



Australian
Competition &
Consumer
Commission

Australian Competition and Consumer Commission

Appendices to Position Paper

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

21 December 2010



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Appendix 1: Submissions from ARTC

This Appendix summarises submissions the ACCC has received from ARTC in relation to:

- the ACCC's March 2010 Draft Decision
- the proposed 2010 HVAU.

In certain cases ARTC's submission in relation to the proposed 2010 HVAU reflects its earlier submission in relation to the Draft Decision.

A.1 Submissions post March 2010 Draft Decision

A.1.1 Preliminary matters

A.1.1.1 Introduction

ARTC proposed to amend:

- section 1.1(d) to explicitly refer to ARTC's obligations under the *Transport Administration Act* 1988 (NSW),¹ and to provide that ARTC recognises that non-coal users have certainty of access and ARTC will recognise the involvement of non-coal users in future decisions regarding investment in Capacity;²
- section 1.1(g) to explicitly recognise that the Network is used by non-coal traffic;³ and
- section 1.1(f) to specifically refer to the long term solution as proposed by the Greiner Review.⁴

A.1.1.2 Objectives

In response to the ACCC's concerns regarding consistency with the pricing principles in section 44ZZCA of the TPA, ARTC proposed to amend section 1.2 to provide for:

'[the] recovery of at least sufficient revenue to meet the efficient costs associated with Access to the Network.'⁵

ARTC submitted that it is considering providing further detail on the meaning of 'efficient', particularly that 'efficient costs' must be considered in the context of the Hunter Valley Network and should not be construed as the lowest cost.⁶

¹ ARTC, *Response to the ACCC Draft Decision on the Hunter Valley Access Undertaking*, 31 March 2010, p. 19.

² ARTC, *Response to the ACCC Draft Decision*, 31 March 2010, p. 19.

³ ARTC, *Response to the ACCC Draft Decision*, 31 March 2010, p. 19.

⁴ ARTC, *Response to the ACCC Draft Decision*, 31 March 2010, p. 19.

⁵ ARTC, *Response to the ACCC Draft Decision*, 31 March 2010, p. 20.

⁶ ARTC, *Response to the ACCC Draft Decision*, 31 March 2010, p. 20. ARTC submitted, by way of example, that it may not be appropriate for ARTC to adopt a certain maintenance practice, which is

A.1.1.3 Contract Structure

ARTC submitted that the OSA and AHA will be negotiated concurrently and that Operators will be able to take part in the negotiations with the agreement of the Access Holder. Further, where the Access Holder wants to nominate a new Operator during the term of its AHA, ARTC will accept the nomination in accordance with clause 4.4 of the IAHA.⁷

ARTC stated that the terms of a new OSA can be negotiated by ARTC, the Access Holder and the Operator, with disputes to be resolved in accordance with HVAU section 3.15.⁸

A.1.1.4 Scope

Network Definition

ARTC proposed the following changes to address concerns stated in the Draft Decision regarding the clarity of the definition of the Network:⁹

- Incorporate a new section 2.1(b) and renumber accordingly:
 - “The Network means the network of railway lines delineated or defined in Schedule B, excluding Annexure 1 to Schedule B, where Annexure 1 to Schedule B contains a map, being a representation of these railway lines for illustrative purposes only.”
- Change the definition of ‘Network’ in section 9 to provide that ‘Network has the meaning described in section 2.1(b).’
- Change the wording in the Annexure to Schedule B as follows:
 - “See Map [map identification] which has been provided as a separate map for illustrative purposes only, and forms part of this annexure.’
 - “The map represents the railway lines described at Schedule B as at the Commencement Date. The map may change over the Term. Applicants should refer to ARTC’s website for an up to date map of the railway lines described at schedule B.”
- A current illustrative map intended to be included as Annexure 1 to Schedule B is provided at Attachment 6 for illustrative purposes. It should be noted that the map may be further updated prior to the Commencement Date.

Application of multiple regulatory arrangements

ARTC submitted that access to the rail network in NSW under multiple regulatory arrangements was inevitable due to horizontal separation of the network following ARTC’s lease. ARTC submitted that it has experience in dealing with these

cheapest in terms of expense, but has an impact on coal chain throughput that could be avoided by a different and higher cost maintenance practice.

⁷ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 20.

⁸ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 20.

⁹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 21.

circumstances, but still sought to delivery greater consistency regarding the regulation of rail access.¹⁰

ARTC submitted that approximately 31% of non-coal services on the Hunter Valley Network on any given day will have travelled a route which crosses the Interstate network and the network covered by the NSWRAU. ARTC submitted that upon commencement of the HVAU, this would rise to 40% of non-coal services travelling a route which crosses more than one undertaking. ARTC noted that for some of these services, the HVAU would be replacing the NSWRAU so the journey would be covered by the 2008 Interstate AU and HVAU.¹¹

ARTC submitted that it currently has executed around 14 non-coal access agreements in NSW that cover both the Interstate and NSWRAU and that these agreements are based around the Indicative Interstate TAA. ARTC submitted that provided consistency between the 2008 Interstate AU and HVAU was maximised, ARTC could not see a reason why these agreements could not be retained with the commencement of the HVAU.¹²

ARTC submitted that its objective in respect of coal access seekers, was to have a single access agreement based on the terms and conditions of the IAHA to apply to access to both networks. ARTC submitted that this objective would be undermined should the IAHA contain operational provisions that differ to those currently applicable on the Interstate Network.¹³

ARTC submitted that if the agreements had different operational and safety provisions, ARTC could then either negotiate separate agreements or adopt the new terms and conditions in the IAHA to apply to coal producers who also use the Interstate network. ARTC submitted that the latter option would require renegotiation of existing Interstate TAAs. ARTC submitted that this would undermine the efficiencies and alignment ARTC is attempting to achieve.¹⁴

ARTC submitted that its objective was to also have non-coal traffic operating on a single access agreement based on the Interstate Indicative Track Access Agreement (Interstate Indicative TAA). ARTC submitted that this too would be undermined if changes were introduced to the IAHA.¹⁵

ARTC submitted that single agreements are possible and that the comparison document provided confidentially to the ACCC showed that provided the conditions of access to the Hunter Valley network and Interstate network were consistent, 95% of access holders would not be worse off, i.e. would not be subject to an increased number of different regulatory instruments or undertakings and the access holder would not face an increased number of contracts.¹⁶

¹⁰ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 21.

¹¹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, pp. 21-22.

¹² ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 22.

¹³ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 7.

¹⁴ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 7.

¹⁵ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 8.

¹⁶ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 8.

ARTC submitted that the ACCC's justification for amendments to the agreements submitted as part of the 2009 HVAU was to seek a more appropriate balance of interest between ARTC and the Access Holder or Operator. ARTC submitted that the proposed terms and conditions were largely drawn from the Interstate TAA, and ARTC further submitted that the Interstate TAA, as a whole, represented a balance of interests of the parties.¹⁷

A.1.1.5 Exclusion of Extensions

ARTC submitted that Extensions are principally dedicated spur lines connecting the Network to an Access Holder's specific mine. ARTC further submitted that it has no monopoly in relation to the construction of Extensions, it does not generally have tenure over the relevant land for spur lines and therefore mine owners often arrange for the construction of Extensions themselves.¹⁸

ARTC submitted that to the extent an extension needs to be connected to ARTC's track, this was covered by 2009 HVAU section 6.1. ARTC noted that the last part of an extension, which joins ARTC's track, may be on ARTC controlled land. ARTC submitted that the obligation to connect and the ability to obtain arbitration on any dispute ensures that ARTC cannot extract monopoly rents through withholding access to ARTC controlled land. ARTC submitted that it is willing to clarify this with amendments to section 6.1.¹⁹

ARTC submitted that the 2009 HVAU was meant to cover expansions, but not Extensions, and that drafting of the HVAU could be clarified to reflect this if necessary.²⁰

ARTC submitted that there is no inconsistency between ARTC's exclusion of Extensions and section 44V(2)(d) of the TPA. Specifically, ARTC submitted that section 44V(2)(d) sets out a list of potential matters on which the ACCC may make a determination in respect of an arbitration of an access dispute, but the section does not require a voluntary access undertaking submitted to the ACCC to allow for all of the possible determinations.²¹

ARTC further submitted that the ACCC allowed the exclusion of Extensions in its decision on the 2008 Interstate AU. ARTC submitted that it is not aware of different circumstances in relation to a future Extension of the Hunter Valley Network that would warrant different treatment to the 2008 Interstate AU.²²

ARTC submitted that the ACCC's reasoning for allowing the exclusion of Extensions in the 2008 Interstate AU was that the undertaking was voluntary, and as such, ARTC was not obliged to include any particular facilities in the undertaking unless it could be demonstrated that their exclusion would undermine the effectiveness of the regime

¹⁷ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 8.

¹⁸ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 23.

¹⁹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 23.

²⁰ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 23.

²¹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 23.

²² ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 23.

such that it would no longer be appropriate to accept the undertaking having regard to section 44ZZA of the TPA.²³

ARTC submitted that any concern the ACCC has over the interpretation of section 44V of the TPA, particularly whether the ACCC can require ARTC to expand Capacity on the Network, cannot be addressed by ensuring Extensions are covered by the HVAU.²⁴

ARTC stated that given the NCC decisions on the recommendation to declare the Robe, Hamersley and Goldsworthy railways, it appeared unlikely that a technical interpretation would be given to section 44V preventing the ACCC from requiring an access provider to expand Capacity. ARTC further stated that a court's decision as to whether expansions are covered by section 44V of the TPA would not be influenced by ARTC's categorisation of Extensions under the HVAU. ARTC stated that it has done all it can to make it clear that requests for Additional Capacity are covered by the HVAU.²⁵

ARTC referred to the clause 5.7 in the 2009 IAHA which deals with Extensions and submitted that this is effectively an agreement to agree. ARTC submitted that the clause contains an important principle that where an access holder is granted access to an extension funded by another person then it should make a contribution to the cost of that extension.²⁶

A.1.1.6 Term, Grant and Duration of the HVAU

ARTC proposed to make the changes recommended by the ACCC to section 2.2(a) and to remove sections 2.2(b) and (c) of the HVAU. ARTC submitted that it will also make some further minor drafting corrections as proposed by the ACCC.²⁷

A.1.1.7 Review of the HVAU

ARTC proposed to amend section 2.4(d) to make it clear that ARTC's review of the HVAU will also take into account the long term solution proposed by coal producers under the Greiner Review which was intended to provide for alignment.²⁸ ARTC also proposed to delete section 2.4(a) and (b) in response to the ACCC's concerns.²⁹

A.1.2 Negotiating for access

A.1.2.1 Offer and negotiation rights

ARTC has prepared a flow chart setting out the steps involved in an Applicant seeking Coal Access Rights. This diagram is at Attachment 3 of ARTC's submission.³⁰

ARTC submits that the key steps involved in the process are:

²³ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 23.

²⁴ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 23.

²⁵ ARTC, Response to the ACCC Draft Decision, 31 March 2010, pp. 23-24.

²⁶ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 24.

²⁷ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 24.

²⁸ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 25.

²⁹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 25.

³⁰ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 27.

- An optional Initial Review;
- Access Application;
- Capacity Assessment;
- Formulation of an Indicative Access Proposal;
- Negotiations; and
- Execution of an Access Agreement.³¹

ARTC submits that these steps are flexible and an agreement may be reached much more quickly than envisaged under the process.³² ARTC has not proposed any amendments to the process in section 3.

Timeframe for negotiation

ARTC submits that the timeframes in section 3.11(b) of the April 2009 HVAU are a default framework, and given the particular circumstances of each application, the actual steps may vary and ARTC and the Applicant can agree to tailor the process accordingly.³³ ARTC submits it has no incentive to prolong the period for negotiations; that the three month timeframe matches that in the 2008 Interstate AU; and that the default framework achieves workable alignment with the PWCS process.³⁴

Determination of Indicative Access Charges each year

ARTC submits it does not propose to re-determine the characteristics of an Indicative Service (or the Interim Indicative Service during the Interim Period (each year). ARTC will however determine Indicative Access Prices (or the Interim Indicative Access Prices during the Interim Period) each year as per the process in section 4 of the HVAU.³⁵

HVAU applies equally to Interim Indicative Services

ARTC submits that it intends section 3 of the HVAU will apply to negotiations for access to Interim Indicative Services. ARTC propose to make changes to section 3.14 'to avoid any doubt that an Applicant for Interim Indicative Services is entitled to the IAHA.'³⁶

Mandatory incorporation of alignment clauses

In response to the ACCC's comments regarding the inclusion of non-negotiable terms and conditions in the interests of alignment, ARTC submitted:

³¹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 27.

³² ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 27.

³³ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 27.

³⁴ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 28.

³⁵ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 28.

³⁶ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 29.

ARTC proposes to identify those terms in the IAHA which it considers need to be consistent across all Access Holder Agreements for Coal Access Rights to ensure workable alignment.

These provisions will be identified as Tier 1 (mandatory) provisions.

These terms will be identified as Tier 1 (mandatory) provisions in Schedule A and section 3.14 of the HVAU will be amended to make it clear that all contracts for coal Access Rights must include those provisions. Schedule A will also identify those provisions of the IAHA which are to be included in all Access Holder Agreements unless ARTC agrees otherwise. ARTC proposes to identify these provisions as Tier 2 (negotiable) provisions.³⁷

The full list of designated Tier 1 (mandatory) provisions is set out below. In addition to the provisions identified in the ACCC's Draft Decision as likely suitable for 'non-negotiable' status, ARTC identified the following, and provided some explanation as to their rationale:

- IAHA Clause 3.1: Grant of Train Paths for transport of coal (*The AH's entitlement to tolerance arises under this provision*)
- IAHA Clause 3.6: Availability Exceptions (*Availability Exceptions are taken into account under the True-up test and if these differ between access holders, there may be issues in applying this test*)
- IAHA: Clause 5.4: Annual Reconciliation (*This is linked to the true-up test which must be applied system wide*)
- IAHA Clause 19.2 New or varied Access Undertaking (*ARTC proposes to amend clause 19.2 to provide that only changes to Tier 1 provisions in an IAHA accepted by the ACCC under a subsequent undertaking will be automatically incorporated into existing AHAs.*)
- IAHA Train Path Schedule: Clause 4.1 Network Exit Capability Condition Precedent; Clause 4.2 Removal of Path Usages for failure to satisfy Network Exit Capability Condition Precedent (*without these provisions, ARTC will be unable to apply the Capacity Shortfall provisions*).
- IAHA Schedule 2: System True Up (*The system true-up test is applied across the whole system and needs to be consistent*)
- IAHA Schedule 3: Clause 4.1(c) Determination of TOP Price_{PZ} and Non-TOP Price_{PZ} (dispute resolution provisions) (*These provisions cross refer to particular dispute resolution provisions in the HVAU which require system application*)
- ARTC also proposes to identify the Capacity Shortfall provisions in the IAHA as Tier 1 (mandatory) provisions that need to also be included in all Access Agreements for Non-Coal Access Rights.³⁸

Indicative terms and conditions for non-coal Access Rights

³⁷ ARTC, Response to the ACCC Draft Decision, 31 March 2010, pp. 29-30.

³⁸ ARTC, Response to the ACCC Draft Decision, 31 March 2010, pp. 29-30.

ARTC reiterates its submission that it intends to offer Applicants for Non-Coal Access Rights on the Network an Access Agreement based on the terms and conditions set out in the 2008 Interstate AU indicative access agreement, adjusted to take into account the circumstances of the Hunter Valley Network.

ARTC proposes to amend section 3.14 of the HVAU to provide that ‘an Applicant for Non-Coal Access Rights will be entitled to:

‘an Access Agreement on the terms and conditions contained in the Indicative Interstate Access Agreement, amended to take into account the particular circumstances of the Network as reasonably determined by ARTC and which will incorporate those provisions identified as Tier 1 (mandatory) Non-Coal Provisions’.³⁹

ARTC submits that it also proposes to identify the Capacity Shortfall provisions in the IAHA as Tier 1 (mandatory) provisions that need to be included in all Access Agreements for Non-Coal Access Rights which will ensure consistency across all agreements.⁴⁰

Reservation of Non-Coal Access Rights

ARTC submits that it will amend the drafting of section 2.5(b) to clarify that the offered terms are negotiable in accordance with the HVAU.⁴¹

A.1.2.2 Dispute resolution and arbitration

Disputes on mirrored capacity provisions

ARTC does not consider that the ACCC should arbitrate disputes on the mirrored capacity provisions. ARTC submits:

- ‘most of the provisions in the IAHA are to be resolved ultimately by court proceedings’⁴² and a court decision on AHA would have precedent value for a similar question;
- disputes on certain provisions are resolved via expert determination. Where the parties can’t agree on an expert, the President of the Institute of Mediators and Arbitrators will appoint someone, and ARTC expects that the President would look to appoint the same expert where possible. ARTC also considers that a previous determination ‘is likely to be of significant persuasive value’⁴³
- disputes may not be as to the interpretation of provisions, instead as to ‘the application of an accepted understanding of the provision to the particular factual circumstances of a single Access Holder’.⁴⁴
- having the ACCC as arbitrator is more likely to cause confusion.⁴⁵

³⁹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 30.

⁴⁰ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 30.

⁴¹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 31.

⁴² ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 31.

⁴³ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 32.

⁴⁴ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 32.

ARTC agrees, however, that there may be circumstances where a court or expert determination leads to a result that is inconsistent with coal chain alignment.⁴⁶

Disputes involving an operator

ARTC submits that where a dispute arises in relation to the negotiation of an OSA as part of the negotiation of the Access Arrangements, the Operator will be party to the dispute with the Access Holder and ARTC, unless the Access Holder agrees otherwise. ARTC further submits that as the Operator does not have rights of access to the Network independent of the Access Holder and does not hold Capacity on the Network, it is not appropriate for the Operator to have a right to bring a dispute independently of the Access Holder.⁴⁷

ARTC submits that where an AHA is in place and the Access Holder wishes to appoint a new Operator and a new OSA needs to be agreed and endorsed by the Access Holder, this would be a variation of the AHA, as the OSA is attached to it as an Annexure. The variation to the AHA and the negotiation of a new OSA will be covered by the HVAU and the dispute resolution provisions set out in the HVAU will apply.⁴⁸

A.1.2.3 Transitional arrangements, timeframes and processes

Transitional arrangements

ARTC submits that it does not consider concerns from stakeholders regarding the absence of transitional arrangements to be justified, and provides the following reasons:

- The HVCCC has indicated that ARTC has sufficient track Capacity to contract for the Access Rights sought by coal producers for 2010 and 2011
- The ACCC has indicated that it is comfortable with the provision for mutually exclusive Access Rights
- If an access seeker wishes to negotiate and agree an Access Holder Agreement prior to the commencement of the HVAU, the Applicant will obtain the benefit of the protections set out in the NSWRAU; and
- Given that the purpose of an Access Undertaking is to provide a framework for reaching a binding agreement, the suggestion that ARTC and a willing access seeker should not contract in advance of an undertaking coming into effect is surprising.⁴⁹

⁴⁵ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 32.

⁴⁶ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 32.

⁴⁷ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 32.

⁴⁸ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 32.

⁴⁹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, pp. 33-34.

Involvement of Operator in negotiations

ARTC submits that the HVAU does not preclude an Operator, at the Access Holder's request, from taking part in tripartite negotiations.⁵⁰

A.1.2.4 HVCCC consultation

ARTC submits that it proposes to include in the revised HVAU the steps that ARTC will take when seeking the HVCCC's view on the impact of a proposal on Coal Chain Capacity,⁵¹ however these steps will not impact on the operation of section 3 provisions.

For the purposes of section 3, ARTC submits that 'the substantive obligations on ARTC to consult with the HVCCC in assessing the impact of Access Rights sought are set out in ... section 3.6 of the HVAU where ARTC commits to participate in the Initial Review with the HVCCC'.⁵² ARTC will not apply the steps it has developed for HVCCC consultation to section 3.6 and ARTC retains discretion on whether to consult with the HVCCC under this provision.⁵³

A.1.2.5 Prudential requirements

ARTC submits that Section 3.4(e) of the 2009 HVAU does not require the Applicant to meet specified criteria, including the provision of Security or Parent Guarantee at the negotiation stage, but rather, ARTC is entitled to ask for a demonstration of creditworthiness and seek a commitment to provide the security in the AHA. ARTC submits that it was not its intention that ARTC would not negotiate unless the Applicant committed in advance to providing the credit support. ARTC notes that the provision of credit support and the level is negotiable, although ARTC flags that creditworthiness will be critical to it entering into long term take or pay contracts which are the basis for large investments. ARTC submits that it will clarify the wording of this provision.⁵⁴

A.1.3 Agreements

A.1.3.1 Compliance with the AHA and OSA and the Recitals

In response to the ACCC's preliminary view on apparent inconsistencies between the agreements, ARTC submitted that it doesn't consider any amendments are necessary. ARTC submitted that Recital F makes it clear that the Access Holder does not have any physical right to access the Network, which is only accessible by the Operator and further that the Recitals are explanatory rather than prescriptive.⁵⁵

A.1.3.2 Clause 24.7 of the OSA

The Draft Decision referred to the possible need to amend clause 24.7 of the 2009 OSA in line with clause 21.6 of the 2009 IAHA.⁵⁶ ARTC submitted that it agreed with the ACCC's recommendation as the OSA provided to the ACCC for approval is

⁵⁰ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 35.

⁵¹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 36.

⁵² ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 36.

⁵³ ARTC, Response to the ACCC Draft Decision, 31 March 2010, pp. 34-35.

⁵⁴ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 38.

⁵⁵ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p.39.

⁵⁶ ACCC, *Australian Rail Track Corporation Limited – Hunter Valley Coal Network Access Undertaking Draft Decision*, 5 March 2010, p. 223.

only an indicative agreement, ARTC does not consider it necessary to make this change to the standard OSA.⁵⁷

A.1.3.3 Term of the IAHA and OSA

ARTC submitted that it is prepared to negotiate shorter term agreements than that set out in the 2009 IAHA but ‘this does not need to be contemplated in the IAHA’. ARTC no longer proposes to specify a term in the standard OSA.⁵⁸

A.1.3.4 Long term uplift

ARTC submitted, with respect to automatic incorporating future changes to the IAHA, that if a new or varied AU is accepted by the ACCC during the term of an Access Agreement, any change to a Tier 1 provision in the IAHA will be automatically incorporated into the Access Agreement. All other terms will be negotiated in good faith.⁵⁹ Further discussion of ARTC’s proposal on Tier 1 and 2 provisions is contained in Chapter 6 – Negotiating for Access.

A.1.3.5 Liability and Indemnity in the IAHA

The Draft Decision sets out preliminary views on aspects of the liability and indemnity provisions of the 2009 IAHA. ARTC submitted that there is a ‘very good reason why the liability regimes are different in the IAHA and the OSA - they deal with very different subject matter’ as the producers did not want to be liable for incidents.⁶⁰

Mutual liability release

ARTC submitted that it does not however propose to amend the release to exclude liability for either negligence or breach of contract in addition to the 24 December amendments excluding fraud or wilful misconduct.⁶¹ ARTC submitted:

- The mutual liability release in the IAHA is fundamental for ARTC’s risk allocation
- The remedy for conduct for incidents that cause ARTC to fail to make a train path available is a rebate under the True-up Test (TUT) regardless of whether the failure is due to breach of contract or negligence. The TUT rebate is ‘pre-agreed compensation for the failure’.
- If breach of contract actions were available as well as the TUT rebate then the Access Holder could recover twice.
- ARTC ‘cannot possibly fully compensate an Access Holder from the losses that flow from a failure to make a Path Usage available.’ Even if limited to direct losses, this could include loss of profits, demurrage fees etc; the TUT rebate is effectively a ‘cap on the “damages” arising [from] the failure by ARTC to provide Path Usages’.

⁵⁷ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 40.

⁵⁸ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 41.

⁵⁹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 41.

⁶⁰ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 43.

⁶¹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 44.

- In respect of any other potential breaches by ARTC of the AHA or negligent action which does not result in a failure to make Path Usages available, the remedy is limited to the liability cap.
- The provisions are similar to those in the PWCS Long Term Ship or Pay Agreement.⁶²

Liability Cap

ARTC submitted that the reduction of the liability cap in the 24 December IAHA ‘coincided with a reworking of the liability regime to narrow the release from liability such that the TOP rebate was the limitation only for acts or omissions etc giving rise to a failure to provide path usages’⁶³. ARTC submitted that its exposure could be up to \$30-40 million per annum and ‘exposure of this level is inconsistent with regulated returns.’⁶⁴ A higher level of exposure is not required for breaches that do not result in a failure to make Path Usages available. ARTC submitted that the cap would apply to breaches including (*inter alia*):

- Breach of warranty as to accuracy of information;
- improper use or failure to return security;
- breach of confidentiality;
- failure to use best endeavours to construct projects on time [...].⁶⁵

ARTC submitted that it ‘does however propose to amend the liability cap to provide that it will increase annually in line with CPI increases.’⁶⁶

Consequential Loss

ARTC submitted that it does not propose to limit the definition of consequential loss any further. ARTC submitted that the definition is consistent with *Hadley v Baxendale* and that the definition of consequential loss does not exclude direct losses as it only includes liabilities which do not flow naturally from the breach. Indirect losses are ‘damages which may reasonably be supposed to have been in contemplation of both parties at the time they made the contract as a probable result of the breach’ and these losses have been properly included in the consequential loss definition.⁶⁷ ARTC submitted that ‘there has been a misreading of paragraph (a) of the definition by the ACCC and stakeholders’ as it ‘only excludes losses which may reasonably be supposed to have been in the contemplation of the parties where those losses are ones which do not flow naturally from the breach and might otherwise be recoverable under the second limb of *Hadley v Baxendale*’.⁶⁸

ARTC submitted that the definition of consequential loss does not exclude liability for personal injury or property damage if it flows naturally from the breach. ARTC further stated:

⁶² ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 44.

⁶³ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 44.

⁶⁴ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 45.

⁶⁵ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 45.

⁶⁶ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 45.

⁶⁷ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 45.

⁶⁸ ARTC, Response to the ACCC Draft Decision, 31 March 2010, pp. 45-46.

- ARTC is not willing to accept liability for loss of goods on a train and notes that the coal on just one coal train could have a value of \$500,000 to \$1M. Operators do not generally accept liability for damage to goods and ARTC sees no reason why it should do so under a regulated return regime;
- It is difficult to see how ARTC could cause a personal injury when the IAHA does not give any rights to an employee of an Access Holder to access or use the network.⁶⁹

ARTC submitted that it is consistent with standard drafting practice for the definition of consequential loss to not be exhaustive. ARTC submitted that it would not be willing to contract with coal producers if there was a risk that it could be liable for consequential losses of the kind included in that definition.

Cross Claims

In relation to cross claims, ARTC submitted that it does not intend to amend the clause and that its purpose is to ensure that the Access Holder does not circumvent the IAHA liability clauses by suing the Operator who then seeks cross contribution from ARTC.⁷⁰ ARTC submitted in relation to the drafting of the clause that the Access Holder is not being asked to indemnify ARTC, notwithstanding that the claim may not arise as a result of an act or omission of the Access Holder and that the reference to the Operator is limited to an Operator with whom the Access Holder has an OSA.⁷¹

Limited agency indemnity

ARTC submitted that it will amend clauses 4.6(a) and 13.1 of the 2009 IAHA to explicitly state that the Access Holder is not liable for Incidents ‘caused by the acts or omissions of the Operator’ as suggested by the ACCC.⁷²

Liability for Third Party Works

ARTC submitted that definition of Third Party Works already specifically excludes works by or on behalf of ARTC or its contractors, i.e. where it has control.⁷³

Liability and Indemnity in the OSA

ARTC submitted that it proposed to amend clause 15.9 of the 2009 OSA so it does not refer to clause 5.8 of the 2009 IAHA and so it provides for principles regarding interest calculation in the OSA.⁷⁴

ARTC agreed that it may be necessary to amend provisions in the 2009 IAHA or the 2009 OSA to reflect the possibility of the Operator and the Access Holder being the same entity, however, as the IAHA and the OSA are indicative agreements, such changes are not necessary.⁷⁵

⁶⁹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 46.

⁷⁰ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 46.

⁷¹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 46.

⁷² ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 47.

⁷³ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 47.

⁷⁴ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 48.

⁷⁵ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 48.

A.1.3.6 Financial viability provisions

Conditions Precedent

ARTC submitted that it ‘does not consider the conditions precedent in the 2009 IAHA to be onerous or prescriptive.’ ARTC submitted that it is ‘making a long term investment programme and it is not inappropriate that ARTC has the ability to require a creditworthy counterparty’ which will be the case where.⁷⁶

- an Access Holder has an Acceptable Credit Rating;
- the Access Holder supplies a Parent Guarantee where that Parent Company has an Acceptable Credit Rating; or
- where neither the Access Holder nor the Parent Company has a Parent Guarantee, the Access Holder provides ARTC with Security, which may include an unconditional and irrevocable bank guarantee, letter of credit, performance or issuing bond (as set out in the definition of Security).

ARTC submitted that ‘there are clear options available when neither the Access Holder nor its Parent has an Acceptable Credit Rating’ and that ‘it is also important to note that the conditions precedent in the IAHA are not Tier 1 provisions and are therefore negotiable.’⁷⁷

Parent Guarantee

ARTC submitted that the Parent Guarantee in the 2009 HVAU is a standard form guarantee. ARTC submitted that it is necessary that the Guarantor indemnify ARTC if an Access Holder or Operators’ obligation under the Agreement is void, voidable or unenforceable. ARTC also submitted that it is a critical element of the guarantee that the Guarantor is liable for variations to the relevant agreement as otherwise the Guarantee could be avoided by amendment of the underlying agreement.⁷⁸

Security

ARTC submitted that the amendment to the 24 December IAHA, which provides that the amount of Security will be reviewed to reflect any increase in TOP charges, makes it clear that the increase will be linked to TOP charge increases.

ARTC also submitted that it proposed to amend the 2009 OSA to provide that Security will be linked to CPI increases, the amount of Security requested is an amount less than \$2 million and the formula for CPI will be linked to the value of the Security.⁷⁹ ARTC submitted that it will make it clear that both the amount of security charged and the escalation of the Security are not subject to the dispute resolution provisions, but that other related provisions are still covered.⁸⁰

ARTC submitted in relation to 2009 IAHA clause 7.1(e) (drawing on security irrespective of whether there are monies owing) that it does not disproportionately

⁷⁶ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 48.

⁷⁷ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 49.

⁷⁸ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 49.

⁷⁹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 49.

⁸⁰ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 50.

favour ARTC, nevertheless if the ACCC considers it necessary, ARTC is willing to delete this clause.⁸¹

A.1.3.7 Dispute Resolution

ARTC submitted that there are only two areas in the 2009 IAHA where the dispute resolution provisions set out in the IAHA do not apply:

- An Access Holder is unable to dispute an invoice for TOP Charges except for manifest error (clause 5.2) as there is no subjective assessment involved; and
- The dispute resolution provisions in the 2009 HVAU apply to TOP price disputes,⁸² as the rules and timeframes set out in the 2009 HVAU are more appropriate given TOP prices will be charged to a number of different Access Holders.⁸³

A.1.3.8 Termination

ARTC noted the ACCC's views on the defaulting party providing a Rectification Response that is 'reasonably satisfactory' and submits that the 24 December IAHA had been so amended.⁸⁴

ARTC submitted that it does not intend to amend clause 12.1(d) relating to its ongoing right to manage the network as 'ARTC needs to retain the ability to continue to manage the Network including under that AHA even if one Train Path Schedule is terminated.'⁸⁵

ARTC submitted that 'the phrase "ceasing to carry on business" is often used in contracts and other legal documents as an indicia of insolvency' and should be determined by looking to the status of the company's business activities.⁸⁶

ARTC submitted that it is not practical to allow an Access Holder to terminate an AHA simply because the NSW Lease is terminated because 'the NSW Lease terminates and is not replaced, either the Access Agreements will novate to the new lessor or new lessee or ARTC has the right to terminate the agreements and Access Holders will not be liable for future TOP.'⁸⁷

ARTC submitted that it 'does not consider that the ACCC's proposed recommendation to clause 12.6(a) is necessary. Clause 12.6(a) of the 2009 IAHA makes it clear that ARTC is able to suspend the IAHA 'but only to the extent such obligations relate to the cause giving rise to the right to terminate and only until such time as the cause giving rise to terminate is remedied.'⁸⁸

The 2009 OSA gives ARTC a right to immediate termination of the OSA if the Operator has had any of its other OSAs terminated for breach by ARTC. ARTC

⁸¹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 50.

⁸² Contained in clause 4.1 of Schedule 3 of the 2009 IAHA.

⁸³ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 50.

⁸⁴ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 51.

⁸⁵ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 52.

⁸⁶ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 52.

⁸⁷ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 52.

⁸⁸ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 52.

submits that it proposes to amend this clause to ‘limit ARTC’s right to immediately terminate the OSA to breaches by the Operator of a non-financial, safety obligation’ in another OSA.⁸⁹

ARTC submitted that it wished to clarify matters with respect to the timeframes and deadlines for a Rectification Response:

- a timeframe for rectification would be specified in a Rectification Notice;
- the notice period in clause 14.1(b)(vi) of the 2009 OSA is in fact 14 days for notice plus a further 14 days; and
- these periods are provided to give certainty to the process and consistency in application assists all users of the Network.⁹⁰

A.1.3.9 Confidentiality

ARTC submitted that it proposes to make amendments to clause 15 of the 2009 IAHA (confidential information) discussions with Access Holders and to uplift these changes to the HVAU.⁹¹

A.1.3.10 Provisions relating to Operators

ARTC submitted that the 24 December IAHA provides that ‘ARTC is able to refuse a nomination of an Operator if the nominated Operator has received a rectification notice or similar notice from ARTC for material breach of any agreement with ARTC and the event giving rise to the rectification notice or similar notice has not been rectified.’⁹² ARTC submitted that it is able to reject a nomination if it forms the view ‘that the Accredited Operator is not of sufficient financial capacity to meet potential liabilities under the Operator Sub-Agreement provided that ARTC is only able to form this view if it has requested Credit Support from the Operator and the Operator has not provided the Credit Support within the timeframe provided under the Operator Sub-Agreement’.⁹³ ARTC submitted that it considers that these amendments set a ‘higher hurdle’ for ARTC and that it sets out clearly the process that would need to be followed before ARTC rejects or refuses a nomination.⁹⁴

ARTC submitted that it will adopt the definition of material default contained in the 2009 HVAU.⁹⁵

The Draft Decision considered a number of issues in relation to Accreditation and considered that ‘ultimately the clauses as drafted may be negotiated further between the parties’.⁹⁶ ARTC submitted that:

- wording similar to clause 7.1(b) of the 2009 OSA was agreed in the PN (Asciano) Interstate TAA;

⁸⁹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 53.

⁹⁰ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 53.

⁹¹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 53.

⁹² ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 54.

⁹³ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 54.

⁹⁴ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 54.

⁹⁵ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 54.

⁹⁶ ACCC, Draft Decision on HVAU, 5 March 2010, p. 243.

- the obligation is mutual and ARTC is similarly obliged to advise Operators about any Accreditation notices it has received;
- ARTC agreed to the term ‘material’ being inserted before the word ‘notice’ in its negotiations with Asciano/Pacific National on amendments to its Interstate TAA; and
- similar wording to clause 7.1(d) of the 2009 OSA is used in the Interstate TAA and has not given rise to any particular concerns in its application.⁹⁷

A.1.3.11 Charges

ARTC submitted that does not propose to amend clause 5.2 of the 2009 IAHA in relation to the commencement of payment of charges to ‘provide that the Access Holder’s liability to pay TOP Charges does not commence until an OSA is in place’ as this ‘would simply allow the Access Holder to circumvent and delay its TOP commitments by delaying the appointment of an Operator and the endorsement of the OSA.’⁹⁸ ARTC submitted that if it were required to amend this provision along the lines proposed by the ACCC, ARTC would not agree to any AHA until the applicable OSA had first been signed.⁹⁹

ARTC submitted that it does not propose to amend clause 5.3 of the 2009 IAHA which provides for payment of Non-TOP Charges and Ad Hoc Charges. ARTC submitted that the Monthly TOP charge will be set out in the Train Path Schedule and in subsequent years will be determined in accordance with GTK pricing which Access Holders can dispute under the HVAU.¹⁰⁰ Therefore, ARTC submitted that ‘there is no legitimate basis for disputing a charge which is clearly set out for the first year and in subsequent years involves the mechanical application of a formula unless ARTC has clearly made a serious error’ and allowing Access Holder to dispute the invoice would result in unnecessary delay and potential game playing.¹⁰¹

A.1.3.12 Miscellaneous

The Draft Decision stated that clause 10.4 of the 2009 OSA could be clarified by making explicit that where ARTC conducts an audit, it is at ARTC’s own cost and risk.¹⁰² ARTC submitted that clause 8.4 of the 2009 OSA ‘makes it clear that ARTC and the Operator are responsible for their own costs in relation to compliance with ARTC Instructions and each releases the other from any claim arising from compliance’ nevertheless ARTC submitted it would be prepared to amend the clause to clarify that ‘when ARTC conducts an audit it is at ARTC’s risk.’¹⁰³

ARTC submitted that it does not propose to limit the number of audits to be carried out each year as audits are primarily conducted for safety and ARTC would not request an audit without good reason.¹⁰⁴

⁹⁷ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 55.

⁹⁸ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 55.

⁹⁹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 55.

¹⁰⁰ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 55.

¹⁰¹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 55.

¹⁰² ACCC, Draft Decision on HVAU, 5 March 2010, p. 246.

¹⁰³ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 56.

¹⁰⁴ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 56.

ARTC submitted that its ‘requirement for Incident reports under clause 11.5 of the OSA cannot require the Operator to waive legal professional privilege’ and ‘it is not necessary for the contractual obligation to explicitly recognise this limitation’.¹⁰⁵

ARTC submitted that if necessary it will, in accordance with its longstanding practice, include an obligation in the OSA to provide Operators with a ‘Train Control Report’ in the event of an Incident.¹⁰⁶

ARTC submitted that the 2009 OSA does not require clarification in relation to the responsibility of parties for bearing the costs of remediation in the case of an Environmental Condition arising. ARTC submitted that clauses 13.5(a) and (b) of the OSA make it clear that ‘ARTC’s Remediation notice will only relate to Environment Conditions resulting from “the activities of the Operator”’.¹⁰⁷

ARTC submitted that it proposes to amend clause 16.2 of the 2009 IAHA to introduce a reasonableness criterion into ARTC’s ‘prior written consent’ with respect to assignment and novation. ARTC submitted that otherwise, ‘ARTC does not agree any other amendments are necessary - it should be able to subcontract without impediment’.¹⁰⁸

ARTC submitted that it ‘does not propose to amend clause 21.1 to allow for involvement of the Operator in negotiations concerning variations to the IAHA’. ARTC submitted that the only potential impact on the Operator from a change to the IAHA relates to amendment of the Limited Agency provision. ARTC submitted that it proposes to amend clause 3.2 of the OSA to provide that: ‘The Operator agrees that, unless otherwise notified by ARTC, it is the agent of the Access Holder for the following purposes’.¹⁰⁹

A.1.4 Capacity Management

A.1.4.1 Capacity Analysis

ARTC has set out the steps it proposes to take when it requests the HVCCC’s view as to the impact of a proposal (including a request for Access Rights) on Coal Chain Capacity, which include (broadly) that:

- ARTC will seek the HVCCC's view as to whether the proposal will have an impact on Coal Chain Capacity;
- Where the HVCCC provides its view/recommendation within 20 Business Days or such other time as agreed with ARTC, ARTC will consider the view expressed by the HVCCC in good faith. (This reflects the timetable under the MOU).
- Where ARTC disagrees with the view expressed by HVCCC and ARTC reasonably considers there is sufficient time, given the particular circumstances, for the HVCCC to reconsider its views, ARTC will provide its reasons to the

¹⁰⁵ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 56.

¹⁰⁶ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 56.

¹⁰⁷ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 56.

¹⁰⁸ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 57.

¹⁰⁹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 57.

HVCCC (either orally or in writing) and will ask the HVCCC to consider ARTC's reasons.

- Where the HVCCC provides its revised view/recommendation within specified timeframe, ARTC will consider the revised view of the HVCCC in good faith. Ultimately, however, ARTC will not be obliged to follow the HVCCC's recommendation.¹¹⁰

ARTC submits that these 'steps would be followed where ARTC seeks the HVCCC's view on Coal Chain Capacity under section 5.1 of the HVAU, when an Applicant seeks a Connection under section 6.1 and when an Applicant requests Additional Capacity under section 6.2.'¹¹¹

In relation to the Capacity Analysis provisions, ARTC submits that it intends to 'amend the HVAU to make it clear that ARTC will follow those steps when seeking the HVCCC's view of the impact of Access Rights sought on Coal Chain Capacity under section 5.1(d).'¹¹²

A.1.4.2 Shortfall in Existing Capacity

Uplift of Capacity shortfall provisions

ARTC submits that it 'intends to uplift the Capacity shortfall provisions set out in the December version of the IAHA into the HVAU ... as they will apply to both coal and Non-Coal users.'¹¹³

ARTC also submits that it will 'identify the Capacity shortfall provisions in the IAHA as Tier 1 (mandatory) provisions that need to be included in all Access Holder Agreements for Coal Access Rights, and as Tier 1 (mandatory) provisions to be included in all Access Agreements for Non-Coal Access Rights.'¹¹⁴

'Affected' Access Holders

ARTC submits that in most cases, 'identification of "affected Access Holders"' will be relatively easy, noting that in clause 6.2 of the 'December IAHA all Access Holders with load points west of where the event causing the Capacity Shortfall occurs are likely to be affected. Access Holders who have used up their full Capacity entitlement for that Period will not be affected.'¹¹⁵

However, ARTC submits that it will also provide more clarity by amending the provision it is clear that 'an Access Holders will be an affected Access Holder where the impact of the Incident occurs between the load point and the exit point and the Access Holder's has some remaining contractual entitlement to Path Usages in the Period.'¹¹⁶

¹¹⁰ ARTC, Response to the ACCC Draft Decision, 31 March 2010, pp. 36-37.

¹¹¹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, pp. 36-37.

¹¹² ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 58.

¹¹³ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 59.

¹¹⁴ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 59.

¹¹⁵ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 59.

¹¹⁶ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 59.

Capacity shortfalls of less than 7 days – ‘take into account’ contractual obligations

ARTC submits that in the event of a capacity shortfall that will last for a short period, ARTC requires ‘some flexibility to allocate any remaining Capacity efficiently amongst Access Holders in order to get the system up and running’ under clause 6.2(b).¹¹⁷

However, ARTC will ‘make it clear in clause 6.2(b) that the objective [of this flexibility] is to ensure the Network is efficiently utilised during the period of the short term temporary shortfall and that with this objective in mind, ARTC has a discretion to allocate the remaining Capacity as it sees fit, but taking into account ARTC’s contractual obligations.’¹¹⁸

ARTC also submit that ‘the December IAHA differentiates arrangements in relation to capacity shortfalls of less than 5 days and greater than 5 days and ARTC plans to update the HVAU to reflect the shorter period.’¹¹⁹

Facilitating contractual alignment via HVCCC consultation

ARTC notes that clause 6.1 of the ‘December IAHA contained an obligation on ARTC to ‘subject to meeting [ARTC]’s obligations under clause 6.2 and clause 6.3 to consult with the HVCCC with the objective of coordinating its response to the Capacity Shortfall with the Terminal Operators and above rail providers.’¹²⁰

ARTC submits that it will include this provision ‘in the Capacity shortfall provisions in the HVAU’ which ‘will be identified as a Tier 1 (mandatory) provision to be included in all Access Agreements for Coal Access Rights and also for Non-Coal Access Rights.’¹²¹

ARTC submits that in its view the ‘commitment in clause 6.1 plus the proposed HVCCC consultation process described in Attachment 1 address the ACCC’s concerns.’¹²²

The process set out in Attachment 1 is:

- Where ARTC is required to consult with the HVCCC under the HVAU or IAHA and a specific process is not set out in that provision, ARTC will use reasonable endeavours to follow the following steps to the extent practical and in light of the specific circumstances:
 - ARTC will request the HVCCC to provide ARTC with its view by a specified date, as reasonably determined by ARTC;
 - Where the HVCCC provides its view by the notified date, ARTC will consider that view in good faith;

¹¹⁷ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 59.

