Australian
Competition &
Consumer
Commission

# Australian Rail Track Corporation Limited

# Hunter Valley Coal Network Access Undertaking

# Position Paper on Matters Other Than Price

## 10 February 2010

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# Glossary

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|---|---|
| 24 December IAHA | The revised Indicative Access Holder Agreement provided to the ACCC by ARTC on 24 December 2009 |
| 2002 AU | ARTC's access undertaking accepted by the ACCC in 2002 for the Interstate network, superseded by the 2008 Interstate Undertaking |
| 2008 Interstate AU | ARTC's access undertaking accepted by the ACCC in 2008 for the Interstate network |
| ACCC | Australian Competition and Consumer Commission |
| AHA | Access Holder Agreement |
| ARTC | Australian Rail Track Corporation |
| CAWG | Contractual Alignment Working Group |
| CPRS | Carbon Pollution Reduction Scheme |
| DTP | Daily Train Plan |
| gtkm | gross tonne kilometres |
| HRATF | Hunter Rail Access Task Force (referred to by ARTC as Hunter Valley Rail Access Task Force - HVRATF) |
| HVAU | Hunter Valley Access Undertaking |
| HVCCC | Hunter Valley Coal Chain Coordinator |
| HVCCLT | Hunter Valley Coal Chain Logistics Team (precursor to the HVCCC) |
| HVCN | Hunter Valley coal network |
| IAHA | The Indicative Access Holder Agreement attached to the HVAU |
| IAP | Indicative Access Proposal |
| IM | Implementation Memorandum |
| IPART | Independent Pricing and Regulatory Tribunal |
| KPI | Key Performance Indicator |

Idemitsu is a member of the international energy group, Idemitsu Kosan. Idemitsu owns an interest in four Australian mines located in Queensland and New South Wales.[10]

**New South Wales Minerals Council Ltd (NSWMC) – submissions received 24 July 2009, 18 August 2009 and 1 December 2009**

NSWMC is a not for profit, industry association representing the NSW mining industry. NSWMC member companies include mineral producers, operators, explorers and extractive material producers operating in NSW.[11]

NSWMC made its submissions to the ACCC on the HVAU on behalf of the Hunter Rail Access Task Force (HRATF), an associated group comprising all 14 Hunter Valley coal producers using ARTC's Hunter Valley rail network.[12]

**New South Wales Ministry of Transport – submission received 20 August 2009**

The Ministry (now NSW Transport and Infrastructure) is the lead public transport agency of the NSW Government, with primary responsibility for transport policy, planning and coordination functions as well as oversight of infrastructure delivery and asset management.[13]

**Peabody Australia Mining Limited (Peabody) – submission received 24 July 2009**

Peabody is a subsidiary of Peabody Energy.[14] Peabody currently operates 10 surface and underground mines producing thermal and metallurgical coal in Queensland and New South Wales.[15]

**QR National Coal (QRN Coal) – submission received 26 June 2009**

QRN Coal is a subsidiary of Queensland Rail (QR), and commenced rail haulage services in the Hunter Valley in 2005.[16] QRN Coal operates around 550 services each week in Queensland and New South Wales, transporting coal from 56 mines to eight export coal terminals and eight domestic customers.[17]

**Rail Corporation New South Wales (RailCorp) – submission received 3 July 2009**

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10 http://www.idemitsu.com/products/resource/coal.html at 14 December 2009.

11 http://www.nswmin.com.au/About-Us/default.aspx at 14 December 2009.

12 New South Wales Minerals Council (NSWMC) Hunter Rail Access Task Force (HRATF), Response to Australian Competition and Consumer Commission Issues Paper Regarding Australian Rail Track Corporation Hunter Valley Coal Network Access Undertaking, 24 July 2009.

13 http://www.transport.nsw.gov.au/ at 14 December 2009.

14 http://www.peabodyenergy.com.au/general/about-peabody.html at 14 December 2009.

15 http://www.peabodyenergy.com/Operations/CoalOperations-Australia.asp at 14 December 2009.

16 QR National Coal, Submission on the Hunter Valley Access Undertaking, 26 June 2009, introductory letter.

17 http://www.freight.qr.com.au/Coal_Freight/default.asp at 14 December 2009.

> Extension and will be treated as Additional Capacity which is covered by the HVAU.
>
> Arrangements for the developments of Extensions may require greater flexibility (e.g. funding and operations) than is provided in the HVAU. However, where appropriate[,] access to an Extension can be brought within the scope of the HVAU (clause 5.7 of the Indicative AHA).
>
> The distinction between an Extension and the provision of Additional Capacity is consistent with the approach in the Interstate Access Undertaking and Interstate Track Access Agreement. [212]

#### 5.5.1.5 Interaction between different access regimes

ARTC submits that its objective is for its rail networks to be governed by consistent access undertakings and contractual arrangements to the maximum extent considered appropriate, however there is a likelihood that traffics will need to pass over networks covered by more than one access undertaking and that this is presently the case for the 2008 Interstate AU and the NSWRAU.[213]

ARTC submits there is a need for separate access undertakings covering the Hunter Valley and Interstate networks in NSW and that it has sought to keep the number of traffics with routes crossing undertakings to a minimum. ARTC submits that it does not expect significant difficulties where access seekers seek rights to routes which cross undertakings.[214]

ARTC notes that interfaces between infrastructure covered by an ARTC undertaking and networks covered by state based regimes has not given rise to concerns in Victoria and South Australia or other parts of NSW.[215]

#### 5.5.1.6 Non-coal reservation

ARTC submits that the HVAU only applies to new Access Agreements and that existing agreements will be unaffected. ARTC further submits that the terms and conditions for the reserved train paths will be those applicable at the time of the Access Application. ARTC submits that such terms and conditions are not expected to substantially differ from those applying on the Interstate network.[216]

ARTC submits that it does not intend to include a condition in the Access Agreement restricting the use of the Train Path for a specific purpose or end market. ARTC submits that if the ACCC has concerns with this provision of the HVAU, ARTC will consider making it clear that the access rights will need to comply with the contracted service characteristics and be limited to non-coal traffic.[217]

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[212] ARTC, Response to Submissions, 21 September 2009, p. 3.
[213] ARTC, Response to Submissions, 21 September 2009, p. 4.
[214] ARTC, Response to Submissions, 21 September 2009, p. 4.
[215] ARTC, Response to Submissions, 21 September 2009, p. 4.
[216] ARTC, Response to Submissions, 21 September 2009, p. 7.
[217] ARTC, Response to Submissions, 21 September 2009, p. 7.

Section 2.1 states that the HVAU provides for the negotiation of Access Rights to the Network, with details of the specified services and sections of the Network defined during Access negotiations. 'Access' is defined in section 9.1 to mean access to use the Network, or any part thereof for the purpose of utilising Access Rights. The Network is defined in section 9.1 as the network of railway lines delineated or defined in Schedule B, excluding the annexure to Schedule B. Schedule B states:

> Mainline, crossing loops, dual gauge and turnouts as summarised below:
>
> 1. Newcastle (Islington Junction) 164.400 km to Port Waratah
> 2. Scholey Street Junction (Via Coal) 164.900 to Muswellbrook 288.900 km
> 3. Hanbury Junction 168.800 to Kooragang Island
> 4. Kooragang East Junction 169.3 km to Sandgate 170.500 km[1]
> 5. Muswellbrook 288.900 km to Ulan 435.300 km
> 6. Muswellbrook 288.900 km to Gap[2] 416.000 km
>
> * Includes Sandgate Flyover (for the purposes of **section 4** Pricing Principles only) which forms part of ARTC Sector 938 Sandgate – Maitland (via Main)
>
> [1] To the extent where the railway line joins the rail network owned by Rail Infrastructure Corporation.

