



# Consultation Paper

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

20 December 2023

**Stakeholder submissions due by 5:00pm (AEDT), Friday 23 February 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  
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# 1. Overview and consultation process

The Australian Rail Track Corporation Limited (ARTC) has submitted an access undertaking to the Australian Competition and Consumer Commission (ACCC) for assessment under Part IIIA of the *Competition and Consumer Act 2010* (Cth) (the Act). The proposed Interstate Rail Network Access Undertaking (the [Proposed Undertaking](#)) relates to the provision of access to the Interstate Rail Network that ARTC owns or leases in New South Wales, Victoria, Queensland, South Australia and Western Australia.<sup>1</sup>

The ACCC previously accepted access undertakings for the Interstate Rail Network in May 2002 and July 2008 in accordance with Part IIIA of the then *Trade Practices Act 1974*. The 2008 undertaking originally expired on 21 August 2018 but the ACCC has subsequently approved extensions on 7 occasions, in each case to allow more time to develop a replacement undertaking. The current [2008 Interstate Rail Network Access Undertaking](#) (the Existing Undertaking) expires on 30 June 2024 after the ACCC approved a one year extension on 19 May 2023.<sup>2</sup> Further information about the extension is available on our website.

ARTC has submitted the Proposed Undertaking to the ACCC for assessment under section 44ZZA in Part IIIA of the Act to replace the Existing Undertaking. We have released this Consultation Paper to invite public submissions on the Proposed Undertaking in accordance with section 44ZZBD of the Act.

## 1.1. Context for the Proposed Undertaking

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 that the proposed Regulatory Asset Base resulted in a wide gap between the floor and ceiling charges. ARTC subsequently withdrew the 2018 undertaking proposal and the ACCC issued a notice to further extend the Existing Undertaking, following an application by ARTC.

In July 2022 the ACCC published a Guidance Paper on ways that the ACCC considered ARTC could potentially improve the Existing Undertaking.<sup>3</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>4</sup> This was due to the substantial challenges in determining an asset base for the Interstate Rail Network at the time, including difficulty assessing the efficiency of past capital expenditure, as well as the impending rollout of the Inland Rail project.

The ongoing rollout of the Inland Rail project and how it will, or will not, be incorporated into the Interstate Rail Network poses considerable uncertainties. It could mean that an asset

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<sup>1</sup> The Proposed Undertaking is available on the ACCC's website.

<sup>2</sup> ARTC, *Interstate Access Undertaking*, 15 July 2008 (as varied on 18 April 2012, 10 April 2013, 25 July 2018, 12 December 2018, 28 February 2019, 26 September 2019, 19 June 2020, 15 June 2021 and 19 May 2023).

<sup>3</sup> ACCC, [Guidance Paper – ARTC's Interstate network access undertaking 2023](#), July 2022.

<sup>4</sup> Unless otherwise indicated, terms used in this Consultation Paper 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.

base set now would be largely irrelevant within only a few years. In particular, the total cost of the project 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 as much as \$31 billion.<sup>5</sup>

The extent to which users should (or will 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. Funding for benefits from infrastructure that accrue to other parts of the nation would normally be funded through government grants and, under standard regulatory practice, would not form part of a Regulatory Asset Base. Further, charging the full cost of Inland Rail to users could result in underuse of the network and run counter to 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.

The ACCC recommends the Government consider what share of the cost 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.

In line with the ACCC's Guidance Paper, ARTC has proposed a less complex approach to the pricing methodology in the Proposed Undertaking, through a stand-alone price cap. However, for any future access undertakings the ACCC will review the feasibility of returning to a cost build-up approach to price constraints.

## 1.2. Legislative framework

The access undertaking regime is set out in Division 6 of Part IIIA of the Act. The ACCC may accept the Proposed Undertaking if it thinks it appropriate to do so having regard to the matters set out in subsection 44ZZA(3) of the Act.

Under that subsection the ACCC must have regard to, among other things, the:

- legitimate business interests of ARTC
- public interest, including the public interest in having competition in markets (whether or not in Australia)
- interests of persons who might want access to the service
- whether the undertaking is in accordance with an access code that applies to the service
- any other matters the ACCC thinks are relevant.

The ACCC is also required to have regard to the objectives of Part IIIA set out in section 44AA, which are to promote the economically efficient operation of, use of and investment in the infrastructure (in this case, the Interstate Rail Network) by which services are provided, thereby promoting effective competition in upstream and downstream markets, and to provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

In addition, the ACCC must have regard to whether any proposed application meets the pricing principles set out in section 44ZZCA of the Act.

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<sup>5</sup> Kerry Schott AO, [The Delivery of Inland Rail: An Independent Review](#), January 2023, pp 52-56.

ARTC's submission considers the requirements expressed by the ACCC for a new regulatory framework and the legislative approval requirements in Section 9 of its Explanatory Guide.<sup>6</sup>

The ACCC has not yet formed a view on the appropriateness of the Proposed Undertaking. Statements in this Consultation Paper should not be taken as indicative of the ACCC's view, nor the likelihood of its acceptance.

### 1.3. Timeline for assessment

Under subsection 44ZZBC(1) of the Act, the ACCC must make a decision on an access undertaking application within the period of 180 days (the expected period) commencing at the start of the day the application is received.<sup>7</sup>

Subsection 44ZZBC(2) of the Act also provides for 'clock-stoppers', meaning that some days will not count towards the 180 days of the expected period 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 any submissions received in response to this consultation, the ACCC expects to publish a Draft Decision for consultation prior to making its Final Decision.

The Existing Undertaking is due to expire on 30 June 2024, with the Proposed Undertaking to commence on 1 July 2024. To ensure continuity in the regulatory framework, and assuming no person applies for review of the decision, this would require the ACCC to publish its Final Decision by no later than 9 June 2024, to allow 21 days to pass for it to become operational (as per section 44ZZBA of the Act).

