



Australian
Competition &
Consumer
Commission

Australian Competition and Consumer Commission

Consultation Paper

**in relation to the Australian Rail Track
Corporation's proposed Hunter Valley Rail
Network Access Undertaking**

16 September 2010



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1 Introduction

Australian Rail Track Corporation Limited (**ARTC**) has submitted a proposed access undertaking to the Australian Competition and Consumer Commission (**ACCC**) for assessment under Part IIIA of the *Trade Practices Act 1974* (Cth) (**the Act**). The proposed undertaking is in relation to the provision of access to the Hunter Valley Rail Network operated by ARTC in New South Wales (**the proposed 2010 HVAU**).

ARTC previously submitted to the ACCC a proposed access undertaking in relation to the Hunter Valley Rail Network on 22 April 2009 (**the April 2009 HVAU**). On 5 March 2010, the ACCC issued a Draft Decision in which it outlined its preliminary view that it would reject that proposed undertaking as being unlikely to be appropriate under Part IIIA of the Act. In response to the ACCC's Draft Decision, ARTC withdrew the April 2009 HVAU.¹

The ACCC is conducting a public consultation as part of its assessment of the proposed 2010 HVAU and seeks submissions from interested parties by 11 October 2010.

1.1 ARTC's proposed 2010 HVAU

ARTC provided the proposed 2010 HVAU to the ACCC on 7 September 2010. The proposed 2010 HVAU and associated documents, including the indicative access holder agreement and submissions from ARTC, are available on the ACCC's website at:

<http://www.accc.gov.au/content/index.phtml/itemId/945831>

Alternatively, go to the ACCC's homepage at www.accc.gov.au and follow the links to 'For regulated industries' and 'Rail' and 'ARTC Hunter Valley Access Undertaking 2010.'

1.2 ACCC assessment

The test the ACCC applies in deciding whether to accept an access undertaking is set out in section 44ZZA(3) of the Act. Essentially, the ACCC may accept the undertaking if it thinks it appropriate to do so, having regard to various matters. The full test is set out in section 3 of this Paper.

The ACCC has not yet formed a view on the appropriateness or otherwise of the proposed 2010 HVAU, and statements in this Consultation Paper should not be taken as indicative of the ACCC's view of the appropriateness of HVAU under the Act, nor of its likelihood of acceptance.

¹ Materials relating to the April 2009 HVAU are available on the ACCC's website at <http://www.accc.gov.au/content/index.phtml/itemId/870137>.

1.3 Indicative timeline for assessment

The ACCC received the undertaking application from ARTC on 7 September 2010. Under section 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

On the basis of information currently available, the end of the expected period, taking into account the 26 day 'clock-stopper' for the consultation period, is 31 March 2011.

However, the ACCC will endeavour to issue a statement in relation to the proposed 2010 HVAU prior to the end of 2010 in the interests of timely resolution of this matter.

1.4 Consultation

The ACCC, by publication of this Consultation Paper, is inviting submissions on the proposed 2010 HVAU.

Section 2 of this Paper outlines a range of matters to which the ACCC wishes to draw your attention. Matters are outlined in that section because they represent either areas of the undertaking that have been significantly revised since the April 2009 HVAU; new provisions not present in the April 2009 HVAU; or issues on which the ACCC received substantial submissions in relation to the Draft Decision and the April 2009 HVAU.

The matters in section 2 do not represent a comprehensive summary of all aspects of the proposed 2010 HVAU, nor do you need to comment on each of those matters. You are welcome to provide submissions on any relevant aspect of the proposed 2010 HVAU, though the ACCC recognises that substantial submissions were made in relation to the April 2009 HVAU, and in relation to the ACCC's March 2010 Draft Decision, and that the proposed 2010 HVAU incorporates a number of revisions to the earlier application, in some cases to take into account submissions made by interested parties and the views of the ACCC. The ACCC therefore welcomes submissions on what you consider to be outstanding issues with the proposed 2010 HVAU.

