

Our ref: #16,339,558



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26 February 2024

Simon Ormsby  
Group Executive Interstate  
Australian Rail Track Corporation  
PO Box 10343  
ADELAIDE, SA 5000

By email: [REDACTED]  
CC: [REDACTED]

Dear Mr Ormsby

**Section 44ZZBCA request for information – Interstate undertaking – 26 February 2024**

On 12 December 2023 the Australian Rail Track Corporation (ARTC) submitted the 2024 Interstate Network Access Undertaking application (Proposed Undertaking) to the Australian Competition and Consumer Commission (ACCC) to replace the 2008 undertaking due to expire on 30 June 2024.

This letter requests further information from ARTC in relation to the Proposed Undertaking and ARTC's supplementary documents such as the Explanatory Guide, to assist the ACCC in making its decision on whether to accept the Proposed Undertaking. The detail of the information request is set out in Schedule 1 to this letter.

Please provide the information specified in this notice in electronic format by emailing it to [transport@acc.gov.au](mailto:transport@acc.gov.au) no later than 18 March 2024.

This letter, including Schedule 1, is a notice under section 44ZZBCA of the *Competition and Consumer Act 2010* (the Act). A copy of this notice will be published on the ACCC's website shortly. Information provided in response to this notice will also be published subsequently on the ACCC's website. Any information that is confidential should be clearly identified, and reasons should also be provided in support of that claim. The identified information must be genuinely of a confidential nature and not otherwise publicly available. The general policy of the ACCC on the collection, use and disclosure of information is set out in the *ACCC & AER information policy: collection and disclosure of information*.

If you have any questions about this request, please contact [REDACTED] by email at [REDACTED] or by phone on [REDACTED]

Yours sincerely

[REDACTED]

Matthew Schroder  
General Manager  
Infrastructure & Transport - Access & Pricing Branch

## Schedule 1

### NOTICE REQUESTING INFORMATION UNDER SUBSECTION 44ZZBCA(1) OF THE COMPETITION AND CONSUMER ACT 2010

#### *Interstate Network Access Undertaking – 26 February 2024*

The ACCC gives this notice, requesting ARTC to provide the information specified below, pursuant to subsection 44ZZBCA(1) of the Act. The ACCC notes that the period from 26 February 2024 to 18 March 2024 constitutes the specified period for a response to this notice pursuant to subsection 44ZZBCA(1) of the Act.

To assist the ACCC in making its decision on whether to accept the 2024 Interstate Network Access Undertaking application (Proposed Undertaking), further information is requested on the following matters:

1. Negotiation and dispute resolution
2. Commercial arbitration
3. Charges
4. Interstate Network Development Strategy (INDS), Inland Rail and additional capacity
5. Cost recovery
6. Annual reporting information
7. Map of the Interstate Network as at 2024
8. Concerns raised by stakeholders as set out in the Explanatory Guide.

#### **1. Negotiation and dispute resolution**

##### Background

ARTC's Explanatory Guide states 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” (page 3).

##### Request

- 1.1. Outline the negotiation and dispute resolution activity that has occurred under the current 2008 Interstate Access Undertaking (IAU) (as varied from time to time).
- 1.2. What barriers (if any) does ARTC consider have limited its ability to negotiate varied prices or alternative services to date?
- 1.3. Given the price of Reference Services is constrained by the CPI mechanism in clause 4.5 of the Proposed Undertaking, how does ARTC consider changes to prices for the recovery of investments to improve reliability and service would occur? We note that additional capacity is dealt with under clauses 6.3 and 6.4 of the Proposed Undertaking.

## 2. Commercial arbitration

### Background

ARTC states in the Explanatory Guide that “ARTC has continually advocated to the ACCC on the benefits of a commercial arbitration-based framework to deliver the commercial agility required for rail volume to grow and to drive modal shift” (page 9).