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

**Table 1: Indicative timeline for assessment**

<b>Milestone</b>	<b>Approximate timing</b>
Proposed Undertaking received	12 December 2023
Consultation Paper published and consultation period commences	20 December 2023
Consultation period ends	5:00pm (AEDT), 23 February 2024
Draft Decision published and consultation period commences	Early April 2024
Draft Decision consultation period ends	Mid-April 2024
Final Decision published	On or before Friday, 7 June 2024
Operational date (21 days after publication)	1 July 2024

<sup>6</sup> ARTC, [Explanatory guide for the 2024 Interstate Access Undertaking](#), 12 December 2023, pp 17-19.

<sup>7</sup> An application applies to a proposed new undertaking or variation to existing undertaking.

## 1.4. Request for submissions

The ACCC encourages all stakeholders to provide a written submission. If you would like to arrange a meeting to discuss any matter relating to the Proposed Undertaking, please contact the Regulated Access – Rail team (at [transport@acc.gov.au](mailto:transport@acc.gov.au)).

The Proposed Undertaking mirrors many sections of the Existing Undertaking, but some proposed sections are substantially different. We invite submissions on any aspect of the Proposed Undertaking.

Stakeholders should address submissions to:

Mr Matthew Schroder  
General Manager  
Infrastructure & Transport – Access & Pricing Branch  
Australian Competition and Consumer Commission  
GPO Box 3131  
Canberra ACT 2601

Email: [transport@acc.gov.au](mailto:transport@acc.gov.au)

### 1.4.1. Due date for submissions

The ACCC will consider all submissions provided by **5:00pm (AEDT) on Friday, 23 February 2024.**

## 1.5. Confidentiality

The ACCC strongly encourages public submissions. Unless a submission, or part of a submission, is marked confidential, we will publish it on the ACCC's website and may make it available to any person or organisation upon request. For the avoidance of doubt, stakeholders should mark submissions 'for publication'.

If stakeholders wish to provide a confidential submission, the ACCC asks that stakeholders provide a full copy of the document and a public version with the confidential information omitted, which we will publish on the ACCC's website.

Stakeholders should clearly identify sections of submissions they claim to be confidential. The ACCC will consider each claim of confidentiality on a case-by-case basis. If the ACCC refuses a request for confidentiality, we will give the submitting party the opportunity to withdraw the submission in whole or in part.

For further information about the use of information provided to the ACCC, please refer to the ACCC publication '*ACCC & AER Information Policy – the collection, use and disclosure of information*', available on the ACCC website at: <https://www.accc.gov.au/publications/acc-aer-information-policy-collection-and-disclosure-of-information>.

## 1.6. Further information

Further information regarding ACCC regulation of ARTC's Interstate Rail Network Access Undertaking is [available on our website](#).

## 2. Key differences with ARTC's Proposed Undertaking

The Proposed Undertaking mirrors some sections of the Existing Undertaking, and some proposed sections are substantially different. We are interested in stakeholders' views about any aspect of the Proposed Undertaking.

This paper focuses discussion on the more substantial proposed differences. These are:

- pricing and services
  - price increases capped at accumulated movement in Consumer Price Index (CPI) for the term of the Proposed Undertaking, with no calculation of a Regulatory Asset Base or floor and ceiling revenue limits
  - 8 core regulated services to be known as Reference Services, compared to the current single Indicative Service (Super Freight)
- a change from the ACCC as arbitrator of disputes to use of a commercial arbitrator
- additional transparency and record keeping by ARTC.

For additional information please refer to ARTC's [Explanatory Guide](#).

### 2.1. Pricing and services (Part 4)

Part 4 of the Proposed Undertaking sets out the pricing methodology ARTC must follow when setting prices for access to the Interstate Rail Network and the services they apply to.

#### 2.1.1. Expanded coverage from Indicative Services to Reference Services

##### Background

The Existing Undertaking regulates prices for Indicative Services running on the Interstate Rail Network, via the Indicative Access Charge described in clause 4.6 of the Existing Undertaking. Indicative Services are those that have specific characteristics, namely:

- 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 other parts of the network.

Indicative Services correspond to the 'Super Freight' service category in ARTC's pricing schedule.<sup>8</sup> ARTC has 7 other service categories for which it sets out access charges in its public pricing schedule:

- Express Freight

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<sup>8</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/>



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

These are collectively known as ‘Non-Indicative Services’ and do not have charges prescribed in the Existing Undertaking. Charges for these other train types could potentially be negotiated with customers, but in practice ARTC has determined charges by applying a similar CPI-linked approach to price changes as for Indicative Services.

The ACCC noted in its 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>9</sup>

## Proposed Undertaking

The Proposed Undertaking seeks to expand price regulation to cover the Non-Indicative Services as well as the Indicative Service. The 8 service categories would collectively become ‘Reference Services’, all of which are subject to the Standing Offer described in clause 4.5 of the Proposed Undertaking (discussed in section 2.1.2). The Standing Offer prices for each Reference Service and Segment are set out in Schedule J.

### Question 1

Do stakeholders have views on the inclusion of 8 service categories, collectively ‘Reference Services’, which are subject to the Standing Offer? Should there be any additional services included in the ‘Reference Services’?

## 2.1.2. Access charges and pricing

### Background

Clause 4.4 of the Existing Undertaking stipulates that ARTC must set Charges for Services on the Interstate Rail Network such that revenue for a Segment or group of Segments will not be lower than the Floor Limit or higher than the Ceiling Limit for that Segment or group of Segments.<sup>10</sup> This constrains the overall revenue for each Segment.

The Floor Limit is the amount of revenue ARTC requires to cover its incremental costs of a Segment or group of Segments. This is defined as costs that could be avoided if the Segment or group of Segments were removed from the network.

The Ceiling Limit is the amount of revenue that is sufficient to cover the Economic Cost of the Segment or group of Segments. That is, an allocation of operating costs plus a return on the asset base plus depreciation on relevant assets.<sup>11</sup> The Existing Undertaking needs an

<sup>9</sup> ACCC, [Guidance Paper – ARTC’s Interstate network access undertaking 2023](#), July 2022, p 15.

<sup>10</sup> The Interstate Rail Network comprises 12 Segments as listed in Schedule H of the Proposed Undertaking.

<sup>11</sup> For the precise definition of Economic Cost, see clause 4.4(f) of the Existing Undertaking.

appropriate value for the asset base to calculate depreciation on assets and return on capital.

