Australian Competition and Consumer Commission

Position Paper

in relation to Australian Rail Track Corporation's Hunter Valley Rail Network Access Undertaking variation

9 May 2012

Contents

Glossary

Capitalised terms not listed in this glossary are as defined in section 14.1 of the accepted Hunter Valley Access Undertaking, available on the ACCC's website.

ACCC	Australian Competition and Consumer Commission
ARTC	Australian Rail Track Corporation
consist	A train 'consist' is the group of cars (including wagons and locomotives) which make up the train
draft revision	A draft revised version of the HVAU provided by ARTC to the ACCC on 8 March 2012
gtkm	Gross tonne kilometres
Hunter Valley Rail Network	The rail network in the Hunter Valley owned and operated by ARTC and covered by the HVAU
HVCCC	Hunter Valley Coal Chain Coordinator
HVAU	Hunter Valley Access Undertaking prescribing arrangements for access to ARTC's Hunter Valley Rail Network.
Initial Indicative Access Charges	Charges proposed by ARTC to apply to the Initial Indicative Services
Interim Indicative Access Charges	Charges for the Interim Indicative Services to be determined by ARTC in accordance with subsection 4.19 of the HVAU.
IPART	Independent Pricing and Regulatory Tribunal
June 2011 HVAU	The Hunter Valley Access Undertaking (HVAU) accepted by the ACCC on 29 June 2011
kgtkm	Thousand gross tonne kilometres
NCIG	Newcastle Coal Infrastructure Group
NPC	Newcastle Port Corporation
NSWMC	New South Wales Minerals Council
PN	Pacific National
PWCS	Port Waratah Coal Services
Proposed Variation	ARTC's proposed variation to the June 2011 HVAU, submitted on 2 December 2011
QR	QR National
TOP	Take or pay

Summary

This Position Paper sets out the Australian Competition and Consumer Commission's (**ACCC's**) preliminary view of Australian Rail Track Corporation's (**ARTC's**) application to vary the Hunter Valley Access Undertaking accepted by the ACCC on 29 June 2011 (the **June 2011 HVAU**). ARTC submitted the variation application (the **Proposed Variation**) on 2 December 2011. Section 4.17 of the June 2011 HVAU required ARTC to submit this Proposed Variation.

The ACCC may consent to a variation of an accepted access undertaking if it thinks it appropriate to do so in accordance with s. 44ZZA(7) of the *Competition and Consumer Act 2010* (Cth) (**the Act**).

The Proposed Variation relates to the determination of the efficient train configuration for the Hunter Valley rail network, and the implementation of the Initial Indicative Service and associated Indicative Access Charges. The purpose of the variation is to contribute to achieving the most efficient utilisation of coal chain capacity in the Hunter Valley.

This Position Paper sets out the ACCC's preliminary views on the Proposed Variation. The ACCC will make a decision after considering the information and industry views provided in response to this Position Paper.

ACCC preliminary view

It is the preliminary view of the ACCC that the characteristics of the Initial Indicative Services proposed by ARTC are appropriate. In summary, the ACCC considers that:

- ARTC has addressed the requirements in section 4.17 of the June 2011 HVAU for determining the Initial Indicative Service(s)

- adoption of the Initial Indicative Services by Access Holders is likely to improve network efficiency by making better use of overall coal chain capacity.

The ACCC's views on the proposed Initial Indicative Services are discussed in more detail in Chapter 4 of this Position Paper.

However, the ACCC has concerns about the appropriateness of the proposed Initial Indicative Access Charges and aspects of the drafting of the Proposed Variation.

The ACCC considers that the Initial Indicative Access Charges should provide pricing signals that promote efficient use of and investment in coal supply chain infrastructure. While below-rail services are only one component of the capacity of the overall coal supply chain, the ACCC considers that the charges for below-rail services should reflect the efficient costs of providing those services and their consumption of network capacity, and thereby promote the efficient use of below-rail infrastructure.

The ACCC is concerned that the proposed Initial Indicative Access Charges may not provide appropriate pricing signals for efficient use of and investment in coal supply

chain infrastructure. In particular, the ACCC is not satisfied that the magnitude and direction of the proposed relativities appropriately reflect the relative costs incurred in providing those services and their relative consumption of coal chain capacity.

In addition, the ACCC is concerned that ARTC has not provided sufficient explanation of how prices for other services provided on the network will be determined. Specifically, ARTC has not provided information on how it intends to set charges for the Interim Indicative Services and other coal access rights in relation to the Initial Indicative Access Charges. As a result, the ACCC may be unable to satisfy itself that the 'package' of access charges will provide appropriate incentives for efficient use of network and coal chain capacity.

In the ACCC's view, greater pricing transparency would allow Access Holders to understand the basis for the pricing relativities applied by ARTC, which would inform their own investment decisions and assist them in making efficient use of the coal supply chain.

The ACCC's views on ARTC's proposed Initial Indicative Access Charges are discussed further in Chapter 5 of this Position Paper.

The ACCC also has concerns about the drafting of the Proposed Variation. In particular, the ACCC considers that the application of the dispute resolution provisions in the Proposed Variation remains unclear and is unlikely to be appropriate. While ARTC's draft revision to the Proposed Variation, provided to the ACCC on 8 March 2012, appears to address some of the ACCC's concerns, the ACCC is of the view that several drafting issues remain outstanding. The ACCC's concerns are discussed in Chapter 6 of this Position Paper.

Consequently, the ACCC's preliminary view is not to accept the Proposed Variation in its current form. However, the ACCC is of the view that if ARTC were minded to submit a revised version of the Proposed Variation, which incorporated the amendments in ARTC's draft revision and addressed the ACCC's concerns, the ACCC would be likely to accept the revised variation, subject to the information and views provided in response to this Position Paper.

In the event that the ACCC does not consent to a variation of the HVAU to adopt the Initial Indicative Services and Initial Indicative Access Charges, Access Holders would still able to run the efficient train configurations as non-Indicative Services and seek to negotiate appropriate charges with ARTC. Access Holders may avail themselves of the dispute resolution provisions in the June 2011 HVAU in relation to charges for non-Indicative Services if they disagree with a charge formulated by ARTC.

Stakeholder views

The ACCC is seeking comments on its preliminary views regarding the Proposed Variation lodged by ARTC. In particular, the ACCC seeks comments on the questions included in this Position Paper, ARTC's proposed changes as contained in the draft revision, and the additional changes suggested by the ACCC in this Position Paper. Submissions by interested parties are due on Thursday 24 May 2012.

1 Introduction

On 29 June 2011 the Australian Competition and Consumer Commission (**ACCC**) accepted, pursuant to Division 6 of Part IIIA of the *Competition and Consumer Act 2010* (Cth) (**the Act**), an access undertaking submitted by Australian Rail Track Corporation (**ARTC**) for its rail network in the Hunter Valley (the **June 2011 HVAU**).

Under s. 44ZZA(7) of the Act, the ACCC may consent to a variation of an accepted access undertaking if it thinks it appropriate to do so having regard to the matters listed in s. 44ZZA(3).[1] ARTC submitted a variation request (**the Proposed Variation**) in accordance with s. 44ZZA(7) on 2 December 2011. The Proposed Variation relates to the determination of the Initial Indicative Service in accordance with section 4.17 of the June 2011 HVAU.

The ACCC is assessing whether it is appropriate to accept the Proposed Variation under Part IIIA of the Act.

ARTC also provided a draft revision of its Proposed Variation (**draft revision**), to the ACCC on 8 March 2012. The Proposed Variation, draft revision, and supporting submissions are available on the ACCC's website.

The ACCC has chosen to release this Position Paper, setting out its preliminary views, to obtain further information and industry views to assist it in making its decision on the Proposed Variation. As such, this is not a formal decision of the ACCC, but a statement of the ACCC's views on:

- aspects of the Proposed Variation which the ACCC considers are likely to be appropriate;
- aspects of the Proposed Variation which the ACCC considers may not be appropriate; and
- the additional explanation and supporting information, which if provided by ARTC, would enable the ACCC to be assured that the Proposed Variation is likely to improve the efficiency of the Hunter Valley coal supply chain.

The ACCC seeks comments from stakeholders on its preliminary views, after which the ACCC will form a decision. In particular, the ACCC seeks comments on ARTC's proposed changes as contained in the draft revision, the additional changes suggested by the ACCC in this Position Paper, and the ACCC's views on the additional information that would assist it in making a decision. To assist the parties, this Position Paper includes questions related to key issues on which the ACCC particularly seeks feedback.

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[1] See chapter 3 of this document.

1.1 The ACCC's preliminary view

It is the preliminary view of the ACCC that the characteristics of the Initial Indicative Services proposed by ARTC are appropriate. However, the ACCC has concerns about the proposed Initial Indicative Access Charges and aspects of the drafting of the Proposed Variation. The ACCC considers that amendments to the Proposed Variation are required. The ACCC also notes that while ARTC's draft revision appears to address some of the ACCC's concerns, several issues remain outstanding.

The ACCC's concerns particularly relate to:

- the transparency of ARTC's method for determining the Initial Indicative Access Charges;
- the efficiency implications of the associated pricing differentials and the likely impact of the proposed charges on the use of the network and coal chain capacity; and
- the application of the dispute resolution provisions to the Initial Indicative Access Charges and Interim Indicative Access Charges.

The ACCC considers that the Initial Indicative Service and Initial Indicative Access Charges should provide pricing signals that promote efficient use of and investment in coal supply chain infrastructure. In forming this view, the ACCC has had regard to the following considerations which it considers are particularly relevant to its assessment of the Proposed Variation:

- the objects of Part IIIA of the Act, which include the promotion of economically efficient operation of, use of and investment in the infrastructure by which services are provided;
- the pricing principles in s. 44ZZCA of the Act, which include that access pricing regimes should provide incentives to reduce costs or otherwise improve productivity; and
- subsection 4.17 of the June 2011 HVAU, which requires that ARTC select the coal train configuration which it considers will represent the most efficient utilisation of coal chain capacity when compared to the other coal train configurations tested.

While below-rail services are only one component of the capacity of the overall coal supply chain, the ACCC considers that the pricing for below-rail services should reflect the efficient costs of providing those services and their consumption of network capacity, thereby promoting the efficient use of below-rail infrastructure.

Accordingly, the ACCC considers that it is important that Access Holders have sufficient information regarding the basis for the pricing relativities applied by ARTC, in order to inform their own investment decisions and make efficient use of the coal supply chain. The ACCC considers that ARTC should provide greater transparency around the pricing methodology it intends to use to differentiate charges.

This additional information would also enable the ACCC to assess whether access charges are likely to promote more efficient use of and investment in coal supply chain infrastructure. Based on the information ARTC has provided, the ACCC is concerned that the proposed Initial Indicative Access Charges do not reflect the relative consumption of coal chain capacity by particular services and may not provide appropriate pricing signals. Further, in the absence of sufficient explanation of how charges for other services (including the Interim Indicative Access Charges) will be determined in relation to the Initial Indicative Access Charges, the ACCC is unable to satisfy itself that pricing relativities across services on the network will provide appropriate efficiency incentives.

The ACCC also has concerns about several other aspects of the Proposed Variation; these are discussed in chapters 4 to 6 of this document. In particular, the ACCC considers that the application of the dispute resolution provisions in the Proposed Variation remains unclear, even with the amendments proposed in ARTC's draft revision, and is unlikely to be appropriate.

The ACCC's preliminary view is that it will not consent to the Proposed Variation in its current form as it is unlikely to be appropriate. However, the ACCC is of the view that if ARTC were to:

- address the ACCC's concerns set out in this Position Paper; and
- submit a revised version of the Proposed Variation which incorporated both the amendments in ARTC's draft revision and the ACCC's proposed amendments in this Position Paper,

then the ACCC would be likely to consent to a variation of the June 2011 HVAU in accordance with that revised variation, subject to consultation on this Position Paper.

Table 1 provides a summary of the issues the ACCC considers need to be addressed in order for it to be appropriate for the ACCC to consent to a variation of the June 2011 HVAU. The reasons for the ACCC's views are set out in the relevant section of this Position Paper.

Table 1: Summary of amendments proposed by the ACCC

Issue	Description	Reference
Pricing differentials	The ACCC considers that the proposed Initial Indicative Access Charges do not appropriately reflect the relative consumption of Coal Chain Capacity by particular services and may not provide appropriate signals for efficient use of and investment in coal supply chain infrastructure. In particular, the low magnitude of the differentials proposed by ARTC may reflect an inappropriate allocation of costs to services and may not create incentives to adopt the Initial Indicative Services. Also, the proposed TOP charge for the 82 wagon service in Pricing Zone 1 is higher than the current TOP charge for the 72 wagon service, which does not provide the correct incentive for Pricing Zone 3 producers to use the more efficient 82 wagon service. The ACCC is seeking industry's views on these aspects of ARTC's pricing approach.	Sections 5.4.2 - 5.4.3 Page 45
Pricing transparency	The ACCC considers that ARTC should provide additional information to Access Holders regarding the basis on which it differentiates charges for particular services, in order to inform their own investment and contractual decisions. The ACCC also considers that ARTC should provide further information about how it intends to determine charges for other services (including the Interim Indicative Access Charges).	Section 5.4.4 Page 56

Issue	Description	Reference
Dispute resolution – Initial Indicative Services	The ACCC considers that ARTC should amend the June 2011 HVAU to ensure that Access Holders using the Initial Indicative Services can access the dispute resolution provisions in subsection 4.20 after the first calendar year. More generally, the ACCC considers that the drafting in section 4.20(i) should be revised to make clear that the provisions in section 4.20 will apply to the Initial Indicative Services and may also apply to the Interim Indicative Services (and associated charges).	Section 6.3.2.2 Page 63
Dispute resolution – Interim Indicative Services	The ACCC considers that ARTC should make clear whether the Interim Indicative Access Charges will be subject to the dispute resolution provisions in subsection 4.20 or 4.15. If subsection 4.20 applies, ARTC should clarify whether the two-thirds requirement will apply across all Access Holders using Interim and/or Initial Indicative Services, or separately to those Access Holders using Interim Indicative Services and those using Initial Indicative Services. The ACCC considers that applying the threshold separately would be the preferred approach.	Section 6.3.2.2 Page 63
Determination of Initial Indicative Access Charges	The ACCC considers that ARTC should make clear in the drafting of subsection 4.17(c) that the Initial Indicative Access Charges will be determined annually.	Section 6.3.4 Page 66
Determination of other charges	The ACCC considers that the revised June 2011 HVAU should specify that charges for non-Indicative Services will be determined by 1 November each year, at the same time as the Indicative Access Charges.	Section 6.3.4 Page 66
Varying existing agreements	The ACCC considers that the revised June 2011 HVAU should specify that Access Holders will be given the opportunity to vary their Access Holder Agreement during the Initial Period to operate the Initial Indicative Services if the Operators make those services available and the Access Holders wish to operate those services.	Section 6.3.4 Page 66

If the ACCC does not accept ARTC's Proposed Variation, the June 2011 HVAU will remain in effect, unless and until ARTC submits a further variation application which can be accepted by the ACCC. Regardless of whether the Proposed Variation (or a subsequent variation) comes into effect, parties are still able to run the efficient train configurations as non-Indicative Services. Access Holders may avail themselves of the dispute resolution provisions in the June 2011 HVAU in relation to charges for non-Indicative Services if they disagree with charges proposed by ARTC in relation to these services.

1.2 Indicative timeline for assessment

The ACCC received the Proposed Variation from ARTC on 2 December 2011. Under s. 44ZZBC(1) of the Act, the ACCC must make a decision in relation to the application within the period of 180 days starting at the start of the day the application was received (referred to as 'the expected period').

The Act also provides for 'clock-stoppers', meaning that some days will not count towards the 180 days of the expected period in certain circumstances. In particular, the clock is stopped where the ACCC publishes a notice inviting public submissions in relation to an undertaking application, or where the ACCC gives a notice requesting information in relation to an application.[2]

The end of the expected period will be **13 August 2012**, taking into account the following 'clock-stoppers':

- 40 day period for submissions on the initial Consultation Paper
- 15 day period for ARTC's response to the ACCC's request for information
- 14 day period for submissions to this Position Paper.

The ACCC may make a final decision before this date.

1.3 Making a submission

Submissions on the ACCC's Position Paper should be addressed to:

Mr David Salisbury
Deputy General Manager
Fuel, Transport and Prices Oversight
ACCC
GPO Box 520
MELBOURNE VIC 3001

Email: transport@accc.gov.au

[2] See Appendix A of this document for further information on these provisions of the Act.

1.3.1 Due date for submissions

Submissions must be received by Thursday 24 May 2012. It is in your interest that the submission be lodged by this date, as s. 44ZZBD of the Act allows the ACCC to disregard any submission made after this date.

1.3.2 Confidentiality

The ACCC strongly encourages public submissions. Unless a submission, or part of a submission, is marked confidential, it will be published on the ACCC's website and may be made available to any person or organisation upon request.

Sections of submissions that are claimed to be confidential should be clearly identified. The ACCC will consider each claim of confidentiality on a case by case basis. If the ACCC refuses a request for confidentiality, the submitting party will be given the opportunity to withdraw the submission in whole or in part.

For further information about the collection, use and disclosure of information provided to the ACCC, please refer to the ACCC publication *"Australian Competition and Consumer Commission / Australian Energy Regulator Information Policy – the collection, use and disclosure of information"* available on the ACCC website.

1.4 Structure of this Position Paper

This Position Paper is structured as follows:

Chapter 2 - Background sets out the process that led to the ACCC's decision to accept the June 2011 HVAU and the background to ARTC submitting the Proposed Variation.

Chapter 3 – Decision-making framework provides an overview of the matters that the ACCC must have regard to when assessing a request to vary an access undertaking under Part IIIA of the Act. The chapter also discusses other relevant matters that the ACCC proposes to have regard to in assessing the Proposed Variation to the HVAU.

Chapter 4 – The efficient train configuration discusses the characteristics of the proposed Initial Indicative Service, including whether ARTC has complied with the requirements in the June 2011 HVAU.

Chapter 5 – Proposed charges assesses the proposed Initial Indicative Access Charges and the methodology which ARTC has used to differentiate the charges for particular services.

Chapter 6 – Drafting changes considers the drafting changes in the Proposed Variation and the draft revision, including the application of the dispute resolution provisions.

Chapter 7 – The Final Indicative Service sets out some matters the ACCC considers relevant to the process for determining the Final Indicative Service.

Appendix A – Legal framework provides additional information on the timeframes for ACCC decisions on access undertaking applications and formal information requests under Part IIIA of the Act.

2 Background

This chapter describes the Hunter Valley rail access arrangements, the context for developing the efficient train configuration for the Initial Indicative Services, and industry consultation to date.