In making your submissions please include detailed reasons to support any views proffered. If you consider that an aspect of the proposed 2010 HVAU is *not* appropriate, please provide suggestions of changes that could be made to address the relevant concerns, including to the level of drafting amendments where possible.

² See section 3 of this Paper for further information on these provisions of the Act.

1.5 Making a submission

Submissions should be addressed to:

Mr Anthony Wing
General Manager
Transport and General Prices Oversight
ACCC
GPO Box 520
MELBOURNE VIC 3001

Email: transport@accc.gov.au

1.5.1 Due date for submissions

Submissions **must** be received by **11 October 2010**. It is in your interest that the submission be lodged by this date, as section 44ZZBD of the Act allows the ACCC to disregard any submission made after this date.

1.5.2 Confidentiality of information provided to the ACCC

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.

1.5.3 Prior submissions

In making its decision whether it is appropriate to accept the proposed 2010 HVAU, the ACCC also intends to consider, where relevant, submissions it received in respect of the April 2009 HVAU.

If you have previously made submissions to the ACCC in relation to the 2009 HVAU, and consider that issues raised in those submissions are still outstanding, or if you wish to draw the ACCC's attention to specific comments made in prior submissions, it would greatly assist the ACCC if you could clearly identify such matters in your response to this Consultation Paper.

1.6 Further information

The proposed 2010 HVAU and other relevant material, including supporting submissions from ARTC, are available on the ACCC's website at the following link:

<http://www.accc.gov.au/content/index.phtml/itemId/945831>

Alternatively, go to the ACCC's homepage at www.accc.gov.au and follow the links to 'For regulated industries' and 'Rail' and 'ARTC Hunter Valley Access Undertaking 2010.'

Public submissions made during the current process will also be posted at this location.

Background information on the current process, including an overview of recent amendments to Part IIIA of the Act, are set out in section 3.

If you have any queries about any matters raised in this document, please contact:

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2 Matters for comment

The ACCC has outlined in this section various matters upon which it seeks comments from stakeholders. As far as possible, matters are outlined here in the order in which they appear in the proposed 2010 HVAU and associated agreements.

2.1 Extensions and connections

Section 2.1(c) of the proposed 2010 HVAU provides that the undertaking does not apply to Extensions. ARTC submits, however, that the Network Connections provision in section 6.1 allows for the connection of track not owned by ARTC to the Network, and ensures that ARTC cannot extract monopoly rents or frustrate access where a party seeks to build an extension and connect it to ARTC's network.³ ARTC has proposed changes to section 6.1 to clarify its operation.

The ACCC seeks views on whether the proposed changes to section 6.1 are appropriate, particularly in light of ARTC's position that Extensions be excluded from the proposed 2010 HVAU.

2.2 Alignment measures

ARTC has incorporated into section 3.14 of the proposed 2010 HVAU measures to address comments made by the ACCC in the March 2010 Draft Decision. These measures include recognition that certain provisions of the IAHA should be 'Tier 1 (mandatory) provisions,' that is, provisions which are to be consistent across all relevant access agreements to ensure workable alignment of the coal supply chain. The list of Tier 1 (mandatory) provisions is set out in Schedule A:1 to the proposed 2010 HVAU.

The ACCC seeks views on whether ARTC's approach is appropriate, particularly whether it is likely to promote alignment across the supply chain, and whether the provisions identified as mandatory are appropriate, including whether certain provisions should be included/excluded.

2.3 Rate of return (WACC)

In the March 2010 Draft Decision, the ACCC outlined a preliminary view that ARTC's proposed overall rate of return was not appropriate. The ACCC considered that the key features of the 2009 HVAU (including the use of the loss capitalisation model, the revenue cap pricing regime, the use of long term take or pay contracts, the use of shorter asset lives to determine regulatory depreciation) had the effect of reducing both the commercial and regulatory risk faced by ARTC and therefore the rate of return proposed was too high.⁴

In addition, it was the ACCC's preliminary view that certain input parameters into the weighted average cost of capital (WACC) calculation were not appropriate. In particular, the ACCC considered that ARTC's proposed cost of debt methodology,

³ ARTC, *Explanatory Guide to the proposed 2010 HVAU* (September 2010), para 4.18-4.18.2.