Initial prices for Indicative Services were set in 2008 at a point between the floor and ceiling and are specified in clause 4.6(b) and (c) of the Existing Undertaking. Clause 4.6(d) sets out a formula by which ARTC may vary the prices over time by up to an amount in line with total inflation (CPI) over the period.<sup>12</sup>

The price indexation formula provides 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 one year the prices were not increased 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. In that case, 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.

Although the 'Non-Indicative Services' are not covered by the Existing Undertaking, ARTC has varied these charges by using the same price adjustment mechanism as for Indicative Services.

In the 2018 Draft Decision, the ACCC had significant concerns with the robustness of ARTC's financial model with respect to the calculation of the 2018–19 Floor and Ceiling Limits, as well as whether the minimum and maximum prices were economically efficient.<sup>13</sup> Further, the calculation of the inputs and large range in the Indicative Access Charges did not provide sufficient transparency to access seekers about how they were determined.<sup>14</sup> The composition of revenue from the flagfall and variable components of Charges was to be determined by negotiations between ARTC and the access seeker, rather than reflecting the composition of costs of the relevant Segment. As a result, prices may not have reflected efficient costs.

The Draft Decision noted ARTC was unable to provide sufficient records to allow detailed assessment of the capital expenditure, actual overhead data, Ceiling Limit and other relevant information. There was also insufficient detail available to stakeholders on expenditure.

### **The ACCC's 2022 Guidance Paper**

As discussed in Section 1.1 above, the ACCC noted in its Guidance Paper that calculating a cost-based Ceiling Limit for the Interstate Rail Network is currently problematic due to difficulties determining an appropriate value for the Regulatory Asset Base, as well as the impending rollout of Inland Rail.

In the Guidance Paper we noted that, in the interim and subject to the undertaking's full terms and our assessment against the statutory requirements, it may be acceptable for ARTC to offer a pricing mechanism such as stand-alone price caps.<sup>15</sup>

However, for future access undertakings the feasibility of returning to a cost build-up approach to price constraints will be reviewed.

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<sup>12</sup> All groups Consumer Price Index, Weighted Average of Eight Capital Cities, Index Number for the March quarter preceding the relevant Determination Date.

<sup>13</sup> ACCC, [Draft Decision – Australian Rail Track Corporation's 2018 Interstate Access Undertaking](#), 20 December 2018, p 110.

<sup>14</sup> ACCC, [Draft Decision – Australian Rail Track Corporation's 2018 Interstate Access Undertaking](#), 20 December 2018, p 173.

<sup>15</sup> ACCC, [Guidance Paper – ARTC's Interstate network access undertaking 2023](#), July 2022, p 15.

## Proposed Undertaking

### Price control

The Proposed Undertaking does not include a Floor Limit and Ceiling Limit and instead uses a stand-alone price cap mechanism. This removes the requirement for the revenue for each Segment to be between the Floor Limit and Ceiling Limit for that Segment, as well as the underlying need to calculate a Regulatory Asset Base.

In considering whether to accept the Proposed Undertaking, the ACCC is required to have regard to the pricing principles set out in section 44ZZCA of the Act. These include that regulated access prices should be set so as to generate expected revenue that is at least sufficient to meet the efficient costs of providing access to the regulated service.

While the existing requirements in relation to the Floor Limit would no longer apply under the Proposed Undertaking, the ACCC will explore the ability for ARTC's revenue to cover incremental costs in its assessment of the Proposed Undertaking.

A CPI-based price control would remain in clause 4.6 to provide a price cap for Reference Services, being the 8 services as described in Schedule J. Unless there is a price change between now and 1 July 2024, the prices at the commencement of the Proposed Undertaking would be limited to existing prices plus an amount up to CPI.

In the Proposed Undertaking, annually on 1 July ARTC may vary the Standing Offer prices up to a price cap that is adjusted by total inflation over the period. This provides for only one price change per year.

As with the Existing Undertaking, if prices were below the price cap because ARTC did not apply a full year's CPI increase previously, ARTC could increase prices in future years to anywhere up to the cap to 'catch up'.

However, the proposal will remove the constraint on the price cap not falling due to deflation that was in the Existing Undertaking. Under the Proposed Undertaking when inflation is negative, the price cap would decrease and any price changes ARTC chose to make would be restricted to that cap. As ARTC's price changes are at its discretion, inflation or deflation does not automatically change actual prices.

### Structure of charges

The Proposed Undertaking deletes the excess network occupancy component of access charges that was in place in the Existing Undertaking. ARTC states that this charge has never been levied on users, so the proposed structure of access charges would consist of:

- a variable component, which is a function of distance and gross mass ( $\$/\text{gtkm}$ );<sup>16</sup> and
- a flagfall component, which is fixed and specific to each Train service type and Segment ( $\$/\text{km}$ ).

### Publication of prices

The Proposed Undertaking states that ARTC will publish the Standing Offer for Reference Services annually. In addition, it will publish the prices of negotiated outcomes for other services, along with a general description of the services (clause 4.6(a)).

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<sup>16</sup> gtkm refers to gross tonne kilometres, measured by gross tonnes carried multiplied by the number of kilometres travelled, also abbreviated as GTK.

*4.6 (b) If ARTC cannot de-identify a Customer from the pricing information it is required to publish under paragraph (a)(ii), then ARTC will publish the pricing information or equivalent information that it can reasonably do so in the circumstances.*

As noted in the Guidance Paper, the publication of negotiated outcomes would ensure that potential users can access this information in considering their own negotiations. The greater the transparency, the less the disadvantage faced by infrastructure users when negotiating terms of access.

The prices for the 8 Reference Services are specified in Schedule J of the Proposed Undertaking.

### **Question 2**

Do stakeholders have views on the proposed access charges and pricing in the Proposed Undertaking, including the change to a stand-alone price cap mechanism?

### **Question 3**

Is CPI the best rate to use to adjust the price cap?

### **Question 4**

How can ARTC de-identify a negotiated service and therefore publish sufficient non-pricing information on a negotiated outcome?