2.1 Regulatory arrangements

ARTC is a Commonwealth Government owned corporation, established in 1998 for the purpose of managing and providing access to the National Interstate Rail Network. The Interstate Rail Network is subject to an access undertaking accepted by the ACCC on 30 July 2008.[3]

The June 2011 HVAU regulates access to the Hunter Valley Rail Network operated by ARTC in New South Wales. ARTC has leased the Hunter Valley Rail Network from the New South Wales government under a 60 year lease granted on 5 September 2004.

Capacity management arrangements at the export coal loading terminals at the Port of Newcastle were authorised by the ACCC in December 2009, with the aim of improving overall supply chain performance and reducing ship queues forming off the coast of Newcastle. The interaction between the rail network access undertaking and the authorised capacity arrangements at the port was a key issue during assessment of the June 2011 and previous versions of the HVAU.[4]

The network was previously subject to an access regime administered by the NSW Independent Pricing and Regulatory Tribunal (**IPART**). As a consequence of the decision to accept the June 2011 HVAU, access regulation is now governed by the ACCC and the HVAU.

2.2 Industry context

ARTC is vertically separated, providing ‘below-rail’ track access services and not ‘above-rail’ services such as haulage. Above rail services are provided by QR National, Pacific National, XRail, Southern Shorthaul RailRoad and FLA Coal Haulage.

The Hunter Valley rail network is predominantly used to transport coal from mines in the Hunter Valley region to the Port of Newcastle for export. Approximately 16 coal producers have either existing or planned operations in the region. It was estimated in 2010 that the coal shipped on the network equated to around $9 billion worth of Australian export earnings per annum.[5]

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3 See the ACCC website at http://www.accc.gov.au/content/index.phtml/itemId/789738 for further details.

4 ARTC formally submitted two versions of the HVAU prior to the 23 June 2011 version which was accepted by the ACCC. These previous versions were submitted on 23 April 2009 and 7 September 2010 respectively.

5 NSWMC, *Submission in response to the ACCC’s consultation paper in relation to ARTC’s proposed 2010 Hunter Valley Rail Network Access Undertaking*, 25 October 2010, p. 3.

The rail network is also used to transport coal from the region's mines to domestic customers such as power stations, and by non-coal traffic including general and bulk freight services (such as grain) and passenger services.

Significant growth in export coal tonnage carried over the Hunter Valley Rail Network is expected over the next four years. ARTC's 2011-2020 Hunter Valley Corridor Capacity Strategy Consultation Document states that based on indicative contractual nominations provided to ARTC, export coal demand from the Hunter Valley is projected to increase from 135mtpa to 163mtpa in 2012, 190mtpa in 2013, 209mtpa in 2014 and 216mtpa in 2015, where it will stabilise at this level.[6] The ACCC understands that these export volumes are contingent upon investment across the supply chain, including but not limited to: port terminal expansions; upgrades of arrival and departure roads at the port; removal of provisioning from the port; construction of holding roads to enable better sequencing of trains in and out of the port; and duplication or triplication of ARTC's track.[7]

2.3 Development of the efficient train configuration

Sections 4.17 and 4.18 of the June 2011 HVAU require ARTC to submit two variations during the term of the HVAU in relation to the Indicative Service and the Indicative Access Charges.

These variations are required in order to develop and put in place price signals to promote efficient consumption of capacity. The approach provides for the evolution of reference coal services as follows:

- **Stage one:** Interim Indicative Services to apply from commencement of the HVAU in accordance with section 4.19.
- **Stage two**: Initial Indicative Services to be developed within 5 months of commencement in accordance with section 4.17.
- **Stage three:** Final Indicative Services to be developed within 30 months of commencement in accordance with section 4.18.

The Proposed Variation forms part of the transition towards service characteristics that will ultimately promote the efficient operation of, use of and investment in infrastructure.

The Initial Indicative Service characteristics and associated charges are expected to provide pricing signals regarding the efficient consumption of coal chain capacity within the constraints of the existing infrastructure. Final Indicative Service characteristics will be determined following a more comprehensive and robust modelling and consultation process. The Final Indicative Service and associated access charges are intended to promote the efficient consumption of coal chain

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6 ARTC, *2011-2020 Hunter Valley Corridor Capacity Strategy Consultation Document,* May 2011, p. 3.

7 Ibid, pp. 12-16.

capacity given ‘optimised’ coal chain infrastructure and more advanced modelling (discussed further in Chapter 7).

The Proposed Variation has been submitted by ARTC in order to implement the Initial Indicative Services and proceed to ‘stage two’ in accordance with section 4.17 of the June 2011 HVAU.

It should be noted that the ACCC’s assessment of the Proposed Variation will not consider whether gtkm pricing is the appropriate pricing unit. The review of gtkm pricing will be undertaken as part of the Final Indicative Service assessment outlined in subsection 4.18(b) of the June 2011 HVAU (‘stage three’ of the process).

2.3.1 ARTC consultation with industry

In accordance with subsection 4.17(b), which requires that ARTC consult with industry, ARTC issued a consultation document on 8 November 2011. This consultation document outlined the process by which ARTC had determined the proposed efficient train configurations, including the efficiency measures used and the number of combinations considered. This process was undertaken in consultation with the Hunter Valley Coal Chain Coordinator (**HVCCC**).

As a result of this process ARTC determined that the Coal Train configuration which would represent the most efficient utilisation of Coal Chain Capacity is the combination of 96 wagon trains in Pricing Zones 1 and 2 and 82 wagon trains in Pricing Zones 1 and 3.[8]

ARTC gave interested parties two weeks to provide comments in relation to its proposal. Subsection 4.17(c) of the HVAU requires ARTC to have regard to submissions received prior to submitting to the ACCC the characteristics of the Initial Indicative Service and Indicative Access Charges and requesting the ACCC’s approval to vary the HVAU.

2.4 ACCC public consultation process

The Act provides that the ACCC may invite public submissions on an access undertaking application.[9]

The ACCC published a Consultation Paper on 13 December 2011 inviting submissions on the Proposed Variation. The ACCC received public submissions from the following parties:

- Peabody
- Asciano
- Coal and Allied

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8 ARTC, *Industry Consultation Document*, 8 November 2011, pp. 5-6. Trains originating in Pricing Zones 2 and 3 will pass through Pricing Zone 1 to get to port.

9 *Competition and Consumer Act 2010*, s. 44ZZBD(1).

- QR National
- Port Waratah Coal Services (PWCS).

All public submissions are available on the ACCC's website at:

http://www.accc.gov.au/content/index.phtml?itemId=1029416

2.5 ACCC request for information and ARTC draft revision

On 15 February 2012 the ACCC sent a request for information to ARTC under s. 44ZZBCA of the Act. ARTC provided an initial draft of its response on 29 February 2012 and requested feedback from the ACCC. ARTC provided a finalised version of its response on 8 March 2012.

As part of its response to the ACCC's request for information, ARTC provided a draft revision, with the aim of addressing certain questions posed by the ACCC. The draft revision was not submitted as a formal 'replacement' of the Proposed Variation under consideration by the ACCC. As such, the ACCC's decision will relate to the Proposed Variation. However, the ACCC has also provided preliminary views on aspects of the draft revision in this Position Paper. While the draft revision addresses some of the ACCC's concerns, a number of issues remain outstanding – these are discussed in chapters 4 to 6 of this document.

The ACCC's request for information, a public version of ARTC's response, and ARTC's draft revision are available on the ACCC's website at:

http://www.accc.gov.au/content/index.phtml/itemId/1038248 .

2.6 ACCC request for information from the HVCCC

On 29 March 2012 the ACCC sent an informal request for information to the HVCCC.[10] The purpose of the request was to assist the ACCC in fully understanding the current factors affecting the efficiency of the Hunter Valley coal supply chain, the framework for modelling the Final Indicative Service and better understanding the broader industry context for the Proposed Variation. In making its request to the HVCCC, the ACCC had regard to several submissions to the ACCC's Consultation Paper calling for the final modelling to be expedited.

On 2 April 2012 the HVCCC provided a confidential response to the request for information. The HVCCC advised that it intended to make its response available to the members of the HVCCC Capacity Management Committee, a sub-committee of the HVCCC's Board upon which all HVCCC members are represented.

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[10] This informal request for information was not issued under s. 44ZZBCA of the Act and therefore did not 'stop the clock' under s. 44ZZBC of the Act.

3 Decision-making framework

This chapter provides an overview of the framework under which the ACCC will make its decision on ARTC's Proposed Variation.

3.1 Legislative framework under Part IIIA

Under s. 44ZZA(7)(b) of the Act, an access provider may withdraw or vary an access undertaking at any time after it has been accepted by the ACCC, but only with the consent of the ACCC.

If the ACCC consents to the variation, the provider is required to offer third party access in accordance with the varied access undertaking. An access undertaking is binding on the access provider and can be enforced in the Federal Court upon application by the ACCC.

Subsection 44ZZA(7) allows the ACCC to consent to a variation of an accepted access undertaking if it thinks it appropriate to do so, having regard to the matters contained in s. 44ZZA(3), which are:

- the objects of Part IIIA of the Act, which are to:
  - promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
  - provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry;
- the pricing principles specified in s. 44ZZCA of the Act (see further below);
- the legitimate business interests of the provider of the service;
- the public interest, including the public interest in having competition in markets (whether or not in Australia);
- the interests of persons who might want access to the service;
- whether the undertaking is in accordance with an access code that applies to the service;[11] and
- any other matters that the ACCC thinks are relevant.

In relation to the pricing principles, s. 44ZZCA of the Act provides that:

- regulated access prices should:

[11] There is currently no access code that applies to services provided under the HVAU.

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

3.2 Other relevant matters

Under s. 44ZZA(3)(e) of the Act, the ACCC may consider any other matters that it thinks are relevant. In its assessment of the Proposed Variation, the ACCC considers that the June 2011 HVAU and the long term solution and supply chain alignment are relevant matters. These matters are discussed below.

3.2.1 The June 2011 HVAU

The ACCC considers that the June 2011 HVAU, in particular the requirements in subsection 4.17 and whether ARTC has complied with those requirements, are matters relevant to the current decision for the purpose of s. 44ZZA(3)(e). The ACCC notes that the Proposed Variation seeks to implement the requirements contained in section 4.17 of the June 2011 HVAU.

Subsection 4.17(a) requires that ARTC, in consultation with the HVCCC:

> *(i) select a reasonable number of alternative Coal Train configurations in addition to the Coal Train configurations forming the Interim Indicative Services;*
>
> *(ii) test the consumption of Coal Chain Capacity by those Coal Train configurations using the HVCCC modelling existing as at the Commencement Date (including, to avoid doubt, the coal chain infrastructure constraints as used by existing HVCCC modelling) unless otherwise agreed by ARTC and the HVCCC; and*
>
> *(iii) select the Coal Train configuration which it considers will represent the most efficient utilisation of Coal Chain Capacity when compared to the other Coal Train configurations tested.*

Subsection 4.17(b) requires that ARTC consult with the HVCCC, Access Holders and Operators on the Initial Indicative Service selected under subsection (a).

Subsection 4.17(c) requires that ARTC request the approval of the ACCC to vary the HVAU to implement the Indicative Service, as follows:

> *(c) Within 5 months of the Commencement Date, and after having regard to submissions from the consultation at subsection (b), ARTC will:*
>
> *(i) submit to the ACCC:*
>
> *(A) the characteristics of the initial indicative service selected as a result of the process described in subsection (a); and*
>
> *(B) the indicative access charges for the initial indicative service; and*
>
> *(ii) seek the approval of the ACCC to vary this Undertaking to provide for the adoption of the initial indicative service and indicative access charges applicable until ARTC develops and the ACCC accepts the indicative service and indicative charges under section 4.18.*

These arrangements for determination of the Initial Indicative Service were the result of consultation between ARTC and coal industry stakeholders during the development of the June 2011 HVAU.

The ACCC considers that ARTC's compliance with the requirements in section 4.17 of the June 2011 HVAU is in the interests of coal industry stakeholders as it will promote more efficient use of the Hunter Valley rail network in the interim, and is a step toward providing efficient investment signals to industry.

3.2.2 The long term solution and supply chain alignment

In its decision to accept the June 2011 HVAU the ACCC was of the view that the 'long term solution' for the Hunter Valley export coal supply chain, and the significance of the Hunter Valley rail network to that supply chain, were relevant 'other matters' to which to have regard under s. 44ZZA(3)(e). The ACCC also recognised the desirability of facilitating 'alignment' across the different elements of the supply chain to seek to achieve the objectives sought by the long term solution.[12]

A detailed overview of the long term solution is set out in the ACCC's March 2010 Draft Decision in relation to an earlier version of the HVAU.[13] In summary, the long term solution refers to steps taken by participants in the Hunter Valley export coal industry to address capacity constraints that have impacted the supply chain for several years.

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[12] ACCC, *Final Decision*, 29 June 2011, pp. 31-3.

[13] ACCC, *Draft Decision*, 5 March 2010, pp. 41-7.

Key stages in the process for developing the long term solution, which has been driven by industry participants in conjunction with regulatory bodies, have included:

- a review of the coal chain operations in 2008 by the Hon. Nick Greiner AC, and the subsequent development of a framework to govern the expansion and management of the chain (the Greiner Review);

- the agreement of an Implementation Memorandum in April 2009 between export terminal operators PWCS and Newcastle Coal Infrastructure Group (NCIG), and Newcastle Port Corporation (NPC), to address issues with capacity management at the port; and

- the authorisation by the ACCC in December 2009 of long term 'Capacity Framework Arrangements' agreed between and put forward by the port terminal operators and NPC.

The ACCC's decision to accept ARTC's June 2011 HVAU was another key step in the implementation of the long term solution.

The ACCC continues to view the promotion of alignment between the Hunter Valley rail network and other elements of the Hunter Valley coal chain as a key consideration in its assessment of the Proposed Variation. The ACCC is of the view that the alignment will promote the interests of access seekers and the public interest, and is likely to promote the efficient operation of, use of and investment in the Hunter Valley rail network.

The ACCC also continues to recognise that these alignment considerations are to be viewed alongside the legitimate business interests of ARTC as the access provider and the interests of parties using the network other than to transport coal (that is, non-coal users).

Accordingly the ACCC is of the view that alignment considerations are a relevant factor in assessing the Proposed Variation in accordance with s. 44ZZA(3)(e). These considerations are discussed further in Chapter 4 of this document.

4 The efficient train configuration

This chapter sets out the ACCC's preliminary views on particular aspects of ARTC's Proposed Variation, including the determination of the efficient train configuration and the proposed Initial Indicative Services.

4.1 The proposed Initial Indicative Services

ARTC is required under subsection 4.17 of the June 2011 HVAU to follow a process for determining the Initial Indicative Service, which includes the following steps:

- select a reasonable number of coal train configurations in addition to those forming the Interim Indicative Services (subsection 4.17(a)(i))
- in consultation with the HVCCC, select the coal train configuration which will represent the most efficient utilisation of coal chain capacity, given the HVCCC modelling existing at the commencement of the June 2011 HVAU (including infrastructure constraints as used by HVCCC modelling) (subsections 4.17(a)(ii) and (iii))
- consult with industry on the proposed Initial Indicative Service (subsection 4.17(b)).

In the Proposed Variation, ARTC has proposed the following Initial Indicative Services as providing for the most efficient utilisation of coal chain capacity:

- for services commencing in Pricing Zones 1 and 2, a train with the following characteristics:
  - 96 wagon train length
  - 30 tonne maximum axle load
  - 60 kph maximum speed (loaded)
  - 80 kph maximum speed (empty)
- for services commencing in Pricing Zone 3, a train with the following characteristics:
  - 82 wagon train length
  - 25 tonne maximum axle load
  - 80 kph maximum speed (loaded)
  - 80 kph maximum speed (empty).

4.2 Submissions in response to the Consultation Paper

The ACCC received a number of submissions on the proposed Initial Indicative Services in response to the 13 December 2011 Consultation Paper. Below is a summary of the submissions.

4.2.1 Peabody

Peabody submitted that ARTC has not considered a sufficient number of configurations and that the modelling is not advanced enough. Peabody suggested that the modelling should have included:

- entry and exit points to the network;
- geographic spread; and
- encouraging alignment in capital investment between above/below rail.[14]

4.2.2 QR National

QR submitted that the process undertaken by ARTC was 'completely inadequate' as ARTC should have considered the impact of above rail efficiency in its modelling, which QR suggested affects overall transportation costs to coal producers.[15]

QR also submitted that ARTC should have considered system velocity as an efficiency indicator, driven by cycle times. In addition, QR stated that the time and resource constraints placed on the modelling process have limited the value of the modelling outputs.[16]

QR considered that its trains are more efficient from an above rail perspective, as it uses more efficient locomotives and could haul up to 120 wagons if another locomotive was added.[17]

Consequently QR stated that the Initial Indicative Service is of limited value in guiding investment decisions.[18]

4.2.3 Asciano

Asciano supported the conclusion that longer trains provide more coal chain capacity than shorter trains. Asciano submitted, however, that some of the modelling assumptions used by ARTC could have been varied – for example, the assumptions that fix the capacity at 160mtpa and ignore the impact of congestion.[19]

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14 Peabody, *Submission in response to Australian Rail Track Corporation's Proposed Variation to the June 2011 Hunter Valley Coal Network Access Undertaking*, 25 January 2012, p. 3.

15 QR National, *QR National's submission in response to the ACCC's Consultation Paper on ARTC's application to vary the HVAU to implement the Initial Indicative Service*, 27 January 2012, p. 2.

16 Ibid., pp.7-8.

17 Ibid., pp.4-5.

18 Ibid., p. 5.

19 Asciano, *Submission to the ACCC in relation to the ACCC Consultation Paper on Australian Rail Track Corporation's Hunter Valley Rail Network Access Undertaking variation,* 27 January 2012, pp. 6, 7-8.

Asciano noted that there may be one loop (the Sandy Hollow loop) in Pricing Zone 2 in which the 96 wagon train does not fit. Asciano noted however, that email correspondence with ARTC clarified that the 96 wagon train length is actually 1540m long and not 1570m as contained in ARTC's documents.[20]

4.2.4 Coal and Allied

Coal and Allied (C&A) supported the conclusion that longer trains represent more efficient use of capacity.[21]

C&A submitted that of the metrics used by ARTC to determine the efficient train configuration (path utilisation, average vessel queue and number of consists to compare each train configuration), path utilisation is the best measure of efficiency given a fixed throughput as it reflects the extent to which spare network capacity remains available to industry to support growth and/or cope with unforeseen variability in the coal chain.[22]

C&A considered that the other metrics used by ARTC are inappropriate, but noted that their inclusion does not appear to have altered the outcome.[23]

4.3 ACCC view

The ACCC has assessed the efficient train configuration proposed by ARTC in terms of ARTC's compliance with the relevant requirements in the HVAU and the expected impact on efficient use of coal chain capacity that would result from adoption of the efficient train configuration.

