CPI-based price cap.

## 10.1. Interstate Network Development Strategy

### Background

The Interstate Network Development Strategy (INDS) is a new document contemplated in the Proposed Undertaking that will provide a planning and consultation framework for the network, in particular on major capital investments.



ARTC's proposed 2018 Undertaking had no provision like the INDS but maintained the approach in the 2008 Undertaking where the ACCC would have to approve capital expenditure for it to be included in the regulatory asset base.<sup>175</sup> ARTC submitted that this methodology reflected an ex-post capital addition based on actual project cost (rather than the ACCC approving an allowance in advance).<sup>176</sup> The ACCC considered the proposal was not appropriate, as it did not provide transparency for stakeholders and did not ensure prudence of ARTC's capex.<sup>177</sup>

## Proposed Undertaking

Clause 6.1 of the Proposed Undertaking commits ARTC to the annual publication of, and consultation on, an INDS which frames the potential projects required to meet growth scenarios. ARTC submitted that:

The INDS is an annual snapshot of ARTC's view of the opportunities for the commodities that underpin the use of the rail network, the investments (and forecast costs) required to improve service and deliver increased capacity to capture those opportunities, a summary of actions ARTC has taken to address broader policy issues such as interoperability and an ability for stakeholders to propose alternatives based on industry wide consultation. A draft will be provided for consultation, then a final version published.<sup>178</sup>

Clause 6.1 provides that ARTC will:

- develop an Interstate Network Development Strategy annually
- base the strategy on the rolling annual capacity forecast developed by ARTC, which will be based on forecast volumes sought by existing and prospective Customers, forward growth capital, and future Capacity and performance requirements
- include: Capacity expansion options: that seek to ensure capacity meets combined demand forecasts; a preliminary high-level assessment of objectives, indicative benefits and estimated costs; a cost estimate in the concept assessment stage; and recommendations on preferred options
- before finalising the INDS schedule an annual meeting with operators, publish a draft INDS and invite comments from all users of the network, consider those views in good faith and take them into account in finalisation of the strategy.

It also provides that the INDS is indicative only and any Capacity expansion options are subject to ARTC's approval processes. A close out report will be published on completion of a project, with project deliverables, capex incurred and a review against initial budget, timeline and scope.

ARTC's Explanatory Guide lists the following as topics that ARTC envisages will be covered by the INDS:<sup>179</sup>

- representation of the network and its current capabilities

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<sup>175</sup> The 2008 Undertaking, Schedule H listed the amount of capital expenditure proposed in each segment, for each year from 2006-07 to 2017-18, which was approved by the ACCC as part of the undertaking. Clause 4.4(e) provided that ARTC could undertake additional prudent capital expenditure but would obtain the approval of the ACCC for any increase exceeding 20% of Capital Expenditure on the Network in any single year.

<sup>176</sup> ACCC, [Draft Decision – ARTC's 2018 Proposed Interstate Access Undertaking](#), ACCC, 20 December 2018, p 146.

<sup>177</sup> ACCC, [Draft Decision – ARTC's 2018 Proposed Interstate Access Undertaking](#), pp 82, 147.

<sup>178</sup> ARTC, [Explanatory Guide – ARTC's Proposed 2024 Interstate Access Undertaking](#), p 13.

<sup>179</sup> ARTC, [Explanatory Guide – ARTC's Proposed 2024 Interstate Access Undertaking](#), p 17.

- completed Interstate Network investments by ARTC
- future investments in development/progress
- projections of the interstate rail task
  - intermodal, steel, grain, minerals, general freight, passenger
- network performance (current state)
- additional capacity enhancements to meet the projections of the rail task
- rail market challenges and opportunities
- operational improvements (including a separate section for stakeholder suggestions that can be consulted on more broadly)
- network resilience
- actions taken by ARTC to improve interoperability and harmonisation.

ARTC submitted that this “provides the ACCC and other stakeholders comfort on project transparency given removal of Schedule H [the provisions for ACCC approval of proposed capital expenditure]”.<sup>180</sup> Further, it stated the INDS provides a framework for engagement on growth opportunities, service improvements, and potential investments in the network. In particular, the INDS provides users with the opportunity to put forward service options they believe will benefit the industry for wider consideration.<sup>181</sup>

## Stakeholder submissions

Stakeholders generally supported the introduction of the INDS but several suggested ways to broaden and strengthen it.

Aurizon submitted:

Aurizon recommends that it have a broader scope, including investments to promote interoperability, productivity and coordination with adjoining networks, and that ARTC provide a stronger commitment to ongoing engagement with relevant stakeholders, including network operators, end customers, adjoining infrastructure owners and the Rail Operators Group (ROG), to input into the development of the annual INDS. Project “close out reports” should also include an assessment of project outcomes against the anticipated benefits, as well as a commitment to rectifying any identified performance gaps, together with identifying the available options and preferred approach to achieve this.<sup>182</sup>

Pacific National submitted:

Pacific National appreciates that ARTC is a member of the NTC working group on harmonisation and interoperability, and that ARTC is planning to outline initiatives to support interoperability in its Interstate Network Development Strategy (INDS). However, because the INDS is not an enforceable document there still needs to be a firm commitment to interoperability in the 2024 IAU. The impact on rail operators of misaligned interfaces with other track providers must be reduced.<sup>183</sup>

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<sup>180</sup> ARTC, [Explanatory Guide – ARTC’s Proposed 2024 Interstate Access Undertaking](#), p 29. Schedule H in the Existing Undertaking (which is to be removed) sets out the amounts of capital expenditure approved for each segment and year from 2006-07 to 2017-18. Clause 4.4 sets out further limits on capital expenditure.

<sup>181</sup> ARTC, [Explanatory Guide – ARTC’s Proposed 2024 Interstate Access Undertaking](#), p 4.

<sup>182</sup> Aurizon, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 36-37.

<sup>183</sup> Pacific National, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 28.

Qube submitted:

... support for the Interstate Network Development Strategy is qualified, pending an enforceable obligation on ARTC to deliver on the strategy. This obligation protects private investments by operators in new rolling stock and terminals, as individual operators would be unable to negotiate assurances through access agreements (in the case of rail operators) or connection agreements (in the case of terminal operators). It also protects operators from Government decisions to re-prioritise resources to other projects without consultation.<sup>184</sup>

TAHE submitted:

TAHE believes that ARTC should also consult with adjoining networks prior to finalising the strategy, as network volumes, capacity, capital, and performance may all be impacted by activities on adjoining networks.

TAHE believes that adjoining network interactions with ARTC in developing the Interstate Network Development Strategy may contribute to aligning network development more broadly across adjoining networks where appropriate.<sup>185</sup>

GrainCorp submitted:

The INDS process should not be limited to train operators (in the Rolling Stock Operator sense) but should be broadened to include network users with significant infrastructure and rail network use. Generally speaking, the significant private investment decisions being made into rail infrastructure that connects to or uses the Interstate Network is being made by non-Rollingstock Operator entities. For example, GrainCorp has made significant investment into rail infrastructure like sidings, above rail loading infrastructure, below rail unloading infrastructure, and aside rail container terminal infrastructure, but also additional grain storage and handling investment in rail specific loading sites. GrainCorp, like other large rail user entities, should be included in the development strategy.<sup>186</sup>

## Discussion

The ACCC considers that the INDS is a positive addition to the Proposed Undertaking that should promote efficient investment in the infrastructure. However, we discuss below several concerns expressed by stakeholders and potential improvements.

### Scope of INDS

The INDS per clause 6.1 is primarily focused on additional capacity. However, several stakeholders have suggested including other investments, such as those to promote interoperability, productivity and coordination with adjoining networks.

We note that the proposed Strategy would identify future performance (as well as capacity) requirements (clause 6.1(b)(iii)). However, the other provisions regarding analysis of options and consultation focus on capacity rather than performance issues.

ARTC's Explanatory Guide lists several topics it envisages will be covered by the INDS, several of which are not explicitly referred to in clause 6.1 of the Proposed Undertaking:

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<sup>184</sup> Qube, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), pp 11, 12, 14.

<sup>185</sup> Transport Asset Holding Entity, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), p 2.

<sup>186</sup> GrainCorp, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), p 7.

- operational improvements
- network resilience
- actions taken by ARTC to improve interoperability and harmonisation.<sup>187</sup>

Stakeholders recommended that the full scope of the INDS be reflected in the actual undertaking rather than in the Explanatory Guide.<sup>188</sup>

### **ACCC draft views**

The ACCC agrees with stakeholders that the proposed scope of the INDS, as set out in ARTC's Explanatory Guide, should be reflected in the Proposed Undertaking itself.

The ACCC accepts that operational improvements, resilience and interoperability and harmonisation can be just as important to efficient use of the network as capacity expansion. The ACCC considers it would be reasonable for ARTC to clarify or confirm its commitment to the topics listed for the INDS in the Explanatory Guide by including them in the Proposed Undertaking, and to clarify that options to address performance issues as well as capacity will be analysed and consulted on.

### **Proposed amendment 10.1**

Part 6 of the Proposed Undertaking should be amended to reference all the matters the INDS will cover, as set out in the Explanatory Guide, including:

- operational improvements
- network resilience
- actions taken by ARTC to improve interoperability and harmonisation.

### **Time horizon**

ARTC has advised that the INDS will provide forecasts of freight volumes under a range of growth scenarios, and the consequent potential required enhancements to the network, over a 10-year timeframe.<sup>189</sup>

While the ACCC welcomes this clarity, volume growth scenarios may need to consider a longer timeframe, because rail investments may only be economically feasible if the benefits are counted over the life of the assets.

### **Project details**

Following Qube's submission concerning funding sources, the ACCC asked ARTC:

<sup>187</sup> ARTC, [Explanatory Guide – ARTC's Proposed 2024 Interstate Access Undertaking](#), p 17.

<sup>188</sup> From ARTC RoundTable, 30 April 2024.

<sup>189</sup> ARTC, [Response to Information request #2 – ARTC's Proposed 2024 Interstate Access Undertaking](#), response to 4.1.

Is there any reason the INDS cannot state the source and type of funding for each project/option being considered, as well as final funding details in the proposed 'close-out reports'? For example, indicating whether funding originates from company internal funds, government grants or equity—including whether it is general funding or for specific projects?

ARTC's response was that, given the INDS reflects potential projects that would be required under a range of growth scenarios, funding for such projects generally would not have been secured and therefore cannot be stated. The close out report, therefore, will be the relevant document for defining the funding source of completed projects and not the INDS.<sup>190</sup>

The ACCC understands therefore that it will be feasible for ARTC to report the funding source at the close-out stage, but considers it should do so at an earlier stage if known. We consider it particularly useful to distinguish equity from grant funding as context for understanding the expected benefits and potential pricing approach.

#### **ACCC draft view**

The ACCC considers that the funding source (including government equity vs grant) should be stated in the INDS in cases where it is known at an early stage, or otherwise in close-out reports.

#### **Inland Rail**

Inland Rail is set to become an important part of the Interstate network, but the INDS and the broader undertaking do not make clear the role of Inland Rail or its relationship with the existing network.

Inland Rail projects will not be included in the projects consulted on through the INDS. From 2024, the development of Inland Rail and project construction has moved from ARTC to a new company Inland Rail Pty Ltd (a subsidiary of ARTC). In response to an ACCC question as to whether there is a separate process for consulting with stakeholders on proposed Inland Rail capex projects, ARTC responded:

Consultation on the requirement for Inland Rail was extensive and undertaken throughout the development of the Business Case culminating in the Inland Rail Program Business Case 2015.<sup>191</sup>

In response to a further ACCC information request, ARTC stated:

The INDS will provide forecasts of volumes under a range of growth scenarios, and potential enhancements to the network over a 10-year timeframe. The commencement of operations on the full scope of Inland Rail is yet to be determined. Hence, the timing and location of additional enhancements on existing and new segments of the ARTC network will not be known until such time as the INDS forecast period covers a timeframe that includes Inland Rail being operational.<sup>192</sup>

<sup>190</sup> ARTC, [Response to Information request #2 – ARTC's Proposed 2024 Interstate Access Undertaking](#), response to 4.2.

<sup>191</sup> ARTC, [Response to Information request #1 – ARTC's Proposed 2024 Interstate Access Undertaking](#), response to 8.11.

Inland Rail website: Inland Rail Program Business Case 2015, <https://inlandrail.com.au/inland-rail-program-business-case-2015/>

<sup>192</sup> ARTC, [Response to Information request #2 – ARTC's Proposed 2024 Interstate Access Undertaking](#), response to 4.4.