## **2.2. Dispute resolution for negotiations (Part 3)**

Access to the Interstate Rail Network is based on a negotiate-arbitrate model. Some services are regulated and access seekers have the opportunity to negotiate other services. This includes a dispute resolution process should negotiations fail, including mediation and arbitration. A major change in the Proposed Undertaking is to use a commercial arbitrator rather than the ACCC. The Proposed Undertaking specifies that this section covers disputes for new access seekers and existing access holders seeking new or additional train paths.

### **2.2.1. Executive negotiation and mediation steps**

#### **Background**

The Existing Undertaking sets out the dispute resolution process for access seekers in clause 3.12. It steps through raising the dispute, negotiation between senior representatives to resolve the dispute, then mediation or arbitration in accordance with the Existing Undertaking.

We noted in the Guidance Paper that uncertainty around process, rights and responsibilities can be a disincentive for users to make full (or any) use of the framework. A negotiate-arbitrate framework should ensure clear rules for process and timelines, including trigger points to start a formal negotiation, mediation, appointment of commercial arbitrator, trigger points for arbitration, and the considerations and rules for arbitral decision-making.

## Proposed Undertaking

The Proposed Undertaking seeks to add the step of executive negotiation prior to mediation. As with negotiation, executive negotiation is designed to resolve or narrow the dispute. The changes to mediation are mainly updates for clarity and timelines.

### Question 5

Do stakeholders have any comments on the change in the executive mediation step in the dispute resolution process, or any other aspects of the pre-arbitration dispute resolution arrangements?

## 2.2.2. Arbitration

### Background

The Existing Undertaking sets out arbitration as the final step in the dispute resolution process in clause 3.12.4. The ACCC is the arbitrator, and the undertaking adopts the arbitration procedures in Division 3 Subdivision D of Part IIIA of the Act (with some modification). The Existing Undertaking lists the procedures for all the parties and directions for how the arbitral proceedings will be conducted. It also lists what the arbitrator will take into account, the scope of the decision and other instructions. The determination of the arbitrator is final and binding.

ARTC did not propose any changes to arbitration in the proposed 2018 Undertaking. In the 2022 Guidance Paper, the ACCC stated it is open to considering the use of a commercial arbitrator.<sup>17</sup>

### Proposed Undertaking

#### Commercial arbitration

ARTC has proposed the use of a commercial arbitrator instead of the ACCC. In its Explanatory Guide, ARTC states the benefits of a commercial arbitration-based framework delivers the commercial agility required for rail volume to grow and to drive modal shift.<sup>18</sup>

### Question 6

Do stakeholders have any comments on the proposed use of a commercial arbitrator?

There are a range of proposed changes to the arbitration clauses in the Existing Undertaking to provide for this proposed use of a commercial arbitrator, including specified procedures, timelines for action, information and items an arbitrator is required to consider.

#### ACICA Rules

The Undertaking proposes that arbitration will be conducted in accordance with the rules of arbitration of the Australian Centre for International Commercial Arbitration (ACICA). The ACICA states that its Rules and model clauses facilitate best practice and efficient

<sup>17</sup> ACCC, [Guidance Paper – ARTC's Interstate network access undertaking 2023](#), July 2022, p 19.

<sup>18</sup> ARTC, [Explanatory guide for the 2024 Interstate Access Undertaking](#), 12 December 2023, p 9.

resolution of commercial arbitration.<sup>19</sup> Using ACICA Rules provides a framework for commercial arbitration which can then be tailored to the dispute and parties involved in the dispute.

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

- 1 arbitrator (ACICA Rules allows for 1 or 3 arbitrators)
- the seat of the arbitration is Adelaide, South Australia (the default seat in ACICA Rules is Sydney, NSW)
- the parties will seek to agree on choice of arbitrator, with ACICA appointing an Arbitrator if necessary
- the Arbitrator will observe the rules of natural justice
- the Arbitrator will have power to grant all legal, equitable and statutory remedies
- timelines for various actions to be completed
- any arbitration conducted pursuant to clause 3.12.5 will not mimic court proceedings of the seat of the arbitration and the practices of those courts will not regulate the conduct of the proceedings before the Arbitrator
- the Arbitrator will give reasons on which the award is based (ACICA Rules allow for no reasons to be given if the parties agree)
- 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
- 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.

In addition, the arbitration section includes the requirement for an executed Arbitration Agreement. This allows for the commercial arbitration to take place, as this provides a contractual basis for the arbitration between the parties (ARTC and the access seeker). The form of the Arbitration Agreement is in Schedule A.

### Question 7

Do stakeholders have any concerns with the arbitration procedures specified in clause 3.12.5? Please provide details of why or why not.

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<sup>19</sup> Australian Centre for International Commercial Arbitration, [ACICA Rules 2021](#), ACICA website, n.d., accessed 19 December 2023.

Matters the arbitrator must take into account

Clause 3.12.5(a)(xii) of the Proposed Undertaking lists the matters the Arbitrator must take into account in making an award.

(xii) *In making an award the Arbitrator must take into account:*

- (A) *the principles, methodologies and provisions set out in this Undertaking;*
- (B) *ARTC's legitimate business interests and investment in the Network;*
- (C) *any additional investment that the Applicant or ARTC has agreed to undertake;*
- (D) *the interests of all persons who have rights to use the Network;*
- (E) *the operational and technical requirements necessary for the safe and reliable operation of the Network;*
- (F) *the economically efficient operation of the Network;*
- (G) *the costs of providing the Services requested, including the particular characteristics of the relevant Service, which includes axle load, speed, wheel diameter, Train length, origin and destination, number and length of intermediate stops, departure and arrival times and days of the week;*
- (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; and*
- (L) *any other matters that the Arbitrator thinks are appropriate to have regard to.*

This list retains many items from the equivalent clause 3.12.4(b)(vi) of the Existing Undertaking. It omits 2 items, being:

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

The ACCC will consider these matters further in its assessment of the Proposed Undertaking, including whether these matters should and are appropriate to be considered by a commercial arbitrator.

ARTC has added the following new items to 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.

### Question 8

Is the list of matters the Arbitrator must take into account in making an award in clause 3.12.5(a)(xii) appropriate? Are there other things that the Arbitrator should take into account? Do any items need further clarification?