The annexure to Schedule B comprises two maps of the Network, and states that:

> …the precise details of the Network forming part of the New South Wales Lease will change over the duration of the Undertaking, but not in such a way as to be inconsistent with the textual descriptions in Schedule B.

The ACCC considers it is important for the HVAU to include a clear specification of its scope, as the definition of the scope sets the boundaries for the operation of the undertaking, and delineates the subject matter to which access seekers may seek access. The ACCC considers that the definition of the scope of the HVAU as currently drafted is, however, uncertain and unclear, and therefore unlikely to be appropriate.

The ACCC also notes that the definition of 'Network' refers to a description of railway lines specified in Schedule B, but excluding the maps of those lines annexed to the Schedule. The annexure nonetheless states that the Network forming part of the lease may change over time, but not so as to be inconsistent with Schedule B. The ACCC notes the submissions from interested parties expressing confusion over what is and is not covered by the HVAU.

The ACCC considers that it should not be difficult for ARTC to clearly define the Network proposed to be covered by the HVAU, and that the convoluted approach described above creates significant uncertainty that is unlikely to be appropriate.

those years (after taking into account system losses). ARTC submits that it is working with the HVCCLT to confirm this through system modelling.

ARTC submits that allocation of track access for 2009 and 2010 in accordance with port allocations avoids the need for any initial queuing mechanism and ensures alignment. ARTC anticipates that new track capacity will be required post 2010 to match port expansions which will be identified through the processing of access applications with the assistance of the HVCCC.[241]

ARTC submits that the HVAU provides that where there are mutually exclusive access applications ARTC will allocate the capacity to the applicant who accepts an access agreement which is most favourable to ARTC. ARTC submit that this is 'considered to be unlikely to occur given that the HVAU is designed to ensure that track access is expanded to meet port capacity.'[242] However, ARTC submits that non-coal applicants are unlikely to be able to compete against coal applicants under the NPV of returns test. ARTC submits that following consultation, it was agreed applicants may reserve access rights used for non-coal traffic to the extent it existed immediately before the commencement of the HVAU and is to be used for substantially the same purpose and in respect of the same traffic as the existing access rights.[243]

#### 6.2.1.3 Network exit capability

ARTC submits that it is important that it can require applicants to establish their capacity to offload coal at the Port of Newcastle or some other discharge point, as this 'will ensure ARTC does not over contract coal chain capacity in the initial allocation stage and will assist in enabling alignment of coal chain capacity.' [244] ARTC submits that at the preliminary stage of the process an applicant may not have a contract in place, and accordingly ARTC has discretion whether or not to require this information.[245]

#### 6.2.1.4 Prudential requirements

ARTC submits that the prudential requirements in the HVAU reflect those contained in the 2008 Interstate AU, but with an additional requirement that the applicant has an acceptable credit rating or is willing to provide credit support before the access agreement becomes effective.[246] ARTC considers this necessary given that:

> [it] will be making significant capital expenditure on the basis of the long term take or pay contracts and it is necessary to ensure that there is financial standing or some form of credit support to meet the commitments. In contrast, the interstate network does not require the same level of investment and the flagfall fees are a smaller proportion of the overall revenue.[247]

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241 ARTC, EG, 13 May 2009, p. 31.
242 ARTC, EG, 13 May 2009, p. 31..
243 ARTC, EG, 13 May 2009, p. 32.
244 ARTC, EG, 13 May 2009, p. 61.
245 ARTC, EG, 13 May 2009, p. 61.
246 ARTC, EG, 13 May 2009, pp. 61-62.
247 ARTC, EG, 13 May 2009, p. 62.

that the coal producer would not have the expertise to negotiate the OSA, nor would it be able to bind its operator.[266]

Asciano submits that the HVAU gives limited protection to Operators during negotiations, that the focus of the negotiation provisions is the AHA, and the OSA 'is not given similar protection.' As an example, Asciano cites section 3.12, which it submits does not cover the OSA, and section 3.14, the effect of which it submits is thus that ARTC is not obligated to offer an indicative OSA to Operators.[267]

Asciano submits that the proposed approach in the HVAU only gives the Access Holder protection, whereas in the proposed contracting framework there are two persons who may be adversely affected by ARTC's monopoly behaviour.[268] Asciano recommends that the Operator be given an equal role in the negotiation process and not merely as an agent. Further, Asciano submits that the indicative OSA be afforded the same status as the indicative AHA and that ARTC be obligated to offer the OSA to Operators should they require it.[269]

#### 6.3.2.2 Prudential requirements

Asciano raises concerns with the breadth of section 3.4(e)(ii). Asciano submits:

> It is unreasonable for ARTC to refuse to negotiate with an access seeker if it is in default of any of it rail access agreements. Contractual defaults occur from time to time and may be the subject of legitimate disputes between contracting parties. Defaults can also be affected by the reasonableness or otherwise of the track access provider.[270]

Asciano submits that whether an applicant is in default of its rail access contract with another party is not an appropriate indicator of risk for ARTC, and thus not a reason for ARTC to refuse to negotiate access. Asciano argues this is particularly the case 'given the built in protections in ARTC's AHA and OSA.'[271]

#### 6.3.2.3 Unreasonably prolonged time periods

Asciano submits that the timeframe in section 3.9, which permits ARTC 60 business days to provide an IAP is 'extraordinary.'[272] Asciano submits that '[i]n the analogous situation in Queensland, QR Network requires 30 days (ordinary days ie 1 month, not business days).'[273] Asciano also notes that ARTC has reserved the right to extend the period to prepare the IAP in section 3.9(b).[274]

#### 6.3.2.4 Application for mutually exclusive access rights

Asciano submits that section 3.13(b) – which provides that where there is a choice between mutually exclusive applications, ARTC will normally choose on the basis of greatest net present value – raises two issues:

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266 Asciano, 26 June 2009, p. 9.
267 Asciano, 26 June 2009, p. 9.
268 Asciano, 26 June 2009, p. 9.
269 Asciano, 26 June 2009, p. 9.
270 Asciano, 26 June 2009, p. 9.
271 Asciano, 26 June 2009, p. 9.
272 Asciano, 26 June 2009, p. 9.
273 Asciano, 26 June 2009, p. 9.
274 Asciano, 26 June 2009, p. 9.

a) In a contest between coal and non-coal traffics, coal will almost certainly win on the grounds of ability to pay – how is non-coal intended to compete for capacity?

b) In a contest between two coal Applicants within the constrained network, both always win as ARTC achieves its ceiling rate of return under either choice through the unders/overs mechanism.[275]

Asciano submits that the test fails to provide a measure that is relevant to making the choice, as it 'almost automatically' excludes application to non-coal and does not illuminate a coal versus coal choice.[276] Asciano further submits that even if the test were able to distinguish between applications it would still be too narrow 'as it is based purely on the ARTC's NPV and ignores wider coal chain implications.'[277]

#### 6.3.2.5 Implementation

Asciano submits that ARTC has informed Asciano of its intention to conclude all AHA and OSA contracts by 30th September 2009 with an implementation date of 1st January 2010, and that it intends that these contracts will not include the ability to reflect any changes to the indicative AHA and OSA required as a result of the ACCC's scrutiny.[278] Asciano submits that it is extremely concerned about this approach as the 'timeframe does not allow for effective negotiation and the process prevents the access seekers from gaining the benefit of regulatory protection' and that '[i]n effect, these agreements will be negotiated under the NSWRAU, a high level regime unsuited to dealing effectively with the characteristics of the Hunter Valley network.'[279]

