

Code Review

Response to Draft Decision Paper – Review of Western Australian Rail Access Regime

11 March 2019

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1 Introduction

Arc Infrastructure Pty Ltd (**Arc**) welcomes the opportunity to respond to the *Review of the Western Australian Rail Access Regime, Draft Decision Paper* as published by the Western Australia Department of Treasury in December 2018 (**Draft Decision Paper**).

This submission (**Submission**) is structured to align with the Draft Decision Paper and addresses the draft recommendations set out in the Draft Decision Paper.

The rail access regime in Western Australia is established by the *Railways (Access) Act 1998* (**Act**) and the *Railways (Access) Code 2000* (**Code**). The purpose of the review is to identify elements of the regime that warrant change that would further promote the statutory objective of the regime; namely, to promote:¹

...the efficient use of, and investment in, railway facilities by facilitating a contestable market for rail operations

The Department has formed the view that price negotiations are not effective under existing arrangements. In particular, the Draft Decision points to the broad range of possible pricing outcomes under the existing revenue ceiling and floor limits, and suggests that this should be changed.

In order to address these concerns, the Department has put forward several proposed changes to help address the perceived difficulty with price negotiations, including:

- moving from a GRV to a DORC basis for valuing rail assets, which is expected to narrow the gap between the revenue ceiling and floor limit for older assets and more accurately reflect the condition of the asset as at the time of an access request;
- requiring railway owners to develop standing offers when requested by the ERA; and
- requiring railway owners to follow competitive imputation pricing principles, where the access price offered to access seekers will be guided by the cost of moving the freight via road transport.

Arc provides this Submission in response to the Draft Decision Paper. Arc seeks to engage in further discussions with the State to ensure that the practicalities and repercussions of the draft recommendations are fully understood before any amendments are made to the Code. Arc also requests the opportunity to review and comment on any proposed drafting amendments to the Code. In this regard, Arc specifically notes the requirements of section 11A(1) of the Act.

Arc engaged economics firm HoustonKemp to provide advice in relation to the Draft Decision. The expert advice provided by HoustonKemp is reflected within this Submission.

A full list of acronyms and commonly used terminology is provided in section 11 of this Submission for reference.

¹ *Railways (Access) Act 1998*, section 2A

2 Regulation of the Arc Network

2.1 Current Western Australian rail access regime

- (a) The current Western Australian rail access regime is designed to encourage commercial negotiations between access seekers and railway owners, who negotiate the terms and conditions under which access is provided, including the price for access. The access price negotiated must fall between a ceiling and floor limit, where:
 - (1) the ceiling represents the total economic cost of providing the infrastructure, designed to preclude price outcomes that reflect the exercise of market power and;
 - (2) the floor reflects the marginal cost of using the rail network to ensure access seekers pay at least the incremental cost of their access.
- (b) Access revenue collected by Arc is far below the revenue ceilings for most of its rail lines. The users' ability to pay, rather than regulatory arrangements, prevent Arc from increasing its access price. The access revenue that Arc can collect from users is constrained by market factors (rather than regulatory factors), such as competition from road and the users' ability and willingness to pay.
- (c) These circumstances stand in sharp contrast to many other infrastructure sectors such as electricity and gas networks, and water services. Rail infrastructure services often have no prospect of earning total revenue that would exceed the long run economic cost of providing the service. Consistent with these observations, many rail lines require regular financial contributions from government to remain financially viable. This is at odds with the possession of market power.

2.2 The rationale for economic regulation

- (a) Economic regulation of infrastructure-based services is generally established under a framework that allows third parties to gain access to infrastructure services owned and operated by others. The need for regulation of the terms and conditions of access arises when the relevant services tend towards natural monopoly. A natural monopoly service exists where it is more efficient for there to be just one service provider, principally arising from the scale economies associated with provision of the service.
- (b) In the absence of economic regulation, the sole service provider would have the incentive and ability to exercise monopoly power, so that prices exceed the long run economic cost of providing the service. This leads to higher prices and lower levels of output, thereby giving rise to allocative inefficiency. The objectives of access regulation are to mitigate the negative efficiency consequences of enduring market power. Access regulation aims to promote more efficient outcomes in markets, as compared with the circumstances that are likely to prevail absent an industry-specific form of regulatory intervention.
- (c) As stated in Productivity Commission's 2013 review of the national access regime:²

The only economic problem that access regulation should address is an enduring lack of effective competition, due to natural monopoly, in markets for

² Productivity Commission, *National Access Regime Inquiry Report*, 25 October 2013, p 7.

infrastructure services where access is required for third parties to compete effectively in dependent markets.

2.3 Options for economic regulation

- (a) There is a spectrum of possible economic regulation options that are typically available. The most common are:
 - (1) cost of service regulation, where a regulator determines the maximum prices or level of revenue that an infrastructure owner can charge, generally with the objective that the infrastructure owner has a reasonable prospect of recovering its efficient cost including a reasonable rate of return on its invested capital;
 - (2) forms of price regulation, under which a regulator sets the maximum price that can be charged for the service but with less emphasis on the recovery of invested capital;
 - (3) a negotiate-arbitrate framework, under which access seekers and the infrastructure owner negotiate in relation to the access charges to be applied (and, if agreement is not forthcoming, may have matters decided by arbitration), subject to floor and ceiling limits as to the costs to be recovered; and
 - (4) price monitoring, where a regulator gathers and publishes information on the costs incurred and charges paid by users.
- (b) The more prescriptive the form of regulation, the more costly it is in terms of its administration. There is also greater potential for unintended distortions to the efficient conduct of service providers, such as the distortions that arise from regulatory error.
- (c) Regulatory error could involve setting prices that are too low or too high relative to the optimal level. Prices that are too low could result in the asset owner being forced into making a loss for providing access, or delays to efficient investment and so the non-provision of services. In contrast, prices set too high cause underuse of the infrastructure relative to the optimal level.
- (d) The significance and scale of the market power problem should be a key consideration when assessing both the need for regulatory intervention and, if so, the appropriate form that it should take. The more costly and intrusive forms of economic regulation are more likely to be justified in industries where the service provider has significant market power and vice versa.
- (e) Arc does not have market power given that:
 - (1) the access revenue it collects is far below the revenue ceiling, which represents the long run cost of providing rail services; and
 - (2) its ability to increase prices is not constrained by regulatory arrangements but rather by market factors, such as competition from road and ability to pay by users.

Accordingly, Arc considers there is a strong rationale for it to be subject to a light handed form of regulation.

3 Asset valuation

Draft recommendation 1A: Change the asset valuation methodology to a DORC method and align the floor and ceiling cost calculations to a building block methodology with an initial DORC valuation.

Draft Recommendation 1B: Allow the use of an annuity approach to depreciation where it is necessary to manage transitional impacts on existing railway owners, for a limited time.

3.1 Background to draft recommendations 1A and 1B

- (a) The Draft Decision Paper proposes moving from a GRV to a DORC value for assets that underpin the determination of ceiling limits, with a rolled forward asset base to determine the revenue ceiling and floor limit in subsequent years.
- (b) The Department believes that moving towards a DORC approach would address its concerns with a GRV approach, which are stated to be that it:
 - (1) does not prevent railway owners from earning a return on capital higher than the regulated WACC;
 - (2) results in a revenue ceiling and floor that does not reflect asset condition, and so hinders negotiations by setting a broader than necessary access price range; and
 - (3) is inconsistent with other regulatory approaches elsewhere in Australia, which could make it harder to obtaining certification from the NCC.
- (c) The Draft Decision then describes how total cost, ie, the revenue ceiling, would be calculated for each year. It explains that total cost would include:³
 - (1) annual capital costs, based on forecast regulatory asset base, incorporating:
 - (A) asset depreciation; plus
 - (B) return on assets based on assessed WACC; less
 - (C) asset appreciation;
 - (2) annual operating costs, including:
 - (A) efficient maintenance costs, which would reflect the age and condition of the asset;
 - (B) operating costs; and
 - (C) tax allowance.
- (d) The Draft Decision recognises that a move from a GRV approach to a DORC approach could have financial implications for railway owners. To help manage

³ Western Australia Department of Treasury, *Review of the Western Australian Rail Access Regime Draft Decision Paper*, December 2018, p 10.

the transition, the Draft Decision (draft recommendation 1B) also recommends that railway owners be allowed the:⁴

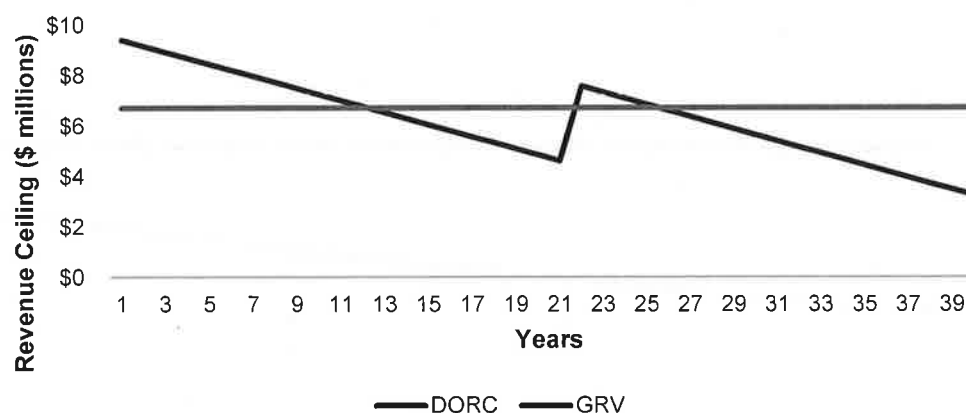
...use of an annuity approach to depreciation where it is necessary to manage transitional impacts on existing railway owners, for a limited time.

- (e) The purpose of this recommendation is to address the short term transitional effects of moving to a DORC, so that access prices in the near term are not constrained. The Draft Decision recommends limiting the use of an annuity depreciation profile to five years.⁵ The intent is to have a ceiling that 'reflects the condition of assets as they age'⁶ in the long run such that the revenue ceiling that declines over time.

3.2 Hypothetical ceiling comparison under GRV and DORC

- (a) In order to assess the implications of moving from a GRV approach to a DORC approach in setting a revenue ceiling, we considered the example of a railway that has a replacement value of \$80 million, comprising of:⁷
- (1) \$40 million in assets with an economic life of 20 years, ie, signalling, communication, level crossing and timber sleepers; and
 - (2) \$40 million in assets with an economic life of 40 years, ie, concrete sleepers and rail tracks; and
 - (3) a WACC of 8 per cent.
- (b) In our example, it is assumed that the railway owner will replace the rail assets at the end of their economic life and that this would be rolled into the asset base. For example, the railway owner would replace assets with an economic life of 20 years at the start of year 21, and this would be rolled into its asset base going forward. A comparison of the ceiling under GRV and DORC over the 40 year life of the asset is shown in Figure 1 below.

