



Australian
Competition &
Consumer
Commission

Australian Competition and Consumer Commission

Consultation Paper

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

13 April 2011



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1 Introduction

Australian Rail Track Corporation Limited (**ARTC**) has provided to the Australian Competition and Consumer Commission (**ACCC**) a revised version of the proposed access undertaking for the Hunter Valley Rail Network.

ARTC submitted an access undertaking to the ACCC on 7 September 2010 (**the September 2010 HVAU**) for assessment under Part IIIA of the *Competition and Consumer Act 2010* (Cth) (**the Act**). The ACCC released a Position Paper on 21 December 2010 setting out its views on, and recommending revisions to, the September 2010 HVAU (**the December 2010 Position Paper**).

ARTC provided a response to the ACCC's Position Paper in the form of a revised proposed access undertaking for the Hunter Valley Rail Network on 7 April 2011 (**the April 2011 HVAU**). The April 2011 HVAU seeks to implement the ACCC's views from the December 2010 Position Paper.

The April 2011 HVAU is not formally a new undertaking application under the Act, and does not re-start the statutory timeframe for assessment. Rather, ARTC requested, and the ACCC has agreed to, an extension of time until 9 June 2011 for consideration of the April 2011 HVAU in the context of the pre-existing statutory process.

The ACCC requests that any submissions on the April 2011 HVAU address the extent to which the drafting of the April 2011 HVAU appropriately implements the recommendations set out in the ACCC's December 2010 Position Paper.

1.1 Background

ARTC previously submitted an access undertaking proposal to the ACCC in relation to the Hunter Valley Rail Network on 22 April 2009 (**the April 2009 HVAU**), though only provided complete pricing information essential to the ACCC's assessment on 13 October 2009.

On 5 March 2010, the ACCC issued a Draft Decision in which it outlined its preliminary view that it would reject that proposed undertaking as being unlikely to be appropriate under Part IIIA of the Act. In response to the ACCC's Draft Decision, ARTC withdrew the April 2009 HVAU.¹

On 7 September 2010, ARTC submitted the September 2010 HVAU to the ACCC for assessment, which incorporated a number of the recommendations from the March 2010 Draft Decision. The ACCC commenced a public consultation on the proposed 2010 HVAU on 16 September 2010 and, in response to several requests from stakeholders, extended the closing date for submissions to 25 October 2010.

The ACCC subsequently released a Position Paper on 21 December 2010, setting out its views on the September 2010 HVAU.

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

In response to the Position Paper, ARTC provided the April 2011 HVAU to the ACCC on 7 April 2011. ARTC also requested a ‘clock-stopper’ to the existing statutory timeframe to allow for consideration of the April 2011 HVAU.

1.2 ARTC’s April 2011 HVAU

The April 2011 HVAU and associated documents, including the Indicative Access Holder Agreement (**IAHA**) and supporting submissions from ARTC, are available on the ACCC’s website at:

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

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

Key revisions incorporated into the April 2011 HVAU are highlighted in section 2 of this document.

ARTC has also provided a document entitled *Explanatory Guide – ARTC Response to ACCC HVAU Position Paper* (**the Explanatory Guide**), which details the revisions ARTC has made to the HVAU and the IAHA that seek to implement the ACCC’s views from the December 2010 Position Paper.

1.3 ACCC assessment

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

The ACCC has not yet formed a view on the appropriateness or otherwise of the amendments included in the April 2011 HVAU, and statements in this Consultation Paper should not be taken as indicative of the ACCC’s final view of the appropriateness of these amendments, nor of the likelihood of their acceptance.

1.4 Indicative timeline for assessment

Under section 44ZZBC(1) of the Act, the ACCC must make a decision in relation to an access undertaking application within the period of 180 days starting at the start of the day the application was received (referred to as ‘the expected period’).

The Act also provides for ‘clock-stoppers’, meaning that some days will not count towards the 180 days of the expected period in certain circumstances. In particular, the clock is stopped where:

- the ACCC publishes a notice inviting public submissions in relation to an undertaking application;
- the ACCC gives a notice requesting information in relation to an application; or

- the ACCC and the access provider agree in writing that certain days are to be disregarded for the purposes of calculating the expected period.²

ARTC formally lodged the September 2010 HVAU with the ACCC on 7 September 2010. Taking into account the consultation period clock-stopper in September/October 2010, the ACCC was previously required to make a decision on the September 2010 HVAU by 14 April 2011. As noted, the ACCC released its Position Paper on the September 2010 HVAU on 21 December 2010.