¹¹⁸ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 59.

¹¹⁹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 59.

¹²⁰ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 59-60.

¹²¹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 59-60.

¹²² ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 59-60.

- Where ARTC disagrees with the view and there is sufficient time for the HVCCC to reconsider its view, as reasonably determined by ARTC, ARTC will provide its reasons to the HVCCC and will ask the HVCCC to reconsider in light of the ARTC's reasons by a specified date, as reasonably determined by ARTC;
- Where the HVCCC provides its revised view by the notified date, ARTC will consider the revised view expressed by the HVCCC in good faith.
- Ultimately, ARTC is not obliged to follow the HVCCC's recommendation.¹²³

A.1.4.3 Shortfall in Creation of Additional Capacity

ARTC submits that the 'commitments in clause 6.1 apply to both shortfalls in existing Capacity and shortfalls in the creation of Additional Capacity', which will be included in the HVAU and will also be a Tier 1 (mandatory non-negotiable provision). ARTC submits that in combination with the applicable HVCCC consultation processes in Attachment 1, this 'will address the ACCC's concerns.'¹²⁴

A.1.4.4 Capacity Resumption

Uplift of Capacity resumption

ARTC submits that it will include 'clause 11.4 of the IAHA (Capacity resumption) as a Tier 1 (mandatory) provision.'¹²⁵

The appropriate threshold for Capacity resumption

ARTC submits that the '90% / three month threshold put forward by ARTC in April 2009 was amended to take into account the submissions of coal producers and was developed in consultation with them.'¹²⁶

ARTC also submit that 'ARTC will be prepared to amend the threshold in clause 11.4 to accord with what the ACCC considers appropriate, provided this is acceptable to prospective Access Holders.'¹²⁷

Facilitating contractual alignment on resumption via HVCCC consultation

ARTC submits that it:

does not see how misalignment will occur if ARTC exercises its powers under clause 11.4 and resumes an Access Holder's Capacity entitlements. If an Access Holder is not using its track Access Rights, it will also not be using its nominated allocations at the coal terminal at the Ports. Accordingly, ARTC cannot see any basis for ARTC consulting with and obtaining the HVCCC's views on whether the Capacity should be resumed. Indeed, including such a step could be highly problematic as the HVCCC is comprised of representatives of coal companies and the view expressed could

¹²³ ARTC, Response to the ACCC Draft Decision, 31 March 2010, Schedule 1, 128.

¹²⁴ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 60.

¹²⁵ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 61.

¹²⁶ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 61.

¹²⁷ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 61.

be seen to be biased if individual coal companies stood to benefit from the resumption.¹²⁸

ARTC also submits that '[i]n practice, however, ARTC would inform the HVCCC when it resumes Capacity under clause 11.4 in order to allow the HVCCC to plan the coal schedule.'¹²⁹

A.1.4.5 Capacity Relinquishment

Uplift of Capacity relinquishment

ARTC submits that it proposed to 'uplift the Capacity relinquishment provision in clause 11.1(b)(iii)(C), ARTC will make it clear that this provision is a Tier 1 (mandatory) provision to be included in all agreements for Coal Access Rights.'¹³⁰

Circumstances when permanent variation mandatory

ARTC submits that the December IAHA 'added an important limit to clause 11.1(b)(iii)(C) preventing ARTC from permanently varying a Train Path on the grounds of maximising the use and the reliability of the Network where that variation materially adversely affects the Access Holder's entitlement to the Path Usages set out in the Train Path Schedule'.¹³¹

ARTC considers these amendments 'provides Access Holders with sufficient certainty and comfort by limiting ARTC's powers under this clause' and does not 'consider it necessary to specify the situations when ARTC would use this provision.'¹³²

A.1.4.6 Capacity Assignment and Trading

Uplift of Capacity trading

ARTC submits that it will 'identify the temporary trading provisions in clauses 16.4-16.8 of the IAHA as Tier 1 (mandatory) provisions to be included in all Access Holder Agreements for Coal Access Rights.'¹³³

Reasonableness criterion – clause 16.2

ARTC submits that '[c]ause 16.2 of the IAHA sets out the backstop position that applies to transfers (including licensing, novation, assignment and trading) which do not take place in accordance with the principles and rules set out in clause 16.3 (permanent trades) and clause 16.4 (temporary trades). ARTC considers it will be unusual for such transfers to take place.'¹³⁴

¹²⁸ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 61.

¹²⁹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 61.

¹³⁰ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 62.

¹³¹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 62.

¹³² ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 62.

¹³³ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 63.

¹³⁴ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 63.

ARTC submits however that it is ‘prepared to amend clause 16.2 to make it clear that ARTC would not unreasonably withhold its consent.’¹³⁵

Clarification – no charges for Trades of Paths

In response to the ACCC’s concern that it is unclear, under clause 16.3(a)(ii) of the April 2009 Undertaking, whether or not it is possible that ARTC is able to receive a windfall gain through a transfer, ARTC submits that this ‘misconceives how trades of track Capacity will take place and ARTC’s involvement in these trades. When a Path Usage is traded, the former Access Holder will remain liable for the TOP Charge associated with that Path Usage before it was traded and the new Access Holder who actually uses the path following the Trade will pay the Non-TOP Charge. This is set out in clause 16.4(d) of the December IAHA.’¹³⁶

As such, ARTC submits that ‘[c]ause 16.4(d) also makes it clear that the new Access Holder will not be liable for any Ad Hoc Charge. Accordingly, there is no possibility of ARTC receiving a windfall gain as a result of a Trade.’¹³⁷

Defined term should not be used in clause 16.3

ARTC submits that the ‘defined term “Path Usage” should not be used in clause 16.3. “Path Usage” is defined in the IAHA to mean rights granted under the Access Holder Agreement to that particular Access Holder and clause 16.3 is referring to Path Usages which may have belonged to another access holder which are being assigned to the Access Holder (as well as Path Usages which the Access Holder is assigning to another access holder).’¹³⁸

Non-safe harbour trades

ARTC submits that it ‘proposes to amend clause 16.4(f) to make it clear that ARTC will inform the HVCCC of its decision to approve a trade as soon as practicable or at least within two weeks of being informed of the Trade, or in such lesser period as ARTC notifies from time to time following consultation with the HVCCC.’¹³⁹

ARTC submits that its proposed amendments to clause 16.4(f) are as follows:

‘If an Access Holder requests to Trade a Path Usage which does not meet the conditions in clause 16.4(c), subject to satisfying clause 16.4(c)(viii), ARTC:

- (i) will not unreasonably refuse its consent provided ARTC is able to ascertain that the Trade will not have an impact on Coal Chain Capacity and the Capacity entitlements of other access holders;
- (ii) will use reasonable endeavours to inform the HVCCC of its decision whether or not it approves a trade as soon as practicable;

¹³⁵ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 63.

¹³⁶ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 63.

¹³⁷ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 63.

¹³⁸ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 64.

¹³⁹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 64.

- (iii) in any case, must inform the HVCCC of its decision within two weeks of ARTC being notified of the Trade, or in such other period (which may not be more than two weeks) as notified by ARTC to all access holders and the HVCCC as a result of clause 16.8 or from time to time following consultation with the HVCCC by ARTC; and
- (iv) may impose reasonable conditions on an approval of a Trade, including the period in which the Path Usage may be used.¹⁴⁰

The role of the HVCCC

ARTC submits that it ‘proposes to amend clause 16.6 to make it clear that ARTC will consider in good faith the views of the HVCCC before making a decision in respect of any trade of Coal Access Rights.’¹⁴¹

ARTC submits that the proposed amendments will ‘also provide that Access Holders will be able to identify parties to take part in a trade via the CTS Clearing House (currently the HVCCC) and that ARTC will inform the HVCCC of its decision whether to consent to a trade in accordance with the timeframes and principles set out in the IAHA.’¹⁴²

ARTC submits that it ‘will however retain the ultimate decision making in respect of a Trade. This is consistent with the Transfer Process set out in the CTS Protocols developed by the PWCS Working Group.’¹⁴³

ARTC submits that its proposed amendments to clause 16.6 are as follows:

‘16.6: CTS Administrator and HVCCC

- (a) The Access Holder may use the CTS Clearing House, in accordance with the procedures and functionality of the CTS Clearing House, to identify an access holder willing to participate in a Trade.
- (b) In accordance with the timeframes in clause 16.4, ARTC will consider all Trades notified to ARTC by the CTS Administrator and will inform the CTS Administrator whether a Trade meets the requirements in clause 16.4(c) (and that explicit ARTC consent is therefore not required) and where ARTC consent is required under clause 16.4, whether ARTC consents to that Trade.
- (c) In deciding whether consent should be given under clauses 16.3 or clause 16.4, ARTC will consider in good faith, and is entitled to rely on, recommendations by the HVCCC as to the impact of the Trade on Coal Chain Capacity and the Capacity entitlements of other access holders and ARTC will not be taken to be unreasonably withholding its consent or terminating a Trade where the HVCCC raises material objections to the assignment, novation or trade.’¹⁴⁴

ARTC also submits that it proposes to include the following definitions in the IAHA:

¹⁴⁰ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 64.

¹⁴¹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 64.

¹⁴² ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 64.

¹⁴³ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 64.

¹⁴⁴ ARTC, Response to the ACCC Draft Decision, 31 March 2010, pp. 64-65.

‘CTS Clearing House is the online interface on the website of the CTS Administrator where Access Holders can publish offers and requests for capacity at PWCS and Path Usages and receive the contact details of other Access Holders who indicate their interest in participating in a Trade;

CTS Administrator is the body, appointed from time to time, as responsible for the establishment, administration, operation and maintenance of the PWCS capacity trading system and, as at the Commencement Date of this Agreement is the HVCCC.¹⁴⁵

Specifying a shorter period under clause 16.8

ARTC submits that it ‘proposes to amend clause 16.8 of the IAHA to commit ARTC to complete a review by 31 December 2011 of the maximum time required to approve non-safe harbour trades.’¹⁴⁶

ARTC submits that it ‘will request the HVCCC for its view on the appropriate period of time for approval of trades (which will have regard to the time required for the HVCCC to make an assessment of the impact of the trade on Coal Chain Capacity, and the reasonable time required by ARTC in order to make an assessment of the impact of the trade on the Capacity Entitlements of other access holders), and ARTC will consider the HVCCC’s views in good faith. If ARTC considers that it is able to commit to make a decision to approve or reject non-safe harbour trades in a shorter period of time, ARTC will send written confirmation to the HVCCC and to Access Holders that this is the case.’¹⁴⁷

ARTC submits that its proposed amendments to clause 16.8 are as follows:

‘16.8 Reduction in notice periods

- (a) By [31 December 2011], ARTC will conduct a review of the appropriate time period for ARTC to inform the HVCCC of its decision to approve or reject trades including a decision to approve a trade subject to conditions, which do not meet the conditions set out in clause 16.4(c).
- (b) In conducting that review, ARTC will seek the views of the HVCCC on the appropriate time period for ARTC to inform the HVCCC of its decision to approve or reject trades including a decision to approve a trade subject to conditions, which do not meet the conditions set out in clause 16.4(c), taking into account the appropriate time necessary to determine the impact of the trade on Coal Chain Capacity and the Capacity entitlements of other access holders, and ARTC will consider the views expressed by the HVCCC in good faith.
- (c) If ARTC considers that it is able to reduce the maximum period to consent to a trade under clause 16.4(f), ARTC will inform the HVCCC and access holders in writing of the new maximum period within which it will notify the HVCCC of its decision to approve or reject a trade.’¹⁴⁸

Clause 16.4(a) and (b) of the December IAHA

¹⁴⁵ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 65.

¹⁴⁶ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 65.

¹⁴⁷ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 65.

¹⁴⁸ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 65.

ARTC submits that '[i]n light of the proposed amendments to clauses 16.4(f), 16.6 and 16.8, ARTC proposes to remove the commitments made in clause 16.4(a) and 16.4(b) to work with the HVCCC to develop a new system to trade track Capacity.'¹⁴⁹

A.1.4.7 Reduction of Capacity at port causing potential misalignment with below rail Capacity

ARTC submits that it is 'not necessary for the IAHA to include an additional clause providing for realignment where there is a reduction in PWCS Capacity:'

- 'The Network Exit Capability requirement in clause 3.14 of the IAHA is sufficient to ensure ARTC will not allow an Access Holder to utilise a Path Usage where the Access Holder does not have sufficient Capacity at the PWCS terminal. As this clause is reliant on the port advising ARTC, there is a risk that the train may already be in transit if the port delays informing ARTC. ARTC is therefore very reluctant to make this an absolute obligation.
- This clause is sufficient to enable the 'box ticking' exercise to go ahead.

In any event, when an Access Holder does not have sufficient allocation of port Capacity, there would be no reason for the Access Holder to seek to schedule a Service.'¹⁵⁰

A.1.5 Network Connections and Additions

A.1.5.1 Network Connections

Consultation with the HVCCC

ARTC has set out the steps it proposes to take when it requests the HVCCC's view as to the impact of a proposal (including a request for Access Rights) on Coal Chain Capacity, which include (broadly) that:

- ARTC will seek the HVCCC's view as to whether the proposal will have an impact on Coal Chain Capacity;
- Where the HVCCC provides its view/recommendation within 20 Business Days or such other time as agreed with ARTC, ARTC will consider the view expressed by the HVCCC in good faith. (This reflects the timetable under the MOU).
- Where ARTC disagrees with the view expressed by HVCCC and ARTC reasonably considers there is sufficient time, given the particular circumstances, for the HVCCC to reconsider its views, ARTC will provide its reasons to the HVCCC (either orally or in writing) and will ask the HVCCC to consider ARTC's reasons.
- Where the HVCCC provides its revised view/recommendation within specified timeframe, ARTC will consider the revised view of the HVCCC in good faith.

¹⁴⁹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 66.

¹⁵⁰ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 66.

Ultimately, however, ARTC will not be obliged to follow the HVCCC's recommendation.¹⁵¹

ARTC submits that these 'steps would be followed where ARTC seeks the HVCCC's view on Coal Chain Capacity under section 5.1 of the HVAU, when an Applicant seeks a Connection under section 6.1 and when an Applicant requests Additional Capacity under section 6.2.'¹⁵²

In relation to the Network Connection provisions, ARTC submits that it intends to 'amend section 6.1(a)(iii) of the HVAU to make it clear that it will follow those steps when seeking the HVCCC's view of the impact of a Network Connection on Coal Chain Capacity.'¹⁵³

Defined term 'Applicant'

ARTC notes that it 'agrees that that the defined term "Applicant" should not be used and proposes to amend section 6.1(b) to make this clear.'¹⁵⁴

Ownership of the connecting infrastructure

ARTC's submits that its 'intention in section 6.1(a) is to set out the conditions on which it will enable another piece of track to connect with the Network and the responsibilities of the owner of that piece of track.'

ARTC also submits that '[i]n response to the ACCC's specific concerns that it is not clear who will actually own the connection, ARTC can confirm that ARTC, as a general rule, leases assets relating to the Connection where they form part of the mainline infrastructure as the mainline has to be controlled by ARTC.'¹⁵⁵

A.1.5.2 Additional Capacity Sought by Applicants

Meaning of 'commercial viability' – section 6.2(a)(i)

ARTC submits that it will amend section 6.2(a)(i) of the HVAU in the follow way so 'the factors that ARTC will take into account when considering whether the Additional Capacity sought is commercially viable having regard to the Access Agreement and ARTC's total business activity' are clarified:

6.2 Additional Capacity sought by Applicants

(a) *As provided in sections 3.9 and 5.1, ARTC will consider, as part of the negotiation process with an Applicant, any requests for Additional Capacity. ARTC will consent to the provision of Additional Capacity if:*

(i) *in ARTC's opinion, such provision is commercially viable to ARTC having regard to the:*

(A) *terms and conditions of the relevant Access Agreement;*

¹⁵¹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 36-37.

¹⁵² ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 36-37.

¹⁵³ ARTC, Response to the ACCC Draft Decision, p. 67.

¹⁵⁴ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 67.

¹⁵⁵ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 67.

- (B) *circumstances for ARTC to service and raise financing through debt and equity for the Additional Capacity;*
- (C) *opportunity cost to ARTC given the relative risk and returns associated with the additional capacity financing relative to other investment opportunities; and*
- (D) *net effect on ARTC's balance sheet, gearing ratios and any other debt covenants in existence at the time.*

ARTC submits that it 'considers this provides more detail on the relevant criteria which are relevant to ARTC forming its opinion and in circumstances it is not necessary to add a further reasonableness criterion.'¹⁵⁶

Economic feasibility – section 6.2(a)(iii)

ARTC submits that it 'proposes to delete the reference to “economically” and amend section 6.2(a)(iii) of the HVAU' so that it is consistent with the wording used in Part IIIA of the TPA 'to clarify that ARTC will consent to the provision of Additional Capacity if:'

the Additional Capacity of the Network is, in the opinion of ARTC, technically feasible and provides for the economically efficient operation of the network, consistent with the safe and reliable operation of the Network, will not impact on the safety of any user of the Network, does not reduce Capacity or Coal Chain Capacity (in assessing Coal Chain Capacity, ARTC will consult the HVCCC, and take into account HVCCC's comments on any reduction of Coal Chain Capacity), meets ARTC's engineering and operational standards and does not compromise ARTC's legitimate business interests.¹⁵⁷

Consultation with the HVCCC – section 6.2(a)(ii)

In relation to consultation with the HVCCC when Additional Capacity is sought by Applicants, ARTC proposes to 'amend section 6.2(a)(iii) of the HVAU to make it clear that it will follow' the steps set out above (and at pages 36 and 37 of its submission in response to the March 2010 Draft Decision).¹⁵⁸

ARTC's legitimate business interests

ARTC submits that it 'does not consider it appropriate or necessary to define ARTC's legitimate business interests. “Legitimate business interests” of the access provider is a criterion to which the ACCC must have regard in making an access determination under s 44X(a) of the TPA. Accordingly, ARTC considers that its meaning is sufficiently familiar to ACCC, and access seekers and providers alike and need not be further defined.'¹⁵⁹

Agreements outside of the HVAU – section 6.2(f)

¹⁵⁶ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 68.

¹⁵⁷ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 69.

¹⁵⁸ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 69.

¹⁵⁹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 69.

ARTC notes that it does not intend to ‘circumvent the operation of the HVAU ... by entering into agreements covered by section 6.2(h)’ and to avoid concerns will ‘remove this provision.’¹⁶⁰

A.1.5.3 Expansions and Additional Capacity Identified by ARTC

ARTC notes that it intends that ‘Additional Capacity identified by ARTC would go through the RCG process’, however ‘given the ACCC’s concerns’, ARTC proposes ‘to amend section 6.4(d)(i) to make it clear that ARTC will provide a Concept Assessment Report to the RCG for each project identified by ARTC which ARTC seeks to be included in the RAB.’

ARTC also submits however that ‘if the RCG does not endorse any stage of the project put forward by ARTC, then ARTC may withdraw from the process and proceed without RCG endorsement and seek to have the capital expenditure rolled into the RAB with the approval of the ACCC.’¹⁶¹

A.1.5.4 Additional Capacity recommended by the HVCCC

Meaning of ‘commercial viability’ and reasonableness criteria

ARTC submits that it will amend section 6.3(a)(i) of the HVAU so ‘the factors that ARTC will take into account when considering whether the Additional Capacity sought is commercially viable having regard to the Access Agreement and ARTC’s total business activity’ are clarified (as set out above in relation to clause 6.2(a)(i)).

ARTC submits that it ‘considers this provides more detail on the relevant criteria which are relevant to ARTC forming its opinion and in circumstances it is not necessary to add a further reasonableness criterion.’¹⁶²

Meaning of ‘economic feasibility’

As set out in greater detail above in relation to clause 6.2(a)(iii), ARTC submits that it ‘proposes to delete the reference to “economically” and replace it with ‘provides for the economically efficient operation of the network’ so the wording of 6.3(b)(ii) is consistent with the wording used in Part IIIA of the TPA.’¹⁶³

Determining impact on ARTC legitimate business interests

ARTC submits that it ‘does not consider it appropriate or necessary to define ARTC’s legitimate business interests. “Legitimate business interests” of the access provider is a criterion to which the ACCC must have regard in making an access determination under s 44X(a) of the TPA. Accordingly, ARTC considers that its meaning is sufficiently familiar to ACCC, and access seekers and providers alike and need not be further defined.’¹⁶⁴

¹⁶⁰ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 69.

¹⁶¹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 70.

¹⁶² ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 70.

¹⁶³ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 69 and 71.

¹⁶⁴ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 69 and 71.

A.1.5.5 Conditions precedent to delivery of Additional Capacity in the IAHA

ARTC notes that clause 4.3(a)(iii) of the December IAHA ‘sets out the [following] factors that ARTC will have regard to in determining whether a project is commercially viable’:

ARTC’s total investment programme; and the availability and total cost of capital to ARTC when compared to the rate of return under the HVAU.¹⁶⁵

ARTC submits that its ‘decision in this regard is subject to dispute resolution (but not expert determination)’ and that ‘these factors provide an objective basis and clearly articulate how ARTC will carry out its assessment of commercial viability’ under the AHAs. In addition, ARTC submits that ‘these clauses are negotiable with access seekers, including ACCC arbitration.’¹⁶⁶

ARTC also notes that ‘[a]s the ACCC recognises, ARTC is not a construction company and its revenue is capped at a regulated rate of return that is less than that of a construction company.’ As such, ARTC submits that it:

does not believe it should be committed to build a project when the cost of it obtaining capital to fund the expansion is greater than its regulated rate of return.

Where ARTC is unable to obtain funding at the time, ARTC will be willing to negotiate a funding arrangement with the Access Holder. ARTC has a good faith obligation to negotiate in this regard as set out in the Train Path Schedule.¹⁶⁷

A.1.5.6 Industry Consultation Process

Involvement of Non-Coal users

ARTC submits that it proposes to amend ‘section 6.4(c) ... to provide that ARTC will publish a draft [Hunter Valley Corridor Capacity Strategy] and that ARTC will seek comments from all stakeholders including Non-Coal users before publishing the final strategy. ARTC will commit to considering the views expressed by all stakeholders, including Non-Coal users, in good faith before finalising the strategy.’¹⁶⁸

ARTC notes that it ‘considered whether to include Non-Coal users as members of the RCG but has concluded that this would be inappropriate and potentially unworkable’ as:

There are over 10 Non-Coal producers, each with different interests. However, the contracted GTK of Non-Coal users (and hence their voting entitlement) will be negligible compared to the voting entitlement of the coal users. Their participation would therefore, in effect, be limited to attending meetings and expressing their views on projects which they will not pay for. ARTC does not believe that such participation would assist the endorsement process and may potentially be counter productive.¹⁶⁹

¹⁶⁵ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 71.

¹⁶⁶ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 71.

¹⁶⁷ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 71.

¹⁶⁸ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 72.

¹⁶⁹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 72.

ARTC's obligations to continue construction where there is variation to the endorsed plan

ARTC submits that it 'proposes to amend section 6.4(g)(iii) of the HVAU to make it clear that where a variation to an endorsed project budget is identified:'

- ARTC will continue with project implementation pending a decision of the RCG whether to endorse the revised costing (section 6.4(g)(iii)(C)(i);
- where the RCG endorses the revised costing (the full variation), ARTC will continue with project implementation;
- where the RCG endorses less than the full variation, ARTC may refer the matter to an independent expert and will continue with project implementation in the meantime;
- where the independent expert endorses the revised costing (the full variation) as Prudent, ARTC will continue with project implementation; and
- Where the independent expert does not endorse the revised costing (the full variation) as Prudent, ARTC may cease project implementation.¹⁷⁰

ARTC submits however that 'it will also be made clear ... that any expenditure incurred by ARTC in continuing a project while ARTC waits for endorsement by the RCG or the independent expert will be deemed a Prudent direct cost to the project.'¹⁷¹

ARTC notes that if 'there was a risk that ARTC's expenditure in continuing a project while waiting for a decision would not be deemed Prudent, ARTC would not be prepared to continue construction. The alternative would be for ARTC to 'down tools' while waiting for endorsement.'¹⁷²

Absence of timeframes for endorsement

ARTC's submits that it intends 'the RCG to control the timeframes for development, endorsement and the delivery of projects' under clause 6.4.¹⁷³

ARTC submits that this 'is clear at section 6.4(e)(ii)(F) which provides that the project feasibility report may include a preliminary project plan, including an initial estimate of a timeline for project milestones.'¹⁷⁴

ARTC notes that it is 'exploring what further amendments can be made ... to make it clear that ... the RCG ... controls the timetable' including proposing the following changes:

¹⁷⁰ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 73-74.

¹⁷¹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 73-74.

¹⁷² ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 73-74.

¹⁷³ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 74. ARTC further note that in this respect it is important to note the proposed clarification to clause 6.4(a)(iv) where ARTC will be required to seek RCG approval for a modified consultation process.

¹⁷⁴ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 74.

The concept assessment report to be provided to the RCG under section 6.4(d) will include an assessment of the indicative timeframes for the development, through consultation and the delivery of the project; and

The project assessment report to be provided to the RCG under section 6.4(f) will include a project schedule, including project phases, milestones, deliverables and time tolerances.¹⁷⁵

ARTC also submits that ‘there is no incentive on ARTC to delay the preparation of reports, plans and variations of plans, for endorsement by the RCG. Delays in obtaining endorsement will delay delivery of the project, completion of conditions precedent to Access Rights and receipt of TOP Charges.’¹⁷⁶

‘Modified’ consultation process and minor projects (section 6.4(a)(iv))

ARTC submits that it will ‘clarify section 6.4(a)(iv)’ to show that ‘RCG controls the development, endorsement and delivery of projects’ and that ‘ARTC will seek RCG approval to a modified consultation process’ as:

Given the range and urgency of projects, it is sensible to have flexibility with the process. Ideally, all projects should commence development in a timely manner so as to ensure the risk of project delivery is minimal. This is not an easy thing to achieve as any process involving a series of endorsements is likely to be uncertain to some extent. ARTC believes that the development of a longer term Hunter Valley Corridor Capacity Strategy will mitigate this uncertainty. However, where the RCG has control over process timing, ARTC does not consider it unreasonable that the RCG accept the risk where delivery of a project is not achieved in a timely manner because of the consultation process being unnecessarily complex or time consuming.¹⁷⁷

ARTC also submit that ‘it is critical that ARTC is able to wrap up projects that are not substantial and are undertaken on a regular basis into single reports for endorsement’ as ‘[r]equiring an individual endorsement process for each project that is more related ongoing and programmed replacement of quantities of assets each year (such as rail, sleepers and ballast) is unwarranted and will waste time and resources for both ARTC and the RCG.’¹⁷⁸

ARTC submit however that ‘in order to address the ACCC’s concerns and provide stakeholders with certainty that ARTC will not misuse the flexibility available in section 6.4(a)(iv)’ ARTC proposes to:

‘include clarification in the HVAU as to what normally constitutes minor capital. This would be aligned to the current approach taken where projects that relate to ongoing annual programs for asset replacement will be considered minor capital, as opposed to projects that are intended to deliver tranches of Capacity (which would generally be higher cost). Generally classification of projects into minor capital or otherwise has been clear and uncontentious in the past. ARTC’s principles underlying classification of

¹⁷⁵ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 74.

¹⁷⁶ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 74.

¹⁷⁷ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 74.

¹⁷⁸ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 74-75.

projects could be agreed with the RCG and transparently applied. Where the classification of a project was not clear the RCG would have discretion.’¹⁷⁹

Developing the HV Corridor Capacity Strategy

ARTC submits that it ‘proposes to make the following changes to section 6.4(c) of the HVAU:’

- ARTC will conduct an annual meeting with the HVCCC and the relevant terminals at the Port of Newcastle prior to developing the Hunter Valley corridor Capacity strategy. The objective of the consultation is to provide that any planned expansion to the Network is aligned with expansions at coal terminals at the Port of Newcastle;
- Following that annual meeting, ARTC will publish a draft Hunter Valley corridor Capacity strategy on ARTC’s website and will invite comments from stakeholders, including both coal and Non-Coal users of the Network;
- ARTC will consider and take into account the views expressed by stakeholders in good faith before publishing the Hunter Valley corridor Capacity strategy on its website.¹⁸⁰

ARTC submits that it will also make it ‘clear that these steps will be followed each year and that following finalisation of the Hunter Valley corridor Capacity strategy, ARTC may seek formal endorsement from the RCG of the strategy (as contemplated in section 6.4(c)(v)).’¹⁸¹

ARTC is of the view that these ‘proposals address the ACCC’s apparent concern that ARTC is not committing to publishing the strategy each year as well the ACCC’s concerns regarding recognition of the interest of Non-Coal users.’¹⁸²

ARTC submit that there ‘is no benefit in requiring ARTC to commit to publish the Hunter Valley Corridor Capacity strategy each year according to a prescribed timetable which cannot be varied’ as the ‘timetable for the preparation of the draft strategy and the publication of the final strategy needs to be flexible to take into account the timetables of particular important projects and developments and the need to take in the views of the coal terminals, the HVCCC and coal producers.’¹⁸³

However, ARTC note that for ‘the sake of clarity,’ ARTC proposes that it will:

amend section 6.4(c)(ii) to make it clear that in developing the Hunter Valley corridor Capacity strategy, ARTC will base the strategy on the rolling annual Capacity forecast developed by the RCG which will be based on contracted volumes sought (not demand forecasts). This reflects the greater commitment made by coal producers to volumes when TOP contracts are entered into.¹⁸⁴

¹⁷⁹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 75.

¹⁸⁰ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 75.

¹⁸¹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 75.

¹⁸² ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 75.

¹⁸³ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 75.

¹⁸⁴ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 75.

Content of reports and plans provided to RCG

ARTC submits that it ‘proposes to make amendments to section 6.4 to make it clear that the reports provided to the RCG at each stage of consultation will contain the information set out in the relevant section, unless ARTC and the RCG agree that the information does not need to be provided.’¹⁸⁵

Meaning of planned ‘timing tolerance margins’

ARTC submits that it ‘does not consider it necessary or appropriate to include explicit definitions for the planned ‘timing tolerance margins’. The tolerance margins for both cost and timing will alter from project to project and will be set out in the project assessment report provided to the RCG:’

- in terms of cost, the tolerance margins will be indicated in the project budget included with the project assessment report (section 6.4(f)(ii)(C)) which sets out that the tolerance margins would typically be +/- 10%, unless there is a larger margin appropriate for large projects;
- in terms of timing, the proposed amendment to section 6.4(f) which would require the report to include a ‘project schedule, including project phases, milestones, deliverables and time tolerances’ would specify the timing tolerance margins.¹⁸⁶

Large projects and staged delivery

ARTC submits that it ‘proposes to amend section 6.4(g)(iv) to remove the subjective criteria to be employed ... in determining whether there should be staged delivery of a project’.¹⁸⁷

ARTC also submits that under the proposed approach, it ‘may only propose a staged delivery ... where a project has a delivery timeframe of more than 12 months. It will still be clear that where this is the case, upon commissioning of any stage, ARTC may capitalise financing costs in the year that stage is commissioned.’¹⁸⁸

ARTC further submits that it will be made clear ‘that ARTC still has discretion as to whether it will propose a staged delivery for such projects. ARTC considers that it is necessary for it to retain such discretion as the appropriateness of staged delivery will depend on the characteristics of the particular project.’¹⁸⁹

Agreeing on an independent expert

ARTC submits that it ‘proposes to amend section 6.4 to provide that where RCG and ARTC fail to reach agreement upon the appointment of an independent expert within 10 business days of ARTC deciding to refer a matter to an independent expert, such a

¹⁸⁵ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 76.

¹⁸⁶ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 76.

¹⁸⁷ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 76.

¹⁸⁸ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 76.

¹⁸⁹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 76.

person as appointed by the President of the IAMA (the Institute of Arbitrators and Mediators Australia) will act as expert.’¹⁹⁰

A.1.6 Network Transit Management

A.1.6.1 ARTC Response (31 March 2010) and Proposed Amendments

ARTC submitted an explanation of how Capacity Planning takes place:¹⁹¹

- The long and medium term Capacity analysis takes place through the annual Corridor Capacity Strategy.
- The Master Train Plan (MTP) is the underpinning timetable and sets out slots available for coal users (which are available for allocation by the HVCCC) and generally timetables specific scheduled services for non-coal users. The MTP ‘... does not in practice take into account the Hunter Valley corridor Capacity strategy (which covers anticipated volumes and future expansion)’. ARTC proposes to remove reference to the Hunter Valley corridor Capacity strategy to remove any ambiguity that it takes into account forecast paths.
- The starting point for determining the Daily Train Plan (DTP) is the MTP and ARTC adds in long term and short term track possessions and the timetable slots available under the MTP for coal trains.
- The MTP with additions is provided to the HVCCC which then develops a daily template to optimise coal throughput using those slots. In future, this process will take into account the contractual entitlements of each coal producer through the ‘box ticking’ exercise. The HVCCC’s template/schedule (Coal Train Plan) in effect overlays the slots available under the MTP for coal trains.
- The Coal Train Plan will then be used by ARTC to form part of the Daily Train Plan (in effect the daily timetable) together with the paths scheduled for Non-Coal trains and also the planned network possessions.

ARTC concludes that in summary it is the HVCCC that carries out the coal train planning function and ARTC is ultimately responsible for preparing the daily train plan which takes into account possessions and Non-Coal trains.¹⁹²

A.1.6.2 Medium Term Capacity Management

ARTC submits that it will amend section 7.1 of the HVAU to make it clear that it will have regard to capacity entitlements under existing AHAs (agreements for coal access rights) and existing Access Agreements (agreements for non-coal access rights), in developing the MTP.¹⁹³

ARTC submits that it will not take into account any prospective contractual commitments in preparing the MTP.¹⁹⁴

¹⁹⁰ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 76.

¹⁹¹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p.78.

¹⁹² ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 78.

¹⁹³ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 78.

¹⁹⁴ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 79.

ARTC submits that it ‘does not consider it necessary or appropriate for section 7 of the HVAU to specify the processes and in particular the timeframes that it will follow in carrying out network transit management in the HVAU. ARTC submits.’¹⁹⁵

- It is not appropriate for ARTC (and the HVCCC) to commit to rigid timeframes in preparing the above documents as planning is a fluid process with immediate actions and outcomes. Express obligations and timetables would potentially slow down the process and render it less flexible.
- The comments considered by the ACCC ‘appear to be limited to comments made by the NSWMC and coal producers (plus very limited comments by RailCorp) who are not familiar with how train scheduling takes place’.
- ‘The explanations ... in the Explanatory Guide are to educate and inform the ACCC and coal producers of the reasons and background for section 7’ and ‘it is not appropriate to include detailed explanations in the HVAU itself.’

The preliminary view in the Draft Decision stated that the HVAU should include a mechanism that requires ARTC to consult with the HVCCC when undertaking medium term capacity management.¹⁹⁶ ARTC submits that the HVCCC is an integral part of the process and it plans the coal trains’ capacity for coal Access Rights. ARTC submits that ultimately it is contractually responsible for the preparation of the DTP and delivery of contracted capacity and that ‘rigidly locking in a process for 10 years with what is effectively a sub-contractor is simply not appropriate’.

A.1.6.3 Network Management Principles

ARTC submits that Train Decision Factors are included as a Schedule to ARTC’s lease of the NSW Network and that the Train Decision Factors set out a train priority matrix and a decision matrix with rules to be followed by ARTC. These have been imported as Network Management Principles (NMPs) in the 2009 HVAU (Schedule C).¹⁹⁷

ARTC has sought to provide some guidance in the NMPs to a train controller where the Train Decision Factors under the NSW Lease allow for such discretion. ARTC proposes to make it clear in the NMPs that the Train Priority Decision Matrices are contained in the NSW Lease and that ‘ARTC has sought to recognise the particular objectives of coal trains in providing for an additional set of guidelines to be applied when coal trains run out of course.’¹⁹⁸

A.1.6.4 Network Transit Management in the IAHA

Sculpting the Annual Contracted Path Usages and the HVCCC

ARTC submits in relation to sculpting the annual contracted path usages that it proposes to include in the HVAU the set of principles set out in Attachment One of its Response to the ACCC Draft Decision which relates to consultation with the

¹⁹⁵ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 79.

¹⁹⁶ ACCC, Draft Decision on HVAU, 5 March 2010, p. 442.

¹⁹⁷ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 79.

¹⁹⁸ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 80.

HVCCC. ARTC submits that these principles will apply to ARTC's proposed obligation to consult with the HVCCC under section 3.2.¹⁹⁹

Inclusion of alignment clauses in the HVAU

ARTC submits that it proposes that clauses 3.2 (sculpting) and 3.3 (tolerance) be included in the IAHA as Tier 1 mandatory provisions which must be included in all Access Holder Agreements for coal Access Rights.²⁰⁰

Clarity and Certainty in Sculpting the Annual Contracted Path Usages

ARTC submits that all Access Holders 'will have a Contract Year that commences 1 January' and where the initial Contract Year is not a calendar year then ARTC will need to follow a revised process in determining the monthly base path usages. ARTC submits its approach will be to:

- determine what would have been the Access Holder's Annual Contracted Path Usages if a full year had been contracted and to prorate this to the remaining months of that year. This contracted path entitlement will then be divided by the number of the months of their initial Contract Year to determine the Monthly Average Path Usages.²⁰¹
- consult with PWCS before determining its planned track possessions for the initial Contract Year, and once these are determined, ARTC will consult with the HVCCC and after taking into account the HVCCC's views, ARTC will inform Access Holders of their Monthly Base Path Usages for the remainder of the Contract Year.

ARTC proposes to make changes to clause 3.2 of the IAHA to make this process clear.²⁰²

Availability Exceptions in the IAHA

ARTC submits that it amended clause 3.6 of the 24 December IAHA to 'make it clear that Availability Exceptions only apply to the extent that the occurrence of the Availability Exception prevents ARTC (acting reasonably) from making that particular Train Path or Path Usage available to the Access Holder.'²⁰³ ARTC does not propose to make a further amendment to clause 3.6 requiring ARTC to provide notice of an Availability Exception to an Access Holder.²⁰⁴

A.1.6.5 Train Path Schedule

ARTC submits generally that the Train Path Schedule (TPS) is critical to the agreement and that drafting notes simply provide an explanation of how it operates to enable an understanding of how charges are calculated and examples of conditions precedent to the entitlement of a tranche of Path Usages. ARTC submits that

¹⁹⁹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 81.

²⁰⁰ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 81.

²⁰¹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 81.

²⁰² ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 82.

²⁰³ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 82.

²⁰⁴ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 82.

significant changes were made to the 24 December version of the IAHA after consultation with stakeholders, ‘review of the PWCS Long Term Ship or Pay Agreement and related protocols and attempts by ARTC to clarify the obligations set out in the earlier version.’ ARTC advises that it awaits industry comment on this.²⁰⁵

Clause 1.4 of the 2009 IAHA provides that if a Train Path Schedule imposes additional terms in relation to a train path, then those terms will take priority over the body of the agreement to the extent that any inconsistency arises between them. The Draft Decision invited ARTC to provide the ACCC and stakeholders with examples of potentially inconsistent terms.²⁰⁶ ARTC submits that ‘the Train Path Schedule is more likely to be amended to suit the particular situation of the Access Holder rather than provisions in the body of the Access Holder Agreement which are of more general application’.²⁰⁷ ARTC submits that ‘given the additional level of specificity that is likely to be included in the Train Path Schedule, ARTC considers it important to make it clear that the Train Path Schedule may override the terms in the body of the agreement’. ARTC submits that ‘given the ACCC’s concerns with alignment provisions, ARTC will make it clear that those provisions identified as Tier 1 (mandatory) provisions will be excluded from the scope of clause 1.4 of the IAHA’.²⁰⁸

A.1.6.6 Network Transit Management in the OSA

ARTC submits that ‘a number of the issues raised here [by the ACCC in the Draft Decision] were considered by the ACCC in approving the Interstate Access Undertaking’ and ‘[t]he ACCC agreed that such changes were not necessary for the reasons explained by ARTC during that process’. ARTC submits that it has not been able to identify why the differences between the Interstate and Hunter Valley Networks would justify making these changes given the impacts on ARTC and customers of the inconsistencies in the two undertakings and the contracts discussed above.²⁰⁹

Availability Exceptions

ARTC submits that it proposes to amend the definition of Availability Exceptions in clause 3.1(b) of the 2009 OSA to align with clause 3.6 of the IAHA. ARTC submits that it does not propose to amend clause 3.1(b) to provide that ARTC must use best endeavours to give reasonable notice of an Availability Exception and that the reasons for this are set out in the discussion on Availability Exceptions in the IAHA (above).²¹⁰

Accessing the Network under multiple agreements

ARTC submits that it proposes to ‘amend clause 3.1(c) of the OSA to clarify that operators may have additional contracts under which they can access the Hunter

²⁰⁵ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 82.

²⁰⁶ ACCC, Draft Decision on HVAU, 5 March 2010, p. 450.

²⁰⁷ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 83.

²⁰⁸ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 83.

²⁰⁹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 83.

²¹⁰ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 83.

Valley Network. The amendments made will be similar to those made to clause 3.6(b) of the IAHA',²¹¹

Passenger Priority obligations

The Draft Decision considered that direct clarification of passenger priority obligations in the OSA is important to ensure parties are fully informed of their obligations.²¹² ARTC submits that 'the current wording in clause 3.4 of the OSA reflects the wording of the NSW Lease and ARTC is currently investigating and reviewing its obligations under the NSW Lease in that regard.'²¹³

Code of Practice and changes to Communication Equipment

ARTC submits that it does not propose to amend clause 5.4(b) or (j) of the 2009 OSA. ARTC submits that 'changes to the Code of Practice or to communications equipment will typically be required to address safety concerns and in order to adhere with directions from local or state government entities'. ARTC submit that it is not feasible to consult with, or provide timeframes to, the Operator in these cases.²¹⁴

Removal of Rolling Stock from the Network

ARTC submits that it 'does not propose to amend clause 5.5 of the [2009] OSA to require ARTC to provide an Operator with a specified or reasonable period of notice before ARTC is be able to remove the Operator's train.' ARTC submits that it cannot afford to have rolling stock blocking the network where Access Rights have been allocated. To add a 'reasonableness' requirement may act to delay removal by providing parties with the ability to dispute what is reasonable, when the aim is to remove the obstruction as soon as possible.²¹⁵ ARTC further submits that the 'requirement is consistent with the terms of the Interstate Indicative TAA' and that 'the concern is even more critical in the Hunter Valley network than on the Interstate Network due to the potential massive economic loss to the coal chain arising from delays in throughput on the Hunter Valley.'²¹⁶

ARTC submits that it does not agree that the risk allocation in the removal of rolling stock is inappropriately balanced. ARTC submits that as the obstruction was caused by the Operator, 'any costs, liability, injury or loss should be indemnified by the Operator.' ARTC submits that if ARTC had to accept the exposure then it would not apply the provision which could have a significant adverse effect on coal chain throughput. ARTC also submits that the clause is consistent with the Interstate TAA and there is no reason for it to be different in the Hunter Valley.²¹⁷

Instructions

²¹¹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 84.

²¹² ACCC, Draft Decision on HVAU, 5 March 2010, p. 452.

²¹³ ARTC, Response to the ACCC Draft Decision, 31 March 2010, pp. 83-84.

²¹⁴ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 85.

²¹⁵ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 85.

²¹⁶ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 85.

²¹⁷ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 85.