Figure 1: Comparison of the revenue ceiling under GRV and DORC



⁴ Western Australia Department of Treasury, *Review of the Western Australian Rail Access Regime Draft Decision Paper*, December 2018, p 22

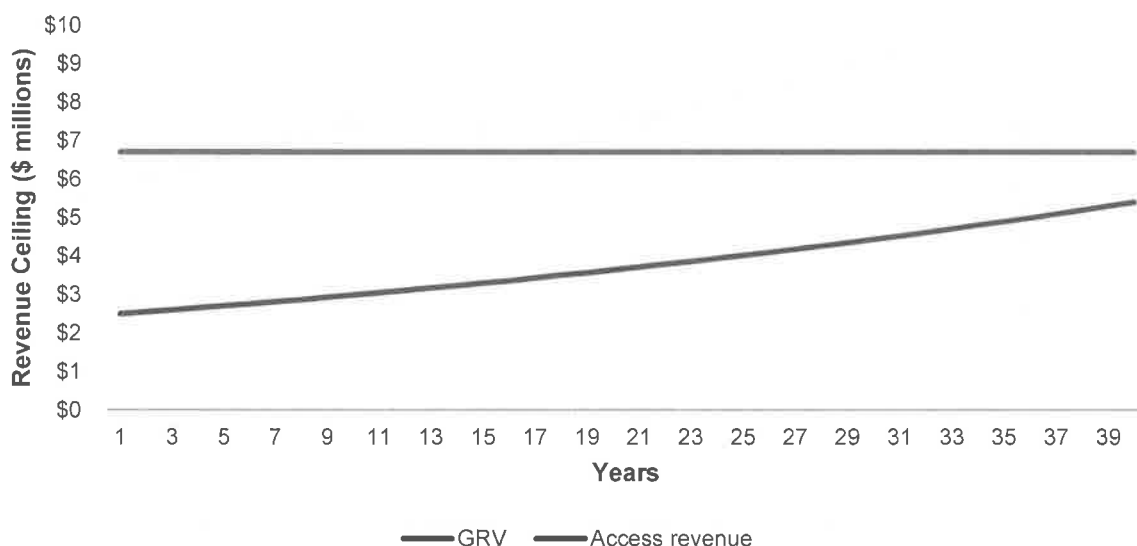
⁵ Ibid, p 20

⁶ Ibid, p 20

⁷ For simplicity, we have excluded maintenance cost from our analysis. We note that this does not affect our analysis in the remainder of this Submission.

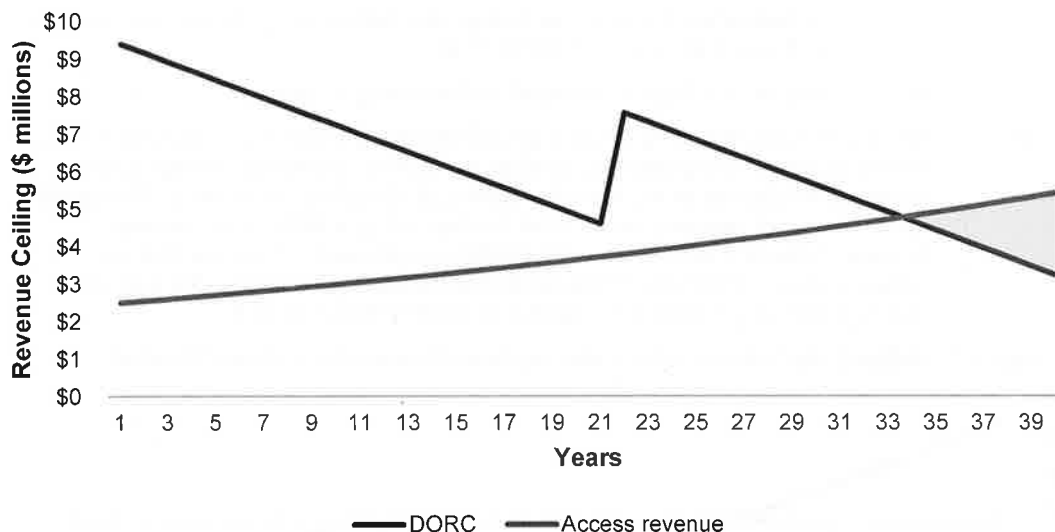
- (c) We make the following comments:
- (1) generally speaking, the DORC approach leads to a higher ceiling in earlier years when assets are relatively young because:
 - (A) under a GRV approach the ceiling is stable during the 40 year period; and
 - (B) under a DORC approach the ceiling declines over the same period;
 - (2) there is an increase in the ceiling under a DORC approach in year 21, as the railway owner incurs \$40 million to replace assets that are at the end of their economic life;
 - (3) the present value of the ceiling under the GRV is \$80 million, which is lower than under the DORC since the DORC ceiling reflects:
 - (A) the initial \$80 million investment; and
 - (B) the \$40 million capex accrued in year 20; and
 - (4) a shift to DORC reduces the owner's ability to recover its future investment cost.
- (d) Notwithstanding the comments above, having a higher ceiling in a DORC framework appears beneficial to the railway owner as it is able to frontload its cost recovery. However, these theoretical benefits are constrained by commercial outcomes which are largely dependent on market conditions and the access seekers' ability to pay.
- (e) We have also considered the example above assuming that the railway owner is able to earn an access revenue of \$4 million in year one, which grows at one per cent per year as in Figure 2.

Figure 2: Comparison of the revenue ceiling under GRV and access revenue



- (f) Under a GRV approach, the railway owner is able to collect what users can reasonably pay (depicted as the red line in Figure 2) and that the revenue ceiling does not prohibit the railway owner from collecting a revenue above this. Rather, it is the market circumstances, such as the competition from road and users' ability to pay that constrain the railway owner's ability to collect revenue. This is despite access revenue being below the total cost of building and operating the hypothetical railway.
- (g) Put simply, the railway owner is constrained by two factors, ie:
- (1) the revenue ceiling, and so the regulatory arrangements that are in place; and
 - (2) the market factors, such as competition from road and users' ability to pay.
- (h) We have also considered an example where the revenue ceiling is determined using a DORC approach. The revenue ceiling becomes binding from the year 34 and onwards as the ceiling declines over time and access revenue increases, reducing the railway owner's ability to collect revenue. The reduction in revenue is represented as the grey triangle in Figure 3 below.

Figure 3: Comparison of the revenue ceiling under DORC and access revenue

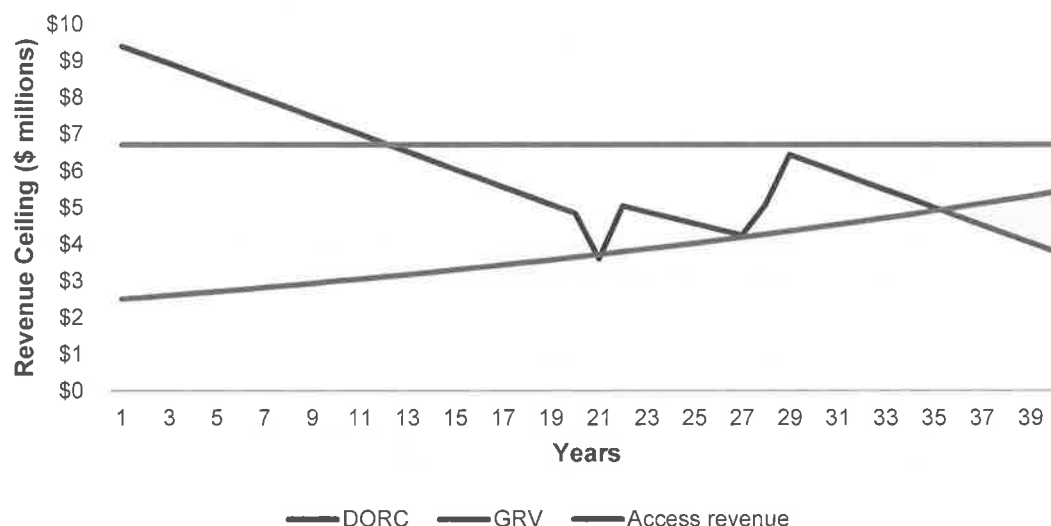


- (i) When the railway owner is considering whether to undertake the capex program in year 21, it would be based on a financial assessment of:
- (1) the cost of undertaking the investment, or \$40 million; against
 - (2) the access revenue it can make from the investment, which would keep the line open.
- (j) It follows that shifting to a DORC approach reduces the railway owner's ability to recover its investment cost, even when users are willing to pay for the upgrade.

3.3 Effect of a declining ceiling on capital expenditure

- (a) Another consequence of shifting to a DORC approach is that the revenue ceiling is more likely to be binding. It follows that there is a higher financial incentive to invest in the network when the ceiling is binding, and a reduced incentive to invest when it is not.
- (b) In the example mentioned above, assuming that the railway owner would replace assets at the end of their economic life, the revenue ceiling will increase in year 21, when the ceiling is not binding.
- (c) We have also considered an alternative replacement approach, where the railway owner:
 - (1) only invests \$20 million in the year 21, ie, it only replaces half the assets that have exceeded their economic life; and
 - (2) replaces the remaining assets that have exceeded their economic life in the year 27, when the revenue ceiling becomes binding.
- (d) The consequence of this investment profile is that it 'smooths' the revenue ceiling later when the ceiling becomes binding – Figure 4. This increases the access revenue the railway owner can collect because it:
 - (1) delays when the revenue ceiling becomes binding, ie from the year 34 in figure 4 to year 35 in figure 5; and
 - (2) results in a higher ceiling when the ceiling is binding.
- (e) Put another way, a ceiling under a DORC approach creates an incentive for the railway owner to undertake capex when the ceiling is binding, as opposed to when it is efficient to do so, thereby leading to allocative inefficiency. This could take the form of delaying capex to when the ceiling is binding, or moving forward capex so that it does not constrain the amount of revenue that the railway owner can collect. In the context of the example railway, the loss in revenue (the grey triangle) in Figure 4 is smaller than Figure 3.