ARTC has, however, requested a 56 day ‘clock-stopper’ to the current statutory timeframe to allow for consideration of the April 2011 HVAU. ARTC requested that the period from 13 April 2011 to 7 June 2011 be disregarded in calculating the expected period, meaning that the final date by which a decision must be made would be 9 June 2011.

The ACCC has agreed to disregard the period as requested by ARTC. Consequently, this has the effect of extending the timeframe by which the ACCC is required to make a decision on the HVAU until 9 June 2011.

The Act provides that, in calculating the expected period, a day should not be disregarded more than once; section 44ZZBC(3). The consultation period on the April 2011 HVAU does not, therefore, further extend the overall timeframe.

1.5 Consultation

The ACCC has published the April 2011 HVAU on its website for stakeholder consideration. Section 2 of this Paper highlights aspects of the undertaking that have been significantly revised since the submission of the September 2010 HVAU.

The April 2011 HVAU seeks to implement the ACCC’s views from the December 2010 Position Paper. The ACCC requests that any submissions address the extent to which the drafting of the April 2011 HVAU appropriately implements the recommendations set out in the ACCC’s Position Paper.

In making this request, the ACCC notes that extensive submissions have previously been received on the substantive aspects of the undertaking in relation to:

- the April 2009 HVAU;
- the ACCC’s March 2010 Draft Decision; and
- the September 2010 HVAU.

The ACCC also notes that it has provided extensive views on the undertaking in both the March 2010 Draft Decision and in the December 2010 Position Paper.

The ACCC is considering whether to hold a pre-decision conference in relation to the April 2011 HVAU. Should this take place, it would likely be scheduled on 16/17 May 2011. The aim of this conference would be for ARTC representatives and interested

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

stakeholders to discuss aspects of the April 2011 HVAU in the presence of the ACCC. The ACCC may proceed with the conference if it considers there are suitable outstanding issues that would benefit from discussion in a conference-type context. The ACCC will advise its intentions in relation to the pre-decision conference in due course.

1.6 Making a submission

Submissions on the April 2011 HVAU should be addressed to:

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

Email: transport@acc.gov.au

1.6.1 Due date for submissions

Submissions **must** be received by **11 May 2011**. It is in your interest that the submission be lodged by this date, as section 44ZZBD of the Act allows the ACCC to disregard any submission made after this date.

1.6.2 Confidentiality of information provided to the ACCC

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

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

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

1.7 Further information

The April 2011 HVAU and other relevant material, including supporting submissions from ARTC, are available on the ACCC's website at the following link:

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

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

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

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

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

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2 Key revisions in the April 2011 HVAU

The April 2011 HVAU seeks to implement the ACCC's views from the December 2010 Position Paper. In this section the ACCC has highlighted aspects of the April 2011 HVAU that have been significantly revised since the September 2010 HVAU, or where ARTC's proposed revisions may not precisely address the recommendations in the ACCC's December 2010 Position Paper. Cross reference is also made to ARTC's Explanatory Guide.

2.1 Term

ARTC has proposed that the HVAU run for a period of 10 years, but has made revisions to expand the review of the HVAU that occurs under section 2.3.

ARTC has included discussion of its proposed approach in Item 1 of the Explanatory Guide.

2.2 Financial model

2.2.1 RAB roll-forward

ARTC has proposed a number of amendments to the regulated asset base (RAB) roll-forward that seek to achieve consistency in the financial model, as recommended by the ACCC.

ARTC has advised however that it may propose further changes to the financial model beyond those already contained in the April 2011 HVAU. These will be circulated in due course.

ARTC has included discussion of its proposed approach in Items 8 to 11 of the Explanatory Guide.

2.2.2 Use of loss capitalisation

ARTC has proposed to incorporate the use of 'loss capitalisation' into the Financial Model under the HVAU, which would allow it to include revenue shortfalls in the RAB for recovery in later periods.

In the Position Paper, the ACCC considered that ARTC should confine the use of loss capitalisation to new investment in 'Pricing Zone 3' (that is, the region of the network where ARTC is not currently recovering its full revenue allowance). The ACCC also considered that ARTC should include revenue allocation obligations in order to effectively limit the use of loss capitalisation to new investment in Pricing Zone 3 only.