Asciano submit that ARTC will be negotiating 'approximately 24 OSAs, 12 AHA, 2 coal ancillary contract[s] and 2 non coal contracts.'[280] Asciano submit that ARTC's negotiations are 'traditionally very slow' and that ARTC have still not finalised Asciano's interstate access agreement with negotiations having been underway for almost 12 months.[281] Asciano submits that the timeframe ARTC proposes is not credible 'if there are to be effective negotiations especially given that they are complex tri-partite negotiations.'[282]

Asciano submits that it would see some merit with pushing ahead with contractual agreements in parallel with the ACCC approval process if there was flexibility in the arrangements to change them to reflect the ACCC's decision. However, Asciano submits that ARTC has stated its intention is that 'the contracts signed in September 2009 will run for ten years and there would not be an ability to adopt any changes the ACCC required to the indicative agreements.'[283] Asciano submits that there is concern among producers about securing the capacity to move their coal against the 'backdrop of the monopolist attempting to subvert the regulatory protections afforded the Access

[275] Asciano, 26 June 2009, p. 10.
[276] Asciano, 26 June 2009, p. 10.
[277] Asciano, 26 June 2009, p. 10.
[278] Asciano, 26 June 2009, p. 32.
[279] Asciano, 26 June 2009, p. 32.
[280] Asciano, 26 June 2009, p. 32.
[281] Asciano, 26 June 2009, p. 32.
[282] Asciano, 26 June 2009, p. 32.
[283] Asciano, 26 June 2009, p. 32.

a similar contracting process to the HVAU but also specifies fixed annual dates for that process. C&A submits that the timing mismatch between the processes 'will complicate the ability of ARTC to assess whether an applicant has sufficient network exit capability.'[288]

#### 6.3.3.2 Adverse consequences of proposed track access negotiation process

C&A submits that the offer of an Indicative Access Agreement and allowance for negotiation could undermine the binding nature of the PWCS terminal nominations.[289]

C&A submits that the PWCS nomination process is designed such that if a producer is offered a contract for terminal capacity and timing substantially the same as their nomination, that contract will become binding without any further action by the producer. C&A submits that negotiation of an offer is only permitted under the PWCS arrangements where the offer is outside set variation limits on key dimensions.[290]

C&A submits that under the proposed arrangements in the HVAU, the track offer is negotiable and the producer could ultimately decline the offer; without access to track, the producer would be relieved of their port obligation hence undermining the binding nature of the terminal arrangements.[291]

C&A submits that the ARTC negotiation process should be limited to access offers that are significantly different to a predefined indicative contract, in a similar way to the port negotiation process, to ensure track nominations remain binding.[292]

#### 6.3.3.3 'The mechanism to align track and terminal contracts is not effective in all circumstances'

C&A submits that under the HVAU there is no certainty that allocated track capacity will align with allocated port capacity as the allocation priority rules are different and the terminal and track allocation processes currently do not provide for communication between the service providers.[293]

#### 6.3.3.4 Process alignment

C&A submits that in order to ensure coal chain alignment is achieved, the ARTC process must be consistent in timing and allocation with the annual terminal contracting process. C&A submits that this is best achieved through a more closely integrated planning and contracting process to ensure each producer is offered a matching terminal and track contract.[294]

C&A has suggested a Stapled Process alignment model for terminal and track contracting to facilitate discussion.[295]

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[288] Coal & Allied, 3 July 2009, p. 3.
[289] Coal & Allied, 3 July 2009, p. 3.
[290] Coal & Allied, 3 July 2009, p. 3.
[291] Coal & Allied, 3 July 2009, p. 3.
[292] Coal & Allied, 3 July 2009, p. 3.
[293] Coal & Allied, 3 July 2009, p. 3.
[294] Coal & Allied, 3 July 2009, p. 4.
[295] Coal & Allied, 3 July 2009, p. 4.

duration of the associated port terminal access rights'.[322] To ensure contractual alignment, NSWMC submits that ARTC's minimum term should be aligned to the duration of the associated port terminal access arrangements (which is currently expected be a minimum of 10 years).[323]

NSWMC submits that it understands that coal mines with lives of less than 15 years will be classified as non-Indicative Services and that those mines will have to enter into further negotiation of access rights with the ARTC and will therefore 'have no certainty that such access will be granted or about the terms on which this will occur.'[324] NSWMC submits that this is 'particularly unacceptable, and contrary to the legitimate interests of coal producers, in light of the fact that this alteration of the existing access rights held by coal producers is being driven by regulatory change […] rather than arising from the expiry of the relevant access rights'.[325]

NSWMC further submits that existing mines with known future train path requirements should be able to continue to obtain those train paths for a minimum term of 10 years, or for a minimum term that is equal to the expected remaining mine life of the relevant mine, whichever is the shorter, regardless of whether those services are Indicative Services or non-Indicative Services.[326] NSWMC submit that these mines should also be entitled to terminate that train path by giving 3 years notice to the ARTC (to take effect from any time after the minimum term).[327] NSWMC considers that a 3 year notice period (rather than the 5 year period proposed by the ARTC) will allow more than sufficient time to enable the ARTC to reallocate that capacity for subsequent use. Also, the NSWMC submit that the HVAU should 'allow notice periods of less than 3 years in some circumstances (e.g. where the volume is not large and/or another user can take up the capacity).'[328]

NSWMC submits that 'any subsequent shortfall in cost recovery by the ARTC as a result of a mine having a life of less than 15 years will be able to be recovered from subsequent users of the relevant portion of HVCN after the operation of that mine has ceased. In the event that there is no subsequent user, it will be recoverable from the other users as provided for in the access pricing provisions.'[329]

#### 6.3.6.3 Involvement of HVCCC

NSWMC submits that section 3.6(c), which provides that ARTC would be entitled to not participate in an initial review of capacity requirements 'if other Hunter Valley Coal Chain Participants do not participate reasonably and effectively in that review,' would enable delay in usage of the Hunter Valley coal network by one coal producer as a result of the actions of other industry participants.[330] NSWMC submits that, given the co-ordination role that is to be played by the HVCCC in respect of capacity

[322] NSWMC, 24 July 2009, p. 22.
[323] NSWMC, 24 July 2009, p. 22.
[324] NSWMC, 24 July 2009, p. 22.
[325] NSWMC, 24 July 2009, p. 22.
[326] NSWMC, 24 July 2009, p. 22.
[327] NSWMC, 24 July 2009, p. 22.
[328] NSWMC, 24 July 2009, p. 23.
[329] NSWMC, 24 July 2009, p. 23.
[330] NSWMC, 24 July 2009, p. 25.

#### 6.3.7.10 Indicative access proposal – timeframes and information

QRN Coal has no concerns with the process and timeframes outlined in the HVAU.[356]

QRN Coal notes that:

> …the Indicative Access Proposal (IAP) contains indicative arrangements only and does not oblige ARTC to provide Access Rights in accordance with specific terms and conditions (including charges). However, we note that negotiation is undertaken on the basis of the arrangements outlined in the IAP and in this regard, the information contained in the IAP needs to be accurate and able to be relied upon as a basis for negotiation. [357]

#### 6.3.7.11 Negotiation process

QRN Coal submits that the negotiation process is reasonable and reflects an appropriate balance between the parties. [358]

> QRN Coal notes that the negotiation period is 3 months (as opposed to a 9 month negotiation period in Queensland) and questions whether this timeframe is sufficient to negotiate and execute an Access Holder Agreement and an Operator Sub-Agreement., particularly given that three parties are involved and the mechanics of the interfaces may be tailored on a case by case basis.
>
> It is noted however, that the negotiation period can be extended with the agreement of both negotiating parties where required. [359]
>
> QRN Coal notes that negotiations may be cease by ARTC at the expiry of the 3 month negotiation period. As per above, QRN Coal has concerns that the timeframe may be insufficient to negotiate and execute an Access Agreement. It is noted however, that the negotiation period can be extended with the agreement of both negotiating parties where required. [360]