Figure 4: Delaying replacement capex can increase the maximum access revenue





3.5 Asset roll-forward in other sectors

- (a) An asset base roll-forward approach is typically used in the context of revenue cap regulation, where a regulator sets the maximum amount of revenue that a business can collect by means of its services. The revenue cap reflects the total cost of providing the regulated service, including an appropriate return on capital. Regulated prices are then set so that the expected revenue collected is the same as total costs. Doing so promotes allocative efficiency, since infrastructure owners will only invest if they can recover the cost of their investment, including a reasonable rate of return.
- (b) Where actual revenue differs from expected revenue, for example as arises from a difference in forecast and actual demand, there is usually an under or over recovery adjustment mechanism.⁸ The purpose of the mechanism is to ensure that any under or over recovery of revenue is reflected in the revenue cap in future periods, thereby ensuring that the regulated business has an opportunity to recover its total cost. In other words, a revenue shortfall in one year would lead to an increased revenue cap in future years.

⁸ One notable exception we found in our review is the ERA's approach to regulating Western Power. Western Power had an under/over recovery adjustment mechanism but the ERA decided to remove this mechanism. The rationale for the removal was to prevent price shocks to users that were arising from the adjustments. See Economic Regulation Authority, *Further Final Decision on Proposed Revisions to the Access Arrangement for the Western Power Network 2017/18 – 2021/22*.

Table 1:

| Approach | Description | Examples of regulatory regimes |
|---|---|---|
| Asset roll-forward with under/over recovery adjustment mechanisms | <p>The infrastructure owner can earn a revenue equal to the ceiling. Prices are set so that expected revenue collected from users is equal to the ceiling. Over/under recovery in a year leads to adjustment to the revenue ceiling in future years so that in the case of:</p> <ul style="list-style-type: none"> over-recovery of revenue, users do not pay more than efficient cost; and under-recovery of revenue, infrastructure owners are able to still recover their total costs | <ul style="list-style-type: none"> Australian Energy Regulator (AER) – electricity networks in all states except WA AER – covered gas distribution networks Queensland Competition Authority (QCA) – Aurizon central Queensland coal rail network Australian Competition and Consumer Commission (ACCC) – Australian Rail Track Corporation (ARTC) Hunter Valley coal rail network QCA – Queensland Rail rail network (West Moreton line only) |
| Asset roll-forward without under/over recovery adjustment mechanisms but receive significant government funding | <p>The infrastructure owner does not earn an amount that is near the revenue ceiling. Access prices are not set with reference to the ceiling but are negotiated within a revenue ceiling and floor limits. An under-recovery mechanism does not exist but government funding is typically required to ensure the financial sustainability of the business</p> | <ul style="list-style-type: none"> QCA – Queensland Rail rail network (all lines except West Moreton line) ACCC – ARTC interstate rail network |
| Asset roll-forward without under/over recovery adjustment mechanisms | <p>The infrastructure owner can earn a revenue equal to the ceiling. Prices are set so that expected revenue collected from users is equal to the ceiling. However, there are no over/under recovery adjustments</p> | <ul style="list-style-type: none"> Economic Regulation Authority (ERA) – Western Power electricity network |
| (c) | <p>The proposed DORC and associated roll forward asset valuation approach put forward by the Department is similar to that applied to two other regulatory frameworks in the rail sector, namely:</p> <ol style="list-style-type: none"> the ACCC's regulation of ARTC's interstate network; and the QCA's regulation of Queensland Rail's rail network, except for the West Moreton line. | |
| (d) | <p>Both regimes above have a ceiling and floor limit calculated using a DORC roll-forward approach and do not have any revenue under-recovery adjustment mechanism. Access revenue for both networks is also lower than the ceiling, meaning that there is limited prospect of recovery of total costs. However, both railway companies are owned by the government, and receive significant funding each year. For example:</p> <ol style="list-style-type: none"> Queensland Rail's below rail network received \$850 million in revenue in 2016-17, of which \$538 million was government funded;⁹ and ARTC received around \$70 to \$80 million per year from government grants from 2015-16 to 2017-18 – by way of comparison, access revenue from its interstate rail network ranged from \$271 to \$286 million per year during the same period.¹⁰ | |

⁹ Queensland Rail, *Financial Statements for the Year Ended 30 June 2017: Below Rail Services Provided by Queensland Rail*, 2017, p. 4. Queensland Rail receives funding from the Queensland government via the transport service contract

¹⁰ ARTC, *Annual Reports*, available at <https://www.artc.com.au/about/reports/annual-reports/>

- (e) Both the ACCC and the QCA have applied different regulatory approaches depending on the circumstance of the rail business, ie:
 - (1) the ACCC has an under-recovery mechanism for the ARTC's Hunter Valley coal rail network but not for ARTC's interstate rail network; and
 - (2) the QCA has an under-recovery mechanism for Aurizon's central Queensland coal network and Queensland Rail's West Moreton line¹¹ but not for other lines owned by Queensland Rail.
- (f) This highlights the need for any regulatory regime to be 'fit for purpose' and thereby match the circumstances of the service providers.

3.6 Inclusion of an under-recovery mechanism

- (a) The proposed DORC approach without an under-recovery mechanism would result in allocative inefficiency because it would:
 - (1) reduce a railway owner's ability to recover the cost of future investment;
 - (2) distort the timing of when a railway owner undertakes capex;
 - (3) [REDACTED]
 - (4) lead to allocative inefficiency, and therefore risk not being assessed as an effective access regime by the NCC (see section 3.7 of this Submission).
- (b) Whilst the lack of an under-recovery mechanism is consistent with the framework applied to Queensland Rail's rail network and ARTC's interstate network, those rail networks should be differentiated from the Arc Network and the other rail networks subject to the Western Australia access regime in that the Queensland Rail rail network and ARTC interstate network require significant government funding to remain financially viable.
- (c) Arc's view is that the existing, light handed GRV approach is appropriate for the Arc Network, given its absence of market power. If a DORC approach is adopted, then the Department should include an under and over revenue adjustment mechanism. This would:
 - (1) resolve the issues identified above;
 - (2) be consistent with other regimes and sectors; and
 - (3) represent minimal change to Draft Decision from an administrative perspective.

3.7 Efficiency criteria for an effective access regime

- (a) In making a decision whether an access regime is an 'effective access regime for a service' under the CCA, the designated Minister must have regard to the objects of Part IIIA of the CCA,¹² which are to:
 - (a) *promote the **economically efficient** operation of, use of and investment in the infrastructure by which services are provided, thereby promoting*

¹¹ Queensland Rail is able to collect access revenue that is at the ceiling limit on the West Moreton line for its coal users.

¹² CCA, section 44N(1)(2)(aa).

effective competition in upstream and downstream markets; and [Emphasis added]

(b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.¹³

- (b) 'Efficiency' is widely accepted by economists as having three distinct dimensions, being:¹⁴
- (1) productive efficiency, ie, production using a least-cost combination of inputs;
 - (2) allocative efficiency, ie, production of an optimal set of goods and services, which is allocated so as to provide the maximum benefit to society; and
 - (3) dynamic efficiency, ie, achieving productive and allocative efficiency over time, in the face of changes in technology and consumer preferences.

Arc's assessment of the proposed shift to a DORC approach to calculating the revenue ceiling is that it would lead to allocative inefficiency

[REDACTED]

[REDACTED]

[REDACTED]

- (d) The proposed change from a GRV to a DORC asset valuation methodology may render the Western Australian rail access regime inconsistent with the objectives of Part IIIA of the CCA, and therefore less likely to be certified as an effective access regime under the CCA.

3.8 Expert selected from agreed panel

- (a) Arc considers that, where the ERA disagrees with a railway owner's submission with respect to any of the matters referred to in paragraphs 3.8(a)(1) to 3.8(a)(6) of this Submission, the ERA should be required to obtain advice from an expert (selected from a panel of experts agreed by the ERA and the railway owner) with respect to:
- (1) the railway owner's proposal as to how its railway will be segmented or broken down for the purposes of establishing the RAB;
 - (2) the railway owner's calculation of the RAB;
 - (3) the railway owner's determination of the remaining life of the assets in the RAB;
 - (4) the railway's proposed depreciation profile for the remaining life of the asset;

¹³ CCA, section 44AA.

- (5) any changes proposed by the railway owner to its depreciation profile; and
 - (6) the railway owner's 5-yearly submissions in relation to the RAB roll-forward and WACC.
- (b) In addition, the Department must give railway owners the opportunity to be closely involved in the development of the detailed asset valuation methodology, so as to ensure it is capable of being implemented.

3.9 Expert advice

- (a) Where the ERA is required to obtain expert advice in relation to a matter referred to in section 3.8, the ERA must be required to obtain that advice from a suitably qualified and experienced expert who is on the panel of experts agreed by the ERA and the railway owner.
- (b) The ERA must also be required to provide a copy of all expert reports obtained in connection with a railway owner's submission, and give the relevant railway owner a reasonable opportunity to review the expert report and respond to its findings.

3.10 RAB roll-forward

- (a) The proposed DORC approach requires the railway owner to roll forward its asset base on a periodic basis. The Department has suggested that the ERA review the roll forward of the asset base every five years (to coincide with its review of the WACC), or when an access proposal is made. The Department has also suggested that the ERA conduct an ex-post assessment of capex.
- (b) The Draft Decision does not provide any detail as to how the ex-post assessment would work. We can only assume that this would involve a similar assessment used by other regulators, such as the AER. By way of example, the ex-post assessment undertaken by the AER involves assessing whether the expenditure was prudent and efficient. The AER further explains that: ¹⁵

Prudent expenditure is that which reflects the best course of action, considering available alternatives. Efficient expenditure results in the lowest cost to consumers over the long term. That is, prudent and efficient expenditure reflects the lowest long term cost to consumers for the most appropriate investment or activity required to achieve the expenditure objectives.
- (c) The prudent and efficient assessment can involve a detailed, project by project assessment, and so can be costly to conduct. For example, the AER's ex-post assessment of capex may examine the following: ¹⁶
 - (1) if the project management and planning processes were appropriate;
 - (2) the drivers of capex;
 - (3) if any overspending was justified; and
 - (4) if overspending was not justifiable, how much should be considered inefficient and/or imprudent.

¹⁵ AER, *Expenditure Forecast Assessment Guideline for Electricity Distribution*, November 2013, p 11.

¹⁶ AER, *Capital Expenditure Incentive Guideline for Electricity Network Service Providers*, November 2013, p 61.

- (d) If the capex is considered inefficient or imprudent, then the AER can exclude some, or all, of its value from being rolled into the asset base. In effect, capital expenditure that is considered to be inefficient or imprudent will be written off from a regulatory perspective.