#### The making of an award

Clause 3.12.5(a)(xiii) of the Proposed Undertaking lists actions the Arbitrator may do or must not do in making an award.

(xiii) *In making an award, the Arbitrator:*

(A) *may require ARTC to provide access to the Service requested by the Applicant (or a variation of it);*

(B) *may specify the terms and conditions of the Service;*

(C) *may require ARTC to extend the Network (including capacity or geographical reach);*

(D) *may require ARTC to permit interconnection to the Network by the Applicant;*

(E) *may specify the extent to which the award overrides an earlier award relating to access to Services by the Applicant;*

(F) *must not prevent an existing user obtaining a sufficient amount of the Service to be able to meet the user's requirements, measured at the time when the dispute was notified;*

(G) *must not deprive any person of an existing contractual right;*

(H) *must not result in the Applicant becoming the owner (or one of the owners) of any part of the Network, or of extensions of the Network (including expansions of the capacity of the Network and expansions of the geographical reach of the Network), without the consent of ARTC;*

(I) *must not require ARTC to bear some or all of the costs of extending the Network (including expanding the capacity of the Network and expanding the geographical reach of the Network);*

(J) *must not require ARTC to bear some or all of the costs of maintaining extensions of the Network (including expansions of the capacity of the Network and expansions of the geographical reach of the Network); and*

(K) *must not require ARTC to bear some or all of the costs of interconnections to the Network or maintaining interconnections to the Network.*



The Existing Undertaking specifies requirements for the arbitrator (the ACCC) in clause 3.12.4(b)(vii). In making its determination, the ACCC:

- (A) may deal with any matters referred to in section 44V of the [Act]
- (B) will not make a determination that would have any of the effects described in section 44W of the [Act]
- (C) will take into account the matters referred to in section 44X of the [Act].

The items in the Proposed Undertaking largely mirror the matters in clause 3.12.4(b)(vii) of the Existing Undertaking in terms of what is in the Act.

In particular, items 3.12.5(a)(xiii) (A) – (E) of the Proposed Undertaking largely mirror the matters in subsection 44V(2) of the Act. Likewise, items 3.12.5(a)(xiii) (F) – (K) largely mirror the matters in subsection 44W of the Act. The matters in section 44X of the Act are largely covered by the matters the arbitrator must consider as part of clause 3.12.5(a)(xii).

There is only one item covered by the Existing Undertaking that is not reflected in the Proposed Undertaking; it does not state that an award may require the third party to accept, and pay for, access to the service.

#### Question 9

Is this list of the things the Arbitrator may or must not do in clause 3.12.5(a)(xiii) appropriate? Do any items need further clarification?

### 2.2.3. Dispute resolution in the Indicative Track Access Agreement

#### Background

The Indicative Track Access Agreement is a model for agreements between ARTC and individual train operators or other access seekers setting out their rights and responsibilities in using the network. It fits within the framework set by the Interstate Access Undertaking.<sup>20</sup>

Clause 17 of the Existing Indicative Track Access Agreement outlines the procedure to settle disputes for existing track access holders. The first stage is negotiation between senior representatives, the second stage is informal mediation with CEOs, followed by formal mediation. Formal mediation is to be carried out by a single mediator. It is to be conducted in accordance with the details in clause 17.3, unless agreed otherwise. There is no arbitration process in the Existing Indicative Track Access Agreement.

The ACCC understands access holders have primarily used this in relation to track incidents, whereas disputes under the Undertaking are more likely to relate to access for new services or prices.<sup>21</sup>

#### Proposed Undertaking

The Proposed Undertaking has minor changes to the dispute resolution in the Indicative Track Access Agreement. These relate to updating the guideline document from “Guidelines for Legal Practitioners Acting as Mediators” to “Ethical Guidelines for Mediators”, published

<sup>20</sup> Track access agreements are negotiated between the ARTC and individual operators, whereas the Undertaking is given by the ARTC to the ACCC.

<sup>21</sup> Incidents refers to accidents or problems on the network, such as collisions, derailment or breach of safe-working rules.

by the Law Council of Australia. The ACCC does not have visibility on the disputes which arise between access holders and ARTC.

#### Question 10

Do stakeholders consider any changes are required to the dispute resolution process in the Indicative Track Access Agreement?

## 2.3. Annual reporting and performance indicators (Part 8, Schedule G, Schedule I)

ARTC's proposed reporting for financial and performance indicators are set out in Part 8, Schedule G and new Schedule I in the Proposed Undertaking.

### 2.3.1. Publishing financial information

#### Background

Schedule G of the Existing Undertaking requires ARTC to report annually on certain unit cost information, as shown in Table 2 below.

**Table 2: Unit cost information ARTC must report on, as required by the Existing Undertaking (Schedule G)**

Cost category	Explanation	Unit cost ARTC must report
<b>Infrastructure maintenance</b>	Expenditure on outsourced infrastructure maintenance and ARTC's associated costs for managing maintenance contracts	\$ per track kilometre \$ per gross tonne kilometre
<b>Train control</b>	Expenditure on controlling and regulating all rail operations and transit management functions	\$ per train kilometre
<b>Operations</b>	Total expenditure associated with Train control plus ARTC operations planning and management function	\$ per train kilometre

Clause 4.4(e) of the Existing Undertaking requires ARTC to obtain approval from the ACCC for any increases in capital expenditure exceeding 20% of capital expenditure on the Interstate Rail Network. ARTC's initial estimate of capital expenditure for each year of the Undertaking's duration is set out in Schedule H.

Beyond the above, the Existing Undertaking does not require ARTC to report on financial or other information commonly reported by regulated entities, such as operating volumes, revenue earned, total operating costs (which is greater than 'Operations' costs above) or the roll-forward of the Regulatory Asset Base.

ARTC did not propose any amendments to its reporting requirements or compliance approach in the proposed 2018 Undertaking, which was later withdrawn.