⁴ ACCC, *ARTC Hunter Valley Access Undertaking – Draft Decision* (5 March 2010), p. 478.

asset beta, market risk premium, the gearing ratio and value of gamma were not appropriate.⁵

Section 4.7 of the proposed 2010 HVAU outlines the process by which the rate of return will be determined and approved by the ACCC. Appendix 3 to ARTC's 2010 HVAU Explanatory Guide outlines ARTC's revised rate of return proposal and analysis of the WACC parameters.

ARTC has made amendments to section 4.7 to allow ARTC to review and propose a new rate of return to the ACCC if the ACCC's decision and methodology on the debt risk premium or gamma is inconsistent with the Australian Competition Tribunal's decision on certain matters currently before it.

The ACCC seeks views on:

- Whether ARTC's proposed Rate of Return is appropriate and commensurate with the regulatory and commercial risks involved for ARTC in the Hunter Valley.
- Whether indicative contracts with a 10 year rolling term are likely to affect ARTC's regulatory and commercial risks.
- Whether ARTC/Synergies' proposed cost of debt methodology is an appropriate proxy for the cost of debt. If not, what methodology is appropriate.
- Whether ARTC's approach regarding the value of the debt risk premium and gamma, as set out in section 4.7(c), is appropriate.

2.4 Limit to price increases

In the March 2010 Draft Decision, the ACCC recommended that ARTC consider constraining price increases to limit risks beyond the control of Access Holders bound by long term take or pay (TOP) contracts.⁶ On this point ARTC has incorporated changes into the proposed 2010 HVAU, including:

- Under section 4.2(d), capping the annual increase in both the Interim Indicative Access Charges or the Indicative Access Charges at a maximum of 25% when capitalised losses result in the RAB for a Pricing Zone being in excess of its RAB Floor Limit; and
- Under section 4.19, providing annual forecast operating expenditure information and coal volumes.

The ACCC seeks views on:

- Whether ARTC's proposed cap on price increases is appropriate, including the circumstances where it will apply and where access holders are not under Indicative Access Holder Agreements.

⁵ ACCC, *ARTC Hunter Valley Access Undertaking – Draft Decision* (5 March 2010), pp. 525 – 580.

⁶ ACCC, *ARTC Hunter Valley Access Undertaking – Draft Decision* (5 March 2010), pp. 479; 491; 600-604; 627-629; 645-646; 649-650; 667-670.

- Whether the information provision under section 4.19 appropriately addresses any information asymmetry between ARTC and individual access holders, including whether the provision of forecast information and coal volumes allows Access Holders to appropriately assess their liability under the TOP contracts.

2.5 Determination of the efficient train configuration, indicative service description and indicative access charges

Section 4.16 of the 2010 HVAU outlines the consultation process to be followed by ARTC in determining the efficient train configuration as well as specifying timeframes for the determination of efficient train configuration. The section requires ARTC to consult with industry in determining the proposed characteristics of the Indicative Service, provides for the ACCC's approval of the Indicative Service and outlines the characteristics that will deliver the efficient train configuration.

The ACCC seeks views on:

- Whether the process for determination of the efficient train configuration is appropriate.
- Whether the processes for determining Indicative Access Charges and the Indicative Service description are appropriate.
- How the Indicative Service and Indicative Access Charges, once determined, should be implemented, including in relation to existing Access Holders.