3.11 Assessment of the need for ex-post capex assessment

- (a) Ex-post capital expenditure assessments are a common feature in revenue cap regulation when the regulated business can expect to earn a revenue that is equal to its regulated revenue cap. In these circumstances, there may be an incentive for the regulated business to over-invest, ie, act in an inefficient or imprudent manner, since it can earn the regulated rate of return on its investment. An ex-post capex assessment can act as a significant deterrent to the incentive to over-invest, since there is a risk that any inefficient and/or imprudent capex could be written-off.
- (b) The need for ex-post capital expenditure assessment depends on whether there is an incentive for the railway owner to over-invest, which could depend on its market circumstance. Where cost recovery is a challenge, ie, when access revenue is below the revenue ceiling, a railway owner has a strong incentive to be prudent and efficient in its capital expenditure, given that there is no guarantee that it would be able to recover its costs. Any inefficient or imprudent expenditure would translate into reduced profits for that railway owner's business.
- (c) There are a number of important reasons to suggest that ex-post capital expenditure assessments are not appropriate for Arc. These are because:
 - (1) Generally speaking, Arc is unlikely to consistently earn access revenue exceeding the ceiling on a network wide basis, and so has little incentive to over invest in the Arc Network;
 - (2) any ex-post investment evaluation is likely to be costly for both Arc and the ERA; and
 - (3) the end result of these considerations is that the threat of such an assessment being applied is likely to be a substantial disincentive for future investment.
- (d) In summary, having ex-post capital expenditure assessments would result in significant costs for both Arc and the ERA, and would result in limited, if any, benefits for users.

3.12 Transitional Provisions – Annuity Depreciation Profile

- (a) The Department proposes that draft recommendation 1B would be implemented by allowing railway owners to make a proposal to the ERA about:
 - (1) the use of an annuity depreciation profile for their railway; and
 - (2) the railway owner's need to use that profile.
- (b) The Department proposes that a railway owner would have to demonstrate that an annuity depreciation profile was required to address transitional impacts of moving from a GRV to a DORC asset valuation methodology. If a railway owner can demonstrate that these arrangements are required to address the transitional impacts then the ERA would be required to approve the use of an annuity depreciation profile for a maximum of five years.
- (c) According to the Department, a railway owner can show that an annuity depreciation profile is required to address transitional impacts by demonstrating

that the conventional straight line depreciation approach to DORC would constrain the access prices that could otherwise be negotiated. This would involve providing evidence that the conventional DORC ceiling price would be below the prices that access seekers are willing to pay for access to the relevant railway.

- (d) The difficulty with the method referred to above is that it requires a railway owner to demonstrate the requirement for an annuity depreciation approach where no other entity has the type of access sought by the access seeker. Accordingly, a railway owner could only provide a theoretical justification for its annuity depreciation profile, which would not be grounded in actual data about the prices access seekers are willing to pay for rail access.
- (e) Whilst the intent of the annuity depreciation profile provision is clear, the difficulty in implementation lies in the fact that the railway owner has already foregone the revenue gap between the actual price paid by access seekers and the revenue ceiling in the earlier years of the GRV framework, which will be further exacerbated in a DORC framework. Offering a transitional provision as such would raise the revenue ceiling for up to a maximum of five years however that does not necessarily mean that the railway owner will be able to recover revenue at the ceiling, due to market constraints. This means that, whilst the railway owner can implement the transitional provisions at the outset of the new regime, this may be of no benefit to the railway owner. The GRV methodology offers the railway owner an assurance that it will not be penalised in future years for charging access prices below the ceiling. One resolution for this problem would be the inclusion of the proposed under-recovery mechanism referred to at paragraph 3.6 of this Submission.

3.13 Increase to compliance costs

- (a) As set out in Arc's Issues Paper Submission of 17 November 2017, Arc is concerned that a shift to a DORC asset valuation methodology will significantly increase its regulatory compliance costs and create a substantial administrative burden both initially and on an ongoing basis.
- (b) Calculating ceiling costs in a DORC regime for each asset existing on the 5,500km Arc Network will create a significant administrative burden for Arc. The Arc Network comprises in excess of 8 million individual rail assets, collectively forming more than 50 routes. It is not clear to Arc whether the Department envisages Arc provide an individual submission in respect of each rail asset, line segment or route. At the very least, this would require Arc to produce in excess of 50 submissions, each supported by expert advice and each to be subject to further expert opinion and review. This is also likely to create a significant administrative burden and substantial costs for the ERA.
- (c) Arc proposes that railway owners be entitled to submit to the ERA that certain assets be bundled for the purpose of determining a RAB. Arc seeks that the Department consult with Arc to determine the basis on which some assets should be bundled, and that the Department include provisions enabling this to occur. Without guidance from the Department on this issue, Arc considers that is likely that significant cost and expense may be incurred by both Arc and the ERA in resolving this issue.
- (d) Without further detail on how the Department envisages the DORC regime to be implemented, Arc can only assume that each railway owner will develop their own interpretation of how the principles should be applied, and make submissions to the ERA accordingly. There is no guarantee that there will be a consistent approach amongst railways owners, or that the approach taken by

railway owners will be consistent with the Department's intended application of the regime.

3.14 Developing a fit for purpose regulatory framework

- (a) The design of any regulatory regime should consider:
 - (1) the market power possessed by the business;
 - (2) the potential benefits of regulation;
 - (3) the regulatory burden placed on the business and regulator; and
 - (4) the cost of regulation.
- (b) It follows that the regulatory design should be conscious of the burden that it imposes on the regulator and business, and be fit for purpose. For example:
 - (1) the State should consider consolidating some rail assets or routes from a regulatory perspective so as to reduce regulatory burden; and
 - (2) having a lighter handed approach to regulating routes that are far below the ceiling.
- (c) Having a different approach to regulation based on the circumstance on the network is consistent with the approach adopted by other regulators, ie, the arrangements are tailored by reference to the likelihood that the rail business will be able to earn a revenue that is at or near the ceiling. For example, the ACCC has a more comprehensive approach to regulating ARTC's Hunter Valley rail network when compared to ARTC's interstate network. Similarly, the QCA imposes more comprehensive regulatory restrictions on Queensland Rail's West Moreton system than on other parts of Queensland Rail's network, such as the requirements for reference tariffs and ex-post capex assessments.

3.15 Insufficient information and lack of procedural fairness

- (a) Arc has not been provided with sufficiently detailed information to enable it to perform a technical analysis of the impact of draft recommendation 1A and 1B on Arc's business. This in turn has limited the extent to which Arc can respond to these draft recommendations.
- (b) The insufficiency of information creates uncertainty for Arc's business. It is indicative of a flawed consultation process that lacks procedural fairness, which potentially jeopardises the validity of any amendments to the Code that may result from this process. The Draft Decision Paper lacks detailed information regarding:
 - (1) the operational and economic principles underlying the Department's proposal;
 - (2) the financial models used by the Department and the detailed information used by the Department to develop the models;
 - (3) the framework and guiding principles that will be used to determine and verify the calculation of the RAB, the economic or physical asset life, and the floor and ceiling forecasts;
 - (4) the process of transitioning from a GRV to a DORC asset valuation methodology;
 - (5) any details as to the annuity formula the Department used in making draft recommendation 1B;

- (6) the framework and guiding principles to be used in the development of an annuity depreciation profile; and
 - (7) how the proposal contained in draft recommendations 1A and 1B will be implemented in practice.
- (c) Furthermore, the Draft Decision does not include sound and quantifiable industry-specific examples of the postulated benefits arising from draft recommendations 1A and 1B.
- (d) The Department has advised that it is unable to provide Arc with the financial models used by the Department in connection with draft recommendation 1A. It is important that Arc is given access to the financial models and the detailed assumptions underpinning the models so that it can make an informed assessment as to whether they are reasonable and appropriate for the Arc Network.
- (e) The insufficiency of information in relation to draft recommendations 1A and 1B creates significant uncertainty for Arc's business, particularly with respect to:
 - (1) how the process of transitioning from a GRV to a DORC asset valuation methodology will be undertaken and managed across the Arc Network;
 - (2) how the change in asset valuation methodology will impact negotiations under the Code and access agreements entered into under the Code during the transition period;
 - (3) how the new asset valuation methodology will be applied in practice to each of Arc's 8 million individual rail assets;
 - (4) Arc's ability to plan future investments and quantify expected revenue (particularly where there is a risk that Arc may not be entitled to include in its RAB certain assets resulting from future investments);
 - (5) Arc's ability to realise revenue in the long term where its assets are valued under a DORC methodology on the basis that the level of permitted revenue recovery is determined by the capital expenditure allowed by the ERA; and
 - (6) Arc's rail assets having a nil regulatory value at the end of the Lease when Arc and the State may wish to renew or extend the Lease, whether with Arc or otherwise. This will also be problematic for the State if the Lease comes to an end and the State resumes control of the rail assets.
- (f) The lack of detail provided in relation to recommendation 1A has also impacted on Arc's ability to assess the impact of draft recommendation 1B, particularly Arc has been unable to:
 - (1) assess the quantitative impact of an annuity approach to depreciation on the Arc Network on a practical level;
 - (2) compare an annuity approach to depreciation against a conventional straight line depreciation approach to its assets; or
 - (3) determine the extent to which an annuity approach to depreciation will affect the impact that the transition from a GRV to DORC asset valuation methodology will have on Arc's business.
- (g) This uncertainty for Arc's business is compounded by the fact that any submission by Arc with respect to the RAB, the depreciation profile (including any changes to the profile) and the RAB roll-forward is subject to approval by the ERA which means there is no certainty that Arc's proposed implementation

of the DORC asset valuation methodology would be accepted and apply in practice in the future.

- (h) A proper consultation process (whether under section 11A(1) of the Act or otherwise) requires that the Department provide sufficient information to permit Arc to intelligently consider and respond to the recommendations. The lack of critical information, the lack of certainty in relation to draft recommendations 1A and 1B and the Department's failure to provide financial models is a critical issue for Arc. As noted above, these deficiencies suggest a process that lacks procedural fairness. The flawed consultation, and the failure to have regard to Arc's submissions, jeopardise the validity of any amendments to the Code that may result from this process and expose the amended legislation to challenge.

[illegible]

3.17 Summary

- (a) Arc opposes the proposed change in the asset valuation methodology to a DORC method and the proposed floor and ceiling reset. Arc is of the view that the GRV asset valuation methodology is best placed to support the local economy and provide businesses with competitive rail access pricing, and that the existing floor and ceiling cost calculations should be retained.
- (b) If, despite Arc's objections, draft recommendations 1A and 1B are implemented then:
 - (1) the Department must modify the regime to incorporate a revenue under-recovery mechanism and over-recovery mechanism;
 - (2) the State must ensure that railway owners are given the opportunity to be closely involved with the development of the detailed asset valuation methodology prior to the amendments to the Code being made; and

- (3) the ERA must be required to obtain advice from an expert (selected from a panel of experts agreed by the ERA and the railway owner) with respect to the railway owner's submissions in connection with this proposal including the RAB value, the depreciation profile and RAB roll-forwards.