The Draft Decision outlined some concerns with the subjectivity and clarity of the definition of Instructions.²¹⁸ ARTC submits that ‘introducing inconsistency in the definition creates potentially different standards between the operations of two networks in circumstances where ARTC staff members may control different networks on different days’.²¹⁹

The Draft Decision set out the ACCC’s preliminary view that the right to issue operating restrictions without an express obligation to remove them when unnecessary is unlikely to be appropriate.²²⁰ ARTC submits that it proposes to amend clause 6.2 of the 2009 OSA (which applies to operating restrictions) to make it clear that ARTC will remove operating restrictions when they are no longer necessary. ARTC submits that the ACCC’s recommendation that this change be made to clause 8.1, which applies to Instructions, is not appropriate. ARTC submits that ‘instructions, which are usually issued for safety reasons, direct an Operator to do something specific; a single direction rather than an ongoing obligation’ and ‘it is therefore not appropriate or necessary for the clarification proposed to clause 6.2 to also apply to Instructions.’²²¹

Network Control Directions

ARTC submits that it proposes to amend the definition of Network Control Directions to remove the operative element requiring the Operator to comply with the Network Control Directions immediately.²²² The Draft Decision set out the preliminary view that ‘amendments to the section to recognise qualifications relating to safety are likely to be appropriate’.²²³ ARTC submits that ‘the obligation to comply with a Network Control Direction immediately will however remain in clause 8.2(a) of the OSA. As this is only a minor correction with no operational impact, it has no consistency implications with the operation of the Interstate Indicative TAA’.²²⁴

A.1.6.7 Repairs, maintenance and upgrading of the Network

The Draft Decision states:

‘The ACCC notes the inclusion of the words ‘to the extent of such a requirement only’ in clause 6.2 of the indicative OSA. The ACCC has taken the inclusion of this wording to mean that ARTC would be obliged to remove the restriction where necessary and seeks ARTC’s confirmation that they consider themselves so bound under this provision.’²²⁵

ARTC submits that ‘it considers it is required to remove an operating restriction when that restriction is no longer necessary under clause 6.2 of the OSA.’²²⁶

A.1.6.8 Third Party Works

ARTC submits that it ‘proposes to amend both clause 11.3(a)(i) of the IAHA and clause 9.4(a)(i) of the OSA to make it clear that Third Party Works can only be

²¹⁸ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 86.

²¹⁹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 86.

²²⁰ ACCC, Draft Decision on HVAU, 5 March 2010, p. 454.

²²¹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 86.

²²² ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 86.

²²³ ACCC, Draft Decision on HVAU, 5 March 2010, p. 454.

²²⁴ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 86.

²²⁵ ACCC, Draft Decision on HVAU, 5 March 2010, p. 456.

²²⁶ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 86.

automatically carried out where there is a legal obligation that those works be carried out.’ ARTC further submits that the ‘legal obligation may arise from legislation (including regulations), the NSW Lease or contractual commitments entered into by ARTC. ARTC also wishes to clarify that the Third Party Works definition under the IAHA excludes ARTC’s contractors.’²²⁷

A.1.7 Miscellaneous

A.1.7.1 System Assumptions

ARTC submitted that it is committed to participating in the development of System Assumptions and to use them in Capacity assessments. ARTC further submitted that it is critical that it not be forced into accepting track related System Assumptions that it does not agree with. ARTC stated that the System Assumptions proposed in the 24 December IAHA protect ARTC from this scenario.²²⁸

ARTC submitted that there is no agreed mechanism as to how System Assumptions will be determined and there is a possibility that the HVCCC could adopt System Assumptions which ARTC does not agree with. ARTC noted that its voting entitlements under the HVCCC Services Agreement are less than those of coal representatives in general resolutions and equal to the vote of one producer representative for special resolutions.²²⁹

ARTC further noted that the PWCS Long Term Ship or Pay Agreement specified a set of System Assumptions that the HVCCC was to develop in a System Assumptions Document, but it did not specify how they were to be developed and nor how they would be determined in the event of disagreement.²³⁰

ARTC submitted that it is necessary for it to reserve the ability to determine additional track related System Assumptions, which may not be in the System Assumptions Document. ARTC submitted that the System Assumptions referred to in the PWCS Long Term Ship or Pay Agreement are port-centric and do not identify track related assumptions that need to be developed. ARTC submitted that if the HVCCC fails to identify these assumptions, ARTC will need a backstop to be able to determine them.²³¹

ARTC noted that changes to the definition of System Assumptions may have implications for ARTC’s ability to deliver contractual entitlements because the System Assumptions determine ARTC’s Capacity assessment in the contract.²³²

A.1.7.2 KPIs

ARTC submitted its intention to include system-wide KPIs in a revised HVAU and IAHA.²³³

²²⁷ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 86.

²²⁸ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 88.

²²⁹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 88.

²³⁰ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 88.

²³¹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, pp. 88-89.

²³² ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 89.

²³³ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 89.

ARTC submitted that it is important for the ACCC to recognise that the IAHA includes additional mechanisms intended to create incentives for ARTC and the Access Holder to deliver on contracted performance and that these would have the same effect as any prescribed KPIs.²³⁴

ARTC submitted that its performance is measured against System Assumptions and the true-up test. Specifically, ARTC stated that it will carry out its Capacity analyses by reference to the System Assumptions and should it depart from the System Assumptions, ARTC may, for example, over contract Capacity and this would lead to rebates under the true-up test. ARTC further stated that the application of the true-up test places strong incentives on ARTC to ensure it makes all contracted paths available as applicable. ARTC submitted that it will only be able to do so if it keeps unplanned maintenance and ARTC system losses to a minimum, and maintains the condition of the Network so that contracted Capacity can be achieved.²³⁵

ARTC submitted that an Access Holder's performance will be measured against a set of Service Assumptions applicable to the services the access holder runs. The Service Assumptions are set out in the Train Path Schedule to the AHA and will include train axle load, train length, maximum speed and section run time. ARTC noted that in particular circumstances of non-compliance with the Service Assumptions, it can penalise the Access Holder under clause 11.5 of the 24 December IAHA.²³⁶

ARTC submitted that it does not object to reporting of specific performance through KPIs to aid transparency, but in cases where this could possibly incorporate compensation for poor performance, this will result in double counting, given the incentives established through the System Assumptions and true-up test.²³⁷

ARTC submitted that it will include system-wide KPIs in a revised IAHA to act as a starting point for limited negotiation in individual access agreements. ARTC submitted that it will incorporate certain limitations around the KPIs that eventually might be negotiated so as to ensure a degree of consistency across AHAs.²³⁸ ARTC submitted that it will negotiate KPIs with applicants prior to entering into AHAs.²³⁹

ARTC submitted that it would not object to an Access Holder involving an Operator in the development of KPIs for AHAs.²⁴⁰

A.1.7.3 The exercise of discretion under the HVAU and associated agreements

ARTC submitted that it is not appropriate to apply a blanket rule to all provisions in the HVAU, IAHA and OSA where ARTC has discretion in the view or opinion to be formed or its consideration, as these are very complicated arrangements, which serve the needs of a different range of markets and customers and address a number of

²³⁴ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 89.

²³⁵ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 90.

²³⁶ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 90.

²³⁷ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 90.

²³⁸ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 90.

²³⁹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 90.

²⁴⁰ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 90.

different variables, including commercial, planning, operational and infrastructure developments.²⁴¹

ARTC submitted that there are a number of areas where it is appropriate to employ a reasonableness criterion and where it is appropriate to do so, ARTC has provided for this in the 2009 HVAU, 2009 IAHA or 2009 OSA. ARTC stated that it is also reviewing other discretions identified and considering whether a reasonableness criterion is appropriate.²⁴²

ARTC submitted by way of examples that where decisions are to be made by ARTC under the OSA in a very short period of time, it is inappropriate to employ a reasonableness criterion which may delay and prolong the decision making and compliance with that decision, due to the risk of dispute. ARTC provided an example, that an obligation to provide reasonable notice before ARTC takes possession of the track is inappropriate when immediate action is required for safety reasons.²⁴³

A.1.8 Financial modelling

A.1.8.1 Loss capitalisation model

ARTC submitted that it has little incentive to price excessively because excessive pricing would reduce the benefit of loss capitalisation. Further, ARTC states that excessive pricing may affect volumes and delay revenue growth, which can delay the recovery of prior economic losses under the loss capitalisation model, even where full economic cost can be achieved.²⁴⁴

Despite this, to address the ACCC's concerns, ARTC intended to develop a cap on annual pricing variations in Pricing Zone 3, where revenue is not constrained. The cap is only applicable to coal access revenue in Pricing Zone 3 intended to recover the variable capital component (VCC) and fixed capital component (FCC).²⁴⁵

ARTC, however, did not intend for the cap to apply to capital charges associated with new investments (i.e. the new capital component or NCC) in Pricing Zone 3 from the Commencement Date to the year in which the annual pricing variation is to apply. ARTC stated that the extent to which new investments are commissioned and recovered through TOP charges will be subject to the outcomes of the RCG consultation process.²⁴⁶ The starting access prices at the Commencement Date are the Interim Indicative Access Charges for Pricing Zone 3.²⁴⁷

Further, ARTC stated that a cap to the variation between the Indicative Access Charge and the Interim Indicative Access Charges cannot be incorporated.²⁴⁸

A.1.8.2 Regulated asset bases

The Use of DORC Values

²⁴¹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 90.

²⁴² ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 91.

²⁴³ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 91.

²⁴⁴ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 92.

²⁴⁵ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 92.

²⁴⁶ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 92.

²⁴⁷ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 92.

²⁴⁸ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 92.

To address the ACCC's concerns, ARTC proposed to amend section 4.3(a)(ii) to specify that the ACCC's approval is required for the DORC value for segments that have not been ascribed a regulatory asset value in accordance with the NSW Rail Access Undertaking.²⁴⁹

In relation to the Dartbrook to The Gap segment, ARTC intended to roll forward the DORC value proposed to the ACCC to an opening asset value as at the Commencement Date using the formula for the roll forward of the RAB Floor Limit. ARTC has stated that the details of the roll-forward will be submitted as part of the first Annual Compliance Assessment.²⁵⁰

Different RABs for new and old assets

In accordance with the ACCC's preliminary view, ARTC intended to use a single RAB for each Pricing Zone and a single WACC for the Undertaking. However ARTC was of the view that the WACC proposed by the ACCC did not fully recognise the higher risk on new investments.²⁵¹

Capital expenditure and prudence

ARTC proposed to make amendments to section 6.4(g)(iii)(C)(i) to make it clear that ARTC will continue with project implementation while awaiting a decision by the RCG or an independent expert to determine if budget variations are prudent, and proposes that any expenditure incurred while awaiting the decision will be deemed as prudent.²⁵²

Direct payments from Individual Applicants

ARTC proposed to amend definitions of Out-turn revenue and Net Capex in section 4.3 to make it clear that direct payments from individual applicants will be excluded, as it is not ARTC's intention to recover return on capital contributions.²⁵³

Apportionment of shared maintenance and capital costs

ARTC submitted that it would remove section 6.2(f) from the HVAU (in relation to calculation of shared ongoing maintenance and capital cost) as it considers that the Pricing Principles in the HVAU will ensure ARTC does not collect more access revenue than the Ceiling Limits, which was the initial purpose of inclusion of this clause.²⁵⁴

A.1.8.3 Floor and ceiling price and revenue limits

Treatment of Ancillary Services

ARTC submitted that it would seek to recover the Direct Cost on the Constrained Network for ancillary services. As such, ARTC proposed to treat ancillary services in

²⁴⁹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 93.

²⁵⁰ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 93.

²⁵¹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 94.

²⁵² ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 94.

²⁵³ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 94.

²⁵⁴ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 94.

the same way as it treated non-coal for the purposes of the ceiling test compliance. ARTC submitted that it was not its intention to charge for services relating to the trading of train paths.²⁵⁵

Definition of Direct Cost

In accordance with the ACCC's preliminary view, ARTC proposed that the definition of direct costs would be amended as such:

“Direct Cost” means maintenance expenditure, including major periodic maintenance that varies with usage of the Network, and may include other costs that vary with the usage of the Network, but excluding Depreciation.²⁵⁶

ARTC stated, however, that this amendment may increase Direct Cost, and non-coal services may recover less than Direct Cost in the future, which makes the application of a price cap for non-coal services more problematic.²⁵⁷

A.1.8.4 Economic cost and cost allocation

ARTC submitted that its proposed approach in relation to including interest during construction in the RAB includes the following features:

- The rate of return will be used as a proxy for the cost financing;
- Interest incurred during construction, and the capitalisation of that interest will be included in the RAB in the year the asset is commissioned;
- To determine the interest on capital spend for the current year, the rate of return will be applied to 50% of the capital spend incurred in the current year, to reflect the spread of cash flows over the entire year; and
- The amount of capital spends and interest during construction to be included in the RAB will be calculated according to 1 July of the year in which the assets are commissioned.²⁵⁸

To reflect this approach, ARTC proposed to amend the HVAU as follows:

- amending the definition of Net Capex in section 4.3(b) and (d) to make it clear that capital expenditure will include interest reasonably incurred during construction and a capitalisation of that interest incurred during construction up until commissioning of the asset (to the extent that capital expenditure is incurred on a prudent basis);
- amending section 4.4(g) to remove the reference to ‘including interest reasonably incurred during construction’ which will have the effect of ensuring such interest is not taken into account as an expense when determining the costs of Additional Capacity relevant to the Economic Cost of a section 6; and

²⁵⁵ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 95.

²⁵⁶ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 95.

²⁵⁷ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 95.

²⁵⁸ ARTC, Response to the ACCC Draft Decision, 31 March 2010, pp. 96 – 97.

- amending section 4.4(c) and (f) to include capitalised interest during construction in the asset base.
- including a new section 6.4(g)(v)(C) that requires, where a project is delivered after the latest of the date for delivery in the timetable provided under section 6.4(d)(ii)(E) or any delivery date forming part of an endorsed variation under section 6.4(g)(i)(D) or any delivery date determined by the Independent Expert or the ACCC as applicable, then any interest during construction related to the period between that date and actual delivery will not be deemed as prudent.²⁵⁹

ARTC further stated that these changes were desirable for the following reasons:

“... will have the effect of ensuring ARTC does not double count interest incurred during construction, nor does it recover interest during construction incurred in relation to capital expenditure that is not prudent, nor any delay in delivery resulting from ARTC management that is not prudent.”²⁶⁰

A.1.8.5 Return on capital (WACC)

Impact of proposed rate of return on ARTC

In considering the WACC, ARTC’s submission raised the concern that the proposed rate of return by the ACCC was 225 basis points below the low end of the range proposed by ARTC. ARTC states that the average level of Interim Indicative Access Charges for 2010 remained at similar levels to the access pricing applied under the NSW Rail Access Undertaking in 2009, based on the rate of return proposed by ARTC (10.29% real pre-tax for EWACC and 10.54% real pre-tax for IWACC). If the WACC in the draft decision was to be applied, the estimated decline of the average level of access pricing on the constrained network would be 15% or 20c/tonne.²⁶¹

ARTC further submitted that the effect of underestimating the WACC (high risk of underinvestment and low benefit from reduced pricing) is potentially worse than the effect of overestimating it (higher pricing and possible overinvestment is not as costly compared to benefit of increased likelihood that investment will occur).²⁶²

Calculation of debt margin

ARTC commissioned Synergies Economic Consulting (Synergies) to consider an alternative methodology to determine the appropriate cost of debt proxy to determine the debt margin. Based on Synergies’ recommendation, ARTC proposes an alternative to extrapolate the 10 year rate based on the difference between the 5 year rate and 7 year rate.²⁶³

Synergies imply that Bloomberg provides a more robust estimate of the debt margin than CBASpectrum, as CBASpectrum is only available to CBA customers and not

²⁵⁹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, pp. 97 – 98.

²⁶⁰ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 98.

²⁶¹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 99.

²⁶² ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 100.

²⁶³ ARTC, Response to the ACCC Draft Decision, 31 March 2010, pp. 100 – 101.

readily accessible. Further, Synergies consider that, the method that CBASpectrum uses to construct its yield curve from shorter yield curves is not known.²⁶⁴

Synergies submitted that the ACCC's approach to calculating the debt margin by adding the difference between a 7 year and 10 year AAA rated bond to a 7 year BBB rated bond could be problematic. Synergies state that this is because it is uncertain if Bloomberg will continue to publish ratings for 10 year AAA yields following the cessation of the Commonwealth Government guarantee on 31 March 2010.²⁶⁵

Alternatively, Synergies proposed a simple linear extrapolation of the 10 year BBB yield based on the difference between the 5 year and 7 year BBB curve. Comparing the result of the proposed extrapolation to that of the AER's method using AAA yields, Synergies conclude that the average difference in yields is minimal.²⁶⁶

Value of gamma

ARTC submitted that substantial uncertainty still existed surrounding the value of gamma, and cited IPART's decision to retain a range of gamma of 0.3 to 0.5, which was made with knowledge of the AER's decision to set gamma at 0.65. ARTC did not consider reliable evidence existed to support a value of gamma more than 0.5. A gamma value of 0.5 was considered by ARTC to be appropriate for consistency's sake, as the Interstate Access Undertaking also applied a gamma value of 0.5.²⁶⁷

In relation to the payout ratio, Synergies submitted that only the Hathaway and Officer (2004) study²⁶⁸ was consistent with the Monkhouse definition of the payout ratio, and that Lally (2002)²⁶⁹ only estimated the payout ratio from financial statements which were likely to be very different to the actual credits created and distributed. Synergies also questioned the assumptions behind Handley (2009) in relation to the distribution of free cash flows and reinvestment of retained cash flows which earn the firm's cost of capital. In addition, Synergies regarded Officer (1994) as only requiring a constant payout ratio, and did not imply that a 100% payout ratio was required. Based on this evidence, Synergies considered that the appropriate payout ratio was 71%.²⁷⁰

In relation to the utilisation rate or theta, Synergies cited Skeels' review of the SFG study, an extension of the original Beggs and Skeels (2006). Skeels concluded that the revised theta estimate of 0.23 that SFG submitted represented the 'most accurate estimate currently available.' Synergies therefore asserted the maximum value of theta is 0.37, if sole reliance was to be placed on Beggs and Skeels (2006). Also, Synergies considered that Handley and Maheswaran (2008) should be excluded from

²⁶⁴ Synergies Economic Consulting, *ACCC's Draft Decision re ARTC's Hunter Valley Coal Network – Response re WACC Issues*, Attachment 5, March 2010, p. 9.

²⁶⁵ Synergies Economic Consulting, *Response re WACC Issues*, Attachment 5, March 2010, p. 10.

²⁶⁶ Synergies Economic Consulting, *Response re WACC Issues*, Attachment 5, March 2010, pp. 10-11.

²⁶⁷ ARTC, *Response to the ACCC Draft Decision*, 31 March 2010, p. 105.

²⁶⁸ Hathaway, N. and Officer, R.R., *The Value of Imputation Tax Credits*, Update 2004, Capital Research Pty Ltd, 2004.

²⁶⁹ Lally, M., *The Cost of Capital Under Dividend Imputation*, A Report Prepared for the ACCC, 2002.

²⁷⁰ Synergies Economic Consulting, *Response re WACC Issues*, Attachment 5, March 2010, pp. 15 – 16.

consideration for a number of reasons, among which were the measurement of face value instead of market value, and not accounting for the risk borne by investors to earn dividends.²⁷¹ Given the above considerations, Synergies maintained its view that a reasonable estimate of gamma was zero.

Market risk premium

ARTC was not convinced that global financial markets have recovered to a level of substantial stability, and cited the AER's decision in February 2010 to adopt a market risk premium of 6.5 per cent. In addition, ARTC considers that the compulsory review after 5 years will represent a more appropriate point at which an assessment can be made about stability.²⁷²

In the Draft Decision, the ACCC agreed that general market conditions may justify an increase in the MRP, however, considered the question is whether current economic conditions can be considered stable. Synergies provided citations from the World Bank, the Reserve Bank of Australia, the Federal Reserve and the Federal Treasurer to refute the 'stable market' claim. Citing the recent decision of the AER in February 2010, Synergies concluded that at a minimum the MRP value should be selected from the mid-point of a range of 6 per cent and 7 per cent.²⁷³

Asset beta

ARTC took the view that the proposed asset beta by the ACCC did not adequately reflect the risks borne by ARTC. A summary of ARTC's arguments are as follows:

- Investors take a long term view in making investment decisions. The ACCC's demand and pricing considerations appear to be short, and have not addressed the potential impact of climate change on long-term outlook for coal. ARTC cites that NSWMC financial modelling shows that if the emissions trading scheme were to be introduced, 11 mines will close in NSW between now and 2015.
- Investors who make complementary investments also have concerns regarding the stranding risk associated with their investments. Investors expect higher returns on their investment in other unregulated parts of the coal supply chain, and this would have been reflected in commercial arrangements.
- Although the capital expenditure approval process ensures investment is incorporated into the RAB, stranding risk relates to ability to recover investment in the long run. ARTC is not guaranteed recovery unless coal volumes and access pricing are such that generated revenue is sufficient.
- Long term TOP contracts only guarantee the recovery of costs associated with assets in existence at the time of contract execution and do not guarantee that volumes underpinning future investment will materialise. Therefore future

²⁷¹ Synergies Economic Consulting, Response re WACC Issues, Attachment 5, March 2010, pp. 16 – 19.

²⁷² ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 104.

²⁷³ Synergies Economic Consulting, Response re WACC Issues, Attachment 5, March 2010, pp. 21 – 24.

revenues are exposed to the market during and beyond the term of the contracts and the regulatory period.

- The loss capitalisation approach addresses the impact of truncation of returns, which is a regulatory risk. It does not influence long term coal demand and pricing and so does not reduce stranding risk.
- The lower asset lives will reduce stranding risk only to the extent that they are conservative, but this is not clear to ARTC. The asset lives result from the higher forecasts of volume throughput that currently exists compared to those underpinning historical estimates.²⁷⁴

In conclusion, ARTC submitted that an asset beta of 0.5 is not considered conservative in light of the above factors, and even if it were, a gamma value of 0.65 eliminated any conservatism. Therefore, ARTC proposed to use an asset beta of 0.55.²⁷⁵

Synergies' submission addressed three key issues, namely the ACCC's preferred range of asset beta, issues regarding ARTC's stranding risk, and a methodology to quantify asymmetric risk.

In relation to the ACCC's proposed lower bound asset beta of 0.40, Synergies submitted that:

- The comparison to electricity distribution network service providers (DNSPs) was unsuitable. The ACCC should undertake a more detailed evaluation of the differences and similarities between ARTC and DNSPs based on first principle analysis; and
- It is unclear why the lower bound beta estimate (0.40) for ARTC was selected from below the mid-point of the range of electricity network betas (0.30 – 0.55) when the ACCC considered that electricity businesses are 'marginally less risky' than ARTC.²⁷⁶

With regards to the ACCC's proposed upper bound asset beta of 0.50, Synergies considered that:

- It is not clear why the ACCC referenced the upper bound to the QCA 2005 decision, when the ACCC determined that the Central Queensland Coal Network is similar to ARTC's Hunter Valley Network; and
- Reliance should not be placed on QCA's decision for the following reasons: QCA solely relies on electricity businesses as comparators for QR Network, and QCA

²⁷⁴ ARTC, Response to the ACCC Draft Decision, 31 March 2010, pp. 101 – 103.

²⁷⁵ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 104.

²⁷⁶ Synergies Economic Consulting, Response re WACC Issues, Attachment 5, March 2010, pp. 25 – 26.

proposed reductions to beta based on factors that were not previously taken into account (such as stranding risk) or considered as having little impact.²⁷⁷

Synergies agreed with ARTC's rationale that ARTC is exposed to material stranding risk. In addition, Synergies also stated that take or pay (TOP) provisions and the ability to seek capital contributions from access seekers did not alone mitigate the stranding risk, as TOP contracts needed to be successfully negotiated with producers before they could actually be assumed to reduce ARTC's risk.²⁷⁸

In terms of quantifying the asymmetric risk, Synergies proposed a methodology that involved:

1. identifying the risks that would not normally be faced by a non-regulated business;
2. assessing correlation between risks and probability of occurrence;
3. investigating possible mitigation strategies – i.e. contracting out of the risk;
4. estimating the compensation for bearing such risks; and
5. using a stochastic simulation to estimate the consequence of the risks.
6. the value of the consequence of the risks could then be included in the cash flows.

However, Synergies submitted that in the absence of an adjustment to cash flows due to time constraints, an uplift to the asset beta was warranted. Synergies also maintained their view that the asymmetric consequences of error need to be considered and suggest an estimate above the mid-point of a reasonable range.²⁷⁹

Other issues

Other relevant issues outlined in ARTC's submission included:

- A proposed gearing level of 52.5% – ARTC consider that this gearing level is appropriate, given the choice of the midpoint of the range for the other parameters;²⁸⁰
- Amending section 4.7(a) to replace 'comprise' with 'include';²⁸¹
- Removal of section 4.7(d) and (e) which address the annual reset of rate of return and cost of debt;²⁸²
- Removal of words 'if necessary' in review of rate of return every 5 years;²⁸³

²⁷⁷ Synergies Economic Consulting, Response re WACC Issues, Attachment 5, March 2010, pp. 26 – 27.

²⁷⁸ Synergies Economic Consulting, Response re WACC Issues, Attachment 5, March 2010, p. 29.

²⁷⁹ Synergies Economic Consulting, Response re WACC Issues, Attachment 5, March 2010, pp. 30 – 31.

²⁸⁰ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 104.

²⁸¹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 100.

²⁸² ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 100.

- Exclusion of the ‘convenience yield’ proposed by ARTC in 2009;²⁸⁴
- Calculation of debt issuance costs to the order of 9.5 bps;²⁸⁵ and
- Calculation of equity raising costs to the order of 3 per cent of the minimum external equity capital required.²⁸⁶

A.1.8.6 Return of capital (depreciation)

In relation to section 4.6, addressing return of capital, ARTC has proposed to make the following amendments to address the ACCC’s concerns:

- Section 4.6(b) will be amended to make it clear that the ACCC will approve average remaining mine life in all cases;
- Remove the words “Hunter Valley” from 4.6(b)(i) to reflect that only all mines that use the Network will be included;
- Review data used by Booz & Co and update estimates to correct for clear errors identified by Marsden Jacob Associates that can be confirmed by ARTC; and
- Make the 5 year review compulsory by removing the words ‘if necessary’ from section 4.6(c).²⁸⁷

A.1.8.7 Unders and Overs accounting and Annual Compliance Assessment

Content of ARTC Annual Compliance Report

ARTC proposed that Section 4.9 will be amended to provide documentation in accordance with the requirement in relation to the nature, level of detail and timing prescribed in a schedule to the HVAU.²⁸⁸

The ACCC’s regard to submissions of industry participants

ARTC cited Clause 5(c) in Schedule 3 in the NSWRAU, which stated that IPART may have regard to the submissions of users to the consultation process, but not otherwise have regard to submissions of users which are inconsistent with such submissions.²⁸⁹

ARTC raised a concern that it would be contrary to the intent of enabling industry control of the investment program, if the ACCC could determine that certain capital expenditure should not be included in the RAB despite RCG endorsement. ARTC considers that it would be critical that industry participants are not able to dispute capital expenditure in the RAB which has already been endorsed by the RCG.²⁹⁰

²⁸³ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 100.

²⁸⁴ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 100.

²⁸⁵ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 101.

²⁸⁶ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 104.

²⁸⁷ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 107.

²⁸⁸ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 107.

²⁸⁹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 107.

²⁹⁰ ARTC, Response to the ACCC Draft Decision, 31 March 2010, pp. 107 – 108.

Consequently, ARTC proposed to amend section 4.9(iii)(b) to specify that while the ACCC may have regard to submissions made by stakeholders, expenditure that has been endorsed by the RCG cannot be re-examined by the ACCC as part of the Annual Compliance Assessment.²⁹¹

Definition of ‘industry efficient’

ARTC was of the view that its definition of industry efficient is consistent with common industry practice, and cites a few examples including the WA Rail Access Regime, QR Network Access Undertaking and National Gas Rules. ARTC submits that if ‘industry efficient’ is unclear to the ACCC and its stakeholders, ARTC is open to using the term ‘efficient’, but considers that the definition of ‘efficient’ will have regard to normal rail industry practices and benchmarks.²⁹²

Use of out-turn operating expenditure

ARTC detailed IPART’s ex-post assessment of the efficiency of ARTC’s operating expenditure, which usually occurs following a review of stakeholder submissions. ARTC submitted that this approach increases uncertainty for ARTC, and is willing to explore an alternative in which allowable expenditure can be approved on an ex-ante basis, requiring only scope and cost deviation to be reviewed on an ex-post basis. Even with such an approach, ARTC did not consider the use of ‘out-turn operating expenditure’ as inappropriate.²⁹³

In relation to vesting of compliance powers with the ACCC, ARTC was unclear as to why section 4.9(b)(ii) is insufficient to empower the ACCC to undertake such an assessment.²⁹⁴

A.1.9 Pricing principles

A.1.9.1 Determination of the Indicative Services

ARTC submitted to the ACCC that it is unnecessary to provide for arbitration of disputes by the ACCC as the charges and train types will have been approved by the ACCC. ARTC also submits that it is unnecessary to specify that pricing will apply to all coal services because non-indicative charges will be linked to indicative charges.²⁹⁵

In response to the ACCC’s concerns outlined in the Draft Decision regarding the annual review of the Indicative Access Charges, ARTC clarified that:

ARTC’s annual review of Indicative Access Charges will not extend to a review of Indicative Service descriptions. The assessment of an Indicative Service is a long term view and it is important that industry has certainty as to the Indicative Service. This certainty is necessary for long term investment decisions.²⁹⁶

²⁹¹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 108.

²⁹² ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 108.

²⁹³ ARTC, Response to the ACCC Draft Decision, 31 March 2010, pp. 108 – 109.

²⁹⁴ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 109.

²⁹⁵ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 123.

²⁹⁶ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 114.

Where a review of the service descriptions is necessary, ARTC proposed to follow the same process as in determination of the efficient train configuration outlined above.²⁹⁷

A.1.9.2 Cap on maximum annual increase in Indicative Access Charges

ARTC regarded the ACCC's suggested cap on the annual increase in Indicative Access Charges as problematic for the following reasons:

Introducing a pricing cap is inconsistent with the RCG endorsement process put forward by ARTC (with the support of industry) in section 6 of the HVAU. ARTC cannot commit to a pricing cap when its major cost (the cost associated with capital expenditure in the construction of Additional Capacity) is controlled by producers. As noted in section 11.3.4, around 80% of the forecasted increase over the term of the HVAU in Full Economic Cost (which, along with volume, governs the level of constrained pricing in Pricing Zone 1 and Pricing Zone 2) results from an increase in the capital charge associated with new investments over the period. Producers can either have the ability to determine ARTC's capital expenditure or ARTC can retain control and certainty over its costs including capital expenditure and producers can obtain the benefit of a price cap.

Access Holders' TOP commitments are not open ended - their commitment does not justify the introduction of a long term pricing cap. An Access Holder's commitment to TOP Charges is limited to existing capacity and an Access Holder's obligation to pay TOP Charges in respect of new capacity only arises when that Additional Capacity is built which is dependent on RCG endorsement of the project creating the Additional Capacity.

A pricing cap would also place the wrong incentives on ARTC and jeopardise ARTC's commitment to the creation of Additional Capacity. Where it is not certain that ARTC will be able to recover the costs associated with the creation of Additional Capacity through increased charges, ARTC will be unlikely to commit to creation of new capacity. While loss capitalisation provides a mechanism for ARTC to recover its investment costs in the long run (if the market permits) it does not guarantee recovery.

ARTC already faces significant constraints on its ability to increase Indicative Access Charges due to the application of the Ceiling Limit and the application of ACCC arbitration when two thirds of access holders dispute the Indicative Access Charges notified by ARTC. Moreover, both the IAC and the IIAC are approved by the ACCC.²⁹⁸

ARTC proposed the following mechanism to provide increased certainty for access holders subject to long term TOP contracts:

- For existing assets, Indicative Access Charges are initially subject to ACCC approval, and subsequently restricted by ceiling limits and dispute resolution processes.
- For future investment, ARTC proposes to provide 10 year pricing forecasts based on forecasts of expected volume, and the scope and cost of capacity investments. This will ensure access holders are informed as to the 'most likely outcome' and will reduce asymmetry of information between access holders and ARTC.

²⁹⁷ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 114.

²⁹⁸ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 116.

- ARTC would also provide pricing forecasts to RCG to inform investment decisions.²⁹⁹

A.1.9.3 Determination of Indicative Access Charges

ARTC submitted that limiting Indicative Access Charges to within a certain percentage of the Interim Indicative Access Charges was problematic for the following reasons:

ARTC will not control the level of investment (capital expenditure) in the Network. This will be determined by the RCG in accordance with the process set out in section 6. Around 80% of the forecasted increase over the term of the HVAU in Full Economic Cost (which, along with volume, governs the level of constrained pricing in Pricing Zone 1 and Pricing Zone 2) results from an increase in the capital charge associated with new investments over the period. Without certainty of its costs, ARTC cannot commit to provide pricing certainty for access holders.

ARTC does not know what the efficient train configuration will be. As set out in section 4.16(b) of the HVAU, ARTC and the HVCCC will be unable to determine this until appropriate modelling tools are available and the necessary input information for such tools is available. This assessment is also subject to consultation with industry and approval by the ACCC.³⁰⁰

ARTC further submitted that it does not know what the efficient train configuration will be, and submitted that since less-efficient existing services will continue for some time, it needs the ability to differentiate prices in order to encourage desired behaviour. ARTC also considered that such a limit is unnecessary because any price shocks will be subject to ACCC approval prior to their implementation, and as overall revenue will still need to satisfy the ceiling test, average price levels will be unlikely to increase.³⁰¹

A.1.9.4 Explicit powers to reconfigure train paths

ARTC submitted that including an explicit power enabling it to require access holders to reconfigure trains where the reconfiguration would significantly increase coal chain throughput would be problematic for the following reasons:

- access holders require time to invest in new locomotives and wagons which is unavailable due to ARTC's promise not to change the basis of its pricing for five years;
- such power will impose excessive risk on above rail operators and coal producers;
- it is unlikely ARTC would ever exercise this power given the significant consequences to access holders and the likelihood of dispute, which therefore would render the power practically ineffective;
- the requirement that parties not be made materially worse off would be met only in situations where the coal chain capacity impact would be minor; and

²⁹⁹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, pp. 118-119.

³⁰⁰ ARTC, Response to the ACCC Draft Decision, 31 March 2010, pp. 114-115.

³⁰¹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 115.

- efficient train type has not yet been established.³⁰²

A.1.9.5 Structure of charges for Non-Coal

ARTC submitted that in some situations pricing for Non-Coal will necessarily be higher than Coal on a c/gtkm basis, due to the variable nature of maintenance and capacity costs for Non-Coal. A price cap for Non-Coal at the full economic cost paid by Coal access holders is therefore problematic. ARTC proposed to include a cap per path where Non-Coal users are charged at the average Coal price on the basis of proportionate capacity consumption.

A.1.9.6 Indicative Access Agreement for Non-Coal

ARTC proposed that Non-Coal access seekers will be entitled to the Interstate TAA terms and conditions of access, adjusted for specific circumstances of the Hunter Valley including the Tier 1 provision for capacity shortfall.³⁰³

A.1.9.7 Charge differentiation

ARTC proposed to amend section 4.14 of the HVAU to set out the basis on which charges for both coal and non-coal users will be differentiated.³⁰⁴

ARTC has proposed to remove the reference to ‘credit risk’ and ‘potential for growth’ from the list of factors it will have regard to with respect to charge differentiation for Coal users. However, ARTC submitted that these factors are still required for Non-Coal users. ‘Credit risk’ is proposed to be a necessary factor because security is not a precedent for Non-Coal access agreements based on the Interstate TAA. ARTC regarded ‘potential for growth’ as a necessary factor to maintain consistency with the Interstate Network for Non-Coal usage.³⁰⁵

A.1.9.8 Limits on Charge differentiation

ARTC submitted that it will not typically be able to determine the marginal cost of a mine’s production due to sunk investment and therefore it would be inappropriate to require ARTC to inquire into the marginal cost of a mines production prior to determining the applicable access charges. ARTC has proposed, however, to amend section 4.15 to make it clear that ARTC will not differentiate between Applicants on the basis of their marginal costs of production to the extent that the marginal costs of production are known to ARTC.³⁰⁶

A.1.9.9 Pricing Constraint for non-Indicative Services

ARTC did not consider it necessary to introduce a price constraint for non-Indicative Services as ARTC will be restricted by the reference to Indicative Access Charges in the bases for differentiation and the threat of arbitration. ARTC references the ACCC decision on the Interstate Access Undertaking pricing constraint to justify its decision:

³⁰² ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 111.

³⁰³ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 113.

³⁰⁴ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 120.

³⁰⁵ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 120.

³⁰⁶ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 122.

Thus clause 4.6(c) may have the effect of capping the indicative prices for those other services currently covered by ARTC's pricing schedule.³⁰⁷

A.1.9.10 Interim Indicative Access Charges

ARTC proposed to provide Interim Indicative Access Charges in a revised Undertaking, and does not consider it necessary that information on the calculation of the Interim Indicative Access Charges should be included in the Undertaking, stating that this information will be provided to the ACCC and "there is no benefit in including this level of detail in the HVAU".³⁰⁸

ARTC did not consider it necessary to provide a firm range for the Indicative Access Charges in relation to the Interim charges due to cost uncertainty facing ARTC and the ambiguity surrounding the efficient train configuration. ARTC also considered that it would not make sense to include an explicit provision for dispute and arbitration because the Indicative Access Charges and descriptions will have been approved by the ACCC.³⁰⁹

A.1.9.11 Capacity Reservation

ARTC proposed to amend the last sentence of section 5.2(b) of the Undertaking to make it clear that the Reservation Fee will be reduced to the extent of any Access revenue received in relation to the utilisation of Access rights during the period less the Direct Cost associated with that utilisation. Further, the amendment will also specify that the Reservation Fee would only be payable from the date that the future Capacity exists for use.³¹⁰

ARTC also proposed to modify the Capacity reservation provisions to make it clear that Capacity that is not reserved will be sold before the reserved Capacity to avoid disputes, as well modifying section 5.2(a) to allow for future Capacity to be reserved prior to the usage of the Applicant.³¹¹

A.1.9.12 Capping TOP charges

ARTC considered that it is inappropriate and unworkable to put in place a maximum cap on the annual increase in Indicative Access Charges. ARTC intends to develop a price cap in relation to access revenue associated with recovery of operating expenditure and the capital charge associated with existing assets as at the Commencement Date in Pricing Zone 3. This is intended to separately address the ACCC's concerns in relation to price certainty under the application of the loss capitalisation where the building blocks revenue ceiling does not act to constrain revenue (i.e. prior economic losses have not been recovered).³¹²

ARTC intended to provide 10 year forecasts of contracted volumes, operating expenditure and capital expenditure to reduce the asymmetry of information.³¹³

³⁰⁷ ACCC, Interstate Access Undertaking November 2001 Draft Decision, p. 106.

³⁰⁸ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 123.

³⁰⁹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 123.

³¹⁰ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 124.

³¹¹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 124.

³¹² ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 125.

³¹³ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 125.

A.1.9.13 The True-Up Test

ARTC stated that it is considering definitions for the Network Path Capability and Tolerance Cap components of the True-up test.³¹⁴

Regarding the ACCC's view that ARTC should be obligated to waive TOP charges for paths not provided due to ARTC actions, ARTC submitted that it needs discretion in this matter because 'high' maintenance months may be balanced by subsequent 'low' maintenance months. ARTC also submitted that where maintenance exceeds assumptions, access holders will receive a True-up test rebate, therefore, to waive charges could result in 'double dipping'.³¹⁵

ARTC submitted that it may waive TOP charges where ARTC's actions affect individual access holder(s) without affecting others in the zone, or necessarily failing the true up test.³¹⁶

A.2 ARTC 2010 HVAU Submission (Explanatory guide September 2010) – Key changes to the 2010 HVAU

A.2.1 Greater recognition of passenger priority obligation (section 1.1)³¹⁷

ARTC has made the following amendments to section 1.1(d) and (g) of the 2010 HVAU:

- section 1.1(d) to explicitly refer to ARTC's obligations regarding passenger priority set out in the *Transport Administration Act 1988* (NSW); and
- section 1.1(g) to explicitly recognise that the Network is used by non-coal traffic.

A.2.2 Recognition of coal chain principles (section 1.3 and 2.3(b))³¹⁸

ARTC submits that following discussions with stakeholders, ARTC understand that the reference to a Long Term Solution would be unsatisfactory.

Accordingly, ARTC has instead recognised in section 1.3 of the 2010 HVAU the following key coal chain principles:

- the long term certainty of access to a contracted portion of coal capacity sought by coal producers
- the availability of a reliable process through which track capacity can be negotiated
- the development of a set of System Assumptions to apply across the Coal Chain

³¹⁴ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 126.

³¹⁵ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 126.

³¹⁶ ARTC, Response to the ACCC Draft Decision, 31 March 2010, pp. 126-127.

³¹⁷ ARTC, *Hunter Valley Access Undertaking - Explanatory Guide (September 2010)*, 7 September 2010, p. 6.

³¹⁸ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 6.

- alignment between track capacity and coal terminals at Port of Newcastle

These principles will also be taken into account when ARTC carries out its five year review of the HVAU under section 2.3 of the 2010 HVAU. Further, ARTC has provided under 1.5(b) of the 2010 IAHA that all Tier 1 provisions are to be interpreted by reference to these principles.

A.2.3 Consultation with the HVCCC

A.2.3.1 HVCCC/ARTC consultation obligations (section 3.2 etc and Schedule F) ³¹⁹

ARTC submits that it has included in Schedule F of the 2010 HVAU a set of principles that ARTC will use its best endeavours to follow when consulting with the HVCCC.

- ARTC will request the HVCCC to provide ARTC with its view by a specified date, as reasonably determined by ARTC
- Where HVCCC provides its view by the notified date, ARTC will consider that view in good faith
- Where ARTC disagrees with the view and there is sufficient time for the HVCCC to reconsider its view, ARTC will provide its reasons and request HVCCC to reconsider its view by a specified date
- Where the HVCCC provides its revised view by the notified date, ARTC will consider the revised view expressed by the HVCCC in good faith

ARTC submits that these principles will apply to a proposed obligation to consult with the HVCCC under 2010 HVAU and 2010 IAHA when a specific process is not identified.

With regard to any divergence in views between HVCCC and ARTC, ARTC considers the requirement to provide written reasons to affected Access Holders to be an additional administrative burden and is inconsistent with the need to have a central coordinating body for the purpose of consultation.

A.2.3.2 Obtaining HVCCC view on Coal Chain Capacity impact (section 5.1, 6.1, 6.2) ³²⁰

ARTC submits that where the 2010 HVAU requires ARTC to seek HVCCC's view on the impact of a proposal on Coal Chain Capacity (section 5.1, 6.1 and 6.2), the following steps will apply:

- ARTC will seek the HVCCC's view as to whether the proposal will have an impact on Coal Chain Capacity;
- Where HVCCC provides its view/recommendation within 20 Business Days or such other time as agreed with ARTC, ARTC will consider the view expressed by the HVCCC in good faith;

³¹⁹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 7.

³²⁰ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, pp. 7-8.

- Where ARTC disagrees with the view and there is sufficient time for the HVCCC to reconsider its view, ARTC will provide its reasons and request HVCC to reconsider its view by a specified date
- Where the HVCCC provides its revised view/recommendation within the specified timeframe, ARTC will consider the revised view of the HVCCC in good faith.

A.2.4 Certainty of terms and conditions and introduction of Tier 1 (mandatory provisions) (section 3.14 and Schedule A)

ARTC has made a number of amendments to section 3.14 and Schedule A in the 2010 HVAU regarding the availability of the different forms of access agreement set out in section 3.14 and the certainty of terms and conditions to be included in those access agreements.

Section 3.14(b) makes it clear that an applicant is entitled to any of the relevant forms of access agreement set out in section 3.14, provided the applicant meets the applicable conditions as set out in that section.³²¹

A.2.4.1 Export coal access rights (section 3.14(b))³²²

ARTC will offer an applicant seeking access rights to transport coal to the Port of Newcastle:

- the 2010 IAHA if the applicant is seeking Indicative Services and satisfies the Network Exit Capability requirement and the specific prudential requirements identified in section 3.14(b)(i)(A)
- an updated AHA which will include all those provisions identified as Tier 1 (mandatory) provisions in Schedule A:1 of the 2010 HVAU, as well as the Tier 2 (negotiable) provisions, unless both parties agree otherwise
- an access agreement based on the terms and conditions made available to another applicant, as published on ARTC's website. It must include those clauses from the 2010 IAHA identified as Tier 1 (mandatory) provisions in Schedule A:1.

ARTC submits that Tier 1 provisions identified by ARTC in Schedule A:1 is consistent across all AHAs with coal producers seeking to transport coal to the Port of Newcastle and cannot be amended by negotiation.