#### 6.3.7.12 Mutually exclusive access rights

QRN Coal submits:

> QRN Coal supports the concept of notification to each applicant where mutually exclusive Access Rights are being sought.
>
> On the basis of standard access agreements (and therefore presumably a standardised level of risk) and a detailed pricing structure (with floor and ceiling prices and revenue limits) QRN Coal believes that access rights should not be allocated by ARTC on a most favourable basis.
>
> A more equitable methodology for allocating access rights to coal customers would be on the basis of the order in which applications were sought and negotiations were commenced.[361]

QRN Coal also submits:

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356 QRN Coal, 26 June 2009, p. 5.
357 QRN Coal, 26 June 2009, p. 6.
358 QRN Coal, 26 June 2009, p. 6.
359 QRN Coal, 26 June 2009, p. 6.
360 QRN Coal, 26 June 2009, p. 6.
361 QRN Coal, 26 June 2009, p. 6.

non-coal rights is unclear particularly as it could place a considerable administrative burden on an operator.[368]

RailCorp also notes that ARTC indicates the fresh path applications will be 'contracted on the terms and conditions, applicable at the time of the Access Application'.[369] RailCorp submits that the intent of this section is vague and open to interpretation. RailCorp suggests that ARTC clarify whether this is a reference to the terms contained in any contract that pre dates the commencement date of the proposed Hunter Valley Access Undertaking or are a reference to the ARTC current market terms and conditions that are proposed apply to non coal access rights.[370]

#### 6.3.8.3 Mutually exclusive applications

RailCorp refers to section 3.13(b) of the HVAU, which proposes that in the case of mutually exclusive applications, ARTC will accept that application which is most favourable, which ordinarily will be the application that represents the highest present value of future returns to ARTC.[371]

RailCorp submits that this would mean coal applications would be accepted over non-coal applications and appears counter to the expressed ARTC position regarding passenger priority. RailCorp suggests that ARTC clarify both how the 'highest present value' rule would be applied and the exceptions to the rule. [372]

#### 6.3.8.4 Access agreement

RailCorp notes that ARTC believes it is appropriate to provide an indicative access agreement for coal traffic, however ARTC is not prepared to provide an indicative access agreement for non-coal rights.[373] RailCorp notes that ARTC through the Explanatory Guide indicates an intention for a non-coal rights agreement on the Hunter Valley to be based on the indicative access agreement under the 2008 Interstate AU.[374] RailCorp submits that this is only an intention as the Explanatory Guide states that it does not comprise part of the HVAU and is overridden by the HVAU to the extent of any inconsistency.[375] RailCorp submits that the failure to provide an indicative non-coal access agreement and the reliance on 'an unenforceable 'intention' creates uncertainty.[376]

RailCorp submits:

> RailCorp is not necessarily suggesting that it is appropriate to have multiple access agreements with ARTC as separate access agreements will result in administrative burdens. However the structure of the proposed Hunter Valley Access Undertaking reduces the regulatory certainty of the terms of access for non-coal access rights. For example, in the case of an arbitrated dispute it is unclear, given the lack of guidance within the proposed Hunter Valley Access Undertaking, what elements the arbitrator would take into account. ARTC

368 RailCorp, 3 July 2009, p. 6.
369 HVAU, section 2.5(b).
370 RailCorp, 3 July 2009, p. 7.
371 RailCorp, 3 July 2009, p. 8.
372 RailCorp, 3 July 2009, p. 8.
373 RailCorp, 3 July 2009, p. 8.
374 RailCorp, 3 July 2009, p. 8.
375 RailCorp, 3 July 2009, pp. 8-9.
376 RailCorp, 3 July 2009, p. 9.

potential for uncertainty, delay, misalignment between track and port contracts, and opportunities for ARTC to impose inefficient terms.[444]

ARTC made the following statement in a letter to the ACCC, which suggests that the lack of transitional arrangements in the HVAU is explained by ARTC's intention to execute access agreements prior to the HVAU taking effect:

> ARTC is proposing to put in place long term contractual arrangements with coal producers and other access seekers prior to receiving a decision from the ACCC on the Hunter Valley Access Undertaking.[445]

The ACCC notes section 2.5(a) of the HVAU, which states that the HVAU applies only to the negotiation of new Access Agreements, and the negotiation of Access Rights in addition to those already the subject of an Access Agreement. Further, the section provides that nothing in the HVAU can require a party to an existing Access Agreement to vary a term or provision of that agreement.

ARTC commented in response to submissions that it intends to allocate track access for coal export for 2009 and 2010 in accordance with port allocations,[446] however the ACCC notes that this is not reflected in the HVAU. ARTC also provided a letter to industry participants dated 23 June 2009 setting out proposed transitional arrangements, but the ACCC again notes that these arrangements are not contemplated in the HVAU. Further, ARTC stated in the Explanatory Guide to the HVAU that:

> …by allocating track access for 2009 and 2010 in accordance with port allocations, it avoids the need for any initial queuing mechanism and ensures alignment. Post-2010, it is anticipated that new track capacity will be required to match port expansions. [ARTC considers that this capacity] will be identified through the processing of applications with the assistance of the HVCCC and will require producers to contract for the construction of additional track capacity to meet their requirements.[447]

The ACCC acknowledges that if all current users of the Hunter Valley rail network (including coal producers) execute access agreements prior to the commencement of the HVAU, then it is unlikely to be necessary for the HVAU to include transitional provisions. The ACCC considers, however, that execution of access agreements prior to commencement of the HVAU may have other consequences for the appropriateness of the HVAU as currently drafted. The ACCC understands, though, that current users of the Hunter Valley rail network have not executed contracts with ARTC to replace arrangements that existed at the time of submission of the HVAU in April 2009.

The ACCC has stated in this chapter that the purpose of an access undertaking is often to facilitate agreement between parties that otherwise cannot agree mutually acceptable terms, and hence if ARTC and access seekers execute long term agreements prior to commencement of the HVAU, the effect of section 2.5(a) would be to undermine the usefulness of the undertaking. In particular, current access

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444 NSWMC, 24 July 2009, p. 23-24.
445 ARTC, letter to Ms Jaime Martin & Mr David Hatfield, ACCC, 10 July 2009.
446 ARTC, Response to Submissions, 21 September 2009, p. 43.
447 ARTC, EG, 13 May 2009, p. 31.

view is that such matters may appropriately be included as pre-conditions to the performance of obligations under the access agreement, and therefore the subject of negotiation prior to execution of such an agreement.

is to be treated as Confidential Information and must not be disclosed save in the case of specified limited exceptions such as for obtaining advice from legal advisers, financiers, accountants or other consultants (provided these persons are under a legal obligation not to disclose the Confidential Information to any third party); and any disclosure required by the HVCCC or the Rail Capacity Group (RCG) for the purposes of co-ordinating the operation and capacity development of the Hunter Valley coal chain.

Clause 18 of the OSA essentially mirrors clause 15 of the IAHA.

The ACCC notes that NSWMC has submitted in relation to both clause 15 (AHA) and clause 18 (OSA) that the definition of Confidential Information is too narrow and that the definition should be extended to include all information provided by either party.[634] The NSWMC has also submitted that the Members' Agreement for the HVCCC will regulate (in great detail) the basis on which ARTC (as a member of HVCCC) can disclose to HVCCC the confidential information of the Access Holder and that clause 15.3(c) of the AHA and the corresponding clause 18.3(c) of the OSA are inconsistent with those arrangements and should be deleted.

The ACCC considers that the arrangements in respect of the handling of confidential information with the HVCCC and the RCG should be consistent with and operate in alignment as between the HVAU, the AHA and the OSA The ACCC notes the submissions of interested parties and considers that it would be preferable for ARTC and industry participants to resolve such arrangements and for ARTC to include the agreed provisions in the HVAU and agreements, thereby avoiding the need for prolonged negotiations or dispute in relation to each individual access agreement.