4.3.1 Compliance with the June 2011 HVAU

The ACCC considers that ARTC's compliance with the requirements in section 4.17 is a relevant factor in its assessment of the Proposed Variation in accordance with s. 44ZZA(3)(e). ARTC submits that it has followed the requirements of section 4.17.[24]

The ACCC has identified three key components of this process:

- selection of a reasonable number of train configurations
- determination of the most efficient train configuration
- consultation with the HVCCC and industry.

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[20] Asciano, *Submission to the ACCC in relation to the ACCC Consultation Paper on Australian Rail Track Corporation's Hunter Valley Rail Network Access Undertaking variation*, 27 January 2012, pp. 9-10.

[21] Coal and Allied, *Submission in response to the Australian Competition and Consumer Commission's Consultation Paper In relation to Australian Rail Track Corporation's Hunter Valley Rail Network Access Undertaking variation*, 27 January 2012, p. 4.

[22] Ibid., p. 5.

[23] Ibid., p. 5.

[24] ARTC, *Application by ARTC to vary the Hunter Valley Access Undertaking to provide for the initial indicative services and initial indicative access charges*, 2 December 2011, section 2.3

This section discusses ARTC's response to each of those requirements and the ACCC's view on whether the requirements have been addressed.

4.3.1.1 Selection of a reasonable number of train configurations for testing

Subsection 4.17(a)(i) requires that ARTC select a reasonable number of trains in addition to those forming the Interim Indicative Services, as described in Table 2.

Table 2: Interim Indicative Services

Interim Indicative Service	Segments	Indicative Service Assumptions
Indicative Service 1	Pricing Zones 1 and 2	30 tonne maximum axle load 60 kph maximum speed (loaded) 80 kph maximum speed (empty) 91 wagon train length section run times as per applicable Hunter Valley standard working timetable
Indicative Service 2	Pricing Zones 1 and 2	30 tonne maximum axle load 60 kph maximum speed (loaded) 80 kph maximum speed (empty) 74 wagon train length section run times as per applicable Hunter Valley standard working timetable
Indicative Service 3	Pricing Zones 1 and 3	25 tonne maximum axle load 80 kph maximum speed (loaded) 80 kph maximum speed (empty) 72 wagon train length section run times as per applicable Hunter Valley standard working timetable

Table source: See June 2011 HVAU, subsection 4.19.

ARTC states in its supporting submission that 'due to constraints imposed by the limited time frame, testing only of combinations that either already existed and/or had been previously developed by the HVCCC was feasible.'[25] In order to comply with subsection 4.17(a)(i), ARTC selected two alternative Coal Train configurations as described in Table 3.

[25] ARTC, *Supporting Documentation*, 2 December 2011, p. 4.

Table 3: Alternative Services

Alternative Service	Segments	Indicative Service Assumptions
Alternative PZ1/2 Service	Pricing Zones 1 and 2	30 tonne maximum axle load 60 kph maximum speed (loaded) 80 kph maximum speed (empty) 96 wagon train length section run times as per applicable Hunter Valley standard working timetable
Alternative PZ3 Service	Pricing Zones 1 and 3	25 tonne maximum axle load 80 kph maximum speed (loaded) 80 kph maximum speed (empty) 82 wagon train length section run times as per applicable Hunter Valley standard working timetable

Table source: See ARTC, *Supporting Documentation*, 1 December 2011, p. 16.

In response to the ACCC's information request ARTC provided additional information to clarify the train consists that make up the Initial Indicative Services. This information is contained in Table 4.

Table 4: Train consist assumptions

PZ1/2 Alternative service 1 (96 wagon)	Max length (m)	Max train length (m)
Wagons (e.g. NHDH, NHEH, PHYH)	15.38	1543
Locomotives (e.g. TT, XRN, 5000)	22	
PZ3 Alternative service 3 (82 wagon)	**Max length (m)**	**Max train length (m)**
Wagons (e.g. NHDH, NHEH, PHYH)	15.38	1350
Locomotives	22	

Table source: See ARTC, *Response to ACCC Information Request*, 29 February 2012, p. 7.

ARTC also stated that the 'dimensions of the Initial Indicative Service rely on materially shorter wagons compared to the majority of the older style current fleet'.[26]

Consequently, the ACCC has concluded that some train operators may need to invest in replacing existing wagons with newer shorter wagons in order to move to the efficient train configurations that make up the Initial Indicative Services.

[26] ARTC, *Response to ACCC Information Request*, 8 March 2012, p. 8.

In relation to the assumptions in the modelling used to determine the Initial Indicative Services, the ACCC notes that subsection 4.17(a) requires that ARTC use 'the HVCCC modelling existing as at the Commencement Date (including, to avoid doubt, the coal chain infrastructure constraints as used by existing HVCCC modelling)'. In accordance with subsection 4.18(a), the determination of the Final Indicative Service 'will be a more robust modelling exercise than that used for selecting the initial Indicative Service under section 4.17 and will include scenarios under which System Assumptions are also varied in addition to the Coal Chain configurations'.

ARTC has used only those configurations that already existed or had already been developed by the HVCCC at the time the Initial Indicative Service was being determined.

The ACCC notes Peabody's concerns that an insufficient number of train configurations were considered during the process for determining the Initial Indicative Service.

The ACCC acknowledges ARTC's position that the approach adopted was necessary due to time constraints. The ACCC accepts that the two alternative services in Table 3 are a 'reasonable' number of alternative services for the purposes of compliance with the requirements in subsection 4.17(a)(i) of the June 2011 HVAU.

However, in the ACCC's view the limited number of alternative services considered highlights the need to undertake a more robust comparison of alternatives in the final modelling for the determination of the Final Indicative Service. The ACCC notes that several submissions advocated accelerating this process (see Chapter 7).

4.3.1.2 Determining the efficient train configuration

Subsections 4.17(a)(ii) and (iii) require that ARTC test the consumption of Coal Chain Capacity by the selected configurations, using existing HVCCC modelling, and select the Coal Train configuration which it considers will represent 'the most efficient utilisation of Coal Chain Capacity when compared to the other Coal Train configurations tested'.

ARTC submitted that the most appropriate efficiency measures to compare are:

- total export train consists required[27]
- path utilisation
- average vessel queue.

Given these criteria, ARTC has determined that the most efficient combination is the 96 wagon train on Pricing Zones 1 and 2, and the 82 wagon train on Pricing Zones 1 and 3 (as described above in Table 3). Accordingly, subsection 4.17(d) of the Proposed Variation proposes that these services should form the Initial Indicative Services.

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[27] A 'train consist' is the group of cars (including wagons and locomotives) which make up the train.

Assumptions

ARTC's modelling is based on the following assumptions:

- maximum system capacity of 160 million tonnes per annum (**mtpa**)
- a base case using forecast 2011 volumes
- no congestion.

As outlined in section 4.3.1 above, the June 2011 HVAU requires that the Initial Indicative Service be selected based on 'HVCCC modelling existing as at the Commencement Date (including, to avoid doubt, the coal chain infrastructure constraints as used by existing HVCCC modelling)'. The modelling assumptions used by ARTC are consistent with the existing HVCCC modelling, and therefore the ACCC considers that ARTC has complied with the requirements in subsections 4.17(a)(ii) and (iii) for the selection of the efficient train configuration.

Current HVCCC modelling and network constraints

The ACCC considers that it would inappropriate if no access seeker was able to run the Initial Indicative Services on the current network due to the constraints of the existing ARTC rail infrastructure. While the Final Indicative Service is intended to represent efficient utilisation of the optimised network, the Initial Indicative Service is intended to recognise current network constraints.

As noted in section 4.2, only Asciano questioned whether the 96 wagon train would fit in a passing loop in Pricing Zone 2.

In its response to the ACCC's request for information, ARTC has stated that there was a drafting error with regard to the train length of Coal Train configuration 3 (the 96 wagon train) and that this has now been clarified with the concerned stakeholder.[28] Consequently, ARTC submitted that 'it was of the opinion that the resultant dimensions and characteristics of the proposed Initial Indicative Services are capable of operating within the existing ARTC network configuration including track infrastructure and signalling design constraints'.[29]

It is possible that there may be some private infrastructure, such as individual miners' loading loops, which are currently unable to accommodate the proposed 96/82 combination. However, ARTC stated in its response to the ACCC's request for information that:

> it believed that the vast majority of other infrastructure owners were capable of accommodating the proposed Initial Indicative Service… however, it was not in a position to confirm this definitively.[30]

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[28] ARTC, *Response to ACCC information request*, 8 March 2012, p. 6.

[29] Ibid., p. 7. As noted in section 4.3.1.1 above, the dimensions require the use of newer, shorter wagons. See also Table 3 above.

[30] Ibid., pp. 7-8.

In the ACCC's view efficient use of the Hunter Valley Rail Network by all coal customers should not be constrained by the limitations of any individual customer's private infrastructure adjoining the network.

One of the objectives of identifying an efficient train configuration, and providing price signals to adopt this service is to offer incentives for miners and train operators to align their own investments and operating practices with the objective of promoting the efficiency of the entire coal supply chain.

However, the ACCC recognises that the Initial Indicative Service is an interim arrangement that will be superseded by the Final Indicative Service, which may not have the same characteristics. The ACCC therefore considers it is important to balance the price signalling role of the charges for the Initial Indicative Services with the potential for the efficient train configuration to be different following the completion of the final modelling. The ACCC's preliminary views on the proposed charges are discussed in Chapter 5.

4.3.1.3 ARTC consultation with industry

ARTC circulated a consultation document to Access Holders and Operators on 8 November 2011, seeking submissions and comment by 22 November 2011.[31] ARTC had previously consulted with the HVCCC in determining the proposed efficient train configuration.

ARTC received submissions from seven parties. To the extent that ARTC was able to obtain permission from the relevant parties, ARTC included copies of those submissions in its application to the ACCC to vary the June 2011 HVAU.

ARTC's submission provides an overview of its response to the submissions. ARTC submitted that:

> Overall, ARTC considers that the balance of views expressed in the submissions were supportive of ARTC's proposal and does not consider that there were compelling reasons put forward to warrant a change to this proposal. It was recognised that the selection of an initial indicative service would be undertaken in the context of existing infrastructure constraints, as a first step towards establishing and incentivising optimal utilisation of Coal Chain Capacity.[32]

The ACCC considers that ARTC has met the requirements in subsection 4.17(b), which requires that ARTC consult with the HVCCC, Access Holders and Operators on the Initial Indicative Service selected under subsection (a).

Industry has been provided with a further opportunity to provide submissions and outline its concerns through the ACCC's consultation processes.

The ACCC notes that the process for determining the Final Indicative Service in section 4.18 of the June 2011 HVAU is intended to be a more robust process, which includes principles for consultation between ARTC and the HVCCC. The ACCC

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[31] ARTC, *Application by ARTC to vary the Hunter Valley Access Undertaking to provide for the initial indicative services and initial indicative access charges*, 2 December 2011, section 2.3.

[32] Ibid.

encourages Access Holders and Operators to take a proactive approach to their involvement in this process to ensure robust industry negotiation and achievement of an optimal outcome for the Final Indicative Service. The ACCC's view on the process for determining the Final Indicative Service is discussed further in Chapter 7 of this Position Paper.

4.3.2 Network efficiency considerations

ARTC submitted that if Operators were to adjust their train configurations to utilise the proposed Initial Indicative Service, fewer train consists would be required and path utilisation would be reduced for the same throughput. ARTC stated that this would allow ARTC more flexibility to manage congestion and disruption events, and that vessel queue sizes would be reduced.[33] ARTC also submitted that greater throughput volumes may occur if Access Holders are able to adjust vessel cargo sizes to match the larger trains.[34] ARTC submits that these factors suggest that, even absent the constraints imposed by the existing HVCCC modelling, the proposed 96/82 wagons combination would be a more efficient configuration in terms of network efficiency than the 91/74/72 combination represented by the Interim Indicative Service.

Under s. 44ZZA(3)(c) of the Act, the ACCC must have regard to the interest of persons who might want access to the service. This includes both above-rail operators and end user customers (such as coal miners). The ACCC recognises that there may be diverging interests between the various users of the network. In balancing the interests of the various access seekers, the ACCC has had regard to the other matters in s. 44ZZA(3), including:

- promoting the economically efficient operation of, use of, and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets (s. 44ZZA(3)(aa))
- the public interest, including the public interest in having competition in markets (s. 44ZZA(3)(b))
- the long term solution for capacity constraints in the Hunter Valley (s. 44ZZA(3)(e)).

The ACCC considers that the proposed Initial Indicative Services are likely to be appropriate having regard to the matters in s. 44ZZA(3) of the Act as their use is likely to increase coal throughput on the network, leading to more efficient use of overall coal chain capacity. This will, in turn, facilitate better alignment of coal chain capacity, promote competition in upstream and downstream markets, and further the public interest by improving the competitiveness of Australian coal exports.

The ACCC acknowledges QR's submission that its locomotives could physically haul a longer train than the proposed efficient train configuration. The ACCC understands that it may be possible to operate a longer train on some parts of the network and that

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[33] ARTC, *Supporting Documentation*, 2 Dec 2011, p. 25.

[34] Ibid., p. 5. A similar outcome could also potentially be achieved if more vessels were filled as a result of the increase in throughput.

the more robust modelling to be undertaken in determining the Final Indicative Service will investigate this.

The ACCC also notes that certain train configurations and types of rolling stock may be seen as cost-effective from an individual train Operator’s perspective. However, the ACCC is of the view that above-rail efficiency cannot be considered in isolation. Promoting the efficiency of the entire coal supply chain requires alignment of all components of the supply chain, including Access Holders’ and Operators’ own infrastructure. The ACCC considers that supply chain efficiency will be promoted by identifying the efficient train configuration and setting charges that provide incentives for Access Holders and Operators to align their own operations and infrastructure with other infrastructure in the supply chain.

The ACCC also notes that the Initial Indicative Services have been proposed by ARTC and are therefore likely to be consistent with ARTC’s legitimate business interests. In particular, the ACCC notes ARTC’s view that:

> Decreased path utilisation in the short term increases network flexibility to manage live run disruption events and in the longer term reduces the need for capital expenditure on infrastructure.[35]

4.3.3 Conclusion

The ACCC considers that ARTC has complied with the requirements in section 4.17 of the June 2011 HVAU for determination of the Initial Indicative Service(s). The ACCC considers that adoption of the proposed Initial Indicative Services would improve network efficiency by improving the utilisation of Coal Chain Capacity. The ACCC’s preliminary view is that the proposed Initial Indicative Services are appropriate having regard to the matters in s. 44ZZA(3) of the Act and the constraints of the initial modelling.[36]

The ACCC acknowledges that there may be constraints that will limit the adoption of the Initial Indicative Service during the Initial Period.

Questions for comment

- What is the likely take up of the Initial Indicative Services during the Initial Period? What factors will influence this decision?
- Would Access Holders and Operators have to make any investments to be able to move to the Initial Indicative Services?
- Would there be any lead time in moving to the Initial Indicative Services?

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35 ARTC, *Supporting Documentation*, 2 December 2011, p. 28.

36 The ACCC’s preliminary view is that the matter listed in s. 44ZZA(3)(ab) of the Act (pricing principles specified in s. 44ZZCA) is not directly relevant to the consideration of the appropriate train configuration for the Initial Indicative Services, but will be relevant to considering the Initial Indicative Charges for the services. The ACCC also considers that its preliminary view is not inconsistent with paragraph (b) of the objects of Part IIIA contained in s. 44AA, which is to provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

- How many locomotives are required to run the 91, 74 and 72 wagon trains?

- The ACCC understands that the longest train configurations that can be run on the Hunter Valley network using the old locomotives and wagons are the 91 wagon train in Pricing Zones 1 and 2 and the 72 wagon train in Pricing Zone 3. If this is not the case, what are the longest train configurations that can be run using the old locomotives and wagons?

- QR National's current train configuration includes 2 'new and efficient AC traction locomotives' hauling 74 wagons. Is it possible for QR to haul more than 74 wagons using two of the 'efficient' locomotives? If not, what is the longest possible configuration?

5 Proposed charges

This chapter sets out the ACCC's preliminary views on the pricing aspects of ARTC's Proposed Variation, including the proposed Initial Indicative Access Charges and the level of transparency provided by ARTC.

5.1 The proposed Initial Indicative Access Charges

Subsection 4.17(c)(i)(B) of the June 2011 HVAU requires that ARTC submit to the ACCC the Indicative Access Charges for the Initial Indicative Service.

ARTC has proposed that the charges in the table below will form the Initial Indicative Access Charges. These charges will apply to the Initial Indicative Services from the first day of the calendar month following publication of the Initial Indicative Service characteristics and other information as required by section 4.17(d) of the June 2011 HVAU.

Table 5: Initial Indicative Access Charges

Initial Indicative Service Assumptions	Pricing Zone	Non-TOP $/kgtkm (ex GST)	TOP $/kgtkm (ex GST)
96 wagon train 30 tonne maximum axle load 60 kph maximum speed (loaded) 80 kph maximum speed (empty) 96 wagon train length section run times as per applicable Hunter Valley standard working timetable	Pricing Zone 1: Initial Indicative Service 1	0.844	8.342
	Pricing Zone 2: Initial Indicative Service 1	2.393	6.939
82 wagon train 25 tonne maximum axle load 80 kph maximum speed (loaded) 80 kph maximum speed (empty) 82 wagon train length section run times as per applicable Hunter Valley standard working timetable	Pricing Zone 1: Initial Indicative Service 2	0.844	9.251
	Pricing Zone 3: Initial Indicative Service 1	0.837	5.072

Table sources: See ARTC's Proposed Variation, subsection 4.17(d).

Subsection 4.17(c) of the Proposed Variation provides that ARTC will determine, using reasonable endeavours and having regard to available information, Initial Indicative Access Charges for each calendar year of the Initial Period, being the period during which the Initial Indicative Services apply under subsection 4.17(b). The Initial Indicative Access Charges in Table 5 above are proposed to apply during the first calendar year of the Initial Period.

ARTC will also determine and publish:

- annual Interim Indicative Access Charges for the current Interim Indicative Services during the Interim Period (i.e. until the Final Indicative Services and the Indicative Access Charges approved by the ACCC come into effect under section 4.18), in accordance with subsection 4.19(a) of the Proposed Variation, and

- charges for other services associated with Coal Access Rights applicable during the Initial Period, in accordance with subsection 4.17(c) of the Proposed Variation.