ARTC has identified the following provisions that need to be consistent for all export coal producers as Tier 1 (mandatory) provisions in Schedule A:1:

- 2010 IAHA clause 1.5: Tier 1 (mandatory) provisions;
- 2010 IAHA clause 11.1(b)(iii): variation of a Train Path for the purposes of maximising the use and reliability of the Network;

³²¹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 8.

³²² ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, pp. 8-9.

- 2010 IAHA clause 15: Confidentiality;
- 2010 IAHA clause 16.5: Treatment of Traded Path Usages

A.2.4.2 Domestic coal access rights (section 3.14(b))³²³

ARTC submits that the following provisions identified as Tier 1 (mandatory) provisions will not need to be included in domestic coal agreements. They will be identified as Tier 2 (negotiable) provisions for ‘domestic coal’ agreements and will therefore be addressed in the access holder agreement unless the parties agree otherwise.

- 2010 IAHA clause 3.1: Grant of Train Paths for transport of coal;
- 2010 IAHA clause 3.3: Tolerance;
- 2010 IAHA clause 3.14: Network Exit Capability requirement;
- 2010 IAHA clause 11.4: Removal of paths for under-utilisation;
- 2010 IAHA clause 15: Confidentiality; and
- 2010 IAHA clause 16.5: Treatment of traded Path Usages
- 2010 IAHA Train Path Schedule: Clause 4.1 (Network Exit Capability Condition Precedent; and Clause 4.2: Removal of Path Usages for failure to satisfy Network Exit Capability Condition Precedent).

A.2.4.3 Non-coal access rights³²⁴

In response to the Draft Decision, ARTC submits that applicants for Non-Coal Access Rights will be given an access agreement which is based on the terms and conditions set out in the Interstate Indicative Track Access Agreement, adjusted to take into account the specific circumstances of the Hunter Valley network.

In particular, section 3.14(c) of the 2010 HVAU lays out how the terms and conditions in the Interstate TAA will be adjusted:

- the network will be amended to cover the Hunter Valley network rather than the Interstate network; and
- the Tier 1 (mandatory) provisions for Non-Coal Access Rights identified in Schedule A:2 must be incorporated into the access agreement. The only Tier 1 (mandatory) provisions for Non-Coal Access Rights that ARTC has identified are the Capacity Shortfall provisions

³²³ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, pp. 9-10.

³²⁴ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 10.

A.2.5 Definitions of revenue and Ancillary Services (section 4.2)³²⁵

ARTC submits that the critical ancillary services charges are not separate from the access charges and the services which ARTC must provide are included in the price. With regard to ACCC's example of a charge on trading, ARTC submits that the ability to trade Access Rights is necessary to enjoy those rights and the costs involved are already part of the price and recovered through the ceiling cost. Operators for ancillary train movements will not be carrying coal and will be treated the same as non-coal for pricing and ceiling test compliance.

ARTC proposes to amend the definition of "Out-turn Revenue" in the 2010 HVAU to mean the "total Access revenue earned by ARTC..." to address the ACCC's concern that only earnings from charges levied for ancillary services which are necessary to gain access to the Network are captured within the revenue model in the 2010 HVAU.

A.2.6 Loss capitalisation (section 4.3)

A.2.6.1 Single RAB and Rate of Return (section 4.3)³²⁶

ARTC submits that the 2010 HVAU has adopted a single RAB for each Pricing Zone, a single WACC for the Network, and a single estimate of remaining mine life for the Hunter Valley coal network. However ARTC has left provision in the 2010 HVAU for different estimates if appropriate at some future time.

ARTC also submits that Rate of Return in section 4 of the 2010 HVAU is the relevant form that should be used when applicable.

A.2.6.2 RAB Roll Forward Formula³²⁷

ARTC submits that in section 4.3(a) of the 2010 HVAU, ARTC has made a consequential amendment to the roll forward formula to clarify that capitalised economics losses will also include a return on Net Capex incurred during the year. The return is calculated for half of that year, (i.e. the expenditure is deemed to have been incurred on 1 July).

ARTC also submits that any roll forward undertaken prior to the commencement of the 2010 HVAU in order to determine the initial RAB will be undertaken in accordance with the asset valuation roll forward principles in the NSW RAU as at August 2010, or as otherwise agreed between ARTC and IPART.

A.2.6.3 Zone 3 Price Cap (section 4.2(d))³²⁸

ARTC submits that it has proposed a cap on the annual pricing variation of 25% in any one year in Pricing Zone 3 in section 4.2(d) of the 2010 HVAU. While section 4.2(d) is not explicitly identified as applicable to Pricing Zone 3, it is only in Pricing Zone 3 that the applicable RAB will likely be greater than the applicable RAB floor limit.

³²⁵ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 10-11.

³²⁶ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 11.

³²⁷ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, pp. 11-12.

³²⁸ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 12.

A.2.7 Costs to be efficient (section 4.4(b)) ³²⁹

ARTC submits that section 4.4(b) of the 2010 HVAU specifies how efficiency in the context of ARTC's costs in the Hunter Valley should be assessed

This efficiency 'test' applies to the costs incurred by ARTC as Segment Specific Costs, Non-Segment Specific Costs, any costs applicable to Additional Capacity and the determination of Operating Expenditure (Opex) included in the roll forward of the RAB.

A.2.8 Treatment of interest incurred during construction (section 4.3) ³³⁰

ARTC submits that it has made a number of amendments to section 4 to clarify how IDC is to be capitalised and included in the RAB in the year the asset is commissioned:

- Section 4.3(a) and (b): IDC is included in the definition of Net Capex, where IDC is calculated up until 1 July (half year) in the year of commissioning;
- Section 4.4(a)(iii) (previously 4.4(c) in the 2009 HVAU): the value of the Segment Specific Assets will be determined in accordance with section 4.3(b) which provides that IDC is included in the definition of Net Capex;
- Section 4.4(a)(vi) (previously 4.4(f) in the 2009 HVAU): in determining an allocation of a return on Non-Segment Specific Assets, the value of the Non-Segment Specific Assets will include capitalisation of interest costs incurred during construction up until commissioning of the asset, capitalised at the time of commissioning and determined by reference to the relevant (approved) form of the rate of return;
- Section 4.4(a)(vii) (previously 4.4(g) in 2009 HVAU): removal of the reference 'including interest reasonably incurred during construction';
- Section 6.4(g)(v): clarification that:
 - Where a project is delayed and is delivered after the latest approved or endorsed delivery date, then any IDC for the period between the latest approved or endorsed date and the actual delivery date will be deemed not Prudent;
 - Where, however, a project has a delivery timeframe of more than 12 months and the RCG consents to a stage delivery of a project, any capital expenditure and IDC associated with that stage will be capitalised and incorporated in the RAB in the year of completion of that stage (section 6.4(g)(v)(B)).

ARTC submits that these changes will have the effect of ensuring ARTC does not double count interest incurred during construction, nor will ARTC recover interest

³²⁹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, pp. 12-13.

³³⁰ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, pp.13-14.

during construction in relation to capital expenditure which is not Prudent, nor any delay in delivery resulting from ARTC management which is not Prudent.

A.2.9 Treatment of capital contributions (section 4.3, 4.8(b)(iii) & 6.2(f))

A.2.9.1 Equitable treatment between access holders and ARTC ³³¹

ARTC submits that a number of changes has been made to section 6.2(g) of the 2009 HVAU (now 6.2(f) of the 2010 HVAU) and included a new section 6.2(G), in order to provide greater clarity and certainty around how Capital Contributions will be treated. ARTC submits that it has made these changes in order to substantially increase certainty around:

- recovery of a capital contribution made by an Applicant or Access Holder (contributor);
- ARTC pricing in relation to Additional Capacity made available through a Capital Contribution;
- treatment of other users of that Additional Capacity including the addition of a set of principles for dealing with cost recovery and pricing; and
- allocation of Additional Capacity made available through assets funded by a Capital Contribution.

Specifically, ARTC has incorporated at section 6.2(g) of the 2010 HVAU a set of principles that seek to ensure an equitable form of reconciliation is achieved:

- a) ARTC is no worse off as a result of Additional Capacity made available through assets funded by a Capital Contribution (Contributed Assets);
- b) Only Capital Expenditure that is Prudent will be included in the RAB for pricing purposes and shared equitable among users in the relevant Pricing Zone;
- c) Subject to paragraph (a), the resulting additional Access revenue collected through ARTC Charges will be allocated between ARTC and the Contributor such that cost recovery on assets funded by ARTC and Contributed Assets are equitable;
- d) The Contributor cannot achieve cost recovery higher than the approved Rate of Return on Contributed Assets;
- e) As the cost of the Contributed Assets is recovered from all users in the Pricing Zone, no priority in the allocation of Additional Capacity made available through the assets for the Contributor will apply;
- f) Where Capital Expenditure is incurred through a Capital Contribution that is not Prudent, ARTC Charges will not recover any capital cost associated with that Capital Expenditure, except where another Access Holder elects to use the resulting Additional Capacity, considered not Prudent. In this case, the charge for

³³¹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, pp. 14-15.

that use will reflect capital cost recovery of the Capital Contribution and the relative use of the Additional Capacity made available through the Contributed Assets. Subject to paragraph (a) above, all revenue collected will be allocated between ARTC and the Contributor such that cost recovery on assets funded by ARTC and Contributed Assets are equitable. The Contributor will receive priority in the allocation of Additional Capacity made available through Contributed Assets resulting from a Capital Contribution that is not Prudent.

Further RCG voting arrangements apply where the Additional Capacity made available through Contributed Assets result in an increase in the Indicative Access Charge by more than 10%.

A.2.9.2 Ongoing maintenance and capital costs³³²

ARTC submits it believes that the pricing principles in the 2010 HVAU will act to ensure it does not collect more access revenue than the Ceiling Limit except where there are unrecovered prior economic losses and as such has removed section 6.2(f) of the 2009 HVAU from the 2010 HVAU.

A.2.9.3 No return on capital contributions³³³

ARTC submits that replacement of any Additional Capacity funded by a Capital Contribution will be undertaken by ARTC if it is able to recover the cost of that Additional Capacity replaced, through some form of depreciation charge. Otherwise, replacement of that Additional Capacity could be funded by a further Capital Contribution made at the time.

A.2.10 Remaining mine life estimate³³⁴

ARTC submits that it has undertaken a review of its remaining mine life estimate and has proposed a revised remaining mine life estimate of a single estimate for the Hunter Valley being 22 years as at 2010. The results of ARTC's review and revised remaining life proposal is provided at Appendix 2.

A.2.11 Rate of Return proposal³³⁵

ARTC submits that in Appendix 3, ARTC has now proposed a revised single Rate of Return to apply to the Hunter Valley coal network assets. The revised Rate of Return proposal is consistent with ARTC's position in relation to each parameter expressed in its response to the Draft Decision. ARTC has proposed a revised Rate of Return as follows:

| | Nominal, post-tax | Real, pre-tax |
|--|----------------------|------------------|
| Hunter Valley coal network assets (based on current time based parameters) | 10.84% | 9.16% |

³³² ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, pp. 15-16.

³³³ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 16.

³³⁴ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, pp. 16-17.

³³⁵ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, pp. 17-20.

| | | |
|---|-------|-------|
| Hunter Valley coal network assets (for comparison, based on current time based parameters and the ACCC Draft Decision including the more recent AER precedents for gamma and debt risk premium) | 9.78% | 7.73% |
|---|-------|-------|

ARTC proposes in section 4.7 of the 2010 HVAU to be able to revisit Rate of Return and proposes, for ACCC approval, a revised Rate of Return at the time when existing uncertainty surrounding the regulatory position on gamma and debt risk premium is resolved, and to take into account any revised outcomes in relation to regulatory developments regarding gamma and debt risk premium in that review.

A.2.12 Annual Compliance Assessment

A.2.12.1 Provision of information under Schedule G³³⁶

ARTC has included a new Schedule G, which is based on material that ARTC provides to IPART under the NSW RAU, in the 2010 HVAU. It provides a template of the information that is provided to the ACCC as part of the Annual Compliance Assessment. In addition the new Schedule will include an indicative timetable for the provision of information and the steps to be carried out as part of the Annual Compliance Assessment.

In particular, ARTC has included in section 4.9(c) of the 2010 HVAU an obligation on ARTC to provide information requested by the ACCC in accordance with section 3 of Schedule G as soon as reasonably practicable. Further information can be sought by the ACCC under scenarios set out in Schedule G, as well as how confidential information should be handled by the ACCC and ARTC.

As part of the Annual Compliance Assessment, ARTC has proposed to include provisions requiring ARTC to provide details (inc. spreadsheets) of all system-wide TUTs and the annual conciliation in the new Schedule G.

A.2.12.2 ACCC: having regard to views of industry participants³³⁷

ARTC's view is that once capital expenditure has been endorsed by the RCG then it is deemed to be prudent and as such will be included in the RAB. Hence, it believes that it is unnecessary for the ACCC to take into account of submissions of industry participants. ARTC will provide in the compliance submission to the ACCC that the RCG endorsement has been obtained.

ARTC has amended section 4.9(d)(iii) of the 2010 HVAU such that ACCC may have regard to submissions of relevant industry participants in determining whether ARTC has complied with the provisions regarding the roll forward of the RAB and RAB floor limit.

³³⁶ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 21.

³³⁷ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 21

A.2.12.3 Information about price variation Cap in Pricing Zone 3³³⁸

ARTC has extended the information to be provided under section 4.9(a) to include documentation demonstrating that Indicative Access Charges, or Interim Indicative Charges (as applicable) satisfy the requirement in section 4.2(d) (see the new subsection 4.9(a)(iii)). This will enable the ACCC to assess whether ARTC has complied with section 4.2(d) with regards to the cap on the annual price variation when RAB is in a Pricing Zone is greater than the RAB Floor Limit.

A.2.13 Determination of efficient train configuration/Indicative Service (section 4.16)

A.2.13.1 Indicative Service is the efficient train configuration³³⁹

The Indicative Service to be adopted by ARTC under section 4 of the 2009 HVAU (following approval by the ACCC) was intended to be the efficient train configuration.

ARTC has made this clear in the 2010 HVAU and has set out the steps it will take to determine the Indicative Service in section 4.16(a) of the 2010 HVAU.

A.2.13.2 Detailed process for determination of efficient train configuration³⁴⁰

In response to ACCC's recommendation in the Draft Decision that an obligation on ARTC to determine an efficient train configuration within four years and that a consultation process should be included in the 2009 HVAU, ARTC has proposed the following steps for the determination of Indicative Service in section 4.16 of the 2010 HVAU:

- Within 12 months of ARTC being reasonably satisfied that an efficient train configuration has been accurately determined based on modelling by the HVCCC, and in any event within four years of the commencement of the 2010 HVAU, ARTC will submit the proposed characteristics of the indicative service to the ACCC for approval and for the 2010 HVAU to be varied to take into account of the proposed characteristics.
- ARTC will also submit to the ACCC the proposed indicative access charges for the indicative service and supporting documentation (section 4.16(d)).
- The consultation process between ARTC and HVCCC on determining the characteristics of an efficient train configuration is set out in Schedule F of the 2010 HVAU (section 4.16(a) and (c)). ARTC will endeavour to agree the characteristics proposed by HVCCC before submitting them to the ACCC.
- Characteristics put forward by ARTC and accepted by the ACCC will form the Indicative Service and Indicative Access Charges. They will apply in the year immediately following the date the variation to the 2010 HVAU accepting the Indicative Service and Indicative Access Charges comes into effect (section 4.16(e)).

³³⁸ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 21-22.

³³⁹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 22.

³⁴⁰ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, pp. 22-23

- Charges for Coal Access Rights for services other than the Indicative Services will be determined in accordance with the charge differentiation characteristics set out in section 4.14.
- If the ACCC does not accept the characteristics put forward by the ARTC, the Interim Indicative Service and the Interim Indicative Access Charges will continue.

ARTC's view is that it is not necessary to provide additional consultation steps that the ACCC will follow. Consent for the variation will be required from the ACCC and the ACCC may invite public submissions in accordance with section 44ZZBD of the TPA.

ARTC submits that a dispute resolution mechanism (with ACCC arbitration) is not required as the efficient train configuration only comes into effect if it is accepted by the ACCC.

A.2.13.3 Impact on non-indicative (coal) services³⁴¹

In relation to how an efficient train configuration will impact on the existing users of the network and whether it will change the incentives of the existing access holders:

- During the interim period, the Interim Indicative Access Prices for the two Interim Indicative Services will, for each year following the first calendar year, be determined (on an annual basis) in accordance with Schedule 3 to the 2010 IAHA and section 4.18 of the 2010 HVAU.
- Post interim period, only access holders operating the Indicative Service will be entitled to the Indicative Access Charges accepted by the ACCC under section 4.16. Access holders with Coal Access Rights for an Interim Indicative Service will not be entitled to the Indicative Access Charge (unless the service has been accepted by ACCC as the Indicative Service) and charges will be formulated in accordance with the charge differentiation principles set out in section 4.14(a) of the 2010 HVAU. In determining the charges for Coal Access Rights using other than the Indicative Service, ARTC will take into account the Indicative Access Charges (section 4.14(a)(i)) and factors affecting efficiency such as the consumption of track capacity and Coal Chain Capacity. Charges for non-Indicative Service will be expected to be higher than for Indicative Service should it consume more track capacity or Coal Chain Capacity.

A.2.13.4 Explicit power to reconfigure train configurations not appropriate³⁴²

ARTC does not agree with the ACCC's recommendation that ARTC should have the power to reconfigure access holders' train configurations if it would significantly increase coal chain throughput. It finds the broad ranging power to be inappropriate and inconsistent with the ACCC's position on clause 11.1(b)(iii) of the 2009 IAHA, which prior to the December 2009 IAHA amendment, allowed ARTC to permanently vary a Train Path on the grounds of maximising the use and reliability of the Network.

³⁴¹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, pp. 23-24.

³⁴² ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 24.

A.2.14 New Interim Indicative Access Charges proposed

Interim Indicative Access Charges (IIAC) for inclusion in the 2010 HVAU has been revised by ARTC as a reflection of recently available information on forecast coal volume, budget information and improved network description. Modelling is largely identical to the 2009 IIAC and ARTC has provided the financial model on a confidential basis to the ACCC (Appendix 7). The proposed IIACs are intended to apply as at the Commencement Date of the 2010 HVAU, covering the period between the Commencement Date and the end of 2010 should the 2010 HVAU be accepted in 2010. Future IIACs will be developed in accordance with the process provided in the 2010 HVAU.³⁴³

A.2.15 Provision of forecast information and volumes (section 4.18 & 4.19)

A.2.15.1 Removing any information asymmetry³⁴⁴

ARTC submits that section 4.19 of the 2010 HVAU will set out all the detailed information that ARTC will provide to all access holders of Coal Access Rights on an annual basis:

- ARTC's forecast operating expenditure for each of the next ten years (section 4.19(a)(i));
- ARTC's forecast capital expenditure for each of the next ten years (section 4.19(a)(ii));
- the aggregate contracted coal volume for each of the next ten years (section 4.19(a)(iii)(A)); and
- the minimum aggregate contracted coal volume for each of the next 10 years (section 4.19(a)(iii)(B)).

ARTC submits that the information provided to all Access Holders will allow them to ascertain the risk that their access charges would increase in subsequent years should other access holders with contracted coal terminate their access agreements early.

A.2.15.2 Mitigates need for a price cap³⁴⁵

ARTC submits that the provision of section 4.19 removes any information asymmetry between Access Holders and ARTC and therefore removes the need for a price cap. Furthermore it submits that:

- Introducing a pricing cap is inconsistent with the RCG endorsement process. ARTC's view is that the industry can either have the ability to determine ARTC's capital expenditure or ARTC can retain control and certainty over its costs including capital expenditure and the industry can obtain the benefit of a price cap.

³⁴³ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, pp. 24-25.

³⁴⁴ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, pp. 25-26.

³⁴⁵ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, pp. 25-26.

- Access Holders' TOP commitments are not open ended – their commitment does not justify the introduction of a long term pricing cap.
- A pricing cap would also place the wrong incentives on ARTC and jeopardise ARTC's commitment to the creation of Additional Capacity if it is not certain that ARTC will be able to recover the costs associated with the creation of Additional Capacity through increased charges.
- ARTC already faces significant constraints on its ability to increase Indicative Access Charges due to the application of the Ceiling Limit and the application of ACCC arbitration when two thirds of access holders dispute the Indicative Access Charges notified by ARTC.

A.2.16 Inclusion of System Assumptions (section 5.1)³⁴⁶

ARTC submits that the definition of System Assumptions in both the 2010 HVAU and the 2010 IAHA protects ARTC from being forced into accepting and applying track related System Assumptions which it does not agree with. Furthermore, ARTC submits that it reserves the ability to determine additional track related System Assumptions which may not be contained in the System Assumptions document, which are port centric and do not specifically identify the track related assumptions that need to be developed.

A.2.17 Review of mechanisms to identify and assign capacity losses (section 5.9)³⁴⁷

ARTC submits that it has strengthened the cancellation procedure (now contained in clause 11.6 of the 2010 IAHA).

In section 5.9 of the 2010 HVAU, ARTC proposes to, within 12 months of the commencement of the 2010 HVAU, undertake a review of the policy and processes for identifying and allocating losses of Capacity caused by Access Holders and their Operators and potential incentive mechanisms to minimise such losses where they have a material impact on Capacity or Coal Chain Capacity or the Capacity entitlements of Access Holders.

A.2.18 Extensions and connections (section 6.1)

A.2.18.1 Amendments to section 6.1(b)³⁴⁸

ARTC submits that it has made it clear in section 6.1(b) that the obligation on ARTC to consent to a request for a connection in section 6.19a) covers consent to the construction of the Turnout and consent to the construction of track on ARTC's Hunter Valley corridor to the extent that this is necessary to connect the Turnout to the owner's track, and provided the applicants agrees to reasonable terms. This obligation does not commit ARTC to construct the track on behalf of the applicant and leaves open the possibility that either the applicant or ARTC will be responsible for the construction of the track.

³⁴⁶ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, pp. 26-27.

³⁴⁷ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, pp. 27-28.

³⁴⁸ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 28.

A.2.18.2 Other amendments to section 6.1(a)³⁴⁹

ARTC submits that to mitigate any ability for ARTC to extract monopoly rents or frustrate access, amendments to section 6.1(a) gives a party seeking to build an extension that must connect to the ARTC network a choice in either accepting ARTC terms and conditions for building and gaining access to that extension, or building the extension itself and gaining access to ARTC land to build a Connection to ARTC's Network on reasonable terms and conditions.

A.2.19 Commercial viability test (section 6.2 and 6.3)

A.2.19.1 Greater specification of 'commercial viability' test³⁵⁰

ARTC submits that section 6.2(a)(i) sets out the criteria it will take into account in determining whether a project is commercially viable. These criteria are objective measurements which ARTC is to access according to 'its opinion'.

ARTC submits that it does not agree with ACCC's recommendation that ARTC amend section 6.2(a)(i) (and section 6.3(b)(iii)) to provide that ARTC's opinion is to be 'ARTC's reasonable opinion' because:

- The criteria set out in section 6.2(a)(i) (and section 6.3(b)(iii)) are objective criteria;
- ARTC's view could be trumped by an alternative view expressed by another party;
- ARTC's decision should not be second guessed with regard to assessing commercial viability;
- Applicants have the option of funding Additional Capacity themselves should ARTC decide that the commercial viability criteria are not satisfied.

A.2.20 Creation of Additional Capacity³⁵¹

ARTC submits that Appendix 4 contains a flow chart describing the pathways and options for creation of additional capacity in the Network.

A.2.21 RCG consultation process (section 6.4)

A.2.21.1 RCG control of timeframes and delivery of projects³⁵²

ARTC submits that the 2010 HVAU makes it clear that the RCG will control the timeframes for both consultation and approval of projects and the delivery of projects.

- In section 6.4(a)(iv), ARTC has made it clear that the stages of consultation set out in section 6.4(c) to (g) will be followed except where the RCG consents to a request by ARTC to adopt a modified consultation process (which would be the

³⁴⁹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 29.

³⁵⁰ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, pp. 29-30.

³⁵¹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 30.

³⁵² ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, pp. 30-31.

case where ARTC considers that the process set out in section 6.4 would unjustifiably compromise the timely delivery of the project).

- Concept assessment report provided by ARTC to the RCG under section 6.4(d)(ii) will now include indicative timeframes for the development, through delivery of the project (unless otherwise agreed upon by ARTC and the RCG). ARTC will seek endorsement of the concept assessment report from the RCG, which will include endorsement of the indicative timeframes under subsection (iii).
- Project assessment report provided by ARTC to the RCG under section 6.4(f)(ii)(C) will incorporate a project schedule, including time tolerances and project management plan under section 6.4(f)(ii)(E)(xi) setting out, among other things, project phases, milestones, deliverables. ARTC will seek endorsement of the project assessment report from the RCG, which will include endorsement of the project schedule and these project phases, milestones and time tolerances.

A.2.21.2 RCG membership rules³⁵³

ARTC set out in 6.4(b)(ii) of the 2010 HVAU changes to the membership of the RCG aimed at ensuring the RCG membership will include a representative from each of the Pricing Zones.

The membership of the RCG set out in the 2010 HVAU will include, one representative of:

- each Access Holder who holds the largest volume of contracted coal GTK;
- any other Access Holder with more than 7% of contracted coal GTK on the Network, who is not already eligible to appoint a representative under subsection (A);
- all Access Holders with less than 7% of contracted coal GTK on the Network;
- each Operator, in its capacity as an Operator, with more than 10% of contracted coal GTK on the Network (in a non-voting capacity);
- the HVCCC (in a non-voting capacity).

ARTC notes that access holders having less than 7% of contracted coal GTK on the Network will still have their interest represented in votes of the RCG, including matters of Prudential expenditure. The member representing those access holders is entitled and is expected to split its vote according to the percentage of contracted coal GTK held by each represented access holder.

As set out in its response to the Draft Decision, ARTC does not think it is appropriate to include access holders of Non-Coal Access Rights in the RCG. ARTC has made it clear in section 6.4(c)(iv) that before finalising the Hunter Valley Corridor Capacity Strategy it will invite comments from non-coal and coal users and will consider the views submitted prior to finalising the strategy. ARTC has also clarified the steps it

³⁵³ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, pp. 31-32.

will go through in preparing the Corridor Capacity Strategy in response to concerns expressed by the ACCC in its Draft Decision.

A.2.21.3 Clarification as to how voting entitlement is determined³⁵⁴

ARTC has proposed amendments to section 6.4(b)(v) and introduced a new section 6.4(b)(vi) to clarify how it will determine voting entitlement in the RCG:

- In assessing contracted coal GTK, ARTC will take into account all coal volumes contracted by access holders for the current calendar year and the next nine calendar years.
- Under the new section 6.4(b)(vi), ARTC has reserved the discretion to take into account anticipated coal GTK which ARTC reasonably expects to become contracted coal GTK for any of the next ten years, immediately following the completion of the project.

ARTC submits that this discretion prevents existing coal producers in the Hunter Valley from holding up new projects aimed at providing capacity to new entrants. However, ARTC acknowledges that this may cause concern as a new investment endorsed by the RCG on the back of a potential new or expanding access holders vote may not see the expected volume eventuate. ARTC's view is that it is not required or likely to commence a project until sufficient volumes are committed, even if the project has been endorsed.

A.2.21.4 Clarification of treatment of variations to budget and timetable (section 6.4(g)(iii))³⁵⁵

ARTC submits that the reports provided by ARTC to the RCG for endorsement at various stages will include forecast budgets and timelines for the project unless otherwise agreed by ARTC and the RCG:

- Concept assessment report will include broad cost estimates and indicative timeframes for the development, through consultation and the delivery of the project.
- Project feasibility report will identify the estimated project costs (+/- 20%), a preliminary project management plan, initial estimate of timeline for milestones and an outline of the Project Assessment stage including an estimate of budget.
- Project assessment report will include a project budget (+/-10% or larger when appropriate) and a project schedule, an estimate of contingency (risk assessment, cost analysis and basis for contingency), financial evaluation, including estimated impact on access pricing, a developed project management plan.

With regard to variations to the cost estimates and project schedule included in the Concept Assessment and Project Feasibility report, ARTC submits that these will be included in the RCG review of the project assessment report.

³⁵⁴ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 32.

³⁵⁵ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, pp. 32-33.

ARTC submits that if a variation to the project budget or schedule endorsed by the RCG at the Project Assessment stage is found on the procurement step of the Project Implementation stage, then ARTC may seek endorsement from the RCG for this variation. ARTC may refer the matter to an independent expert should RCG not endorse the full amount of the variation.

ARTC has made it clear in section 6.4(g)(i)(F) that it will proceed with a project regardless of whether the independent expert determines the full cost confirmed by ARTC as Prudent, having regard to the reasonableness of the variation to the project schedule.

ARTC submits that it will have the opportunity to proceed with the project by way of open competitive tender if the cost determined by the independent expert is less than the cost confirmed by ARTC, or if the variation to the project schedule is determined to be unreasonable. Under this approach ARTC believes that the costs should be taken as Prudent and included in the RAB, and changes to project schedule should be deemed to be reasonable. ARTC prefers the open tender approach to internal evaluation or alliance as the former would incur a lower cost and therefore ensures the industry obtains a prudent cost. ARTC considers this approach appropriate as the independent expert may use open tender process as a comparator when reaching a decision on whether the costs are Prudent and changes to project schedule are reasonable.

ARTC submits that progress reports submitted to RCG at RCG meetings following the commencement of the Project Implementation will include 'exceptions' where the project will deviate outside of its planned cost margins or outside of the planned timing tolerances, unless agreed otherwise. (Section 6.4(g)(iii)(B)(v)). In addition, it may submit a revised costing or revised project schedule to the RCG for endorsement if following the commencement of Project Implementation ARTC identifies a variation to the project budget or project schedule already endorsed by RCG as part of the Project Assessment report.

A.2.21.5 Certainty of completion and timing incentives (section 6.4(g)(i)(F))³⁵⁶

ARTC has made amendments to section 6.4(g)(iii) of the 2010 HVAU to clarify the obligations on ARTC to proceed with a project when there has been a variation to the project budget or project schedule which has been endorsed by the RCG:

- where a variation to a project budget or project schedule has been identified under section 6.4(g)(iii)(C), ARTC will submit a revised costing to the RCG but will continue with implementation of the project while a decision from the RCG is pending (section 6.4(g)(iii)(C)(i));
- where the RCG endorses less than the full variation to the budget and project schedule put forward by ARTC, ARTC may refer the matter to an independent expert and will continue with the project implementation while a determination of the independent expert is pending;

³⁵⁶ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, pp. 34-35.

- if the independent expert decides the full extent of the variation to be taken is Prudent or the variation to the project schedule is reasonable, ARTC will continue with project implementation (section 6.4(g)(iii)(C)(vi)).

ARTC submits that any expenditure incurred in continuing with a project while an endorsement by the RCG or the independent expert is pending will be deemed a Prudent direct cost to the project (section 6.4(g)(iii)(C)(vii)). Otherwise, ARTC would not be prepared to continue construction if there was a risk that ARTC's expenditure in continuing a project during the decision pending period would not be deemed Prudent.

ARTC believes it is important that additional incentives be provided for ARTC to deliver a project on time and as such any financing costs incurred during the period between the actual delivery date and delivery dated endorsed by the RCG or independent expert, as applicable, will not be able to be included in the RAB and recovered by ARTC. ARTC submits that it should not be penalised for any reasonably unforeseen delays beyond its control.

ARTC submits that although financing costs incurred during delays is small compared to the loss of volume and un-utilised investments in other parts of the coal supply chain, it considers its loss to represent ample disincentive to ARTC in the context of its own business and is more than commensurate with what would be expected given the relativity of ARTC as an input to the coal supply chain, against the output of that chain.

A.2.22 Performance measures (section 8 and schedule D)

A.2.22.1 Schedule D of the 2010 HVAU³⁵⁷

ARTC submits that section 1 of Schedule D contains Network KPIs, including both coal specific and non specific metrics. ARTC has specified the responsibility for performance in relation to the KPIs, the reporting frequency and the reporting level. In developing these KPIs, ARTC has taken into account:

- The other performance measures, incentives and remediation obligations on ARTC and access holders in the 2010 HVAU and the 2010 IAHA.
- The additional reporting requirements on ARTC outside of the 2010 HVAU and in particular the Hunter Valley KPIs included in the NSW Lease.
- Performance measures reported by the HVCCC of the Coal Chain and the individual elements on of the coal chain.
- The need for consistency with KPI reporting under the Interstate Access Undertaking.
- The need for consistency with ARTC's internal KPI reporting.
- The need to recognise the presence of applicable System Assumptions.

³⁵⁷ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 35.

A.2.22.2 Section 8.1 and 8.2 of the 2010 HVAU³⁵⁸

ARTC submits that in section 8.1 of the 2010 HVAU it has set out its reporting obligations, the reporting frequency for each indicator and that ARTC will commence reporting performance against each of these indicators following the completion of the first full relevant period after the commencement of the 2010 HVAU.

In section 8.2 of the 2010 HVAU, ARTC has set out its obligations to negotiate KPIs to be included in an access agreement and provide a framework for the selection of the Agreement KPIs.

A.2.22.3 Section 8.3 of the 2010 HVAU and section 2 of Schedule D³⁵⁹

ARTC submits that it has now included an obligation to comply with the performance incentive schemes included in section 2 of Schedule D and is in the process of developing those schemes further with a view to having them included in the final approved undertaking.

A.3 ARTC 2010 HVAU Submission (Explanatory guide September 2010) – Key changes to the 2010 IAHA

A.3.1 Clarification of tolerance³⁶⁰

ARTC submits that it has changed the drafting in clause 3.1 to clarify tolerance as a flexibility mechanism included to assist producers in managing use of Coal Access Rights where ships slip from one Allocation Period to another.

A.3.2 Determination of Monthly Tolerance Cap (MTC)³⁶¹

ARTC submits that amendments have been made to clause 3.3 to provide a detailed methodology as to how MTC is determined. The details are as follow:

- Step 1: ARTC will identify a target MTC for each Pricing Zone for each Contract Year in the Hunter Valley Corridor Capacity Strategy published in the previous year after consultation with the RCG. The industry will be able to fund Additional Capacity to increase the level of tolerance available to the system. The level of TMTC reflects the amount of capacity that the industry is prepared to build to provide for system flexibility to meet demand variation and the maximum for each Contract Year is 10%. Additional capacity in excess of 10% could still be available for ad hoc usage.
- Step 2: ARTC will sculpt the TMTC for each month of the Contract Year to reflect the maintenance requirements in each month. The TMTC set out in the Hunter Valley Corridor Capacity Strategy may rely upon additional capacity to be created by a project which has not yet been commissioned. If the project creating the additional capacity for the purposes of tolerance is delayed, ARTC will advise the access holders of the revised MTC for that Pricing Zone, prior to the commencement of each month. ARTC will use reasonable endeavours to publish

³⁵⁸ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 36.

³⁵⁹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 36.

³⁶⁰ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p.36.

³⁶¹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, pp. 36-37.

the MTC by 30 September of the previous contract year and in any event prior to the commencement of the contract year for every year except the first contract year. ARTC will notify the access holder the MTC for each Pricing Zone in each month prior to the commencement of the agreement.

A.3.3 Agreement KPIs³⁶²

ARTC submits that the Agreement KPIs in clause 3.13 are consistent with ARTC objectives set out in Schedule D and section 8 of the 2010 HVAU. ARTC submits that it will report performance against the Agreement KPIs within a reasonable period when requested by the access holder and ARTC will meet with the access holder regularly to review performance against the Agreement KPIs.

A.3.4 Ad Hoc Charge Rebate³⁶³

ARTC submits that it has amended clause 5.4(b) of the 2010 IAHA to provide an Ad Hoc Charges rebate to an access holder, where the access holder would not have used its Annual Contracted Paths had those Ad Hoc Paths not been made available. ARTC has also made amendments to clause 5.4 (a) and (d) of the 2010 IAHA to distinguish between a rebate for TOP Charges and a rebate for Ad Hoc Charges.

A.3.5 Extensions³⁶⁴

ARTC has removed clause 5.7 of the December 2009 IAHA in response to the ACCC request on the basis that extensions are not covered by the 2010 HVAU.

A.3.6 Discretion to waiver TOP Charges for Coal Access Rights for track possessions³⁶⁵

ARTC submits it has amended clause 11.2 to remove ARTC's discretion to waive the TOP charges for Coal Access Rights during track possession for maintenance and repairs, so it is consistent with ARTC's contractual obligation to provide ACP to the Access Holder in the Contract Year. ARTC submits all track possession for maintenance will be taken into account in the annual sculpting process and the impact of any unplanned maintenance activity is contemplated and remedied in the application of the TUT and the Annual Reconciliation. ARTC considers the option to waive Charges as contemplated in clause 11.2(c) would be reasonable in the case of non-coal Access Rights, which are not covered under the TUT and annual reconciliation remedies.

A.3.7 Removal of paths for under-utilisation³⁶⁶

ARTC submits that it has amended clause 11.4 in the 2010 IAHA in line with the ACCC consideration to strengthen the obligations on ARTC in the event of under-utilisation. The amendment requires ARTC to request the access holder to provide reasons why it still has a sustained requirement for the path usages, where the number of services operated on behalf of an access holder is below the six month threshold.

³⁶² ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 38.

³⁶³ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 38.

³⁶⁴ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 39.

³⁶⁵ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 39.

³⁶⁶ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 40.

A.3.8 Use of Non-Compliant Services³⁶⁷

ARTC has amended clause 11.5 in the 2010 IAHA to provide for temporary use of a Non-Compliant Service or a permanent change to the Service Assumptions with consent of the ARTC.

ARTC will not unreasonably withhold its consent to the temporary use of a Non-Compliant Services or permanent variation of the Service Assumptions in the applicable Train Path Schedule, provided the access holder provides ARTC with the requisite notice and the operation of service will not have an impact on Coal Chain Capacity, capacity of the Network or the capacity entitlement of another access holder. ARTC is entitled to rely on the recommendations of the HVCCC on the impact of Non-Compliant Services and may adjust TOP charges to reflect the characteristics of the non-compliant services.

A.3.9 Cancellation of Services

A.3.9.1 Producer proposals³⁶⁸

ARTC submits that it has reviewed two proposals submitted by industry. The key elements were as follows:

- Under both proposals, an access holder is only able to schedule a number of paths up to its Scheduling Cap and they will consume a Scheduled Path if they use or cancel one of their own paths or if the cancellation of another access holder's Scheduled Path was assigned to them.
- Under Proposal 1, cancellation or assignment of a cancellation does not consume a BPU. ARTC may allow scheduling above the Scheduling Cap if there is no impact on another access holder's ability to schedule up to their Scheduling Cap or to allow accumulation of a cargo at the port.
- Under Proposal 2, cancellation or assignment of cancellation will consume an access holder's contractual entitlement. ARTC may also allow scheduling above the Scheduling Cap where necessary to promote the efficient operation of the coal chain or ARTC builds more capacity. This proposal measures ARTC's performance by assessing whether ARTC allowed an access holder to schedule paths in excess of the sum of the Scheduling Cap.

A.3.9.2 Concerns with producer proposals³⁶⁹

ARTC submits there were a number of significant concerns regarding those proposals:

- Inappropriate reliance on the current cancellation assignment procedure as cancellation policy and process are subject to ongoing review. The assignment of faults is not carried out by the HVCCC or an independent arbiter, cancellation due to multiple causes are hard to allocate, cancellation cannot be assigned unless

³⁶⁷ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, pp. 40-41.

³⁶⁸ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, pp. 41-42.

³⁶⁹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, pp. 42-43.

agreed by the producer, such informal process leads to “horse trading” and does not allow time for in-depth investigation.

- Increase the possibility of disputes as producers seek to avoid assignment of cancellations.
- Provide inappropriate incentives to operators, which lead to a reluctance by operators to cancel services or to delay making cancellations.
- Fundamental misconception of tolerance by equating the availability of tolerance across the system with an individual entitlement to tolerance each period.
- Allowing consumption up to the Scheduling Cap is unworkable as there isn't a direct linear relationship between the number of cancellation and the number of paths available on the Network
- Envisage that ARTC may allow an access holder to schedule paths above their BPU despite this affects other access holders.
- Introduce additional monitoring tasks on ARTC and the HVCCC and might create potential for delay.
- Proposed cap is very low, this disconnects the impact of a cancellation from the quarantining effect when the event causes more than two cancellations.

A.3.9.3 Key elements of clause 11.6³⁷⁰

- The key elements of the proposal put forward by ARTC in clause 11.6 are:
- Clause 11.6(a) and (b) capture direct and indirect cancellations
- Clause 11.6(a) relies on the assignment of cancellation by the LRSG
- ARTC will rely on the HVCCC's advice as to whether the cancellations have had an impact on track capacity, Coal Chain Capacity or the contractual entitlement of another access holder.
- The maximum number of paths that ARTC is able to remove from access holders in respect of any one event is two.

A.3.10 Assignment, novation and ability to terminate on expiry NSW Lease³⁷¹

ARTC submits that it does not consider the right that the Access Holders could terminate the agreement if the NSW Lease ends is appropriate as ARTC has an obligation under the NSW Lease to include within all ARTC Agreements a right for the Lessor to require the novation of the AHAs at the expiration in such circumstances.

³⁷⁰ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, pp. 44-45.

³⁷¹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 45.

A.3.11 Trading

ARTC does not consider the proposed amendment to clause 16.2 in response to the Draft Decision is appropriate as most types of transfers are covered separately in clause 16.3 and 16.4 of the 2010 IAHA and the only transfer that may not be covered is an assignment or novation of the entire agreement and ARTC believes it should have discretion in relation to consent to such a transfer.³⁷²

ARTC submits that it has proposed a number of amendments in response to the Draft Decision to address concerns regarding the trading provisions in clause 16.4-16.8 of the IAHA:³⁷³

- ARTC has made changes to clause 16.4(d) that it will not unreasonably refuse its consent to a non-safe harbour trade provided it can ascertain that the trade will not have an impact on capacity, coal chain capacity or the capacity entitlement of another access holder and ARTC will use reasonable endeavours to inform the HVCCC of its decision within two weeks of being informed of a trade.
- ARTC has made amendments to clause 16.4 to clarify that a trade must be for an unconditional BPU in the relevant Contract Year to fall within the safe harbour provisions and that the trading provisions apply to internal trading between load points of the one access holder.
- ARTC has amended clause 16.5 to clarify that a traded path will be deemed to be used by the former access holder and will therefore not consume new access holder's BPU.
- ARTC has clarified the drafting in clause 16.6(a) that an access holder may use Capacity Trading System (CTS) to identify counterparties to a trade of track capacity. ARTC submits that it will consider all trades of track capacity notified by the administrator of the CTS and inform the CTS Administrator of whether or not the trade is a safe-harbour trade.
- ARTC has amended clause 16.6(c) to make it mandatory for ARTC to consider the HVCCC's view on the impact of a trade of Coal Chain Capacity and the Capacity entitlement of other access holders.
- ARTC submits it has made a commitment to reduce the timetable to make a decision for non-safe harbour trade in clause 16.8(a).

A.3.12 True-up test

A.3.12.1 Provision of TUT information³⁷⁴

ARTC submits that it has amended clause 2.6 to provide greater transparency by committing to publish the result of each system-wide TUT carried out throughout the year on its website, as well as notify the Access Holder of any rebate accruing to that Access Holder throughout the year.

³⁷² ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 46.

³⁷³ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, pp. 46-48.

³⁷⁴ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 49.

A.3.12.2 Treatment of tolerance³⁷⁵

ARTC submits that the purpose of Tolerance is to enable the access holder to adjust its contracted path usages from one period to the next, rather than providing additional path usages to top up the annual contracted requirement. Therefore, ARTC does not consider it is appropriate for an access holder to be entitled to a rebated under the TUT if it did not receive its share of the MTC.

A.3.12.3 Definition of NPC³⁷⁶

ARTC submits that it has clarified NPC and how it will be determined in Schedule 2 of the 2010 IAH. ARTC defines NPC as a functional measure of the number of coal paths that a Pricing Zone is capable of providing in a particular Period and this measure will be determined prior to the commencement of the relevant Contract Year, following consultation with the HVCCC. ARTC sets a provision to adjust NPC during a year to reflect changes to the delivery of capacity expansion that may arise during that year.