The ACCC notes that definition of confidential information has been revised in the 24 December IAHA and now provides:

> (a) Each party acknowledges, subject to **clause 15.2** and **15.3**, that all information provided by one party ("**Provider**") to the other ("**Receiver**") under this agreement that is designated or indicated, either orally or in writing, as being the confidential information of the Provider or any of its related body corporates ("**Confidential Information**") is secret and confidential and that the Receiver of Confidential Information will treat that Confidential Information as secret and confidential and the property solely of the Provider and not use that Confidential Information for any purpose other than the purposes that the provisions of this agreement allow.
>
> (b) To avoid doubt, information provided by the Access Holder to ARTC on the forecast and actual volume of coal to be transported on the Network by the Access Holder is Confidential Information.

The ACCC notes that clause 15.3(c) has been amended in the 24 December IAHA and now provides that either party may disclose confidential information to the HVCCC or the RCG to the extent necessary to enable the HVCCC or the RCG to co-ordinate the operation and capacity development of the Hunter Valley coal chain.

[634] NSWMC, 24 July 2009, p. 52.

while in many instances these issues may be resolved via negotiation between the parties, in providing a view the ACCC hopes to reduce the length of negotiations and the likelihood of disputes, thereby lowering transaction costs and ensuring a more effective undertaking.

#### 7.4.10.1 Commencement date

Commencement date is defined in the IAHA and OSA as 'the date that this agreement is signed by both parties.' Asciano submits that the definition should be amended to state that 'commencement date means the date on which the last party signs this agreement'.[644]

The ACCC notes that it is a generally accepted view that an agreement commences on the date that the agreement has been signed by each party to the agreement, and that ARTC's definition of the commencement date is sufficiently clear in communicating this point.

The ACCC notes that Commencement Date is defined in the 24 December IAHA as 'the later of the date that this agreement is signed by both parties and 1 January 2010'.

#### 7.4.10.2 RIC & SRA definitions

The IAHA and OSA define the acronym SRA (State Rail Authority of NSW) and the OSA defines the acronym RIC (Rail Infrastructure Corporation). However, the full terms are used in both the IAHA and OSA rather than the acronyms in the definition. Asciano questions the inclusion of the acronyms as defined terms when not used in the agreements.[645] As a matter of clarity, the ACCC favours a consistent approach to the use of defined terms, and notes that RIC and SRA have been deleted from the definitions in the 24 December IAHA.

#### 7.4.10.3 Warranty of accuracy of information

Clause 3.9 of the IAHA states that a party providing information to another party, in relation to use of the Network, warrants the accuracy of that information.

NSWMC submits that it is unreasonable to apply such a warranty to all information passed between parties, irrespective of its nature. NSWMC notes that specifically the warranty should not cover forward looking information.[646]

The ACCC acknowledges NSWMC's submission and agrees that it may be difficult to warrant the accuracy of forward looking information. The ACCC also notes that in the 24 December IAHA, the warranty clause is amended in relation to forward looking information.[647]

#### 7.4.10.4 Rolling Stock

In relation to the Rolling Stock warranty provision at clause 5.3 of the OSA, NSWMC submits that it is unclear if the Operator's warranty in relation to rolling stock should have extended to include a warranty as to fitness for purpose.[648] The ACCC notes that

644 Asciano, 26 June 2009, pp. 23 and 30.
645 Asciano, 26 June 2009, p. 30.
646 NSWMC, 24 July 2009, p. 55.
647 AHA, 7 December 2009, clause 3.10.
648 NSWMC, 24 July 2009, p. 59.

the warranty provides that the Rolling Stock be fit for use on the Network having regard to the terms of the OSA, and when read with the Operator's obligations in OSA clause 5.4, the ACCC's view is that no such extension to the warranty on rolling stock appears necessary.

#### 7.4.10.5 Audit

Clause 10.1 of the OSA provides that ARTC may require an audit for a particular Service of an Operator to assess whether the Operator is complying with the terms of the OSA or whether the wagons are correctly loaded. Clause 10.4 provides that an Operator, at its own cost and risk, may audit any of the railway track and lines making up part of the Network to assess whether ARTC is properly repairing and maintaining the network.

Asciano submits that clause 10.1 should be amended to state that audits conducted by ARTC are at ARTC's own cost and risk.[649] NSWMC states that the clause does not clarify which party is responsible for the cost, but agrees with Asciano in that it should be at ARTC's cost and risk.[650]

The ACCC considers that as clause 10.4 provides that where an Operator conducts an audit it is at the Operator's own cost and risk. It is not clear that where ARTC conducts an audit it is at ARTC's own cost and risk, and that clarity could be added by making this explicit.

Clause 10.2(a) provides that ARTC may carry out audits per clause 10.1 as often as is reasonably necessary. NSWMC submits that the frequency of audits should be limited to four times per year.[651] The ACCC acknowledges the importance of the audit provisions and specifically the importance of balancing the need to conduct audits with the efficient running of the network. The ACCC notes that the clause states that ARTC will not carry out more audits that 'reasonably necessary and also notes clause 10.2(b) providing that ARTC will use its best endeavours to minimise disruption to the Operator's service in conducting an audit. Ultimately, the ACCC considers that the clause as drafted may be negotiated further between the parties.

#### 7.4.10.6 Emergencies and incidents

Clause 11.5 of the OSA provides that where an Incident has occurred, ARTC may request a report from the Operator detailing several factors relevant to the Incident. Asciano believes the obligation to provide a report should be reciprocal.[652] NSWMC submits that the Operator should not be required to produce a report commissioned under legal professional privilege.[653]

The ACCC acknowledges that is important for ARTC to be informed of the details of an Incident given the implications it may have for the management of trains on the Network. The ACCC also sees merit in Operators being fully informed of Incidents, as suggested by Asciano, given the significance it may have for performance of contracts with access holders or customers.

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649 Asciano, 26 June 2009, p. 29.
650 NSWMC, 24 July 2009, p. 56.
651 NSWMC, 24 July 2009, p. 56.
652 Asciano, 26 June 2009, p. 29.
653 NSWMC, 24 July 2009, p. 57.

The ACCC also agrees with the NSWMC that ARTC should not be able to compel an Operator to waive legal professional privilege for the purposes of providing an Operator's Incident report, but that a report which does not cause the Operator to waive privilege should still be provided to ARTC.

#### 7.4.10.7 Environmental requirements

Clause 13 of the OSA provides that the Operator must comply with broad environmental requirements. Specifically clause 13.5 provides that where ARTC has informed an Operator that an Environmental Condition exists as a result of the Operator's actions, ARTC may require the Operator to implement steps to remedy or mitigate the situation.

NSWMC submits that an Operator should only be responsible for the cost of compliance where the remediation requirement is a direct result of the Operator's activities and only to the extent it was caused by the Operator. Further, if multiple Operators are responsible, the cost should be shared.[654]

The ACCC believes it is reasonable to expect the party or parties that have caused the Environmental Condition to bear the cost and or responsibility of remediation, and that clarifications to the OSA as suggested by the NSWMC may avoid uncertainty and disputes in the event that an Environmental Condition occurs.