In response to the Position Paper, ARTC has proposed to apply loss capitalisation to both existing assets and new investment in this Pricing Zone, subject to ARTC providing written statements of support from affected coal producers utilising this Pricing Zone.

ARTC has advised it is in the process of procuring these statements from relevant producers.

ARTC has included discussion of its proposed approach in Items 5 and 6 of the Explanatory Guide.

2.2.3 Efficient costs

In both the Draft Decision and Position Paper, the ACCC considered that it was necessary for the HVAU to provide the ACCC with appropriate compliance powers to ensure that ARTC does not incur inefficient operational expenditure.

Under the April 2011 HVAU, ARTC has proposed that the ACCC should determine during the Annual Compliance Assessment performed under the HVAU whether ARTC has incurred efficient costs.

The ACCC also considered in the Position Paper that ARTC's proposed definition of Efficient Cost contained in the 2010 HVAU was unlikely to be a suitable efficiency benchmark. In response, ARTC has proposed a simplified definition of Efficient under the April 2011 HVAU.

ARTC has included discussion of its proposed approach at Item 14 of the Explanatory Guide.

2.3 Rate of return

In its Position Paper on the September 2010 HVAU, the ACCC considered that an 8.57% real pre-tax rate of return was likely to appropriately reflect the commercial and regulatory risks faced by ARTC.

ARTC has submitted a proposal for a 9.10% real pre-tax rate of return under the April 2011 HVAU.

ARTC has included discussion of its proposed approach at Item 15 of the Explanatory Guide, as well as in a separate submission.

2.4 Determination of the Indicative Service (efficient train configuration)

ARTC is yet to determine the characteristics for final Indicative Services based on the most efficient consumption of network capacity. Until these characteristics are determined, the HVAU provides for ARTC to offer access to '*interim* indicative services,' which are based on two train configurations currently used by Queensland Rail (QR) and Pacific National (PN).

In the Position Paper the ACCC expressed the view that ARTC should put forward the Indicative Service proposal within 6 months of receiving modelling from the HVCCC, or no later than 12 months after the commencement of the HVAU.

The April 2011 HVAU appears to reflect continuing ARTC consideration of its response to this ACCC view in light of the development of modelling ARTC considers is required in order to determine the characteristics of efficient services.

ARTC has included discussion of its proposed approach at Item 19 of the Explanatory Guide.

2.5 Performance and accountability

In the December 2010 Position Paper the ACCC expressed the view that, given the broad exclusion of liability under the proposed HVAU, and the intent that the true-up test (TUT) be the sole remedy where ARTC fails to deliver the subject matter of the access contract, the TUT should be robust and effective.

In line with this view, the ACCC recommended revisions to provide for enhanced transparency and objectivity in the calculation of Network Path Capability (NPC), to provide for rebates of Tolerance in certain circumstances under the TUT, and to provide for an independent audit of the TUT calculations.

ARTC has proposed amendments to the TUT that:

- provide for publication of track-related System Assumptions, and thereby seek to provide transparency in relation to the calculation of NPC;
- provide for Access Holders to accrue rebates for Tolerance in certain circumstances;
- provide for an independent audit of the TUT;
- incorporate a review of the TUT; and
- provide for ARTC to develop positive incentives to include in the TUT.

ARTC has included discussion of its proposed approach to the TUT at Items 42 to 44, and Items 46 and 47, of the Explanatory Guide.

ARTC has further advised the ACCC that it intends to publish initial track-related System Assumptions in the near future to provide for enhanced transparency and objectivity in the determination of NPC.

The ACCC also considered in the Position Paper that it may be appropriate to accept the HVAU without an incentive scheme, provided that a suitable proposal will be developed in consultation with stakeholders and proposed for inclusion in the HVAU within an appropriate timeframe. ARTC has proposed a process under the April 2011 HVAU for the development of positive incentives that would promote enhanced efficiency and productivity.

ARTC has included discussion of its proposed approach to positive incentives at Items 45 of the Explanatory Guide.

2.6 Capacity management

In both the March 2010 Draft Decision and the December 2010 Position Paper the

ACCC provided extensive recommendations on the capacity management provisions in the HVAU, recognising their importance to supply chain alignment.