ARTC has stated that the pricing differentials for non-Indicative Services will be calculated in relation to the charges for the Initial Indicative Services.[37] Section 4.17(d) requires that these charges be published 30 days after the Proposed Variation is approved.

5.1.1 The process for determining Initial Indicative Access Charges

The June 2011 HVAU does not prescribe a particular process by which ARTC must determine the Initial Indicative Access Charges. However, section 4 of the June 2011 HVAU contains general principles and objectives for setting prices, including the structure of charges for coal access rights (section 4.11) and pricing objectives (section 4.13). Section 4.14 sets out the process by which ARTC will determine Indicative Access Charges each year for the Indicative Services, including by having regard to the system assumptions. The June 2011 HVAU also contains grandfathering provisions for charges for particular Interim Indicative Services in section 4.15(a)(iii).[38]

5.1.1.1 Factors used in estimating charges

ARTC's supporting documentation provides further detail regarding the Initial Indicative Access Charges, including the factors it has taken into account in determining those charges. ARTC elected to have regard to the relative impacts of each service on:

- capacity of the network (being the rail track)

- Coal Chain Capacity

- consumption of ARTC's resources, focussed on maintenance impacts (driven by speed and axle load).

ARTC outlined the process by which it has determined the relative impacts as well as the weightings applied to each of the differentiation factors in each pricing zone. ARTC also provided guidance as to how it has differentiated the Initial Indicative Access Charges from the Interim Indicative Access Charges, and submitted that it

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37 ARTC, *Application by ARTC to vary the Hunter Valley Access Undertaking to provide for the initial indicative services and initial indicative access charges*, 2 December 2011, section 3.

38 Subsection 4.15(a)(iii) of the June 2011 HVAU requires that ARTC charge the same price for the two primary existing Interim Indicative Services using the network as at the Commencement Date (being the 91 and 74 wagon trains) until 31 December 2014.

based this differentiation upon the factors prescribed in section 4.15 of the June 2011 HVAU.

ARTC has applied the following weightings to each of the key differentiation factors in each pricing zone:

Table 6: Differentiation factors

Pricing Zone	Maintenance	Coal Chain Capacity	Capacity
1	19%	54%	27%
2	35%	43%	22%
3	13%	58%	29%

Table sources: See ARTC Supporting Submission, 2 December 2011.

ARTC submitted that it has proposed to apply the differentiation factors in accordance with weightings as follows:

- Differentiation based on maintenance impacts will be weighted by reference to the proportion of maintenance expenditure forecast in Economic Cost for each Pricing Zone in 2012. Differential will be applied across the non-TOP and TOP components on the initial Indicative Access Charges. These proportions are 19% (Pricing Zone 1), 35% (Pricing Zone 2) and 13% (Pricing Zone 3) as forecasted in 2012.
- The remaining weightings in each Pricing Zone (representing other operating costs and capital costs) would be allocation to Capacity and Coal Chain Capacity considerations.
- ARTC recognises the importance placed by the coal industry on efficient utilisation of Coal Chain Capacity. To this end ARTC proposes to weight Coal Chain Capacity considerations 2/3rds and Capacity consideration 1/3rd.[39]

5.1.1.2 ARTC's pricing methodology

The ACCC's understanding of ARTC's pricing methodology is summarised below.

Pricing Zone 1 – Initial Indicative Access Charges for the 96 wagon train

- The 2012 Interim Indicative Access Charge for the 91 wagon train in Pricing Zone 1 is used as a base for differentiation (that is, for determining price relativities).
- Maintenance expenditure is divided into fixed and variable components. The variable component of maintenance expenditure is included as the non-TOP component of charges and the fixed component of maintenance forms part of the TOP component of charges. ARTC concluded that there is no basis for differentiating maintenance costs between the 96 and 91 wagon train. The average

39 ARTC, *Supporting Documentation*, 2 December 2011, pp. 44-5.

and maximum speeds and axle loads (which influence maintenance costs) are the same for both trains.

- The remainder of the TOP component of charges is determined according to relative consumption of Network Capacity and Coal Chain Capacity respectively.

- ARTC has concluded that the 96 and 91 wagon trains consume the same amount of Network capacity per train path. As charges apply on a per gross tonne kilometre (gtkm) basis, ARTC has applied a negative differential on the TOP component in respect of the 91 wagon train to reflect its lower gross tonnage compared to the 96 wagon train.

- In relation to Coal Chain Capacity, ARTC has applied a 0.5 per cent differential on the TOP component in respect of the 91 wagon train to reflect its lower throughput in terms of tonnage carried compared to the 96 wagon train.[40]

Pricing Zone 1 – Initial Indicative Access Charges for the 82 wagon train

- The Initial Indicative Access Charge for the 96 wagon train in Pricing Zone 1 is used as a base for setting the relative price of the 82 wagon train.

- ARTC has concluded that there is no basis for differentiating the non-TOP charge as there is no difference between the 96 and 82 wagon trains in terms of variable maintenance costs. However, it has applied an 8 per cent difference in the TOP component that relates fixed maintenance costs to reflect the higher maximum speed of the 82 wagon train.[41]

- In relation to Network Capacity, ARTC has determined that the 82 and 96 wagon trains consume the same amount of network capacity per train path. ARTC has therefore applied a 34 per cent differential on the TOP component in respect of the 82 wagon train to reflect its lower gross tonnage compared to the 96 wagon train.[42]

- In relation to Coal Chain Capacity, ARTC has not differentiated the TOP component of the charges between the 96 and 82 wagon trains. ARTC has argued that it would not be fair to penalise Access Holders from Pricing Zone 3 for not running longer trains when the infrastructure in Pricing Zone 3 does not physically allow them to run trains longer than 82 wagons.

Pricing Zone 2 – Initial Indicative Access Charges for the 96 wagon train

The 2012 Interim Indicative Access Charge for the 91 wagon train in Pricing Zone 2 is used as a base for differentiation. ARTC has applied the same methodology as used to determine the Initial indicative access charges for the 96 wagon train in Pricing Zone 1.

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[40] ARTC, *Supporting Documentation*, 1 December 2011, p. 43.
[41] ARTC, *Supporting Documentation*, 1 December 2011, p. 39.
[42] ARTC, *Response to ACCC information request*, 29 February 2012, p. 17.

Pricing Zone 3 – Initial Indicative Access Charges for the 82 wagon train

- The 2012 Interim Indicative Access Charge for the 72 wagon train in Pricing Zone 3 is used as a base for differentiation.

- ARTC has concluded that there is no basis to differentiate the non-TOP and TOP components that relate to variable and fixed maintenance costs respectively between the 82 and 72 wagon train, because the average and maximum speeds and axle loads are the same for both trains.

- In relation to Network Capacity, ARTC has concluded that the 82 and 72 wagon trains consume the same amount of network capacity per train path. Consequently, as charges apply on a per gtkm basis, ARTC has applied a negative differential to the TOP component in respect of the 82 wagon train to reflect its higher gross tonnage compared to the 72 wagon train.

- In relation to Coal Chain Capacity, ARTC has applied a negative 0.5 per cent differential on the TOP component in respect of the 82 wagon train to reflect its higher throughput in terms of tonnage carried compared to the 72 wagon train.[43]

- ARTC has then adjusted downwards the total TOP component of the access charge, calculated using the above methodology, for the 82 wagon train in Pricing Zone 3. ARTC has stated that the adjustment is made to 'offset' the financial impact on Access Holders of the increase in charges for the 82 wagon train in Pricing Zone 1.

5.2 Submissions in response to the Consultation Paper

The ACCC received a number of submissions on the proposed Initial Indicative Access Charges in response to its 13 December 2011 Consultation Paper.

5.2.1 Efficiency implications

QR National: QR noted that gtkm-based pricing has been retained in the Initial Indicative Access Charges, which QR submitted was appropriate because it incentivises a lower gross-to-net ratio and promotes efficiency.[44]

Asciano: Asciano submitted that the level of the proposed charges is not appropriate. Asciano considered that the pricing relativities are not sufficient to encourage Operators to move from smaller to larger trains and that ARTC should provide pricing incentives for the operation of efficient, longer trains.[45]

Asciano also submitted that the proposed Initial Indicative Access charges are unlikely to address network congestion. Asciano considered that the differentials between the 72, 74 and 82 wagon trains in Pricing Zone 1 are not appropriate because

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43 ARTC, *Supporting Documentation*, 2 December 2011, p. 43.

44 QR National, *QR National's submission in response to the ACCC's Consultation Paper on ARTC's application to vary the HVAU to implement the Initial Indicative Service*, 27 January 2012, p. 8.

45 Asciano, *Submission to the ACCC in relation to the ACCC Consultation Paper on Australian Rail Track Corporation's Hunter Valley Rail Network Access Undertaking variation* January 27 2012, pp. 9-10.

they do not provide sufficient incentives to facilitate more effective use of the network. Asciano also considered that trains other than the Initial Indicative Services should be priced in relation to the efficient train benchmark.[46]

Coal and Allied: C&A submitted that the differential charges for the 96 and 82 wagon trains will not promote efficiency. C&A noted that ARTC has proposed a 0 per cent non-TOP differential (that is, no differential) and an 11 per cent TOP differential. C&A submitted that ARTC should apply a -7.5 per cent non-TOP differential (that is, the 82 wagon service should face a lower non-TOP charge) and a 31 per cent TOP differential. In determining these differentials, C&A noted that ARTC had not reflected consumption of coal chain capacity in the proposed Initial Indicative Access Charges:

> Given the constraints of the existing modelling which cap throughput at 160 Mtpa it is difficult to assess the relative efficiency of different train configurations based on throughput estimates alone.[47]

The following table is from C&A's submission, and sets out its understanding of how ARTC has determined the Indicative Access Charges.[48]

Table 6: C&A's proposed differential in Zone 1 Charges for the two Initial Indicative Services*

Component of Access Charge	Proportion of total**	96 wagon train configuration	82 wagon train configuration	Differential
	%	*$/'000GTK*	*$/'000GTK*	%
Non-TOP (variable maintenance charge)	9%	0.844	0.781	(7.5%) decrease due to axle load
TOP (fixed charge for maintenance and capacity)	91%	8.342	10.926	31%
- Maintenance	10%	0.901	0.973	8% (1% of total)
- Coal Chain Capacity	54%	4.960	6.635	34% (20% of total)
- Capacity (Network)	27%	2.480	3.318	34% (10% of total)

* These values reflect the appropriate relatively rather than absolute values – by raising Charges for 82 wagon trains ARTC might over-recover revenue in Zone 1

** Total Access Charge is sum of TOP and non-TOP Charges

Table source: See Table 3 in C&A's submission.

C&A also submitted that ARTC had decreased access charges in Pricing Zone 3 to offset the impact of Pricing Zone 1 price differentials on Pricing Zone 3 producers

46 Asciano, *Submission to the ACCC in relation to the ACCC Consultation Paper on Australian Rail Track Corporation's Hunter Valley Rail Network Access Undertaking variation* January 27 2012, pp. 9-11.

47 Coal and Allied, *Submission in response to the Australian Competition and Consumer Commission's Consultation Paper In relation to Australian Rail Track Corporation's Hunter Valley Rail Network Access Undertaking variation*, 27 January 2012, p. 10.

48 Ibid., p. 13.

using the 82 wagon train. C&A stated that this approach would distort the overall efficiency incentives for Pricing Zone 3 producers.[49]

C&A also stated that it is the pricing signals from the Initial Indicative Service that will influence the efficient investment and use of the network:

> it is the approach to price differentiation that ARTC will use to determine Charges for all train configurations that will send economic signals to industry regarding the efficient investment in and use of available capacity. The Initial Indicative Services merely set a benchmark against which other train configurations will be measured. The proposed Initial Indicative Services can serve this purpose as well as any other if they are priced appropriately relative to each other and to other services.[50]

C&A also submitted that the 2012 Interim Indicative Access Charges published by ARTC in November 2011 should be adjusted following the determination of the Initial Indicative Access Charges.[51]

PWCS: PWCS submitted that the access charges for Pricing Zone 3 services are not consistent with efficiency based pricing and do not necessarily give producers incentives to adopt the more efficient Pricing Zone 3 configuration (i.e. the 82 wagon train).[52]

5.2.2 Pricing transparency

There was general agreement in submissions that the level of information provided by ARTC regarding the proposed Indicative Access Charges and how they had been determined was insufficient.

Peabody: Peabody submitted that access seekers need more information around how ARTC's proposed charges are calculated. For example, Peabody suggested that if the charge differentiation factors under section 4.15 of the June 2011 HVAU are intended to apply then this should be clearly expressed by ARTC.[53]

QR National: QR noted that it does not have access to ARTC's modelling, costs and forecasts and therefore is not able to comment on the quantum of the proposed Indicative Access Charges.[54]

Asciano: Asciano submitted that more clarity is needed around how the proposed Initial Indicative Access Charges have been derived and how non-efficient trains, including Asciano's 91 wagon train, will be priced.[55]

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49 Ibid., p. 10.

50 Coal and Allied, *Submission in response to the Australian Competition and Consumer Commission's Consultation Paper In relation to Australian Rail Track Corporation's Hunter Valley Rail Network Access Undertaking variation*, 27 January 2012, p. 5.

51 Ibid., p. 10.

52 PWCS, *Submission to the Australian Competition and Consumer Commission regarding the Australian Rail Track Corporation Limited's proposed variation to the Hunter Valley Rail Network Access Undertaking*, 27 January 2012, p. 3

53 Peabody, *Submission in response to Australian Rail Track Corporation's Proposed Variation to the June 2011 Hunter Valley Coal Network Access Undertaking*, 25 January 2012, p. 2.

54 QR National, *QR National's submission in response to the ACCC's Consultation Paper on ARTC's application to vary the HVAU to implement the Initial Indicative Service*, 27 January 2012, p. 9.

Coal and Allied: C&A considered that greater transparency is needed around the calculation of charges for different services (both Indicative and non-Indicative) and submitted that this will help industry make investment decisions.[56]

PWCS: PWCS submitted that it is not clear how ARTC intends to price for smaller configurations in the Hunter Valley.[57]

5.2.3 Grandfathering

Peabody: Peabody submitted that the pricing parity mechanism should apply after the Regulatory Transition Period. Peabody considers that pricing parity should remain until the expiry of the above rail contracts entered into prior to the commencement of the June 2011 HVAU.[58]

QR National: QR also submitted that the grandfathering provisions in section 4.15 of the June 2011 HVAU should apply for the term of above rail contracts entered into under arrangements in place at the time. QR considers that 3.5 years is an unreasonably short period for grandfathering to apply.[59]

Asciano: Asciano submitted that congestion is unlikely to be addressed on the Hunter Valley network due to the grandfathering provisions contained in section 4.15 of the June 2011 HVAU.[60]

Coal and Allied: C&A submitted that ARTC is only required to maintain pricing parity for the two main services in Pricing Zones 1 and 2 (that is the 91 and 74 wagon train), but not for services in Pricing Zone 3 (the 72 wagon train).[61] C&A considered that ARTC should adjust the Interim Indicative Access Charges for the less efficient Pricing Zone 3 services.[62]

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55 Asciano, *Submission to the ACCC in relation to the ACCC Consultation Paper on Australian Rail Track Corporation's Hunter Valley Rail Network Access Undertaking variation* January 27 2012, p. 7.

56 Coal and Allied, *Submission in response to the Australian Competition and Consumer Commission's Consultation Paper In relation to Australian Rail Track Corporation's Hunter Valley Rail Network Access Undertaking variation*, 27 January 2012.

57 PWCS, *Submission to the Australian Competition and Consumer Commission regarding the Australian Rail Track Corporation Limited's proposed variation to the Hunter Valley Rail Network Access Undertaking*, 27 January 2012, p. 3.

58 Peabody, *Submission in response to Australian Rail Track Corporation's Proposed Variation to the June 2011 Hunter Valley Coal Network Accexs Undertaking*, 25 January 2012, p. 2.

59 QR National, *QR National's submission in response to the ACCC's Consultation Paper on ARTC's application to vary the HVAU to implement the Initial Indicative Service*, 27 January 2012, p. 3.

60 Asciano, *Submission to the ACCC in relation to the ACCC Consultation Paper on Australian Rail Track Corporation's Hunter Valley Rail Network Access Undertaking variation* January 27 2012, pp. 10-11.

61 Coal and Allied, *Submission in response to the Australian Competition and Consumer Commission's Consultation Paper In relation to Australian Rail Track Corporation's Hunter Valley Rail Network Access Undertaking variation*, 27 January 2012, p. 16

62 Ibid., p. 15.

5.3 ARTC response to the ACCC's request for information

On 15 February 2012 the ACCC requested that ARTC provide further information to assist the ACCC in its assessment of the Proposed Variation. On 29 February 2012 ARTC provided a response to the ACCC's request for information.

Documents relating to the request for information, including the ACCC's notice and ARTC's public response, are available on the ACCC's website. A summary of ARTC's response is provided below.

5.3.1 Efficiency implications

ARTC's response addressed two issues raised by the ACCC in regard to the expected efficiency implications of the Initial Indicative Access Charges:

- pricing of trains in Pricing Zone 1 and differentiation for coal chain capacity
- lower access charges in Pricing Zone 3 to offset pricing differentials in Pricing Zone 1.

ARTC provided a number of reasons for its proposal not to differentiate the Coal Chain Capacity component of pricing between the 96 wagon configuration and the 82 wagon configuration in Pricing Zone 1.

First, ARTC noted that producers operating in Pricing Zone 3 are not able to run longer trains than 82 wagons due to existing infrastructure constraints in that zone. ARTC submitted that:

> Providing a pricing incentive for them to do so would not seem to add any value…[63]

Second, ARTC recognised that running only 96 wagon trains in Pricing Zone 1 (instead of both 96 and 82 wagon trains) would increase coal chain capacity utilisation. However, ARTC noted that existing infrastructure constraints currently rule out this option in practice and the HVCCC had not modelled the impact of running only 96 wagon trains: [64]

> ARTC accepts that throughput would be higher if only 96 wagon trains were operated… However the most efficient utilisation of Hunter Valley coal chain must be contemplated in terms of the market being serviced by that coal chain which includes the Gunnedah basin mines… As such, ARTC cannot see any basis for differentiation in terms of Coal Chain Capacity consumption between the 96 and 82 wagon configurations where existing infrastructure constraints are to be applied.[65]

Third, ARTC considered that existing infrastructure constraints mean that an 82 wagon train is the most efficient train that can be run in Pricing Zone 1 when it originates in Pricing Zone 3. ARTC concluded that:

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63 Ibid., p. 18.
64 ARTC, *Response to ACCC information request*, 29 February 2012, p. 19.
65 ARTC, *Supporting Documentation*, 2 December 2011, p. 43.