2.6 Aspects of the Financial Model

2.6.1 Out-turn expenditure

In the Draft Decision, the ACCC's preliminary view was that it was unlikely to be appropriate for efficiency of operational expenditure included in the RAB roll-forward equation in section 4.3 to be determined by considering an undefined 'industry efficient basis' criterion for the purposes of Annual Compliance under section 4.9, and that utilising 'out-turn' expenditure would require the inclusion of appropriate assessment and compliance mechanisms.⁷

The ACCC seeks views on:

- Whether ARTC's proposed definitions of efficient expenditure contained in section 4.4(b) and in the section 9 definitions of both Direct Cost and Prudent, are appropriate.
- Whether appropriate mechanisms have been included to assess ARTC's expenditure.

⁷ ACCC, *ARTC Hunter Valley Access Undertaking – Draft Decision* (5 March 2010), p 597.

2.6.2 Out-turn revenue – ancillary services

In the March 2010 Draft Decision the ACCC noted that the definition of Out-turn Revenue in section 4.3 of the HVAU did not ensure that the charges ARTC could levy for ancillary services were captured by the revenue model or that ARTC was prevented from charging prices above those that would be achieved in a competitive market for these services.⁸ In section 4.3 of the proposed 2010 HVAU, ARTC has proposed changes to the definition of Out-turn Revenue.

The ACCC seeks views on whether the revised Out-turn Revenue definition captures appropriate revenues earned by ARTC.

2.6.3 Timing of cash flows

In the Draft Decision, the ACCC considered that the timings of cash flows should be consistent across ARTC's financial modelling. The ACCC identified a number of issues in relation to the treatment of interest during construction, including when it is payable or capitalised, and for what period it may be incurred.

In the proposed 2010 HVAU, ARTC has proposed some changes to its financial modelling, including the treatment of interest during construction, and the treatment of depreciation of capital expenditure in the year that it is commissioned.

The ACCC seeks views on:

- Whether ARTC's financial model in section 4 utilises appropriate timings of cash flows, including whether it is appropriate for ARTC to earn depreciation on capital expenditure for half the year in which it is commissioned in the RAB roll forward equation.
- Whether ARTC's treatment of interest during construction in sections 4.3(a), 4.3(b), and 4.4(a)(vi) is appropriate.
- Whether it is appropriate for asset disposals in the RAB roll forward equation to be accounted for at written down value.

2.7 Capacity management

ARTC has proposed several revisions in section 5 of the proposed 2010 HVAU, including:

- introducing recognition of System Assumptions in section 5.1;
- expanding upon the consultation it will undertake with the HVCCC in relation to Capacity Analysis carried out under section 5.2;
- revising section 5.3, relating to Capacity Reservation, such that it applies only to reservation on Non-Coal Access Rights, and making additional changes;

⁸ ACCC, *ARTC Hunter Valley Access Undertaking – Draft Decision* (5 March 2010), pp. 514-515.

- revising the provisions relating to Capacity Shortfalls (now sections 5.4 – 5.7), including reducing the ‘short-term shortfall’ period from 7 days or less to 5 days or less; and
- introducing section 5.9 to provide for the review of the ‘policy and processes for identifying and allocating losses of Capacity caused by Access Holders and their Operators.’ (Interested parties should cross reference this provision with clauses 11.5 and 11.6 of the IAHA, noted further below).

The ACCC seeks views on whether ARTC’s proposed revisions to section 5 are appropriate.

2.8 Additional capacity

Section 6 of the proposed 2010 HVAU outlines processes by which investment in additional infrastructure to increase the capacity of the Hunter Valley rail network may occur.

The ACCC seeks views on:

- Whether the proposed capital expenditure framework in section 6 is appropriate, both of itself and when having regard to its interaction with other parts of the undertaking and associated agreements.
- Whether the RCG Process is appropriate, including:
 - Whether all appropriate elements of the RCG process, including the voting process and composition of the RCG, are specified in sufficient detail in the undertaking;
 - Whether existing and future access holders are appropriately represented in the RCG process, including the manner and controls for accounting for anticipated coal volumes;
 - Whether the RCG process will ensure that RCG-approved CAPEX is prudent;
 - Whether the ACCC will need to have a role in determining whether CAPEX is prudent; and
 - Whether appropriate mechanisms have been included to allow objective determination of whether the prescribed RCG process has been followed.
- Whether ARTC’s equitable reconciliation approach to access seeker funded capital contributions is appropriate, including:
 - Whether equitable reconciliation is appropriate;
 - Whether appropriate principles have been included for determining what reconciliation a contributing access holder will receive for capacity funded under sections 6.2(b) to (h) of the 2010 HVAU;

- Whether appropriate principles have been included for determining the reconciliation a subsequent access holder will pay for access to another access holder's funded capacity; and
- Whether appropriate mechanisms have been included in ARTC's revenue model to allow equitable reconciliation to occur.