#### 7.4.10.8 Assignment and novation

Clause 16.1 of the IAHA provides that ARTC may not assign or novate its rights under the agreement without written consent from the access holder. However, ARTC is not prevented from entering into sub-contracting or agency agreements.[655]

IAHA Clause 16.2 provides that an access holder may not licence, assign, novate, sell, trade, sub-licence or dispose of its interest under the agreement without ARTC's written consent.[656]

Asciano submits that the restrictions imposed on ARTC should reflect those imposed on access holders in clause 16.1 and further that ARTC may sub-contract provided it remains liable to the access holder under the agreement.[657] Similarly, NSWMC submits the clause should be amended to clarify that ARTC remains responsible for the acts or omissions of its sub-contractors or agents.[658] Subject to the ACCC's views regarding capacity trading as set out in the Capacity Management chapter, the ACCC agrees that a more balanced approach in clauses 16.1 and 16.2 would be reasonable, and that more specificity in relation to the liability of the parties in the event of assignments etc., would add a degree of certainty.

#### 7.4.10.9 Variation

Clause 21.1 of the IAHA provides that no variation of the agreement will be effective unless in writing, signed by the parties. Asciano submits that this clause would result

654 NSWMC, 24 July 2009, p. 57.
655 See also OSA clause 19.1 in relation to Operators.
656 See also OSA clause 19.2 in relation to Operators.
657 Asciano, 26 June 2009, p. 22.
658 NSWMC, 24 July 2009, p. 53.

in ARTC and the access holder agreeing to variations that have a significant impact on the Operator without needing the Operator's prior consent.[659]

In line with the ACCC's views in the Negotiating for Access chapter regarding the involvement of the Operator in access negotiations, the ACCC considers that clause 21.1 should provide for the involvement of the Operator in negotiations regarding variation of an agreement, particularly to the extent that any variation would impact upon the Operator's rights and obligations under the OSA.

#### 7.4.10.10 Costs

IAHA clause 21.2 provides that the access holder will pay any legal costs due from executing the agreement and related documents, except for ARTC's internal costs relating to execution of the agreement.[660]

NSWMC submits that this provision is too broad and that the access holder should only be liable for stamp duty payable upon execution of the agreement and on the performance of obligations under the agreement.[661]

The ACCC considers that it is unreasonable for an access seeker to bear ARTC's legal costs of executing an agreement when the process involves two parties.

The ACCC notes that clause 21.2 has been amended in the 24 December IAHA, and now provides that each party will bear its own costs in relation to the negotiation, execution and performance of this agreement except that the Access Holder will be liable for any stamp duty, and associated fees, fines and penalties associated with the execution of this agreement.

#### 7.4.10.11 ARTC's obligations under the IOSA

SCT Logistics submits that ARTC's obligations under the OSA are not appropriately covered by the agreement. Specifically, SCT Logistics submits there is no requirement in the OSA for ARTC to appropriately manage and maintain the track.[662]

The ACCC notes OSA clause 6.1 which provides that ARTC will maintain the network in a condition fit for use by an Operator to provide a service which meets the service assumptions. Further the ACCC notes that ARTC is subject to requirements to manage and maintain the track under the NSW lease.

NSWMC submits there is no express obligation on ARTC to conduct Network Control, issue Instructions or maintain and operate the network in a non-discriminatory manner.[663]

The ACCC notes OSA clause 5, which sets out ARTC's control and management of the network and clause 8, which details ARTC's discretion to issue Instructions and Network Control Directions.

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659 Asciano, 26 June 2009, p. 20.
660 See also OSA clause 24.2.
661 NSWMC, 24 July 2009, p. 53.
662 SCT Logistics, 25 June 2009, p. 2.
663 NSWMC, 24 July 2009, p. 59.

#### 7.4.10.12 CPRS

NSWMC submits that provisions should be included in the IAHA and OSA for dealing with the proposed Carbon Pollution Reduction Scheme (CPRS), particularly the inclusion of a statement regarding the parties' intention as to who will take responsibility for managing emissions at particular sites and during transport.[664]

The ACCC notes that there is continued uncertainty as to the implementation of a proposed CPRS in Australia. The ACCC notes OSA clause 22.2, which details how ARTC and Operators can alter their agreement in light of any changes to the law, which impact on the agreement. The ACCC is of the preliminary view that this clause is likely to allow sufficient flexibility to deal with any proposed CPRS that may be introduced in the future.

[664] NSWMC, 24 July 2009, p. 59.

### 8.1.2.2 Section 5 of the HVAU

**"5.1 Capacity Analysis**

(a) A Capacity Analysis will be undertaken by ARTC as part of the preparation of the Indicative Access Proposal. The Capacity Analysis will identify whether, indicatively, there is sufficient Available Capacity to meet the Applicant's request for Access Rights and, if not, indicatively, the extent to which Additional Capacity is required.

(b) Where ARTC believes that there are major impediments to the provision of Additional Capacity to meet an Applicant's request, and that the Additional Capacity that might be necessary would have a significant bearing on the economics of the proposed operation, the Capacity Analysis may be done in more detail which may require more time for the preparation of the Indicative Access Proposal (**section 3.10**).[665] Where a Capacity Analysis is to be done in more detail pursuant to this section, ARTC may charge a fee that is based on reasonable cost and agreed with the Applicant.

(c) The finalisation of the Capacity Analysis will enable the finalisation of the resultant Capacity Entitlement, Train Paths, Charges and terms and conditions of the resultant Access Agreement.

(d) As part of undertaking its Capacity Analysis, ARTC will consult the HVCCC and will take into account the HVCCC's comments on the availability of Coal Chain Capacity.[666]

**5.2 Capacity Reservation**

(a) Where an Applicant seeks to execute an Access Agreement relating to new or additional Access Rights more than 6 months prior to utilising those Access Rights and there is sufficient Available Capacity to accommodate those Access Rights until they are utilised such that ARTC is effectively reserving the Capacity equivalent to the Access Rights sought for the Applicant until those Access Rights are utilised, ARTC will, at its absolute discretion, execute the Access Agreement or an amendment to the Access Agreement covering the Access Right requested, subject to the Applicant agreeing to pay any Reservation Fee that may be sought by ARTC in relation to the period between execution of the Access Agreement and utilisation of the Access Rights.

(b) In determining the Reservation Fee, ARTC will have regard to the opportunity cost foregone in relation to the reserved Access Rights (which would normally consider the extent of potential revenue lost by ARTC through average utilisation of the Access Rights not available to another user), the period of the reservation, and other demand for the Access Rights. The Reservation fee will be no greater than 75% of the Indicative Access Charge applicable to the Pricing Zone where the Access Rights are sought, applied to the use of the reserved Access Rights had those Access Rights been utilised by the most commonly utilised Indicative Service for the period of reservation. The

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665 HVAU section 3.10 broadly describes the types of provisions (price and non-price) that will be included in an Indicative Access Proposal (amongst other provisions).

666 HVAU section 5.1 links to sections 3.6 and 3.10. These provisions are discussed further in the Negotiating for Access chapter.

(a) The terms of the Access Agreement will provide that ARTC may reduce the Capacity Entitlement of an Access Holder where an Access Holder has underutilised the Capacity Entitlement granted to it under that Access Agreement. Any decision by ARTC in this regard is subject to the dispute resolution provision in the Access Agreement.

(b) An Access Holder may also reduce its Capacity Entitlement in accordance with the terms of the Access Agreement.

(c) A Capacity Entitlement may be assigned or traded by an Access Holder to a third party in accordance with the assignment or trading provisions of that Access Agreement.

…

**9.1 Definitions**

**Access** means access to use the Network, or any part thereof for the purpose of utilising Access Rights.

**Access Agreements** means an agreement between an Access Holder and the ARTC for Access Rights.

**Access Holder** means an Applicant who has been granted Access Rights to the Network.

**Access Right(s)** means Coal Access Rights and Non-Coal Access Rights.

**Additional Capacity** means, in relation to the Network, the capability of the Network to carry additional task by an enhancement or improvement of the infrastructure associated with the Network.

**Applicant** means the person seeking Access Rights under **section 3**, and to become an Access Holder and, to avoid doubt, does not include an Operator seeking to enter into an Operator Sub-Agreement.