> penalising Pricing Zone 3 producers by differentiating on the basis of coal chain capacity in Pricing Zone 3 when they [are] operating the most efficient configuration that they are able to given the existing infrastructure constraints in Pricing Zone 3 would not be reasonable.[66]

ARTC concluded that the only reliable basis upon which prices could be differentiated in Pricing Zone 1 was maintenance. ARTC submitted that this differentiation would only impact upon fixed costs. ARTC concluded that there was no reliable basis upon which prices could be differentiated due to maintenance considerations in relation to all other Coal Train configurations in all pricing zones.[67]

In relation to ARTC's decision to reduce access charges in Pricing Zone 3 to offset the increased charges in Pricing Zone 1, ARTC gave two reasons.

First, ARTC stated that it considered that Pricing Zones 1 and 2 are in a different 'market' to that of Pricing Zone 3:

> …the Coal Train configurations utilised by Pricing Zone 1 and 2 mines, and Pricing Zone 3 mines are in different markets. As such any access pricing available in one market (Pricing Zone 1/2 mines) would not be necessarily be available in the other market (Pricing Zone 3 mines) and vice versa.[68]
>
> ARTC considers that the IIS and IIS 2 are products realistically offered to customers in geographically distinct locations.[69]

Second, ARTC stated that the price adjustment would ensure that ARTC's total revenue from Pricing Zone 3 producers would remain the same after the Initial Indicative Services were implemented. ARTC noted that this would reduce its revenue risk.[70]

More generally, ARTC stated that the Hunter Valley coal network should be considered as 'a system serving mines in all three pricing zones together rather than serving 3 individual pricing zones'.[71] ARTC also submitted that:

> [the idea that] achieving efficiency in certain parts of the Hunter Valley will, in aggregate result in efficiency of the Hunter Valley coal network as a whole… is by no means clear to ARTC.[72]

5.3.2 Pricing transparency

In response to submissions that ARTC should be more transparent regarding how it has calculated the Indicative Access Charges, and how it will calculate other charges, ARTC stated that:

> …with only a few exceptions rail access undertakings/regimes in Australia generally provide for pricing that ensures that revenue collected by the track manager does not cross subsidise other users of the network or other parts of

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66 Ibid, p. 18.
67 ARTC, *Supporting Documentation*, 2 December 2011, p. 41.
68 Ibid., p. 43.
69 ARTC, *Response to ACCC request for information*, 29 February 2012, p. 18.
70 Ibid., p. 20.
71 Ibid., p. 18.
72 Ibid.

> the network. Within that constraint, the track manager is able to exercise a reasonable amount of discretion.[73]

ARTC submitted that it should have a reasonable amount of discretion in setting prices, subject to the broader constraint of the revenue limits, noting that:

> providing the track manager with this discretion has certain investment and efficiency benefits by enabling the track manager to maximise revenue where it can and not be constrained in promoting new entry by restrictive pricing mechanisms. [74]

While ARTC provided some further detailed information on its pricing approach, it did not provide the financial model as requested by the ACCC, submitting that:

> …notification of a particular calculation or determination of access pricing to the regulator and industry may create a precedent and expectation that future pricing will be calculated or determined in the same way, irrespective of whether the method of calculation is explicitly prescribed in the undertaking.[75]

However, ARTC provided some additional explanation to the ACCC about how it had calculated its charges. ARTC stated that its intention in doing so was that:

> Regulatory satisfaction in this regard then provides the industry with confidence that the regulatory requirements have been complied with.[76]

5.4 ACCC view

For the purpose of its assessment of ARTC's proposed charges, the ACCC considers the following factors to be important:

- compliance with the June 2011 HVAU
- efficiency implications and appropriateness of pricing signals
- pricing transparency.

5.4.1 Compliance with the June 2011 HVAU

As outlined in section 3.2.1 of this Position Paper, the ACCC considers that the June 2011 HVAU is a matter relevant to the assessment of the Proposed Variation under s. 44ZZA(3)(e). In relation to its assessment of the proposed Initial Indicative Access Charges, the ACCC particularly notes the following aspects of the June 2011 HVAU:

- the principles for the structure of charges for coal access rights in section 4.11 and the pricing objectives in section 4.13
- the revenue limits in subsections 4.2 and 4.3

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73 ARTC, *Response to ACCC Information Request*, 8 March 2012, p. 10.
74 Ibid., p. 10.
75 Ibid., p. 11.
76 Ibid., p. 12.

- the grandfathering requirements in subsection 4.15(a)(iii).

The ACCC's preliminary views on the Initial Indicative Access Charges having regard to each of these aspects are outlined below.

The ACCC notes that section 4.14 of the June 2011 HVAU requires ARTC to have regard to the system assumptions in setting Indicative Access Charges. The ACCC's view on whether the proposed Initial Indicative Access Charges appropriately reflect the particular characteristics of the Initial Indicative Service is set out in section 5.4.3 of this Position Paper.

As noted in section 2.3 of this Position Paper, the ACCC's assessment of the Proposed Variation has not considered whether gtkm-based pricing is appropriate. The review of gtkm pricing will be undertaken as part of the comprehensive Final Indicative Service assessment outlined in subsection 4.18(b) of the June 2011 HVAU. As noted in Chapter 7 of this Position Paper, the ACCC considers that the determination of the Final Indicative Service should include an assessment of alternative pricing methods.

5.4.1.1 Pricing principles and objectives

Subsection 4.11(a) of the June 2011 HVAU requires that charges for coal access rights may be based on a combination of:

- actual usage, being a function of distance and gross mass ($/gtkm for a pricing zone); and

- a take or pay (**TOP**) component for the Access Rights contracted for under the Access Holder Agreement irrespective of whether the Access Holder uses all or any of the Access Rights.

ARTC has included both TOP and non-TOP components in the proposed Initial Indicative Access Charges.

Subsection 4.13 of the June 2011 HVAU includes various pricing objectives which ARTC will have regard to in determining Charges under the June 2011 HVAU. These objectives include:

- achieving full recovery of the variable component of costs from all Access Holders on the basis of actual network usage

- achieving maximum recovery of the fixed and new capital components of cost from all users

- applying a TOP component to fully recover, on the basis of forecast network usage (or otherwise on the basis of actual network usage):

    - new capital component of costs over the life of new investments, and

    - some or all of the fixed capital costs from applicable Access Holders on the basis of forecast network usage, or otherwise recover some or all of fixed capital costs on the basis of actual network usage.

As discussed in section 5.1.1 of this Position Paper, ARTC has differentiated the proposed Initial Indicative Access Charges from the 2012 Interim Indicative Access Charges having regard to consumption of network capacity, coal chain capacity, and consumption of ARTC's resources. The ACCC considers these differentiation factors are appropriate as they reflect the costs to ARTC of providing particular services and the opportunity costs of those services relative to other services in terms of overall coal chain capacity.

ARTC has also apportioned the maintenance impacts of each of the Indicative Services to both the TOP and non-TOP components of charges, based on whether the maintenance impacts can be attributed to fixed or variable costs.

The ACCC considers it is appropriate that ARTC has apportioned the maintenance differentials to the TOP and non-TOP charges, in accordance with whether the maintenance impacts affect the fixed and variable components of costs respectively.

5.4.1.2 Compliance with revenue limits

The revenue limit provisions are contained in sections 4.2 and 4.3 of the June 2011 HVAU.

> **4.2 Floor Limits**
>
> Access revenue from every Access Holder must at least meet the Direct cost imposed by that Access Holder
>
> For each Segment or group of Segments, Access revenue from Access Holders should, as an objective, meet the Incremental Cost of those Segments ("Floor Limit")
>
> **4.3 Ceiling Limits**
>
> In relation to Segments identified as forming part of Pricing Zone 1 and 2 in Schedule E, Access revenue from any Access Holder, or group of Access Holders must not exceed the Economic Cost of those Segments which are required on a stand alone basis for the Access Holder or group of Access Holders ("Ceiling Limit")
>
> In relation to Segments identified as forming part of Pricing Zone 3 in Schedule E, the Access revenue from any Access Holder, or group of Access Holders must not exceed the Ceiling Limit where the RAB for those Segments is equal to, or falls below, the RAB Floor Limit for those Segments at the end of the calendar year (t – 1).
>
> Access revenue for the purposes of this section 4.3 does not include Access revenue returned to a Contributor as a result of the operation of a user funding agreement between the Contributor and ARTC.

ARTC's actual revenue is reconciled with the applicable ceiling limits through 'unders and overs accounting' pursuant to section 4.9 of the June 2011 HVAU. This forms part of the annual ACCC compliance assessment pursuant to section 4.10 of the June 2011 HVAU. Should ARTC's pricing result in over or under-recovery against applicable ceiling limits, it is to be reconciled with each Constrained Coal Customer in accordance with subsection 4.9(b) of the June 2011 HVAU.

Subsection 4.20(c) of the June 2011 HVAU requires that ARTC determine Indicative Access Charges based on the contracted coal volumes for that calendar year, any additional volumes that ARTC considers likely to be contracted coal volumes for that relevant year, and ARTC's forecast costs. ARTC informed Access Holders of the 2012 Interim Indicative Access Charges for Interim Indicative Services in November 2011.

In response to the ACCC's request for information, ARTC stated that there are no Access Holders, prospective Access Holders or related above-rail operators that currently operate an Initial Indicative Service. Accordingly, ARTC forecast zero tonnage for the Initial Indicative Services for 2012.[77] ARTC states in its supporting submission:

> there is no basis to now assume that there may be any significant conversion from contracted configurations to this initial Indicative Service configuration in developing Indicative Access Charges. As such, ARTC proposes to set the initial Indicative Access Charges by reference to the Interim Indicative Charges currently proposed in Pricing Zone 1 and 2.[78]

However, the ACCC understands that since ARTC's response to the request for information, there has been a successful trial running a 96 wagon train.

The ACCC accepts that there is uncertainty around the expected take-up of the Initial Indicative Services. Consequently, the ACCC has not formed a view on whether the charges are consistent with the revenue limits. However, the ACCC has a role in assessing ARTC's compliance with the revenue limits in the HVAU on an annual basis, and is able to ensure that any under or over-recovery is addressed.

ARTC has based the proposed Initial Indicative Access Charges on the existing Interim Indicative Access Charges, which are based on volume forecasts for the Interim Indicative Services. The ACCC considers that this is likely to be an appropriate alternative method for determining the Initial Indicative Access Charges given that accurate forecast volumes for the Initial Indicative Services are not yet available.

The ACCC notes that forecast volumes for the Initial Indicative Services should become more reliable in subsequent years, and that ARTC is required to provide aggregate forecasts each year in accordance with the process for determining Indicative Access Charges in section 4.20 of the June 2011 HVAU.

5.4.1.3 Grandfathering provisions

Subsection 4.15(a)(iii) of the June 2011 HVAU requires that ARTC charge the same price for the two primary existing Interim Indicative Services using the network as at the Commencement Date (being the 91 and 74 wagon trains in Table 2). This requirement applies until 31 December 2014. By that time, ARTC will have determined and submitted to the ACCC the Final Indicative Services based on more advanced HVCCC modelling.

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[77] ARTC, *Response to ACCC Information Request*, 8 March 2012, Questions 6 and 10, pp. 9, 19.

[78] ARTC, *Supporting Documentation*, 2 December 2011, p. 8.

ARTC is not required to charge the same price as the 91 and 74 wagon trains for any other services, including the 96 and 82 wagon trains constituting the Initial Indicative Services and the 72 wagon train constituting the Interim Indicative Service in Pricing Zone 3. The ACCC therefore considers that it is likely to be appropriate, having regard to the grandfathering provisions in subsection 4.15(a)(iii), that ARTC has differentiated the Initial Indicative Access Charges for the 96 and 82 wagon trains in Pricing Zone 1.

The ACCC notes that the grandfathering provisions would not preclude ARTC from differentiating the charges for other coal access rights, including the charges for the 91 and 74 wagon trains, from the Initial Indicative Access Charges.

5.4.2 Efficiency implications—overview

The ACCC considers that the efficiency implications of the proposed Initial Indicative Access Charges will depend on the pricing relativities of the various services Access Holders seek to run on the network. The ACCC notes that industry submissions raised concerns about the appropriateness of the price relativities and how they have been calculated.

The ACCC also notes ARTC's contrary view that access pricing relativities are relatively unimportant because:

> Access pricing (currently averaging nearly $2 per tonne of coal) forms only part of the overall rail transport cost (around one quarter). When mine infrastructure and extraction cost and other supply chain costs (port costs, demurrage and shipping costs) are considered, the cost of access to the network forms a very small component of the total cost of delivering a tonne of coal to the customer. Current pricing of coal is around $100 per tonne to put this into context…. Given this, ARTC considers that it is unlikely that any reasonable differentiation in access pricing would, on its own, drive a decision to move to a different train type.[79]

While below-rail services are only one component of the capacity of the overall coal supply chain, the ACCC considers that the pricing for below-rail services should reflect the efficient costs of providing those services and should promote the efficient use of below-rail infrastructure.

The ACCC accepts that in the short term the Initial Indicative Access Charges may not lead to a significant move by Access Holders and Operators to the efficient train configuration. In part, this is likely to reflect that Operators will not immediately be able to run all trains with the newer, shorter wagons given the investment and the lead time required to purchase these train sets (see chapter 4).

However, the ACCC considers that the determination of the Initial Indicative Service and the associated Initial Indicative Access Charges should provide appropriate price signals to promote efficient use of and investment in the coal supply chain. In forming this view, the ACCC has had regard to:[80]

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[79] ARTC, *Response to ACCC information request*, 8 March 2012, pp. 21-22.

[80] See section 3.1 of this document for an overview of the matters the ACCC must have regard to in assessing an access undertaking application.

- the objects of Part IIIA, which include the promotion of economically efficient operation of, use of and investment in the infrastructure by which services are provided;

- the pricing principles in s. 44ZZCA of the Act, which include that access pricing regimes should provide incentives to reduce costs or otherwise improve productivity; and

- subsection 4.17 of the June 2011 HVAU, which requires that ARTC select the coal train configuration which it considers will represent the most efficient utilisation of coal chain capacity when compared to the other coal train configurations tested.

The ACCC considers that access charges that reflect the efficient costs and relative capacity consumption of providing various services will support the objective of optimising coal chain capacity, by providing appropriate pricing signals for future efficient investment decisions.

In the ACCC's view, the appropriateness and effectiveness of the pricing signals will be determined by the magnitude and direction of the price relativities between the charges for various services.

5.4.2.1 Magnitude of the price relativities

The pricing differentials between the proposed Initial Indicative Access Charges and the current Interim Indicative Access Charges are small. As shown in Table 7 below, the total difference between the charges for the efficient 96 wagon train configuration and the 91, 74 and 72 wagon trains is less than two per cent.

While the charge for the 82 wagon train in Pricing Zone 1 is 8.19 per cent higher than the Interim Indicative Access Charge, this is largely offset by the reduced charge applied to that service in Pricing Zone 3 (11.33 per cent lower than the Interim Indicative Access Charge). Therefore, for 82 wagon trains originating in Pricing Zone 3 and travelling through Pricing Zone 1 to the port, the net pricing signal is generally likely to be fairly small (depending on the relative distances travelled in each zone).

The ACCC has some concern that the magnitude of the price relativities may not be sufficient to create incentives to adopt the Initial Indicative Services.

On the other hand, the ACCC notes that the Initial Indicative Services will be superseded by the Final Indicative Service, which may involve a different efficient train configuration. A conservative approach to setting price differentials may be appropriate given the potential for the efficient train configuration to change. Such an approach may, however, delay the adoption of more efficient train configurations and the resulting increase in the efficiency of capacity utilisation.

The ACCC notes that Access Holders and Operators may have other incentives, apart from lower relative access prices, to adopt the more efficient train configuration. In the ACCC's view, the main incentive is that adopting the more efficient train configuration is likely to allow Access Holders and Operators to increase their total throughput.

Table 7: Pricing relativities for the Interim and Initial Indicative Access Charges

TOP and Non-TOP charges[1]	Pricing Zone 1	Pricing Zone 2	Pricing Zone 3
(1) Interim Indicative Access Charge for 91, 74 and 72 wagon trains[2]	$9.331 per kgtkm	$9.442 per kgtkm	$6.664 per kgtkm
(2) Initial Indicative Access Charges – 96 wagon train	$9.186 per kgtkm	$9.332 per kgtkm	-
Difference compared to (1)	***-1.55%***	***-1.17%***	
(3) Initial Indicative Access Charges – 82 wagon train	$10.095 per kgtkm	-	$5.909 per kgtkm
Difference compared to (1)[3]	***+8.19%***		***-11.33%***

Source: Calculated by the ACCC from the Initial Indicative Access Charges proposed by ARTC and the current Interim Indicative Access Charges.

1 To estimate the total charge per thousand gross tonne kilometre (kgtkm), the TOP and non-TOP components of the access charges have been added together. Estimated charges exclude GST.

2 ARTC's 2012 Interim Indicative Access Charges for the 91, 74 and 72 wagon trains are the same in each pricing zone.

3 The charge (per kgtkm) for the 82 wagon train is 9.9 per cent higher than the charge for the 96 wagon train in Pricing Zone 1.

Nevertheless, the ACCC recognises that the low magnitude of the differentials proposed by ARTC may reflect an inappropriate allocation of costs to services. In this regard, the ACCC seeks industry views on the following aspects of ARTC's pricing approach:

- No pricing differential has been applied to reflect the impact of Coal Chain Capacity in Pricing Zone 1 of running the 82 wagon train instead of the more efficient 96 wagon train.
- The HVCCC's modelling includes some system assumptions that limit the ability to model differences in Coal Chain Capacity consumption between different services.
- ARTC does not appear to have reflected the impact of differences in axle load on the maintenance component of the differentials.
- ARTC has applied a downwards adjustment to the charge for the 82 wagon train in Pricing Zone 3 to 'offset' the impact of higher charges in Pricing Zone 1.

These aspects of the pricing approach are discussed in more detail in section 5.4.3 of this Position Paper.

5.4.2.2 Direction of the price relativities

The ACCC considers that the direction of most of the proposed price differentials is likely to be appropriate. This is because the proposed charges for the Initial Indicative

Services are generally lower than the current charges for the less efficient Interim Indicative Services. Lower charges (on a gtkm basis) for the efficient services will provide an incentive to adopt the efficient train configurations.

The ACCC considers that, in deciding on any revision to the Interim Indicative Access Charges, ARTC should maintain this directional relativity, that is, a more efficient service should attract a lower charge than a less efficient service.

However, this directional relativity does not apply to the differential between the two services originating in Pricing Zone 3 as they pass through Pricing Zone 1. The proposed TOP charge for the (more efficient) 82 wagon service in Pricing Zone 1 is higher than the current TOP charge for the (less efficient) 72 wagon service. This results in the total access charge for the 82 wagon service in Pricing Zone 1 being 8.17 per cent higher than the access charge for the 72 wagon service (see Table 7). This does not provide the correct incentive for Pricing Zone 3 producers to use the more efficient 82 wagon service.