2.9 Performance measurement and incentives

Schedule D to the proposed 2010 HVAU sets out a range of performance indicators relating to the management and operation of the Network, and section 8.1 provides that ARTC will report on these indicators. Section 8.2 provides for the negotiation of performance indicators into individual Access Agreements.

Section 8.3 provides that ARTC will comply with a 'performance incentive scheme' and that this scheme will be set out in Schedule D. ARTC has not provided this scheme as part of the proposed 2010 HVAU application, and indicates in section 8.3 that it will propose one or more performance incentive mechanisms prior to acceptance of the undertaking by the ACCC.

The ACCC seeks views on:

- Whether the provisions relating to performance indicators are appropriate, including whether the matters specified as indicators in Schedule D are appropriate, and whether the provision regarding the negotiation of performance indicators into individual Access Agreements is appropriate.
- ARTC's proposal to provide performance incentive mechanisms at a later date, and whether the proposed 2010 HVAU is appropriate notwithstanding the absence of any such performance incentive mechanisms.
- If parties consider it appropriate for the proposed 2010 HVAU to include a performance incentive scheme for ARTC, they are requested to outline what that scheme should or could comprise.

2.10 System Assumptions

System Assumptions are defined in section 9 of the proposed 2010 HVAU, and include coal chain-wide assumptions developed by the HVCCC and agreed to by ARTC, and additional track-related assumptions reasonably determined by ARTC.

System Assumptions are referred to in various provisions of the proposed 2010 HVAU and IAHA, including:

- section 4.13 of the HVAU, relating to the determination of Indicative Access Charges;
- section 4.16, relating to the determination of the Indicative Service;
- section 5.1, relating to Capacity Analysis;

- section 8.2, relating to the negotiation of performance indicators;
- clause 3.2 of the IAHA, relating to the determination of Base Path Usages, the Monthly Tolerance Cap and Network Path Capability;
- Schedule 2 to the IAHA, relating to the determination of Network Path Capability.

The ACCC seeks views on whether ARTC's approach to the incorporation of System Assumptions in the proposed 2010 HVAU (including the associated agreements) is appropriate, including the use of additional track-related assumptions.

2.11 HVCCC consultation

Schedule F to the proposed 2010 HVAU includes principles to guide consultation between ARTC and the HVCCC in circumstances where a more specific obligation has not been specified. The Schedule states that, where ARTC is required to consult with the HVCCC under the HVAU (or the IAHA), it will use reasonable endeavours to follow the steps set out in the Schedule, to the extent practical and in light of the specific circumstances.

The ACCC seeks views on whether the principles set out in Schedule F are appropriate, in particular whether they are likely to ensure effective consultation between ARTC and the HVCCC in relation to the operation of the coal chain.

2.12 Access rights under the IAHA

Various revisions have been made to clauses 3.1 to 3.5 of the IAHA attached to the proposed 2010 HVAU, and to the Train Path Schedule attached to the IAHA. These clauses relate to the grant of access rights to an Access Holder (including the determination of Base Path Usages and the Monthly Tolerance Cap), while the Train Path Schedule is intended to specify the particular access rights granted to an Access Holder under an executed contract.

The ACCC seeks views on whether these clauses, and the Train Path Schedule, are appropriate.