Stakeholders emphasised the importance of transparency around ARTC's costs and pricing in submissions to the ACCC's 2021 Issues Paper on the regulatory framework for the

Interstate Rail Network.<sup>22</sup> ARTC has also previously stated that transparency of ARTC's operations and performance should be a key element of the Undertaking.<sup>23</sup>

We noted in our 2022 Guidance Paper that the ACCC would still expect to maintain general oversight on matters such as price movements and expenditure on the Interstate Rail Network, even if there is no Regulatory Asset Base calculation or revenue ceiling limit in the next undertaking.<sup>24</sup> The ACCC considered that ARTC should report regularly on financial variables, with information to be 'published as far as possible unless there is clear justification of adverse commercial effects' in doing so.<sup>25</sup> The Guidance Paper listed the following financial data as what the ACCC expected would be reasonable for ARTC to publish by a set time following the completion of each financial year:

- revenue
- operating expenditure
- capital expenditure (corridor and non-corridor)
- volume information
- changes to price schedules
- audit assurance for the information provided.

We also listed additional information for ARTC to provide the ACCC that would assist the future consideration of the regulatory framework for the Interstate Rail Network, so as to avoid the situation in 2018 where ARTC had insufficient information available for the ACCC to assess the efficiency of the expenditure proposed to be rolled into the Regulatory Asset Base.

Specifically, we also highlighted the following as important records for ARTC to keep to assist future consideration of the regulatory framework for the Interstate Rail Network:

- supporting information for capital expenditure, including:
  - any project evaluation/cost-benefit analysis or consultation undertaken
  - any information pertinent to whether an investment is commercial or non-commercial
  - whether expenditure was brought forward due to government requirements or decisions, and
  - the nature of the funding (grant, equity, forgone dividends, etc.)
- asset disposals
- audit assurance for the information provided.

We noted in our Guidance Paper that there would not be a need for a detailed annual compliance process, as for the Hunter Valley Coal Network Access Undertaking, in the next undertaking if there was no Regulatory Asset Base calculation or revenue ceiling.<sup>26</sup>

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<sup>22</sup> See submissions available at ACCC, [The regulatory framework for ARTC's Interstate network](#), website, 25 August 2021.

<sup>23</sup> See ACCC, [Guidance Paper – ARTC's Interstate network access undertaking 2023](#), July 2022, p 20; ARTC, [ARTC response to ACCC IAU DORC and framework calculation](#), July 2021, p 4.

<sup>24</sup> ACCC, [Guidance Paper – ARTC's Interstate network access undertaking 2023](#), July 2022, p 20.

<sup>25</sup> ACCC, [Guidance Paper – ARTC's Interstate network access undertaking 2023](#), July 2022, p 21.

<sup>26</sup> ACCC, [Guidance Paper – ARTC's Interstate network access undertaking 2023](#), July 2022, p 21.

## Proposed Undertaking

ARTC is proposing to retain its unit cost reporting obligations under Schedule G in the Proposed Undertaking, as shown in Table 2 above.

The Proposed Undertaking also introduces a new Schedule I, which sets out additional reporting requirements. Under the proposed schedule, ARTC must report annually on the following:

- total Access revenue earned for each Segment
- volumes on each Segment, on a gross tonne kilometre and train kilometre basis
- maintenance costs, split by category of fixed and variable for each Segment
- rail infrastructure capital for each Segment
- non-maintenance operating costs, including Network control and overheads, at the whole network level
- references to published financial reports, for the purpose of outlining accounting depreciation of ARTC's asset base as reflected in ARTC's financial asset registers.

ARTC must report the above information by 30 November each year for the previous financial year. Where any of the above information contains confidential information, ARTC will keep records of these items and provide these to the ACCC on a confidential basis.

Schedule I also sets out requirements around reporting of completed major projects that are specified in the Interstate Network Development Strategy during the term of the Undertaking. The proposed schedule will require ARTC to include in its reporting documentation:

- descriptions of the relevant major projects (i.e., those completed in the reporting period)
- reference to any published business case or project assessments shared with stakeholders for the major project, and
- the final capital cost and associated data of each completed major project.

The Proposed Undertaking does not include clause 4.4(e), meaning ARTC will no longer need to obtain the ACCC's approval for any increase in capital expenditure exceeding 20% of total capital expenditure on the Interstate Rail Network in any single year. The Proposed Undertaking also does not include estimated capital expenditure each year of its duration, as is shown in Schedule H of the Existing Undertaking. The removal of these provisions is due to the removal of the Regulatory Asset Base and associated provisions from the Proposed Undertaking.

ARTC's proposal broadly aligns with the ACCC's suggestions in the Guidance Paper. However, ARTC is not proposing to report on disposals or provide audit assurance of its financial information. Further, ARTC proposes to report on major projects and rail infrastructure capital, rather than reporting on capital expenditure as corridor and non-corridor expenditure.

### Question 11

Do stakeholders consider the proposed financial information publication requirements are clear and provide appropriate transparency?

## Question 12

Is there any other financial information stakeholders consider ARTC should publish? If so, please say why.

### 2.3.2. Publishing performance indicators

#### Background

Clause 8.2(a) and Schedule G of the Existing Undertaking require ARTC to publish Performance Indicators, including reliability, network availability, transit time, temporary speed restrictions and track condition, on its website quarterly. Clause 8.2(b) of the Existing Undertaking requires ARTC to incorporate a review of its Performance Indicator reporting into its annual internal audit process. ARTC must publish the findings of this review on its website and make the auditor's written report available to the ACCC on request. The most recent Performance Indicator review findings currently available on ARTC's website are for 2013–14 and 2014–15.<sup>27</sup>

ARTC's leases with the NSW and Victorian Governments also require it to report on specified key performance indicators annually (NSW) or quarterly (Victoria). These are also reported on ARTC's website.<sup>28</sup>

ARTC did not propose any material changes to the Performance Indicator reporting provisions in the withdrawn 2018 Undertaking.