The ACCC considers that some aspects of Inland Rail can be anticipated and will be relevant to other projects on the Interstate network. For example, the section from Beveridge (Melbourne) to Parkes is due to be completed by 2027 – within the term of the Proposed Undertaking.<sup>193</sup> Inland Rail is integrally connected to the Existing Undertaking segments by aiming to enhance capacity and grow traffic on north-south routes to meet future demand, while diverting traffic from road. This is likely to increase rail traffic on existing North-South inland routes and divert traffic from the coastal route through Sydney.

We consider that developing the INDS in the light of anticipated developments on Inland Rail would promote the efficiency of investment and would be in the interests of users of the network.

#### **ACCC draft view**

ARTC's INDS and its annual updates should make clear any likely interactions between its volume and capacity forecasts and Inland Rail.

### Consultation

Clause 6.1(e) of the Proposed Undertaking provides for consultation on the INDS through an annual meeting with Operators and general consultation on a draft strategy with all users of the network.

The extent of stakeholder involvement in capital expenditure decisions for the interstate network has been considerably less than for the Hunter Valley network. As part of the Hunter Valley Access Undertaking, the Rail Capacity Group assesses whether capex projects are prudent. The Group is comprised of access holders who ultimately pay for capital expenditure undertaken. ARTC also publishes a Corridor Capital Strategy for the Hunter Valley network each year which informs its discussions with the Group.<sup>194</sup>

The ACCC considers that it would be beneficial for the Interstate network undertaking to adopt some of the consultative principles applied in the Hunter Valley undertaking. However, we recognise that the context is different insofar as Hunter Valley involves a small group of well-resourced users with aligned incentives – the coal mining companies. We expect that the annual forum with stakeholders outlined above in chapter 5.3, as well as the consultation proposed for the INDS, will advance consultation and deliver benefits.

### Engagement with non-operators

The ACCC notes the support from several stakeholders for consultation with a wider range of stakeholders beyond train operators.

Although it is train operators that generally contract directly with ARTC as Access Holders on the network, the shippers or freight owners who supply the freight are critically important to the task and future needs. Noting non-Access Holders are currently outside the scope of the Proposed Undertaking, we recommend ARTC consider a role in the INDS for other users besides Operators. These users could include shippers of agricultural and mining products, grocery and logistics companies.

<sup>193</sup> For more information, see the Inland Rail website, Building Inland Rail. [https://inlandrail.com.au/building-inland-rail/#:~:text=The%20sections%20of%20Inland%20Rail,prioritised%20for%20completion%20by%202027.&text=The%20Parkes%20to%20Narrowmine%20\(NSW,now%20running%20on%20these%20sections.](https://inlandrail.com.au/building-inland-rail/#:~:text=The%20sections%20of%20Inland%20Rail,prioritised%20for%20completion%20by%202027.&text=The%20Parkes%20to%20Narrowmine%20(NSW,now%20running%20on%20these%20sections.)

<sup>194</sup> ARTC, [2023 Hunter Valley Corridor Capacity Strategy](#), September 2023.

## Close-out reports

Aurizon suggests that project close-out reports should include assessment of outcomes against anticipated benefits, commit to rectifying any identified performance gaps and set out options to rectify them.

Clause 6.1(g) of the Proposed Undertaking provides that the close-out report will include ‘a review of the project against its initial budget, timeline and scope’. However, it is not clear that this would include an assessment of outcomes against anticipated benefits, as it may not be possible to know the full benefits of a project until later. The ACCC asked ARTC as to whether the INDS will include periodic reviews of major projects that have been conducted in the past. ARTC responded that it would not, as the INDS will be a forward-looking document. ARTC stated that the purpose of the INDS is to forecast future network requirements under a range of scenarios and not to undertake reviews of historic projects.<sup>195</sup>

The ACCC considers that an assessment of outcomes against anticipated benefits is an aspect of good governance and contributes to efficiency of future investments. However, we recognise that the appropriate time lag after a project is completed before it is reviewed could vary between projects and adding more functions to the INDS will increase the complexity. However, it would be in the interests of stakeholders and transparency for ARTC to share information on the extent to which the benefits of projects have been achieved periodically. Identifying performance gaps and setting out options to rectify them, this may also be more appropriately done at the time of post-implementation review.

The INDS includes a stage where ARTC sets out its recommended project among the various options, and another where ARTC publishes a “close-out report” on completion of a preferred option.<sup>196</sup> However, clause 6.1(d) says that the INDS is indicative only and any Capacity expansion options set out in the Interstate Network Development Strategy are subject to ARTC’s approval processes. It is not clear what information ARTC would provide as to what projects it is going ahead with, following its internal approval processes – that is, between the recommendation and the completion. We consider it would be in the interests of end-users for ARTC to clarify when it will provide this information, whether specified in the INDS or not.

## Enforcing INDS

Pacific National and Qube queried whether there will be sufficient accountability of ARTC if the Undertaking does not provide for enforcement of ARTC’s obligations on the INDS. Qube recommended an enforceable obligation on ARTC to deliver on the strategy, submitting the following:

This obligation protects private investments by operators in new rolling stock and terminals, as individual operators would be unable to negotiate assurances through access agreements (in the case of rail operators) or connection agreements (in the case of terminal operators). It also protects operators from Government decisions to re-prioritise resources to other projects without consultation.<sup>197</sup>

The Proposed Undertaking sets out ARTC’s obligations to develop the strategy and consult but does not require ARTC to adopt any projects proposed or recommended. The ACCC is not convinced that it would be feasible for ARTC to guarantee the implementation of every

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<sup>195</sup> ARTC, [Response to Information request #2 – ARTC’s Proposed 2024 Interstate Access Undertaking](#), response to 4.3.

<sup>196</sup> Australian Rail Track Corporation (ARTC), [Proposed Interstate Access Undertaking – ARTC’s Proposed 2024 Interstate Access Undertaking](#), ACCC, 12 December 2023, clause 6.1(c)(iv) and clause 6.1(g).

<sup>197</sup> Qube, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), pp 11-12.

project recommended in the Strategy, nor that it is necessary to create an enforcement mechanism that requires ARTC to deliver on the strategy.

#### **ACCC draft views**

The ACCC considers that the INDS processes and related consultation will provide a considerable advance in users' understanding of future projects.

We recommend ARTC consider incorporating post-implementation reviews as part of the outcomes of INDS projects and consider how best to incorporate the needs of non-Operators in its planning.

## 10.2. Network connections

### Background

Clause 6.1 of the Existing Undertaking deals with other track owners wishing to connect their track to the Interstate network and the conditions that must be satisfied before ARTC consents to such a connection.

In its 2018 Draft Decision, the ACCC considered that the provisions on Network connections (which were the same as in the Existing Undertaking) were appropriate to accept, subject to some amendments. Under clause 6.1(b) of the Existing Undertaking, ARTC is only required to provide reasons as to why it has refused to consent to allow a Network connection in one specific circumstance –that is, if it refused consent because, in its view, the connection would reduce capacity. The ACCC considered that ARTC should be obliged to provide reasons, if requested, as to why it has refused a Network connection under any of the relevant grounds.<sup>198</sup>

In the Proposed Undertaking clauses are renumbered so that clause 6.2 covers network connections. It makes no changes to the existing provisions and there were no submissions from stakeholders on the issue.

### Discussion

The ACCC notes that ARTC has not taken up the recommendation in the ACCC's 2018 Draft Decision to widen the cases in which it has to give reasons for refusing a request for a new connection.

The ACCC maintains its view from 2018 that, under clause 6.2(b), ARTC should be obliged to provide reasons, if requested, as to why it has refused a Network connection under any of the relevant grounds. We consider that it would make for a fairer process to ARTC to provide reasons for a refusal and would be in the public interest for reasons to be given why potential expansions of rail routes through connections were not made. Further, it would be consistent with the approach proposed by ARTC for additional capacity under clauses 6.3(b) and (g) in the Proposed Undertaking (noted below) whereby ARTC must provide reasons for the basis of decisions made by it in relation to additional capacity.

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<sup>198</sup> ACCC, [Draft Decision – ARTC's 2018 Proposed Interstate Access Undertaking](#), ACCC, 20 December 2018, p 206.



## Proposed amendment 10.2

Clause 6.2(b) of the Proposed Undertaking should be amended to require ARTC to provide reasons where a Network connection is refused in all cases.

## 10.3. Additional capacity

### Background

Clauses 6.3 to 6.5 in the Proposed Undertaking set out the processes for the following situations:

- 6.3: additional Capacity sought by Applicants
- 6.4: additional Capacity sought by ARTC for the benefit of the rail industry
- 6.5: improvements due to directions to operators under Victorian transport law.

### Proposed Undertaking

ARTC proposes minor changes to clause 6.3 of the Proposed Undertaking for additional Capacity sought by Applicants (previously clause 6.2 in the Existing Undertaking) has 2 new paragraphs:

(b) If ARTC does not agree to the creation of Additional Capacity, then ARTC will provide the relevant Applicant with its reasons in writing (having regard to the matters in paragraph (a)).

(c) A request by Applicants for Additional Capacity under paragraph (a) may, but does not need to be, Additional Capacity identified in the Interstate Network Development Strategy.

### Stakeholder submissions

Pacific National proposed that clause 6.3 be further revised so that if ARTC refuses a request for additional capacity, “the Applicant is also given a right of reply and an opportunity to seek a negotiated compromise”.<sup>199</sup>

Qube submitted that the proposed model for rail operator investment outlined in the Proposed Undertaking is unlikely to attract significant operator-led investment, as new network capacity is available to all users.<sup>200</sup>

### Discussion

The ACCC considers that the additions to clause 6.3 of the Proposed Undertaking are appropriate, as the provision of reasons is in the interests of access seekers. We note the recommendation by Pacific National to add a right of response by the applicant and an opportunity to seek a negotiated compromise. However, we expect ARTC to provide for such

<sup>199</sup> Pacific National, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 29.

<sup>200</sup> Qube, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 12.

a response as part of conducting negotiations in good faith generally, without requiring amendment to the Proposed Undertaking.

Certain aspects of the application of clauses 6.3 and 6.4 are unclear, as outlined below.

### Use of clause 6.3

ARTC reported that clause 6.3 of the Existing Undertaking regarding Additional Capacity sought by Applicants has not been used in the past.<sup>201</sup>

The ACCC considers that the clause has the potential to facilitate efficient investment in the infrastructure, consistent with the Act, by allowing Additional Capacity to be proposed by users and not just the monopoly infrastructure owner, so is an appropriate part of the Proposed Undertaking.

However, the operation of clause 6.3(a), is unclear, as it includes three items in the same list with both 'and' and 'or' used. We consider the operation of this clause should be clarified.

It is also not clear whether clause 6.3 allows ARTC and an Applicant proposing Additional Capacity to agree to share the capital costs.

The ACCC asked ARTC:

Has ARTC considered including provision in the Proposed Undertaking for ARTC and beneficiaries to agree to share the costs and benefits of proposed additional capacity?

ARTC's response stated:

.... While ARTC would own and manage the Additional Capacity, the funding applicant would have a contract for the additional capacity in consideration for funding it. This approach could apply to a group of applicants who could share the benefits (i.e. additional capacity) relative to their cost contributions.

ARTC notes that the provisions of the clause, especially under clause 6.2(b)(iii) [*Note: reference to existing numbering, now 6.3(d)(iii) in the Proposed Undertaking*] also allow for ARTC and the Applicants to negotiate and agree the appropriate recovery of the costs of investing for additional capacity. This can include mechanisms for dealing with circumstances where additional Applicants contract for a portion of the additional capacity if the initial Applicant does not procure 100% of the capacity so created.

A provision that assumes ARTC will share in the costs of the investment, places an obligation on ARTC to consider investments that do not earn a commercial return. Whilst ARTC does not earn a commercial return on its investment in the Interstate Network, making this a regulatory obligation is not something ARTC considers appropriate. ARTC also notes this is not consistent with the provisions of the Act under which a services provider cannot be made to bear some or all of the costs of expanding a facility (see s44W(1)).<sup>202</sup>

We agree that it may not be appropriate for the clause to *require* ARTC to share the cost if it were a non-commercial investment. However, we consider the Proposed Undertaking should not preclude ARTC choosing to share the cost where it is in its own benefit to do so.

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<sup>201</sup> ARTC, [Response to Information request #1 – ARTC's Proposed 2024 Interstate Access Undertaking](#), response to 4.2.

<sup>202</sup> ARTC, [Response to Information request #2 – ARTC's Proposed 2024 Interstate Access Undertaking](#), response to 5.

We consider that in some circumstances, ARTC bearing some of the cost would widen the range of economic investments that could be supported by clause 6.3, and thereby promote economically efficient investment in the infrastructure.