(c) Arc considers that:

- (1) the State should be solely liable for the costs incurred by the ERA in connection with the implementation of draft recommendations 1A and 1B (including the costs of engaging experts) until the transition from a GRV to a DORC asset valuation methodology is complete; and
- (2) the State should have no right to recover from a railway owner any such costs incurred by the ERA during that period.

4 Pricing guidance

Draft recommendation 2 – require railway owners to publish a standing offer for defined rail tasks when required by the ERA

- (a) The Department proposes that draft recommendation 2 would be implemented in the following way:
 - (1) the ERA would be required to determine when a standing offer is required, using the criteria that the ERA applies in any situation where there are one or more actual or potential operators on a route with similar freight tasks, with similarity in freight tasks assessed in relation to train length, axle load and freight type;
 - (2) the railway owner would be required to develop standard terms and conditions to underpin the standing offer, including service standards associated with that price (which would not need to be approved by the regulator);
 - (3) once a standing offer was required, the railway owner would be required to keep it up to date until such time as the ERA decided it was no longer required; and
 - (4) the railway owner would be required to publish the standing offer on its website.
- (b) Arc generally supports draft recommendation 2 subject to the following comments.
- (c) Arc submits that, apart from the interstate rail freight task (container traffic only), there are currently no freight tasks on the Arc Network where a standing offer could be required as the majority of tasks on the Arc Network are not homogenous.
- (d) With respect to the assessment of 'similar freight tasks', it is critical to recognise that the regulation of access to rail infrastructure differs significantly from the regulation of access to other transportation infrastructure (such as access to gas pipelines, electricity transmission lines and water pipelines). This difference arises due to the diverse nature of the rail access tasks. The access required for transportation of a quantity of gas, electricity or water for different customers is far more homogenous than the access required for the transportation of freight for different customers. Some of the variables in relation to a rail freight task include the type commodity being transported, the axle load, speed, train length and type, wheel diameter, origin and destination, and timing of services in relation to both day of the week and time of day.
- (e) There are no such analogous requirements in relation to the transportation of gas, water and electricity, where all 'product' transported must necessarily comply with certain quality requirements before that can be transported on a common system, such that the molecule of gas (for example) a producer puts into a transportation system is unlikely to be the same molecule that is withdrawn by them (or their customer) at the other end.
- (f) Arc considers that a number of aspects of draft recommendation 2 require clarification. In relation to paragraph 4(a)(1) of this Submission, it is not clear:
 - (1) what is meant by the term 'standing offer' – and whether it is the pricing schedule for access to a particular freight task, or if it also

encompasses the standard terms and conditions governing access for that freight task;

- (2) what is meant by the criteria that the ERA applies 'in any situation where there are one or more actual or potential operators on a route with similar freight tasks' – Arc recommends that, for clarity:
 - (A) the reference to 'one or more' operators should be amended to refer to 'more than one' operator;
 - (B) the reference to 'potential operators' should be limited to operators that have submitted a *bona fide* access request;
 - (C) the factors that must be taken into account when assessing whether certain freight tasks are 'similar freight tasks' should include:
 - freight/commodity/product type;
 - tonnage (per wagon and per train);
 - origin and destination (including number and length of immediate stops), travel time and speed of travel;
 - departure and arrival times and days of the week; and
 - train configuration (including with respect to the number and type of rollingstock used in the train, axle load and train length);
- (3) how the ERA determination process would be triggered - for example, would the ERA make a determination that a standing offer is required of its own accord or would the process be triggered by a request from a railway owner, access seeker or access holder to the ERA for a determination that a standing offer is required;
- (4) what input the railway owner would have with respect to the ERA's determination that a standing offer is required; or
- (5) what rights the railway owner would have with respect to disputing the ERA's determination that a standing offer is required.

(g) In relation to paragraph 4(a)(2) of this Submission:

- (1) Arc assumes that the ERA would advise the railway owner when a standing offer is required to be prepared, and, the railway owner would then determine the price and the terms governing access, which comprise the standing offer, and the standing offer would not require approval by the ERA - Arc notes this process is not clear in the Draft Decision Paper and, if this draft recommendation is proposed to be adopted then railway owners must be given an opportunity to comment on the proposed process and the process must be clearly set out in any amendment to the Code; and
- (2) if this draft recommendation is implemented then the Code must be amended to include a provision that clarifies that the price specified in the standing offer is only available where the access seeker is prepared to accept the standard terms and conditions that underpin the standing offer, and that if an access seeker requires a departure from the standard terms and conditions, or any variation to the standard freight task, then the railway owner is entitled to determine an adjustment to the price specified in the standing offer.

- (h) In relation to paragraph 4(a)(3) of this Submission:
- (1) it is not clear what the railway owner is required to keep up to date. Presumably it is the price and the standard terms and conditions that underpin the price, however this requires clarification;
 - (2) the Code should expressly allow for a railway owner to make a submission to the ERA that a standing offer is no longer required and apply for revocation of the standing offer; and
 - (3) the railway owner's right to vary the price specified in the standing offer and the standard terms and conditions specified in or underpinning the standing offer at any time should be made clear in the Code.

Draft recommendation 3 – introduce a competitive imputation pricing principle as part of the pricing principles set out in Clause 13, Schedule 4 of the Code

- (a) The Department proposes that draft recommendation 3 would be implemented by requiring the parties to consider the following principle when negotiating access prices:
- Where there is a competitive alternative, an access price should be negotiated with regard to the price of another mode of transport (or combination of) for transporting similar freight, adjusted for service quality differences between rail and the competitive alternative and reduced by the efficient above rail cost of providing the relevant freight service.*
- (b) The Draft Decision Paper suggests that the access price should reflect:
- (1) the maximum competitive price that could be charged for rail haulage for the freight service having regard to:
 - (A) the long term efficient line haul cost of using an alternate mode of transport for a similar freight service; and
 - (B) any **service quality** or **other difference** between rail haulage and the alternate mode of transport; [emphasis added]
 - (2) less the long term efficient cost of providing the above rail service.
- (c) Arc generally supports draft recommendation 3 subject to the following comments.
- (d) Firstly, Arc considers that the Code should be amended to expressly state that the application of the pricing principle does not, in any circumstances, require the railway owner to offer a price for access that is less than the incremental costs and a reasonable return on capital, resulting from its operations on that route and use of that infrastructure.
- (e) Secondly, if this proposal is implemented then it must include provisions that manage the information asymmetry between the railway owner and the access seeker. The railway owner is unlikely to have access to information regarding the long term efficient line haul cost of using an alternative mode of transport. Nor is the railway owner likely to be in a position to know the costs of providing an above rail service (assuming the railway owner is not vertically integrated). This information asymmetry will create a significant disadvantage for the railway

owner when this principle is purported to be applied in the negotiation of access prices.

- (f) Thirdly, given that the pricing principle refers to an adjustment to the negotiated access price for differences in service quality and other differences, consideration must be given to how 'service quality' and 'other difference[s]' (see paragraph 4(b)(1)(B) of this Submission) will be defined, assessed and quantified in the application of the adjustment mechanism. Some of the 'other differences' between rail haulage and road haulage are the costs (some of which are subjective) associated with road haulage, such as:
 - (1) environmental costs including air and noise pollution costs;
 - (2) the cost of upgrading, maintaining and repairing road infrastructure;
 - (3) decreased amenity for communities associated with more trucks on roads; and
 - (4) fatalities and serious injuries resulting from road freight crashes.
- (g) The process of gathering reliable data in relation to these costs and quantifying such costs (particularly subjective costs) is likely to be extremely difficult, time consuming and expensive.
- (h) Accordingly, Arc considers that the Code should recognise that a rail access price that is negotiated with regard to the price of road haulage should be subject to a positive adjustment which captures the social and other benefits of rail transport over road referred to in paragraph 4(f) of this Submission. The arbitrator must be required to have regard to the parties' submissions on the quantum of the positive adjustment or premium.
- (i) It is also unclear what is meant by the term 'service quality' when used in the proposed pricing principle. Arc considers that, if draft recommendation 3 is implemented then the term 'service quality' should be defined.

5 Ability to opt out

Draft recommendation 4 - Extend the requirement in s.16(1)(b) of the Code to not unfairly discriminate between proponents to access agreements made outside the Code.

- (a) The Department proposes that draft recommendation 4 would be implemented by:
 - (1) permitting an access seeker to request that the arbitrator assess a claim of unfair discrimination at any time after negotiations have begun; and
 - (2) requiring the arbitrator to consider whether the price, terms or conditions in the proposed access agreement could constitute unfair discrimination, in relation to:
 - (A) other proponents that had sought access within the Code; and
 - (B) proponents that had sought access out of the Code.
- (b) Arc is generally supportive of draft recommendation 4, subject to the following conditions.
- (c) Arc is concerned that the implementation of draft recommendation 4 will undermine the commercial position achieved by access holders through commercial negotiations of access agreements outside the Code. If access agreements are disclosed to competitors of the relevant access holder, then the competitors will have access to the access holder's commercially sensitive information and the access holder will lose the benefit of any hard won commercial negotiation.
- (d) Arc submits that if draft recommendation 4 is implemented then information in relation to outside-the-Code access agreements should not be made available to anyone except the arbitrator. If the Department does not agree to limit the obligation to provide information in this manner, then the Code should be amended to ensure that the railway owner is only required to provide outside-the-Code information where a rigorous confidentiality regime is in effect. The railway owner should only be obliged to disclose information that is directly relevant to the claim of unfair discrimination. Furthermore, the railway owner should only be required to disclose the information to a limited number of individual recipients who have:
 - (1) been approved in advance by the railway owner (in its absolute discretion) as authorised recipients of confidential information; and
 - (2) signed a confidentiality undertaking in favour of the railway owner on terms acceptable to the railway owner.
- (e) Arc also considers that the arbitrator should be required to have regard to the principle that the price, terms and conditions of an access agreement will not be unfair if the relative terms reflect reasonable commercial and technical considerations including:
 - (1) the relative costs of providing access to different parties, having regard to:
 - (A) the commodity being transported;

- (B) the type of rollingstock used by the operator including the length and mass of the rollingstock;
 - (C) the train configurations used by the operator;
 - (D) the geographic area in which the access is being provided; and
 - (E) the relative effect of the task on the efficient utilisation of the network;
- (2) the costs and risks associated with providing services required by, or in respect of, some parties but not others;
- (3) the nature and characteristics of the section of the network to which access is sought;
- (4) circumstances in the market which have had, or will have, a material effect on a party's ability to pay access charges; and
- (5) the extent of competition for the task with other modes of transport.
- (f) If draft recommendation 16 is implemented (which means there is an explicit allowance for differential treatment in favour of foundation customers) then:
 - (1) the unfair discrimination provisions should include an acknowledgement that the 'foundation customer rights' afforded to foundation customers must be excluded when assessing unfair discrimination; and
 - (2) the exclusion referred to above applies to access agreements with foundation customers outside the Code and under the Code.
- (g) Arc also considers that, if draft recommendation 4 is implemented, then it should be amended so that:
 - (1) it is only available to access seekers that have made a *bona fide* access request (the onus of demonstrating this must be borne by the access seeker);
 - (2) it only applies to *bona fide* claims of unfair discrimination (the onus of demonstrating this must be borne by the access seeker); and
 - (3) it only applies to access agreements entered outside the Code after the date that the relevant amendment to the Code takes effect however it does not apply to access agreements that have been extended, renewed, assigned, novated, varied or restated after that date.