### Request

- 2.1. Explain further ARTC’s rationale for the proposed use of a commercial arbitrator instead of the ACCC and what ARTC considers to be the benefits of a commercial arbitration-based framework.
- 2.2. The Proposed Undertaking introduces several new matters for an arbitrator to take into account; cl. 3.12.5(a)(xii) states the following:

In making an award the Arbitrator must take into account:

...

(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;

...

For each of these new factors in (K), provide examples of cases, hypothetical or otherwise, where ARTC considers such a factor could affect pricing, in what direction, and why.

## 3. Charges

### Structure of charges - Background

ARTC states in the Explanatory Guide that “The split of the two-part tariff (between flag fall and variable charges) was also set low to encourage competition and bring new Operators onto the network. This resulted in flagfalls at c 25-30% of revenue compared to c 70% in other regimes” (page 11).

### Request

- 3.1. How does ARTC consider this two-part pricing structure will promote efficient use of rail capacity regarding different train sizes or non-standard services? Is the split between flag fall and variable charges negotiable by applicants?
- 3.2. The Explanatory Guide states that two-part pricing is “set at less than fixed cost levels so as not to inhibit market entry” (page 10). Can ARTC provide a breakdown of estimated fixed and variable costs and tariff revenue for each of its eight proposed Reference Services, or if not available, for the Reference Services combined, for the most recent 2 years?
- 3.3. Has ARTC applied the excess network occupancy charge under the current 2008 IAU?
- 3.4. If there have been cases of excess occupancy since 2008 where ARTC could have applied the charge but did not, explain why ARTC did not apply it.

## Standing Offer - Background

Cl. 4.5(b) states that ARTC “may annually vary” the Standing Offer for Reference Services (i.e., price) on 1 July each year “by up to an amount determined by” the specified formula.

### Request:

- 3.5. Is it ARTC’s expectation that it will make a variation to the Standing Offer every year, including if the formula would provide for a reduction in prices?
- 3.6. Is it ARTC’s expectation that variations could be different in magnitude for the various Reference Services? For example, if there were cost differences between provision of the services.
- 3.7. Provide worked examples showing how ARTC intends the Standing Offer formula would work to change the price of Reference Services over the 5 years of the Proposed Undertaking in the below scenarios. Include both price and any headroom to the cumulative cap.
  - a) positive inflation each year where:
    - I. ARTC increases the price of the Reference Service by the full annual CPI amount each year
    - II. ARTC increases the price of the Reference Service by less than the annual CPI amount in some years and the annual CPI in others
    - III. ARTC increases the price of the Reference Service by more than the annual CPI in some years and below the CPI in others
  - b) negative inflation in a middle year of the examples given in response to a) to illustrate how deflation affects the price of the Reference Service
  - c) negative inflation causes the cap change to become negative/a price reduction.

ARTC may provide other scenarios to illustrate the how the formula may be applied to the price of the Reference Service.

## **4. INDS, Inland Rail and additional capacity**

### Background

There is a potential relationship between the Interstate Network Development Strategy (INDS), additional capacity (cl. 6.4) and Inland Rail upgrades, if work for Inland Rail relates to either a new segment or an upgrade of existing track.

### Request

- 4.1. How does ARTC consider work for Inland Rail on existing segments of the Interstate Network (e.g., most of Melbourne to Narromine) will be treated under the Proposed Undertaking for annual reporting and the INDS?
- 4.2. Has ARTC/Applicants used the provisions of cl. 6.3 of the current 2008 IAU regarding Additional Capacity sought by Applicants in the past?

In relation to the Proposed Undertaking:

- 4.3. Does ARTC consider that a variation to prices made under cl. 6.3(d) could apply to Reference Services or only non-Reference Services?