ARTC submits it will assess the number of Functional Coal Paths available in each Pricing Zone that is capable of providing on the assumption that the Network was only used for Coal Trains at a particular point in that Pricing Zone.

A.3.12.4 Application of TUT³⁷⁷

ARTC will compare predetermined NPC with TPR for each Pricing Zone for each month. ARTC would have failed the TUT for that Pricing Zone for that month if the TPR is greater than the NPC.

TPR is calculated as the sum of:

- aggregated BPU for all monthly producers
- MTC
- Ad Hoc and other relevant Path Usages for Coal trains
- Path usage consumption due to utilisation by non-Coal Trains
- lesser of actual vs. forecast system losses by other parties
- actual maintenance requirements
- ARTC's actual system losses
- and subtract those paths that were not made available by ARTC due to Availability Exceptions

³⁷⁵ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, pp. 49-51.

³⁷⁶ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 52.

³⁷⁷ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, pp. 53-56.

ARTC will rebate TOP Charges to the Access Holders equivalent to the size of the Access Holders' shortfall against BPU and Access Holders who have used their total BPU are not entitled to a rebate.

A.3.13 Interpretation of Tier 1 mandatory provisions³⁷⁸

ARTC submits that it has amended clause 1.5 to address the ACCC's concern that negotiations could result in Access Agreements that frustrate the objectives of alignment and the long term solution. ARTC submits clause 1.5 of the 2010 IAHA provides that a Tier 1 provision will have priority over any other provision and will be interpreted by reference to the objectives of the 2010 HVAU.

A.3.14 Train Path Schedule³⁷⁹

ARTC recognises that its obligation to commit to new capacity once it enters into an access holder agreement to construct this new capacity, however ARTC submits there may be occasions where it is inappropriate that ARTC be bound to construct this new capacity and ARTC should not be obliged to construct the listed project at a loss.

ARTC submits that it has amended clause 4.3(b) to provide that if a project is not commercially viable, then ARTC will be required to offer the access holder the opportunity to self fund the project. If the access holder makes a capital contribution, equitable treatment of capital contribution in section 6.2(f) of the 2010 applies. ARTC also submits that it will enter into good faith negotiations with the access holder to arrange alternative funding if the access holder does not want to self fund the project.

A.4 Appendix 2 – ARTC revised remaining mine life estimate

A.4.1 Processes and Assumptions³⁸⁰

ARTC submits that it has made every effort to establish JORC compliant 1 July 2008 marketable reserves for each mine. ARTC applied the following method where it has been unable to establish a figure:

- Where reserves information was established, but not marketable reserves, ARTC has assumed this higher total reserves figure.
- Where ARTC has been unable to establish reserves information, but resources information is available, ARTC has applied a uniform 30% resource to reserves conversion factor.
- In cases if marketable reserves information was only available for 31 December 2008, ARTC has added back tonnage based on a pro rate of actual 2008 production from ARTC records.

³⁷⁸ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 56.

³⁷⁹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, pp. 56-57.

³⁸⁰ ARTC, *Hunter Valley Access Undertaking - Explanatory Guide (September 2010)*, 7 September 2010, [Appendix 2,] pp. 6-9.

In relation to new mines that are not yet in production, ARTC has proposed to continue with past practice to assume the mine will definitely come into production in less than 5 years.

ARTC submits that it has noted the ACCC's concerns and proposes to apply a single RAB and Rate of Return for the Hunter Valley coal network.

A.4.2 Reserves comparison with MJA assessment³⁸¹

ARTC notes that MJA and the NSWMC have identified a number of mines that are still undergoing exploration, which were excluded in the Booz assessment, however ARTC has taken a conservative approach of assuming such prospects will become productive before 2014 and therefore have been included. ARTC's revised estimate in the 2010 HVAU is 12% greater than what was proposed in the 2009 HVAU.

A.4.3 Treatment of mine production forecasts³⁸²

ARTC submits that it has updated the original forecasts in the Booz assessment with more recent production forecasts that are closely aligned to future capacity allocations at the port.

A.4.4 Treatment of domestic coal and coal transported to other locations³⁸³

ARTC submits that in its Mine Life Calculation Spreadsheet, it has separately estimated production for domestic coal and coal going to locations other than Newcastle. ARTC proposes to compare export mine production, where the impact of domestic and other coal has been removed against supply chain constraint, which it believes would address the ACCC's concern in the Draft Decision.

A.4.5 Treatment of supply chain constraints³⁸⁴

ARTC submits its Capacity Strategy is designed to ensure that track capacity remains higher than port capacity. ARTC has revised production and capacity assumptions and adapted a more valid comparison with port capacity than that used in the Booz assessment.

A.4.6 Revised average remaining mine life³⁸⁵

ARTC now proposes a revised estimate of remaining mine life for the Hunter Valley coal network of 22 years to apply in 2010.

A.5 Appendix 3 – ARTC revised Rate of Return proposal

In response to the ACCC Draft Decision, ARTC proposes a revised pre-tax real WACC of 9.16 per cent³⁸⁶, based on the following revised parameters:

³⁸¹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010,[Appendix 2,] , pp. 9-15.

³⁸² ARTC, 2010 HVAU Explanatory Guide, 7 September 2010,[Appendix 2,], pp.15-16.

³⁸³ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010,[Appendix 2,], pp.16-17.

³⁸⁴ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010,[Appendix 2,], pp.17-20.

³⁸⁵ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010,[Appendix 2,], p. 20.

A.5.1 Risk free rate³⁸⁷

ARTC submits that it has addressed the ACCC's concern by proposing a risk free rate that excludes the 'convenience yield'.

A.5.2 Cost of Debt³⁸⁸

ARTC proposes to linearly extrapolate a 10 year BBB rate based on the difference between the 5 year rate and the 7 year rate and considers this as the best, most certain available proxy.

A.5.3 Debt Issuance Costs³⁸⁹

ARTC submit that it proposes to use debt raising costs of 9.5 basis points per annum consistent with the ACCC recommendation in the Draft Decision.

A.5.4 Asset Beta³⁹⁰

ARTC does not agree with the ACCC's view in the Draft Decision that there are lots of factors to substantially mitigate ARTC's stranding risk:

- ARTC does not consider current spot prices provide any information regarding the long term outlook for the coal market and submits structural change could occur in response to climate change initiatives.
- ARTC submits that Access Seekers who provide complementary investments are able to seek much higher returns for this additional risk, whilst ARTC's return is regulated.
- ARTC believes that being able to incorporate capital expenditure in the RAB, having TOP contracts and loss capitalisation do not guarantee recovery, unless coal volumes and access pricing are such that generated revenue is sufficient.
- ARTC does not believe that remaining mine life has been estimated conservatively even though the estimate is lower than the current value under the NSWRAU.

ARTC does not consider that the ACCC setting of asset beta is conservative and proposes to include an asset beta of 0.55 for the purpose of estimating Rate of Return.

A.5.5 Equity Issuance Costs³⁹¹

ARTC submits that it proposes to include an equity raising cost of 3 per cent of the minimum external equity capital required in its cash flows.

³⁸⁶ ARTC, *Hunter Valley Access Undertaking - Explanatory Guide (September 2010)*, 7 September 2010,[Appendix 3,] p.27.

³⁸⁷ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010,[Appendix 3,] p.16.

³⁸⁸ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010,[Appendix 3,] pp.16-17.

³⁸⁹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010,[Appendix 3,] p.17.

³⁹⁰ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010,[Appendix 3,] pp.17-19

³⁹¹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010,[Appendix 3,] p.19.

A.5.6 Market Risk Premium³⁹²

ARTC does not consider that global financial markets have recovered to a level of substantial stability, therefore ARTC proposes to include a MRP of 6.5% for the purpose of estimating Rate of Return.

A.5.7 Capital Structure and Gearing³⁹³

ARTC proposes to use a debt to equity ratio of 52.5 per cent.

A.5.8 Imputation Factor³⁹⁴

ARTC considers that there is substantial uncertainty surrounding what is the correct value of gamma and proposes to use a gamma value of 0.5, which is consistent with the value used in ARTC's Interstate Network.

A.6 Appendix 5 – Transition of regulatory arrangements

A.6.1 Aspects of annual compliance assessment creating issues that may require transitioning arrangements³⁹⁵

ARTC submits that the NSWRAU and HVAU cover slightly different network, the differences largely lie around those parts of the Hunter Valley coal network that are currently unconstrained, thus the implications lie largely around RAB and RAB Floor Limit Roll Forward.

ARTC recognises that the current annual compliance under the NSWRAU is based around a financial year whilst annual compliance under the HVAU is proposed to be based around a calendar year. ARTC submits some form of industry consultation may be required to achieve alignment and should minimise any financial outcomes.

ARTC submits that aligning the timing of transition to the timing of ARTC's internal financial and operational reporting will result in benefits to ARTC and the industry, by way of reduced compliance cost.

ARTC submits other issues to be addressed in undertaking respective RAB roll forwards during transition include:

- CPI – clearly transition aligned to a quarter or half year would simplify the CPI component of RAB roll forward.
- Capital Expenditure – it would seem reasonable to include all capital expenditure associated with projects commissioned in the compliance period in the RAB roll forward for that compliance period.

³⁹² ARTC, 2010 HVAU Explanatory Guide, 7 September 2010,[Appendix 3,] p.20.

³⁹³ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010,[Appendix 3,] p.21.

³⁹⁴ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010,[Appendix 3,] p.21.

³⁹⁵ ARTC, *Hunter Valley Access Undertaking - Explanatory Guide (September 2010)*, 7 September 2010,[Appendix 5,] pp.67-76.

- Depreciation – depreciation included in the annual RAB roll forward is calculated on the basis of the current carrying RAB value of assets at the start of the compliance period and the life of the assets as at the compliance year.
 - Treatment of ‘deeming’: deeming of commissioning of projects is currently incorporated in NSWRAU and HVAU to simplify calculation. Deeming would suggest that no depreciation should be included in the pre transition RAB roll forward, whilst 100 per cent of depreciation should be included in the post transition RAB roll forward for assets commissioned in that compliance period
 - Alternative approach: while deeming simplifies calculation, depreciation could be more robustly determined by just calculating depreciation in relation to each project based on the actual date of commissioning of the project and using an estimate of economic life from the actual date of commissioning of the project.
- Return - return to be included in the regulatory cost base is based on the average value of the starting and ending RABs for the compliance year under both the NSWRAU and HVAU, this approach is underpinned by an assumption that CAPEX is incurred evenly throughout the compliance year. While averaging value simplifies calculation, ARTC submits that return could be more robustly determined by just calculating return in relation to each project based on the actual date of commissioning of the project.

A.6.2 Proposal for transitioning³⁹⁶

ARTC’s proposal for transition of regulatory arrangements from NSWRAU to the 2010 HVAU are as follow:

- Pre-transition compliance assessment
 - Compliance will be assessed over the 1 July 2010 to 31 December 2010 period.
 - The assessment will be undertaken by IPART and compliance will be assessed in accordance with the NSWRAU.
 - ARTC will submit to IPART by 30 April 2011, in respect of the compliance period in accordance with Schedule 3 Clause 5 of the NSWRAU.
- Post-transition compliance assessment
 - Compliance will be assessed over the 1 January 2011 to 31 December 2011 period.
 - The assessment will be undertaken by the ACCC and compliance will be assessed in accordance with the HVAU.

³⁹⁶ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010,[Appendix 5,] pp.77-82.

- ARTC will submit to the ACCC by 30 April 2010 documentation in accordance with section 4.9 of the HVAU.
- ARTC will submit documentation detailing the initial value of the RAB and RAB Floor Limit in relation to other segments.

A.7 Appendix 6 – Pricing Zone 3 Price Cap proposal

ARTC submits that it has utilised a 10 year forecast model to determine a reasonable price cap for Pricing Zone 3.³⁹⁷ Based on this modelling and assuming price increases each year based on CPI forecast, ARTC submits that it would reach a break-even point in Pricing Zone 3 in 2013 and a recovery of previous capitalised losses 2 years later in 2015.³⁹⁸ ARTC considers that a 40% loss of volume would be reasonably representative of the closure of one of the larger mines in Pricing Zone 3. In such circumstances, ARTC considers a 25% price cap would represent a reasonable balance of interests between ARTC and Pricing Zone 3 producers where the risks to ARTC associated with a delay in long term full economic cost recovery is not intolerable as is any price uncertainty for Zone 3 producers.³⁹⁹

A.8 Appendix 7 – ARTC revised Interim Indicative Access Charges

ARTC has attached its proposed 2010 IIACs in this appendix. ARTC submits that its approach to develop the 2010 pricing is similar to that used in the past in order to determine whether revenue collected, which is based on pricing and volumes satisfies the ceiling test.⁴⁰⁰

ARTC submits its cost base, giving rise to a ceiling revenue limit, consists of maintenance expenditure, network control and terminal management, an allocation of asset management and corporate overheads, depreciation based on proposed remaining mine life estimates, and a return on assets based on proposed asset valuation and proposed rate of return. ARTC believes this approach is not significantly different from that currently used to demonstrate compliance with the ceiling under the NSWRAU, differences arising from the proposed Pricing Principles include:⁴⁰¹

- The introduction of 3 Pricing Zones.
- The inclusion of infrastructure between Dartbrook mine and The Gap.
- The exclusion of Segments included in the IPART evaluation but not included in the HVAU Network.
- The specification of two part prices variable and TOP

³⁹⁷ ARTC, *Hunter Valley Access Undertaking - Explanatory Guide (September 2010)*, 7 September 2010, [Appendix 6,] p. 83.

³⁹⁸ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, [Appendix 6,] p. 83.

³⁹⁹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, [Appendix 6,] pp.83-86.

⁴⁰⁰ ARTC, *Hunter Valley Access Undertaking - Explanatory Guide (September 2010)*, 7 September 2010, [Appendix 7,] p. 3.

⁴⁰¹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, [Appendix 7,] pp. 3-4.

ARTC submits that loss capitalisation would have no direct bearing on the pricing outcomes as Pricing Zone 1 and 2 form the Constrained Network, whilst loss capitalisation is more relevant in Pricing Zone 3 where revenue remains well below a building blocks ceiling and has little bearing on the pricing decision for coal in that Pricing Zone in the calculation of the IIACs for 2010.⁴⁰² However, ARTC proposes to incorporate the loss capitalisation approach for asset roll forward in developing a financial model supporting its 2011 asset roll forward and ceiling test compliance submission to the ACCC in early 2012.⁴⁰³

A.9 ARTC submission in response to ACCC consultation paper

A.9.1 Treatment of asset disposals in RAB roll forward⁴⁰⁴

ARTC submits that the write-down of assets disposed of as a result of asset replacement is consistent with standard accounting practice and is consistent with the current practice in the NSWRAU.

A.9.2 Performance Measurement and Incentives⁴⁰⁵

ARTC submits that the development of incentive mechanism is largely in response to the concern raised by the ACCC in the Draft Decision that there is an absence of balancing mechanisms to positively incentivise ARTC to invest in and maximise utilisation of the Hunter Valley coal network.

ARTC proposes some options to address the ACCC concern, including:

- A mechanism to positively incentivise ARTC to make capacity, in excess of that contracted and available to users and balancing the negative incentives arising under the TUT
- A mechanism to incentivise ARTC to improve productivity by enabling ARTC to capture any benefits for delivering services at costs below pre-agreed benchmarks; and
- Permitting ARTC to earn an increment on the regulated return where it met agreed benchmarks in relation to KPIs

ARTC submits that it intends to release a discussion paper in relation to positive incentive mechanisms to stakeholders in order to obtain views, and subsequently inform ARTC in the development of mechanisms that may be incorporated in the 2010 HVAU.

⁴⁰² ARTC, 2010 HVAU Explanatory Guide, 7 September 2010,[Appendix 7,] p. 4.

⁴⁰³ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010,[Appendix 7,] p. 5.

⁴⁰⁴ ARTC, *Australian Rail Track Corporation Ltd – ARTC Hunter Valley Coal network Access Undertaking – Response to ACCC Consultation Paper*, 18 October 2010, pp. 1-2.

⁴⁰⁵ ARTC, *Submission in Response to ACCC Consultation Paper*, 18 October 2010, pp. 2-4.

A.9.3 Measures for non-coal access⁴⁰⁶

ARTC submits that it has further clarified and improved certainty for non coal users by specifically prescribing those aspects of the Indicative Interstate Access Agreement that would vary to address the particular circumstances of the Hunter Valley. ARTC has amended section 3.14 of the 2010 HVAU to define the network covered by the Access Agreement as the Network subject to this undertaking and incorporate those provisions as Tier 1 Non Coal Provisions in Schedule A:2.

⁴⁰⁶ ARTC, Submission in Response to ACCC Consultation Paper, 18 October 2010, pp. 4-5.

Appendix 2: Submissions from Third Parties

This Appendix summarises submissions received from parties other than ARTC in relation to the ACCC's March 2010 Draft Decision and ARTC's proposed 2010 HVAU.

The ACCC has had regard to these submissions in forming its views on the proposed 2010 HVAU as set out in the body of the Position Paper.

A.10 Submissions post March 2010 Draft Decision

A.10.1 Anglo American Metallurgical Coal Pty Ltd (31 March 2010)

A.10.1.1 Term of the IAHA

Anglo Coal submitted that the term of the agreements does not have the flexibility for parties to negotiate matters to reflect their circumstances.⁴⁰⁷ Anglo Coal submitted that ARTC is not obliged to offer indicative terms to an Access Holder for a shorter period than the proscribed term.⁴⁰⁸ The effect of the imposition of long term contracts on coal producers is to require those producers to bear a disproportionate risk for access to existing infrastructure.⁴⁰⁹ The commercial terms upon which Anglo is provided access to train paths should be no different to those offered to another coal producer whose mine life currently exceeds 10 years and the [2009] IAHA should be amended to allow for indicative access prices to be offered for the lesser of a 10 year fixed term or life of mine.⁴¹⁰

A.10.1.2 Network Transit Management

Anglo Coal submits that the tolerance provisions in the 24 December IAHA should include a requirement to agree appropriate amendments to the tolerance provisions.⁴¹¹

Anglo Coal supports the ACCC's proposal to include the provisions relating to the management of capacity in the HVAU. Further, to the extent that these provisions are included in the HVAU then the content of those provisions should be reflected in the IAHA.⁴¹²

Anglo Coal submitted that the 24 December IAHA should be amended to delete the inclusion of 'matters which arise due to the negligence of ARTC or breach of the agreement' as an Availability Exception, as these matters are adequately addressed by the force majeure provisions.⁴¹³

Anglo Coal notes that ARTC can at its discretion waive the TOP charges when the Network is closed for repairs, maintenance or upgrading of the Network. Anglo Coal

⁴⁰⁷ Anglo Coal, *Submission to the ACCC regarding its Draft Decision on Australian Rail Track Corporation Ltd's Hunter Valley Coal Network Access Undertaking dated 5 March 2010*, 31 March 2010, p. 1.

⁴⁰⁸ Anglo Coal, *Submission on ACCC Draft Decision*, 31 March 2010, p. 1.

⁴⁰⁹ Anglo Coal, *Submission on ACCC Draft Decision*, 31 March 2010, p. 1.

⁴¹⁰ Anglo Coal, *Submission on ACCC Draft Decision*, 31 March 2010, p. 2.

⁴¹¹ Anglo Coal, *Submission on ACCC Draft Decision*, 31 March 2010, p. 3.

⁴¹² Anglo Coal, *Submission on ACCC Draft Decision*, 31 March 2010, p. 3.

⁴¹³ Anglo Coal, *Submission on ACCC Draft Decision*, 31 March 2010, p. 3.

submits that the provision should be amended to ‘the Access Holder will not be liable to pay’.⁴¹⁴

Anglo Coal understands that ARTC can regulate the terms and conditions upon which a third party undertakes Third Party Works other than where access by a third party was a statutory or other legal right.⁴¹⁵ ARTC should be obliged to take reasonable steps to minimise disruption as a result of Third Party Works, regardless of whether the access is by a third party with a statutory or other legal right of access.⁴¹⁶

A.10.1.3 Capacity resumption

Anglo submits that ‘the most appropriate approach to capacity resumption is the position agreed between ARTC and coal producers and set out in clauses 11.4(a) – (e) of the 24 December IAHA.’

Anglo submits that the this position ‘as reflected in clauses 11.4(a) – (e) of the 24 December IAHA provides appropriate incentives from smaller coal producers to ‘use or lose’ capacity as well as safeguards to protect producers from fluctuations in production or market demand. It is important for smaller coal producers such as Anglo to have a quarterly allocation and to not automatically lose train paths if their quarterly allocations are not met in one period.’⁴¹⁷

Anglo notes that it ‘understands the ACCC’s concerns in relation to efficiency’ but submits that ‘certainty of contractual position is essential for coal producers and in particular smaller producers. The level of flexibility inherent in the position agreed between ARTC and coal producers and reflected in the 24 December IAHA is especially important in circumstances where there are long term contract as the loss of train paths may have significant commercial consequences.’⁴¹⁸

Anglo notes that it ‘makes no comment on the appropriateness of the capacity resumption provisions for larger coal producers.’⁴¹⁹

A.10.2 Asciano Ltd (31 March 2010)

A.10.2.1 Determining efficient train configuration

Asciano submits modelling showing that smaller trains are less efficient than large trains, do not incur lower maintenance costs, and that longer trains meet all section times.⁴²⁰ Asciano also submits that it should take “nowhere near the five years claimed by ARTC” to determine the efficient train configuration.

A.10.2.2 Pricing Parity and the Interim Period

Asciano recommends the use of “glide paths” to transition from the current pricing structure to the final Indicative Service structure, rather than an interim period of five

⁴¹⁴ Anglo Coal, Submission on ACCC Draft Decision, 31 March 2010, p. 4.

⁴¹⁵ Anglo Coal, Submission on ACCC Draft Decision, 31 March 2010, p. 5.

⁴¹⁶ Anglo Coal, Submission on ACCC Draft Decision, 31 March 2010, p. 5.

⁴¹⁷ Anglo Coal, Submission on ACCC Draft Decision, 31 March 2010, p. 5.

⁴¹⁸ Anglo Coal, Submission on ACCC Draft Decision, 31 March 2010, p. 5.

⁴¹⁹ Anglo Coal, Submission on ACCC Draft Decision, 31 March 2010, p. 5.

⁴²⁰ Asciano, *Submission to the ACCC - ARTC 2009 Draft Hunter Valley Access Undertaking - Response to the ACCC Draft Decision*, Public Version, 31 March 2010, p. 14

years. Asciano does not agree that the ACCC should honour public commitments made by ARTC.⁴²¹

A.10.2.3 GTK pricing

Asciano considers pricing based on GTKs to be inappropriate, and suggests that they and others may respond by running shorter trains.⁴²²

A.10.2.4 Powers to reconfigure train paths

Asciano submits that ARTC should have the power to reconfigure train paths to maximise coal chain capacity regardless whether some parties are made worse off.⁴²³

A.10.2.5 Recognition of non-coal access seekers

Asciano submitted, consistent with the ACCC's preliminary view, that there should be greater recognition of non-coal services using the Hunter Valley Network.⁴²⁴

A.10.2.6 Supportive of aspects of Draft Decision

Asciano strongly supported the ACCC Draft Decision discussion and recommendations with respect to:

- amending the prudential requirements in the 2009 HVAU;
- requiring a more explicit recognition of the non-coal services using the Hunter Valley network.⁴²⁵

A.10.2.7 Domestic coal access

Asciano submitted that the focus of the 2009 HVAU and the ACCC's Draft Decision has been export coal access, and that to some extent domestic coal access has been marginalised.⁴²⁶

Asciano submitted that the following issues relating to domestic coal access need to be addressed:

- 'domestic coal access users are less able to trade paths as typically they each have unique destinations, and this in turn may create issues with meeting take or pay provisions as trading paths is not a readily available option as there is no trading counterparty;
- domestic coal users may have different coal usage patterns such that the current provisions for resumption of unused paths may be problematic as usage may vary; and
- domestic coal users may have different contracting time frames such that the ten year take or pay contract time frames envisaged for the Access

⁴²¹ Asciano, Response to ACCC Draft Decision, 31 March 2010, pp. 8-9

⁴²² Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 10, 17

⁴²³ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 18.

⁴²⁴ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 19.

⁴²⁵ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 19.

⁴²⁶ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 21.

Holder Agreements may not align with the commercial situations and time frames of domestic coal users'.⁴²⁷

A.10.2.8 Transitional arrangements

Asciano submitted that it remained concerned that the 2009 HVAU's lack of transitional arrangements creates potential for uncertainty and delay.⁴²⁸

A.10.2.9 Preparation of Indicative Access Proposal

Asciano was concerned that there remains 'an unreasonably long time period, being sixty business days, [for ARTC] to provide an Indicative Access Proposal'.⁴²⁹

A.10.2.10 Shortfall in Existing Capacity

Asciano submitted that it 'is concerned with the ability of ARTC to use discretion rather than contractual obligations to allocate capacity for short term shortfalls in capacity'.⁴³⁰

Asciano noted that this 'concern has been largely rejected by the ACCC as the ACCC argues that the purpose ... section 5.3(a) (ii), is to provide ARTC with flexibility when reallocating capacity in response to a short term shortfall. The ACCC also recommends that the ARTC amend the Access Undertaking so that the rationale and need for this flexibility is clear'.⁴³¹

Asciano submitted that it 'welcomes the ACCC requirement for clarification but continues to have concerns with the level of ARTC discretion' and 'believes at a minimum that in all instances where ARTC is explicitly allowed to use discretion, the use of ARTC's discretion must be justified in writing by reference to objective criteria and reasonableness'.⁴³²

A.10.2.11 Train Path Variations

Asciano noted that section '11.1(b)(iii)(c) of the IAHA currently indicates that access holders cannot withhold consent to a request by ARTC for permanent variations to their train paths'.⁴³³

Asciano also noted that the 'ACCC's preliminary view is that the specific circumstances under which ARTC will use this provision need to be further set out by ARTC' and submitted that while it 'welcomes the ACCC position, it believes that the final position should limit ARTC's discretion in altering access holders rights, and any use of this discretion should be justified by reference to objective criteria and reasonableness'.⁴³⁴

⁴²⁷ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 21.

⁴²⁸ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 22.

⁴²⁹ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 19.

⁴³⁰ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 20.

⁴³¹ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 20.

⁴³² Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 20.

⁴³³ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 25.

⁴³⁴ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 25.

A.10.2.12 Agreement

Asciano submitted that it had strong concerns with the ACCC position that it was not necessary for the ACCC to provide a comprehensive set of amendments in relation to concerns raised with the 2009 IAHA given the indicative nature of the agreements and the negotiation provisions in the Access Undertaking.⁴³⁵ It submitted that the ACCC should prescribe amendments to agreements rather than simply comment.⁴³⁶ Asciano have concerns that ‘negotiation with a monopolist [...] is unlikely to be productive’ and that ‘ARTC has previously demonstrated reluctance to negotiate away from indicative agreements which passed through a regulatory process.’⁴³⁷

Asciano submitted that it agrees with the ACCC’s view that it is not excessive to terminate all agreements if one is terminated. However, the ACCC needs to be more definitive in its Final Decision and each OSA should stand alone.⁴³⁸ Asciano submitted that the ACCC’s Final Decision should be more definitive in requiring reciprocity of reports between ARTC and the Operator in the event of an Incident.⁴³⁹

Asciano submitted that it believes that the IAHA and OSA should place explicit obligations on ARTC to maintain the network.⁴⁴⁰ The ACCC has mentioned but not commented on this aspect in the Draft Decision.⁴⁴¹

Asciano submitted that it strongly supports the ACCC’s Draft Decisions and recommendations with respect to:

- Clarifying the 2009 IAHA’s liability and indemnity regime to ensure a balanced approach;⁴⁴²
- Clarifying the position with regard to the Access Holders liability for incidents in the limited indemnity provisions;⁴⁴³
- Clarifying that the liability and indemnity regime in the 2009 IAHA should reflect the tripartite nature of the agreements;⁴⁴⁴
- Addressing provisions in the agreements relating to financial viability;⁴⁴⁵
- Clarifying that ARTC audits are at ARTC’s own cost and risk;⁴⁴⁶
- Addressing the assignment and novation provisions to allow a more balanced approach;⁴⁴⁷

⁴³⁵ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 22.

⁴³⁶ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 5.

⁴³⁷ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 22.

⁴³⁸ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 26.

⁴³⁹ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 24.

⁴⁴⁰ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 26.

⁴⁴¹ ACCC, *Australian Rail Track Corporation Limited – Hunter Valley Coal Network Access Undertaking Draft Decision*, 5 March 2010, p. 233.

⁴⁴² Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 23.

⁴⁴³ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 23.

⁴⁴⁴ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 23.

⁴⁴⁵ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 23.

⁴⁴⁶ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 26.

⁴⁴⁷ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 25.

- Addressing the involvement of the Operator in negotiations regarding variation of an agreement;⁴⁴⁸

Asciano submitted that the ACCC did not address its concerns in relation to:

- the definition of ‘Solvent’ in the 2009 OSA which requires a demonstration of solvency for 5 years; a period of two to three years is more appropriate;⁴⁴⁹
- it is not clear why the warranty that the Access Holder read and agree to each OSA in 2009 IAHA 4.3(b) is needed given the requirement that the Access Holder endorse an OSA;⁴⁵⁰ and
- revisions were made to the OSA (clause 5.2(g)) to provide for notice to access holders and operators and a best endeavours provision to provide an alternative train path. Asciano submitted that the use of best endeavours terminology is inappropriate and ARTC should be under an absolute obligation to advise Operators of the details of incidents.⁴⁵¹

A.10.2.13 Network Transit Management

Asciano remained concerned that the NMPs proposed by ARTC would be unable to manage the Hunter Valley coal network. Asciano submitted that the emphasis on on-time running is inconsistent with the primary objective of sequencing trains delivering from mines to ports.⁴⁵² Asciano submitted that while it is aware that the NSW Lease does not make provision for the Network Management Principles (NMPs) to be altered, the set of alternate NMPs submitted previously by Asciano would not necessarily negatively impact on ARTC’s compliance with the NSW Lease and should be adopted where they are not inconsistent.⁴⁵³ Where the alternate NMPs are incompatible with the lease, consideration should be given to amending the lease.⁴⁵⁴

Asciano was concerned that the preservation of future train paths for passenger priority in the IAHA and OSA will reduce capacity and seeks an indication that the preservation of future train paths will not reduce capacity.⁴⁵⁵ Asciano suggested that the preservation of future train paths should be addressed more directly by the ACCC in its Final Decision.

Asciano strongly supported the ACCC’s Draft Decision and recommendations with respect to:

- Addressing the clauses in the 2009 OSA relating to changes to Codes of Practice and communication equipment so that there is an obligation on the part of the ACCC to consult with affected Operators.⁴⁵⁶

⁴⁴⁸ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 25.

⁴⁴⁹ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 27.

⁴⁵⁰ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 27.

⁴⁵¹ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 27.

⁴⁵² Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 25.

⁴⁵³ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 20.

⁴⁵⁴ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 20.

⁴⁵⁵ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 25.

⁴⁵⁶ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 24.

- Addressing the balance of the risks, liabilities and negligence of ARTC and the Operator when removing rolling stock from the Network.⁴⁵⁷
- Addressing the 2009 OSA definition of Instructions so that it is subject to reasonable, rather than honest, belief.⁴⁵⁸
- Addressing the 2009 OSA definition of Network Control Directions to remove operational provisions.⁴⁵⁹
- Addressing the Network Control Directions clause in the 2009 OSA so that compliance is not required if it would jeopardise the safety of personnel.⁴⁶⁰
- Addressing the Third Party Works provisions in the 2009 IAHA and 2009 OSA so that Third Party Works are only to be carried out where the third party is under a legislative obligation or during designated maintenance periods.⁴⁶¹

Asciano submitted that the ACCC did not address its concerns in relation to the following matters:

- It is unreasonable for ARTC to charge TOP charges when the Network is effectively closed due to Repairs, maintenance and upgrading of the network.⁴⁶²
- ARTC should be under an absolute obligation to advise Operators of the details of incidents and as such the use of best ‘endeavours’ terminology is inappropriate.⁴⁶³

A.10.2.14 KPIs

Asciano submitted that it supports the ACCC’s Draft Decision regarding the use of KPIs, which are to be negotiated and agreed prior to the execution of AHAs and OSAs.⁴⁶⁴

Asciano submitted that the KPIs in the 2009 IAHA address issues of track availability, track quality, track reliability safety and speed restriction, however the material consequences for not meeting these KPIs is unclear. Asciano submitted that the IAHA and OSA should place explicit obligations on ARTC to maintain the network.⁴⁶⁵

A.10.2.15 Exercise of Discretions

Asciano submitted that it supports the ACCC’s Draft Decision regarding the use of ARTC discretion to be justified by reference to objective criteria and reasonableness.⁴⁶⁶

Specifically, Asciano submitted the following:

⁴⁵⁷ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 24.
⁴⁵⁸ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 23.
⁴⁵⁹ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 24.
⁴⁶⁰ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 24.
⁴⁶¹ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 23.
⁴⁶² Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 27.
⁴⁶³ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 27.
⁴⁶⁴ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 19.
⁴⁶⁵ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 26.
⁴⁶⁶ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 19.

- The ability of ARTC to use discretion rather than contractual obligations to allocate capacity for short term shortfalls in capacity should be limited and the use of ARTC's discretion must be justified in writing by reference to objective criteria and reasonableness;⁴⁶⁷
- The 2009 OSA definition of section (b) of 'Instructions' should be addressed such that the ARTC would be subject to a more objective test of reasonable belief;⁴⁶⁸ and
- The final position on Clause 11.1 (b) (iii) (c) of the 2009 IAHA, regarding train path variations, should limit ARTC's discretion in altering access holder's rights, and any use of this discretion should be justified by reference to objective criteria and reasonableness.⁴⁶⁹

A.10.3 Macquarie Generation (23 March 2010)

A.10.3.1 Domestic coal

Macquarie Generation submitted that there are significant differences between export coal haulage and domestic coal haulage which warrant the flexibility to negotiate different arrangements for access.⁴⁷⁰

Macquarie Generation transports coal via rail and overland conveyor from New South Wales coal mines to Liddell and Bayswater Power Stations. Macquarie Generation submits the TOP requirements are more onerous for them as Macquarie Generation is unable to trade paths because their train paths do not stop at the Port of Newcastle.⁴⁷¹

Macquarie Generation disagreed with the ACCC's draft decision that the "Show Cause" provisions have weakened the ability to remove rail access in the HVAU. Macquarie Generation submits to remove rail access without the ability to show cause may impact the company's ability to generate electricity.⁴⁷²

A.10.3.2 Capacity Management

Domestic users should have the ability to negotiate capacity management

Macquarie Generation submitted that the Draft Decision noted that 'in general users should be able to seek to negotiate mutually acceptable terms and conditions for the Access Agreement. However, it is also stated that provisions relating to the management of capacity should be included in the HVAU itself so that these conditions are mirrored in all access agreements.'⁴⁷³

Macquarie Generation submitted that '[p]rohibiting the ability to negotiate some of these provisions is inequitable in Macquarie Generation's case.' An example given was in relation to trading of train paths:

⁴⁶⁷ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 20.

⁴⁶⁸ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 23.

⁴⁶⁹ Asciano, Response to ACCC Draft Decision, 31 March 2010, p. 25.

⁴⁷⁰ Macquarie Generation, *Australian Rail Track Corporation Limited Hunter Valley Coal Network Access Undertaking – Draft Decision 5th March 2010*, 23 March 2010, p. 1.

⁴⁷¹ Macquarie Generation, Submission in Response to ACCC Draft Decision, 23 March 2010, p. 2.

⁴⁷² Macquarie Generation, Submission in Response to ACCC Draft Decision, 23 March 2010, pp. 2-3.

⁴⁷³ Macquarie Generation, Submission in Response to ACCC Draft Decision, 23 March 2010, p. 2.

‘Macquarie Generation is highly disadvantaged by the requirement to sign a 10 year take or pay contract which allows unused train paths to be traded with other users. We are unable to trade paths because our train paths stop at the Antiene Rail Unloader near the Power Stations, not the Port of Newcastle. As such the take or pay requirements are more onerous for us than other users.

Our train paths are for supply of fuel to Bayswater and Liddell Power Stations. We have no connection to rail paths to the Port, stacking and reclaim at Port Waratah, ship arrivals or Port congestion issues.’⁴⁷⁴

Macquarie Generation also noted that ‘ARTC’s revised undertaking in December 2009 stated that if access holders use less than 90% of their paths in a quarter, then the unused paths may be removed, unless it can be shown that they are needed in the future. However, the ACCC’s draft decision states that the show cause provisions have weakened the undertaking and “As a result...a stronger approach to that in the 24 December IAHA is needed...”’.⁴⁷⁵

Macquarie Generation submitted that it ‘disagrees with the ACCC’s decision in this regard’ and that to ‘ensure a stable supply of electricity to the eastern States, Macquarie Generation requires constant rail access for fuel delivery, and would seek to negotiate conditions which matched our long term coal supply agreements.’⁴⁷⁶

Macquarie Generation submitted that ‘[t]o remove rail access without the ability to show cause is inequitable and may impact the Corporation’s ability to generate electricity. Again, the differences between coal haulage for export compared with domestic electricity supply are not adequately considered.’⁴⁷⁷

Macquarie Generation also noted that the ‘draft decision notes that the ACCC must have regard to “...the interests of person who may want access to the service”’.⁴⁷⁸

Macquarie Generation submitted that it is of the view that ‘the inappropriateness of many of the provisions to the domestic task justify the explicit exclusion of domestic haulage in certain instances’ or that at ‘the very least domestic coal users should have the ability to negotiate all of the provisions with ARTC.’⁴⁷⁹

A.10.3.3 Network Transit Management

Macquarie Generation submitted that ‘it is appropriate to clarify the role of the HVCCC in relation to network management, particularly the development of the Monthly Train Plan and the Daily Train Plan’. A detailed description of the HVCCC’s role in relation to network management should be included in the HVAU, particularly as the HVCCC is seeking to charge access holders for this function.’⁴⁸⁰

⁴⁷⁴ Macquarie Generation, Submission in Response to ACCC Draft Decision, 23 March 2010, p. 2.

⁴⁷⁵ Macquarie Generation, Submission in Response to ACCC Draft Decision, 23 March 2010, p. 2.

⁴⁷⁶ Macquarie Generation, Submission in Response to ACCC Draft Decision, 23 March 2010, p. 2.

⁴⁷⁷ Macquarie Generation, Submission in Response to ACCC Draft Decision, 23 March 2010, p. 2.

⁴⁷⁸ Macquarie Generation, Submission in Response to ACCC Draft Decision, 23 March 2010, p. 2.

⁴⁷⁹ Macquarie Generation, Submission in Response to ACCC Draft Decision, 23 March 2010, p. 3.

⁴⁸⁰ Macquarie Generation, Submission in Response to ACCC Draft Decision, 23 March 2010, p. 3.

A.10.4 New South Wales Minerals Council (31 March 2010)

A.10.4.1 Objectives

The New South Wales Minerals Council (NSWMC) submitted that a new section 1.3 be added to the preamble setting out ‘Coal Chain Principles’, which reflect the Implementation Memorandum (IM) principles and alignment needs.⁴⁸¹ NSWMC considered that the provisions are required to set out the principles intended to govern the coal chain and to require that efficiencies and principles for implementing these arrangements are reviewed.⁴⁸² NSWMC noted that these provisions were drafted subject to the inclusion of provisions dealing with priority in access queues and efficiency reviews.⁴⁸³

A.10.4.2 Scope – extensions

The NSWMC submitted that a new section 2.1(c) be inserted into the HVAU regarding the cost of obtaining access to Extensions. This proposed clause mirrors the NSWMC’s proposed amendments to clause 5.7 of the IAHA.⁴⁸⁴ The approach proposed was as follows:

- HVAU section 2.1(c) to provide that ARTC and an Access Holder will enter into an agreement setting out the Access Holder’s terms of access to the Extension. ARTC may charge the Access Holder to use the Extension as a term of it building the Extension. ARTC may charge an amount it determines as being reasonable, taking into account (i) reasonable costs incurred in building the Extension and recovery of costs over such time the Extension will be used, (ii) location of the Extension, (iii) the number of Access Holders expected to use the Extension and (iv) any other legitimate commercial factors which ARTC might reasonably consider.⁴⁸⁵
- HVAU section 2.1 amended to provide that the dispute resolution provisions of the HVAU do not apply to section 2.1(c).⁴⁸⁶
- HVAU section 2.1(b) amended to provide that Extensions are not covered by the HVAU, other than as provided in section 2.1(c).⁴⁸⁷
- IAHA clause 5.7 amended to reflect the inclusion of s. 2.1(c) in the HVAU.⁴⁸⁸

⁴⁸¹ The Implementation Memorandum (IM) was signed by Port Waratah Coal Services (PWCS), Newcastle Coal Infrastructure Group (NCIG) and the Newcastle Port Corporation (NPC), in relation to the long term solution to facilitate alignment across the coal chain. ACCC authorisation for the application from PWCS and NCIG to seek a further extension of the operation of a capacity balancing system (called the ‘PWCS Tonnage Allocation Stage 1’) was conditional upon the three parties finalising the IM.

⁴⁸² NSWMC, *Explanatory Comments for NSWMC mark-up of the ARTC Hunter Valley Access Undertaking*, Attachment B, 1 April 2010, p. 1.

⁴⁸³ NSWMC, *Explanatory Comments HVAU mark-up*, Attachment B, 1 April 2010, p. 1.

⁴⁸⁴ NSWMC, *Explanatory Comments HVAU mark-up*, Attachment B, 1 April 2010, p. 2.

⁴⁸⁵ NSWMC, *Hunter Valley Coal Network Access Undertaking marked up version*, Attachment A, 1 April 2010, pp. 7-8.

⁴⁸⁶ NSWMC, *HVAU mark-up*, Attachment A, 1 April 2010, p. 8.

⁴⁸⁷ NSWMC, *HVAU mark-up*, Attachment A, 1 April 2010, p. 7.

A.10.4.3 Alignment and Transparency of Consultation Processes

The NSWMC noted that it ‘supports the ACCC’s view that the inclusion of greater clarity and transparency in the HVAU processes, especially in consultation with the HVCCC and industry participants, is an appropriate approach to achieving... balance. We submit that clearly defining the HVAU processes, including consultation with the HVCCC and the Rail Capacity Group, is critical to achieving effective alignment of the coal chain and meeting the legitimate business interests of the coal producers.’

The NSWMC also submitted however that ‘in specific areas, the ACCC’s views do not go far enough in clarifying the HVAU processes. We are concerned that the flexibility allowed to ARTC could compromise alignment to the detriment of coal chain efficiency’ and ‘we believe that further definition of the processes is necessary to address this issue (e.g. the provision of Additional Capacity and the Systems Assumptions process).’⁴⁸⁹

A.10.4.4 Facilitating Access Agreements

The NSWMC submitted that it supports the ACCC’s acceptance of ARTC’s general approach to negotiation of access agreements and dispute resolution and the recommended revisions to address ambiguity and uncertainty around the operation of the arrangements for coal including the scope of the matters subject to negotiation.⁴⁹⁰

The NSWMC submitted that it supports the ACCC’s acceptance of the use of an Indicative AHA and OSA and access seekers having the right to negotiate different terms, with the exception of certain key provisions in relation to capacity management.⁴⁹¹

The NSWMC submitted that the Indicative AHA should be available to all coal access seekers so that non-Indicative Services for coal can be subject to all the terms of the Indicative Access Holder Agreement, except those relating to the description of the Service, the charge for the service and the term of the Agreement.⁴⁹²

The NSWMC supported the ACCC view that it may be appropriate to include provisions relating to rail capacity management in the HVAU which can then be mirrored in access agreements to ensure their consistent application across all access seekers.⁴⁹³ NSWMC included a new proposed sub-section in s. 3.15 which states:

- (f) ‘For the avoidance of doubt, an Applicant is entitled to negotiate with ARTC in relation to the terms of its Access Holder Agreement.’⁴⁹⁴

⁴⁸⁸ NSWMC, *Access Holder Agreement for Indicative Services in the Hunter Valley marked up version*, Attachment C, 1 April 2010, p. 30.