#### **ACCC draft view**

The operation of clause 6.3 should be clarified, including to ensure it does not prevent the possibility of ARTC paying some of the up-front cost of Additional Capacity, if it wishes to do so because it would also benefit from the investment.

#### **Proposed amendment 10.3**

Clause 6.3 should be amended to:

- clarify the operation of 6.3(a)
- expressly provide that ARTC can, at its sole discretion, choose to agree to pay some of the capital costs of an Applicant's request for Additional Capacity.

#### **Additional capacity proposed by ARTC**

Proposed clause 6.4(a) (largely unchanged from the Existing Undertaking) provides that:

ARTC may make an application to the ACCC to provide Additional Capacity, including a variation to the Standing Offer for Reference Services to reflect the cost of that Additional Capacity, at any time during the Term.

ARTC stated that this clause has yet to be used although it has existed, in some form or another, across all versions of the Existing Undertaking.<sup>203</sup>

The proposed new provision for the INDS means that ARTC is likely to undertake consultation with stakeholders on such projects. However, clause 6.4 is distinct in that it appears to provide an avenue to vary Standing Offer (prices) for Reference Services based on cost recovery for such projects, whereas the INDS is a project strategy document and does not provide a specific mechanism to increase the prices in the Standing Offer.

The ACCC asked ARTC to explain the conditions under which it expects clause 6.4 would operate. ARTC responded as follows:

Note, this is a Clause that anticipates an event where negotiations have failed with Industry but ARTC believes the investment, and cost recovery of that investment, is essential for the efficient operation of the network. Such a project would not be commercial in nature and therefore requires resolution by the ACCC and not via commercial arbitration.

ARTC is not able to hypothesise on the range of scenarios where this would apply, however would note that given the ACCC's indication that a future IAU may revert to

<sup>203</sup> ARTC, [Response to Information request #1 – ARTC's Proposed 2024 Interstate Access Undertaking](#), response to 4.7.

a RAB based framework post Inland Rail, there may be merit in such a process to demonstrate the need for the investment even if no change in pricing is sought.<sup>204</sup>

...Given the 22 year history of the IAU has seen no applications made by ARTC for investment on this basis, ARTC is not able to hypothesise on exact determinations for the use of Clause 6.4. However, given the arbitration framework that applies, it is possible to extrapolate that any application under 6.4 would likely be made only where a project is sought by ARTC with no support from industry and no commercial benefit to trigger a commercial arbitration but ARTC saw value in pursuing an ACCC application.<sup>205</sup>

As the Proposed Undertaking would remove the cost-based revenue ceiling, it is notable that clause 6.4(a) would be one of the few avenues remaining for assessing cost-reflective pricing. It is consistent with clause 4.2 which provides that, in formulating its charges, ARTC will have regard to a range of factors which impact on its business, including but not limited to, the cost of any Additional Capacity and capital or other contributions by the Applicant to ARTC's costs. These clauses potentially provide flexibility for new investments to be reflected in prices which should promote efficiency of investment in the network.

However, the potential flexibility from clause 6.4 appears to contrast with the upper limits for prices set in clause 4.5. The ACCC asked ARTC for its views on how clause 6.4 would work in conjunction with the formula for the calculation of the Standing Offer for Reference services in clause 4.5. ARTC responded as follows:

Clause 4.5 is limited purely to the annual variation of prices based on the application of the CPI formula. ARTC therefore considers that any ACCC approval of pricing under Clause 6.4 is separate to the application of Clause 4.5.<sup>206</sup>

However, the Proposed Undertaking does not make sufficiently clear how a price increase for a Reference Service under clause 6.4(a) would interact with the price cap provisions of Part 4. Clause 4.5 allows ARTC to vary the Standing Offer for Reference Services by up to an amount determined in accordance with the CPI but does not specifically indicate any exceptions that could allow variations above that limit.

#### **Proposed amendment 10.4**

ARTC should clarify in the Proposed Undertaking exactly how any price increases pursuant to clause 6.4 would work in conjunction with the CPI indexation constraints in clause 4.5 for Reference Services.

#### **Industry consultation**

Clause 6.6 of the Proposed Undertaking provides for consultation by ARTC with operators about plans for additional capacity under 6.3 and 6.4. In the Proposed Undertaking, clause 6.6 is, other than in respect of clause references, unchanged from clause 6.5 in the Existing Undertaking.

<sup>204</sup> ARTC, [Response to Information request #1 – ARTC's Proposed 2024 Interstate Access Undertaking](#), response to 4.5.

<sup>205</sup> ARTC, [Response to Information request #1 – ARTC's Proposed 2024 Interstate Access Undertaking](#), response to 4.8.

<sup>206</sup> ARTC, [Response to Information request #1 – ARTC's Proposed 2024 Interstate Access Undertaking](#), response to 4.7.

Apart from these provisions, the INDS provides a new avenue for consultation on additional capacity on major projects. ARTC provided further information on how these provisions would interact in response to an ACCC information request as follows:

Clause 6.3 relates to Additional Capacity projects requested by Applicants. It is therefore possible that such projects would not be in those included in the INDS and so may not have been consulted on.

The nature of the use of Clause 6.4 assumes that ARTC is of the understanding that industry does not support the benefits of the project, which presupposes consultation which will likely have occurred under the provisions of the INDS. However, where 6.4 has been triggered, and noting that this has yet to be done in the 22 year history of the IAU, additional consultation under Clause 6.6 will be of merit.<sup>207</sup>

The ACCC considers that the provisions are appropriate and provide avenues for consultation for different types of projects, which is in the interest of ARTC and access seekers.

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<sup>207</sup> ARTC, [Response to Information request #1 – ARTC's Proposed 2024 Interstate Access Undertaking](#), response to 4.10.

# 11. Network transit management (Part 7)

The ACCC notes the challenges that access seekers face if the transit of trains is not reliable or efficient. Specific changes have not been recommended by stakeholders to Part 7 or Schedule F of the Proposed Undertaking, nor have changes been recommended to Schedule 4 of the Indicative Track Access Agreement (ITAA).

Stakeholders have made comments on clauses in the ITAA to address issues raised around disruption, repair and maintenance of the network and recovery of rolling stock that has broken down on the network. Further information will be sought from ARTC on these proposed adjustments.

The ACCC considers that in the absence of alternative proposals, the proposed transit management arrangements in the Proposed Undertaking could be accepted, noting that:

- We consider ARTC should work towards improved transparency around performance on transit management, as discussed in chapter 12. This might include actual versus scheduled data, path availability, timing, maintenance and coordination. Improved performance reporting will provide a sound basis on which to consider whether the prioritisation framework is delivering efficient transit management.
- Given the issues raised by stakeholders about speed restrictions, track closures and the 15-minute tolerance of healthy trains exiting from the network, the ACCC is of the view that transit management should also be discussed further between ARTC and its users.

Stakeholders have made comments on clauses in the ITAA that aim to address issues raised around disruption, repair and maintenance of the network and recovery of rolling stock that has broken down on the network. Further advice will be sought from ARTC on these proposed adjustments.

The ACCC considers expectations around prioritisation of premium paths should be discussed at the annual stakeholder forum to encourage collective problem solving among all access seekers and ARTC. We also consider that determining whether 'priority' or 'premium' freight paths can be described as a Reference Service should also be included in the forward agenda of the annual stakeholder forum.

## Background

Part 7 of the Proposed Undertaking sets out ARTC's approach to the management of train movements on the network. ARTC has proposed no changes to Part 7 of the Proposed Undertaking (that is, it is the same as the Existing Undertaking), which consists of a single clause:

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."<sup>208</sup>

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<sup>208</sup> ARTC, [Proposed Interstate Access Undertaking – ARTC's Proposed 2024 Interstate Access Undertaking](#), p 34.

The Network Management Principles, set out in Schedule F, apply in circumstances where Train Paths are interrupted due to matters outside of ARTC's control and there is a need to resolve competing interests of users of the Network. The Network Management Principles are mirrored in Schedule 4 of the Indicative Track Access Agreement. No changes have been proposed by ARTC to either of these schedules.

Stakeholders have raised several concerns around their ability to transit through the network efficiently and the way prioritisation decisions impact on freight services. The issues raised have been grouped into the following topics:

- delays, transit and exit on the Interstate network
- premium paths and their prioritisation.

## 11.1. Delays, transit and exit on the Interstate network

### Proposed Undertaking

The Proposed Undertaking and associated Indicative Track Access Agreement state that ARTC's objective is to manage the transit of trains so that they exit the network according to their contracted exit time.

The Train Decision Factors in Schedule F of the Proposed Undertaking state:

1. Where Trains are on-time, they will be managed as specified in the daily train plan.

Where one or more Trains are late or unhealthy<sup>209</sup>, they will be managed as specified in the 2 tables and Rules set out in Schedule F subject to a rail operator's preferences for its own services.<sup>210</sup> In Schedule F of the Proposed Undertaking, train services running on the ARTC network are listed according to their priority, with 1 being the highest:

1. Long-distance Passenger Services
2. Commuter Peak Services and rail passenger services likely to affect Commuter Peak Services or Special Event services
3. Limited-Stop Services that are not Commuter Peak Services or Special Event Services
4. Freight services likely to affect Commuter Peak Services or Special Event services
5. Express Freight Services
6. Frequent-Stopping Services that are not Commuter Peak Services
7. Non-express Freight Services
8. Non-Revenue Positioning Movements.

In Schedule F, Rule 7 states that "a Healthy Train should be given preference over an unhealthy Train. An unhealthy Train may be given preference over a Healthy Train provided

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<sup>209</sup> Schedule F defines a 'healthy train' as a train, having regard to the daily train plan applicable on the day, that:

- presents to the Network on time, is configured to operate to its schedule and operates in a way that it remains able to maintain its schedule; or
- is running late only due to causes within the Network, but only where the root cause is outside the Operator's control; or
- is running on time, regardless of previous delays.

<sup>210</sup> ARTC, [Proposed Interstate Access Undertaking – ARTC's Proposed 2024 Interstate Access Undertaking](#), pp 63-64.

the delay to that Train is kept to a minimum as defined in Rule 2” (the delay limits applying to the full journey of a Healthy Train). Under Rule 2 the downstream effect for a healthy freight service of being held back should not exceed 15 minutes.

## Stakeholder submissions

### Delays on the network

Submissions from stakeholders have indicated that delays to freight trains are commercially significant, avoidable and impact the efficient use of the network. GrainCorp noted:

GrainCorp relies on an efficient grain train achieving a predictable and reliable cycle time from silo to port (or mill). Planning, management and operation of grain trains can be plagued or stopped as a result of congestion, lack of priority of pathing, clunky interfaces between rail networks and network managers, speed restrictions, inefficiencies in maintenance or lack of knowledge of the state of existing track infrastructure assets.<sup>211</sup>

The Rail Operators Group provided examples including the following:

Sub-standard crossing outcomes and excessive delays at network boundaries, such as one operator initially obtained new east coast interstate train paths based on a speed limit of 115km/hr, however the speed limit was dropped to 80km/hr when it was identified that there would be no change in the overall transit time from the reduced speed, highlighting the extended crossing delays embedded in the original train schedule.<sup>212</sup>

Pacific National stated:

Lack of coordination between rail networks and inconsistent arrangements for access creates network inefficiencies and higher costs, ultimately borne by the rail operator and the end customer.... If, for example, ARTC closes a section of track on Wednesday and then ARC closes a section on Saturday, it means trains are disrupted for two days. Conversely, if ARTC and ARC both have their closures on the same day the disruption to rail operators and trains is halved.<sup>213</sup>

GrainCorp also stated that:

Maintenance and non-urgent repair should consider customer demand profiles and avoid peak services. Where possible, ARTC should avoid disruption to the Scheduled Train Paths during peak retail periods such as Christmas and Easter, and avoid service disruption during peak agricultural seasonal periods.<sup>214</sup>

### Prioritisation and exit from the network

Stakeholder submissions have discussed the challenges of paths that move across networks as they travel from origin to destination.

The Rail Operators Group stated:

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<sup>211</sup> GrainCorp, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 11.

<sup>212</sup> Rail Operators Group, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 6.

<sup>213</sup> Pacific National, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 26.

<sup>214</sup> GrainCorp, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 7.