- 4.4. If an applicant sought and paid for an increase in capacity under cl. 6.3, and that capacity also increased capacity for Reference Services generally, would that user contribution reduce any future increases in prices for the relevant Reference services?
- 4.5. Is cl. 6.4 (Additional Capacity sought by ARTC for the benefit of the rail industry) intended to operate only when it results in a proposed change in price to one or more Reference Services?
- 4.6. What is the intention for having efficiency of expenditure dealt with separately under cl. 6.4(c) rather than under the list of factors in (b)?
- 4.7. Given price is not linked to capital expenditure (capex) for the purpose of maintaining a regulatory asset base, how does ARTC consider the additional capacity and a change in Reference Services prices would work? More specifically, how does ARTC consider cl. 6.4 would work in conjunction with the formula for the calculation of the Standing Offer for Reference services in cl. 4.5?
- 4.8. What determines whether ARTC would or would not apply under cl. 6.4 for a project that provides additional capacity?
- 4.9. Does ARTC expect any of the projects currently under consideration by ARTC, (including projects to be included in the INDS, and Inland Rail projects upgrading existing segments) will need to be considered under cl. 6.4?
- 4.10. How does ARTC consider the proposed cl. 6.6 (providing for industry consultation on additional capacity) would interact with the provisions for consultation in the INDS?

## 5. Cost recovery

### Background

In assessing whether to accept the Proposed Undertaking, the ACCC will have regard to the extent to which the proposed pricing meets the pricing principles in section 44ZZCA of the Act. Among other matters, this includes assessing whether regulated access prices are:

- (i) ...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....

The Proposed Undertaking involves indexation of current prices rather than cost-based pricing. ARTC's Explanatory Guide states the following:

"ARTC takes risk on investments and operating costs on the Interstate Network given the lack of direct linkage between costs and price..." (page 5)

"Whilst these pricing levels are constrained by competition from rail's modal competitors of road and sea, they at least cover the incremental cost of usage of the network and therefore meets the ACCC legislative requirements to deliver efficient pricing." (page 8)

“The 2024 IAU continues the real pricing levels which have broadly applied since 2008.”  
(page 19)

To this end, the ACCC wishes to gain an understanding of the extent to which ARTC has been able to recover its costs for the interstate network in recent years and the likely outlook over the coming regulatory period. This includes recovery of both operating and capital costs. We are requesting data from ARTC’s regular corporate accounting records rather than a regulatory asset base methodology.

### ***Efficient pricing of services***

#### Request

- 5.1. For the most recent 2 years, what percentage of access revenue for the Interstate Network is contributed by the eight proposed Reference Services?
- 5.2. What services contribute to the remainder of the access revenue for the Interstate Network?
- 5.3. Have the prices of the eight proposed Reference Services vary relative to each other under the current 2008 IAU, by negotiation or otherwise? If so, provide details.
- 5.4. Does ARTC have any concerns or evidence that the current pricing no longer reflects the charge differentiation factors such as opportunity costs and market value listed in cl. 4.2(c) of the Proposed Undertaking?
- 5.5. Has ARTC considered introducing sub-categories of Reference Services (such as time of day or duration) to reflect differing desirability of paths and promote efficient use of the network?

### ***Annual reporting data – historical***

#### Request

- 5.6. Advise whether the floor analysis data provided by ARTC on 21 November 2023 relates to calendar years or financial years; for example, does “2019” refer to 2018-19 or calendar year 2019?
- 5.7. Provide data on capital expenditures for each year from 2018-19 up to 2022-23, in categories consistent as far as possible with the data to be reported annually under the proposed Schedule I.

### ***Depreciation and asset value***

#### Background

Schedule I of the Proposed Undertaking requires ARTC to provide “references to published financial reports, for the purpose of outlining the accounting depreciation of ARTC’s asset base” (page 68). The ACCC understands data for depreciation is published in ARTC’s annual reports at a whole of company level.

#### Request

- 5.8. Provide historical whole of network data for the Interstate network for each financial year from 2018-19 to 2022-23 for the following:
  - (i) accounting depreciation of ARTC’s asset base; and
  - (ii) asset values for the interstate network on which the depreciation data are based.

Include in your response any relevant public documents that show depreciation for the interstate network.