2.13 TOP rebate, true-up test and liability regime

Clause 5.4 of the Indicative Access Holder Agreement (IAHA) attached to the proposed 2010 HVAU provides for the payment by ARTC of a rebate of take-or-pay charges in certain circumstances, and schedule 2 of the IAHA sets out a 'true up test' that ARTC will undertake for the purposes of determining whether or not a rebate is ultimately payable.

Provisions relating to liability of ARTC and the Access Holder are set out in clause 13 of the IAHA, and include liability releases, an exclusion of consequential loss, and a monetary cap on liability not otherwise excluded. Clause 5.4(h) of the IAHA provides that the sole remedy available to an Access Holder for the failure by ARTC to make available a Train Path or Path Usage is the rebate calculated under clause 5.4.

The ACCC seeks views on:

- Whether the TUT methodology is adequately specified, including whether:
 - the definitions of inputs to the TUT are appropriate, including Network Path Capability, Functional Coal Path, and Total Path Usages Required;
 - the processes for determining Network Path Capability and Monthly Tolerance Cap are appropriate;
 - the locations used for measurement of Functional Coal Paths in each Pricing Zone are appropriate;
 - additional capacity is appropriately accounted for; and
 - treatment of capacity not made available due to non-Coal trains is appropriate.
- Whether the TUT provides for rebates to accrue to access holders for all System Availability Shortfalls.
- Whether actual path usages by access holders are appropriate to measure whether ARTC has made paths available under the TUT and Annual Reconciliation.
- Whether the TUT appropriately accounts for Tolerance.
- Whether the TOP rebates accrued by individual access holders are appropriate.
- Whether the TOP rebates paid as a result of the Annual Reconciliation to individual access holders are appropriate.
- Whether there are adequate mechanisms included to objectively verify ARTC's application of the TUT and payment of TOP rebates.
- Whether the TOP rebate scheme provides appropriate incentives for ARTC.
- In light of the overall liability regime, the appropriateness of TOP rebates determined by the TUT and Annual Reconciliation being ARTC's sole liability mechanism for failing to make contracted paths available.

2.14 Accountability for performance measures

Clause 11.5 of the IAHA is a provision regarding the use of 'Non-Compliant Services' on the Network, and relates to circumstances in which an Access Holder consistently uses 'Non-Compliant Services' without ARTC's consent, and circumstances in which an Access Holder may seek ARTC's consent to run 'Non-Compliant Services.' This clause was not included in the IAHA attached to the April 2009 HVAU.

Clause 11.6 of the IAHA provides for ARTC, in certain circumstances, to remove path usages from an Access Holder where that Access Holder has cancelled services. This clause was not included in the IAHA attached to the April 2009 HVAU.

The ACCC seeks views on whether clauses 11.5 and 11.6 are appropriate.

2.15 Assignment and trading

Various changes have been made to clause 16 of the IAHA, which relates to the assignment, trading and novation of the agreement, or of rights granted under the agreement. The ACCC notes in particular clause 16.6, which refers to the use of the CTS Clearing House to identify an access holder willing to participate in a trade.

The ACCC seeks views on whether clause 16 is appropriate, including whether clause 16 should be included as a Tier 1 (mandatory) provision.

2.16 Changes over time

Clause 19.1 of the IAHA relates to the incorporation into an executed access agreement of changes to that may occur over time to the HVAU (after it has been accepted by the ACCC). The clause provides that any change to a Tier 1 (mandatory) provision will be automatically incorporated into the agreement, and that where there is a change to the indicative access agreement that is inconsistent with the executed access agreement, the parties will negotiate in good faith to modify the executed agreement, with recourse to the dispute resolution provisions in the executed agreement if necessary.

The ACCC seeks views on whether clause 19.1 is appropriate, including whether disputes of the kind referred to above should be resolved pursuant to the executed access agreement, or by ACCC arbitration pursuant to the undertaking.