When an operator seeks access to ARTC's interstate network, this is as a component of an access solution for its entire journey. However, ARTC's draft IAU presents a framework for negotiating and contracting access to paths on ARTC's network as a stand-alone service, with no recognition of the coordination required with adjoining network owners in order to provide a path of value to an operator.<sup>215</sup>

The Qube submission provided an example of transit management decisions resulting in delays on other networks as part of a train's overall journey:

Operators also incur a penalty when moving across network boundaries in a live-run environment. ARTC, as a network manager, records a train in its key performance indicator metrics as being on-time if it leaves the ARTC network within 15 mins of the timetabled time. Adjoining network owners (e.g. Sydney Trains) use tighter metrics for trains entering the network, meaning a train moving from the ARTC network to an adjoining network may be recorded as 'on-time' but the adjacent network manages the train as an 'unhealthy' service which results in the service having reduced priority under the network management principles.<sup>216</sup>

## Discussion

Rail operators can commit to delivering a service to their customer based on the path they negotiate with ARTC and other networks, but carry risk associated with the uncertainty about entry and exit to the network and delays while in transit that result in a train's journey differing from the agreed path times. Key challenges raised by stakeholders are:

- Instances where ARTC does not maintain the line and agreed speed limits cannot be achieved. Speed restrictions can be in place for extended periods of time due to delays in maintenance.
- There is a lack of clarity about actual transit performance and stakeholders seek more information to be reported.
- The prioritisation framework can mean freight trains are subject to time penalties for delays over which they had no control.
- The 15-minute 'healthy train' tolerance on the ARTC network can result in trains exiting the network as 'healthy' but immediately classified as 'unhealthy' on the next network if it has lower tolerance.

Qube stated that:

A consequence of this under-performance is that rail operators are losing customers due to this poor reliability, which is a likely explanation for the downward trend in network usage and rail mode share. Interstate rail has also a poor reputation for reliability across the broader freight sector.<sup>217</sup>

Specific changes have not been recommended by stakeholders to Part 7 or Schedule F of the Proposed Undertaking, nor have changes been recommended to Schedule 4 of the ITAA. However, stakeholders have made comments on clauses in the ITAA to address issues around repair and maintenance of the network and recovery of rolling stock that has broken down on the network. The detail of these can be found in Appendix B: List of proposed changes to the ITAA, regarding clauses 6.1, 8.1, 9.3, 9.6 and 16.2. Further advice will be

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<sup>215</sup> Rail Operators Group, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), p 6.

<sup>216</sup> Qube, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), p 6.

<sup>217</sup> Qube, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), p 9.

sought from ARTC on these proposed adjustments. The ACCC draft view on the Proposed ITAA is in chapter 13.

The ACCC notes that stakeholders and ARTC do not appear to have clarity or consensus on the scale of the problems associated with transit management, and that clarity would be improved through transparency measures, which are discussed further in chapter 12.

#### **ACCC draft views**

The ACCC considers that in the absence of alternative proposals the proposed transit management arrangements in the Proposed Undertaking are appropriate, noting that:

- We consider ARTC should work towards improved transparency around performance on transit management, as discussed in chapter 12. This might include actual versus scheduled data, path availability, timing, maintenance and coordination. Improved performance reporting will provide a sound basis on which to consider whether the prioritisation framework is delivering efficient transit management.
- Given the issues raised by stakeholders about speed restrictions, track closures and the 15-minute tolerance of healthy trains exiting from the network, the ACCC is of the view that transit management requires further discussion between ARTC and its users.
- Stakeholders have made comments on clauses in the Proposed ITAA that aim to address issues raised around disruption, repair and maintenance of the network and recovery of rolling stock that has broken down on the network. Further advice will be sought by the ACCC from ARTC on these proposed adjustments.

## 11.2. Premium paths and the prioritisation framework

### Proposed Undertaking

In Schedule F of the Proposed Undertaking, the highest priority that a freight service is awarded is '5. Express Freight Services', unless another freight service is likely to affect Commuter Peak Services or Special Event Services.

### Stakeholder submissions

The introduction of 'Premium Paths' was discussed in several submissions.

In Aurizon's view, paths within the premium windows should be prioritised to services that are consistently run at high utilisation (train length and loading) and high reliability. Non-premium paths can be used to provide a more flexible option for use for non-time sensitive, overflow or seasonal services.<sup>218</sup>

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<sup>218</sup> Aurizon, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), pp 3-4.

Although there is ample available capacity on ARTC's interstate network over a 24 hour timeframe, there are binding capacity constraints at critical times and locations (including on adjoining networks) which mean that it can be very difficult to secure paths appropriate for an operator's needs... there is no ability to schedule additional premium paths for key origin-destination pairs (e.g. Melbourne-Perth, Sydney-Perth, Melbourne-Brisbane) by simply 'fitting around' existing scheduled paths in all RIM MTPs. Despite ARTC publicly claiming there is sufficient growth capacity on all corridors, operators and ARTC are aware of the key congestion points on the network.<sup>219</sup>

The Rail Operators Group recommended that ARTC strengthen the mechanisms in the Proposed Undertaking and ITAA to allow pathing to be optimised from origin to destination.<sup>220</sup>

## Discussion

Stakeholder submissions have provided some practical suggestions for ARTC to open up capacity for more premium paths; for example, Aurizon has suggested ARTC use its powers under Track Access Agreements to ensure that parties in control of premium paths are fully utilising them, therefore promoting efficient use of the network.<sup>221</sup>

However, stakeholders do not explicitly discuss in their submissions whether changes to the Network Management Principles might be required or possible to secure premium or 'golden' paths for freight, particularly paths that need to move through sections of track with a heavy passenger train load.

In its Response to Stakeholder Submissions, ARTC stated:

Some customers expressed a desire to see differentiated pricing for a path which enjoys premium timing (such as early morning arrival in capital cities). This feedback was taken into consideration by ARTC and the complexity of departing from the standing offer based only on time was taken into account. As a result, premium pathing was a matter for the subsequent IAU.<sup>222</sup>

### **ACCC draft view**

The ACCC considers that determining whether and how 'priority' or 'premium' freight paths can be described as a Reference Service should be included in the forward agenda of the annual stakeholder forum to encourage collective problem solving among all access seekers and ARTC.

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<sup>219</sup> Rail Operators Group, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), p 7.

<sup>220</sup> Rail Operators Group, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), pp 6-7.

<sup>221</sup> Aurizon, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), pp 16-17.

<sup>222</sup> ARTC, [Response to stakeholder submissions – ARTC's Proposed 2024 Interstate Access Undertaking](#), p 2.

## 12. Performance indicators, annual reporting (Part 8, Schedule G, Schedule I)

The Proposed Undertaking maintains the same set of performance indicators as in the Existing Undertaking, which are also the same as in ARTC's first undertaking in 2002. It also introduces a new requirement for ARTC to report annually on a set of financial and volume measures. This includes access revenue, operating costs, capital expenditure and volumes.

Several stakeholders called for an expansion in the metrics covered in the performance indicators and for a common core set of indicators to be reported by all rail managers. The additional metrics proposed by stakeholders include ones on network availability and cancellations by cause. Stakeholders also requested real time data on trains traversing the network, and provision of data in a software format suitable for dissection and analysis by stakeholders. Stakeholders have also requested more granular or disaggregated data than what is currently available publicly.

The ACCC considers that ARTC should commit to publishing a number of these additional indicators and provide performance data in a form that facilitates further analysis. The greater transparency should aid access seekers in their negotiations with ARTC regarding path availability, network performance, service standards and prices, and assist users and the ACCC to identify where services are deteriorating.

Following receipt of the submissions, ARTC held a data workshop on 23 May 2024 to discuss stakeholders' requests. We understand that subsequently ARTC is considering how it can make additional information available as requested within the constraints of cost and confidentiality, while noting the information already available to stakeholders. We consider that ARTC should publish all reporting data, including the existing measures, in numerical format in a timeseries, in addition to any other methods such as charts.

The ACCC is seeking further advice from ARTC on the practical issues in delivering such measures and the time it would require before implementation. The ACCC acknowledges that data collection and release is complicated, can raise confidentiality issues, and may require dedicated resources within ARTC. As an initial, short-term step, the ACCC recommends that ARTC continue to progress discussions from the data workshop by establishing a working group of stakeholders. We expect that some measures could be delivered by the time the Proposed Undertaking commences, while others should be considered further in consultation with access seekers.

Regarding financial indicators, stakeholders supported the proposed new information but some suggested further breakdowns. The ACCC is of the view that ARTC should consider including in its annual reporting obligations a breakdown of traffic volume by freight type or commodity.

The ACCC considers that ARTC should make other amendments to the Proposed Undertaking to report revenue relating to network access other than from access charges and to clarify definitions and coverage of categories of operating costs and capital expenditures.

### **ARTC's past compliance with performance indicator and financial reporting requirements**

In considering the Proposed Undertaking, it became apparent to the ACCC that ARTC had not published the following data required by the Existing Undertaking since the reporting period 2014-15:

- unit cost data required under 8.2(a) pursuant to Table 2 in Schedule G
- audit reports for performance indicators required under clause 8.2(b).

Once brought to ARTC's attention, it corrected this oversight by uploading the audit reports covering 2015-16 to 2022-23 and publishing the unit cost data for 2022-23.

We understand that non-compliance had not been raised with ARTC by users of the network and that the audit reports were completed at the appropriate times but not published. We remind ARTC that the terms of an undertaking accepted under Part IIIA of the Act are enforceable in the Federal Court (see section 44ZZJ of the Act). The ACCC expects ARTC to put improved processes in place to ensure that it complies with all terms of the Proposed Undertaking, if accepted.

## 12.1. Performance indicators

### Background

Part 8 of the Existing Undertaking provides for ARTC to report publicly on the performance of its network, with the specific measures of performance set out in Schedule G in Table 1 'Service Quality Performance Reporting'.<sup>223</sup> There are 15 individual measures, grouped under:

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

Schedule G requires ARTC to report quarterly on each of these measures. ARTC has published these indicators regularly on its website in the form of time-series charts showing data from 2008 to the most recent period.<sup>224</sup>

ARTC's Indicative Track Access Agreement (ITAA, Schedule 5) includes a more extensive list of key performance indicators relevant to individual services, which are to be reported on a regular basis, by ARTC and in some cases by Operators. ARTC provides monthly reports to Operators with details for their contracted services.

Clause 8.2(b) of the Existing Undertaking requires ARTC to incorporate into its annual internal audit process a review of its performance indicator reporting and to publish the

<sup>223</sup> Schedule G also sets out unit costs to be reported annually. These are discussed under Annual reporting below.

<sup>224</sup> ARTC website, [Performance Indicator Reporting](#), accessed 5 June 2024. At the date of access, the latest is for March 2024, posted 19 April 2024.

findings on its website. ARTC also publishes different sets of performance indicators under other requirements such as its NSW and Victorian lease agreements.<sup>225</sup>

In its 2018 Draft Decision, the ACCC considered the freight-related performance indicators remained appropriate as they increase transparency by providing access holders with a range of information they can use to hold ARTC accountable to relevant service standards. However, the ACCC considered that ARTC should update the 2018 access undertaking to include passenger-related performance indicators.<sup>226</sup>

## Proposed Undertaking

ARTC proposes to maintain the performance indicators in Schedule G without change.

## Stakeholder submissions

Several stakeholders called for an expansion in the metrics covered in the performance indicators, as outlined below.

Aurizon submitted:<sup>227</sup>

At present, most RIMs [rail infrastructure managers] are required to report on performance, either publicly or to operators/access holders on their network, however each report on a different set of indicators. In some cases, individual indicators are well aligned across RIMs, but in other cases different indicators are used to provide similar, but not identical, performance information.

Aurizon believes that considerable benefit can be provided from improved harmonisation of the performance metrics used by Australia's freight rail networks.

The use of a consistent suite of core KPIs is important where individual trains operate over multiple networks (such as is the case for most services operating over ARTC's interstate rail network), as this will provide information on train/network performance for the whole service. However, a consistent suite of core performance indicators is also of value regardless of the operation of multi-network services. This is because:

- Most rail operators, including Aurizon, operate over a national footprint, and this would allow operators to take a more consistent approach to assessing the performance of similar services in different jurisdictions, and to make valid comparisons of performance across jurisdictions – improving their ability to negotiate effectively with RIMs around service quality, and ultimately with benefits in promoting the efficiency of rail services; and
- Many freight customers – including both bulk and containerised freight customers - also operate across a national footprint. An aligned approach to reporting rail network performance will allow operators to present consistent information to their customers on the performance of their freight services, including the reasons for any disruptions to service, in the same way that can occur for road freight.

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<sup>225</sup> For example, see Victorian Interstate Infrastructure Lease KPI Report: 1st Quarter 2023/2024 (Jul-Sep) [https://www.artc.com.au/uploads/Victorian-Lease-23-24-1st-Quarter-Report\\_FINAL.pdf](https://www.artc.com.au/uploads/Victorian-Lease-23-24-1st-Quarter-Report_FINAL.pdf).