5.9. Explain the general methodology for the asset valuation.

### **Forecasts**

#### Background

ARTC states in the Explanatory Guide:

“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” (page 5).

#### Request

5.10. Provide any further relevant information on ARTC’s forecasts of revenue and direct cost of segments insofar as they are available.

## **6. Annual reporting information**

#### Background

Part 8 of the Proposed Undertaking contains a commitment by ARTC to “maintain the Network ...in a condition which is fit for use by the Operator to provide rail transport services” (page 35). Schedule G to the Proposed Undertaking contains the Performance Indicators that will be published and the Proposed Undertaking also contains a commitment by ARTC to conduct an annual audit of the process and reporting of the Performance Indicators.

Schedule G lists 15 Performance Indicators focussed on Reliability, Network Availability, Transit Time, Temporary Speed Restrictions and Track Condition. A further three Performance Indicators are listed for periodic reporting of unit costs.

The Proposed Undertaking also contains Schedule I “Annual Reporting – Information provision and timing”. This commits ARTC to annual reporting of the Performance Indicators by network segment, as well as a range of volume, cost and revenue metrics. It also commits ARTC to publication of documents relating to the completion of major projects specified in the INDS.

#### ***Performance Indicators (Schedules G and I)***

#### Background

ARTC’s Explanatory Guide states that ARTC will “publish Performance Indicators, Access revenue, ..... in addition to the current reporting requirements set out in Schedule G.” (page 31).

#### Request

- 6.1. Are the Performance Indicators to be published under Schedule I intended to be the same as those required under Schedule G, or additional?
- 6.2. If additional, specify what items are proposed.



## **Cost categories (Schedules G and I)**

### Background

Schedule G (Table 2) requires ARTC to report annually on unit costs in 3 categories - Infrastructure Maintenance, Train Control, and Operations.

Schedule I in the Proposed Undertaking requires annual reporting of maintenance costs and non-maintenance operating costs (including Network control and overheads), and volumes, among other items.

### Request

- 6.3. What is the relationship between the unit cost categories in schedule G and those to be reported under Schedule I?

## **Definitions of capital (Schedule I)**

### Background

The proposed Schedule I provides for annual reporting for:

- rail infrastructure capital by network segment; and
- capital cost of each completed major project specified in INDS.

### Request

- 6.4. Explain what is meant by, and provide definitions for, “rail infrastructure capital” and “major projects”.
- 6.5. How do the above terms (“rail infrastructure capital” and “major projects”) relate to the following terms previously used by ARTC: corridor capital, sustaining capital, minor capital, expansion capital?
- 6.6. For the purpose of aggregating total capex, are there any gaps or overlaps between the scope of rail infrastructure capital and major projects?

## **7. Map of the Interstate Network as at 2024**

### Background

A map of the Interstate Network is helpful to visually depict the scope of the Proposed Undertaking, especially where it identifies those sections that are subject to the Proposed Undertaking and those parts of the national rail network that are outside the scope of the Proposed Undertaking.

### Request

- 7.1. Provide a map of the interstate rail network suitable for publication, showing as far as possible:
- geographical map of Australia as base
  - segment start and end locations
  - major towns
  - Inland Rail – new and existing segments
  - other connecting rail (e.g., Arc, Sydney Trains)
  - ARTC track labelled by regulatory framework (IAU, HVAU, NSWRAU etc.)

including as much detail as feasible for display at A4 size.

You may use arrows and calls-out or an inset for the denser part of the map in the south-east corner.

## **8. Concerns raised by stakeholders**

### Background

Part 6 of ARTC's Explanatory Guide sets out a series of concerns that were raised by stakeholders with ARTC during consultation.

### Request

Further information is required to determine how the Proposed Undertaking will manage the various issues that have been raised. Please respond to the requests detailed in the righthand column of Table 1 below.