2.17 Transition and implementation

In the March 2010 Draft Decision, the ACCC outlined a preliminary view that there was a lack of clarity and certainty around how the proposed 2009 HVAU was intended practically to operate, and noted concerns regarding the lack of transitional arrangements for the initial implementation of the 2009 HVAU.⁹

Appendix 5 to the Explanatory Guide that ARTC provided in relation to the proposed 2010 HVAU sets out a proposal by ARTC for the transition of the annual compliance assessment function, currently performed by the Independent Pricing and Regulatory Tribunal (IPART) under the New South Wales Rail Access Undertaking, to the ACCC.

The ACCC seeks views on:

- Whether there are appropriate measures for the initial implementation of the proposed 2010 HVAU, including the transition of current users of the Hunter Valley rail network to the regime created by the proposed 2010 HVAU.
- In relation to this point, please consider whether the proposed 2010 HVAU appropriately deals with the situation where access seekers enter contracts for access to the Hunter Valley network prior to the commencement of the proposed 2010 HVAU.

⁹ ACCC, *ARTC Hunter Valley Access Undertaking – Draft Decision* (5 March 2010), pp. 154-157.

- Whether the operation of the proposed 2010 HVAU over time (that is, beyond the initial implementation) is appropriate, in particular how the application for access processes in section 3, the pricing calculations in section 4, and the processes for the provision of additional capacity in section 6, are likely to interact.

2.18 Other matters

2.18.1 Measures for non-coal access

In the March 2010 Draft Decision, the ACCC's preliminary view was that the HVAU should include an Indicative Access Agreement for non-coal users to improve certainty and that non-coal prices should be limited to those being charged for coal access.¹⁰

ARTC has proposed amendments to section 3.14 that state that non-coal users will be offered access to the Network under the terms and conditions of the Indicative Interstate Access Agreement, amended to take into account the particular circumstances of the Hunter Valley Network as reasonably determined by ARTC, and to incorporate those provisions identified as Tier 1 (mandatory) Non-Coal Provisions in Schedule A:2. ARTC has also proposed to limit non-coal prices to the average charge per path levied on coal users, as outlined in the amendments to section 4.11(b).

The ACCC seeks views on:

- Whether the amendments to section 3.14 provide adequate certainty to non-coal users
- Whether ARTC's amendments to section 4.11(b) regarding non-coal prices are appropriate.

2.18.2 Domestic coal

The ACCC seeks views on whether the proposed 2010 HVAU, including the associated agreements, appropriately accommodate the circumstances of access seekers using the Hunter Valley network to transport coal to domestic locations (that is, other than to the Port of Newcastle for export).

2.18.3 Other comments re HVAU, IAHA and/or OSA

Apart from the specific questions posed in this Consultation Paper, the ACCC welcomes any other comments you wish to make relevant to the assessment of the proposed HVAU, including the IAHA and OSA.

The ACCC also reminds interested parties to cross-refer to the definitions of relevant terms in section 9 of the proposed 2010 HVAU, and in clause 1 of the IAHA and OSA.

¹⁰ ACCC, *ARTC Hunter Valley Access Undertaking – Draft Decision* (5 March 2010), pp. 152, 620-621.

3 Appendix: Background information

3.1 Process background

The following timeline sets out the key stages in the ACCC's assessment of the previous April 2009 HVAU. All documents are available on the ACCC website, www.accc.gov.au.

Timeline – April 2009 HVAU

23 April 2009	ARTC access undertaking relating to the Hunter Valley rail network (the April 2009 HVAU) submitted to the ACCC for assessment under Part IIIA of the Act.
29 May 2009 – 26 June 2009	Public consultation on April 2009 HVAU.
13 October 2009	Proposed Interim Indicative Access Charges for inclusion in the April 2009 HVAU submitted to the ACCC.
21 October 2009	Decision-making timeframe for consideration of the April 2009 HVAU extended for a further six months until 22 April 2010.
10 February 2010	An ACCC Position Paper on Matters Other Than Price issued.
5 March 2010	ACCC Draft Decision issued. The preliminary ACCC view expressed is to reject the April 2009 HVAU.
5 – 31 March 2010	Public consultation on Draft Decision.
19 April 2010	April 2009 HVAU withdrawn by ARTC.