Stakeholders provided varying views on the suitability of ARTC's Performance Indicators in submissions to the ACCC's 2021 issues paper on the regulatory framework for the Interstate Rail Network, including calls for:

- direct linkages between ARTC's access pricing and key performance indicators for its service provision
- potentially a formal evaluation of ARTC's progress towards policy objectives
- appropriate service (track) standards for passengers and for freight
- a more substantive cross-jurisdictional review examining performance and productivity of the Interstate Rail Network.<sup>29</sup>

We have previously noted that ARTC's current Performance Indicators appear broadly appropriate. However, we recommended that ARTC explore adding indicators more specific to passenger services and rationalising its various performance reporting to provide greater clarity and reduce administrative burden.<sup>30</sup>

#### Proposed Undertaking

ARTC proposes minor drafting changes to clause 8.2 of the Existing Undertaking, none of which alter its meaning or what ARTC must report. ARTC is also proposing minor drafting

<sup>27</sup> ARTC, [Performance Indicator Reporting](#), website, October 2023, accessed on 7 December 2023.

<sup>28</sup> ARTC, [NSW Lease](#), website, July 2023, accessed on 7 December 2023; ARTC, [Victorian Lease](#), website, October 2023, accessed on 7 December 2023.

<sup>29</sup> See submissions available at ACCC, [The regulatory framework for ARTC's Interstate network](#), website, 25 August 2021.

<sup>30</sup> ACCC, [Guidance Paper – ARTC's Interstate network access undertaking 2023](#), July 2022, p 23.

changes to Schedule G in the Proposed Undertaking, but again this will not alter ARTC's reporting requirements under this schedule.

The new schedule ARTC is proposing (Schedule I) will require ARTC to report on the Performance Indicators for each Segment of the Interstate Rail Network for the previous financial year, in addition to the financial information discussed above.

#### **Question 13**

Should ARTC report on different performance indicators to those set out in clause 8.2(a) and Schedule G? If so, which ones and why?

## **2.4. Changes to other Parts**

### **2.4.1. Interstate Network Development Strategy (Part 6)**

The Proposed Undertaking includes reference to a new Interstate Network Development Strategy at clause 6.1, which ARTC will be required to draft and publish annually. The Development Strategy will be a capacity planning document based on forecast volumes, growth capital and future capacity and performance requirements of the Interstate Rail Network.

Clause 6.1(e) will require ARTC to meet with train operators and consult on a draft Development Strategy before finalising and publishing it on its website each year. As discussed above, ARTC must also publish a 'close-out report' upon completion of capacity expansion projects, detailing project deliverables, a summary of capital expenditure incurred and a review of the project against its initial budget, timeline and scope.

Relatedly, the Proposed Undertaking includes clause 6.3(c) specifying that ARTC will consider any requests by applicants for Additional Capacity which may, but does not need to be, capacity identified in the Interstate Network Development Strategy.

#### **Question 14**

Do stakeholders have any comments on ARTC's proposed Interstate Network Development Strategy?

### **2.4.2. Grant and duration of the Undertaking (Part 2)**

ARTC proposes that the Undertaking take effect 21 days after it is accepted by the ACCC, consistent with section 44ZZA(3) of the Act (the Commencement Date), and expire on the earlier of 30 June 2029 or when the ACCC consents to ARTC withdrawing the Undertaking. This would mean the Undertaking would be in effect for around 5 years, provided that the undertaking can take effect around 1 July 2024 and ARTC does not seek to withdraw the Undertaking.

#### **Question 15**

Do stakeholders have any comments on the Commencement Date or the length of the Proposed Undertaking?

### 2.4.3. ACCC request for information clause (Part 1)

In its 2018 Draft Decision the ACCC outlined its view that the Interstate Access Undertaking should include provisions setting out information gathering powers for the ACCC.

The Proposed Undertaking includes a new clause 1.3 that provides the ACCC with the ability to seek information from ARTC relating to the Undertaking by issuing a written notice. Clause 1.3 specifies what the ACCC must include in its written notice seeking information, including the form information must be provided in, why the ACCC requires the information and the deadline for ARTC to respond (which must be no less than 14 days from ARTC's receipt of the notice).

Where ARTC considers the request for information is unreasonable, clause 1.3 provides for ARTC to advise the ACCC, within 7 days of receiving the notice, why it considers the request unreasonable and outline how the ACCC could amend the information request to address ARTC's legitimate concerns. The ACCC must then notify ARTC its decision regarding the request as soon as practicable, and ARTC is not obliged to provide the information to the ACCC until after the ACCC has advised its decision.

The new clause aligns with a similar clause in the Hunter Valley Coal Network Access Undertaking.

#### Question 16

Do stakeholders have any comments on the proposed new ability for the ACCC to request information from ARTC during the term of the undertaking?

### 2.4.4. Proposed Indicative Track Access Agreement (Schedule D)

ARTC has proposed some revisions to the Indicative Track Access Agreement, which forms Schedule D of the Proposed Undertaking.

The Proposed Indicative Track Access Agreement has removed the existing requirements on Operators to comply with ARTC's Environmental Manual (Part 13).

ARTC has proposed a new clause relating to Third Party Liabilities (clause 15.6). The proposed clause outlines the provisions that apply in the event that a third party seeks to recover a third-party liability from either ARTC or an Operator. ARTC defines 'third party liability' at a new clause 15.2(f) of the Indicative Track Access Agreement. ARTC notes in its Explanatory Guide that the changes are consistent with the Hunter Valley Access Undertaking Operator Sub-Agreement, which has been in operation since 2011.<sup>31</sup>

The Proposed Indicative Track Access Agreement does not include requirements for ARTC to publish annually its liability insurance premium paid or to apply any savings from a substantial reduction in an insurance premium towards repairs, maintenance or upgrades to the network. ARTC has not provided information on this change in its Explanatory Guide.

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<sup>31</sup> ARTC, [Explanatory Guide for the 2024 Interstate Access Undertaking](#), 12 December 2023, p 40.