Draft recommendation 5 - Allow access seekers who have begun negotiations outside the Code to fast-track the process to arbitration under the Code.

- (a) The Department proposes to implement draft recommendation 5 by giving the arbitrator discretion:
 - (1) not to require a floor and ceiling determination where such determination is not required for a dispute; and
 - (2) to progress other parts of a dispute while a cost determination is being made.

- (b) In terms of implementation, the Department proposes that the ERA would be required to appoint an arbitrator if the access seeker made a proposal for arbitration to the ERA and was able to demonstrate that it:
 - (1) had made an access proposal;
 - (2) had sought to negotiate with the railway owner but had been unable to reach agreement; and
 - (3) was able to comply with the section 14 requirements (being the requirement to show managerial and financial ability).
- (c) Arc submits that where there has been a material change to the access proposal between the date the access proposal was first submitted to the railway owner and the date the access proposal is referred to arbitration, the access seeker should not be entitled to a fast-track process to arbitration under the Code. Rather, the access seeker should be required to submit an amended access proposal in the usual course and demonstrate its compliance with the section 14 requirements with respect to the amended access proposal.
- (d) In relation to paragraph 6(a)(1) of this Submission, Arc supports draft recommendation 5 to the extent the arbitrator has the discretion not to require a floor and ceiling determination where the determination is not required for the resolution of the dispute.
- (e) In relation to paragraph 6(a)(1) of this Submission, Arc queries how useful it will be to allow a cost determination to be made whilst the non-price terms are being determined. In practice, the non-price terms of an access agreement impact the access price. As the risk and cost of providing access increases, so does the access price. Therefore, undertaking a cost determination in parallel with the determination of non-price terms may result in a price that does not reflect the cost and risk profile created by the non-price terms. This may delay the final arbitration outcome where a further arbitral determination is required to align the price and the non-price terms.

6 Capacity extensions and expansions

Draft recommendation 6a – Make both parties responsible for assessing whether an expansion is required to facilitate an access request when a proposal for access is made.

- (a) The Department proposes that draft recommendation 6a would be implemented by:
 - (1) including in the Code a requirement that the railway owner notify the access seeker if it believes an expansion is required (in addition to the railway owner's obligations under section 9); and
 - (2) retaining the requirement in section 8 of the Code that an access seeker notify the railway owner if it believes an expansion is required.
- (b) Arc generally supports draft recommendation 6a subject to the following comments.
- (c) Arc submits that if this draft recommendation is implemented then the Code should be amended to:
 - (1) allow the railway owner to, at any time during negotiations, notify the access seeker if an extension or expansion is required;
 - (2) allow the railway owner 60 days after such notification to give the access seeker a preliminary estimate of the costs relating to the extension or expansion and the access seeker's share of such costs and give the railway owner a right to extend the 60 day period on reasonable grounds;
 - (3) allow the railway owner to require the access seeker to provide the railway owner with such information as may reasonably be available to the access seeker to enable the railway owner to:
 - (A) comply with the requirement referred to in paragraph 6(a)(1) of this Submission; and
 - (B) provide the preliminary fee estimate in paragraph 6(c)(2) of this Submission;
 - (4) allow the railway owner to cease access negotiations if the access seeker fails to provide the information referred to in paragraph 6(c)(3) of this Submission;
 - (5) if a railway owner is required, in accordance with an arbitration decision, to construct, or procure the construction of, an expansion or extension, give the railway owner a right to recover from the relevant access seeker/s its efficient costs incurred in connection with the expansion or extension; and
 - (6) expressly require an access seeker to notify the railway owner if an extension (such as a spur or branch line) is required where that extension will not be operated by the railway owner.
- (d) In the Draft Decision Paper it is not clear how the railway owner's obligation to notify the access seeker that an expansion is required interacts with:

- (1) the access seeker's rights under section 8(4) of the Code to specify in its access proposal any extension or expansion necessary to accommodate the proposed rail operations; and
 - (2) the railway owner's obligation under section 9(2)(b) of the Code to provide a preliminary estimate of costs relating to any extension or expansion in an access proposal within 30 days after an access proposal is received and the proponent's share of such costs.
- (e) For clarity, Arc recommends that:
- (1) the railway owner is only obliged to comply with its obligation under section 9(2)(b) to provide a preliminary cost estimate if the railway owner considers that the expansion or extension specified in the access proposal or in any subsequent request by the access seeker (see paragraph 6(b) of this Submission) is required; and
 - (2) if the railway owner does not consider that the expansion or extension specified in the access proposal is required then the railway owner is only required to comply with section 9(2)(b) to the extent the access seeker agrees to reimburse the railway owner the costs incurred by the railway owner in complying with section 9(2)(b).

Draft recommendation 6b – Place responsibility on the railway owner for demonstrating if an extension or expansion is technically feasible.

- (a) The Department proposes that draft recommendation 6(b) be implemented by amending section 15 and including in the Code:
 - (1) a requirement that, if either party has identified that an extension or expansion is required then the railway owner will be responsible for:
 - (A) assessing if the expansion or extension:
 - (i) can be carried out in a technically feasible way; and
 - (ii) will be consistent with the carrying on of safe and reliable operations on the route;
 - (B) notifying the access seeker of the efficient price for building the expansion or connecting the extension; and
 - (C) providing material to the access seeker to reasonably demonstrate how the efficient price was calculated; and
 - (2) a right for the railway owner to recover the efficient costs incurred in complying with the requirement referred to above.
- (b) Arc generally supports draft recommendation 6b subject to the following comments.
- (c) If draft recommendation 6b is implemented, the Code should include provisions pursuant to which:
 - (1) the railway owner may require the access seeker to provide security for the costs referred to in paragraph 6(a)(2) of this Submission prior to the railway owner commencing its assessment of technical feasibility (and the access seeker must be required to comply with the requirement);
 - (2) the railway owner may require the access seeker to provide the railway owner with such information as may reasonably be available

- to the access seeker to enable the railway owner to comply with the requirement referred to in paragraph 6(a)(1) of this Submission (and the access seeker must be required to comply with the requirement);
- (3) if the access seeker fails to:
- (A) provide the security referred to in paragraph 6(c)(1) of this Submission;
 - (B) provide the information referred to in paragraph 6(c)(2) of this Submission; or
 - (C) demonstrate that it has the necessary financial resources, or can access the necessary financial resources, to pay its share of costs for the extension or expansion,
- then the railway owner is entitled to cease negotiations; and
- (4) the railway owner may engage a third party to conduct the technical feasibility study.

Draft recommendation 6c – Remove requirement to demonstrate technical feasibility as a pre-requisite to beginning negotiations and clarify that a request for an extension or expansion can be made at any time during negotiations if necessary to facilitate the access request.

- (a) The Department proposes that the Code would be amended to specify that:
- (1) a request for extension or expansion can be made at any time during negotiations that are being carried out under Part 3, Division 2 of the Code; and
 - (2) at the time a request was made, the railway owner would be entitled to request that the access seeker demonstrate that it has the necessary financial resources, or can access the necessary financial resources, to pay its share of costs for the expansion.
- (b) Arc supports this proposal but submits that:
- (1) the Code must clarify that the railway owner may cease negotiations with the access seeker if it fails to demonstrate that it has the necessary financial resources, or can access the necessary financial resources, to pay its share of costs for the expansion;
 - (2) the Code must clarify the circumstances in which the railway owner is required to provide a preliminary cost estimate with respect to the request for an extension or expansion (see commentary paragraph 6(e) of this Submission); and
 - (3) the Code expressly recognise that the railway owner may, at any time during negotiations under Part 3, Division 2 of the Code, notify the access seeker that an extension or expansion will be required to facilitate the access request (see paragraph 6(c)(1) of this Submission).

7 Improve efficiency of the regulatory process

Draft recommendation 7 - insert a provision to allow a railway owner to refer an access request to the arbitrator if they can establish a *prima facie* case that it is frivolous.

- (a) The Department proposes that draft recommendation 7 will be implemented by including a provision in the Code which:
 - (1) allows a railway owner to refer an access request to the arbitrator if it can establish a *prima facie* case that the access request is frivolous; and
 - (2) requires the arbitrator to make a determination as to whether the access request is frivolous within 30 days.
- (b) Arc support draft recommendation 7 subject to the following amendments.
- (c) Arc considers that the Code should allow a railway owner to refer an access request to an arbitrator if there is a dispute between the railway owner and the access seeker as to whether the access request is 'frivolous'.
- (d) In support of the railway owner's right to refer a *prima facie* frivolous access request to arbitration, the Code should specify that an access request may, without limitation, be frivolous where:
 - (1) the access seeker is not engaging in good faith negotiations with the railway owner in relation to the access request;
 - (2) there is no reasonable likelihood that the access seeker or its rail operator will comply with the terms and conditions of an access agreement;
 - (3) the access seeker has not demonstrated a genuine intention of obtaining access rights;
 - (4) the access seeker has not demonstrated that there is a reasonable likelihood that it will use the access rights at the level specified in the access request; or
 - (5) the access seeker has not demonstrated that the access request was made for the purpose of obtaining access.
- (e) The Code should also include a provision which states that if the arbitrator determines that the request is frivolous, then the railway owner is:
 - (1) entitled to cease negotiations in respect of the access request;
 - (2) not obliged to comply with the Code in respect of the access request; and
 - (3) entitled to recover from the access seeker costs it has incurred in connection with the frivolous access request.
- (f) If draft recommendation 7 is implemented then Arc submits that it should not 'be up to the railway owner to demonstrate why it should not negotiate' (as stated in the Draft Decision Paper). Rather, the railway owner should be required to establish a *prima facie* case that the access request is 'frivolous' (as defined in the Code).

