



**AUSTRALIAN RAIL TRACK CORPORATION**

**ACCC PART IIIA ACCESS UNDERTAKING  
GUIDELINES**

**ARTC SUBMISSION TO ACCC**

June 2016

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## 1 Summary

ARTC welcomes the opportunity to make a submission on the ACCC's draft "Part IIIA access undertaking guidelines – submitting, varying or withdrawing an access undertaking pursuant to Part IIIA of the Competition and Consumer Act 2010" (**Guidelines**), which was released on 9 May 2016 for public comment.

As one of the few entities that have lodged voluntary access undertakings, ARTC is well positioned to provide feedback on the process. ARTC considers that the Guidelines can be a beneficial tool.

ARTC's comments on the Guidelines are limited to the following areas:

- **(minor variations)** Part IIIA of the *Competition and Consumer Act 2010 (CCA)* does not distinguish between major and minor variations leading to a default position that all variations are subject to a six month approval process. It would be useful if the Guidelines provided a process for addressing minor variations and where that process would be appropriate (refer to section 2 for more detail).
- **(renewal process)** The Guidelines currently do not distinguish between the ACCC's process for assessing a brand new undertaking and a renewal of an existing undertaking. Part IIIA does address them separately which would suggest that the process does not have to be the same. ARTC considers that a different process should apply (and the Guidelines should provide detail on the process) for the renewal of an undertaking which is not a full reconsideration of the approved undertaking (refer to section 3 for more detail).
- **(light regulation)** There is little incentive for service providers to lodge voluntary undertakings if the expectation is a "full" regulatory model, as used for an electricity network or fully regulated gas pipeline determination. It would be highly beneficial if the Guidelines could provide greater detail on the circumstances in which a "light-handed" undertaking (such as a publish, negotiate, arbitrate model) would be appropriate (refer to section 4 for more detail).
- **(administration)** The Guidelines should provide some guidance on how the undertaking will be administered once approved. ARTC's experience on the compliance assessment for the Hunter Valley Access Undertaking (**HVAU**), where the ACCC changed approaches during the undertaking, would suggest that service providers will, in the future, need to include very prescriptive processes in their undertakings to provide certainty. This is not desirable (refer to section 5 for more detail).

ARTC also notes that the Guidelines provide little guidance on the amendment notice process in section 44ZZAAA which ARTC does understand to have been used. The Guidelines also do not address the fixed principles mechanism in section 44ZZAAB which were introduced on 13 July 2010. As these have not been relied upon in this context, it would be useful for the Guidelines to discuss these matters.

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## 2 Minor variations

Section 3.5 of the Guidelines sets out the ACCC's process for assessing a proposed variation to an accepted access undertaking. In particular, the ACCC:

- describes the process as similar to the ACCC's process for accepting an undertaking; and
- acknowledges that an application for a minor variation may be expedited.

Amendment of an undertaking under section 44ZZA(7) of the CCA is a very formal process that requires the commitment of substantial time and resources by a service provider, access holders, other stakeholders and the ACCC.

It is often not appropriate to seek an amendment through the CCA process for minor adjustments to elements of an undertaking to enable a service provider to update its practices to ensure the undertaking remains relevant. These undertakings can be for long periods and the infrastructure involved is often complex, both in its operation and interaction with other infrastructure. Examples where this might apply include the updating of port terminal protocols, cost allocation manuals, network management principles, trading protocols etc.

ARTC considers there would be value in having the Guidelines provide:

- more detail on the ACCC's process for minor variation applications (beyond simply that they may be expedited). ARTC considers it would be highly beneficial for the Guidelines to provide examples or suggestions of circumstances where an expedited variation process would be appropriate and how an expedited process would work; and
- detail on when it is possible for operational documents to sit under the umbrella of the undertaking but not be subject to a full variation process, and the mechanisms for this to operate.

For example, in its proposed 2016 HVAU, ARTC has proposed the concept of amendment of selected *administrative* provisions without triggering the formal CCA variation process. By way of examples from ARTC's HVAU, the process could apply to the following regimes: insurance clauses, contact details, assumptions and characteristics of services, network performance indicators and network and segments.