<sup>226</sup> ACCC, *Draft Decision – ARTC's 2018 Proposed Interstate Access Undertaking*, ACCC, 20 December 2018, pp 211-212.

<sup>227</sup> Aurizon, *Submission to Consultation Paper – ARTC's Proposed 2024 IAU*, pp 30-32.

Aurizon also recommended that ARTC “Amend the list of KPIs in Schedule of 5 of ARTC’s ITAA to include the performance indicators listed in Table 2, which are consistent with Aurizon’s proposed common KPIs for reporting on aggregate system performance.”

The Rail Operators Group supported the measures proposed by Aurizon.<sup>228</sup> Following the data workshop convened by ARTC, the Rail Operators Group made a second submission outlining amendments to the Proposed Undertaking to provide additional reporting of network performance information such as a monthly release of data as follows:

### 8.3 Provision of additional network performance information

...

(b) The following performance information will be provided to Operators using the relevant Network Segment at no less than monthly frequency:

(i) a complete record for each Segment of:

(A) all Train Services that were:

(1) Scheduled

(2) Delayed (including the period of any delay in minutes per transit hour)

(3) Cancelled

(B) the reasons that each Train Service was delayed or cancelled.

[other specific information to reflect the outcomes of the ARTC data workshop]

(c) The following performance information will be made available to Operators using the relevant Network Segment in real time:

[other specific information to reflect the outcomes of the ARTC data workshop]<sup>229</sup>

The Rail Operators Group also include suggested amendments to the Proposed Undertaking and Proposed ITAA to ensure ARTC is in a position to disclose the requested data.

Pacific National recommended:

- accurate, real-time data: real time performance on cancellations and rail operator performance
- interactive and accessible software format (such as PowerBI) so that data can be dissected multiple ways
- path utilisation reports that include usage compared to maximum capacity
- expanded metrics, related to ARTC’s corporate objectives such as:
  - outages (planned versus unplanned) and how quickly they are rectified
  - causes of network delays and cancellations
  - network reliability, against a set target such as 98%
  - carbon emissions avoided
  - KPI that measures standalone closures versus closures that have been coordinated and aligned with adjacent networks
  - an interoperability scorecard.<sup>230</sup>

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<sup>228</sup> Rail Operators Group, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 5.

<sup>229</sup> Rail Operators Group, [Additional Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 9.

<sup>230</sup> Pacific National, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), pp 30-31.

Qube submitted that the Proposed Undertaking places no obligation on ARTC to deliver on its growth objectives while under-performance in rail in the following areas is leading to loss of customers to other freight modes:

- network resilience
- transit times
- track condition and maintenance standards
- network reliability
- train pathing and timetabling
- network interoperability.

Qube stated that ARTC needs clear, accountable obligations to deliver a growth strategy which is underpinned by network resilience and reliability, measured through objective key performance indicators.<sup>231</sup>

Both Aurizon and Pacific National submit that ARTC should consult with other networks and align performance definitions and parameters across networks.<sup>232</sup> In this regard, TAHE (owner of an adjoining network in NSW) submitted that it is working with ARTC to more closely align both definitions of network information, and reporting requirements.<sup>233</sup>

The Rail Operators Group submitted that operators need visibility of how Inland Rail construction will be managed and how impacts on the Interstate rail network will be minimised, although it did not suggest specific performance measures for this.<sup>234</sup>

GrainCorp submitted that current performance reporting can be improved, both in the geographic detail and in the performance indicators reported on, as outlined below. It submitted that the Proposed Undertaking should be further revised to include more regional sections, or industry specific performance data. It supports the Segments as per Schedule H of the Proposed Undertaking being used for both financial and performance reporting, but considers they are too broad and could be improved by further sub-division for reporting as follows:<sup>235</sup>

Existing segment	Segments proposed by GrainCorp
Dry Creek – Spencer St (Melbourne)	<ul style="list-style-type: none"> <li>▪ Dry Creek – Dimboola</li> <li>▪ Dimboola – Ararat</li> <li>▪ Ararat – Spencer St</li> </ul>
Melbourne (Tottenham) – Macarthur	<ul style="list-style-type: none"> <li>▪ Moss Vale – Cootamundra</li> <li>▪ Cootamundra – Junee</li> <li>▪ Junee – Melbourne (Tottenham)</li> </ul>
SSFL – Flemington South	<ul style="list-style-type: none"> <li>▪ Macarthur – Flemington South</li> </ul>

<sup>231</sup> Qube, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), ACCC, 23 February 2024, pp 9-10.

<sup>232</sup> Aurizon, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 31; Pacific National, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 31.

<sup>233</sup> Transport Asset Holding Entity, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 2.

<sup>234</sup> Rail Operators Group, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 9.

<sup>235</sup> GrainCorp, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 6.



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Moss Vale – Macarthur

Crystal Brook – Parkes

- Crystal Brook – Broken Hill
  - Broken Hill – Parkes
- 

GrainCorp suggested the reporting needs to be consistent across all Segments and should be expanded to include measures of:

- network capacity availability, in paths per day
- available paths outside the mandatory timetables paths (i.e., what is the spare capacity for ad-hoc trains)
- mandatory path utilisation
- healthy trains held/delayed to recover unhealthy trains.<sup>236</sup>

## Discussion

Performance indicator reporting and auditing is a valuable part of an access undertaking and improves the transparency and accountability of network performance. It assists users of the network to identify if or where service deterioration is a problem, and aids access seekers in their negotiations with ARTC by providing a means of independently analysing opportunities to access the network and gauging reasonable expectations of service standards, which can be weighed against proposed Charges.

The ACCC recognises ARTC provides performance data on its website and operational data to Customers. It also provides information to the Victorian and New South Wales governments under its lease obligations. However, several stakeholder submissions have argued that the reporting around key performance indicators can be improved and should be supplemented by further measures, ideally ones that are common across rail managers. Aurizon, Pacific Nation and Qube made similar proposals, as did the Rail Operators Group, which includes those 3 operators as well as One Rail, Manildra Group and SSR (Southern Shorthaul Railroad).

The performance indicators in the proposed Schedule G are the same as those in ARTC's original undertaking of 2002.<sup>237</sup> In the intervening 22 years, the collection, analysis and availability of data for driving operational improvements has expanded greatly in most areas of society. The ACCC considers that ARTC should be similarly expanding its data collection and provision to benefit all stakeholders. Issues specific to several types of additional data are considered below. In most cases, we sought further advice from ARTC on the practical issues in delivering such measures and the time it would require before implementation.

At ARTC's data workshop with stakeholders, there was not clear agreement on exactly which indicators or data were most needed, or how to measure the desired indicators. The ACCC understands that the disaggregated data is required for meaningful analysis and that ARTC has concerns that this may have commercial sensitivities. We note that the ACCC has not received stakeholder submissions detailing concerns or risks regarding the release of the detailed network performance data, but that confidentiality is a common challenge with data reporting and can take time to consider and appropriately manage.

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<sup>236</sup> GrainCorp, *Submission to Consultation Paper – ARTC's Proposed 2024 IAU*, p 7.

<sup>237</sup> ARTC, Access Undertaking in favour of ACCC, 30 April 2002, Part 8, Table 1: Service Quality Performance Reporting - <https://www.accc.gov.au/system/files/ARTC%20undertaking.pdf?ref=0&download=y>.

ARTC indicated at the data workshop that some of the data sought was either already provided, or could be provided to users on request. The ACCC's impression of the data workshop was that it was a good initial discussion about a complicated topic. It would not be unusual for a data collection and release project to require a series of engagements with end-users and dedicated resources to properly scope and deliver a data package of data.

ARTC has also noted by comparison, the detailed data provided in the Hunter Valley network was not able to be provided for the Interstate network, as the Hunter Valley network has invested in a new train management system (see discussion of real time data below).

The ACCC appreciates that enhanced performance data collection and release may require dedicated resources. As an initial, short-term step, the ACCC recommends that ARTC continue to progress discussions from the data workshop by establishing a working group with its stakeholders. We expect that some measures could be more readily delivered and available by the time the Proposed Undertaking commences, while others will need to be considered further in consultation with stakeholders.

#### **ACCC draft views**

The ACCC considers that ARTC should commit to publishing a number of these additional indicators. The greater transparency should aid access seekers in their negotiations with ARTC regarding path availability, service standards and prices, and assist users and the ACCC to identify where services are deteriorating.

Following receipt of the submissions, ARTC held a data workshop on 23 May 2024 to discuss stakeholders' requests. We understand that subsequently ARTC is considering how it can make additional information available as requested within the constraints of cost and confidentiality, while noting the information already available to stakeholders.

The ACCC appreciates that data collection and release is complicated, may raise confidentiality issues, and may require dedicated resources within ARTC. As an initial, short-term step, the ACCC recommends that ARTC continue to progress discussions from the data workshop by establishing a working group of stakeholders. We expect that some additional measures could be delivered by the time the Proposed Undertaking commences, while others should be considered further in consultation with access seekers.

The release of data is subject to considerations of confidentiality and commercial sensitivity. Changes to the Proposed Indicative Track Access Agreement may need to be considered to enable this but would require further consultation with stakeholders.

#### **Common core indicators**

Aurizon and other stakeholders submitted that adoption of a consistent suite of core key performance indicators, not just by ARTC but all rail infrastructure managers managing adjacent networks, would harmonise performance metrics over much of Australia's Interstate rail network.

Aurizon's submission set out the suggested common indicators. Of these, 15 are in the Existing Undertaking and only 5 would be additional. The additional measures relate to network availability, including train cancellations by cause and the impact of track

possessions. Similar measures are already reported for other rail networks such as Queensland Rail and Aurizon Network.

A common core of indicators would contribute to a consistent approach to access regulation in each industry. The indicators would allow stakeholders to see the performance of the network and whether it is improving over time. Further, data on the cause of cancellations and delays is useful for understanding areas in need of improvement. As noted by Aurizon, it would help improve the ability of operators to negotiate effectively with rail managers around service quality.

We agree with stakeholders that a common core of indicators for all track managers would be desirable. This would allow easier comparisons of performance between different rail networks and promote improved efficiency through benchmarking. It should also reduce the administrative burden insofar as companies operating in different networks would have fewer different measures to compile and follow. Common indicators would be a modest step towards the harmonisation of rail systems that is a desirable outcome for all stakeholders.

Harmonising the indicators for all rail managers is a task beyond the scope of ARTC's role and the Proposed Undertaking. However, the ACCC considers that, as a national track manager operating in the 5 mainland states, ARTC is well placed to take a lead role in bringing about harmonised indicators. We encourage ARTC to discuss this further with its users, including through the proposed annual stakeholder forum discussed in chapter 5.3.

### Real-time data on network performance

The Rail Operators Group and some other stakeholders recommended that ARTC commits in the undertaking to provide all operators on its Interstate network with real time data on network performance, including the actual operation of all train services compared to the scheduled operation, with visibility on train cancellations and delays for each scheduled path.<sup>238</sup>

ARTC noted that all its Customers have access to the secure Customer Portal on request. This provides access to live information regarding their train location and progress (in Train Tracker) against its schedule and delay information when recorded.<sup>239</sup> ARTC also issues notices regarding network disruptions in real time as well as alerts for weather and other events that may impact operations.

Aurizon stated that real time performance reporting accessed via a customer portal is a feature in both Aurizon Network's central Queensland coal network and ARTC's Hunter Valley coal network.<sup>240</sup>

The ACCC asked ARTC for its views on the feasibility of implementing the beneficial data arrangements and systems available for the Hunter Valley network for the Interstate network. In response ARTC noted that:

....the Hunter Valley real time data provision is generated by the ANCO (ARTC Network Control Optimisation) system. The system configuration and implementation cost approximately \$40m for the 1400km of Hunter Valley Coal Network, which capital investment was approved by the RCG under the HVAU and is therefore part of the RAB and so paid for customers via access charges. ARTC is

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<sup>238</sup> Rail Operators Group, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), p 8.

<sup>239</sup> ARTC, [Response to Information request #2 – ARTC's Proposed 2024 Interstate Access Undertaking](#), response to 7.2.

<sup>240</sup> Aurizon, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), p 17.

assessing the feasibility of implementing ANCO system across the 7,500km Interstate Network.<sup>241</sup>

The ACCC understands that Operators' requests seek information beyond what ARTC currently provides. Such reporting may be significantly more data intensive and demanding than ARTC's existing reporting, and ARTC has noted that, by comparison in the Hunter Valley and central Queensland coal networks, coal customers are prepared to pay for a higher level of service with better data. However, as demands on the freight network grow, we consider that it is reasonable for ARTC to be moving towards greater data transparency for its Interstate network over time. Access to such data would promote more efficient use of the network.