**Table 1 – Further information required on issues raised in stakeholder consultation (in relation to Part 6 of ARTC’s Explanatory Guide)**

Stakeholder comment	ARTC response in Explanatory Guide	ACCC information request
<b>Pathing</b>		
Concern around equivalence of train paths	ARTC does not price differentiate between individual train paths. ARTC encourages engagement with the Interstate Commercial and Customer team on all matters, including access charges and pathing.	8.1. Provide further information on the concerns that were raised around the equivalence of train paths.
Process for migrating paths over from existing north south line to Inland Rail on Inland Rail commencement.	This is not an issue for the term of this IAU. The change of the definition of “Applicant” in the IAU to include existing customers clarifies there is access to IAU arbitration for disputes in respect of new pathing requests.	8.2. Advise the extent to which there will be any expected disruptions of service or other migration issues during the rollout of Inland Rail from works during the term of the IAU, and how they will be managed and communicated to users.
Questions in respect of the schedule in the master train plan and de-identification of paths.	ARTC works with all Customers to provide an optimal schedule based on the needs of the Network which maximises utilisation and, where possible based on confidentiality requirements, maximises transparency. ARTC takes volume risk on its Network and therefore is fully incentivized to maximise the freight tonnage on its Network and optimise pathing to facilitate this. There is always opportunity to engage with Interstate Commercial and Customer team to discuss pathing.	8.3. Provide further detail on the various questions that were raised by stakeholders in respect of the schedule in the master train plan and de-identification of paths.  8.4. Has ARTC reviewed the confidentiality requirements that limit the release of information and whether those limits are consistent with other networks? Please explain.

**PRICING**

<p>Would like to see flexibility of pricing to reflect seasonally-based commodities</p>	<p>We encourage engagement with the Interstate Commercial and Customer team on all matters, including access charges. We are always willing to work with stakeholders and beneficial freight owners to develop solutions and maximise freight on rail.</p>	<p>8.5. What practical steps would an access holder need to take to propose and negotiate a change to the terms/conditions including pricing for seasonal commodities?</p> <p>8.6. Has ARTC had requests for varied pricing for seasonally based commodities in recent years, and what were the outcomes?</p> <p>8.7. How would a new arrangement be communicated publicly so that other access users can consider the same opportunity?</p>
<p>Concerned that ARTC access charges aren't waived when other networks have possessions that impact the ability to use a path</p>	<p>ARTC engages with other RIMs to align possessions wherever possible. However, it is not within ARTC's remit to waive access charges when another RIM's possession affects usage of a path.</p>	<p>8.8. Provide further information on the concerns that were raised around the waiver of access charges.</p> <p>8.9. Outline why ARTC considers it is not within its remit to waive access charges for paths that cannot be used.</p>
<p>Concern in respect of the manner of price escalation</p>	<p>ARTC's escalation clauses in its Access Agreements requires a 60 day consultation on its pricing proposal for the coming year. We encourage engagement with the Interstate Commercial and Customer team on all matters, including access charges. We are always willing to work with stakeholders and beneficial freight owners to develop solutions and maximise freight on rail.</p>	<p>8.10. Provide further information on the concerns that were raised around the manner of price escalation charges.</p>

## INDS and REPORTING

<p>What will be included in the INDS</p>	<p>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.</p>	<p>[No request]</p>
<p>What will be included in annual performance reporting</p>	<p>Annual reporting will include, by segment, maintenance costs, revenue, utilisation (by GTK and TKM), rail infrastructure capital and non-maintenance operating costs (including Network control and overheads) at the Network level as well as the existing performance metrics. In addition, upon completion of major capital projects, ARTC will publish costs and supporting project documentation.</p>	<p>[No request]</p>
<p>Request to put out a draft of the INDS to operators to make sure it meets their needs</p>	<p>A draft will be provided for consultation, then a final version published.</p>	<p>[No request]</p>
<p>What is the process for agreeing upon a capex project, what the cost recovery is, whether a rail operator has a say in it.</p>	<p>The INDS will be a dynamic document that is consulted on and updated annually. It provides a forecast of what capital costs are expected to be for projects, but is not a commitment by ARTC to develop referenced projects. Through the consultation process, there will be opportunity to provide feedback on any planned network improvements.</p> <p>Where ARTC seeks to recover the costs of investments</p>	<p>8.11. Is there a separate process for consulting with stakeholders on proposed Inland Rail capex projects?</p>

	from Customers via negotiation, these negotiations are covered by the clauses of the IAU (including non-discrimination and dispute resolution).	
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### CONTRACTUAL DOCUMENTS