⁴⁸⁹ NSW Minerals Council Hunter Rail Access Task Force, *Submission to Australian Competition and Consumer Commission regarding the Draft Decision in relation to Australian Rail Track Corporation Hunter Valley Coal Network Access Undertaking*, 1 April 2010, p 7 - It is noted that the reference to further comments in Section 4 of the NSWMC submission does not contain further details on this point.

⁴⁹⁰ NSWMC, *Submission in Response to ACCC Draft Decision*, 1 April 2010, p. 7.

⁴⁹¹ NSWMC, *Submission in Response to ACCC Draft Decision*, 1 April 2010, p. 7.

⁴⁹² NSWMC, *Submission in Response to ACCC Draft Decision*, 1 April 2010, p. 7.

⁴⁹³ NSWMC, *Submission in Response to ACCC Draft Decision*, 1 April 2010, p. 8.

⁴⁹⁴ NSWMC, *HVAU mark-up*, Attachment A, 1 April 2010, p. 27.

A.10.4.5 Capacity Expansion

The NSWMC noted that it ‘supports ACCC acknowledgment of the importance of ensuring that the overall capacity of the rail network expands in alignment with the capacity of the port terminals.’⁴⁹⁵

The NSWMC also noted the ‘ACCC’s view that the HVAU should not set out strict rules which oblige ARTC to comply with the recommendations of an Applicant or the HVCCC regarding the creation of Additional Capacity as such a decision is ultimately one for ARTC considering its legitimate business interests.’⁴⁹⁶

However, the NSWMC submitted that ‘as the monopoly provider of rail track access, ARTC cannot be allowed under the HVAU to prevent the creation of Additional Capacity needed to align track access capacity with the capacity of the rest of the coal chain.’⁴⁹⁷

The NSWMC further submitted that it ‘is essential that provisions are incorporated in the HVAU which give the producer(s) an effective alternative means of having capacity added where ARTC is not prepared to fund and/or build it.’⁴⁹⁸

The NSWMC noted that it ‘supports the ACCC’s view that the Additional Capacity provisions in the HVAU are vague and uncertain and its recommendation that clearly drafted, transparent provisions setting out ARTC’s obligations in relation to the provision of Additional Capacity, including consultation with the HVCCC and with the industry, be incorporated in the HVAU’ and that ‘sections 6.2, 6.3 and 6.4 of the HVAU need significant redrafting to achieve this objective.’⁴⁹⁹

A.10.4.6 Capacity Resumption

The NSWMC noted the ‘ACCC’s preliminary view that the capacity resumption provision in the April Undertaking (where an access holder has utilised less than 90% of its train path entitlements over three months) has been inappropriately weakened in ARTC’s 24 December IAHA’.⁵⁰⁰

The NSWMC submitted that it:

requested the changes to the capacity resumption provision that ARTC included in the 24 December draft of the HVAU to allow for potential fluctuations in the use of coal producers’ capacity entitlements relative to the uniform periodic allocations of capacity under the HVAU. These fluctuations may arise from time to time due to fluctuations in customer off-take, the timing of large coal shipments, Force Majeure, Availability Exceptions and operational reasons such as longwall equipment moves and adverse geological conditions in the mines which can curtail or stop coal production for significant periods. Examination of production and coal shipment volumes by producers indicated the changes to the capacity resumption provisions and tolerances that would be necessary.

⁴⁹⁵ NSWMC, Submission in Response to ACCC Draft Decision, 1 April 2010, p 8.

⁴⁹⁶ NSWMC, Submission in Response to ACCC Draft Decision, 1 April 2010, p 8.

⁴⁹⁷ NSWMC, Submission in Response to ACCC Draft Decision, 1 April 2010, p 8.

⁴⁹⁸ NSWMC, Submission in Response to ACCC Draft Decision, 1 April 2010, p 8.

⁴⁹⁹ NSWMC, Submission in Response to ACCC Draft Decision, 1 April 2010, p 8.

⁵⁰⁰ NSWMC, Submission in Response to ACCC Draft Decision, 1 April 2010, p 9.

The NSWMC also submitted that ‘without appropriate tolerances for short term underutilisation of capacity entitlements, coal producers will be at risk of resumption of part or all of their capacity entitlements due to short term throughput fluctuations which are an inherent part of their business.’⁵⁰¹

The NSWMC submitted that ‘[t]his is not the intent of a resumption provision which should be aimed at preventing the hoarding of capacity. We believe that adequate incentives to utilise capacity entitlements whenever possible and prevent hoarding, including the producer’s liability for TOP charges, are incorporated in the HVAU but will consider further ways to ensure that this flexibility will not be misused.’⁵⁰²

A.10.4.7 NSWMC HVAU Mark-ups

Existing Agreements and Rights

The NSWMC proposed an amendment to HVAU section 2.5 setting out that where an applicant can demonstrate Network Exit Capability, the applicant should be entitled to reserve Access Rights which existed prior to the Commencement Date where the Access Application is for substantially the same purpose and end market.⁵⁰³

Introduction to section 3

The NSWMC proposed amendments to provide that ARTC must consult with the HVCCC in respect of each Access Application. Further, NSWMC submitted that ARTC should undertake to allocate any Capacity which becomes available as a result of a termination or expiry of an AHA before undertaking to construct Additional Capacity.⁵⁰⁴

Parties to Negotiation

Applicant to endorse the signed OSA

The NSWMC proposed an amendment to section 3.4(b)(iii) to provide that in endorsing the OSA, the applicant will not become liable under the OSA.⁵⁰⁵

Prudential Requirements

The NSWMC submitted that section 3.4(e)(iv) be deleted, where the section provides that an Applicant must demonstrate that it has legal ownership structures in place that have a sufficient capital base and assets of value in order to meet actual potential liabilities. NSWMC submits that this requirement is subjective and unnecessary, given that ARTC is entitled to obtain Credit Support or a Parent Guarantee.⁵⁰⁶

⁵⁰¹ NSWMC, Submission in Response to ACCC Draft Decision, 1 April 2010, p 9.

⁵⁰² NSWMC, Submission in Response to ACCC Draft Decision, 1 April 2010, p 9.

⁵⁰³ NSWMC, Explanatory Comments HVAU mark-up, Attachment B, 1 April 2010, p. 2.

⁵⁰⁴ NSWMC, HVAU mark-up, Attachment A, 1 April 2010, p. 12.

⁵⁰⁵ NSWMC, HVAU mark-up, Attachment A, 1 April 2010, p. 14.

⁵⁰⁶ NSWMC, Explanatory Comments HVAU mark-up, Attachment B, 1 April 2010, p. 3.

Capacity Analysis, and ‘initial review’ for Coal Access Rights

The NSWMC submitted that section 3.6 of the 2009 HVAU be deleted, as it appears to be redundant considering the Capacity Analysis which takes place under section 3.8.⁵⁰⁷

The NSWMC also submitted proposed amendments to section 3.9 of the 2009 HVAU regarding the carrying out of a Capacity Analysis. Specifically, the NSWMC proposed amendments to the section so that ARTC, when conducting the Capacity Analysis, has regard to System Assumptions, an Applicant's ability to fully utilise its terminal capacity rights, and proposed new rules for priority.⁵⁰⁸

The NSWMC submitted amendments to section 3.10 of the 2009 HVAU to include wording requiring ARTC to indicate in an Indicative Access Proposal the proposed Base Path Usages for the first year, the Tolerance and approved Allocation Period.⁵⁰⁹

Network Exit Capability – information provided as part of Access Application

The NSWMC proposed additions to section 3.7 of the 2009 HVAU regarding the ‘Network Exit Capability’ information to be provided as part of an Access Application, including to incorporate references to the System Assumptions and the Allocation Period.

Priority of Allocation for Coal Access Rights

The NSWMC proposed a new section 3.9, ‘Priority of Allocation for Coal Access Rights’, which it stated adapts the access priority provisions from the port contracts to apply to rail access. The NSWMC noted that provisions would also be required to resolve priority between Coal and Non-Coal Applications. The NSWMC proposed subsequent amendments to section 3.13 (regarding Mutually Exclusive Applications) so that section 3.13 only applies to Non-Coal Applications.⁵¹⁰

Duration of Coal Access Rights

NSWMC proposed a new section 3.14, dealing with the Duration of Coal Access Rights. NSWMC is of the opinion that even where a load point services a mine that has a life shorter than 10 years, it should still be an Indicative Service. NSWMC submits that this proposed amendment to the HVAU mirrors a proposed new clause 2.5 in the AHA.⁵¹¹

Access Agreement

The NSWMC submitted amendments to section 3.14, Access Arrangement, which it has numbered as section 3.15. Specifically, NSWMC has proposed the addition of section 3.15(f), which provides that:

⁵⁰⁷ NSWMC, HVAU mark-up, Attachment A, 1 April 2010, p. 16.

⁵⁰⁸ NSWMC, Explanatory Comments HVAU mark-up, Attachment B, 1 April 2010, p. 4.

⁵⁰⁹ NSWMC, Explanatory Comments HVAU mark-up, Attachment B, 1 April 2010, p. 5.

⁵¹⁰ NSWMC, Explanatory Comments HVAU mark-up, Attachment B, 1 April 2010, p. 5.

⁵¹¹ NSWMC, Explanatory Comments HVAU mark-up, Attachment B, 1 April 2010, pp. 5-6.

‘For the avoidance of doubt, an Applicant is entitled to negotiate with ARTC in relation to the terms of its Access Holder Agreement.’⁵¹²

Capacity Management

NSWMC submitted that (in summary) the mark-ups to clauses 5.2, 5.7 and 5.8 propose that:

Capacity Analysis to be made on basis of System Assumptions

- HVCCC to participate & ARTC to have regard to its recommendations
- ARTC/HVCCC to review Committed and Available Capacity every 6 months

Clause 5.3 proposes ‘that capacity reservation to be replaced with capacity allocation procedure’.

Clause 5.4 proposes that ‘[f]or temporary shortfalls, allocations of track capacity to take account of terminal rules & ARTC to coordinate with other infrastructure suppliers through the HVCCC.’

Clause 5.8 and clause 16.4 propose ‘ARTC to participate in Capacity Trading System and its provisions to be integrated with the AHA provisions for temporary trade of Path Usages.’⁵¹³

The NSWMC submits that in relation to:

Section 5

- Clause 5 of the HVAU will ‘need to address the establishment of operational terms relating to matters such as allocation periods (section 5.8), allocation units, flexibility and tolerance (section 5.7), consumption measurement, capacity trades and transfers (section 5.12), capacity variation and resumption, adjustment for capacity shortfalls (section 5.9), daily planning (section 5.13), capacity modelling and adjustments for under-delivery of Additional Capacity.’⁵¹⁴

Section 5.1: System Assumptions:

- AHA contains defined System Assumptions which have not been incorporated into the Access Undertaking by ARTC.
- NSWMC is seeking to add a definition of System Assumptions to the Access Undertaking and for the definition to refer to a new section 5.1. New section 5.1 would provide that:

⁵¹² NSWMC, HVAU mark-up, Attachment A, 1 April 2010, p. 27.

⁵¹³ NSWMC, Submission in Response to ACCC Draft Decision, 1 April 2010, p 12.

⁵¹⁴ NSWMC, Explanatory Comments AHA mark-up, Attachment B, 1 April 2010, p. 10.

- ARTC is to work with terminal operators to agree a common set of System Assumptions for the Hunter Valley Coal Chain (possibly through the HVCCC); and
 - the System Assumptions would incorporate those items listed in the definition set out in the AHA.
- NSWMC is also seeking the inclusion of a requirement that ARTC act reasonably in agreeing the System Assumptions and the form of the System Assumptions Document.
- Each element of the definition of system Assumption in the AHA to be set out in full in section 5.1 of the Access Undertaking.

Sections 3.1, 5.2, 5.3 and 5.4: Capacity Analysis:

- NSWMC has incorporated provisions requiring ARTC to give notice to the HVCCC of any Capacity Analysis and to assist the HVCCC in participating in that Capacity Analysis. A statement setting out the purpose of the Capacity Analysis has also been included. ARTC should be required to have regard to the HVCCC's recommendations.
- NSWMC is also seeking that the HVCCC carry out 6-monthly reviews of Committed and Available Capacity in order to ensure appropriate allocation of Capacity and to ensure ARTC is appropriately complying with its Hunter Valley strategy (set out in section 6.4(d)).
- Finally, NSWMC is seeking to involve ARTC in a daily 'tick-the box' approach with the HVCCC to ensure effective utilisation of Capacity.
- Insert a new section 5.14 [to the IAHA] requiring ARTC to provide the HVCCC with train path schedules (including amendments) to enable the HVCCC to determine an access holder's entitlement to Path Usages.

Sections 5.6, 5.8 and 5.14:

- 5.6 - Determination of Base Path Usages - The provisions of this section should mirror those contained in clause 3.2 of the AHA (Base Path Usages), once agreed. The section should deal with the method for initial and annual determination of Base Path Usages under Access Agreements for Coal Access Rights.
- 5.8 - Allocation Periods - The provisions of this section should mirror those contained in clause 3.5 of the AHA (Identification of Allocation Periods), once agreed, in relation to all Access Agreements for Coal Access Rights.
- 5.14 - Inefficient use of Access Rights – The provisions of this section should mirror those contained in clauses 11.4 (Removal of Path Usages for under-utilisation; 11.5 (Non-compliance with Service Assumptions) and 11.6 (Cancellation of Services) of the AHA.

Section 5.9: Shortfall in existing Capacity:

- Clause 6 of the [December] AHA now incorporates a provision dealing with the identification of "Capacity Shortfalls", requiring notice to access holders, Terminal Operators and the HVCCC, as well as coordination with the HVCCC.
- The time frame has been shortened to 5 days and for shortfalls of more than 5 days, allocations will continue as normal for unaffected load points.
- NSWMC has incorporated the revised AHA provisions dealing with Capacity Shortfalls and a provision setting out that access holders with affected load points will be entitled to make up lost Path Usages from future Path Usages and ad hoc Path Usages.
- NSWMC is consulting with the HVCCC as to whether the 5 day time-frame can be further reduced.

Section 5.11: Capacity resumption, relinquishment and transfer:

- NSWMC is seeking the incorporation of the provisions contained in the AHA into the Access Undertaking (amended as appropriate), so that the same transfer and trading systems apply consistently across holders of Coal Access Rights. See new section 5.12: Capacity Transfer Working Group.

Network Management Principles

NSWMC submitted that NMPs means the principles regulating Train movements on the Network which must be consistent with the Train Decision Factors contained in the NSW Lease. NSWMC submitted that it has not been provided with a copy of the Train Decision Factors and is not therefore in a position to comment regarding consistency. A copy of the NSW Lease has been requested from ARTC.⁵¹⁵ NSWMC have included a definition of NSW Lease in Attachment A:

“**NSW Lease**” means the Deed of Lease over the interstate Hunter Valley rail lines a[n]d infrastructure between the State Rail Authority of New South Wales, Rail Infrastructure Corporation and ARTC dated 31 May 2004, as amended from time to time;⁵¹⁶

Network Transit Management in the HVAU

Short Term Capacity Management

NSWMC submitted that the HVAU should be amended to require Access Holders to show Network Exit Capability, sufficient Access Rights and a ‘contractual obligation in favour of the person for whom the coal is being hauled obliging an Operator to run the Train. NSWMC further submitted that if Train movements are in accordance with

⁵¹⁵ NSWMC, Explanatory Comments HVAU mark-up, Attachment B, 1 April 2010, p. 20.

⁵¹⁶ NSWMC, HVAU mark-up, Attachment A, 1 April 2010, p. 78.

the relevant Access Agreement, the Network Management Principles and ARTC's other reasonable requirements, they must be included in the DTP.⁵¹⁷

Loss capitalisation model

In the mark-up of the HVAU and the explanatory comments, NSWMC submitted that the loss capitalisation mechanism is not appropriate and should be removed.^{518 519}

Regulated asset bases

NSWMC stated that the starting DORC is not justified for Pricing Zone 3, and the starting values should consider the cost of ARTC's investment and economic value based on continuation of existing pricing policies.^{520 521}

Floor and ceiling price and revenue limits

In terms of definitions, NSWMC considered that efficient costs and prudent capital expenditure should be more rigorously defined and that a definition should be included for 'group of Access Holders'.^{522 523} In addition, NSWMC submitted that access revenue should fully recover avoidable costs in addition to Direct Costs.⁵²⁴

Economic cost and cost allocation

NSWMC asserted that interest during construction of Additional Capacity should not be included as part of Economic Cost. According to NSWMC, the conventional approach should be applied to provide an incentive to complete the project, which is by adding project expenditure to RAB after delivery of the infrastructure.^{525 526}

Return on capital (WACC)

NSWMC took the position that an initial Rate of Return should be applied on a post tax nominal basis, set by the ACCC for a 5 year period and subsequently approved by the ACCC.^{527 528}

Unders and Overs accounting and Annual Compliance Assessment

NSWMC considered that the accounting regime for unders and overs should include a specific provision stating that the TOP Charges for unsupplied Path Usages should be deducted from ARTC's actual access revenue for the relevant period.^{529 530}

In relation to the Annual Compliance Assessment, NSWMC maintained its view that:

⁵¹⁷ NSWMC, Explanatory Comments for HVAU, Attachment B, 1 April 2010, p. 16.

⁵¹⁸ NSWMC, HVAU mark-up, Attachment A, 1 April 2010, p. 32.

⁵¹⁹ NSWMC, Explanatory Comments HVAU mark-up, Attachment B, 1 April 2010, p. 6.

⁵²⁰ NSWMC, HVAU mark-up, Attachment A, 1 April 2010, p. 33.

⁵²¹ NSWMC, Explanatory Comments HVAU mark-up, 1 April 2010, p. 6.

⁵²² NSWMC, HVAU mark-up, Attachment A, 1 April 2010, p. 32.

⁵²³ NSWMC, Explanatory Comments HVAU mark-up, Attachment B, 1 April 2010, p. 6.

⁵²⁴ NSWMC, Explanatory Comments HVAU mark-up, Attachment B, 1 April 2010, p. 6.

⁵²⁵ NSWMC, HVAU mark-up, Attachment A, 1 April 2010, p. 35.

⁵²⁶ NSWMC, Explanatory Comments HVAU mark-up, Attachment B, 1 April 2010, pp. 6 – 7.

⁵²⁷ NSWMC, HVAU mark-up, Attachment A, 1 April 2010, p. 37.

⁵²⁸ NSWMC, Explanatory Comments HVAU mark-up, Attachment B, 1 April 2010, p. 7.

⁵²⁹ NSWMC, HVAU mark-up, Attachment A, 1 April 2010, pp. 37 – 38.

⁵³⁰ NSWMC, Explanatory Comments HVAU mark-up, Attachment B, 1 April 2010, p. 7.

- Information submitted by ARTC to the ACCC should be made available to Access Holders and Access Holders should be entitled to make submissions to the ACCC regarding that information; and
- The ACCC should determine whether costs recovered through Access Charges have been efficiently incurred having regard to industry practice.^{531 532}

A.10.4.8 NSWMC IAHA Mark-ups

Term of the IAHA

NSWMC's submission emphasised the need for the Indicative AHA to be available to all coal access seekers so that non-Indicative Services for coal can be subject to all the terms of the Indicative Access Holder Agreement except those relating to the description of the Service, the charge for the service and the term of the Agreement.⁵³³ NSWMC submitted that this would not prevent 'ARTC and access seekers entering into different terms and conditions for Non-Indicative Services by mutual agreement between them.'⁵³⁴

NSWMC submitted in relation to the 2009 IAHA that clause 3.14 should be aligned to the port terminal access term (i.e. a rolling 10 years) or less where mine served by loadpoint has shorter remaining life.⁵³⁵

NSWMC submitted in relation to Schedule A of the 2009 HVAU that:

'Access holder agreements for non Indicative coal Services to be based on the AHA except that ARTC and the access holder to agree:

- the characteristics of the Service
- the access charges
- the Term of the agreement, where the loadpoint's mine has a life of less than 10 years'⁵³⁶

NSWMC proposed a new section 3.14 of the HVAU entitled 'Duration of Coal Access Rights'.⁵³⁷ NSWMC submitted that 'even where a load point services a mine that has a life shorter than 10 years, it should still be an Indicative Service'⁵³⁸ and 'should be subject to the same Charges as longer-life mines.'⁵³⁹ In Attachment D, NSWMC submitted that clauses 2.3(c) and (d) and a new provision (clause 2.5) of the IAHA should incorporate provisions dealing with mines that have a shorter life than 10 years.⁵⁴⁰

Long Term Uplift

⁵³¹ NSWMC, HVAU mark-up, Attachment A, 1 April 2010, pp. 38 – 39.

⁵³² NSWMC, Explanatory Comments HVAU mark-up, Attachment B, 1 April 2010, pp. 7 – 8.

⁵³³ NSWMC, Submission in Response to ACCC Draft Decision, 1 April 2010, p. 7.

⁵³⁴ NSWMC, Submission in Response to ACCC Draft Decision, 1 April 2010, p. 7.

⁵³⁵ NSWMC, Submission in Response to ACCC Draft Decision, 1 April 2010, p. 11.

⁵³⁶ NSWMC, Submission in Response to ACCC Draft Decision, 1 April 2010, p. 13.

⁵³⁷ NSWMC, HVAU mark-up, Attachment A, 1 April 2010, p. 24.

⁵³⁸ NSWMC, Explanatory Comments for HVAU, Attachment B, 1 April 2010, p. 5;

⁵³⁹ NSWMC, HVAU mark-up, Attachment A, 1 April 2010, p. 25.

⁵⁴⁰ NSWMC, *Explanatory Comments for NSWMC mark-up of the ARTC Access Holder Agreement*, Attachment D, 1 April 2010, p. 3.

NSWMC submitted that its amended version of clause 19.1 (contained in Attachment C) should be incorporated into the IAHA. The amended clause provides that *all* of the provisions of the agreement should be consistent with the provisions of the Indicative Access Agreement. The amended provision submits an alternative proposed method of updating an AHA when an amended Access Undertaking is accepted by the ACCC.⁵⁴¹ NSWMC submitted that:

‘all of the provisions of the AHA should be consistent with the HVAU and the Indicative AHA accepted by the ACCC. AHAs should be consistent so that there are no alignment issues generated. Further, any Access Holder signing before the ACCC accepts it HVAU should be assured of a minimum level of rights. NSWMC’s draft allows any Access Holder wanting to incorporate non-standard terms that are not subject to uplift to do so unless those provisions contradict the HVAU. This position should not be problematic for ARTC, given ARTC has agreed in clause 19.2 to automatic uplift of provisions for future Undertakings or amendments in the future to the HVAU.’⁵⁴²

NSWMC noted that in relation to clause 19.2(b) of the 2009 IAHA, ‘the words "to the extent it is not inconsistent with a provision covered by paragraph (b)(ii)" should be deleted as this is inconsistent with the intent of automatic uplift in that paragraph.’⁵⁴³

Liability and Indemnity in the IAHA

NSWMC submitted in Attachment C that it was still considering whether ARTC’s liability is acceptable.⁵⁴⁴ NSWMC submitted that parties are to be liable for events caused by negligence as well as fraudulent and wilful misconduct.⁵⁴⁵ NSWMC submitted that there is no reason for the words ‘however arising (including under this agreement, in tort including negligence, or for breach of any statutory duty)’ not to apply equally to ARTC and the Access Holder.⁵⁴⁶

NSWMC submitted that the mutual liability cap should only be limited to the TOP Charges per Contract Year.⁵⁴⁷ NSWMC submitted that ARTC’s ‘liability is already heavily limited and further restrictions should not be placed on producers bringing an action in respect of a matter not excluded under clause 13.1.’⁵⁴⁸

NSWMC submitted that clause 13.5(b), relating to contribution for cross claims, should be deleted as ‘the Access Holder should not be responsible for claims arising out of arrangements between the Operator and ARTC.’⁵⁴⁹

NSWMC submitted that ARTC's position regarding liability under clause 4.6(a) (limited agency) is ‘generally acceptable as an Access Holder can include a back-to-back indemnity for breaches by an Operator in its contractual arrangements with the

⁵⁴¹ NSWMC, *Access Holder Agreement for Indicative Services in the Hunter Valley marked up version*, Attachment C, 1 April 2010, p. 62.

⁵⁴² NSWMC, Explanatory Comments AHA mark-up, Attachment D, 1 April 2010, p. 11.

⁵⁴³ NSWMC, Explanatory Comments AHA mark-up, Attachment D, 1 April 2010, p. 11

⁵⁴⁴ NSWMC, AHA mark-up, Attachment C, 1 April 2010, p. 51.

⁵⁴⁵ NSWMC, AHA mark-up, Attachment C, 1 April 2010, p. 9.

⁵⁴⁶ NSWMC, Explanatory Comments AHA mark-up, Attachment D, 1 April 2010, p. 9.

⁵⁴⁷ NSWMC, AHA mark-up, Attachment C, 1 April 2010, p. 52.

⁵⁴⁸ NSWMC, Explanatory Comments AHA mark-up, Attachment D, 1 April 2010, p. 9.

⁵⁴⁹ NSWMC, Explanatory Comments AHA mark-up, Attachment D, 1 April 2010, p. 9.

Operator. NSWMC submitted: ‘however, NSWMC considers that Consequential Loss should be excluded as it considers that it would be more difficult to obtain a back-to-back indemnity for this’.⁵⁵⁰ NSWMC submitted that consequential loss should be consistent with PWCS’ LTSOP.⁵⁵¹

Confidential Information

Section 3.5 of the 2009 HVAU provides for the handling of confidential information. NSWMC submitted that it differs from the confidentiality clause in the 2009 IAHA (clause 15). NSWMC submitted that it is seeking amendments to section 3.5 of the HVAU so that it mirrors the provisions in the AHA.⁵⁵²

NSWMC submitted in Attachment C that ‘NSWMC is still considering whether it is operationally practical to continually designate information as confidential’.⁵⁵³

Termination Provisions

NSWMC submitted that clause 12.3 of the 2009 IAHA:

‘only allows termination if the NSW Lease is "not promptly replaced by a new lease or rights" allowing ARTC to continue its obligations. There is no reason why the Access Holder should not be entitled to terminate in these circumstances and a right should therefore been inserted allowing the Access Holder to do so.’⁵⁵⁴

NSWMC made amendments to clause 12.3 in Attachment C.⁵⁵⁵

NSWMC also submitted that ARTC should not be able to apply clause 12.1, which related to termination of the agreement for breach, where the breach results from ‘an Access Holder using a Non-Compliant Service or Cancelling a Service until such time as ARTC has first complied with the provisions of clause 11.5’.⁵⁵⁶ Clause 11.5 (as amended by NSWMC) deals with Non-compliance with Service Assumptions.

NSWMC submitted that parties should not be entitled to immediately terminate the agreement unless the other party *permanently* ceases to carry on business.⁵⁵⁷ NSWMC submitted that ‘ARTC should not be entitled to terminate the agreement in circumstances where a mine is subject to a temporary shut down and the Access Holder continues to pay TOP Charges’.⁵⁵⁸

NSWMC also submitted that ‘ARTC has agreed that Liability for TOP Charges ceases on termination of the agreement where the termination arises out of clause 12.3. It is unreasonable for ARTC to refuse to suspend TOP Charges where it opts to suspend obligations and that suspension arises out of clause 12.3’.⁵⁵⁹

⁵⁵⁰ NSWMC, Explanatory Comments AHA mark-up, Attachment D, 1 April 2010, p. 5.

⁵⁵¹ NSWMC, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 14.

⁵⁵² NSWMC, Explanatory Comments HVAU mark-up, Attachment B, 1 April 2010, p. 3.

⁵⁵³ NSWMC, AHA mark-up, Attachment C, 1 April 2010, p. 56

⁵⁵⁴ NSWMC, Explanatory Comments AHA mark-up, Attachment D, 1 April 2010, p. 8.

⁵⁵⁵ NSWMC, AHA mark-up, Attachment C, 1 April 2010, p. 48.

⁵⁵⁶ NSWMC, AHA mark-up, Attachment C, 1 April 2010, p. 47.

⁵⁵⁷ NSWMC, AHA mark-up, Attachment C, 1 April 2010, p. 47.

⁵⁵⁸ NSWMC, AHA mark-up, Attachment C, 1 April 2010, p. 47.

⁵⁵⁹ NSWMC, AHA mark-up, Attachment C, 1 April 2010, p. 49.

Capacity Management

Summary

NSWMC submitted that (in summary) the mark-ups to clauses 6.2, 11.5 and 11.6 propose:

Access holder to bear own and other users' capacity loss if:

- non compliant service (Service Assumptions)
- cancellation, late presentation, train breakdown, failure to meet other KPIs/System Assumptions (excluding Service Assumptions)

Access holder does not bear capacity loss where cause cannot be reasonably and promptly attributed (e.g. derailment and/or damage to track infrastructure).

Clause 16.4 proposed 'ARTC to participate in Capacity Trading System and its provisions to be integrated with the AHA provisions for temporary trade of Path Usages.'⁵⁶⁰

Explanatory Comments for NSWMC mark-ups to the IAHA

The NSWMC submitted that in relation to:

Section 6 - Capacity Shortfall

- 6.1 – Capacity Shortfall - NSWMC notes that Access Holders require both alignment and coordination.
- 6.2 & 6.3 – Capacity Shortfall - NSWMC is confirming with the HVCCC whether ARTC should be able to move to prorate allocation in less than 5 days e.g. 2 days.
- 6.3(b) – Unaffected Access Holders – The clause should be amended to provide that each affected access holder should be able to make up its lost path usages from its unaffected loadpoints and/or from future ad hoc path usages.

Section 11 – Permanent variations of Train Paths

- 11.1 – Permanent variation of Train Paths:
 - Some mechanism is required to deal with a failure to respond to a request for permanent variations to Train Paths, as dispute resolution is unlikely to be useful. NSWMC would suggest that amendments be included to provide for a Second Notice to be given if no response is received. The Second Notice gives a further 28 days for a response, after which consent is deemed to have been

⁵⁶⁰ NSWMC, Submission in Response to ACCC Draft Decision, 1 April 2010, p 13.

given. This time frame should be more than sufficient for a party to respond.

- An Access Holder's obligations to pay TOP Charges should cease if varied path is offered to another Access Holder. If an Access Holder requests a variation and ARTC does not relieve it of its TOP Charges, if ARTC is later recompensed by another user, the Access Holder should then be refunded, irrespective of when this occurs.
- 11.2(c) - NSWMC is considering whether it is appropriate that ARTC has discretion to waive the TOP Charge if Access Holder's operations are disrupted.
- 11.4(f) - Removal for Under-utilisation - The number of paths to be added under this clause should be the amount available i.e. the Base Path Usages for the period the Access Holder couldn't use them so there is a clear measure of the effect to be taken into account. NSWMC proposes adding the words "*by adding the number of Base Path Usages for the Period during which they could not be used to the number of Actual Path Usages*" at the end of clause 11.4(f).
- 11.5/11.6 - Non-Compliant Services and Cancellations - NSWMC proposes splitting the clause into two, separately dealing with Non-Compliant Services (in clause 11.5) and Cancelled Services (in clause 11.6).
- 11.5(a) - Non compliance with Service Assumptions
 - If ARTC reasonably considers non-compliance is caused by the Access Holder, it should be obliged (not have the option) to issue a warning notice. Wording should also been inserted to clarify that, where causation cannot be promptly and reasonably attributed, ARTC will not be obliged to issue a warning notice.
 - A provision should be incorporated (also to be reflected in the HVAU) that an access holder retains its existing rights, including train path usages, in a new access agreement where it has existing access rights and applies for more (see clause 3.1(e)).
- 11.5(c) – Non compliance with Service Assumptions - It is important to ensure a Non-Compliant Service ceases to be used as soon as practicable so that efficiency (and Capacity) are retained and an absolute obligation on ARTC to take steps should therefore be inserted. Further, the timeframes should be reduced to 7 days both in relation to ceasing to use Non-Compliant Services and in relation to the time frame for ARTC taking action.
- 11.5(e) - Non-Compliance with Service Assumptions - A statement of purpose should be incorporated, providing that the objective of any

adjustments is to ensure (where practicable) that Base Path Usages of other access holders is not affected.

- 11.5(f) – Non compliance with Service Assumptions - Tolerance should not be adjusted as it constitutes a double penalty and the tolerance adjustment provision should therefore be deleted.
- 11.5(g) – Non compliance with Service Assumptions - This clause should be amended to apply temporarily with the actions being able to be taken again on 14 days notice if further Non-Compliant Services are used within one year of the warning notice. In reality, there are only 4 categories of System Assumptions, none of which are likely to be more than a temporary problem unless the action is deliberate (in which case, it is a new Service and new Access Rights should be applied for under an AHA). ARTC has the right to terminate the existing rights if deliberate breaches occur.
- 11.5(h) – Non compliance with Service Assumptions - Consideration of the HVCCC's advice and recommendations should not be left to ARTC's discretion. The same comment applies equally to the obligation which ARTC should be required to have regard to HVCCC advice/recommendations in clause 16.6 and paragraph 4.1(d) of the Train Path Schedule.
- 11.6 - Cancellation of Service - Wording should be inserted to clarify that:
 - the Access Holder that caused the Cancellation (even if not the party who lost the Path Usages) is the Access Holder who will be penalised;
 - where causation cannot be promptly and reasonably attributed, ARTC will not be obliged to issue a warning notice; and
 - a warning notice can be withdrawn.

The concept of Cancellation should also incorporate late presentation of a train, breakdown of a train and a failure to present a train.

Section 16- Assignment, trading and novation

- 16.1(a) – Assignment by ARTC - Access Holder consent should be required for ARTC to sell, trade, sub-licence and otherwise dispose of AHA. The underlined wording currently only applies to sales etc of an Access Holder. There is no valid reason as to why the wording should not apply equally to ARTC. Further, the new provision should be subject to ARTC remedying any pre-existing breach by it of the AHA.
- 16.1(c) – Assignment by ARTC - Liability should be clearly attributable to ARTC in circumstances where it enters into a sub-agreement or agency agreement. It is unreasonable that it not be liable for its agents and

contractors. ARTC can obtain reciprocal indemnities from its agents and contractors when negotiating contracts.

- New clause 16.3(b) and 16.3(a)(ii) – Assignment by ARTC
 - The drafting of this clause is acceptable on the basis that there should be no incentive for an Access Holder to permanently trade Path Usages. Correspondingly, there should be no disincentive to trade Path Usages as this helps provide the flexibility that is needed in this very rigid allocation structure and, on balance and over time, these trades are unlikely to impose any significant extra access charges for other Access Holder. Therefore clause 16.3(a)(ii) should be deleted.
- 16.4(a), (b) – Trading
 - NSWMC would suggest an update to the wording to reflect the Capacity Transfer System Working Group document dated 14 December 2009.
 - Any advice/recommendations received from the HVCCC as to the amount of Capacity losses should be binding in the absence of manifest error.
- 16.4(c)(iii) and 16.4(f) – Trading - NSWMC is liaising with the HVCCC as to trading timeframes and whether load points must be closer to the Port of Newcastle.
- 16.4(c)(iv) – Trading - NSWMC would propose deleting this provision because neither the Former or New Access Holder would necessarily have sufficient information to be able to provide this warranty.
- 16.4(f) – Trades - NSWMC is liaising with the HVCCC as to whether the time for a response can be reduced.
- 16.6 - HVCCC - NSWMC considers that a requirement should be inserted for ARTC to be obligated to have regard to the HVCCC's advice and recommendations. This still allows ARTC not to follow the HVCCC's advice/recommendations if it has good reason not to.

Network Transit Management in the IAHA

NSWMC submitted that Path Usages should not 'be included in the DTP unless there are sufficient Access Rights and Network Exit Capability and there is contract priority.'⁵⁶¹

NSWMC submitted that there should be a periodic review of Tolerance in the IAHA (considering effect on capacity) with endorsement by RCG.⁵⁶²

⁵⁶¹ NSWMC, Submission in Response to ACCC Draft Decision, 1 April 2010, p. 12.

⁵⁶² NSWMC, Submission in Response to ACCC Draft Decision, 1 April 2010, p. 12.

Sculpting the Annual Contracted Path Usages and Tolerance

NSWMC submitted that the terms in its amended HVAU, section 5.6 (Determination of Base Path Usages), should mirror those contained in clauses 3.2 (Base Path Usages) in the IAHA, once agreed.⁵⁶³ NSWMC also submitted that section 5.7 (Determination of Tolerance) in its amended HVAU should mirror those contained in clauses 3.3 (Tolerance) of the IAHA, once agreed.⁵⁶⁴

NSWMC amended the Tolerance provision (clause 3.3) in the IAHA to require the review of Tolerance to consult with the HVCCC and for it to be completed within 3 months of commencement. NSWMC submits that ‘the review will determine appropriate amendments to Tolerance and resulting changes to Coal Chain Capacity with final changes to be endorsed by the RCG’. NSWMC also submitted that it has proposed a new clause (3.3(e)) to ‘require further reviews to be commenced within 1 month of Additional Capacity becoming available for use and otherwise at not less than annual intervals.’⁵⁶⁵

Availability Exceptions

NSWMC submitted that ARTC should use reasonable endeavours to consult with the Access Holder before an Availability Exception applies. NSWMC included amendments to the provision in Attachment C.⁵⁶⁶ NSWMC submitted that it is ‘drafting excuses ARTC from giving notice where it is unable to reasonably do so (for example, in an emergency).’⁵⁶⁷

Train Path Schedule

NSWMC made submissions on the Train Path Schedule:

- In relation to the Network Exit Capability Condition Precedent (clause 4.1 of the TPS): ‘where requested to do so by an Access Holder and subject to Available Capacity, ARTC should be obliged to grant Path Usages to enable the Access Holder to fully utilise its port capacity.’
- Clauses 4.1 and 4.2 of the Train Path Schedule should be clarified so that they do not limit the operation of clause 3.14 of the agreement during the Term⁵⁶⁸

Repairs, Maintenance and Upgrading of the Network

NSWMC submitted that it is still considering whether it is appropriate for ARTC to have discretion to waive the TOP charges when taking possession of the Network.⁵⁶⁹

Third Party Works

⁵⁶³ NSWMC, HVAU mark-up, Attachment A, 1 April 2010, p. 53.

⁵⁶⁴ NSWMC, HVAU mark-up, Attachment A, 1 April 2010, p. 53.

⁵⁶⁵ NSWMC, Explanatory Comments for AHA, Attachment D, 1 April 2010, p. 3.

⁵⁶⁶ NSWMC, AHA mark-up, Attachment C, 1 April 2010, p. 20.

⁵⁶⁷ NSWMC, Explanatory Comments AHA mark-up, Attachment D, 1 April 2010, p. 4.

⁵⁶⁸ NSWMC, Explanatory Comments AHA mark-up, Attachment D, 1 April 2010, p. 12.

⁵⁶⁹ NSWMC, AHA mark-up, Attachment C, 1 April 2010, p. 41.

NSWMC submitted that ARTC should ‘take and ensure the Third Party takes all reasonable steps to minimise any disruption to the Train Path’. Further, NSWMC notes that it does ‘not consider this to be an unreasonable requirement and it is consistent with NSWMC’s approach off aligning outages/Availability Exceptions to allow optimum use of Capacity under clause 3.2(a)’.⁵⁷⁰

KPIs

NSWMC submitted that amendments be made to clause 3.13 of the 24 December IAHA to include provisions requiring a review after changes to the Network KPIs and that KPIs should incorporate factors which the HVCCC determines are to be used in assessing efficiency in the Network.⁵⁷¹

NSWMC submitted that initial coal specific KPIs for ARTC and Access Holders/Operators should be developed by the HVCCC and, thereafter, reviewed and revised by the HVCCC regularly, and each time there is an expansion of the Hunter Valley Coal Chain.⁵⁷²

NSWMC submitted that performance against the System Assumptions coal specific KPIs should be monitored by the HVCCC and reported to ARTC and Access Holders/Operators on regular basis. NSWMC noted that it is confirming the HVCCC's ability to undertake a monitoring role. NSWMC further submitted that ARTC should monitor its other incentives and measures under the NSW [Lease] and the True-Up Test and report this to Access Holders.⁵⁷³

NSWMC proposed a provision in the IAHA stating that where changes to KPIs and minimum performance levels require a material change to ARTC or an Access Holder/Operator’s operations or infrastructure, there will be a period of up to two years for the change to be implemented.⁵⁷⁴

NSWMC submitted that remedial processes should be included in the IAHA. NSWMC proposed that the ACCC would approve remedial processes by the Commencement Date, or they would be agreed by the parties within 6 months of the Commencement Date. NSWMC submitted that parties would be required to comply with the remedial processes and that once the ACCC approved a remedial process, they would apply in place of agreed principles.⁵⁷⁵

NSWMC submitted that KPIs are a mechanism to monitor and trigger the creation of KPI management plans where there has been a material failure, by either party, to meet KPIs.⁵⁷⁶

NSWMC proposed an amendment to the 24 December IAHA definition of Network KPIs, to provide that ARTC is to develop the performance indicators ‘in consultation

⁵⁷⁰ NSWMC, AHA mark-up, Attachment C, 1 April 2010, p. 41.

⁵⁷¹ NSWMC, Explanatory Comments AHA mark-up, Attachment D, 1 April 2010, p. 4.

⁵⁷² NSWMC, Explanatory Comments AHA mark-up, Attachment D, 1 April 2010, p. 4.

⁵⁷³ NSWMC, Explanatory Comments AHA mark-up, Attachment D, 1 April 2010, p. 4.

⁵⁷⁴ NSWMC, Explanatory Comments AHA mark-up, Attachment D, 1 April 2010, p. 4.

⁵⁷⁵ NSWMC, Explanatory Comments AHA mark-up, Attachment D, 1 April 2010, p. 4.

⁵⁷⁶ NSWMC, Explanatory Comments AHA mark-up, Attachment D, 1 April 2010, p. 4.

with and having due regard to the advice and recommendations of the HVCCC'.⁵⁷⁷ NSWMC submitted that the HVCCC acts as an expert advisory group and is well placed to assist in the development of Network KPIs.⁵⁷⁸

NSWMC submitted that the HVAU should provide that within 6 months of the commencement date, ARTC will propose Network KPIs and minimum levels of performance to the ACCC for inclusion in the HVAU.⁵⁷⁹ NSWMC further submitted that the HVAU should be amended to reflect the proposed amendments to the IAHA.⁵⁸⁰

Definition of the HVCCC

NSWMC submitted that the words 'after having due regard to the views of Access Holders' be added to the end of the definition of HVCCC given in both the 24 December IAHA and in the HVAU.⁵⁸¹

NSWMC submitted that once the Service Level Agreements between various infrastructure providers and the HVCCC have been finalised, further amendments may be required to the HVCCC's role under an AHA to take account of the HVCCC's agreed role in relation to the infrastructure provider.⁵⁸²

Definition of monthly tolerance cap (clause 1.1 AHA)

NSWMC submitted that Access Holders should have a degree of control over determination of the monthly tolerance cap. NSWMC sought a consultation process to regularly assess and potentially adjust the MTC with the approval of the RCG.⁵⁸³

Termination (clause 2.4 AHA)

NSWMC considered that clause 2.4 should not be subject to clause 12.7 as this requires the Access Holder to pay TOP charges after termination or suspension of a Train Path Schedule.⁵⁸⁴

TOP Charges (clause 5.4(f) AHA)

NSWMC submitted that ARTC should be required to pay twice the Rebate where it has provided less than 95% of the Base Path Usages in more than one Period. Further, clause 5.4(f), regarding remedies where ARTC fails to provide paths, should be subject to the liability provisions in clause 13.⁵⁸⁵

⁵⁷⁷ NSWMC, AHA mark-up, Attachment C, 1 April 2010, p. 8.

⁵⁷⁸ NSWMC, Explanatory Comments AHA mark-up, Attachment D, 1 April 2010, p. 2.

⁵⁷⁹ NSWMC, Explanatory Comments AHA mark-up, Attachment D, 1 April 2010, p. 4.