ARTC proposes the following other amendments of note to the Indicative Track Access Agreement:

- amending the Definitions in Part 1 to update law references and to align with changes made throughout the Undertaking (i.e., adding new terms or deleting terms no longer used)
- adding a caveat of 'so far as is reasonably practicable' to ARTC's agreement to control the network in a manner that facilitates compliance with Scheduled Train Paths and the use of those train paths (clause 2.7)
- removing previous clause 4.3 relating to Excess Network Occupancy Charges
- adding the ability for ARTC to vary charges for negotiated services (clause 4.4(c))
- adding the ability for ARTC or its servant, agent, employee, contractor or volunteer accessing the Interstate Rail Network to move an Operator's train, if the Operator does not move the train following ARTC issuing a notice requesting it to do so (clause 5.7)
- adjusting the definition of 'Force Majeure' (clause 20.3)
- adjusting Schedule 1 to reflect the Metropolitan Freight Network leases
- creating separate sections for charges relating to the Standing Offer and Negotiated Charges in Schedule 3
- correcting minor grammatical and similar errors contained in the Existing Undertaking's Indicative Track Access Agreement.

#### Question 17

Do stakeholders have any comments on the Proposed Indicative Track Access Agreement?

### 2.4.5. Other minor changes

In addition to the above, there are a number of other minor differences between the Existing Undertaking and the Proposed Undertaking. These include:

- amending the Definitions in Part 9 to align with changes made throughout the Undertaking (i.e., adding new terms or deleting terms no longer used)
- adjusting Schedule E to reflect the Metropolitan Freight Network and Queensland leases
- amending Schedule H (Schedule I of the Existing Undertaking) to reflect changes to Segments on the Interstate Rail Network
- updating references to the *Trade Practices Act 1974* to the *Competition and Consumer Act 2010*
- updating ARTC's contact details
- amending cross-references throughout to account for new and deleted terminology, schedules and clauses
- correcting minor grammatical and similar errors contained in the Existing Undertaking.



**Question 18**

Do stakeholders have any comments about any of these differences in the Proposed Undertaking?

**2.4.6. General questions about the Proposed Undertaking****Question 19**

Do stakeholders have views on whether the ACCC should accept the Proposed Undertaking, including in relation to the statutory considerations and pricing principles in the Act? If so, please provide reasons.

**Question 20**

Do stakeholders consider ARTC needs to make any amendments to the Proposed Undertaking not otherwise covered in this Consultation Paper? If so, please provide reasons.

# Appendix A: Consolidated list of questions

## Pricing and services (Part 4)

### Question 1

Do stakeholders have views on the inclusion of 8 service categories, collectively 'Reference Services', which are subject to the Standing Offer? Should there be any additional services included in the 'Reference Services'?

### Question 2

Do stakeholders have views on the proposed access charges and pricing in the Proposed Undertaking, including the change to a stand-alone price cap mechanism?

### Question 3

Is CPI the best rate to use to adjust the price cap?

### Question 4

How can ARTC de-identify a negotiated service and therefore publish sufficient non-pricing information on a negotiated outcome?

## Dispute resolution for negotiations (Part 3)

### Question 5

Do stakeholders have any comments on the change in the executive mediation step in the dispute resolution process, or any other aspects of the pre-arbitration dispute resolution arrangements?

### Question 6

Do stakeholders have any comments on the proposed use of a commercial arbitrator?

### Question 7

Do stakeholders have any concerns with the arbitration procedures specified in clause 3.12.5? Please provide details of why or why not.

### Question 8

Is the list of matters the Arbitrator must take into account in making an award in clause 3.12.5(a)(xii) appropriate? Are there other things that the Arbitrator should take into account? Do any items need further clarification?

**Question 9**

Is this list of the things the Arbitrator may or must not do in clause 3.12.5(a)(xiii) appropriate? Do any items need further clarification?

**Question 10**

Do stakeholders consider any changes are required to the dispute resolution process in the Indicative Track Access Agreement?

**Annual reporting and performance indicators (Part 8, Schedule G, Schedule I)****Question 11**

Do stakeholders consider the proposed financial information publication requirements are clear and provide appropriate transparency?

**Question 12**

Is there any other financial information stakeholders consider ARTC should publish? If so, please say why.

**Question 13**

Should ARTC report on different performance indicators to those set out in clause 8.2(a) and Schedule G? If so, which ones and why?

**Changes to other Parts****Question 14**

Do stakeholders have any comments on ARTC's proposed Interstate Network Development Strategy?

**Question 15**

Do stakeholders have any comments on the Commencement Date or the length of the Proposed Undertaking?

**Question 16**

Do stakeholders have any comments on the proposed new ability for the ACCC to request information from ARTC during the term of the undertaking?

**Question 17**

Do stakeholders have any comments on the Proposed Indicative Track Access Agreement?

## **Other minor changes**

### **Question 18**

Do stakeholders have any comments about any of these differences in the Proposed Undertaking?

## **General questions about the Proposed Undertaking**

### **Question 19**

Do stakeholders have views on whether the ACCC should accept the Proposed Undertaking, including in relation to the statutory considerations and pricing principles in the Act? If so, please provide reasons.

### **Question 20**

Do stakeholders consider ARTC needs to make any amendments to the Proposed Undertaking not otherwise covered in this Consultation Paper? If so, please provide reasons.

# Appendix B: Assessment considerations as listed in the Competition and Consumer Act 2010

## **Part IIIA, Division 6, Subdivision A, Section 44ZZA – Access undertakings by providers**

(3) The Commission may accept the undertaking, if it thinks it appropriate to do so having regard to the following matters:

- (aa) the objects of this Part;
- (ab) the pricing principles specified in section 44ZZCA;
- (a) the legitimate business interests of the provider;
- (b) the public interest, including the public interest in having competition in markets (whether or not in Australia);
- (c) the interests of persons who might want access to the service;
- (da) whether the undertaking is in accordance with an access code that applies to the service;
- (e) any other matters that the Commission thinks are relevant.

Note 1: There are grounds on which the Commission may reject the undertaking if it contains, or should contain, fixed principles: see section 44ZZAAB.

Note 2: The Commission may defer consideration of the undertaking if it is also arbitrating an access dispute: see section 44ZZCB.

## **Part IIIA, Division 1, Section 44AA – Objects**

The objects of this Part 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.

## **Part IIIA, Division 6A, Section 44ZZCA – Pricing principles for access disputes and access undertakings or codes**

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.

Note: The Commission must have regard to the principles in making a final determination under Division 3 and in deciding whether or not to accept an access undertaking or access code under Division 6.