Further information on the ACCC's assessment of the April 2009 HVAU is set out in the ACCC's Draft Decision of 5 March 2010.

3.2 Legal test for accepting an access undertaking

In assessing a proposed access undertaking under Part IIIA of the Act, the ACCC must apply the test set out in section 44ZZA(3), which provides that the ACCC may accept the undertaking if it thinks it appropriate to do so, having regard to the following matters:

- the objects of Part IIIA of the TPA, 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 section 44ZZCA of the TPA (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; and
- any other matters that the ACCC thinks are relevant.

In relation the pricing principles, section 44ZZCA of the TPA provides that:

- regulated access prices should:
 - 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.

3.3 Recent changes to Part IIIA

The *Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth) took effect on 14 July 2010 and introduced changes to Part IIIA of the Act, including to the procedures set out in Part IIIA for the assessment of access undertakings.

3.3.1 Timeframes for ACCC decisions and clock-stoppers

Section 44ZZBC(1) of the Act now provides that the ACCC must make a decision on an access undertaking application within the period of 180 days starting at the start of the day the application is received (referred to as ‘the expected period’).

If the ACCC does not publish a decision on an access undertaking under section 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 section 44ZZBE and its reasons for that decision: see section 44ZZBC(6).

The changes to the Act also introduce ‘clock-stoppers’ that mean certain time periods are not taken into account when determining the expected period (see section 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: section 44ZZBC(4) & (5);
- if the ACCC gives a notice under subsection 44ZZBCA(1) requesting information in relation to the application;
- if a notice is published under subsection 44ZZBD(1) inviting public submissions in relation to the application;
- a decision is published under subsection 44ZZCB(4) deferring consideration of whether to accept the access undertaking, in whole or in part, while the ACCC arbitrates an access dispute.

3.3.2 Amendment notices

3.3.2.1 Changes to the Act

Section 44ZZAAA(1) provides that the ACCC may give an ‘amendment notice’ in relation to an undertaking before deciding whether to accept the undertaking.

An ‘amendment notice’ is a notice in writing to the access provider that specifies:

- the nature of the amendment or amendments (the ‘proposed amendment or amendments’) that the ACCC proposes be made to the undertaking; and
- the ACCC’s reasons for the proposed amendment or amendments; and
- the period (the ‘response period’) within which the person may respond to the notice, which must be at least 14 days after the day the notice was given to the person: see section 44ZZAAA(2).

An access provider may give a revised undertaking in response to the notice (within the response period), incorporating amendments suggested in the notice, and provided that undertaking is not returned to the provider by the ACCC, that revised undertaking is taken to be the undertaking the ACCC is assessing under Part IIIA: see sections 44ZZAAA(5) & (7). In other words, the access provider may ‘swap over’ the revised undertaking for the original undertaking if it agrees to the amendments suggested by the ACCC in the notice.

If the access provider does not respond to the notice within the response period, it is taken to have not agreed to the proposed amendment: section 44ZZAAA(8). If the access provider provides a revised undertaking that incorporates one or more amendments that the ACCC considers are not of the nature proposed in the amendment notice, and which do not address the reasons for the proposed amendments given in the amendment notice, the ACCC must not accept the revised undertaking and must return it to the provider within 21 days of receiving it: section 44ZZAAA(6).

The Commission is not required to accept the revised undertaking under section 44ZZA even when it incorporates amendments (see section 44ZZAAA(9)) and does not have a duty to propose amendments when considering whether to accept the undertaking (see section 44ZZAAA(10)).

3.3.3 Other changes

3.3.3.1 Information requests

Section 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.

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

3.3.3.2 Fixed principles

Section 44ZZAAB of the Act now provides that an access undertaking given to the ACCC under subsection 44ZZA(1) may include one or more terms that, under the undertaking, are fixed for a specified period (known as ‘fixed principles’). Such principles must extend beyond the term of the undertaking: section 44ZZAAB(3).