Although several submissions supported publishing details of individual services, some stakeholders were concerned about the confidentiality of some items. We note that ARTC is planning a survey of Operators' views on confidentiality which we will consider in considering what is a reasonable minimum set of published indicators.

### Data format for analysis

Some stakeholders have requested improved data, including real-time data, on train movements on the Interstate network that is in a form that is easy to use for analytical purposes to support their operations.<sup>242</sup> The ACCC asked ARTC for its views on the feasibility of making this information available as raw data at the Proposed Undertaking segment level or even finer detail, so that stakeholders have a better understanding of track quality and where pressure points are, relevant to the segments they use.

ARTC responded that it "does not consider it feasible to make more detailed data publicly available. Raw data is historical and not necessarily reflective of current or future network state or performance." ARTC noted the granular data on Temporary Speed Restriction it currently provides for use by above rail operators. It further stated its willingness to sharing data with access holders for their relevant services, on request, within the bounds of confidentiality commitments.<sup>243</sup>

ARTC also said that its Commercial and Customer Service (C&CS) team engages with customers across a variety of areas (pathing, contractual, billing, wayside monitoring etc.) each week. This includes reporting which is pushed out to customers, or responding to specific queries. Customers are welcome to make any data request to the team, consistent with Clause 2.10 of the ITAA.<sup>244</sup>

The ACCC considers that, although it is helpful that ARTC provides data on request to operators, it would be more convenient and efficient if ARTC published the additional data useful to all operators on an ongoing basis.

In relation to existing data publication, we note ARTC already collects and publishes performance data in charts monthly on its website. We consider ARTC should make this raw data available as a cumulative time series in a spreadsheet or software format that allow users to dissect and analyse it.

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<sup>242</sup> Aurizon, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), p 18; Rail Operators Group, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), p 8.

<sup>243</sup> ARTC, [Response to Information request #2 – ARTC's Proposed 2024 Interstate Access Undertaking](#), response to 6.3.

<sup>244</sup> ARTC, [Response to Information request #2 – ARTC's Proposed 2024 Interstate Access Undertaking](#), response to 7.1.

### Proposed amendment 12.1

Clause 8.2 should be amended to provide that ARTC will publish all reporting data in numerical format in a timeseries, in addition to any other methods such as charts.

#### Commencement of reporting of new items

Clause 8.2(a) of the Proposed Undertaking (which mirrors that of the Existing Undertaking) states:

...ARTC's obligations to report Performance Indicators with annual reporting frequency will not commence until the completion of the first full financial year that is at least twelve months after the date of the acceptance by the ACCC of this Undertaking *and will only relate to performance on the Network during that first full financial year.* [emphasis added]

There is an equivalent provision in clause 8.2(a) relating to quarterly reporting. The ACCC understands that the intention of the Proposed Undertaking is to report the performance measures and unit costs quarterly and annually respectively. However, the last sentence in the above provision is unclear and could suggest that the obligations only relate to the first full financial year that is at least twelve months after the date of the acceptance by the ACCC of this Undertaking.

### Proposed amendment 12.2

Clause 8.2 should be amended to confirm it requires reporting on an ongoing basis.

## 12.2. Annual reporting – financial indicators

### Background

The only financial reporting requirements in the Existing Undertaking are those set out in Table 2 of Schedule G ('Periodic Reporting of ARTC Unit Costs'):

Cost Area	Unit Cost	Frequency
Infrastructure Maintenance <sup>1</sup>	\$/track km,	Annually
Train Control <sup>2</sup>	\$/train km	Annually
Operations <sup>3</sup>	\$/train km	Annually

1. Total annual expenditure associated with outsourced infrastructure maintenance and associated ARTC maintenance contract management function.

2. Total annual expenditure associated with ARTC Train Control and transit management function.

3. Total annual expenditure associated with 2 above, and ARTC operations planning and management function.

In addition, ARTC was required to submit a schedule of capital expenditure from 1 July 2012 to 30 June 2018, and to obtain the approval of the ACCC for any increase to Capital Expenditure exceeding 20% of Capital Expenditure on the Network in any single year.<sup>245</sup> The schedule has not been extended beyond 2018.

In its Draft Decision on the 2018 Undertaking, the ACCC noted that ARTC had not complied with the requirements to report increases in capital expenditure. The ACCC considered that ARTC should be required to include an annual compliance assessment process for all Segments in the undertaking.<sup>246</sup> After ARTC subsequently withdrew its proposed 2018 Undertaking, concern over compliance with the ceiling was set aside while the ACCC, ARTC and stakeholders explored methods of asset valuation and alternative regulatory approaches to pricing.

## Proposed Undertaking

The context for financial reporting in the Proposed Undertaking differs from that in the Existing Undertaking, as there are no floor and ceiling constraints. However, the Proposed Undertaking provides for publication of an expanded set of financial indicators, flowing from discussions since 2018 and the ACCC's 2022 Guidance Paper.

The Proposed Undertaking maintains the requirements for reporting unit costs in the existing Schedule G (Table 2, 'Periodic Reporting of ARTC Unit Costs'), as set out above.

In addition, Schedule I (Annual Reporting – information provision and timing) sets out new reporting obligations for ARTC. Unlike other schedules, Schedule I is not referred to in the main body of the Proposed Undertaking, which we consider will need to be addressed via an amendment.

Schedule I sets out the following items to be reported annually:

- total access revenue earned for each segment
- volumes on each segment of the Interstate Network by GTK and TKM
- maintenance costs, split by category of fixed and variable for each Segment of the Network
- rail infrastructure capital associated with each segment of the Interstate Network (noting that within the INDS, capital costs will be categorised as either rail infrastructure capital or completed major project costs)
- non-maintenance operating costs, including network control and overheads for the Interstate Network
- references to published financial reports, for the purpose of outlining the accounting depreciation of ARTC's asset base as reflected in ARTC's financial asset registers
- documentation for major capital projects specified in the INDS, including a description of the relevant major projects, the published business case, and the final capital cost and associated data.

ARTC submitted that the Proposed Undertaking provides increased transparency on the cost and performance of the network and future opportunities for growth across the network. It stated that such information affords transparency to new and existing users engaged in the

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<sup>245</sup> ARTC, [ARTC's 2008 Interstate Access Undertaking](#), clause 2.4(b) and clause 4.4(e).

<sup>246</sup> ACCC, [Draft Decision – ARTC's 2018 Proposed Interstate Access Undertaking](#), ACCC, 20 December 2018, p 195.

negotiation process and decreases transaction costs for rail users in negotiating the terms and conditions of access.<sup>247</sup>

## Stakeholder submissions

Aurizon supports the increased information proposed for Schedule I but suggests that the new measures of traffic volume (GTKs and Train Kms) be broken down by freight type or commodity.<sup>248</sup> It notes, for example, that Queensland Rail disaggregates freight volumes into coal, industrial products & metals, minerals concentrates, agriculture and general containerised freight.

Aurizon also recommends that ARTC:

- in addition to rail infrastructure capital by segment, report other capital investment for the interstate network as a whole
- include definitions for the various categories of costs, e.g., how ARTC categorises maintenance costs to corridor fixed, corridor variable and shared.<sup>249</sup>

GrainCorp considers that ARTC should report the amount of revenue not just from Access Charges but also Third-Party Works License applications, infrastructure connection agreements, infrastructure licensing and other types of access. It should also report the extent of reinvestment into maintenance, repair and upgrades.<sup>250</sup>

## Discussion

The ACCC considers that the proposed reporting brings an essential degree of transparency to ARTC's operations. The information may assist stakeholders in negotiating with ARTC from a more balanced position. The annual data will also help stakeholders in understanding ARTC's progress on modal shift and cost recovery over the term of the Proposed Undertaking, and inform the ACCC's approach to any future undertakings, including whether a return to a cost-based approach would be appropriate. We consider that data providing a clearer understanding of operations on the network will promote the economically efficient operation and use of the infrastructure, the public interest and the interests of access seekers.

The data on capital projects to be provided through the INDS would include a preliminary high-level assessment of objectives, indicative benefits and estimated costs. This, together with the proposed consultation with stakeholders, should help to promote prudence in capital expenditures. It should also go some way to address the previous concerns expressed by the ACCC in its 2018 Draft Decision about the lack of evidence of prudence and stakeholder engagement in earlier expenditures.

The ACCC considers that several aspects of the Proposed Undertaking are unclear as to the data that would be reported. In response to an ACCC Information Request, ARTC provided further details on the definitions and an example of the data that would be reported regularly in Schedules G and I, using 2022-23 for illustration.<sup>251</sup>

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<sup>247</sup> ARTC, [Explanatory Guide – ARTC's Proposed 2024 Interstate Access Undertaking](#), p 18.

<sup>248</sup> Aurizon, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), p 29.

<sup>249</sup> Aurizon, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), p 29.

<sup>250</sup> GrainCorp, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), p 6.

<sup>251</sup> ARTC, [Response to Information request #2 – ARTC's Proposed 2024 Interstate Access Undertaking](#), response to 6.1.

However, there are several aspects of the descriptions of data items that we still consider ARTC should clarify.

### Performance indicators

The proposed Schedule I also includes the item 1(a)(i) 'performance indicators for each Segment of the Network'. The ACCC sought clarification from ARTC as to whether these indicators in Schedule I are intended to be the same as those required under Schedule G, or additional. ARTC stated in response:

No. Schedule G details Performance Indicators relating to network performance that a customer would experience day-to-day (such as on-time performance).

Schedule I refers to information in Schedule G and also makes commitments for additional reporting on the broader maintenance and management of the network by 30 November of each year.<sup>252</sup>

We understand from ARTC's response and the data provided by ARTC that the performance indicator item in Schedule I refers to those listed in Schedule G and are not additional ones, and would be on an annual rather than quarterly basis. We consider that ARTC should clarify in the Undertaking the relationship between the performance indicator item in Schedule I and the related items in Schedule G.<sup>253</sup>

#### **Proposed amendment 12.3**

ARTC should amend Schedules G and I to clarify the relationship between the performance indicator items in each schedule.

### Cost categories

There is also a lack of clarity between the cost categories in Schedules G and I:

- Schedule G (Table 2) – Infrastructure Maintenance, Train control and Operations
- Schedule I – maintenance costs and non-maintenance operating costs (including Network control and overheads).

Aurizon submitted that ARTC should clarify the definitions for the various categories of costs.<sup>254</sup>

ARTC noted that the costs and categories of the costs should be consistent between Schedule G and Schedule I.<sup>255</sup> However, it is not easy to reconcile the cost data between the two schedules. The ACCC considers that ARTC should amend Schedules G and I to clarify the relationship between the categories in the Proposed Undertaking and publish the data at a level which makes clear how the categories relate to each other, by disaggregating further if necessary.

<sup>252</sup> ARTC, [Response to Information request #1 – ARTC's Proposed 2024 Interstate Access Undertaking](#), response to 6.1.

<sup>253</sup> ARTC, [Response to Information request #2 – ARTC's Proposed 2024 Interstate Access Undertaking](#), response to 6.1.

<sup>254</sup> Aurizon, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), p 29.

<sup>255</sup> ARTC, [Response to Information request #2 – ARTC's Proposed 2024 Interstate Access Undertaking](#), response to 6.2.



## Proposed amendment 12.4

ARTC should amend Schedules G and I to clarify the relationship between the cost categories in each schedule.

### Capital expenditure

Proposed Schedule I provides for annual reporting of:

- rail infrastructure capital by segment
- capital cost of each completed major project specified in the INDS.

The ACCC sought clarification about the coverage of these categories of capital expenditure and ARTC responded as follows:

“Rail infrastructure capital” refers to capital required to maintain the Network and associated facilities, i.e. “sustaining capital” or “replacement capital” and was inserted following discussion with the ACCC on what an appropriate definition would be, and reflects a discussion with ARTC’s Finance team on the most appropriate terminology to align with our internal systems. Rail infrastructure capital is capital expenditure intended to support the economic sustainability of fixed assets such as lines/tracks, level crossings, bridges and tunnels. It is intended to include BAU [business as usual] capital works. Major projects are dealt with separately.<sup>256</sup>

(Major projects) The INDS will identify which future investment projects on the Interstate Network are major projects... This primarily relates to expansion capital.<sup>257</sup>

...Major projects reflect substantial non-BAU projects which are separately reported on and will involve initial engagement through publication in the INDS. Examples of current major projects are the:

1. Cabramatta Loop Project;
2. Narrabri to Turravan Line Upgrade; and
3. Adelaide – Tarcoola Rail Upgrade Acceleration.

ARTC confirmed that for the purpose of aggregating total capex, there are no gaps or overlaps between the scope of rail infrastructure capital and major projects.<sup>258</sup>

### Revenue

The Proposed Undertaking provides for ARTC to publish 'total Access revenue earned for each Segment'. GrainCorp considers that ARTC should report the amount of revenue not just from Access Charges but also Third-Party Works License applications, infrastructure connection agreements, infrastructure licensing and other types of access.