Due to the grandfathering provisions, the 82 wagon service is also 8.17 per cent higher than the access charge for the 74 wagon service in Pricing Zone 1 (see Table 7).

The ACCC considers that if the Proposed Variation is accepted, ARTC should revise the Interim Indicative Access Charges for the 72 wagon service, as provided for in subsection 4.17(d) of the June 2011 HVAU, to ensure that the pricing relativities provide the correct incentives (see section 5.4.3.5 of this Position Paper).

5.4.3 Efficiency implications—detailed analysis

As noted in section 5.1.1 of this Position Paper, ARTC has differentiated the Initial Indicative Access Charges based on network capacity, Coal Chain Capacity, and maintenance impacts. The ACCC considers that these differentiation factors are likely to be appropriate. However, due to its concerns about the magnitude and direction of the proposed price relativities, the ACCC has some concerns about how ARTC has determined and implemented the differentiation factors.

The ACCC's detailed analysis of these aspects of ARTC's pricing method is set out below. In addition, the ACCC has set out some preliminary views to assist ARTC and industry. However, the ACCC recognises that ARTC has discretion in how it applies its pricing method, provided the overall magnitude and direction of the resulting price relativities are likely to promote efficiency in the use of and investment in coal chain capacity.

ARTC is also required to determine charges for services other than the Indicative Services in accordance with subsections 4.15 and 4.20 of the HVAU. The ACCC's view on charges other than the Initial Indicative Access Charges is discussed below in section 5.4.3.5 of this Position Paper.

5.4.3.1 Network capacity

Based on the HVCCC's modelling, ARTC has concluded that all relevant coal train configurations consume the same amount of network capacity (in each pricing zone) on a per train basis (i.e. each train consumes one train path).

ARTC stated that there could be some justification for differentiation to reflect potential speed variations between the different train configurations, based on the modelled impact of different configurations on consumption of network capacity. However, ARTC decided not to adjust for potential speed variations because operational considerations mean that, in practice, trains are generally constrained to more uniform running times.[81]

Since charges apply on a per gtkm basis, ARTC has proposed to differentiate only on the basis of the difference in tonnage between different services in differentiating access charges to reflect each train's consumption of network capacity.

Overall, the ACCC considers that ARTC's approach to determining the relative consumption of network capacity by particular services is likely to be appropriate.

5.4.3.2 Coal Chain Capacity

To determine the Coal Chain Capacity component, ARTC compared overall coal chain throughput for the train configurations modelled by the HVCCC (that is the 96, 91, 74, 82 and 72 wagon train configurations). From these comparisons, ARTC estimated differentiation factors for use in determining appropriate charges.[82] The differentiation factors selected by ARTC are:

- the 96 wagon train compared with the 91 wagon train - 0.50%
- the 96 wagon train compared with the 74 wagon train - 4.00%
- the 82 wagon train compared with the 72 wagon train - 0.50%

ARTC has proposed not to differentiate based on Coal Chain Capacity between the 96 and the 82 wagon trains.

The ACCC has some concerns about potential limitations in both the modelling of the throughput relativities and their application by ARTC. Specifically, the ACCC notes that:

- System throughput was assumed to be fixed at 160mtpa for 2012.
- The modelling did not allow for cargo parcel size (i.e. larger vessels) to adjust to match the greater tonnage carried by a longer train,
- The proportion of total volumes originating from Pricing Zone 3 was assumed to be constant.

The impact of these limitations on ARTC's determination of Coal Chain Capacity differentials are discussed below.

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81 ARTC, *Supporting Documentation*, 2 December 2011, p. 41.
82 Ibid.

System throughput assumption of 160mtpa for 2012

The modelling used by ARTC assumes system throughput is fixed at 160mpta for 2012. ARTC stated that the basis for this assumption is that 'port capacity was set at this level' which meant that the 'port was modelled as the constraining element' ARTC recognised that this assumption 'would mute any differentials in throughput'.[83]

The ACCC is aware that the port capacity at Newcastle is currently expanding. PWCS has stated that its Terminal 4 (T4) project, for example, has the potential to add 120 million tonnes of additional coal loading capacity at Newcastle, subject to planning approvals.[84] As port capacity expands, it is likely that network capacity may become the constraining factor on Coal Chain Capacity (depending on the nature and timing of network investment). In this case, more efficient use of the network, which maximises below-rail capacity, would have a larger positive impact on increasing overall Coal Chain Capacity than assumed in the modelling.

Using the 160mtpa system throughput assumption may therefore understate the true impact on coal chain capacity of running more efficient trains.

Cargo parcel sizes

The modelling does not allow for adjustments to shipping cargo parcel sizes to better match the tonnage from the proposed Initial Indicative Services. ARTC notes that making 'this adjustment would further improve the 96 wagon scenario's delivered throughput performance', but that it would require major re-coding of the model. ARTC intends that the adjustment will be made in the modelling for the Final Indicative Services.[85]

The ACCC notes that this assumption may result in an underestimate of the impact of Coal Chain Capacity of running more efficient, larger trains. However, given the practical constraints, the ACCC accepts that this assumption may be appropriate for the purposes of the Initial Indicative Service.

Volumes from Pricing Zone 3

ARTC has not identified the assumptions made about the relative volumes from each pricing zone. In the absence of any statement to the contrary, the ACCC considers it likely that the relative volumes have been held constant in the modelling.

Infrastructure constraints in Pricing Zone 3 require the use of a shorter train than can be operated in Pricing Zones 1 and 2. The ACCC understands that total coal chain throughput would be reduced if the number of trains from Pricing Zone 3 relative to other pricing zones was increased, and vice-versa. ARTC has confirmed that the modelling did not test the impact on throughput of changing the relative volumes coming from different pricing zones, and therefore this has not been reflected in the proposed Initial Indicative Access Charges.

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83 ARTC, *Supporting Documentation*, 2 December 2011, p. 42.
84 PWCS, *Media Release – Business as usual as PWCS progresses Terminal 4*, 27 January 2012. See http://www.pwcs.com.au/display/assets/download.php?id=551
85 ARTC, *Supporting Documentation*, 2 December 2011, p. 20.

The ACCC considers that the failure to model these impacts may underestimate the potential effects on overall Coal Chain Capacity of appropriate pricing differentials between the pricing zones.

The basis for Coal Chain Capacity differentiation

Given the limitations outlined above, the ACCC has concerns about the method by which ARTC has determined the Coal Chain Capacity component of the pricing relativities of the various services.

Coal and Allied (C&A) raised similar concerns in both its submission and supplementary submission to the ACCC. C&A suggested that in the absence of sufficiently accurate modelling of the effect of different train configurations on coal chain capacity, ARTC could use network capacity as a proxy for Coal Chain Capacity.[86]

In the ACCC's view, C&A's proposed approach may be appropriate where below-rail capacity is the main constraint. However, the ACCC notes that in reality a combination of factors affect overall Coal Chain Capacity, such as constraints at the port terminal, availability of above-rail services, and congestion, as well as network capacity.[87]

Given that network capacity is one of the key determinants of overall coal chain capacity, the ACCC considers that charges should reflect the impact of more efficient use of the network on overall coal chain capacity.

5.4.3.3 Maintenance

ARTC conducted an analysis of the relative maintenance costs imposed by the various services, taking into account the following for each service:

- maximum speed, which affects fixed maintenance (the TOP charge)
- average speed, which affects variable maintenance (the non-TOP charge)
- maximum axle load, which affects fixed maintenance (the TOP charge)
- average axle loads, which affect variable maintenance (the non-TOP charge).

ARTC's supporting documentation outlines the process by which it determined the maintenance impacts of each of the Indicative Services, and how it apportioned maintenance cost differentials to fixed and variable costs.[88] ARTC modelled the net

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86 Coal and Allied, *Submission in response to the Australian Competition and Consumer Commission's Consultation Paper In relation to Australian Rail Track Corporation's Hunter Valley Rail Network Access Undertaking variation*, 27 January 2012, p. 10.

87 Congestion is caused by a number of factors. The ACCC understands these include insufficient off-track stowage, insufficient passing loops, sequencing difficulties, delays related to on-track provisioning, maintenance works, and the amount of other traffic on the rail network (including non-coal and passenger trains).

88 ARTC, *Supporting Documentation*, 2 December 2011, p. 36.

maintenance impacts of each of the five Initial and Interim Indicative Services on the network.[89]

ARTC found that differences in *maximum* speed justified differentiation on the basis of maintenance impact in the case of the Pricing Zone 3 services (the 72 and 82 wagon trains) compared to other services in Pricing Zone 1. ARTC stated that the higher maximum speed of these services would increase fixed maintenance costs, and should therefore be reflected in the TOP charge.[90]

The ACCC considers this approach is likely to be appropriate.

Regarding the impact of *average* speed, ARTC noted practical considerations were likely to affect the actual maintenance impact of various services. ARTC stated that differences in average speed estimated by the modelling may not occur in practice due to all services operating on the same timetable. ARTC stated that:

> Due to this uncertainty, it is difficult to justify a basis for differentiation between these configurations due to differences in average speed suggested by modelling.[91]

Accordingly, ARTC has proposed not to differentiate on the basis of higher average speed. The ACCC accepts ARTC's reasoning behind the average speed differential not being applied in practice due to timetabling constraints.

In regard to the cost impacts of axle load, ARTC's analysis suggests that differences in axle load will affect the proportion of maintenance costs attributable to various services. ARTC stated that:

> It is likely that the average axle load… would mainly affect variable maintenance largely forming the non-TOP component of the Charge, whereas the maximum axle load (driving a certain track standard) would affect fixed maintenance, assumed to be included in the TOP component of the Charge.[92]

However, ARTC does not appear to have reflected the impact of differences in axle load in setting the charges. Although the 82 wagon train has a lighter axle load than the 96 wagon train, the non-TOP charges for both trains in Pricing Zone 1 are currently proposed to be the same.

The ACCC seeks ARTC's reasons for not applying pricing differentials based on axle load.

5.4.3.4 The charges for the 82 wagon train

The ACCC has concerns that the charges faced by Pricing Zone 3 producers using the 82 wagon train (and travelling through Pricing Zones 1 and 3 to the port) may not provide appropriate pricing signals for efficient use of network and coal chain capacity.

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89 See table 2, ARTC, *Supporting Documentation*, 2 December 2011, p. 39.
90 ARTC, *Supporting Documentation*, 2 December 2011, pp. 39-40.
91 Ibid., p. 39.
92 Ibid., p. 36.

The ACCC's key concerns regarding the proposed Initial Indicative Access Charges for the 82 wagon train are that:

- In Pricing Zone 1, ARTC has proposed not to differentiate with respect to Coal Chain Capacity between the 96 wagon configuration and the 82 wagon configuration.[93]
- In Pricing Zone 3, ARTC has decreased the charges for the 82 wagon configuration in order to 'offset' the financial impact on Access Holders operating in Pricing Zone 3 of the increase in charges for the 82 wagon train in Pricing Zone 1.

These concerns are discussed below.

No Coal Chain Capacity differentiation in Pricing Zone 1

The ACCC accepts that, given existing infrastructure constraints, producers in Pricing Zone 3 are unable to operate a train longer than 82 wagons. The 82 wagon train is therefore the most efficient train in Pricing Zone 3 for the purposes of determining the Initial Indicative Service.

However, the ACCC considers that running the 82 wagon train in Pricing Zone 1, rather than the efficient 96 wagon train, is likely to limit total throughput in Pricing Zone 1. This is because the 82 wagon train consumes more coal chain capacity per unit of tonnage relative to the 96 wagon train. To promote efficient use of coal chain capacity, the ACCC is of the view that access charges in Pricing Zone 1 should reflect the relative consumption of Coal Chain Capacity by the services operated on the network in that zone.

The ACCC considers that ARTC's proposal not to differentiate on the basis of Coal Chain Capacity between the 96 wagon train and the 82 wagon train in Pricing Zone 1 is not likely to be appropriate as the Initial Indicative Access Charges do not reflect the consumption of Coal Chain Capacity.

The 'downwards adjustment' of access prices in Pricing Zone 3

In its response to the ACCC's request for information, ARTC noted that the Initial Indicative Access Charges for the 82 wagon configuration in Pricing Zone 1 would result in an increase in total revenue (that is, revenues raised in Pricing Zones 1 and 3) from these users. ARTC submitted that 'this would work against any incentive to use the efficient service and would make access pricing to these users uncompetitive'.[94]

Accordingly, ARTC made a downwards adjustment to the estimated Initial Indicative Access Charges for the 82 wagon train in Pricing Zone 3. ARTC 'adjusted access pricing for the 82 wagon train in Pricing Zone 3 down to a level that would offset increased Pricing Zone 1 revenue for using the 82 wagon configuration'.[95] ARTC

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[93] ARTC, *Response to ACCC information request*, 29 February 2012, p. 18.
[94] Ibid., p. 20.
[95] Ibid., p. 20

submitted that through this adjustment 'the adverse incentive described above is removed'.[96]

ARTC stated further that 'in Pricing Zone 3, access pricing is set at a level that enables mines using Pricing Zone 3 to reasonably compete with mines in Pricing Zone 1 and 2'. The ACCC considers this suggests that ARTC is seeking to maintain a certain level of 'equality' between coal producers in each pricing zone through its access pricing.

In the ACCC's view, the decision by a coal producer to operate in a particular location in the Hunter Valley and to transport a particular quantity of coal to port is a commercial decision by that producer. The ACCC considers it is important that these commercial decisions are based on costs that accurately reflect their consumption of resources so that they promote an efficient allocation of resources across the Hunter Valley.

Consequently, the ACCC considers that the adjustment made by ARTC to offset locational cost differences is not likely to be appropriate. The ACCC considers that charges for services in Pricing Zone 3 should reflect the efficient costs of operating those services and provide appropriate efficiency incentives.[97]

In light of the above, the ACCC considers that ARTC's downwards adjustment to the Initial Indicative Access Charges for the 82 wagon service in Pricing Zone 3 is unlikely to be appropriate.

5.4.3.5 Other charges

As noted in section 5.4.2.5 above, ARTC signalled its intention to review the 2012 Interim Indicative Access Charges and publish them in accordance with the June 2011 HVAU. Accordingly, ARTC submitted that it is yet to determine the Charges for non-Indicative Services (including the Interim Indicative Services), and that it is not required to do so until 30 Business Days after the ACCC approves the Proposed Variation.

However, ARTC noted that, subject to approval of the Proposed Variation, it intends to use a similar methodology to that used to determine the Initial Indicative Access Charges to determine charges for non-Indicative Services (including the Interim Indicative Services).[98] ARTC also noted that its pricing methodology is a guide in determining charges:

> in practice, it should not necessarily be inferred that ARTC's approach to price differentiation is as precise as these calculations might suggest but will guide the direction and magnitude of differentiation.[99]

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96 ARTC, *Response to ACCC information request*, 8 March 2012, p. 20.

97 The ACCC notes that Pricing Zones 1 and 2 form the constrained part of the network and that Pricing Zone 1 effectively forms a 'bottleneck' to get to port. Accordingly, running an 82 wagon train (originating in Pricing Zone 3) displaces a potentially longer train (originating in Pricing Zones 1 or 2) and thereby reduces overall network throughput.

98 ARTC, *Response to ACCC information request*, 8 March 2012, p. 23.

99 ARTC, *Supporting Documentation*, 2 December 2011, p. 38

ARTC stated that it may also take into account:

- the grandfathering arrangements in section 4.15(a)(iii) of the June 2011 HVAU
- the availability of HVCCC modelling for the purpose of determining Coal Chain Capacity differentiation
- other considerations, in accordance with section 4.15 of the June 2011 HVAU.

The ACCC notes ARTC's view that it 'does not consider that the determination of these charges has any direct relevance' to the Proposed Variation. However, the ACCC is of the view that the relativities between the Initial Indicative Access Charges and other charges are likely to have a significant impact on whether Access Holders and Operators have incentives to adopt a more efficient train configuration.

While the ACCC accepts that ARTC is not required to submit its revised Charges for non-Indicative Services for consideration as part of the Proposed Variation, the ACCC considers that these charges should be determined on a fair and transparent basis in accordance with the principles in the June 2011 HVAU and the pricing principles in s. 44ZZCA of the Act.

As discussed in section 5.4.4 below, the ACCC is of the view that ARTC should provide additional transparency regarding the methodology by which it proposes to determine price relativities for various services. ARTC should also provide a clear explanation of how it will ensure that the resulting relativities across the Indicative and non-Indicative services will provide pricing signals that promote the efficient use of, and investment in, the network and coal chain capacity.

In this regard, the ACCC would expect that the Initial Indicative Services would generally be offered at lower prices in their respective pricing zones than the current Interim Indicative Services and other train configurations.

Of particular concern to the ACCC is the perverse price relativity currently generated by the proposed Initial Indicative Access Charges for the 82 wagon train being higher than the 2012 Interim Indicative Access Charges for the 72 wagon train in Pricing Zone 1. The ACCC considers that imposing a higher access charge for the 82 wagon train than for the less efficient 72 wagon train would create disincentives for the efficient use of capacity on the network. Consequently, the ACCC considers that ARTC should review the charges for the 72 wagon train in Pricing Zone 1 in order to provide the correct incentives for producers in Pricing Zone 1 to use more efficient services. The ACCC notes that the 72 wagon train is not subject to the grandfathering requirements in subsection 4.15(a)(iii) of the June 2011 HVAU.

Finally, the ACCC notes that Access Holders are able to dispute charges for coal access rights determined by ARTC if they disagree with the charges (for example, they may consider that the charges are unreasonable) in accordance with the dispute resolution provisions in section 4.15(d) and 4.20(f) of the June 2011 HVAU. The dispute mechanisms are discussed further in Chapter 6 of this Position Paper.

5.4.4 Pricing transparency

As discussed in section 5.2.1 of this Position Paper, industry submissions have expressed concern that the basis on which ARTC has determined the Initial Indicative Access Charges is not sufficiently transparent and that they are unable to estimate likely charges for various train configurations.

In its response to the ACCC's request for information, ARTC stated that the June 2011 HVAU does not require a prescriptive pricing regime. ARTC stated that it does not intend to limit the pricing discretion afforded to it by the June 2011 HVAU going forward.[100]

The ACCC notes ARTC's position. However, the ACCC considers that greater transparency of ARTC's pricing methodology is unlikely to constrain ARTC's exercise of appropriate discretion or prevent it from managing the network efficiently.