**Available Capacity** means Capacity that is not Committed Capacity (but does not include Committed Capacity in instances where it will cease being Committed Capacity prior to the time in respect of which Capacity is being assessed).

**Capacity** means the capability of the Network for Services including Additional Capacity, after taking into account:

(a) possessions of the Network reasonably required by ARTC for maintenance, repair or enhancements; and

(b) the operation of work Trains;

(c) requirement for surge capacity reasonably required to deliver reliable operations where demand varies, in an efficient manner; and

(d) forecast members' losses.

**Capacity Analysis** means the assessment by ARTC as to the Available Capacity of the Network and whether or not there is sufficient Available Capacity to accept the application for Access Rights and, if

If there is a delay in the completion of a project creating Additional Capacity for which the Access Holder has contracted for under this agreement and some, but not all, of that Additional Capacity becomes available, ARTC must allocate that portion of the Additional Capacity which is available in accordance with the Access Undertaking.

…

**11 Permanent variation of Train Paths**

**11.1 Permanent variation to Train Paths**

(a) This **clause 11.1** sets out the procedure to be followed by the parties if it is intended that a Train Path (including the number of Path Usages for that Train Path) is to be permanently varied.

(b) A Train Path may be varied for the remainder of the Term (or for such other duration as may be agreed) if:

(i) one party to this agreement ("**Requesting Party**") sends a notice to the other party ("**Notified Party**") stating:

(A) that the Requesting Party wishes to vary the rights of the Access Holder to a Train Path;

(B) the reason or reasons for the proposal by the Requesting Party; and

(ii) subject to the qualifications set out in **clauses 11.1(b)(iii), 11.1(e), 11.2** to **11.5, 16.3** and **16.4,** the Notified Party consents to the Requesting Party's proposed variation, such consent to be withheld only upon reasonable grounds.

(iii) For the purpose of **clause 11.1(b)(ii)** the Access Holder cannot withhold consent in the case of variations required:

(A) by reason of ARTC's obligations relating to safety of the Network;

(B) for the purpose of Passenger Priority; and

(C) for the purpose of maximising the use and the reliability of the Network.

(c) Subject to clauses **11.2** to **11.5**, **16.3** and **16.4**, the Requesting Party will give not less than 30 days notice of a variation request under clause **11.1(b)(i)**.

(d) The Notified Party's response as to whether it consents or not under **clause 11.1(b)(ii)** to the Requesting Party's notice given under **clause 11.1(b)(i)** will be given to the Requesting Party within 28 days of such notice being received by the Notified Party or within such shorter time if reasonably practicable. If the Notified Party's response is to refuse consent, the Notified Party will within such time also provide full reasons for refusal in writing to the Requesting Party.

(e) Unless **clause 11.1(b)(iii)** applies or unless otherwise agreed by ARTC (in its absolute discretion), a variation agreed under this

**clause 11.1** will not relieve the Access Holder of its obligations to pay the TOP Charges.

…

**11.4 Removal of Path Usage for Under-utilisation**

(a) Subject to **clause 11.4(b)**, if, following the end of a Month, for a Train Path the

$$\text{Actual Path Usages}_{M,\,M\text{-}1,\,M\text{-}2} \;/\; \text{Monthly Base Path Usages}_{M,\,M\text{-}1,\,M\text{-}2} < 90\%$$

then, ARTC has the right to elect, by notice in writing to the Access Holder (of not less than 30 days), to delete Path Usages from the relevant Train Path Schedule in accordance with **clause 11.4(b)**.

Where:

Actual Path Usages $_{M\,,M\text{-}1,M\text{-}2}$ is, the aggregate number of Path Usages for that Train Path on which the Operator operated a Service for the Access Holder in that Month and the immediately preceding two Months as determined under **clause 11.4(d)**;

Monthly Base Path Usages $_{M,\,M\text{-}1,M\text{-}2}$ is the aggregate Monthly Base Path Usages for that Train Path in that Month and the immediately preceding two Months;

(b) ARTC will not exercise its rights under **clause 11.4(a)** if, for that Month or in any of the two immediately preceding Months for any Pricing Zone spanned by the relevant Train Path, the result of the system-wide monthly true-up test carried out in accordance with **schedule 2** is that the System Availability Shortfall for that Pricing Zone is greater than zero.

(c) If ARTC elects to delete Path Usages under **clause 11.4(a)**, then it may delete a number of Path Usages from a Train Path up to, but not exceeding Monthly Base Path Usages $_{M,\,M\text{-}1,M\text{-}2}$ - Actual Path Usages $_{M,\,M\text{-}1,\,M\text{-}2}$.

If no Path Usages remain in a Train Path Schedule, then the schedule terminates.

(d) Other than if the parties agree to substitute an alternative Path Usage, a Path Usage will not be an Actual Path Usage if the relevant Operator has failed:

(i) to present a Train at the scheduled entry point onto the Network; or

(ii) the relevant Train does not, in fact, load and transport a quantity of coal which is substantially consistent with the capacity of the Train.

(e) If ARTC elects to delete any Path Usage under **clause 11.4(b)**, then the Access Holder's obligations to pay the TOP Charges from the date of deletion will be reduced to reflect the removal of the Path Usage.

(f) To avoid doubt, if the Access Holder has been unable to utilise Train Paths as a result of Force Majeure, then ARTC must take that into account in applying this **clause 11.4**.

**11.5 Cost of variation**

Any losses, additional costs (excluding Charges) or other damage suffered by a party in complying with a variation under **clauses 11**, **16** and **21.1** will be borne between the parties to this agreement in such proportion as the parties agree (based on negotiations carried on in good faith), or in the absence of such agreement, by the party which incurs such losses, additional costs or other damages.

**11.6 Effect of Permanent Variations to Train Paths on the Train Path Schedule**

Permanent variations pursuant to clauses **11.1** to **11.5**, or **16.3** or **21.1** of the Path Usages are deemed to be an amendment to the relevant Train Path Schedule.

…

**16 Assignment, trading and novation**

**16.1 By ARTC**

(a) Other than to a successor of ARTC or to any body established by any person in relation to the management of the Network or any relevant or material part of it, ARTC may not assign or novate this agreement, its interest in the subject matter of this agreement or any right under this agreement without the prior written consent of the Access Holder, which will not be unreasonably withheld.

(b) Nothing in **clause 16.1(a)** prevents ARTC from entering into any subcontracting or agency agreements or arrangements in relation to any of its functions.

**16.2 By the Access Holder**

Except as set out in **clause 16.3** and **clause 16.4**, the Access Holder may not license, assign, novate, sell, trade, sub-licence or otherwise dispose ("**transfer**") of this agreement, its interest in the subject matter of this agreement or any right under this agreement without the prior written consent of ARTC.

**16.3 Permanent assignment and trades**

(a) ARTC must not unreasonably withhold its consent to the permanent assignment or novation of this entire agreement or some or all of the Path Usages for a Train Path (for a period of 12 months or more) under this agreement, if,

(i) the incoming party enters into an access holder agreement, or varies its existing access holder agreement, with ARTC on such terms not inconsistent with this agreement as ARTC may reasonably determine;

(ii) the incoming party wishes to vary the Train Paths following the assignment or novation and those variations

involve lower take or pay charges than the TOP Charges under this agreement, then:

(A) ARTC will calculate the difference between the net present value of TOP Charges it would have received from the Access Holder over the remaining Initial Period (if any) plus any Schedule Notice Period for the relevant Train Path but for the assignment or novation and the net present value of the expected take or pay charges it will receive following assignment and novation where the TOP Charges will be assumed over the relevant period to be equal to those applying, and the discount rate to be used will be the rate of return approved by the ACCC, at the time of the assignment or novation; and

(B) either the Access Holder or the incoming party enter into arrangements satisfactory to ARTC for the payment of that amount,

on or before such assignment or novation:

(iii) the Access Holder or incoming party agrees to assume any liability for taxes incurred or related to the assignment or novation; and

(iv) the incoming party does not have an Acceptable Credit Rating and it provides Credit Support satisfactory to ARTC.