⁵⁸⁰ NSWMC, Explanatory Comments HVAU mark-up, Attachment B, 1 April 2010, pp. 16-17.

⁵⁸¹ NSWMC, HVAU mark-up, Attachment A, 1 April 2010, p. 76 and AHA mark-up, Attachment C, 1 April 2010, pp. 6-7.

⁵⁸² NSWMC, Explanatory Comments AHA mark-up, Attachment D, 1 April 2010, p. 2.

⁵⁸³ NSWMC, Explanatory Comments AHA mark-up, Attachment D, 1 April 2010, p. 2.

⁵⁸⁴ NSWMC, Explanatory Comments AHA mark-up, Attachment D, 1 April 2010, p. 3.

⁵⁸⁵ NSWMC, Explanatory Comments AHA mark-up, Attachment D, 1 April 2010, p. 5.

Permanent variation of Train Paths – refund (clause 11.1 AHA)

NSWMC submitted that an Access Holder's obligations to pay TOP Charges should cease if the varied path is offered to another Access Holder, irrespective of when the refund occurs.⁵⁸⁶

Suspension of TOP charges (clause 12.6(d) AHA)

NSWMC considered that ARTC should be required to suspend TOP charges for a suspension as otherwise ARTC could avoid losing TOP charges by opting to suspend and not terminate rights.⁵⁸⁷

Early Termination and TOP Charges (clause 12.8(c) AHA)

NSWMC's position was that the 2 year limitation should be deleted. In particular, if ARTC is receiving TOP Charges from another user, it should not be entitled to double dip.⁵⁸⁸

NSWMC suggested that the words "*to the extent that Capacity is the same*" should be deleted to prevent a rebate of more than the amount paid under clause 12.8(a).⁵⁸⁹

True up Test (Schedule 2, clause 2.3(b) AHA)

NSWMC submitted that since producers are paying extra for Tolerance to be built, they should therefore be entitled to a Rebate where Tolerance is not provided, as this will incentivise ARTC to provide capacity wherever possible. NSWMC considers that the current drafting of Schedule 2 does not provide a Rebate as long as all Access Holders obtain their base tonnage, even if the Tolerance capacity is not provided.⁵⁹⁰

Delay of additional capacity (Train Path Schedule, clause 4.3)

NSWMC submitted that if Additional Capacity is delayed beyond, for example, 6 months from the proposed completion date, the Access Holder should be entitled to receive liquidated damages. Reasonable damages payable would be twice the TOP charge ARTC would have received, had the Additional Capacity been made available on time.⁵⁹¹

A.10.5 Peabody Australia Mining Limited (31 March 2010)

A.10.5.1 Pricing parity/gtkm as a unit of pricing (section 4.10 HVAU)

As submitted in its July 2009 submission, Peabody maintains that pricing parity (same gross tonne kilometre rate) should be maintained for the existing service providers operating in Zones 1 and 2.⁵⁹²

⁵⁸⁶ NSWMC, Explanatory Comments AHA mark-up, Attachment D, 1 April 2010, p. 6.

⁵⁸⁷ NSWMC, Explanatory Comments AHA mark-up, Attachment D, 1 April 2010, p. 8.

⁵⁸⁸ NSWMC, Explanatory Comments AHA mark-up, Attachment D, 1 April 2010, p. 9.

⁵⁸⁹ NSWMC, Explanatory Comments AHA mark-up, Attachment D, 1 April 2010, p. 9.

⁵⁹⁰ NSWMC, Explanatory Comments AHA mark-up, Attachment D, 1 April 2010, pp. 10-11.

⁵⁹¹ NSWMC, Explanatory Comments AHA mark-up, Attachment D, 1 April 2010, p. 12.

⁵⁹² Peabody, *Australian Rail Track Corporation Limited Hunter Valley Coal Network Access Undertaking Submissions of Peabody Australia Mining Limited in response to the Australian Competition and Consumer Commission's draft decision (5 March 2010)*, 31 March 2010, pp. 2-3.

Peabody supports the ACCC's proposal that the use of gtkm based pricing continue on the basis that ARTC submit an efficient train configuration to the ACCC and supports a 10 year commencement date for pricing based on efficient train configuration.⁵⁹³

A.10.5.2 Contract structure

Peabody supported the direct contractual relationships between coal producers and ARTC for coal access rights, and agreed that this does give rise to practical issues which should be resolved with clarity. Peabody supported the inclusion of a provision in the HVAU that gives Operators an express right to be involved in the negotiation of the OSA.⁵⁹⁴

A.10.5.3 Involvement of Operators in negotiations

Peabody supported the inclusion of a provision in the HVAU which gives operators an express right to be involved in the negotiation of the Operator Sub Agreement.⁵⁹⁵

A.10.5.4 KPIs

Peabody submitted that the HVAU should include KPIs and that they should form the basis for negotiation of the KPIs to be included in the access agreements prior to execution.⁵⁹⁶

Peabody further submitted that Operators should be involved in the development of KPIs that relate to operator performance before the IAHA is executed.⁵⁹⁷

A.10.5.5 IAHA

Peabody made the following submissions in relation to the Liability and Indemnity Provisions in the 2009 IAHA:

- The Mutual release should 'reflect commercially acceptable standards by imposing a carve out for Claims or Liability [...] where those events are caused by the negligence or breach of the IAHA by ARTC'.⁵⁹⁸
- The Mutual Liability cap should exclude third party claims (such as personal injury or death and lost property).
- The definition of consequential loss is too broad and inappropriate. It should be deleted 'on the basis that 'economic', special or consequential loss are defined or recognised by the common law with the result that it is ambiguous and arguably so broad that any form of damage would fall within the definition of 'consequential loss'. In addition, sub clause (c) is unnecessary given the breadth of subclauses (a) and (b) of the definition.⁵⁹⁹

⁵⁹³ Peabody, Submissions in Response to ACCC Draft Decision, 31 March 2010, p. 3.

⁵⁹⁴ Peabody, Submissions in Response to ACCC Draft Decision, 31 March 2010, p. 3.

⁵⁹⁵ Peabody, Submissions in Response to ACCC Draft Decision, 31 March 2010, p. 3.

⁵⁹⁶ Peabody, Submissions in Response to ACCC Draft Decision, 31 March 2010, p. 4.

⁵⁹⁷ Peabody, Submissions in Response to ACCC Draft Decision, 31 March 2010, p. 4.

⁵⁹⁸ Peabody, Submissions in Response to ACCC Draft Decision, 31 March 2010, p. 4.

⁵⁹⁹ Peabody, Submissions in Response to ACCC Draft Decision, 31 March 2010, p. 4.

A.10.6 QR National Coal (30 March 2010)

A.10.6.1 Common provisions in access agreements for alignment purposes

QR National Coal noted and was supportive of the ACCC's view that capacity management provisions must be included in the HVAU and mirrored in all access agreements.⁶⁰⁰

A.10.6.2 Negotiation between ARTC and access seekers

QR National Coal submitted that parties should be able to negotiate access agreements on the basis of their legitimate commercial interests, but given the regulated environment a better outcome would be achieved by the standardisation of access agreements. QR National Coal cited concerns around commercial risks, administrative costs and delays that could arise where parties may negotiate varying terms and conditions.⁶⁰¹

QR National Coal submitted that 'a more reasonable approach would be for negotiation in relation to the parties legitimate commercial interests to take place around these standardised documents', with recourse to the dispute resolution and arbitration provisions in the HVAU in event a negotiated outcome could not be reached.⁶⁰²

A.10.6.3 Involvement of Operators in negotiations

QR National Coal submitted that it was supportive of the view that the HVAU should give greater recognition to the ability of an Operator to take part in negotiation of an Operator Sub Agreement, and to utilise the dispute resolution and arbitration provisions of the HVAU in the event of a dispute.⁶⁰³

A.10.6.4 Capacity Management

QR National Coal submitted that it is 'supportive of ACCC's views' including that 'capacity management provisions relating to the Hunter Valley rail network must be included in the HVAU' and 'that these provisions must be mirrored in all agreements'.⁶⁰⁴

A.10.6.5 Additional Capacity

QR National Coal submitted that it was 'supportive of the ACCC's preliminary view for the proposed inclusion of provisions detailing ARTC's obligations in relation to the provision of Additional Capacity (and specifically in relation to consultation with the HVCCC)'.⁶⁰⁵

A.10.6.6 Capacity Resumption

QR National Coal submitted that it is 'cognisant of the complexity involved in finding a practical and appropriate approach to capacity resumption and concurs with ACCC

⁶⁰⁰ QRN Coal, *Submission on the Draft Decision on the Hunter Valley Coal Network Access Undertaking*, 30 March 2010, p. 1.

⁶⁰¹ QRN Coal, *Submission on the Draft Decision*, 30 March 2010, p. 2.

⁶⁰² QRN Coal, *Submission on the Draft Decision*, 30 March 2010, p. 2.

⁶⁰³ QRN Coal, *Submission on the Draft Decision*, 30 March 2010, p. 2.

⁶⁰⁴ QRN Coal, *Submission on the Draft Decision*, 30 March 2010, p. 1.

⁶⁰⁵ QRN Coal, *Submission on the Draft Decision*, 30 March 2010, p. 2.

in its questioning of whether the provision as it is currently drafted achieves the desired outcome and whether or not it is the most appropriate mechanism for penalising and ultimately reducing the risk of capacity hoarding.’⁶⁰⁶

QRNational Coal submitted that ‘more appropriate criteria need to be placed around the resumption provisions for under-utilisation’ including that:

‘Firstly ARTC must be able to demonstrate that it has:

1. a sustained alternative demand for the train paths being resumed; and
2. a reasonable expectation of receiving a commercial benefit from the removal of the under-utilised paths.

Secondly, the provision as it is currently drafted should not apply when the under-utilisation is as a result of ARTC not making the paths available.

Thirdly, the provision as it is currently drafted may result in the Access Holder being exposed to a permanent reduction in path entitlements based on non-performance of another party through a temporary trade. This provision does not achieve the aim of reducing the impact of capacity hoarding.’⁶⁰⁷

As a result, QRNational Coal believed ‘that consideration needs to be given to a more appropriate mechanism for recognising (both in determining an appropriate reduction threshold and in determining the criteria which should be applied) and penalising capacity hoarding as it has significant effect on the capacity of the entire supply chain.’⁶⁰⁸

A.10.6.7 Capacity Trading

QRNational Coal submitted that it was ‘supportive of:’

- ‘The ACCC’s preliminary view that greater clarity should be provided in the HVAU around the charges that the original Access Holder will remain liable for under short term path trades;
- More specific mechanisms and processes being provided around the consent of ARTC for short term trades (where such consent is required); and
- The ARTC’s view that for trades for periods of less than 12 months where ARTC’s consent is not required, that a temporary trading platform for network capacity should be included in the HVAU.’⁶⁰⁹

A.10.6.8 Network Transit Management

QRN Coal submitted that it was supportive of the following preliminary views of the ACCC in the draft decision:

- capacity management provisions must be included in the HVAU, and
- that these provisions must be mirrored in all access agreements.⁶¹⁰

⁶⁰⁶ QRN Coal, Submission on the Draft Decision, 30 March 2010, p. 3.

⁶⁰⁷ QRN Coal, Submission on the Draft Decision, 30 March 2010, p. 3.

⁶⁰⁸ QRN Coal, Submission on the Draft Decision, 30 March 2010, p. 3.

⁶⁰⁹ QRN Coal, Submission on the Draft Decision, 30 March 2010, p. 3.

- recommendations for the inclusion of detailed processes for ARTC's consultation with the HVCCC.⁶¹¹

A.10.6.9 KPIs

QR National Coal (QRN Coal) stated that it agrees with the ACCC's preliminary views in the Draft Decision that (i) if KPIs are included in the HVAU, these can be used as a basis for negotiating KPIs in the access agreements, (ii) negotiation of KPIs can occur with negotiation of the access agreement and (iii) it is likely to be appropriate for Operators to be involved in the negotiation of KPIs.⁶¹²

QRN Coal submitted that along with KPIs, measurement methodologies for KPIs should be included in the HVAU. QRN Coal further submitted that the focus of the KPI regime should be on maximising efficiency, operational performance and impact of supply chain parties on efficiency.⁶¹³

A.10.6.10 Pricing principles (sections 4.10-4.11 HVAU)

QR National maintains its initial position that pricing parity should be maintained from commencement of the undertaking for a period of 5 years.⁶¹⁴

QRNational Coal submits that it is supportive of the ACCC's preliminary view that:

- in the absence of a current determination of an efficient train configuration, the use of gtk is appropriate to apportion fixed costs is appropriate in the short term before an efficient train configuration is known;
- ARTC should be required to submit an efficient train configuration to the ACCC within 3-4 years of the commencement of the Undertaking; and
- pricing based on the efficient train configuration must become effective within 4-5 years form the Commencement of the Undertaking and must apply to all coal services in operation on the Network irrespective of when the access contracts were entered into.⁶¹⁵

QRNational also submits that is it is supportive of the ACCC's assertion that longer heavier trains may not be the efficient train configuration for the overall Hunter Valley Coal Chain.⁶¹⁶

A.10.6.11 Loss capitalisation model

QRN Coal maintained its view that the loss capitalisation approach should not be accepted as it creates an intergenerational equity issue for current and future users of the network.⁶¹⁷

⁶¹⁰ QRN Coal, Submission on the Draft Decision, 30 March 2010, p. 1.

⁶¹¹ QRN Coal, Submission on the Draft Decision, 30 March 2010, p. 3.

⁶¹² QRN Coal, Submission on the Draft Decision, 30 March 2010, p. 4.

⁶¹³ QRN Coal, Submission on the Draft Decision, 30 March 2010, p. 4.

⁶¹⁴ QRN Coal, Submission on the Draft Decision, 30 March 2010, p. 4.

⁶¹⁵ QRN Coal, Submission on the Draft Decision, 30 March 2010, p. 4.

⁶¹⁶ QRN Coal, Submission on the Draft Decision, 30 March 2010, p. 4.

⁶¹⁷ QRN Coal, Submission on the Draft Decision, 30 March 2010, pp. 4 – 5.

A.10.6.12 Return of capital (depreciation)

QRN Coal maintained that setting a mine life for each zone may impact on the pricing of access and lead to current users bearing disproportionately higher access charges relative to future users.⁶¹⁸

A.10.7 RailCorp (31 March 2010)

A.10.7.1 Recognition of non-coal access seekers & passenger priority obligations

RailCorp expressed support for many of the ACCC's preliminary views in the Draft Decision and acknowledged that a number of concerns from its original submissions appeared to have been addressed.⁶¹⁹

RailCorp acknowledged and supported the ACCC preliminary view that it is appropriate for the HVAU to include a separate subsection recognising ARTC's obligations under the *Transport Administration Act* 1988 (NSW), particularly in relation to passenger priority.⁶²⁰ RailCorp submitted though that the passenger priority obligations of ARTC should be more clearly demonstrated, as RailCorp believes passenger priority is a capacity/network management issue the impact of which should be clearly demonstrated in the HVAU.⁶²¹ RailCorp submitted that a descriptive clause in the Introduction of the HVAU is unlikely to draw the attention of potential access seekers to this consideration.⁶²² RailCorp submitted that, instead, the HVAU should nominate passenger priority principles similar to those expressed in the IAHA, and that such clauses should be uplifted from the IAHA to HVAU in a similar manner to those regarding other capacity management matters.⁶²³ RailCorp submitted that this is also in the interests of transparency.⁶²⁴

RailCorp also referred to the ACCC's views on the Introduction of the April 2009 HVAU and submitted that the section should clearly state that references to non-coal traffic includes both non-coal freight and passenger services.⁶²⁵ RailCorp submitted that it should, as an access seeker, be entitled to the same dispute resolution mechanisms as other access seekers under the HVAU. It stated a concern that, under drafting of the HVAU that would be consistent with the ACCC's preliminary view, in the event of a dispute, it is unclear if the passenger priority/network capacity management will fall within the scope of the dispute resolution provisions in the HVAU.⁶²⁶

⁶¹⁸ QRN Coal, Submission on the Draft Decision, 30 March 2010, p. 5.

⁶¹⁹ RailCorp, *Hunter Valley Rail Network – ARTC Proposed Access Undertaking – RailCorp Submission in Response to the ACCC Draft Decision*, 31 March 2010, p. 5.

⁶²⁰ ACCC, ARTC HVAU Draft Decision, 5 March 2010, p. 88.

⁶²¹ RailCorp, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 5.

⁶²² RailCorp, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 7.

⁶²³ RailCorp, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 8.

⁶²⁴ RailCorp, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 8.

⁶²⁵ RailCorp, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 7.

⁶²⁶ RailCorp, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 7.

A.10.7.2 Scope

Application of multiple regulatory access arrangements

RailCorp supported the ACCC preliminary view that the definition of the scope of the April 2009 HVAU requires greater clarity to minimise the likelihood that access seekers will be subject to multiple access arrangements.⁶²⁷ RailCorp expressed a concern that its current access agreement with ARTC, which provided for access to both the Interstate and Hunter Valley networks in accordance with the 2008 Interstate AU and the NSWRAU, has expired and is operating on a monthly extension basis. RailCorp submitted that negotiations with ARTC had only recently commenced and the lack of contractual certainty, confusion regarding the interface between the different regulatory instruments and the unclear nature of what is being proposed in relation to non-coal paths in the HVAU has created a considerable amount of uncertainty.⁶²⁸

Exclusion of Extensions

RailCorp supported the concept of Extensions being covered by the HVAU.⁶²⁹

A.10.7.3 Alignment considerations

RailCorp submitted that many of the aspects contained in the IAHA that the ACCC has identified as capacity management provisions should be uplifted into the HVAU.⁶³⁰ RailCorp submitted that any provisions contained in the HVAU and mirrored in access agreements should be subject to the dispute resolution mechanisms in the HVAU.⁶³¹

RailCorp submitted that ARTC's statutory passenger priority obligations should be contained in the HVAU and mirrored in access agreements.⁶³²

A.10.7.4 Essential elements

RailCorp agreed with the ACCC's view that the drafting of the Essential Elements in the 2009 HVAU permits negotiation of access agreements with non-aligning provisions. RailCorp noted that this drafting could permit, through negotiation, the removal or variation of those Essential Elements relating to passenger priority.⁶³³

A.10.7.5 Non-coal access rights

RailCorp submitted that it supports the view that the HVAU should include an indicative access agreement for non-coal access rights, particularly if an indicative passenger service is also developed.⁶³⁴ RailCorp submitted that any indicative non-coal access agreement should be subject to regulatory scrutiny and provided to non-coal access seekers for review.⁶³⁵

⁶²⁷ RailCorp, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 8.

⁶²⁸ RailCorp, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 10.

⁶²⁹ RailCorp, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 8.

⁶³⁰ RailCorp, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 8.

⁶³¹ RailCorp, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 10.

⁶³² RailCorp, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 9.

⁶³³ RailCorp, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 9.

⁶³⁴ RailCorp, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 9.

⁶³⁵ RailCorp, Submission in Response to ACCC Draft Decision, 31 March 2010, pp. 9-10.

A.10.7.6 Reservation of non-coal access rights

RailCorp submitted that it remains of the opinion that processes in relation to the reservation of non-coal trains paths is unclear. RailCorp submitted that it:

‘... is particularly concerned in the current context as its current access agreement with ARTC, which provides for access to both the Interstate and Hunter Valley networks in accordance with the IU and the NSWRAU has expired and it is operating on a monthly extension basis. Negotiations with ARTC have only recently commenced and the lack of contractual certainty, confusion regarding the interface between the different regulatory instruments and the unclear nature of what is being proposed in relation to non-coal paths in the HVAU has created a considerable amount of uncertainty’.⁶³⁶

A.10.7.7 Dispute resolution and arbitration

RailCorp was concerned that the ability to access the dispute resolution mechanisms of the 2009 HVAU in the event of a dispute involving passenger priority/capacity management is unclear and may ultimately be considered outside the scope of the HVAU. RailCorp submitted that the passenger priority principles should be subject to the dispute resolution mechanisms contained in the HVAU, and that RailCorp, as an access seeker, should be entitled to utilise the dispute resolution mechanisms available to other access seekers under the HVAU.⁶³⁷

A.10.7.8 Capacity Shortfalls

RailCorp noted that it ‘supports the ACCC call for the rationale for the flexibility and objective to be followed [in relation to the Capacity Shortfall provisions] be more clearly explained. However RailCorp submitted that it would be concerned if the actual principles were altered as they appear to accord with ARTC obligations under passenger priority.’⁶³⁸

A.10.7.9 Capacity Resumption

RailCorp noted that it ‘acknowledges the difficulty in developing a capacity resumption threshold in the light of coal industry output variability’, however submits that ‘a key component of network management must include the ability of the network owner to resume unused capacity to ensure the efficient use of the network for the benefit of all stakeholders including all access seekers.’⁶³⁹

A.10.7.10 Industry Consultation Process

RailCorp reiterated that ‘ARTC has failed to include RailCorp in the industry consultations prior to the proposed HVAU being lodged with the ACCC’ and that the ‘process for developing the network capacity strategy was flawed in that non-coal Access seekers were not accommodated.’⁶⁴⁰

RailCorp noted that it is ‘very supportive of the ACCC suggestion that the HVAU contains a mechanism that would take into account the views of non-coal users during

⁶³⁶ RailCorp, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 10.

⁶³⁷ RailCorp, Submission in Response to ACCC Draft Decision, 31 March 2010, pp. 7-10.

⁶³⁸ RailCorp, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 11.

⁶³⁹ RailCorp, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 11.

⁶⁴⁰ RailCorp, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 11.

the development of a corridor capacity strategy. The mechanism would take the form of either membership of the RCG or a separate consultation process.’⁶⁴¹

RailCorp submitted however that a ‘concern with any consultation process is the requirement and incentive for the process to be effectively undertaken.’⁶⁴²

RailCorp further submitted that ‘ARTC has demonstrated, in RailCorp’s case, an apparent lack of willingness to consult ... about the HVAU’. RailCorp submitted that it ‘has no wish to complicate or make RCG membership unwieldy’ but argues that ‘membership of the RCG may be preferable to a separate consultation process.’⁶⁴³

RailCorp noted the ACCC’s recommendation that the ‘composition of the RCG should be discussed within industry’ however to its knowledge ‘this discussion as not taken place nor has ARTC approached RailCorp. As a result RailCorp has not yet been able to determine a position.’⁶⁴⁴

A.10.7.11 Network Transit Management

RailCorp submitted that it supported the ACCC’s views on the involvement of non-coal stakeholders and the HVCCC in the medium term capacity planning process.⁶⁴⁵

RailCorp submitted that ARTC should amend the HVAU to explain the nature of ARTC’s obligations under the terms of the NSW Lease. The ACCC rationale for the HVAU to explain ARTC’s inability to change the NMPs could equally apply to ARTC’s obligations to the implementation of passenger priority obligations. This has the same potential to avoid disputes.⁶⁴⁶

RailCorp submitted that provisions relating to ARTC’s passenger priority obligations in the 2009 IAHA and the 2009 OSA should be uplifted to the HVAU and dealt with under the dispute resolution process.⁶⁴⁷ Further, passenger priority obligations are not operator specific and should be part of the NMPs.⁶⁴⁸

A.10.7.12 KPIs

RailCorp submitted that the inclusion of KPIs in the HVAU would aid transparency for all access seekers.⁶⁴⁹

A.10.7.13 Structure of charges for non-coal access (section 4.11 HVAU)

RailCorp submits that it has concerns with:

- ARTC’s apparent allocation of VCC
- Contributions to FCC

⁶⁴¹ RailCorp, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 11.

⁶⁴² RailCorp, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 11.

⁶⁴³ RailCorp, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 11.

⁶⁴⁴ RailCorp, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 11.

⁶⁴⁵ RailCorp, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 12.

⁶⁴⁶ RailCorp, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 12.

⁶⁴⁷ RailCorp, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 5.

⁶⁴⁸ RailCorp, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 12.

⁶⁴⁹ RailCorp, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 13.

- Interpretation of the ability to pay together with the guidelines regarding access charge differentiation

RailCorp submits that it still remains convinced that indicative passenger access charges are required even though the ACCC has suggested that a formal ceiling level apply to non-coal access seekers.⁶⁵⁰

RailCorp is concerned that CityRail is making substantial amounts of contributions to FCC, while non-coal freight is making considerably less, if any, contributions to the FCC. Furthermore, RailCorp is unsure as to how its FCC is being allocated outside of the HV network, considering its Islington to Muswellbrook and Islington to Scone services run on both the Interstate Network and HV network.⁶⁵¹

A.10.7.14 Ability to pay (section 4.11 HVAU)

RailCorp submits that ARTC should differentiate it from other non-coal access seekers as it is a Government Authority and as such is required to operate the above rail services irrespective of the commercial aspect of the service supply. Further, RailCorp submits that the unclear nature of the components of the access charge (VCC and FCC) and subsequent network allocation of revenue suggests to RailCorp that scrutinised indicative prices for passenger services are required in addition to an indicative access agreement for non-coal access seekers.⁶⁵²

A.10.7.15 Mutually exclusive access applications (section 3.13 HVAU)

RailCorp submits that it is concerned with the highest present value rule in relation to mutually exclusive access. In particular, RailCorp questions the ACCC's preliminary view that non-coal access seekers have the ability to utilise other methods of transportation. RailCorp maintains the point that it has significantly less ability to utilise other transportation methods and as such requests ARTC and the ACCC to reconsider the impact of the rule in relation to its situation.⁶⁵³

A.10.8 Xstrata Coal Pty Ltd (8 April 2010)

A.10.8.1 Objectives

Xstrata submitted that while it generally considers that the objectives set out in 2009 HVAU section 1.2 are appropriate, an extra section should be added setting out 'Coal Chain Principles'.⁶⁵⁴ Xstrata submitted that it is important to set out specific coal chain principles, which are desirable for the HVAU and Access Agreements to achieve, to ensure certainty of access to Coal Chain Capacity and alignment of port and track capacity and access agreements. Xstrata submitted that such principles would also contribute to a better understanding of the interests of Applicants seeking coal Access Rights in ensuring certainty, and the public interest in ensuring efficiency.⁶⁵⁵

⁶⁵⁰ RailCorp, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 13.

⁶⁵¹ RailCorp, Submission in Response to ACCC Draft Decision, 31 March 2010 pp. 14-15.

⁶⁵² RailCorp, Submission in Response to ACCC Draft Decision, 31 March 2010 p. 16.

⁶⁵³ RailCorp, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 16.

⁶⁵⁴ Xstrata, *Submission in Response to ACCC Draft Decision on ARTC Hunter Valley Coal Network Access Undertaking*, Attachment 1, 8 April 2010, p. 1.

⁶⁵⁵ Xstrata, Submission in Response to ACCC Draft Decision, Attachment 1, 8 April 2010, p. 1.

Xstrata also submitted a marked-up HVAU showing the new section, which is the same as originally proposed by Xstrata in its October 2009 HVAU mark-up.⁶⁵⁶

A.10.8.2 Review

Xstrata submitted that, given the changing nature of the Hunter Valley coal chain, it is not clear how the HVAU, the IAHA and the Access Holder Agreements will practically operate over the Term of each Access Holder Agreement to achieve the objectives set out in the HVAU.

Xstrata proposed and provided drafting for a more comprehensive review mechanism than that in section 2.4(d) of the HVAU, including early review of AHAs to ensure consistency with the HVAU and enable necessary amendments.⁶⁵⁷ Xstrata proposed that at the end of the first and fifth year of the HVAU, each Access Holder may, and ARTC must, participate in a good faith review of the terms of the HVAU and the IAHA, and where the Access Holder participates in the review, the AHA held by the relevant Access Holder. The review participants would prepare a report to the ACCC detailing the appropriateness of the HVAU, IAHA and AHA (if the latter is reviewed) and whether any amendments are required to give effect to the objectives and Coal Chain Principles. In making a determination, the ACCC should have regard to whether proposed amendments are likely to lead to improvements in Coal Chain Capacity or alignment.⁶⁵⁸

Xstrata submitted that the purpose of the review would be to examine the operation of the arrangements rather than the commercial position of ARTC, and that the ACCC should not be able to determine any amendments that would have a material adverse impact on ARTC overall.⁶⁵⁹

A.10.8.3 Additional Capacity

Xstrata submitted that the provisions relating to Additional Capacity in the HVAU ‘allow ARTC too much discretion in whether it will proceed with the construction of Additional Capacity and do not contain sufficient incentives for the control of ARTC’s costs of doing so.’⁶⁶⁰

Expansions and extensions

Xstrata submitted that it is concerned with the provisions by which ARTC will provide Additional Capacity, ‘primarily in respect of Additional Capacity which is delivered by ARTC enhancing its own existing Network, rather than undertaking Extensions’.⁶⁶¹

Xstrata submitted that while ‘section 6.1 of the HVAU ... allow[s] the connection of new sections of track to the Network, which allows users an alternative to ARTC’s

⁶⁵⁶ Xstrata, *Hunter Valley Coal Network Access Undertaking marked up version*, Attachment 2, 8 April 2010, p. 2 and Xstrata, partial HVAU mark-up, 2 October 2009, p. 5.

⁶⁵⁷ Xstrata, Submission in Response to ACCC Draft Decision, Attachment 1, 8 April 2010, p. 2.

⁶⁵⁸ Xstrata, Submission in Response to ACCC Draft Decision, Attachment 1, 8 April 2010, p. 2.

⁶⁵⁹ Xstrata, Submission in Response to ACCC Draft Decision, Attachment 1, 8 April 2010, p. 2.

⁶⁶⁰ Xstrata, Submission in Response to ACCC Draft Decision, Attachment 1, 8 April 2010, p. 2.

⁶⁶¹ Xstrata, Submission in Response to ACCC Draft Decision, Attachment 1, 8 April 2010, p. 2.

construction of such Extensions ... in relation to enhancements of the existing Network, at present no such possibility exists.’⁶⁶²

Access Holder funded enhancements

Xstrata noted that ‘[s]ection 6.2 ... provides two alternatives in respect of the funding of Additional Capacity’:

Either the Additional Capacity must be approved through the RCG process and form part of the RAB which will determine pricing for all Access Holders, or it may be funded by a specific Access Holder. In relation to funding by a specific Access Holder, this may be achieved either through the Access Holder meeting the cost of the provision of that Additional Capacity when incurred, or through ARTC reaching an agreement with the Access Holder under which there is an agreed return on the relevant expenditure for ARTC over time.⁶⁶³

Xstrata submitted that it ‘has a number of concerns in relation to these provisions.’⁶⁶⁴

Obligation on ARTC to proceed

Xstrata submitted that ARTC’s obligation to ‘proceed to construct and provide the Additional Capacity are subject to a number of limitations in section 6.2(a) which’ are not ‘appropriate, especially where the cost of the Additional Capacity is being met by the Access Holder rather than ARTC. In particular.’⁶⁶⁵

- (a) Xstrata does not consider it appropriate that the construction of the Additional Capacity is subject to a test of “economic feasibility” which is separate from a consideration of the impact of the Additional Capacity upon ARTC’s financial position;
- (b) Xstrata is also concerned that the assessment of whether the Additional Capacity compromises ARTC’s legitimate business interests is too vague. Where ARTC is no worse off as the result of the construction of the Additional Capacity, and achieves the regulated Rate of Return on capital expenditure it undertakes, then Xstrata considers that ARTC’s business interests have not been adversely affected; and
- (c) neither of these assessments should be couched in terms of ARTC’s opinion. The criteria should be objective, allowing for the possibility of ACCC arbitration in the event of any disagreement.⁶⁶⁶

Cost of Additional Capacity

Xstrata noted that ‘[w]here ARTC proceeds to construct Additional Capacity through the RCG process, there is an assessment of the project costs by the RCG and if agreement cannot be reached in relation to whether these costs are reasonable, there is reference to an independent expert to consider whether the costs are Prudent. Costs which are not deemed to be Prudent will not be included in the RAB for the purpose of calculating ARTC’s revenue cap.’⁶⁶⁷

⁶⁶² Xstrata, Submission in Response to ACCC Draft Decision, Attachment 1, 8 April 2010, p. 2-3.

⁶⁶³ Xstrata, Submission in Response to ACCC Draft Decision, Attachment 1, 8 April 2010, p. 3.

⁶⁶⁴ Xstrata, Submission in Response to ACCC Draft Decision, Attachment 1, 8 April 2010, p. 3.

⁶⁶⁵ Xstrata, Submission in Response to ACCC Draft Decision, Attachment 1, 8 April 2010, p. 3.

⁶⁶⁶ Xstrata, Submission in Response to ACCC Draft Decision, Attachment 1, 8 April 2010, p. 3.

⁶⁶⁷ Xstrata, Submission in Response to ACCC Draft Decision, Attachment 1, 8 April 2010, p. 3.

Xstrata submitted that it ‘considers that it would be appropriate for a similar process to apply where the Additional Capacity is to be funded by an Access Holder in accordance with section 6.2(b).’⁶⁶⁸

Impact upon regulated returns

Xstrata noted that it was not clear ‘from the draft HVAU what the effect of arrangements entered into in accordance with section 6.2 for the funding of Additional Capacity by an individual Access Holder would have on the regulated level of return of ARTC’ and that:

Presumably, where Additional Capacity has been funded through the provision of direct financing of construction costs by an Access Holder, ARTC would not be entitled to a return on capital in respect of those amounts, given that the amounts have been funded by an Access Holder and not ARTC. Xstrata has suggested some drafting amendments to section 4 which clarify this position.⁶⁶⁹ If this provision is not made, Xstrata is concerned that ARTC will derive a windfall gain from achieving a Rate of Return on Additional Capacity which it did not bear the cost of constructing.
⁶⁷⁰

Access Holder return on capital

Xstrata noted that where ‘an Access Holder provides direct financing of the costs of Additional Capacity, then there should be a definite entitlement for that Access Holder to achieve a return on that investment where ARTC allows access to that Additional Capacity by other Access Holders.’⁶⁷¹

Xstrata submitted that it would be:

reasonable to require the recovery of a pro rata proportion of the Depreciation costs in respect of the Additional Capacity, along with a return on capital equivalent to the regulated Rate of Return which would have been applicable if ARTC had funded the Additional Capacity.’⁶⁷²

In addition:

Xstrata does not consider that the existing drafting in the HVAU, referring to an “equitable form of reconciliation” provides sufficient certainty for the Access Holder which has funded the Additional Capacity. If this change is not made, Xstrata considers that subsequent Access Holders may benefit unfairly from an investment made in Additional Capacity by the first Access Holder.
⁶⁷³

Access Holder funding – sharing of costs

Xstrata submitted that [w]here the Access Holder funds Additional Capacity through a method other than directly meeting the capital costs of the Additional Capacity, it should be clear that where ARTC allows any other Access Holder access to that

⁶⁶⁸ Xstrata, Submission in Response to ACCC Draft Decision, Attachment 1, 8 April 2010, p. 3.

⁶⁶⁹ The detailed mark-ups to the April 2009 HVAU and the December IAHA proposed by Xstrata are available in its submissions in response to the ACCC’s March 2010 Draft Decision on the April 2009 HVAU: <http://www.accc.gov.au/content/index.phtml/itemId/920858>

⁶⁷⁰ Xstrata, Submission in Response to ACCC Draft Decision, Attachment 1, 8 April 2010, p. 3-4.

⁶⁷¹ Xstrata, Submission in Response to ACCC Draft Decision, Attachment 1, 8 April 2010, p. 4.

⁶⁷² Xstrata, Submission in Response to ACCC Draft Decision, Attachment 1, 8 April 2010, p. 4.

⁶⁷³ Xstrata, Submission in Response to ACCC Draft Decision, Attachment 1, 8 April 2010, p. 4.

Additional Capacity, that further Access Holder should bear the costs of the Additional Capacity proportionally to its usage’.⁶⁷⁴

Xstrata submitted that ‘if this is not so then the further Access Holder may benefit unfairly from the payments made by the first Access Holder in relation to that Additional Capacity.’⁶⁷⁵

Access Holder funding – form of agreement

Xstrata submitted that the form of AHA ‘to be entered into by an Access Holder funding Additional Capacity should be in a form which is as near as possible to the IAHA, subject only to those changes which are necessary to reflect the provisions of section 6 of the HVAU.’⁶⁷⁶

Cost of Additional Capacity not Prudent

Xstrata noted that the HVAU ‘allows an assessment by an independent expert of whether the costs are reasonable, and if not then they are not deemed to be Prudent’, which Xstrata considers is ‘appropriate, and should be extended to Access Holder funded Additional Capacity’.⁶⁷⁷

Xstrata submitted that it is presently ‘unclear what the consequence of any such finding would be’ and is ‘concerned that if the expenditure is not deemed to be Prudent then ARTC would not proceed with the construction of the Additional Capacity, leaving Access Holders without access to track capacity.’⁶⁷⁸

As a result, Xstrata submitted that it is:

appropriate that the Access Holder or the RCG (as appropriate) should have the right to appoint another person to complete the construction of the Additional Capacity, subject to appropriate procedures being in place to govern access to the Network and the undertaking of the work to appropriate standards. In that case, the Additional Capacity would be funded by those undertaking the work, unless another arrangement was agreed.⁶⁷⁹

A.10.8.4 Common provisions in access agreements for alignment purposes

Xstrata submitted that ‘it is a key requirement that Xstrata understands not only the terms on which ARTC makes track access available to it, but also the terms on which ARTC makes that access available to other users.’ Xstrata also submits that ARTC should apply the terms on which capacity is available consistently as between users, and that it would be inappropriate for ARTC to administer its agreements in a way which favoured the users of one terminal over another.⁶⁸⁰

⁶⁷⁴ Xstrata, Submission in Response to ACCC Draft Decision, Attachment 1, 8 April 2010, p. 4.

⁶⁷⁵ Xstrata, Submission in Response to ACCC Draft Decision, Attachment 1, 8 April 2010, p. 4.

⁶⁷⁶ Xstrata, Submission in Response to ACCC Draft Decision, Attachment 1, 8 April 2010, p. 4.

⁶⁷⁷ Xstrata, Submission in Response to ACCC Draft Decision, Attachment 1, 8 April 2010, p. 4.

⁶⁷⁸ Xstrata, Submission in Response to ACCC Draft Decision, Attachment 1, 8 April 2010, p. 4.

⁶⁷⁹ Xstrata, Submission in Response to ACCC Draft Decision, Attachment 1, 8 April 2010, p. 4.

⁶⁸⁰ Xstrata, Submission in Response to ACCC Draft Decision, Attachment 1, 8 April 2010, p. 5.

Xstrata also submits that, in addition to those areas identified by the ACCC in its Draft Decision, the provisions relating to tolerance and the calculation of the rebate should also be contained in the HVAU.⁶⁸¹

A.10.8.5 Tolerance

Xstrata submitted that Tolerance provisions should be included in the HVAU and should be granted to all users on an equivalent basis.⁶⁸² In addition a review of Tolerance should be carried out in accordance with clause 3.3(d) of the 2009 IAHA. ARTC should be allowed to change the level of Tolerance in all AHAs to reflect the outcome of the review.⁶⁸³

Xstrata submitted that changes to the Monthly Tolerance Cap should 'be no more than annual, notified at least 6 months in advance and subject to the approval of RCG.'⁶⁸⁴ A 'proper decision making process' should be followed in relation to changes to such a 'fundamental part of the agreement'.⁶⁸⁵

A.10.8.6 Definition of Network Path capability (Schedule 2 IAHA)

Xstrata considers that the definition of Network Path Capability should take into account only path usages that could have been used by Coal Trains operating in accordance with the system assumptions. Xstrata submits that this would prevent Path Usages being classed as included in the Network Path Capability where they could not have been used by a Coal Train even if they had been available. Xstrata considers that this makes the definition more certain and enhances the contractual alignment of IAHA with the contracts for other components of the Hunter Valley Coal Chain.⁶⁸⁶

Xstrata has suggested the following drafting for the definition of Network path Capability:

2.4 Network Path Capability

- (a) The NPC is the capability of the Network (including and Additional capacity made available at the date the true-up test is carried out), specified in terms of capability to provide Usable Paths in the Period
- (b) The Usable Paths in respect of a Pricing Zone are to be determined by ARTC in respect of each period in consultation with the HVCCC
- (c) For the purpose of this paragraph, **Usable Paths** included only those Path Usages which are (or would be if not used for another purpose within the definition of TPR or unavailable due to an Availability Exception or otherwise) capable of being utilised by Coal Trains which comply with the System Assumptions, including assumptions with regard to loading time, unloading time, sectional running time and headway between trains.⁶⁸⁷

⁶⁸¹ Xstrata, Submission in Response to ACCC Draft Decision, Attachment 1, 8 April 2010, p. 5.

⁶⁸² Xstrata, Submission in Response to ACCC Draft Decision, 8 April 2010, p. 5.

⁶⁸³ Xstrata, Submission in Response to ACCC Draft Decision, 8 April 2010, p. 6.

⁶⁸⁴ Xstrata, Submission in Response to ACCC Draft Decision, 8 April 2010, p. 6.

⁶⁸⁵ Xstrata, Submission in Response to ACCC Draft Decision, 8 April 2010, p. 6.

⁶⁸⁶ Xstrata, Submission in Response to ACCC Draft Decision, 8 April 2010, p. 7.

⁶⁸⁷ Xstrata, Submission in Response to ACCC Draft Decision, 8 April 2010- Mark-up of Access Holder Agreement, p. 16.

A.10.8.7 Train Path Schedules and Operator flexibility

Xstrata considered that the operation of the Train Path Schedules (TPS) may impede the ability of Access Holders to utilise different Operators to service the same Train Path. Xstrata wished ‘to have sufficient flexibility to change the nominated Operator servicing each Train Path and the proportions of Path Usages consumed by each Operator which services each Train Path on a daily basis’ to allow flexibility in Operator deployment and increase competition.⁶⁸⁸

The marked-up version of the IAHA attached to Xstrata’s submission reflects these submissions.

A.10.8.8 Capacity resumption

Xstrata noted ‘that the ACCC considers the presently proposed provisions in relation to the resumption of under-utilised capacity to be insufficient’ and raises ‘two key concerns in relation to the ACCC’s findings:’

- (a) the ACCC appears to favour ARTC having an economic incentive to resume Path Usages which are “under utilised”. Xstrata is of the view that there is no benefit to ARTC doing so, except where there is an alternative user seeking access to those paths. The original Access Holder continues to be liable to pay a TOP Charge in relation to Path Usages, even where they are not used. Provided that other Applicants for capacity are able to access under utilised Path Usages through making an application to ARTC which then enables ARTC to trigger the resumption process, Xstrata does not understand the benefit of resuming paths where there is no alternative user to assume liability for the TOP Charges; and
- (b) the use of an 80% utilisation test over a 6 month period recognises the inherent variability of the coal industry. Major force majeure and other events can seriously adversely affect mine production for prolonged periods. The additional threat of resumption of train paths, making reopening of the mine impossible or uneconomic, should only apply after a considerable period of serious under-utilisation. In addition, different Operators utilising different train sizes may require fewer Path Usages, and a short resumption period would run the risk that an Access Holder utilising an Operator with more efficient train sizes (requiring fewer Path Usages) during a short period might be permanently disadvantaged through the loss of Path Usages.⁶⁸⁹

A.10.9 Coal & Allied (31 March 2010)

A.10.9.1 Role and interaction of the HVAU, IAHA and OSA in ensuring accountability for performance and alignment

Coal & Allied (C&A) submits that it ‘agrees with the ACCC’s recommendation that ARTC should work closely with the HVCCC in relation to capacity planning and the overall co-ordination of the Coal Chain, and C&A also agrees that the HVCCC will have a key central role to play in the future in ensuring that effective Coal Chain

⁶⁸⁸ Xstrata, Submission in Response to ACCC Draft Decision, Attachment 1, 8 April 2010, p. 8.