Draft recommendation 8 - insert timeframes for obligations under the Code where these do not already exist.

- (a) The Department's proposes that draft recommendation 8 would be implemented by:
 - (1) including in Part 3, Division 3 of the Code a requirement for the arbitrator to make a decision within 180 days - the proposed amendment would include stop the clock provisions and would also allow the railway owner and access seeker to extend the timeframe for the arbitrator; and
 - (2) amending section 18 to:
 - (A) require that the access seeker provide further information within 10 business days; and
 - (B) notify the railway owner, if there is a dispute within 10 days, if the railway owner still believes the information provided is insufficient.
- (b) Arc supports the draft recommendation referred to in paragraph 7(a)(1) of this Submission however Arc considers that the 180-day period should be extended to a 300-day period.
- (c) Arc supports the draft recommendations referred to in paragraph 7(a)(2) of this Submission.
- (d) Arc queries whether the reference to '10 days' in paragraph 7(a)(2)(B) of this Submission is intended to be '10 business days'.

Draft recommendation 9a – require the ERA to approve a standard access agreement for each railway owner and for this agreement, along with other relevant information to be published on a railway owner's website instead of being made available in hard copy format.

- (a) The Department proposes that draft recommendation 9a would be implemented by adding the following requirements to the Code:
 - (1) each railway owner must have at least one standard access agreement approved by the ERA and published on the railway owner's website; and
 - (2) the information required to be provided by a railway owner under sections 6(a) and 6(b) of the Code be published on the railway owner's website.
- (b) In relation to paragraph 7(a)(2) of this Submission, Arc agrees to publish on its website:
 - (1) its standard access agreement however Arc does not support the proposal that it be approved by the ERA before publication; and
 - (2) the information described in Schedule 2 of the Code as it currently stands.
- (c) The Department has not provided any information regarding the process for obtaining approval of the standard access agreement or any subsequent amendments to the standard access agreement.

- (d) Arc is concerned that allowing the ERA to determine its standard terms and conditions of access may put Arc in an untenable position where the terms and conditions required by the ERA conflict with Arc's obligations under safety laws (including rail safety accreditations), its insurers' requirements or the practical operation of the Arc Network.
- (e) Arc is concerned that:
 - (1) the approval process may consume significant time and other resources of the ERA and the railway owner without there being any significant benefit to access seekers;
 - (2) where the initial approval process is lengthy, there will be a lengthy period where the railway owner will not have any publicly available standard access agreement; and
 - (3) where the approval process with respect to amendments to the standard access agreement is lengthy, the railway owner's publicly available standard access agreement will be out-of-date for a lengthy period.
- (f) Arc notes that the Department also intends to review whether:
 - (1) the requirement to publish 'the running times of existing trains' in Schedule 2 means a document similar to a master train plan is required;
 - (2) gross tonnages and tonnages of freight should be amended to be replaced with gross tonne kilometres; and
 - (3) the definition of capacity in Schedule 2 should require information on the nameplate capacity (i.e. the capacity the asset would have in its replacement condition) and operational capacity to be given, with both calculations taking into account other traffic on the line.
- (g) In relation to paragraph 7(f)(1) of this Submission, Arc does not agree that the obligation to publish the 'the running times of existing trains' in Schedule 2 means that Arc is required to publish its master train plan. It is not appropriate to publish master train plans given that they contain commercially sensitive information, information that is not relevant to an access seeker's request and information that could jeopardise the security of goods in transit.
- (h) In relation to paragraph 7(f)(3) of this Submission, Arc does not support the publication of nameplate capacity and operational capacity taking into account traffic on the line on the basis that it will not assist and, at worst, may mislead an access seeker, given that the capacity of a line is affected by a number of factors other than the traffic on the line. Furthermore, Arc currently provides user specific operational information and milestones to individual users as needed upon request.

Draft recommendation 9b - implement Recommendation 8 from the 2015 ERA review, to reduce the prescribed time limit for updating this information from two years to one year.

- (a) Arc supports the proposal to implement Recommendation 8 from the 2015 ERA review, to reduce the prescribed time limit for updating information required in Schedule 2 of the Code from two years to one year.

Draft recommendation 10 – standardise section 8 requirements

- (a) With respect to the proposal to standardise the section 8 (Proposals for access) requirements, Arc supports the proposal that the Code be amended to include:
 - (1) a Schedule with standard information required for an access agreement; and
 - (2) a provision that allows the railway owner to ask for further information.
- (b) Arc submits that the new Schedule should include:
 - (1) **Access seeker details**
 Relevant contact details including:
 - (A) the access seeker's name and contact details;
 - (B) if the access seeker is a rail operator and is seeking access for a customer, the customer's (or prospective customer's) name and contact details;
 - (C) if the access seeker is a not a rail operator, its rail operator's (or prospective rail operator's) name and contact details; and
 - (D) if the access seeker or its customer or rail operator is an unincorporated joint venture, the name and contact details for each of the joint venture participants.
 - (2) **Ability to use access rights**
 Information describing the access seeker's ability to use the access rights sought including:
 - (A) whether the access seeker has secured, or is reasonably likely to secure, other supply chain rights within the required timeframe;
 - (B) whether the access seeker has secured, or is reasonably likely to secure, a rail haulage agreement for the proposed services within the required timeframe;
 - (C) whether the access seeker has, or is reasonably likely to have access to, facilities (including rollingstock, provisioning facilities, maintenance facilities and storage facilities) to enable it to run train services to fully utilise the access rights sought; and
 - (D) where the access rights require a specific branch line, whether that branch line has been constructed and commissioned, or is reasonably likely to be constructed and commissioned before the date on which train services are to commence.
 - (3) **Train service description**
 Information describing the train services including:
 - (A) the route of operation (including a diagram if necessary) including origin, destination, loading facility, unloading facility, depot and any other railway infrastructure to which access is sought;

- (B) the points on the route that will be used for provisioning and stabling;
- (C) the proposed commencement date of train services;
- (D) the proposed term of access;
- (E) the method of transporting freight, for example containers, louvered wagons or bulk wagons;
- (F) a description of the freight or commodity;
- (G) the forecast net tonnes of product to be transported per annum for each year of access;
- (H) the proposed travel speed of the train;
- (I) the proposed sectional run times;
- (J) the proposed time for provisioning, stabling, loading and unloading; and
- (K) the proposed requirements for stabling.

(4) Timetabling requirements

Information setting out timetabling requirements, including:

- (A) whether the access rights are for a new train service or an existing train service;
- (B) the required frequency of train services, including weekly requirements, seasonal variations and any trends over the proposed access term;
- (C) the preferred departure and arrival times on preferred days of operation; and
- (D) the requirements for shunting or dwell times en route.

(5) Rollingstock details

Information describing the rollingstock and rollingstock configurations including:

- (A) the proposed rollingstock configuration for each train service;
- (B) the proposed number of locomotives and wagons per train;
- (C) the type and class of locomotives;
- (D) the mass of each locomotive (including full sand and fuel load);
- (E) the locomotive power of each locomotive;
- (F) the maximum speed of each locomotive;
- (G) the type and class of wagons;
- (H) the nominal gross mass of wagons;
- (I) the tare mass of each wagon;
- (J) the axle load of each wagon;
- (K) the tare mass per container;
- (L) the average number of containers per wagon;

- (M) the average proposed load (of product) per wagon;
- (N) the maximum axle load of locomotives and wagons;
- (O) locomotive traction types;
- (P) the gross tonnes per train service, separately for forward and return journeys;
- (Q) the nominal payload per train service, separately for forward and return journey; and
- (R) the length of the proposed train (static and non-static).

Draft recommendation 10 (cont.) – standardise section 14 requirements

- (a) Arc supports the proposal that the requirements in section 14 of the Code include more prescriptive requirements. In particular, Arc agrees with the Department that the first two requirements in the ARTC's interstate undertaking with respect to an applicant for access are reasonable subject to the comments below.
- (b) In relation to the first requirement, that the applicant must be 'Solvent', Arc proposes the following amendments to the definition of 'Solvent' in the ARTC interstate undertaking:

"Solvent" means that, in the last five years:

 - (a) the Applicant proponent has been able to pay all its debts as and when they become due and has not failed to comply with a statutory demand under section 459F(1) of the Corporations Act 2001 (Commonwealth);*
 - (b) ~~a~~ no meeting has been convened to place ~~it~~ the proponent in voluntary liquidation or to appoint an administrator;*
 - (c) ~~an~~ no application has been made to a court for the Applicant proponent to be wound up without that application being dismissed within one month after the application was made;*
 - (d) no liquidator, provisional liquidator or a controller (as defined in the Corporations Act 2001 (Commonwealth)) of any of the Applicant's proponent's assets has ~~not~~ been appointed; ~~or~~*
 - (e) the Applicant has not proposed or resolved to enter into, or entered into, any form of arrangement (whether formal or informal) with its creditors or any of them, including a deed of company arrangement; and*
 - (f) no similar event has occurred in respect of the proponent under the law of any jurisdiction other than Australia.*
- (c) Also in relation to the second requirement, regarding compliance with rail access agreements, Arc submits that the timeframe for assessment should be extended to 5 years. Arc also proposes the following amendments to the definition of 'Material Default' in the ARTC interstate undertaking:

"Material Default" means:

 - (a) any breach of a fundamental or essential term or condition of a relevant agreement where that breach would lawfully justify termination of the agreement; or*
 - (b) failure on one or more occasions to comply with repeated breaches of any of the terms or conditions of the a relevant agreements referred to in clause*

3.4(d)(iii) where that breach would not lawfully justify termination of the agreement.

where a 'relevant agreement' is an agreement specified in section [#];

- (d) Arc supports the third requirement in the ARTC's interstate undertaking with respect to an applicant for access, being the requirement that an access seeker demonstrate that it has, or will have, the ability to access, the financial resources to meet its obligations (to both the railway owner and any third parties) under an access agreement. However, with respect to the proposal that the ability to access financial resources would be satisfied by providing a bank or parent company guarantee, Arc submits that:
- (1) it should be at the railway owner's election as to whether a bank guarantee or parent company guarantee is required;
 - (2) the terms (including the amount) of the bank guarantee must be determined by the railway owner;
 - (3) the railway owner should be entitled to determine the criteria for entities that will be acceptable providers of bank guarantees and parent company guarantees; and
 - (4) the terms of the parent company guarantee will be determined by the railway owner.