(b) Where a path usage has been permanently assigned by the Access Holder to another access holder under this **clause 16.3**, then the Access Holder agrees that the applicable **Train Path Schedule** will be amended to reflect that assignment.

**16.4 Temporary trade of Path Usages**

(a) An access holder ("**Former Access Holder**") may temporarily assign, sell, trade, or sub-license ("**Trade**") a Path Usage (for a period of less than 12 months) to a person who has an access holder agreement with ARTC ("**New Access Holder**") without ARTC's consent subject to the following conditions:

(i) despite the Trade, the Former Access Holder remains liable to ARTC for the TOP Charges for the traded Path Usage;

(ii) the New Access Holder will be liable for Non-TOP Charges relating to the traded Path Usage;

(iii) the Former Access Holder and New Access Holder must give ARTC at least two weeks notice (or such lesser period as notified by ARTC from time to time) of the Trade;

(iv) the New Access Holder's load point for the traded Path Usage must be:

(A) closer to the Port of Newcastle; and

(B) within the same or a closer Pricing Zone,

than the Former Access Holder's entry point;

(v) the Former Access Holder and New Access Holder each warrant that the Trade will not adversely impact Coal Chain Capacity and agree that ARTC is entitled to rely, and is under no obligation to review the accuracy of, this warranty;

(vi) the New Access Holder must only use an Operator for a traded Path Usage who has an unconditional Operator Sub-Agreement with ARTC and endorsed by the New Access Holder; and

(vii) the New Access Holder's nominated Operator must comply with the Services Assumptions relating to the Train Path.

(b) If the Access Holder is a Former Access Holder or a New Access Holder for a Trade, it agrees to be bound by the obligations listed above and in **clause 16.5** which apply to a Former Access Holder and to a New Access Holder respectively in relation to that Trade.

(c) Subject to being given at least two weeks' notice (or such lesser period as notified by ARTC from time to time), ARTC will not unreasonably refuse its consent to a request by the Access Holder to Trade a Path Usage which does not meet the conditions in **clause 16.4(a)**.

(d) The entering into a Trade by the Access Holder will not abrogate, impair, release or extinguish any debt, obligation or liability of the Access Holder to ARTC under this agreement which may have accrued before entering into such Trade or which may accrue thereafter.

(e) If ARTC reasonably considers that either the Former Access Holder or New Access Holder has breached any of the conditions in **clause 16.4(a)**, then it may immediately terminate the Trade and the rights and obligations for the relevant Path Usages will from termination revert to the Former Access Holder.

(f) ARTC will not be considered to have agreed that a Trade does not breach **clause 16.4(a)** because it does not object to a Trade at the time of being notified or any delay in terminating a Trade.

**16.5 Treatment of traded Path Usages**

For the purposes of this agreement where a path usage has been the subject of a Trade under **clause 16.4** of this Agreement, the Former Access Holder will be deemed to have utilised the path usage traded to the New Access Holder in the Month in which the traded path usage was utilised by the New Access Holder; and

(a) where the Trade resulted in the New Access Holder receiving more path usages than the Former Access Holder originally made available for the Trade ("Original Path Usages"), the path usages deemed to be used by the Former Access Holder under this **clause 16.5** will be reduced by the path usages created

(a) For the avoidance of doubt, and without limiting **clause 8.1(a)**, the Operator's right to utilise a Train Path or a Path Usage may be temporarily varied by the giving of Instructions:

(i) for the purpose of preventing potential, or in response to actual:

(A) breach of the Safeworking Rules or of **clause 12** by the Operator or of similar safety requirements by other operators on the Network;

(B) material damage to the Network, ARTC's property or any Associated Facilities;

(C) injury to any person or damage to any property;

(D) delay to the progress of Trains on the Network (but only insofar as any trains operated by a third party have priority over the Operator's Trains having regard to the Network Management Principles);

(E) terrorism and security matters; or

(ii) for the purpose of preventing, or in response to, any actual or threatened breach by the Operator of any of its material obligations under this agreement.

(b) The Operator must comply with the Instructions and must only utilise a Train Path or a Path Usage according to the Instructions.

(c) The Instructions referred to in **clause 9.1(a)** may comprise, but need not be confined to, Instructions in one or more of the following terms:

(i) to cease use of a Train Path or a Path Usage by the Service and for the Service to proceed over such path on the Network as ARTC nominates;

(ii) to continue use by the Service of the Network subject to such variation of the applicable Train Path, Path Usage, Service or the composition or quality of Trains as ARTC nominates;

(iii) to cause the Service to proceed to a point on the Network and stand there until ARTC issues a further Instruction in relation to the Service; or

(iv) if the Service operates outside of its Service Assumptions or the Daily Train Plan, to delay or redirect the Service to allow access to the Network by another operator of a Train whose service would, but for the delay or redirection of the Operator's Service, be delayed or further delayed.

### 9.2 Permanent variations to Train Paths

ARTC can:

#### 8.3.7.3 Capacity Shortfall in creation of Additional Capacity should apply to Access Holders based on a set of priority rules

C&A submits that 'in order to achieve alignment with the port, the process for 'compression' of additional track capacity should be determined by ARTC using a similar set of priority rules to that used in PWCS' Nomination and Allocation Principles.'[763]

C&A submits that if 'ARTC does not adopt PWCS' priority rules, the differences in the rules could result in producers receiving separate, non-aligned contracts for terminal and track capacity.'[764]

#### 8.3.7.4 The resumption, relinquishment and transfer provisions are not appropriate, particularly when considering maintenance planning

C&A submits that 'the capacity resumption, relinquishment and transfer provisions should be made more flexible so as to accommodate situations where a producer gives twelve months' notice to ARTC of capital works or new projects that it proposes to undertake in order to upgrade its infrastructure in order to improve its standards or expand its own capacity. These works will result in a more efficient and safer operation, as well as an increase in the amount of coal exported by the producer.'[765]

An example of the type of flexibility that C&A submits ARTC should offer in these circumstances 'would be exempting the producer from the capacity resumption, relinquishment and transfer provisions when it has provided substantial notice in advance of undertaking such work.'[766]

C&A submits that '[w]ith appropriate notification by producers and appropriate planning by ARTC, this level of flexibility can be achieved without ARTC needing to build more track capacity and recover the costs of doing so from producers.'[767]

#### 8.3.7.5 The provisions relating to capacity resumption through under-utilisation are too strict

C&A submits that '[b]ased on historical mine performance data ... the three month period used for the removal of path usages for under-utilisation provisions in clause 11.4(a) of the AHA is too short and so is unreasonable.'768

C&A offers by way of contrast the example of Queensland Rail's undertaking in Queensland which 'provides for a 12 month period in which to test utilisation' and that originally, the undertaking 'contained a three month period, but the period was extended to 12 months, as this was found to be unworkable given how often the utilisation rates were not being met.'769

C&A submits that 'a 12 month period should also be adopted in the Draft Undertaking in order to take into account:'

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763 Coal and Allied, 3 July 2009, p. 10.
764 Coal and Allied, 3 July 2009, p. 10.
765 Coal and Allied, 3 July 2009, p. 11.
766 Coal and Allied, 3 July 2009, p. 11.
767 Coal and Allied, 3 July 2009, p. 11.
768 Coal and Allied, 3 July 2009, p. 11.
769 Coal and Allied, 3 July 2009, p. 11.