<sup>256</sup> ARTC, [Response to Information request #1 – ARTC’s Proposed 2024 Interstate Access Undertaking](#), response to 6.4.

<sup>257</sup> ARTC noted that previous terms used for categories of capital expenditure – corridor, sustaining, minor and expansion capital were not appropriate to use for the interstate undertaking. ARTC, [Response to Information request #1 – ARTC’s Proposed 2024 Interstate Access Undertaking](#), response to 6.5.

<sup>258</sup> ARTC, [Response to Information request #1 – ARTC’s Proposed 2024 Interstate Access Undertaking](#), response to 6.6.

In response to an Information Request from the ACCC, ARTC provided data for 2022-23 for such revenue, which relates to access to the corridor but is not Access revenue, as set out in Table 4 below.<sup>259</sup>

**Table 4: Non Access Revenue**

<b>Non Access Revenue</b>	<b>\$'000</b>	<b>Description</b>
1105 - Mainline Shunting Fee	708	Shunting Fees Port Augusta
1156 - Admin/Establishment Fees	27	Lease/Licence set up fee
1050 – Rents	2,889	Lease of owned or leased land and buildings to third parties (non-rail infrastructure)
1051 - Communications Facilities Use	916	Licence of space on owned or leased communication towers to third parties i.e. Telcos
1055 - Vacant land rent	392	Lease of owned or leased land to third parties
1056 - Licence fees	1,431	Licence of sidings/space in the corridor to third parties - sidings to operators, space to organisations looking to hold infrastructure on ARTC property
1108 - Advertising Site Rental	298	Fee for placing advertising signage on leased or owned property
<b>Total</b>	<b>6,661</b>	

ARTC stated that this revenue is not covered by the Proposed Undertaking.<sup>260</sup> The ACCC understands that the terms and conditions of these services are not covered by the Proposed Undertaking, but that the resources for providing both regulated and unregulated services would be intermingled. We therefore expect that the costs of providing the related services (for example, shunting, providing sidings) would be part of ARTC’s data on operating costs.

ARTC further stated that “the associated revenue is less than 1% of ARTC’s revenue under the IAU”.<sup>261</sup> However, fees for these services could still reflect market power if the services are essential complements to running trains on the network.

ARTC stated it is open to including such non-Access revenue as a separate line item for revenue type under Revenue in Schedule I, noting it is not specific to any rail assets.<sup>262</sup>

Further, ARTC has committed to increasing transparency on its approach to the terms relating to use of sidings leased or controlled by ARTC. It is also comfortable to commit to publish standing rates for non-Operator services on its website.<sup>263</sup>

<sup>259</sup> ARTC, [Response to Information request #2 – ARTC’s Proposed 2024 Interstate Access Undertaking](#), response to 9.1.

<sup>260</sup> ARTC, [Response to Information request #2 – ARTC’s Proposed 2024 Interstate Access Undertaking](#), response to 9.3.

<sup>261</sup> ARTC, [Response to Information request #2 – ARTC’s Proposed 2024 Interstate Access Undertaking](#), response to 2.2.

<sup>262</sup> ARTC, [Response to Information request #2 – ARTC’s Proposed 2024 Interstate Access Undertaking](#), response to 9.2.

<sup>263</sup> ARTC, [Response to Information request #2 – ARTC’s Proposed 2024 Interstate Access Undertaking](#), responses to 2.1 and 2.2.

## ACCC draft view

The ACCC welcomes ARTC's commitment to increased transparency on the rates and revenue for non-Operator services. This would give a clearer picture of revenue related to the facilities subject to ARTC's market power and align the revenue with the reported costs of maintaining and operating the infrastructure.

## Proposed amendment 12.5

Amend Schedule I to specify that the revenue reported annually will include, in addition to Access revenue, all other revenue items relating to access to the Interstate network.

## Disaggregation of volumes

Aurizon proposed that the proposed measures of traffic volume (GTKs and Train Kms) be broken down by freight type or commodity. These measures would be actual volumes reported annually.<sup>264</sup>

The ACCC notes that the proposed INDS would include projections of the Interstate rail task by intermodal, steel, grain, minerals, general freight, and passenger volumes.

Given that ARTC can publish such projections for future years, the ACCC considers it would be appropriate for ARTC consider publishing similar breakdowns of actual annual volumes by type of load in the proposed Schedule I and to clarify the measures of the task it would use. The actual data would make it easier to see where progress is being made or lagging with increasing volumes on rail, and to achieve accountability by comparing projections and aims with achieved volumes.

## Inland Rail

As with the Existing Undertaking, the Proposed Undertaking covers sections of interstate track between Melbourne and Parkes which will be upgraded for Inland Rail. However, the Proposed Undertaking does not cover Inland Rail sections further north, much of which will be new track. ARTC advised that Inland Rail will be considered as existing segments once commissioned and will be reported as such under the relevant provisions of the Proposed Undertaking.<sup>265</sup> ARTC further advised that data on expenditures by segment from 2018-19 up to 2022-23 it has provided previously relates to the Existing Undertaking segments and as such has not contained any Inland Rail Expenditure, including that expended to upgrade existing Interstate segments.<sup>266</sup>

Only the southern sections of Inland Rail between Melbourne and Parkes are likely to be covered by the Proposed Undertaking within the proposed term to 2029. These sections are due for completion by 2027, with nearly all of the work being upgrades of existing track.<sup>267</sup>

<sup>264</sup> Aurizon, [Submission to Consultation Paper – ARTC's Proposed 2024 IAU](#), p 29.

<sup>265</sup> ARTC, [Response to Information request #1 – ARTC's Proposed 2024 Interstate Access Undertaking](#), response to 4.1.

<sup>266</sup> ARTC, [Response to Information request #2 – ARTC's Proposed 2024 Interstate Access Undertaking](#), response to 8.1. ARTC provided the data on maintenance and capital expenditures in ARTC, [Response to Information request #1 – ARTC's Proposed 2024 Interstate Access Undertaking](#), response to 3.2 and 5.7.

<sup>267</sup> <https://inlandrail.artc.com.au/construction-starts-s2p/>.

Existing sections of Inland Rail north of Parkes, some of which have already been commissioned, are regulated under the NSW Rail Access Undertaking by IPART.<sup>268</sup> ARTC stated that, “for the term of this IAU, all greenfield Inland Rail sites will be regulated outside the IAU framework”.<sup>269</sup> We understand this to include the only planned greenfield site south of Parkes. This is a 39 km section which will create a direct route between Illabo and Stockinbingal in NSW, joining up two existing sections in the Proposed Undertaking.

The ACCC understands that, for Inland Rail sections currently covered by the Proposed Undertaking, capital expenditure under Inland Rail up until the time of commissioning would not be reported under the Proposed Undertaking. However, capital and operating expenditure incurred after upgrade works are commissioned or greenfield sections are within scope of the Proposed Undertaking and would be reported. We consider that this, by itself, could give a partial and misleading picture of the cost of the rail infrastructure.

#### **ACCC draft view**

While we do not propose an amendment to the Proposed Undertaking, the ACCC considers that for sections of Inland Rail covered by the Proposed Undertaking, ARTC should obtain and report capital expenditure through Inland Rail, whether incurred before or after commissioning, as a separate item in reporting capital expenditures on the network. This would provide a more accurate view of the cost of services on the network, in anticipation of any future cost-based pricing approach, and thereby promote efficient use and investment in the infrastructure.

#### **Reference to Schedule I**

Schedule G is referenced in clause 8.2 (Reporting) of the Proposed Undertaking. We note that the proposed new Schedule I, which also provides for regular reporting, is not referred to in the Undertaking.

#### **Proposed amendment 12.6**

ARTC should amend clause 8.2 so that Schedule I is referred to in the body of the Undertaking.

<sup>268</sup> Sections from Parkes to Narromine and Narrabri to North Star involving upgrades of existing track were commissioned for use between 2020 and 2022. Most of the remainder of Inland Rail north of Parkes would be new track which has no scheduled construction dates but is also likely to come under IPART coverage initially. ARTC, [Response to Information request #2 – ARTC’s Proposed 2024 Interstate Access Undertaking](#), response to 8.2(a, c).

<sup>269</sup> ARTC, [Response to Information request #2 – ARTC’s Proposed 2024 Interstate Access Undertaking](#), ARTC response to 8.2(c).

# 13. Indicative Track Access Agreement (Schedule D)

The Proposed Indicative Track Access Agreement (ITAA) provides a contract that details the base terms and conditions on which ARTC will grant rights of Access to an Applicant to provide Indicative Services on the Interstate network. Applicants and ARTC can negotiate changes from the ITAA prior to signing.

At the time of publishing this Draft Decision, there have been a mixture of changes proposed by ARTC that appear to the ACCC to be either (a) substantial or (b) uncontentious.

There have also been changes proposed by stakeholders that are not insubstantial in nature, which have not been fully considered by ARTC or other stakeholders.

The ACCC is concerned that there is not currently sufficient information or time available to adequately consider the detailed changes proposed by parties to the standard agreement. We do not consider a further extension to the Existing Undertaking is warranted for this alone.

In addition, there may also be further consequential changes required to respond to amendments to the Proposed Undertaking.

The ACCC's draft view is that any adjustments to the ITAA terms and conditions that are substantial and not yet agreed should occur during the regulatory period and be dealt with as a variation when agreement is reached, to ensure adequate consultation between access seekers and ARTC.

The ACCC proposes that ARTC:

- amend the proposed ITAA to only include uncontentious changes
- engage further with stakeholders outside this assessment process to discuss any substantial updates required to the ITAA that are not yet agreed.

## Background

The ITAA sets out in detail the baseline terms and conditions on which access to ARTC's Interstate network will be offered to Operators. The terms of the ITAA can be adopted by any Operator, with the option to alternatively negotiate terms and conditions that vary from the standard ITAA. That is, the ITAA does not seek to displace the primary role of negotiation or to otherwise abrogate the rights of an access seeker to negotiate a different access agreement.

## Proposed Undertaking

ARTC has stated in its Explanatory Guide that the amendments to the Proposed ITAA are designed to ensure consistency with the Track Access Agreements that are currently in place with Customers and amendments negotiated since 2008.<sup>270</sup>

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<sup>270</sup> ARTC, [Explanatory Guide – ARTC's Proposed 2024 Interstate Access Undertaking](#), p 16.

The changes that ARTC has made to the Proposed ITAA as compared to the Existing ITAA can be found in the marked-up version of the Proposed ITAA<sup>271</sup>, and there is a list of ARTC's proposed amendments at page 38 of the Explanatory Guide with an explanation of each change. The explanation describes the nature of the changes but does not always provide a rationale or justification for a change. The ACCC will request more detail on the rationale for each change in a further Information Request.

In addition to changes proposed by ARTC, stakeholders have also suggested changes to the Proposed ITAA in their submissions to the ACCC.

A full list of ARTC and stakeholder changes can be found at Appendix B: List of proposed changes to the ITAA. In the list at Appendix B: List of proposed changes to the ITAA the ACCC has classified the changes by significance as follows:

- uncontentious change – minor, editorial or no concerns or risks flagged by stakeholders or outstanding questions from the ACCC
- substantial change – may have a material impact on access arrangements and/or ARTC operations.

At the time of publishing this Draft Decision, the ACCC has identified 17 clauses in the Proposed ITAA with changes proposed by ARTC or stakeholders that are substantial and potentially unresolved between the parties:

- 2.7) Manner of control of the Network by ARTC
- 2.10) Key performance indicators
- 4.4) Access charges
- 5.4) Rolling stock
- 5.5) Operator's instructions
- 5.6) Conduct of ARTC
- 6.1) ARTC to repair and maintain the network
- 8.1) Issue of instructions by ARTC
- 9.3) Repairs, maintenance and upgrading the network
- 9.6) Review of scheduled train paths
- 9.10) Cancellation of scheduled train paths
- 15.2) Prohibited Claim - maximum value
- 15.9) Obligation to pay
- 16.1) Operator's insurance policies
- 16.2) ARTC's insurance policies
- 18.2) Confidentiality
- 20.3) Force majeure

A range of issues have been raised by stakeholders that impact on the Proposed Undertaking and corresponding amendments may need to flow through to the ITAA. Many of

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<sup>271</sup> ARTC, [Track changes Indicative Track Access Agreement – ARTC's Proposed 2024 Interstate Access Undertaking](#), ACCC, 12 December 2023.

these issues have been discussed in other parts of the Draft Decision; where this is the case, the chapter reference is included in Appendix B: List of proposed changes to the ITAA. ARTC will need to make any corresponding amendments to the ITAA to replicate changes in the body of the Proposed Undertaking prior to our Final Decision.