Draft recommendation 11 – Standardise consultation across Part 5 instruments

- (e) The Department proposes that draft recommendation 11 would be implemented by amending the Code to require the ERA to:
- (1) consult on the costing principles and overpayment rules (by amending section 45);
 - (2) with respect to segregation arrangements, only consult on material changes (by amending section 42); and
 - (3) review all Part 5 instruments every 5 years at a minimum.
- (f) Arc does not agree that section 45 of the Code should be amended so as to require the ERA to consult on the costing principles and over-payment rules. Arc considers that this amendment is unnecessary and will create further work for the ERA (and cause the ERA to incur further costs) without any discernible benefit. In particular, Arc considers that amendment is unnecessary given that:
- (1) the costing principles and over-payment rules are subject to review and approval by the ERA (sections 46(2) and 47(3) of the Code) and to date the review and approval function carried out by the ERA of these instruments has to date been appropriate, sufficient and successful;
 - (2) under the existing provisions of the Code, the ERA may at any time direct the railway owner to amend the costing principles or the over-payment rules or replace them (sections 46(4) and 47(5) of the Code);
 - (3) all Part 5 instruments (including the costing principles and over-payment rules) will, if the draft recommendation in paragraph 7(e)(3) of this Submission is implemented, be subject to a 5-yearly review; and
 - (4) the 'Compliance and Review' section of Arc's 'Costing Principles' (section 6) and 'Overpayment Rules' (section 5) provide that:

- (A) stakeholders can raise concerns with the ERA at any time and the ERA is empowered to investigate those concerns;
 - (B) the ERA can amend the instruments at any time; and
 - (C) access seekers and operators can ask the ERA to consider amendments at any time.
- (g) Public consultation is generally labour intensive and imposes costs on the State and railway owners. While Arc appreciates the merit of public consultation in principle, in this instance Arc does not see the cost as justified.
- (h) Arc supports the proposal that the ERA only consult on material changes to the segregation arrangements. This will give the ERA greater flexibility to deal more efficiently with minor or procedural amendments to the segregation arrangements.
- (i) Arc supports the proposal that all Part 5 instruments be reviewed every 5 years, or as otherwise determined by the ERA. However, the provision of the Code that introduces this requirement should also specify:
 - (1) the purpose of the review;
 - (2) a requirement that the ERA call for public comment before carrying out its review;
 - (3) a minimum period for public comment of not less than 30 days; and
 - (4) a requirement that the ERA publish a report based on its review and provide the report to the Minister.

Draft recommendation 12 – Require the ERA to develop and maintain a model set of Part 5 instruments.

- (a) Arc is generally supportive of this proposal. A standing set of model Part 5 Instruments would assist in simplifying regulatory obligations for new railway owners.
- (b) However, Arc considers that the Department should clarify the extent to which, if any, the ERA is entitled to use the model Part 5 Instruments when reviewing an existing railway owner's Part 5 Instruments, or whether this ability to review only applies to new rail owners.
- (c) As the implementation of this draft recommendation provides no benefit to existing railway owners nor its access seekers, Arc submits that the new railway owners, or alternatively, the State should bear the ERA's cost of developing the standing set of model Part 5 Instruments.

Draft recommendation 13 – Provide for an arbitrator to make an interim order on access prices, terms and conditions if parties have an agreement under the Code that is expiring.

- (a) Arc is generally supportive of this proposal.
- (b) However, Arc notes that the process of making an interim order may delay finalisation of the arbitration.
- (c) Arc is also of the view that the Code should acknowledge that:

- (1) the arbitrator may determine that the arbitrated access agreement will apply, retrospectively to the interim period; and
- (2) if so, the arbitrator must determine a backdating or adjustment mechanism that applies to the interim period.

8 Railway owner accountability

Draft recommendation 14 – include requirements to publish service quality indicators.

- (a) The Department proposes that draft recommendation 14 would be implemented by requiring railway owners would report quarterly on:
 - (1) actual minimum, maximum and average section run time performance;
 - (2) network entry and exit time against schedule; and
 - (3) percentage of track under temporary speed restriction (i.e. where a speed restriction has differed to one set out in the standard information package).
- (b) Arc considers that reporting on the service quality indicators referred to above is unlikely to facilitate more effective access negotiations.
- (c) With respect to the information referred to in paragraphs 8(a)(1) and 8(a)(2) of this Submission, the information is unlikely to be helpful if it is aggregated due to the diverse range of rail tasks performed across the Arc Network.
- (d) The actual minimum, maximum and average section run time performance is operational information that is specific to a particular rail task and is heavily context-dependent. The information is therefore unlikely to be useful to another access seeker and, at worst, may be misleading where the access seeker's rail task or the context at the relevant time is different.
- (e) The network entry and exit time against schedule is also unlikely to be useful without further contextual information as to the reason for any differences against schedule. Depending on how precise the reporting is required to be, it may be the case that almost all actual network entry and exit times do not comply with the schedule entry and exit times. This is because entry and exit times vary frequently from scheduled times, due in part to the manner in which train services are operated the train operators.
- (f) Disaggregating information referred to in paragraphs 8(a)(1) and 8(a)(2) of this Submission where there are multiple operators on a route is not appropriate for confidentiality reasons. Similarly, it is not appropriate to publicly report this information where there is only one operator on the route for confidentiality reasons.
- (g) The percentage of track under a temporary speed restriction, referred to in paragraph 8(a)(3) of this Submission, is relatively meaningless without contextual information and it is unlikely to facilitate more effective access negotiations. Furthermore, the percentage of track under temporary speed restrictions will fluctuate frequently so any reporting of this measure is unlikely to remain current for any significant period of time.
- (h) Arc is willing to provide the relevant service quality indicator information to access seekers upon request. In this way, Arc can ensure the information provided is current and relevant to an access seeker. Arc can also provide further information regarding the service quality indicators and how a particular access seeker's task is likely to operate on the given route.

9 Regulator accountability

Draft recommendation 15 – provide more upfront direction to the ERA and require the ERA to obtain two expert reports for the initial decision on the regulatory asset value in certain circumstances.

- (a) The Department proposes to implement draft recommendation 15 by:
 - (1) requiring the ERA to obtain a second independent expert opinion on the initial asset valuation if the first expert opinion obtained by the ERA differed significantly from the proposal put forward by the railway owner; and
 - (2) providing up-front guidance to the ERA in the form of a statement of intent (or similar) to guide the ERA in applying the transitional arrangements set out in draft recommendation 1B.
- (b) In relation to paragraph 9(a)(1) of this Submission, Arc agrees that the ERA would benefit from expert advice in relation to the submissions by a railway owner in connection with the matters referred to draft recommendations 1A and 1B. However, Arc notes that:
 - (1) the consecutive preparation of two experts reports may take longer than a process in which two expert reports are prepared simultaneously or a single expert report is prepared jointly by two experts, although Arc acknowledges that there is a potential cost reduction in circumstances where a second report is not required; and
 - (2) it may be the case that the second expert report differs significantly from both the railway owner's proposal and the first expert opinion. In this case, Arc proposes that the ERA may at its discretion, obtain a further expert opinion.
- (c) Arc also considers that wherever the ERA is required under the Code to obtain expert advice, the ERA should be required to obtain the advice from an expert selected from a panel of experts agreed by the ERA and the railway owner.
- (d) In relation to paragraph 9(a)(2) of this Submission, Arc requests that it be given a reasonable opportunity to review and comment on the up-front guidance proposed to be provided to the ERA in relation to the application of the transitional arrangements referred to in draft recommendation 1B.
- (e) Arc considers that the State should be solely liable for the ERA's costs incurred in connection with the implementation of draft recommendations 1A and 1B including the costs of engaging experts until the transition from a GRV to a DORC asset valuation methodology for a railway owner is complete and have no right to recover such costs from the railway owner.
- (f) Arc further considers that where the ERA elects to obtain a second expert report, the ERA should bear the costs of obtaining that report. No costs arising in connection with the second expert report should be recoverable from the railway owner.

10 Greenfields developments

Draft recommendation 16 – Amend the Code to explicitly allow for differential treatment of foundation customers as a form of ‘fair’ discrimination.

- (a) Arc is generally supportive of draft recommendation 16.
- (b) However, Arc submits that the Code should give each railway owner discretion to set the criteria that determines which of its customers are ‘foundation customers’.
- (c) If draft recommendation 16 is implemented then the Code should be amended to:
 - (1) acknowledge that a ‘foundation customer’ may be granted access inside or outside the Code;
 - (2) acknowledge that a ‘foundation customer’ may have been granted access prior to the date the amendment comes into effect;
 - (3) if the unfair discrimination provisions referred to in draft recommendation 4 are implemented, include an acknowledgement that the ‘foundation customer rights’ afforded to foundation customers must be excluded when assessing where there has been unfair discrimination with respect to a foundation customer’s access agreement (whether that access agreement is inside or outside the Code);
 - (4) include a definition of ‘foundation customer rights’ which may include a non-exhaustive list of ‘foundation customer rights’ such as lower access prices, priority access to train paths and a first right of refusal to available train paths; and
 - (5) provide that the foundation customer rights must be commensurate with the risks and costs borne by the railway owner and the foundation customer.

11 Dictionary

The following words, when used in the Submission, have the meaning given in this Part 11 unless the context otherwise requires:

| | |
|-------------------------------|---|
| Act | the <i>Railways (Access) Act 1998</i> (WA). |
| Arc | Arc Infrastructure Pty Ltd. |
| AER | Australian Energy Regulator. |
| Arc Network | the railway network leased to Arc under the Lease. |
| ARTC | Australian Rail Track Corporation Limited. |
| CCA | the <i>Competition and Consumer Act 2010</i> (Cth). |
| Code | the <i>Railways (Access) Code 2000</i> (WA). |
| Department | the Western Australia Department of Treasury. |
| DORC | depreciated optimised replacement cost. |
| Draft Discussion Paper | the <i>Review of the Western Australian Rail Access Regime, Draft Decision Paper</i> as published by the Department in December 2018. |
| ERA | the Economic Regulation Authority. |
| GRV | gross replacement value. |
| Lease | as the context requires, the: <ul style="list-style-type: none"> • Rail Freight Corridor Land Use Agreement (StandardGauge) and Railway Infrastructure Lease dated 17 December 2000; or • Rail Freight Corridor Land Use Agreement (NarrowGauge) and Railway Infrastructure Lease dated 17 December 2000. |
| NCC | National Competition Council. |

RAB regulatory asset base.

State the State of Western Australia.

Submission this document including any schedules or annexures.

WACC weighted average cost of capital.