⁶⁸⁹ Xstrata, Submission in Response to ACCC Draft Decision, Attachment 1, 8 April 2010, p. 8.

alignment is achieved.’ C&A submits however that it queries ‘whether consultation in and of itself will necessarily lead to appropriate outcomes in all cases.’⁶⁹⁰

C&A is of the view that ‘the HVAU must include some specific requirements and functions that ARTC must satisfy to proactively participate in a performance accountability and alignment regime.’ As an example, C&A notes that:

‘in circumstances where there is a capacity shortfall that has not been caused by a specific user (such as the recent grain train derailment), C&A considers that the HVAU should include a protocol that identifies ‘affected producers’ and the specific role which the HVCCC is to play. Where a capacity shortfall has instead been caused by an individual producer, C&A submits that there should be an appropriate at fault regime that allocates an appropriate level of responsibility to the relevant producers. However, C&A acknowledges the ACCC’s comments about ensuring that any regime that is implemented does not expose individual smaller producers to disproportionate risk.’⁶⁹¹

C&A also notes that it ‘refers to its previous submissions which provide more detail on this issue – for example, in relation to clause 3.14 of the draft IAHA (which should be mandatory obligation) , clause 6.2 of the IAHA (which should be underpinned by a clear objective to ensure that throughput is maximised during a temporary shortfall scenario) and clause 11.5 (in relation to which the amendments introduced in the 24 December IAHA are, in C&A’s view, inappropriate).’⁶⁹²

A.10.9.2 The True-up test (Schedule 2 AHA)

C&A agrees with the ACCC that the True-up Test is not sufficiently transparent as it needs to contain specific details on how the Network Path Capability and Monthly Tolerance Cap are to be calculated for the purposes of applying the test. C&A considers that even if these details were included in the True-up Test it would still be inappropriate because Producers will only receive a rebate for shortfalls to Base path Usages, with no consideration of their tolerance entitlements. Consequently, C&A submits that the total rebates paid by ARTC at the end of a Contract Year could be significantly less than the actual capacity shortfall they cause, reducing ARTC’s incentive to perform well. C&A therefore submits that Tolerance entitlements should be included in the True-up Test Calculation.⁶⁹³

C&A submits that it supports the introduction of a mechanism that enables ARTC to benefit above and beyond its revenue cap if it is able to extract further efficiencies from the Network and by doing so make additional train paths available to users.⁶⁹⁴

A.10.9.3 Capacity resumption

C&A notes that the ‘ACCC is seeking advice on a more appropriate approach to capacity resumption’ and submits that it ‘maintains the position it has put forward to the ACCC in its previous submissions that, at the least, the test for resumption as it

⁶⁹⁰ Coal and Allied, *Submission in Response to Draft Decision on Australian Rail Track Corporation Hunter Valley Coal Network Access Undertaking*, 31 March 2010, p. 2.

⁶⁹¹ Coal and Allied, *Submission in Response to ACCC Draft Decision*, 31 March 2010, p. 2.

⁶⁹² Coal and Allied, *Submission in Response to ACCC Draft Decision*, 31 March 2010, p. 2.

⁶⁹³ Coal and Allied, *Submission in Response to ACCC Draft Decision*, 31 March 2010, p. 3.

⁶⁹⁴ Coal and Allied, *Submission in Response to ACCC Draft Decision*, 31 March 2010, p. 3.

currently appears in the 24 December IAHA is appropriate given the practical realities of coal mine production.⁶⁹⁵

A.10.9.4 Conditions precedent to delivery of Additional Capacity

C&A notes that the ‘ACCC has recognised the inappropriateness of the current conditions precedent to the delivery of Additional Capacity, but has acknowledged that ARTC is a below rail operator and not a construction company and that a requirement that ARTC be held to a strict timetable for delivery may not reflect ARTC’s legitimate business interests.’⁶⁹⁶

C&A also notes that ‘[a]ccordingly, the ACCC has asked interested parties to submit proposals that would balance the interests of ARTC and access seekers and achieve an appropriate outcome. The ACCC considers that a possible approach is for the contractual terms between ARTC and access seekers/holders to be subject to negotiation and ultimately arbitration by the ACCC.’⁶⁹⁷

C&A submits that there are ‘two issues for consideration in relation to this point:’

- (a) the issue of the timing of the delivery of additional capacity; and
- (b) the commercial viability of the ARTC creating the additional capacity.⁶⁹⁸

C&A submit in relation to the first issue, although ‘C&A agrees with the ACCC that ARTC’s principal function is not to act as a construction company’:

C&A considers that ARTC is in the business of delivering additional track capacity and should be able to provide access seekers with an appropriate level of commitment about when capacity will ultimately be delivered before ARTC enters a contract with an access seeker for that capacity. Any other outcome does not sufficiently protect the interests of access seekers.⁶⁹⁹

C&A submits in relation to the second issue, that it ‘repeats its previous submission that ARTC should not have the option to decide that an expansion is not commercially viable after ARTC has elected to enter an Access Holder Agreement with a Producer. This assessment should occur before ARTC enters a contract with an access seeker in accordance with procedures set out in the draft HVAU.’⁷⁰⁰

A.10.9.5 Structure of charges – coal access rights (section 4.10 HVAU)

C&A submits that it strongly disagrees with ARTC pricing on a gross tonne per kilometre (GTK) basis and submits that ARTC should be required to submit an efficient train configuration to the ACCC for effective consultation with access seekers within 3-4 years of commencement of HVAU and pricing based on efficient train configuration must become effective within 4-5 years of commencement of HVAU and apply to all services.⁷⁰¹ C&A also believes that ARTC should be in a

⁶⁹⁵ Coal and Allied, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 3.

⁶⁹⁶ Coal and Allied, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 3.

⁶⁹⁷ Coal and Allied, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 3.

⁶⁹⁸ Coal and Allied, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 3-4.

⁶⁹⁹ Coal and Allied, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 3-4.

⁷⁰⁰ Coal and Allied, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 4.

⁷⁰¹ Coal and Allied, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 4.

position to make a determination on efficient train configurations in a much shorter timeframe than 3-4 years and submits that a 1-2 year period is more appropriate.⁷⁰²

A.10.9.6 Liability and indemnity

Coal and Allied submitted that ARTC's limitation of liability is too extreme and that it would be giving further consideration to its position. Coal and Allied further submitted that if liability to fail to provide a train path is limited to the True-up Test, then this will depend on whether the True-up Test is appropriately framed.⁷⁰³

Coal and Allied submitted that the liability cap of \$2 million is too low and that 'a year's take or pay charges – is a more appropriate cap, or, alternatively there should be a significantly larger monetary cap (say, at least \$20 million), which should be subject to indexation during the term of the Access Holder Agreement'.⁷⁰⁴

A.10.9.7 Mutually exclusive access allocation (section 3.13 HVAU)

C&A agrees with the ACCC that mutually exclusive access applications need to be clarified and made more transparent. C&A maintains its previous positions that further consideration should be given to the procedures to apply in relation to defining 'mutually exclusive' and ensure that the procedures ensure a transparent and equitable outcome for all producers.⁷⁰⁵

A.10.9.8 Return on capital (WACC)

Coal and Allied believed that an appropriate rate of return should both reflect the risks faced by ARTC and the interests of producers who want to see track capacity delivered in a timely manner, in order to provide an incentive to ARTC to invest in the Network.⁷⁰⁶

A.11 Submissions in relation to the proposed 2010 HVAU

A.11.1 Asciano Ltd (25 October 2010)

A.11.1.1 Operator's right to view the AHA

Asciano submits that it has concerns that an Operator does not have the right to view the AHA even though it places obligations and requirements on the Operator. Asciano submits that this could potentially be problematic as the operator is required to act in accordance with the AHA agreed to by ARTC and the Access Holder, even though the Operator has not seen the AHA.⁷⁰⁷

Asciano therefore submits that an Operator should have the right to review the AHA and also be made aware of the amendments to the AHA as it holds applicable to the

⁷⁰² Coal and Allied, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 4.

⁷⁰³ Coal and Allied, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 5.

⁷⁰⁴ Coal and Allied, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 5.

⁷⁰⁵ Coal and Allied, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 5.

⁷⁰⁶ Coal and Allied, Submission in Response to ACCC Draft Decision, 31 March 2010, p. 5.

⁷⁰⁷ Asciano, *Submission to the ACCC - ARTC 2010 Draft Hunter Valley Access Undertaking*, 25 October 2010, pp. 4-5.

OSA, do the Operator can understand any implications it may have on its obligations.⁷⁰⁸

A.11.1.2 Transitional arrangements

Asciano reiterates its concern about the lack of transitional arrangements between the current and the OSA-AHA contracting models. Asciano submits that further transitional arrangements are.⁷⁰⁹

A.11.1.3 Efficient train configuration

Asciano is concerned that a four year time frame is unacceptable for developing efficient train configuration as current congestion requires these issues to be resolved in six months. In addition, Asciano submits that ARTC should be obliged to consult with the operators on system assumptions and other matters prior to finalising the efficient train configuration.⁷¹⁰

A.11.1.4 Alignment of Network KPIs

Asciano submits that Network KPIs should be aligned with other coal networks over the longer term to allow performance and cost efficiency comparisons and benchmarking.⁷¹¹

A.11.1.5 Clauses in IAHA and OSA

Asciano is concerned that Clause 4.6 c) of the IAHA may encourage access holders to assign fault to the operator, even in the event where the causes are more complex.⁷¹²

Asciano has continually expressed concerns about the complexity of the “Indemnities and Liabilities” clause in the OSA, the amendments proposed only serve to increase the complexity.⁷¹³

A.11.1.6 Pricing structure

Asciano submits that one of the ARTC’s main fixed cost drivers is the number of train journeys not GTK Asciano continues to believe that GTK charging structure results in larger coal trains being charged a greater amount for the same train path and thus encourages operation of inefficient trains. Asciano recommends using cost reflective rail pricing structures which include a flagfall component will send improved price signals to operators.⁷¹⁴

A.11.1.7 Network management principles and early and late services

Asciano is concerned that the Network Management Principles are not designed for the sequencing requirements of coal trains delivering in sequence from coal mines to ports, rather on time running takes precedence over sequencing. Asciano submits that Clauses 3.6 and 3.8 of the OSA emphasis on “on time” running is inconsistent with the primary objective of the sequencing approach needed. Asciano is aware that the

⁷⁰⁸ Asciano, Submission in Response to ACCC Consultation Paper, 26 October 2010, pp. 4-5.

⁷⁰⁹ Asciano, Submission in Response to ACCC Consultation Paper, 26 October 2010, p. 6.

⁷¹⁰ Asciano, Submission in Response to ACCC Consultation Paper, 26 October 2010, p. 7.

⁷¹¹ Asciano, Submission in Response to ACCC Consultation Paper, 26 October 2010, p. 8.

⁷¹² Asciano, Submission in Response to ACCC Consultation Paper, 26 October 2010, p. 9.

⁷¹³ Asciano, Submission in Response to ACCC Consultation Paper, 26 October 2010, p. 10.

⁷¹⁴ Asciano, Submission in Response to ACCC Consultation Paper, 26 October 2010, pp.12-13.

proposed Network Management Principles are contained in ARTC's lease of the Hunter Valley network from the NSW Government and that this lease does not make provision for the Network Management Principles to be altered. Asciano believes that the relevant clauses in the AHA and OSA could be amended to require that in the event of the time windows not being met, all parties use their best endeavours to implement a course of action to meet and over-arching goal of achieving delivery of trains from the mines to port in sequence.⁷¹⁵

A.11.1.8 Previously raised concerns

Asciano is still concerned that there remains 'an unreasonably long time period, being sixty business days, [for ARTC] to provide an Indicative Access Proposal.'⁷¹⁶

Asciano is also seeking that ARTC continuing to be flexible when negotiating contracts to meet the needs of domestic coal users.⁷¹⁷

Other Asciano's suggestions relate to the OSA are:⁷¹⁸

- two to three years rather than five years is an appropriate time frame to demonstrate solvency
- ARTC should consult with the Operator prior to amending the Code of Practice.
- Clause 5.4(b) should be subject to a "best endeavours" clause rather than an absolute obligation
- in the event of a speed or weight restriction has a material impact on the operator, ARTC should have the obligation to remove the restriction as soon as practicable.
- ARTC consultation with the Operator on network possessions should be on the broader long term network possession plan and not just the current possession.

A.11.2 Coal & Allied (25 October 2010)

C&A submits that ARTC has not addressed the five key issues in the proposed HVAU, therefore C&A is unable to support ARTC's proposed HVAU in its current form.⁷¹⁹

A.11.2.1 Certainty of capacity⁷²⁰

C&A is concerned that there is no transparency for the transition from the current arrangements to the initial allocation of capacity under the proposed HVAU. C&A submits to provide transparency and certainty to Access Seekers, it is essential that

⁷¹⁵ Asciano, Submission in Response to ACCC Consultation Paper, 26 October 2010, pp. 13-14.

⁷¹⁶ Asciano, Submission in Response to ACCC Consultation Paper, 26 October 2010, p.15.

⁷¹⁷ Asciano, Submission in Response to ACCC Consultation Paper, 26 October 2010, p.15.

⁷¹⁸ Asciano, Submission in Response to ACCC Consultation Paper, 26 October 2010, p.16.

⁷¹⁹ Coal and Allied, *Submission in Response to the ACCC's Consultation Paper in relation to the Australian Rail Track Corporation's Proposed Hunter Valley Rail Network Access Undertaking*, 25 October 2010, p.3

⁷²⁰ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, pp. 6-8, 15-41.

ARTC develop appropriate transition arrangements from NSWRAU to the Proposed HVAU.

C&A submits by the end of 2010, coal producers will have committed to a total of approximately 200mt of port terminal allocation on 10 year rolling TOP contracts. Therefore C&A emphasises the importance of transition arrangements that make clear of how Available Capacity and Additional Capacity will be allocated amongst Access Holders to align with their significant existing long term port commitments. ARTC provides for the transition of its own regulatory arrangements in the Proposed HVAU Explanatory Guide, however no transitional arrangements for Access Seekers were provided.

C&A is also concerned that the Proposed HVAU does not provide Access Holders with sufficient certainty that new track capacity will be delivered as required by Access Holders. C&A believes that the investment framework in the Proposed HVAU falls short in terms of:

- the processes for allocating and investing in new Capacity,
- the processes for ensuring users can fund expansions and the appropriate oversight, and
- appropriate oversight and governance of the investment process.

C&A proposes a Nomination, Track Investment and Contracting Framework that addresses the concerns that are raised above. The proposed approach includes:

- An annual Capacity Nomination process, ARTC and HVCCC would then conduct the Capacity Analysis to determine whether existing and planned Capacity is sufficient to meet the track nominations, and whether additional capacity is required.
- After ARTC and HVCCC have issued Indicative Access Proposals with track allocations, Access Seekers enter into contracts for all allocated Path Usages.
- Once AHAs have been entered into by Access Holders, the track investment process is initiated. Once Additional Capacity becomes Pending Capacity, ARTC is contractually bound to complete the construction of that Capacity.
- HVCCC can recommend the construction of additional capacity at any time, whether in conjunction with or outside of this framework.

C&A believes that this process is aligned to the capacity nomination and allocation arrangements developed at PWCS and ARTC by adopting these arrangements would further promote contractual alignment along the Hunter Valley Coal Chain and leave ARTC no worse off than under the Proposed HVAU.

A.11.2.2 Greater accountability for ARTC delivering contracted volumes⁷²¹

C&A submits that in the Proposed IAHA, the True-Up Test (TUT) is the only recourse that Access Holders have for ARTC fails to deliver the required Train Paths, therefore it is critical that the TUT ensures that ARTC is held accountable for any Capacity Shortfalls that it causes. C&A recognises Tolerance is critical for the effective operation of the Hunter Valley Coal Chain. C&A is concerned that by not including Tolerance in the TUT, ARTC could retain revenue from Train Paths it does not supply. Therefore C&A proposes that Tolerance be reintroduced into the calculation of the rebate accruals for the periodic TUT. In addition, C&A submits the TUT must be transparent, comprehensive and be subject to independent audit by a third party.

C&A believes the NPC should accurately and transparently represents the useable capacity of the Network, since it is directly used to determine whether there has been a SAS. C&A submits that ARTC should more explicitly recognise other System Assumptions which impact on the usability of the train Path in determining NPC. C&A requests that ARTC make available to industry its methodology for determining NPC as soon as practicable so that an informed assessment of the appropriateness of the methodology can be made. C&A believes that although ARTC states its NPC calculation is “consistent with capacity reporting undertaken by the HVCCC”, Capacity modelling for ARTC and the HVCCC are done on entirely different basis. C&A suggests that the ARTC’s determination of NPC should reflect the HVCCC’s methodology.

C&A is concerned that the definition of Target Monthly Tolerance Cap (TMTC) gives ARTC the discretion to set the TMTC at a level that is less than the industry’s requirements, which could potentially impact on the flexibility needed in the coal chain. C&A proposes that the definition of TMTC be amended to include a minimum level of TMTC and a requirement that any decisions to set TMTC below this level must be approved by the RCG.

A.11.2.3 Incentives⁷²²

C&A submits that it would be prepared to support the inclusion of an incentive mechanism, provided it is designed in a way that will effectively align the interests of ARTC and Access Holders and lead to gains in the throughput of the Hunter Valley Coal Chain as a whole. Currently C&A believes that ARTC has an incentive to under-contract and not to provide ad hoc paths. C&A believes that the safe operation of the Network is a critical issue, therefore overemphasis on incentivising cost reduction is not ideal as it could threaten the security of track capacity supply. C&A proposes potential incentive package to be developed by ARTC could include:

- Allowing revenue to be earned above the revenue cap if ad hoc paths are made available; and

⁷²¹ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, pp. 8-9, 42-57.

⁷²² Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, pp. 9-10, 58-60.

- additional performance-linked revenue, linked to achievement of safety targets and/or non-capital intensive performance improvements

A.11.2.4 Contractual alignment⁷²³

C&A is concerned that it is not clear as to how ARTC will identify capacity shortfalls. C&A submits the current five day period for capacity shortfall provisions give ARTC too much discretion and no regard to at fault Access Holders, potentially leading to inequitable outcomes. C&A is concerned that the train cancellation provisions in clause 11.6 of the IAHA are inadequate and may lead to inequitable allocation of losses. C&A considers the proposed review of the capacity management process in section 5.9 of the HVAU could be broadened to take a Coal Chain-wide perspective and give the HVCCC the responsibility for conducting the review.

C&A considers that more can be done to improve the contractual and operational alignment of elements along the Hunter Valley Coal Chain to encourage optimal use of assets across the rail, track and terminal assets. C&A proposes that:

- ARTC should be under positive obligations to publish the basis on which it has identified a capacity shortfall and monitor and report on available capacity to HVCCC.
- ARTC should only be able to allocate capacity at its discretion for events leading to capacity shortfalls of less than two days, not five.
- ARTC's capacity allocations must ensure that the Network is efficiently used, the impact on coal chain capacity is minimised and contracted path usages from unaffected load points will not be reduced.
- ARTC should be bound to provide track-related System Assumptions to HVCCC to develop System Assumptions Document and to accept HVCCC's recommendation in relation to certain matters.
- Clause 3.14(a) of the IAHA should be amended so that ARTC 'must not' make Path Usages available where the Access Holder does not have sufficient Network Exit Capability.
- The Tier 1 mandatory provisions should be included in the HVAU and subject to ACCC arbitration.

A.11.2.5 Pricing⁷²⁴

C&A submits that under GTK pricing, Access Holders would not be deterred from using inefficient trains, thereby adding to the congestion on the Network. C&A believes proposal to develop "the indicative service which ARTC considers will deliver the optimum utilisation of Coal Chain Capacity" is flawed. C&A suggests that

⁷²³ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, pp. 10-11, 61-78.

⁷²⁴ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, pp. 11-12, 79-86.

ARTC should instead focus on determining the basis of pricing as this will enable Access Holders to choose the most appropriate service for them.

C&A believes given that most rail network costs are driven by network kilometres, not weight, the appropriate pricing mechanism to be implemented over time, would combine a variable maintenance-related expenditure recovered through a charge based on GTK, with a take-or-pay component of charges recovered on a “per train-kilometre” basis.

C&A proposes pricing principles in the HVAU should be amended as follows⁷²⁵:

- clarify the procedures for setting prices under section 4.2(a)
- clarify the distinction between Direct Cost and Incremental Cost under section 4.2(b)
- define Ceiling Limit under section 4.2(c)
- clarify drafting in section 4.3 and 4.4(a) to include calculation of real pre-tax Rate of Return
- amend section 4.4(b) so that the assessment of the efficient basis of operating expenditure is subject to audit and review
- change section 4.6(b) so that all determinations of average mine life must be approved by the ACCC not only variations
- ceiling Limit in section 4.8 should be adjusted for non-delivery and Access revenue clearly defined
- charge structure uncertainty in section 4.10 should be eliminated
- restrict factors to be considered in charge differentiation to the ones listed in section 4.14.

In addition, C&A submits that ARTC should change clause 5.4 of the IAHA, so it pays interest on the amount due from 1 January until whenever the TOP Rebate is paid.

A.11.2.6 Risk versus Return⁷²⁶

C&A submits that the level of risk proposed to be adopted by ARTC under the Proposed HVAU is not consistent with ARTC’s proposed WACC. Under the Proposed HVAU, ARTC bears little risk by having 10 year rolling TOP contracts, revenue cap scheme and capex approval process, therefore C&A supports the use of the WACC parameters proposed by the ACCC in its Draft Decision. However if the five key issues outlined above were addressed by ARTC and ARTC took on the

⁷²⁵ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, pp.2-5.

⁷²⁶ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, pp. 12, 87-91

associated additional commercial risks, then C&A may support the higher WACC proposed by ARTC.

A.11.2.7 Other

Other C&A's concerns regarding the HVAU and IAHA are:⁷²⁷

- the description and scope of the purpose of the review in section 2.3(b) of the HVAU is unclear and ARTC is under no obligation to report to the ACCC or consult with stakeholders with the information arising out of the review
- ARTC does not have a general obligation to consult with the HVCCC under section 3.1(b) of the HVAU
- Section 4.18 of the HVAU suggests that ARTC could seek proposed variations to the Access Holder's contracted coal volumes
- the party receiving the confidential information is not bounded by obligation of confidentiality under section 3.5(d) of the HVAU
- Clause 3.5(d) of the IAHA is inconsistent with the mode of operation at port terminals.

A.11.3 RailCorp (26 October 2010)

A.11.3.1 Passenger priority

RailCorp submits that one of its key concerns is the draft HVAU does not explicitly address passenger priority. RailCorp is concerned that the amended draft HVAU does not highlight ARTC's obligation to give reasonable priority to passenger services.⁷²⁸

A.11.3.2 Expansions and Connections

RailCorp submits it is unclear as to how a dispute about an expansion or connection would be resolved given they are outside the definition of the Network.⁷²⁹

A.11.3.3 Capacity

RailCorp submits that amendment to clause 5.2 of the HVAU gives HVCCC the ability to determine available capacity for non-coal users, which omits ARTC's obligation in regard to passenger priority. RailCorp is concerned that the amendments to clauses 5.4-5.6 still does not make clear that capacity will be allocated first to passenger services in the event of a capacity shortfall and clause 6.2 should be amended to reflect coal and non-coal scenario.⁷³⁰

⁷²⁷ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, pp.1-6.

⁷²⁸ RailCorp, *Subject: Hunter Valley Access Undertaking*, 26 October 2010, pp.1-4.

⁷²⁹ RailCorp, Submission in Response to ACCC Consultation Paper, 26 October 2010, p.5.

⁷³⁰ RailCorp, Submission in Response to ACCC Consultation Paper, 26 October 2010, pp.5-6.

A.11.3.4 Performance incentives

RailCorp submits that the performance measures proposed by ARTC provide little benefit to non-coal users as they are mainly relate to the use of the network by coal services.⁷³¹

A.11.3.5 Non-coal access rights

RailCorp is concerned that ARTC has not proposed to provide an indicative non-coal access agreement and attempted to use Interstate Indicative Access Agreement as HVAU non-coal access agreement without proper consultation, which creates uncertainty.⁷³²

A.11.3.6 Pricing

RailCorp is concerned that non-coal trains could potentially be charged more than coal trains as passenger trains consume more capacity and reiterated its concerns regarding reservation of non-coal rights and dispute resolution.⁷³³

A.11.4 Aston Resources (25 October 2010)

A.11.4.1 Access to capacity for new entrants

Aston Resources submits that as a new entrant into the Hunter Valley Coal Chain, the 2010 HVAU fails to ensure new entrants are given sufficient access to existing and additional Capacity. Aston Resources is concerned that the HVAU does not provide adequate incentives to ensure incumbent producers do not hoard capacity. In addition, Aston Resources is concerned that section 3.6(c) could potentially enable a single coal producer to derail a new entrant's negotiations for access.⁷³⁴

A.11.4.2 Negotiating for access

Aston Resources submits that the network exit capability requirement, if too strictly interpreted, could decrease the value of capacity transfer system at the port and delay additional capacity construction.⁷³⁵ Aston Resources submits that section 3.13 does not provide transparency as to how mutually exclusive access rights are assessed.⁷³⁶

A.11.4.3 Capacity management

Aston Resources submits that under the 2010 HVAU, access seeker has no right to capacity if projects are unduly delayed and the under-utilisation threshold has weakened the resumption provisions.⁷³⁷ Aston Resources is concerned that ARTC has too much discretion in deciding whether to resume pathways under clauses 11.5 and 11.6 of the IAHA.⁷³⁸

⁷³¹ RailCorp, Submission in Response to ACCC Consultation Paper, 26 October 2010, p. 6.

⁷³² RailCorp, Submission in Response to ACCC Consultation Paper, 26 October 2010, p.6.

⁷³³ RailCorp, Submission in Response to ACCC Consultation Paper, 26 October 2010, pp.6-7.

⁷³⁴ Aston Resources, *Submission: ARTC proposed Hunter Valley Rail Network Access Undertaking*, 25 October 2010, pp. 2-3.

⁷³⁵ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p.3.

⁷³⁶ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p.4.

⁷³⁷ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p.5.

⁷³⁸ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p.6.

A.11.4.4 Network connections

Aston Resources submits that the amendments to section 6.1 of the HVAU do not ensure ARTC will not extract monopoly rents or frustrate access to the Network.⁷³⁹ Aston Resources is concerned that ARTC is given too much discretion regarding when additional capacity will be created and sections 6.2 to 6.4 of the HVAU fails to adequately ensure that capacity will expand to meet the port capacity. Aston Resources also submits when an applicant has agreed to self-fund an expansion, ARTC should not be entitled to have regard to its legitimate business interests.⁷⁴⁰

A.11.4.5 RCG

Aston Resources supports the discretion given to ARTC under section 6.4(b)(vi), which gives new entrants representation in RCG that decides whether or not to endorse capital expansions.⁷⁴¹

A.11.4.6 IAHA

Aston Resources submits that TOP rebate as the sole remedy for the failure by ARTC to make path available is inappropriate and the proposed TUT effectively reward access holders failing to use its access rights. Aston Resources also submits the IAHA should expressly require access holders to transfer excess capacity, thus create an incentive to avoid capacity hoarding. Aston Resources is concerned that an access holder that has failed to exercise its annual right of renewal is given automatic priority over a new entrant under Clause 2.5 of the IAHA.⁷⁴²

A.11.5 HVCCC (25 October 2010)

A.11.5.1 Efficient train configuration

HVCCC submits that it supports ARTC's proposed process for the determination of the efficient train configuration.⁷⁴³

A.11.5.2 Capacity Management

HVCCC submits that ARTC's commitments to consult with HVCCC in development of System Assumptions, undertaking its capacity analysis, coordinating its response to a shortfall in existing capacity and allocating losses of Capacity caused by other parties are appropriate.⁷⁴⁴

A.11.5.3 Additional Capacity

HVCCC submits that ARTC's commitments to consult with HVCCC in assessing impact of requests for Additional Capacity, planning expansions of Coal Chain Capacity and aligning planned expansions with coal terminals are appropriate.

⁷³⁹ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p.6.

⁷⁴⁰ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, pp.6-7.

⁷⁴¹ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p.7

⁷⁴² Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p.9.

⁷⁴³ HVCCC, *Submission Re: ARTC 2010 Hunter Valley Access Undertaking (2010 HVAU)*, 25 October 2010, p.1.

⁷⁴⁴ HVCCC, Submission in Response to ACCC Consultation Paper, 25 October 2010, p.2.

HVCCC also submits its non-voting member role of the RCG under Section 6.4(b) is appropriate.⁷⁴⁵

A.11.5.4 System Assumptions

HVCCC submits the proposed clauses referencing the Systems Assumptions are appropriate.⁷⁴⁶

A.11.5.5 IAHA

HVCCC submits that ARTC should consult with HVCCC to ensure there is sufficient peaking capacity to meet the agreed tolerances and cap.⁷⁴⁷ HVCCC considers 'Cancellation of services clause' of the IAHA is appropriate. HVCCC is concerned that transfer of contractual entitlement to a load point closer to the Port of Newcastle can adversely impact the Capacity entitlement of other Access Holders, therefore ARTC consent should be required under Clause 16.4(a) of the IAHA. HVCCC recommends Clause 16.6(c) of the IAHA should be amended so that ARTC will seek HVCCC's assessment on the impact of the Trade on Coal Chain Capacity and Capacity entitlements of other access holders.⁷⁴⁸

A.11.6 NSW Department of Environment, Climate Change & Water (25 October 2010)

A.11.6.1 Noise abatement program

DECCW submits that ARTC should be committed to future funding of the rail noise abatement program, which requires ARTC to incorporate rail noise management manual developed by DECCW into Clause 13.8 of the OSA, so operators can fulfil their environmental obligations.⁷⁴⁹

A.11.7 Newcastle Port Corporation (25 October 2010)

A.11.7.1 Capacity trading provisions

NPC submits that Clause 16.6(c) of the IAHA does not provide certainty that ARTC will seek HVCCC's recommendation regarding the impact of train paths trades and NPC is not clear as to why temporary trade is included as a Tier 1 provision, but permanent and non-safe harbour trades are not.⁷⁵⁰

NPC is concerned that 'safe harbour' trade has potential to adversely impact on the coal chain, therefore such trades without ARTC's consent is not appropriate.⁷⁵¹ NPC believes that CTS is an important mechanism for facilitating contractual alignment in

⁷⁴⁵ HVCCC, Submission in Response to ACCC Consultation Paper, 25 October 2010, p.2.

⁷⁴⁶ HVCCC, Submission in Response to ACCC Consultation Paper, 25 October 2010, p.3.

⁷⁴⁷ HVCCC, Submission in Response to ACCC Consultation Paper, 25 October 2010, p.3.

⁷⁴⁸ HVCCC, Submission in Response to ACCC Consultation Paper, 25 October 2010, pp.4-5.

⁷⁴⁹ DECCW NSW, *re ARTC Hunter Valley Access Undertaking*, 25 October 2010, pp. 1-2.

⁷⁵⁰ Newcastle Port Corporation, *Re: ARTC proposed 2010 Hunter Valley Rail Network Access Undertaking*, 21 October 2010, p. 4.

⁷⁵¹ Newcastle Port Corporation, Submission in Response to ACCC Consultation Paper, 21 October 2010, p. 5.

the coal chain and CTS transfer approval process should be used for trades of rail network capacity.⁷⁵²

A.11.8 Port Waratah Coal Services (25 October 2010)

A.11.8.1 Transitional arrangement

PWCS submits that the Proposed HVAU provides no guidance for transitioning from the existing access arrangements to the new arrangements and thus failing to provide access holders with assurance of below-rail capacity that matches with their terminal commitments. The lack of transitional arrangement leads to uncertainty in the capacity application process and in particular the mutually exclusive applications.⁷⁵³

A.11.8.2 Additional capacity

PWCS submits that the proposed HVAU is not clear on how ongoing requests for additional capacity will be handled, as even it is a user funded project, ARTC has discretion to not build Additional Capacity and the time frame for ARTC to make a decision is unclear.⁷⁵⁴

A.11.8.3 Operational alignment

PWCS submits that ARTC does not have a positive obligation to identify shortfalls under the proposed HVAU and it is inappropriate for ARTC to have total discretion to allocate shortfalls of five days or less.⁷⁵⁵

A.11.9 New South Wales Minerals Council (25 October 2010)

A.11.9.1 Certainty of contracted volumes

NSWMC submits that the process of determining whether Additional Capacity is required for an Access Seeker is not clear and there is no certainty that track capacity will be expended to align with port terminal capacity. NSWMC is concerned that the proposed IAHA gives ARTC the opportunity to decline to fund a specific expansion required to deliver BPU, even after an AHA is signed.⁷⁵⁶

A.11.9.2 Accountability for delivering contracted capacity

NSWMC submits the TUT must be transparent with independent verification by HVCCC and including Tolerance to be effective as an incentive for ARTC to run the Network efficiently.⁷⁵⁷

⁷⁵² Newcastle Port Corporation, Submission in Response to ACCC Consultation Paper, 21 October 2010, p. 6.

⁷⁵³ PWCS, *Submission in Relation to Australian Rail Track Corporation's proposed Hunter Valley Rail Network Access Undertaking*, 25 October 2010, pp.3-5.

⁷⁵⁴ PWCS, Submission in Response to ACCC Consultation Paper, 25 October 2010, pp.5-6.

⁷⁵⁵ PWCS, Submission in Response to ACCC Consultation Paper, 25 October 2010, pp.6-7.

⁷⁵⁶ NSWMC, *Hunter Rail Access Task Force – Submission in Response to the Australian Competition and Consumer Commission's Consultation Paper in relation to Australian Rail Track Corporation's Proposed 2010 Hunter Valley Rail Network Access Undertaking*, 25 October 2010, p.7.

⁷⁵⁷ NSWMC, Submission in Response to ACCC Consultation Paper, p.8.

A.11.9.3 Pricing Signals

NSWMC submits that the proposed 2010 HVAU dealing with access pricing will not provide accurate and timely price signals. NSWMC submits the process and timing for determining the Indicative Service and Indicative Access Charges is uncertain and the principles and criteria set out in Section 4.14 and 4.15 are poorly defined.⁷⁵⁸

A.11.9.4 Contractual alignment

NSWMC submits that the importance of contractual alignment is highlighted by consideration of the massive sunk and future investment by the stakeholders in the Coal Chain. NSWMC submits that a more definite and certain process that is based on the HVCCC recommendation is needed to identify and assign capacity losses. NSWMC is concerned that the five day period for capacity shortfall events provides ARTC with total discretion and the approach to addressing Network Capacity will not facilitate contractual alignment.⁷⁵⁹

A.11.9.5 Incentives

NSWMC submits that coal producers are prepared to support the inclusion of well designed performance improvement incentive mechanisms that will lead to efficient capacity management and expansion by ARTC.⁷⁶⁰

A.11.10 Two More Trains For Singleton (1 October 2010)

A.11.10.1 Passenger priority

TMTFS is concerned that the proposed HVAU does not provide for additional passenger rail services and TMTFS submits the Undertaking should emphasise passenger priority.⁷⁶¹

A.11.11 Transport NSW (29 October 2010)

A.11.11.1 Passenger priority

Transport NSW submits that the inclusion of passenger priority as Tier 2 provisions is not appropriate. Transport NSW recommends including an explicit reference to ARTC's obligation to accord passenger priority in the definition of Capacity.⁷⁶²

A.11.12 Xstrata (25 October 2010)

A.11.12.1 Alignment measures

Xstrata submits that loss allocation provisions in the IAHA should be included in the Access Undertaking and determination of Allocation Period should be included as a

⁷⁵⁸ NSWMC, Submission in Response to ACCC Consultation Paper, pp. 8-9.

⁷⁵⁹ NSWMC, Submission in Response to ACCC Consultation Paper, p.10

⁷⁶⁰ NSWMC, Submission in Response to ACCC Consultation Paper, p.11.

⁷⁶¹ Two More Trains for Singleton, *Submission – Australian Rail Track Corporation proposed Hunter Valley Network Access Undertaking*, 1 October 2010, p.1

⁷⁶² Transport NSW, *re ARTC Hunter Valley Access Undertaking*, 29 October 2010, pp. 2-3.

Tier One Provision. Xstrata considers that the ACCC is in the best position to act as an arbitrator for disputes in relation to Tier One Provisions.⁷⁶³

A.11.12.2 Rate of return

Xstrata submits that the WACC proposed in the proposed HVAU is too high as ARTC is not assuming any risk. In particular, the proposed rebate mechanics will not entitle Access Holders to any rebate. However, Xstrata would support the WACC proposed if ARTC takes on an appropriate degree of risk, which addresses its other concerns.⁷⁶⁴

A.11.12.3 Efficient train configuration

Xstrata submits that a per Train Path pricing model is better than a GTK pricing approach as it leads to increased efficiency and avoids cross subsidy by efficient train users in favour of inefficient train users. Xstrata is concerned that the four year period for determination of an efficient train size is too long and recommends this should be done within 12 months at most and brought into effect for commencement of the third year of the HVAU.⁷⁶⁵

A.11.12.4 Capacity management

Xstrata is concerned that ARTC in determining the Capacity disregards the ability of trains to enter and exit the Network, this is likely to overstate the number of Train Paths available and no rebate would be payable by ARTC in these circumstances.⁷⁶⁶

Xstrata submits affected Access Holders should be informed of the reasons why ARTC does not accept a recommendation by the HVCCC, which materially affect their contractual entitlement.⁷⁶⁷

Xstrata submits five day period for short term shortfall provisions is too long, Xstrata considers it should be changed to two days. Xstrata recommends details of allocation should be published and ARTC needs to minimise inequalities over time.⁷⁶⁸

Xstrata is of the view that a key objective for the review to be carried out in accordance with section 5.9 of the HVAU is for ARTC to work towards an integrated approach to losses of coal chain capacity taking account of the entire coal chain.⁷⁶⁹

A.11.12.5 Additional Capacity

Xstrata submits that RCG voting rights should be determined by current tonnage contractual entitlements and the ACCC should have the right to review prudence of expenditure on request by the RCG or a user funder.⁷⁷⁰

⁷⁶³ Xstrata, *Xstrata Coal Pty Ltd's response to the Australian Competition and Consumer Commission in relation to the ACCC Consultation Paper in relation to the Australian Rail Track Corporation's proposed Hunter Valley Rail Network Access Undertaking dated 16 September 2010*, 25 October 2010, pp.8-9.

⁷⁶⁴ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p.9

⁷⁶⁵ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, pp.10-11.

⁷⁶⁶ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, pp.11-13.

⁷⁶⁷ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p.13.

⁷⁶⁸ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, pp.13-14.

⁷⁶⁹ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p.14.

⁷⁷⁰ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, pp. 15-16.

Xstrata is concerned as to how the user funding process will work. Xstrata recommends ARTC should produce a detailed user funding deed to be approved by the ACCC, differential pricing should be adopted to distinguish between the funded and other Access Holders and Access Seekers should have the right to user fund at any point in project development.⁷⁷¹

A.11.12.6 Certainty of delivery

Xstrata submits that ARTC's ability to include commercial viability condition precedent in the Train Path Schedules of AHA introduces uncertainty.⁷⁷²

A.11.12.7 Performance measurement and incentives

Xstrata considers that additional return could be provided to ARTC only when the actual tonnage of coal throughput handled by the coal chain as a whole exceeds contracted level and Xstrata opposes any performance incentives that allow "gaming".⁷⁷³

A.11.12.8 Access rights under the IAHA

Xstrata submits that a minimum level of Tolerance for each Pricing Zone should be specified, which may only be reduced with RCG approval.⁷⁷⁴

A.11.12.9 Liability regime

Xstrata submits that determination of NPC should be subject to annual independent expert review and the TUT should be amended to provide a TOP Rebate where an Access Holder does not utilise its Base Paths due to ARTC failing to make Tolerance available. Xstrata is concerned that \$2 million liability cap is low in the context of the IAHA.⁷⁷⁵

A.11.12.10 Capacity trading

Xstrata submits that trades made within the rules of the CTS should be given effect to by the IAHA and Access Holder consent should be required for a transfer of ARTC's obligations under the AHA.⁷⁷⁶

A.11.12.11 Period of the Undertaking

Xstrata considers that a ten year period for the Access Undertaking in absence of any suitable review regime is too long.⁷⁷⁷

A.11.12.12 Provision of train path schedules

Xstrata submits that ARTC should provide its initial determination of the Capacity of the Network prior to the finalisation of the Undertaking.⁷⁷⁸

⁷⁷¹ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, pp. 16-18.

⁷⁷² Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p.18.

⁷⁷³ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, pp. 19-20.

⁷⁷⁴ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, pp. 20-21.

⁷⁷⁵ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, pp. 21-22.

⁷⁷⁶ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, pp. 23-24.

⁷⁷⁷ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, pp. 24-25.

⁷⁷⁸ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 25.

A.11.13 QR National Coal (25 October 2010)

A.11.13.1 Access Agreements

QR submits for provision 13 in Clause 11.6 of the IAHA to be mandatory, a notification and review mechanism should be included. QR is concerned that charges for Coal Access rights being a negotiable provision is inconsistent given the commitment ARTC has given to pricing parity.⁷⁷⁹

A.11.13.2 Contract Structure

QR is concerned that in the proposed HVAU, the OSA is negotiated predominantly by ARTC and the Access Holders, while the Operators do not have an active role in the negotiation. QR submits 3 month negotiation period to finalise an Access Agreement is too short given its complexity.⁷⁸⁰

QR believes resolve mutually exclusive access application based on order in which applications were received rather than most favourable to ARTC would be a more equitable approach.⁷⁸¹

A.11.13.3 Pricing principles

QR supports the view in the Draft Decision that pricing for all services should be set on the basis of the efficient train configuration, determined within a set period and longer heavier trains may not be the efficient train configuration for the overall Hunter Valley Coal Chain.⁷⁸²

QR is concerned that the process for determining the efficient train configuration does not include access holders or operators, which reduces the effectiveness and integrity of the determination⁷⁸³.

A.11.13.4 Additional capacity

QR is supportive of the RCG process in determining additional capacity; however QR suggests the requirement for endorsement to be specifically defined and encourages ARTC to limit consultations restricted to voting members to maximise industry engagement in the development of the Hunter Valley network.⁷⁸⁴

A.11.13.5 Performance measurement

QR believes that the indicators in Schedule D may need supplementing, from time to time, to provide additional focus on system performance issues.⁷⁸⁵

A.11.13.6 Domestic Coal

QR submits the proposed HVAU does not include Domestic Coal within the planning framework and this may lead to an inefficient outcome.⁷⁸⁶

⁷⁷⁹ QR National Coal, *QR National Coal's Submission to the Hunter Valley Access Undertaking*, 25 October 2010, p.2.

⁷⁸⁰ QR National Coal, *Submission in Response to ACCC Consultation Paper*, 25 October 2010, p.3.

⁷⁸¹ QR National Coal, *Submission in Response to ACCC Consultation Paper*, 25 October 2010, p.4.

⁷⁸² QR National Coal, *Submission in Response to ACCC Consultation Paper*, 25 October 2010, pp.4-5.

⁷⁸³ QR National Coal, *Submission in Response to ACCC Consultation Paper*, 25 October 2010, p.7.

⁷⁸⁴ QR National Coal, *Submission in Response to ACCC Consultation Paper*, 25 October 2010, p. 9.

⁷⁸⁵ QR National Coal, *Submission in Response to ACCC Consultation Paper*, 25 October 2010, p. 10.

A.11.13.7 IAHA

QR's main concerns relate to the IAHA are:⁷⁸⁷

- the arrangement for allocation of tolerance to Access Holders with monthly and quarterly allocations is not clear
- It is not clear as to how TOP Rebate and Ad-Hoc Charge Rebate intend to operate and TOP Rebate is the sole remedy, even when ARTC consistently fails to make a Path Usage available
- Clause 11.5(c) could result in the inclusion of Service Assumptions into the Agreement which are operationally unachievable for the operators
- the Access Holders are unable to terminate the Agreement if ARTC's lease is terminated

A.11.13.8 OSA

QR's main concerns relate to the OSA are:⁷⁸⁸

- The changes of definitions for some terms in Clause 1.1 are not clear
- ARTC intends to execute a separate agreement with operators for ancillary train movements, however, the operators have not yet been provided with a draft
- Operators do not have the right to be automatically included in any KPI discussions, which is essential to ensure meaningful and achievable levels are set in Clause 3.10
- the Operator has no real financial obligations, therefore the requirement to grant credit support is not required.

⁷⁸⁶ QR National Coal, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 11.

⁷⁸⁷ QR National Coal, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 12-16.

⁷⁸⁸ QR National Coal, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 17-20.