The ACCC considers that access seekers should have sufficient information to be able to calculate, with a reasonable degree of certainty, the likely direction and estimated magnitude of pricing relativities between various services. The ACCC considers such transparency is necessary to inform investment and contractual decisions by coal industry participants. The ACCC notes the statement by Coal and Allied that:

> Greater transparency at each time Charges are set will facilitate industry's understanding of the factors which contribute to differential pricing and improve their ability to determine how best to achieve efficient use of Network Capacity.[101]

5.4.5 Conclusion

The ACCC has identified several concerns with the Initial Indicative Access Charges proposed by ARTC and their relativities with charges for the non-Indicative Services.

Based on the information provided by ARTC, the ACCC considers that the proposed Initial Indicative Access Charges do not appropriately reflect the relative consumption of coal chain capacity by particular services and may not provide appropriate signals for efficient use of and investment in coal supply chain infrastructure. Therefore, the ACCC considers that ARTC should review the way it has determined and implemented its pricing approach to ensure that the magnitude and direction of the price relativities between the charges for various services provide appropriate and effective pricing signals.

The ACCC also considers that ARTC should provide additional information to access seekers regarding the basis on which it differentiates charges for particular services.

In addition, the ACCC considers that ARTC should provide further information about how it intends to determine charges for other services (including the Interim Indicative Access Charges). In doing so, ARTC should explain how it intends to

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[100] ARTC, *Response to ACCC information request*, 8 March 2012, pp. 10-11.

[101] Coal and Allied, *Submission in response to the Australian Competition and Consumer Commission's Consultation Paper In relation to Australian Rail Track Corporation's Hunter Valley Rail Network Access Undertaking variation*, 27 January 2012, p. 13.

ensure that the relativities between these charges and the Initial Indicative Access Charges will provide appropriate signals for efficient use of coal chain capacity.

The ACCC has formed the preliminary view that the Initial Indicative Access Charges are unlikely to be appropriate having regard to the matters listed in s. 44ZZA(3) of the Act. In particular, the ACCC considers that:

- the legitimate business interests of ARTC in retaining a certain level of discretion regarding the prices it sets must be balanced against the interests of access seekers in having charges that are sufficiently transparent (ss. 44ZZA(3)(a) and (c))

- the proposed Initial Indicative Access Charges should provide pricing signals consistent with promoting 'the economically efficient operation of, use of and investment in the infrastructure by which services are provided' (s. 44AA(a)); [102] and

- the proposed Initial Indicative Access Charges should also be consistent with the pricing principles, specifically paragraph (c) which states that 'access pricing regimes should provide incentives to reduce costs or otherwise improve productivity' (s. 44ZZCA(c)).[103]

As discussed in Chapter 3, the ACCC has also had regard to the long term solution for capacity constraints in the Hunter Valley (supporting the objective of maximising coal chain capacity) and the requirements in the June 2011 HVAU as relevant 'other matters' under s. 44ZZA(3)(e). The ACCC considers that access charges which are cost reflective and promote efficiency in the supply chain are likely to be consistent with the public interest, including the public interest in having competition in markets (s. 44ZZA(3)(b)).[104]

Questions for comment

- Does the magnitude and direction of the price relativities between the access charges for various services provide appropriate and effective pricing signals to promote efficient use of and investment in coal supply chain infrastructure?

- Does industry need any further information from ARTC to understand the basis for the pricing relativities used to determine the Initial Indicative Access Charges?

- What information does industry need to allow them to estimate, with a reasonable degree of certainty, the likely direction and magnitude of pricing relativities that would be used by ARTC in determining charges for non-Indicative Services?

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[102] The ACCC considers its preliminary view is not inconsistent with paragraph (b) of the objects of Part IIIA contained in s. 44AA which is to provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

[103] The ACCC's preliminary view is that the other pricing principles in s. 44ZZCA are not directly relevant to the determination of the Initial Indicative Access Charges.

[104] The ACCC also notes that there is currently no access code that applies to services provided under the HVAU.

- Is the overall pricing approach adopted by ARTC appropriate in terms of ensuring that charges reflect the costs of operating services on the network and their relative consumption of coal chain capacity?

- Is it appropriate that ARTC has reduced charges in Pricing Zone 3 to offset the increase in revenue from Pricing Zone 3 producers in Pricing Zone 1? What would be the likely impacts of this adjustment on efficiency in the use of and investment in coal chain capacity?

6 Drafting changes

This chapter sets out the ACCC's preliminary views on ARTC's proposed drafting of the Proposed Variation, in particular the continuation of the Interim Indicative Services and the application of the dispute resolution provisions.

6.1 The proposed drafting changes

ARTC has made a number of drafting changes in the Proposed Variation, in addition to the changes required to implement the proposed Initial Indicative Services and charges (discussed in chapters 4 and 4.3.3). These changes can be viewed in the marked up version of the June 2011 HVAU at Attachment A, Annexure 1 to ARTC's application to vary the June 2011 HVAU, which is available on the ACCC's website.

ARTC has proposed to continue the Interim Period, during which the Interim Indicative Service and the Interim Indicative Access Charges apply, until the Final Indicative Service is implemented. This means the Interim Period and the Initial Period will run concurrently. This has implications for what constitutes an 'Indicative Service' under the HVAU and the application of the dispute resolution provisions in sections 4.15(d) and 4.20(f) of the June 2011 HVAU. This proposed change is discussed further in sections 6.3.1 and 6.3.2 below.

ARTC has proposed several other minor drafting changes, including removing the provisions relating to the determination of the Initial Indicative Service from section 4.17 of the HVAU, revising several existing defined terms and adding new defined terms in section 13 of the HVAU, and uniformly pluralising 'Indicative Services'. These changes are discussed in section 6.3.2.2 below.

In response to a request for information by the ACCC, ARTC provided a draft revision of its Proposed Variation, available on the ACCC's website. This included additional drafting changes to those included in the Proposed Variation submitted on 2 December 2011. The draft revision was not submitted as a formal replacement of the Proposed Variation. However, the ACCC's preliminary view on the additional changes is also discussed in section 6.2.1 below.

6.2 Submissions on the proposed drafting

Submissions to the ACCC's 13 December 2011 Consultation Paper relate only to the drafting of the Proposed Variation and not to the additional changes in ARTC's draft revision, as the draft revision was received after the consultation period had ended. The ACCC is seeking the views of interested parties on the additional changes in the draft revision as part of its ongoing consultation on the Proposed Variation.

6.2.1 Peabody

Peabody submitted that, given that the Interim and Initial Periods are intended to operate concurrently, it is not clear how to determine whether an actual service will be

an Interim Indicative Service or an Initial Indicative Service and what it means to 'meet' the service assumptions.[105]

6.2.2 Coal and Allied

C&A expressed concerns about the clarity and interpretation of the drafting proposed by ARTC. C&A submitted that:

- The Interim Indicative Access Charges which ARTC issued in November 2011 should be revisited and adjusted, based on the Initial Indicative Services, at the time the Initial Indicative Services are adopted, and that this should be made clear in the drafting of the Proposed Variation (refer subsections 4.17(a) and 4.19(b) of the HVAU).[106]

- The wording in subsection 4.17(d) of the HVAU should clarify that the Initial Indicative Access Charges will be revised annually. C&A also considered that the meaning of the 'reasonable endeavours' in subsection 4.17(c) of the HVAU is uncertain.[107]

- There appears to be a footnote missing from table in 4.17(d) stating that '*Pricing Zones contain Segments as specified at Schedule E'.[108]

- Section 4.17 of the HVAU should provide for the possibility of Access Holders seeking to vary their executed Access Holder Agreements so as to operate the Initial Indicative Services.[109]

- The reference to 'Indicative Access Charges' in section 4.19(a)(i) of the Proposed Variation is incorrect, as the Interim Indicative Access Charges are not actually Indicative Access Charges as defined in section 4.14 of the HVAU. Coal & Allied submitted that section 4.19(b) of the HVAU should be expanded to provide that the Interim Indicative Access Charges will be determined 'in accordance with section 4.15' and will 'take into account' the Initial Indicative Access Charges.[110]

- The timeframes for publication of charges for non-Indicative Services should be made clear. Specifically, C&A considered that these charges should be determined by 1 November each year in accordance with subsection 4.20(d) of the HVAU.[111]

- Regarding the dispute resolution provisions in the HVAU, the 'two-thirds test' in section 4.20(f) of the June 2011 HVAU should be removed. C&A considers that the Indicative Access Charges should be disputed under section 4.15.[112]

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[105] Peabody, *Submission in response to Australian Rail Track Corporation's Proposed Variation to the June 2011 Hunter Valley Coal Network Access Undertaking*, 25 January 2012, s. 3.1(a).
[106] Coal & Allied, *Submission in response to the Australian Competition and Consumer Commission's Consultation Paper In relation to Australian Rail Track Corporation's Hunter Valley Rail Network Access Undertaking variation*, 27 January 2012, p. 17.
[107] Ibid., pp. 17-18.
[108] Ibid., p. 18.
[109] Ibid.
[110] Ibid.
[111] Ibid.

- There is inconsistency in the dispute resolution provisions for Interim Indicative Services, in particular that it is unclear whether disputes will be conducted under section 4.15 or section 4.20. C&A submitted that dispute resolution for Interim Indicative Access Charges should be in accordance with section 4.15.[113]

6.3 ACCC view

6.3.1 Continuation of the Interim Period

Under the June 2011 HVAU, the Interim Period was defined as the period between the commencement of the HVAU and the time the Initial Indicative Services approved by the ACCC come into effect under section 4.17 of the June 2011 HVAU (or, if not approved, the Final Indicative Services approved by the ACCC under section 4.18). The Proposed Variation provides that the Interim Period will apply until the Final Indicative Services and the Indicative Access Charges approved by the ACCC come into effect under section 4.18. Taken with the proposed definition of the Initial Period, this provides that the Interim Indicative Services and applicable charges under section 4.19 of the June 2011HVAU and the Initial Indicative Services and applicable charges under section 4.17 will apply concurrently.

While the Interim Indicative Services will not constitute Indicative Services under the Proposed Variation, in accordance with the definition in section 14.1 of the June 2011 HVAU, ARTC will be required to continue to:

- publish the Interim Indicative Access Charges applicable to the Interim Indicative Services each calendar year (subsection 4.19(b)); and
- offer the Interim Indicative Access Charges to Applicants seeking Coal Access Rights with applicable Interim Indicative Services characteristics (subsection 4.19(d)).

The ACCC considers that these requirements will provide additional transparency and certainty to those access seekers continuing to utilise the Interim Indicative Services following acceptance of the Proposed Variation. Further, the ACCC notes that the services to which the grandfathering provisions in subsection 4.15(a)(iii) of the June 2011 HVAU apply are Interim Indicative Services, and that continuing to publish the charges applicable to these services provides transparency around ARTC's compliance with subsection 4.15(a)(iii).

However, the ACCC notes that continuing the Interim Period has implications for other provisions in the HVAU, including the dispute resolution provisions in subsections 4.15(d) and 4.20(f), discussed below.

The ACCC considers that, subject to ARTC addressing the ACCC's concerns regarding the application of the dispute resolution provisions (see section 6.3 below),

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112 Coal & Allied, *Submission in response to the Australian Competition and Consumer Commission's Consultation Paper In relation to Australian Rail Track Corporation's Hunter Valley Rail Network Access Undertaking variation*, 27 January 2012, p. 19

113 Ibid., pp. 18-19.

continuing the Interim Period concurrently with the Initial Period is likely to be appropriate, having regard to the interests of access seekers in accordance with s. 44ZZA(3)(c) of the Act.

ARTC's draft revision includes the following additional amendment to subsection 4.19(b) of the June 2011 HVAU:

> *ARTC will determine its Interim Indicative Access Charges for Interim Indicative Services in accordance with section 4.15(a).*

The ACCC considers it is likely to be appropriate for ARTC to amend subsection 4.19(b) in accordance with the draft revision, as this amendment provides additional clarity regarding how ARTC will determine the Indicative Access Charges.

The ACCC considers it is also likely to be appropriate that the draft revision proposes to amend subsection 4.19(a)(i) of the June 2011 HVAU to clarify that the Interim Indicative Access Charges are not Indicative Access Charges.

6.3.2 Dispute resolution

The Proposed Variation includes two ways by which access seekers can dispute charges determined by ARTC:

- under subsection 4.15(d), an access seeker can raise a dispute regarding a Charge for coal access rights other than an Indicative Access Charge. This dispute can be resolved by arbitration.

- under subsection 4.20(f), 'Access Holders holding two thirds or more of the contracted gtkm for Indicative Services in the relevant pricing zone for the next calendar year' may raise a dispute regarding Indicative Access Charges. This dispute can be resolved by arbitration.

The services and charges to which these dispute resolution provisions apply are discussed below.

6.3.2.1 The Interim and Initial Indicative Services and subsection 4.20(i)

The ACCC notes that ARTC has retained subsection 4.20(i) of the June 2011 HVAU, which provides that:

> *For the Interim Period, all references to Indicative Services and Indicative Access Charges in this section 4.20 will be read as Interim Indicative Services and Interim Access Charges respectively and all references to section 4.14 will be read as references to section 4.19 as appropriate.*

The ACCC notes that under the June 2011 HVAU this provision would cease to have effect once the Initial Period commences, and references to Indicative Services in section 4.20 would apply to the Initial Indicative Services. However, given that ARTC has proposed to continue the Interim Period concurrently with the Initial Period, the ACCC considers that the application of this clause is unclear.

Specifically, the ACCC considers that subsection 4.20(i) in the Proposed Variation could be taken to mean that references to Indicative Services and Indicative Access

Charges in section 4.20 would be read as Interim Indicative Services and Interim Access Charges *instead of* Indicative Services and Indicative Access Charges.

Given that the Initial Indicative Services and Initial Indicative Access Charges are excluded from the provisions in section 4.15(d) of the June 2011 HVAU, this would have the effect that the Initial Indicative Services and Initial Indicative Access Charges would not be subject to any dispute resolution provisions. The ACCC's preliminary view is that this would not be appropriate.

The ACCC considers that ARTC should clarify which services are intended to be covered by the provisions in section 4.20 during the concurrent Initial and Interim Periods. The ACCC considers that the provisions in subsection 4.20 should apply to the Initial Indicative Services, and that it may be appropriate if the provisions also applied to the Interim Indicative Services.

6.3.2.2 Dispute resolution for Indicative Access Charges under subsection 4.20(f)

As discussed in section 6.3.2.1 above, the ACCC considers that the provisions in section 4.20, including the dispute resolution provisions in subsection 4.20(f), should apply to the Initial Indicative Services. The ACCC considers that it may be appropriate for these provisions to also apply to the Interim Indicative Services.

The ACCC understands that ARTC's intention is that the Interim Indicative Services be subject to the dispute resolution provisions in subsection 4.20(f). In response to the ACCC's request for information, ARTC stated that:

> The "two thirds" rule is necessary to avoid delays and costs to industry arising from an individual dispute which will have implications for all ARTC customers with access rights for Interim Indicative Services and Indicative Services…
>
> Accordingly, the dispute resolution process in section 4.20 will apply when two thirds or more of those Access Holders with Coal Access Rights submit a dispute notice to ARTC within the requisite timeframe in relation to Interim Indicative Services or Indicative Services.[114]

The ACCC's preliminary view is that it would be appropriate for the dispute resolution provisions in 4.20(f) to apply to both Interim and Initial Indicative Services, but that ARTC's intention is not currently clear from the drafting in the Proposed Variation.

The ACCC notes that ARTC's draft revision proposes an amended subsection 4.15(d) which clarifies that this subsection does not cover Interim Indicative Access Charges. The ACCC considers that this is likely to be appropriate, provided the drafting in subsection 4.20 is also amended to clarify its application to both the Interim and Initial Indicative Services.

The ACCC also considers that ARTC should specify how the two-thirds rule is to be applied to the Interim and Initial Indicative Services. Specifically, whether the two-thirds requirement will apply:

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[114] ARTC, *Response to ACCC Information Request*, 8 March 2012, p. 27.

- *across* all Access Holders holding Interim and Initial Indicative Services (i.e. the threshold for a dispute relating to either Interim or Initial Indicative Access Charges will be two thirds of all those Access Holders utilising either Interim Indicative Services or Initial Indicative Services), or

- *separately* to those Access Holders holding Interim Indicative Services and those holding Initial Indicative Services (i.e. the threshold for a dispute relating to Initial Indicative Access Charges will be two thirds of those Access Holders utilising Initial Indicative Services, similarly for disputes relating to Interim Indicative Access Charges and those Access Holders utilising Interim Indicative Services).

The ACCC has not formed a view as to which alternative would be more appropriate. However, the ACCC considers that the current drafting provided by ARTC is unlikely to be appropriate as it lacks clarity and certainty. This issue is not addressed in ARTC's draft revision.

The ACCC considers that ARTC should ensure that the drafting of subsections 4.20(f) and (i) of the June 2011 HVAU reflects ARTC's intended application, and notes that the drafting of subsection 4.15(e) may also need to be updated to reflect amended drafting of subsection 4.20.

The dispute resolution provisions in subsection 4.20(f) will not apply to charges for coal access rights other than those for an Interim or Initial Indicative Service. In determining these charges ARTC will have regard to a range of factors. These factors are listed in section 4.15 of the June 2011 HVAU and include the particular characteristics of the service, the commercial and logistical impacts on ARTC's business, and capital or other contributions by the customer to ARTC's cost. If customers disagree with charges for non-Indicative Services they may avail themselves of the dispute resolution process under subsection 4.15(d).

6.3.2.3 Dispute resolution for the Initial Indicative Access Charges during the first calendar year

In accordance with subsection 4.17(a) of the Proposed Variation, the process in subsection 4.20(f) for dispute of Indicative Access Charges will not apply to the Initial Indicative Access Charges in Table 5. Given that these charges are also excluded from subsection 4.15(d) (as they are Indicative Access Charges), access seekers may not raise a dispute under either process regarding the Initial Indicative Access Charges during the first calendar year of the Initial Period.

Initial Indicative Access Charges published by ARTC for subsequent calendar years of the Initial Period may be disputed by access seekers through the process in subsection 4.20(f) of the June 2011 HVAU provided the two thirds requirement is met.

The ACCC notes that the first set of Initial Indicative Access Charges are to be assessed by the ACCC as part of the June 2011 HVAU variation process, which includes consultation with access seekers. The ACCC will have regard to the interests of access seekers in deciding whether the Initial Indicative Access Charges are appropriate in accordance with s. 44ZZA(3)(c). Therefore, having regard to the legitimate business interests of ARTC and the interests of access seekers in having certainty regarding the terms of access, the ACCC considers it is appropriate for the

Initial Indicative Access Charges accepted by the ACCC not to be subject to further dispute resolution provisions under the varied HVAU.