## Stakeholder submissions

Many of the changes that have been introduced by ARTC did not attract feedback from stakeholders, although we note stakeholders may have focussed primarily on reviewing the Proposed Undertaking in the first instance. Changes that did lead to stakeholders raising concerns include:

- Clause 4.4 - ARTC has added a new clause to clarify that negotiated charges are not subject to the CPI price cap on price increases, but instead to an alternative price increase regime that would be agreed with an operator. Pacific National proposed that as part of the standard ITAA, “ARTC must provide at least 30 days notice of a price change to a negotiated charges”.<sup>272</sup>
- Clause 9.3 - Repairs, Maintenance and Upgrading of the Network. Both Pacific National and GrainCorp provided suggestions around ARTC providing more notice, considering the commercial impact on the Operator of disruption to train paths, taking reasonable steps to avoid disruption to scheduled train paths at peak retail periods and keeping tracks clear of equipment.<sup>273</sup>
- Clause 16.1 - Both Pacific National and Aurizon sought amendments to what they say reflects contemporary insurance arrangements:
  - Pacific National sought to amend clause 16.1(b)(ii), which requires the operator to have a limit of liability of not less than \$250 million *or such other amount as ARTC may reasonably require and notify to the Operator from time to time*. Pacific National seeks amendment to remove the phrase in italics, in recognition that “rail operators do not have readily available liability insurance and cannot confirm ahead of time that any additional limits are reasonably procureable”.<sup>274</sup>
  - Aurizon sought amendment to:
    - 16.1(b)(i) “Any insurance policy required to be effected and maintained by the Operator pursuant to clause 16.1, may at any time, be placed in whole or in part with a wholly owned captive insurance company, reinsured with various insurers in Australia and London (Lloyds and company markets) with a minimum Standard & Poor’s rating of A-.”<sup>275</sup>
    - 16.1(b)(ii) reduce the limit of liability amount from \$250 million to \$150 million, bringing “ARTC more in step with other rail network providers including Aurizon Network”.<sup>276</sup>
    - 16.1(c) limit the evidence requirements around insurance policies by deleting the requirement to provide a copy of insurance policies to the ARTC, which are

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<sup>272</sup> Pacific National, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 33.

<sup>273</sup> Pacific National, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), pp 36-38; GrainCorp, [Additional submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), pp 6-7.

<sup>274</sup> Pacific National, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 38.

<sup>275</sup> Aurizon, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 39.

<sup>276</sup> Aurizon, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 39.

commercially confidential, and require only evidence of insurance in the form of Certificates of Currency.

- Clause 16.2 - ARTC has proposed to remove aspects of this clause that commit ARTC to publishing its payments for its liability insurance premium and to invest savings from insurance premiums into repairs, maintenance and upgrades to the network. Pacific National and GrainCorp do not support this amendment.
- Clause 20.3 - Pacific National did not agree to removing the definitional requirement for Force Majeure events to exclude negligence, stating that “a party should not be responsible for any failure to perform its contractual obligations if it is prevented from or delayed in performing those obligation by a Force Majeure event.”<sup>277</sup>

Other substantial changes suggested by stakeholders to the Proposed ITAA include:

- Clause 2.10 - Pacific National sought to add a requirement that parties will identify “any actions that need to be taken to address performance”.<sup>278</sup>
- Clause 9.6 - provides a mechanism for rescheduling of train paths. Aurizon and the Rail Operators Group sought modification to this clause to ensure that:
  - “ARTC has greater flexibility around what the alternate path needs to reflect, while preserving the principle that it intended to not disadvantage the existing operator given its typical actual practice; and ... a rail operator should have an obligation to use its best endeavours to negotiate variations to agreements defining network entry and exit times to accommodate that varied schedule”<sup>279</sup>
  - Aurizon also submitted that “time limits should be included in CI 9.6 (similar to those applied in CI 9.2) in order to limit the opportunity for an operator to frustrate the process through delay.”<sup>280</sup>
- Clause 9.10 - Aurizon suggested modifications to “reduce the opportunity for anti-competitive path hoarding”<sup>281</sup> by adjusting the utilisation thresholds for paths, adding a new resumption trigger and allowing ARTC the option of resuming or rescheduling a path to the nearest available time.
- Clause 15.2(c) - Pacific National sought to amend the ‘Prohibited Claim’ threshold, stating that “given the threshold of ‘less than \$50,000’ has been in place since the 2008 Undertaking, Pacific National suggests this be adjusted for inflation and increased to ‘less than \$100,000’”.<sup>282</sup>
- Clause 18.2 - In its first submission the Rail Operators Group recommended that ARTC commit to “provide all operators on its interstate network with real time data on network performance”<sup>283</sup> and acknowledged that “this is likely to require amendment to the confidentiality provisions in the ITAA”.<sup>284</sup> In the additional submission dated 19 June 2024, the Rail Operators Group provided specific wording to include in the ITAA.<sup>285</sup>

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<sup>277</sup> Pacific National, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 39.

<sup>278</sup> Pacific National, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 33.

<sup>279</sup> Aurizon, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 15.

<sup>280</sup> Aurizon, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 15.

<sup>281</sup> Aurizon, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 17.

<sup>282</sup> Pacific National, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 38.

<sup>283</sup> Rail Operators Group, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 8.

<sup>284</sup> Rail Operators Group, [Submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), p 8.

<sup>285</sup> Rail Operators Group, [Additional submission to Consultation Paper – ARTC’s Proposed 2024 IAU](#), ACCC, 19 June 2024.



## Discussion

The Proposed ITAA is intended to provide a starting point or a fall-back set of terms and conditions for making bilateral commercial arrangements for access to the network. Its inclusion in the Proposed Undertaking is appropriate to the extent that it provides a framework to encourage a consistent approach to access the infrastructure and assists parties who want access to have clarity about the terms that they might expect.

The inclusion of a template track access agreement (the ITAA) in the Proposed Undertaking does not limit ARTC's ability to respond to the needs of individual customers and change terms and conditions on a case-by-case basis. ARTC has clearly indicated that it is open to negotiation of services, terms and conditions.

Submissions by stakeholders on some clauses indicate there is room for improvement of the Proposed ITAA, and that a number of changes proposed by ARTC require further consultation or refinement. The ACCC has undertaken a preliminary assessment of the changes to classify them as uncontentious or substantial in Appendix B: List of proposed changes to the ITAA.

It may be the case that some changes raised by stakeholders in relation to the Proposed ITAA are relevant to a limited number of access seekers. In those situations the issue may be best dealt with through direct negotiation rather than a change to the standard terms and conditions in the ITAA.

While amendments may be appropriate to the ITAA, it is likely that either ARTC or its users require further time to consider the issues raised, including in the light of any amended undertaking and the ACCC Final Decision. The ACCC's draft view is that in these circumstances adjustments to the ITAA's terms and conditions, where agreed by ARTC and stakeholders, could occur during the regulatory period and be dealt with as a variation to the Proposed Undertaking, if required.

### **ACCC draft views**

The ACCC is concerned that there is not currently sufficient information or time available to adequately consider the detailed changes proposed by parties to the standard agreement. We do not consider a further extension to the Existing Undertaking is warranted for this alone.

In addition, there may also be further consequential changes required to respond to amendments to the Proposed Undertaking.

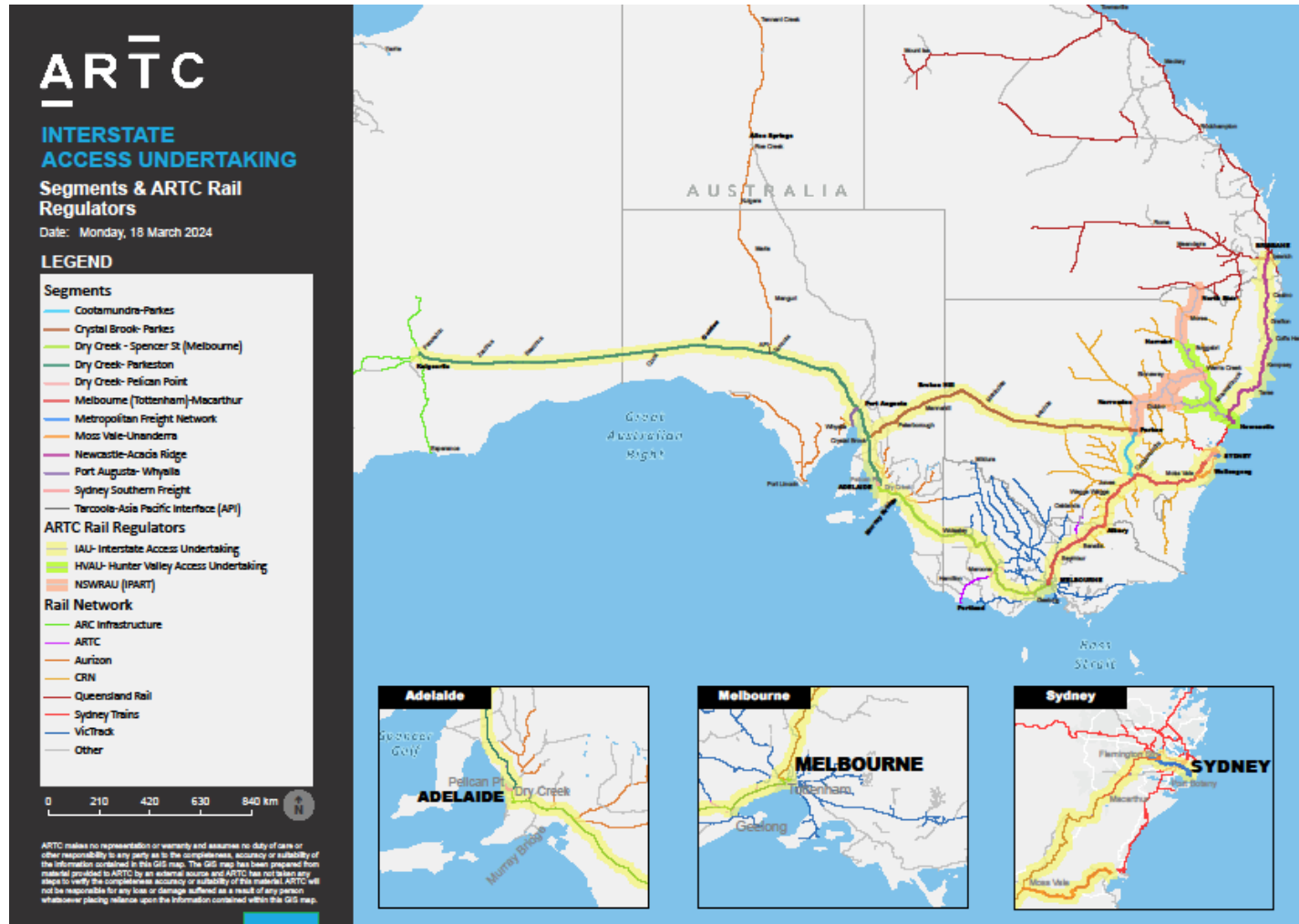
The ACCC's draft view is that any adjustments to the ITAA terms and conditions that are substantial and not yet agreed should occur during the regulatory period and be dealt with as a variation when agreement is reached, to ensure adequate consultation between access seekers and ARTC.

The ACCC proposes that ARTC:

- amend the Proposed ITAA to only include uncontentious changes
- engage further with stakeholders outside this assessment process to discuss any substantive updates required to the ITAA that are not yet agreed.

# Appendix A: Map of ARTC's Interstate network

Source: ARTC.



# Appendix B: List of proposed changes to the ITAA

The ACCC has compiled a list of key proposed changes to the Existing Indicative Track Access Agreement (ITAA). Deletions are in ~~strikethrough~~ and additions are in **bold**. The changes have been suggested by ARTC and stakeholders. We have classified the changes by significance as follows:

- uncontentious – minor, editorial or no concerns or risks flagged by stakeholders, ARTC or outstanding questions from ACCC
- substantial – may have a material impact on access arrangements and/or ARTC operations.

To allow for effective analysis of views on the proposed changes, stakeholders are encouraged to provide their views on the changes by downloading the Excel template titled “Appendix B: List of proposed changes to the ITAA” from the ACCC website and providing the completed spreadsheet to the ACCC as part of a submission on the Draft Decision.