ARTC considers that providing more detail on these matters will be beneficial to all parties involved. It demonstrates that the voluntary undertaking route is not inflexible and therefore makes it a more attractive proposition.

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### 3 Renewal process

The Guidelines do not distinguish between the ACCC's process for assessing a brand new undertaking compared to an undertaking which is simply being renewed under which most provisions and regimes are still agreed between the parties.

In Part IIIA, extensions (section 44ZZBB) are separately dealt with from the original lodgement and approval of an undertaking (section 44ZZA), although section 44ZZBB(3) points the ACCC back to the approval criteria in section 44ZZA(3).

ARTC considers that there is an intention in Part IIIA for a more expedited process for extensions. ARTC considers that a different process should apply for the renewal of an undertaking where it is primarily a "roll over" of terms and only particular issues or provisions need to be reconsidered and renegotiated. This approach provides for a more streamlined and efficient process for service providers, access holders, other stakeholders and the ACCC, as the parties will focus on the key terms that are subject to differing views. ARTC is also concerned that the ACCC views extensions or renewals of an undertaking as an opportunity to ratchet up the level of regulation (so that over time the undertaking reflects a full regulation approach) even though the undertaking is working appropriately.

ARTC sees value in the Guidelines:

- acknowledging the different approach to renewals of access undertakings; and
- providing guidance on, or examples of, the key terms that the ACCC expects would be reviewed on a renewal of an access undertaking.

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## 4 Light regulation

The Guidelines recognise the benefits of providing access to services by way of an access undertaking, where service providers and access holders have greater certainty over the terms and conditions of access. ARTC acknowledges this benefit and considers that access undertakings should take different forms depending on the markets in which they operate and the nature of services being provided. In particular, there will be circumstances where less prescriptive undertakings are more appropriate.

For example, in more contestable markets or where there are other constraints on pricing power of the service provider, there is no need for highly prescriptive undertakings. There should be an opportunity for service providers to provide access by way of a “light-handed” undertaking. This will ensure the benefits of access by way of an undertaking are maintained, will provide for an undertaking which more accurately reflects the nature of the services being provided and the market in which they exist and will make voluntary undertakings a more attractive proposition. Currently, service providers making voluntary undertakings are generally doing so because other reasons compel them to do so.

The Guidelines in section 4.6 do address the issue to some extent and briefly mention the publish, negotiate, arbitrate model used for the grain terminals. ARTC strongly encourages the ACCC to expand the sections as they are critical to how voluntary undertakings work.

Having the Guidelines provide more direction on the circumstances where a light-handed undertaking is appropriate, and the different approaches, would be highly beneficial to service providers. By way of example, ARTC envisages that a “light-handed” undertaking could govern the requirements on a service provider to set and publish price indicators and factors for the provision of regulated services. Provided the expected revenue derived from a regulated service (calculated on the basis of the aggregate volumes and the published prices) falls below the revenue cap and pricing is on a non-discriminatory basis, a service provider is given flexibility to set and adjust prices.

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## 5 Administration of undertakings

ARTC’s experience on the 2013 compliance assessment for the HVAU, where the ACCC materially changed a longstanding approach during the term of the undertaking, was not desirable. Such an approach creates significant regulatory uncertainty where investment has been made on an assumption of a consistent regulation approach. It will lead to service providers being very prescriptive in relation to administrative processes in their undertakings. This in turn may provide a disincentive for both owners and users of a network to invest further in infrastructure. This can result in delays in the undertakings process and will produce overly and unnecessarily complicated documents.

In the absence of a merits review right under Part IIIA for decisions made under approved access undertakings, ARTC considers that there should be an assumption of a consistent regulatory approach to the administration of an undertaking by the ACCC and that the Guidelines should reflect this assumption. In particular, there should not be material changes in approaches to administration within the term of the undertaking and changes will generally only be made on extensions or renewals of an undertaking. This will:

- provide regulatory certainty to service providers and access seekers;
- avoid the need for unwanted, over-prescribed undertakings; and
- make the voluntary undertaking route a more attractive and reliable proposition.