Subsequent Initial Indicative Access Charges will be determined by ARTC and will not be subject to assessment by the ACCC. As noted above, the ACCC considers it would be appropriate, having regard to the interests of access seekers, for these charges to be subject to the dispute resolution provisions in subsection 4.20(f).

6.3.3 Other minor drafting changes

ARTC has proposed several other minor drafting changes in the Proposed Variation. In general, the ACCC considers that these changes are likely to be appropriate subject to ARTC addressing the substantive concerns with the Proposed Variation raised in this chapter and in Chapters 4 and 5 of this document.

6.3.3.1 Removal of process for determination of the Initial Indicative Service

ARTC has deleted sections 4.17 (a), (b) and (c) from the June 2011 HVAU. These clauses outlined the process by which the Initial Indicative Services and charges would be determined and incorporated in the undertaking.

The ACCC's preliminary view is that this drafting amendment is appropriate because, if the ACCC approves the Proposed Variation, ARTC will have fulfilled these requirements, as discussed in section 4.3.1. Retaining the clauses in the Varied HVAU would be of limited value as they would no longer be in operation and would have the potential to create confusion regarding ARTC's ongoing obligations under the HVAU.

6.3.3.2 Pluralised 'Indicative Services'

ARTC has pluralised the term 'Indicative Services' (previously 'Indicative Service'). Subsection 14.2(a) of the HVAU states that unless the context otherwise requires, 'singular words will also have their plural meaning and vice versa'. The ACCC also notes that subsection 4.14(b) of the HVAU states that: 'There may be more than one Indicative Service and Indicative Access Charge within a Pricing Zone.'

Accordingly, the ACCC considers that this change has no material effect on the operation of the HVAU. However, the ACCC considers the change is appropriate as it provides more clarity, given that there is more than one Indicative Service proposed to be in effect for the Hunter Valley Rail Network.

6.3.3.3 Defined terms

ARTC has included the following additional defined terms in section 14.1 of the Proposed Variation:

- <u>'Final Indicative Services'</u> – renamed, previously 'Indicative Services'. ARTC states that this change was made:

to provide clarification that the transitional process will end when the indicative services and associated charges are determined in accordance with section 4.18.[115]

- ‘Initial Indicative Services’ – defined as having the characteristics set out in section 4.17(d). This is consistent with the terminology used in section 4.17 of the June 2011 HVAU.

- ‘Initial Indicative Access Charges’ – defined as having the meaning given in section 4.17(c) of the Proposed Variation.

- ‘Initial Period’ – defined as the period from the time the Proposed Variation takes effect to the time the ACCC approves the characteristics of the Final Indicative Service under section 4.18 of the HVAU.

The ACCC considers these additional defined terms are appropriate as they provide additional clarity and transparency to access seekers regarding the operation of the HVAU. In particular, the ACCC notes that the terms ‘Initial Indicative Services’, ‘Initial Indicative Access Charges’, and ‘Initial Period’ are appropriate as they clearly link the Initial Indicative Services with the applicable charges and the period during which they apply.

6.3.4 Further drafting amendments proposed by the ACCC

The ACCC notes the draft revision submitted by ARTC includes several additional amendments which address some concerns raised by Coal and Allied. The ACCC considers that the amendments in the draft revision are appropriate. However, the ACCC considers that several additional drafting amendments may be required in order for the Proposed Variation to be appropriate. These drafting amendments are set out below.

The first drafting amendments relate to subsection 4.17(c) of the Proposed Variation which provides that:

> *Indicative Access Charges applicable to the Initial Indicative Services (“Initial Indicative Access Charges”) set out in section 4.17(d) will apply during the Initial Period.*

The table in section 4.17(d) of the Proposed Variation sets out the Initial Indicative Service Assumptions and the TOP and Non-TOP charges which would apply if the Proposed Variation is accepted.

The ACCC considers that the intent of subsection 4.17(c) appears to be that the Initial Indicative Access Charges will be determined annually, which the ACCC considers is likely to be appropriate. However, the ACCC is concerned that, as currently drafted, subsections 4.17(c) and (d) of the Proposed Variation could be interpreted to mean that the charges in the table will apply for the entire duration of the Initial Period. The ACCC considers that this is unlikely to be appropriate. The ACCC considers that

115 ARTC, *Application by ARTC to vary the Hunter Valley Access Undertaking to provide for the initial indicative services and initial indicative access charges*, 2 December 2011, section 3.

ARTC should amend the first sentence of subsection 4.17(c) to reflect that the Initial Indicative Access Charges will be determined annually.

The next amendment relates to the publication of charges for services other than the Indicative Services. The ACCC notes the submission by C&A that the timeframes for publication of charges for non-Indicative Services should be made clear.[116]

The ACCC notes that no access seekers are currently operating the proposed Initial Indicative Services, and that it may take some time for Access Holders to transition to these services. The implementation of the Initial Indicative Service is a transitional stage prior to the implementation of the Final Indicative Service, and requires a newer wagon type in order to fit on the network. The ACCC considers this may result in some Operators running configurations other than the Interim or Initial Indicative Service. For example, a party may wish to run a 94 wagon train with a combination of old and new wagons in order to utilise existing rolling stock.

The ACCC considers that parties running services other than the Initial and Interim Indicative Services should have sufficient certainty as to the charges they face. Accordingly, the ACCC considers that the Proposed Variation should specify that charges for Coal Access Rights other than the Indicative Services (or Interim Indicative Services) will be determined by 1 November each year, at the same time as the Indicative Access Charges. The ACCC considers that it would be appropriate for this amendment to be placed at subsection 4.20(d) of the June 2011 HVAU.

The next amendment relates to subsection 4.17(e) of the Proposed Variation, which states that:

> *ARTC will offer the applicable Initial Indicative Access Charges to Applicants seeking Coal Access Rights with applicable Initial Indicative Service characteristics during the Initial Period.*

The ACCC considers that this is likely to be appropriate. However, the ACCC notes the submission by Coal & Allied that section 4.17 of the HVAU should provide for the possibility of Access Holders seeking to vary their executed Access Holder Agreements so as to operate the Initial Indicative Services.[117]

The ACCC agrees that that the Proposed Variation should also specify that Access Holders will be given the opportunity to vary their access holder agreements during the Initial Period to operate the Initial Indicative Services, if the Operators make those services available and the Access Holders wish to operate those services. The ACCC notes that the drafting of subsection 4.18(e)(ii), which relates to the Final Indicative Services, specifically includes Access Holders seeking to vary their Access Holder Agreements so as to operate Final Indicative Services on existing contracted Train Paths. The ACCC considers that ARTC should include similar drafting in subsection 4.17(e).

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116 Coal & Allied, *Submission in response to the Australian Competition and Consumer Commission's Consultation Paper In relation to Australian Rail Track Corporation's Hunter Valley Rail Network Access Undertaking variation*, 27 January 2012, p. 18.

117 Ibid., p. 18.

Questions for comment

- Are the drafting changes proposed by ARTC in its draft revision (available on the ACCC's website) appropriate? If not, what alternative drafting would be more appropriate?
- Should the application of the dispute resolution provisions in subsection 4.20(f) apply across all Access Holders holding Interim and Initial Indicative Services or separately to those Access Holders holding Interim Indicative Services and those holding Initial Indicative Services?
- Does industry agree with the additional drafting changes proposed by the ACCC?

7 The Final Indicative Service

The ACCC notes that this Proposed Variation is in relation to the Initial Indicative Service as prescribed in section 4.17 of the June 2011 HVAU. A subsequent variation will be required in order to implement the Final Indicative Service described in section 4.18.

The ACCC considers that this initial stage has provided both the ACCC and industry with further insight into the broader process for determination of the efficient train configuration in the Hunter Valley. The ACCC considers that experience in developing the Initial Indicative Service should inform the development of the Final Indicative Service by ARTC in consultation with industry and the HVCCC. The ACCC considers that is appropriate to comment on this experience in order to:

- identify likely issues or concerns relevant to determining the Final Indicative Service, with a view to facilitating the resolution of those issues

- provide preliminary guidance to ARTC and industry regarding the ACCC's expectations with respect to the development of the Final Indicative Service.

7.1 Submissions in response to the Consultation Paper

Several submissions in response to the ACCC's 13 December 2011 Consultation Paper made comments relevant to the determination of the Final Indicative Service.

7.1.1 Acceleration of the process

QR National: QR submitted that the modelling and assessment process underpinning the Initial Indicative Services was under-developed. QR submitted that the Initial Indicative services should be abandoned and a more robust and comprehensive assessment should be undertaken.[118]

Asciano: Asciano submitted that the process for the Final Indicative Service, and the implementation of pricing based on the efficient train, should be accelerated.[119]

Asciano stated that the final modelling and implementation of the efficient train can and should be done in a much shorter timeframe than that outlined the in the June 2011 HVAU. Asciano expressed concern that the current congestion in the Hunter Valley system should be relieved as soon as possible, and that this requires modelling of the efficient train and attendant pricing signals.[120]

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[118] QR National, *QR National's submission in response to the ACCC's Consultation Paper on ARTC's application to vary the HVAU to implement the Initial Indicative Service*, 27 January 2012, p. 2.

[119] Asciano, *Submission to the ACCC in relation to the ACCC Consultation Paper on Australian Rail Track Corporation's Hunter Valley Rail Network Access Undertaking variation* January 27 2012, p. 1.

[120] Ibid., pp. 6-7.

PWCS: PWCS submitted that ARTC should determine the Final Indicative Service as soon as possible, and well before the maximum timeframes in the HVAU.[121]

7.1.2 Modelling the Final Indicative Service

Several submissions expressed dissatisfaction with the modelling undertaken for the Initial Indicative Service, and made recommendations for the modelling of the Final Indicative Service.

Peabody: Peabody submitted that the modelling used to develop the Indicative Service is not adequate and that the final modelling should include characteristics such as:

> entry and exit points to the Network, the geographic spread of an above rail provider's trains throughout the Network, and encouraging alignment in capital investment between the above and below rail operations.[122]

Peabody submitted that measuring utilisation of coal chain capacity should include measures of loading and unloading performance, and distribution of trains.[123]

QR National: QR submitted that:

> An efficient outcome from a whole of coal chain perspective is one where maximum possible tonnes are delivered, at the lowest possible total cost, when all elements of coal transportation costs within the coal chain are considered.
>
> This would entail an assessment based on a 'total cost of ownership' approach that allows for trade-offs between different elements of the coal chain that result in optimal utilisation of Coal Chain Capacity.[124]

QR submitted that efficiency measures should include elements of cost and total throughput delivered within a period and should also take account of distance.

QR submitted that ARTC should consider the impact on above rail efficiency, which affects the overall transportation costs to coal producers.[125] QR also submitted that ARTC should consider system velocity, driven by cycle times, as an efficiency indicator.[126]

QR stated that it is willing to work with the HVCCC and ARTC to develop appropriate modelling for the Final Indicative Service.[127]

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[121] PWCS, *Submission to the Australian Competition and Consumer Commission regarding the Australian Rail Track Corporation Limited's proposed variation to the Hunter Valley Rail Network Access Undertaking*, 27 January 2012, pp. 2-3.
[122] Peabody, *Submission in response to Australian Rail Track Corporation's Proposed Variation to the June 2011 Hunter Valley Coal Network Access Undertaking*, 25 January 2012, s. 3.3.
[123] Ibid., s. 3.3.
[124] QR National, *QR National's submission in response to the ACCC's Consultation Paper on ARTC's application to vary the HVAU to implement the Initial Indicative Service*, 27 January 2012, 27 January 2012, p. 2.
[125] Ibid., pp. 4-5.
[126] Ibid., p. 7
[127] Ibid., p. 2.

PWCS: PWCS submitted that ARTC should consider an expanded range of configuration factors and efficiency measures for the Final Indicative Service. PWCS suggested that ARTC should consider additional aspects of train performance, such as wagon types, sizes, and trigger mechanisms, and other measures of coal chain efficiency. PWCS also stated that the Final Indicative Services should contemplate likely future infrastructure configurations, such as the new Terminal 4.[128]

PWCS considered that the relative pricing should provide clear economic incentives for efficient use of capacity.[129]

7.2 ACCC view

The ACCC recognises industry concern about the current uncertainty around the efficient train configuration. The ACCC understands that investments would be required by some coal producers and Operators in order to adopt the Initial Indicative Service, such as purchasing the new, shorter wagons required for the 96 wagon configuration. The ACCC considers that resolving the current certainty regarding the characteristics of the Final Indicative Service, in a timely manner, is important in order to decrease the risk of such investments.

The ACCC is aware that large increases in demand for export coal throughput are expected to occur over the next few years. As at March 2011, indicative contractual nominations provided to ARTC by producers were projected to increase from 135 mtpa in 2011 to around 163 mtpa in 2012, 190 mtpa in 2013, 209 mtpa in 2014 and 216 mtpa in 2015.[130] The ACCC considers that rising demand underscores the importance of increasing throughput on the rail network by improving efficiency in the coal supply chain.

7.2.1 Transition between the Initial Indicative Service and the Final Indicative Service

During the assessment of this Proposed Variation it has become apparent to the ACCC that there are differing views among stakeholders about how the determination and charging for the Initial Indicative Service will 'fit' with the determination of the Final Indicative Service.

The ACCC remains of the view, as set out in the ACCC's final decision on the June 2011 HVAU, that the determination of the Initial Indicative Service and associated charges provides for a *transition* towards the Final Indicative Service characteristics that will ultimately promote the efficient operation of, use of and investment in infrastructure.

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128 PWCS, *Submission to the Australian Competition and Consumer Commission regarding the Australian Rail Track Corporation Limited's proposed variation to the Hunter Valley Rail Network Access Undertaking*, 27 January 2012, p. 3.

129 Ibid., p. 1.

130 ARTC, *2011-2020 Hunter Valley Corridor Capacity Strategy Consultation Document*, March 2011, p. 3.

7.2.2 Process for determining the Final Indicative Service

The ACCC considers that it may be beneficial to set out several matters that the ACCC considers will need to be addressed in determining the Final Indicative Service and price relativities across services.

7.2.2.1 Assumptions for modelling of the Final Indicative Service

Given the importance of the determination of the Final Indicative Service to the efficiency of the Hunter Valley coal supply chain, the ACCC considers that the process for its determination is vital to its successful implementation.

Section 4.18 of the June 2011 HVAU requires ARTC to consult with the HVCCC and industry in determining the characteristics of the efficient train. The ACCC considers that the process outlined in section 4.18 requires a more collaborative process than the process for determining the Initial Indicative Service. This is because implementing the Final Indicative Service is likely to require more significant complementary investments by Access Holders, port operators and above rail operators.

The ACCC considers that appropriate optimisation of the entire coal supply chain in a way that maximises the overall network benefits is likely to involve building on and enhancing the existing infrastructure in the Hunter Valley. In the ACCC's view, successful implementation of the Final Indicative Service is more likely with industry input into the process to be conducted by ARTC and the HVCCC for modelling the Final Indicative Service, including the assumptions used in the modelling.

The following issues are likely to need clarification in order for the HVCCC to start its modelling, and if possible reduce the timeframe for reaching its findings:

- What constraints should be assumed in the final modelling? Should the modelling assume no infrastructure constraints (e.g. no constraint on passing loop lengths) and model the 'utopian' network?

- What investment assumptions should be used in the modelling? For example, will the investments highlighted in ARTC's Hunter Valley Corridor Capacity be used as the 'base' for future assumptions?

- What time horizon should be modelled? Should investments that may occur in, for example, the next10 years, be included in the model or should investments with longer lead times be included?

7.2.2.2 Pricing

The June 2011 HVAU requires ARTC to consider the basis for pricing when it determines the Final Indicative Services. The ACCC considers that it would be beneficial to set out the ACCC's preliminary views on issues relevant to determining prices for the Final Indicative Service and other services.

The ACCC considers that the efficient use of ARTC's below-rail infrastructure will occur when the structure of charges appropriately reflects the cost of providing network capacity and efficiently maintaining the network, and gives incentives to use capacity efficiently. ARTC is currently seeking to apply this principle through gtkm pricing. However, the ACCC considers that a more direct and transparent pricing

structure may lead to greater efficiencies as industry participants in the Hunter Valley will have greater information and 'connection' to costs. Pricing that is linked more directly to costs may create stronger incentives to invest in complementary assets that promote the efficiency of the network.

During the assessment of the June 2011 HVAU, submissions on the determination of the efficient train configuration and ARTC's pricing approach proposed alternative charging structures. Examples included charges based on a per train or per train kilometre basis or a two-part tariff where variable maintenance charges could be priced on a gtkm basis and the TOP charge would be based on a per train basis.[131] During the current consultation on this Proposed Variation, stakeholders suggested that a train path could be priced based on the characteristics of the Final Indicative Service (being the most efficient train configuration). If a shorter train configuration was used, the per unit cost would be higher giving an incentive to make better use of network capacity.

131 Coal and Allied, *Submission in response to the ACCC's consultation paper in relation to ARTC's proposed Hunter Valley rail network access undertaking*, 25 October 2010, pp. 79-86.

8 Appendix A – Legal framework

8.1 Timeframes for ACCC decisions and clock-stoppers

Subsection 44ZZBC(1) of the Act provides that the ACCC must make a decision on an access undertaking application within the period of 180 days starting on the day the application is received (referred to as 'the expected period'). A request made to the ACCC for the withdrawal or variation of an access undertaking is an access undertaking application.

If the ACCC does not publish a decision on an access undertaking application under s. 44ZZBE of the Act within the expected period, it is taken, immediately after the end of the expected period, to have:

- made a decision to not accept the application; and
- published its decision under s. 44ZZBE and its reasons for that decision: see s. 44ZZBC(6).

The Act contains 'clock-stoppers' that mean certain time periods are not taken into account when determining the expected period (see s. 44ZZBC(2)). In particular, the clock may be stopped:

- by written agreement between the ACCC and the access provider (in this case, ARTC), and such agreement must be published: ss. 44ZZBC(4) and (5);
- if the ACCC gives a notice under s. 44ZZBCA(1) requesting information in relation to the application;
- if a notice is published under s. 44ZZBD(1) inviting public submissions in relation to the application;
- if a decision is published under s. 44ZZCB(4) deferring consideration of whether to accept the access undertaking, in whole or in part, while the ACCC arbitrates an access dispute.

8.2 Information requests

Subsection 44ZZBCA(1) provides that the ACCC may give a person a written notice requesting the person give to the ACCC, within a specified period, information of a kind specified in the notice that the ACCC considers may be relevant to making a decision on an access undertaking application.

Subsection 44ZZBCA(3) states that the ACCC must have regard to any information given in compliance with a notice under s. 44ZZBCA(1) in making its decision.

As noted above, the period within which the ACCC requests information constitutes a clock-stopper.