Various requests in respect of the matters to be considered by the Arbitrator and the dispute resolution process	ARTC has accommodated many of these requests (such as inclusion of CEO negotiation prior to mediation) however some requests were not incorporated to ensure consistency with the provisions of the CCA and other access regimes.	8.12. Provide a list of the various requests that were made on matters regarding the Arbitrator and dispute resolution process.  8.13. Advise which of these requests were not incorporated and why.
Would like more detail around what is involved in arbitration	ARTC has provided detail on the arbitration process in this Explanatory Guide.	[No request]
Would like to see "reasonable requests for information" included in ITAA	The IAU allows for reasonable requests for information, and this is covered off by the change to the definition of "Applicant" which clarifies there is access to IAU arbitration for disputes in respect of new pathing requests.	8.14. Can a user request information under the ITAA other than by initiating arbitration? If not, provide further detail as to the issue raised by the stakeholder and why ARTC considers the issue has been addressed.

### INTEROPERABILITY

Concern regarding new technologies and interfacing across networks	As one of National Cabinet's five priorities for collective action, we are focussed on improving national rail interoperability and working with governments and industry in contributing to the development and harmonisation of processes and systems to increase productivity and safety in the sector. ARTC has committed to provide an update on its actions to address this issue in the INDS.	8.15. Provide further information on the concerns that were raised around new technologies and interfacing across networks, and whether stakeholders' suggested adjustments to the Proposed Undertaking address their concerns.  8.16. Explain what clauses (if any) in the Proposed Undertaking reflect the commitment by ARTC to report in the INDS on the steps ARTC is taking to support the resolution of rail network interoperability issues.
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<p>Concerned with interoperability of multiple networks, and the resolution of disputes across networks</p>	<p>ARTC recognises the challenges of interfacing with other networks and RIMs. While the interoperability of the standard gauge network doesn't fit within the scope of IAU discussions, ARTC works with government and industry to streamline transitions between RIMs wherever possible. ARTC has committed to provide an update on its actions to address this issue in the INDS.</p>	<p>8.17. Provide further information on the concerns that were raised around dispute resolution across networks.</p> <p>8.18. Is there a documented process for a dispute resolution issue that relates to multiple networks? If so, provide the link or relevant information.</p>
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**NON-ROLLINGSTOCK INTERESTS**

<p>Concerned regarding rights of non-rollingstock access users</p>	<p>The IAU is a document for negotiation of track access agreements for all traffic. Where access to the network is not the subject of an Access Agreement, the IAU is not the appropriate forum for management of such access.</p>	<p>8.19. Provide further information on the concerns that were raised on the rights of non-rollingstock access users.</p>
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**NETWORK RELIABILITY**

<p>Concern regarding network reliability</p>	<p>The INDS is an ongoing vehicle for stakeholders, regardless of their contractual relationship, to provide input into ARTC's investment planning and Network development to support and protect current volumes and meet future demand.</p>	<p>8.20. Provide further information on the concerns that were raised around network reliability. The INDS focussed on a forward-facing capital improvement program. If concerns relate to current reliability issues in the network, how are these being addressed?</p>
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**OPERATIONS**

<p>Need a better system to get access to track to recover rollingstock</p>	<p>We note the varied efficiency of processes to access track in instances of network disruption. We note this feedback and are working to improve the system for operators and the broader supply chain.</p>	<p>8.21. Provide further information on the concerns that were raised around systems to access track to recover rollingstock.</p>
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