ARTC has incorporated a number of key revisions to the capacity management provisions in the April 2011 HVAU, including:

- introducing a more specific delineation between System Assumptions agreed to with the HVCCC, and those Track Related System Assumptions that are reasonably determined by ARTC;
- providing that ARTC will publish those Track Related System Assumptions on its website;
- expanding on ARTC's obligations to provide reasons to relevant parties when, following consultation with the HVCCC, ARTC disagrees with the HVCCC's assessment;
- clarifying the basis on which an allocation of capacity may occur where there is an event leading to a shortfall in capacity;
- ensuring that the HVCCC is consulted in relation to all temporary trades as to the impact on Coal Chain Capacity; and
- expanding on ARTC's obligations in relation to the operation of the cancellation of services provisions, and the review of the cancellations and loss allocation mechanisms in the HVAU.

ARTC has included discussion of its proposed approach at Items 46 to 72 of the Explanatory Guide.

2.7 Additional capacity and investment

In both the March 2010 Draft Decision and the December 2010 Position Paper the ACCC provided extensive recommendations on the investment framework set out in the HVAU. Key recommendations in the Position Paper were that ARTC:

- improve the clarity of the framework as drafted in the HVAU;
- provide more certainty around the points in the investment process at which funding decisions are made; and
- remove the ability for ARTC to 'opt out' of funding a project once ARTC has entered contracts for the capacity to be delivered by the project.

ARTC has implemented many of the ACCC's recommendations, and in doing so has substantially revised the structure of the investment framework to improve its clarity.

While ARTC proposes to maintain the ability to 'opt out' of funding a project that is to provide capacity under executed contracts, it has proposed an alternative solution. The investment framework provides for network users to 'endorse' each stage of a capacity expansion project. ARTC proposes that at each stage of this process it will state whether it is prepared to fund the next stage, meaning that if it chooses not to fund, users will have the ability to pursue user-funding in a timely manner.

ARTC has included discussion of its proposed approach at Items 73 to 97 of the Explanatory Guide, and has also provided diagrams explaining the framework.

3 Appendix: Background information

3.1 Process background

The following timeline sets out the key stages in the ACCC's assessment of the previous April 2009 and the September 2010 versions of the proposed HVAU. All documents are available on the ACCC website, www.accc.gov.au.

Timeline – April 2009 HVAU

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

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

Timeline – September 2010 HVAU

7 September 2010	ARTC access undertaking relating to the Hunter Valley rail network (the September 2010 HVAU) submitted to the ACCC for assessment under Part IIIA of the Act.
16 September 2010 – 25 October 2010	Public consultation on September 2010 HVAU. Original deadline for submissions of 11 October 2010. In response to several requests from interested parties, the ACCC on 7 October 2010 extended the deadline to 25 October 2010.

21 December 2010	An ACCC Position Paper issued setting out comprehensive views on the required amendments to the September 2010 HVAU.
7 April 2011	ARTC submits revised proposed HVAU to ACCC (the April 2011 HVAU).
11 April 2011	ARTC requests clock-stopper to expected period.
13 April 2011	ACCC agrees to clock-stopper, and expected period is extended to 9 June 2011. Consultation on April 2011 HVAU commences.
11 May 2011	End of consultation on April 2011 HVAU.
9 June 2011	End of statutory ‘expected period.’

3.2 Legal test for accepting an access undertaking

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

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

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

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

3.3 Recent changes to Part IIIA

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

3.3.1 Timeframes for ACCC decisions and clock-stoppers

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

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

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

The changes to the Act also introduce ‘clock-stoppers’ that mean certain time periods are not taken into account when determining the expected period (see section 44ZZBC(2)). In particular, the clock may be stopped:

- by written agreement between the ACCC and the access provider (in this case, ARTC), and such agreement must be published: section 44ZZBC(4) & (5);
- if the ACCC gives a notice under subsection 44ZZBCA(1) requesting information in relation to the application;

- if a notice is published under subsection 44ZZBD(1) inviting public submissions in relation to the application;
- a decision is published under subsection 44ZZCB(4) deferring consideration of whether to accept the access undertaking, in whole or in part, while the ACCC arbitrates an access dispute.

3.3.2 Amendment notices

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

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

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

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

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

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

3.3.3 Other changes

3.3.3.1 Information requests

Section 44ZZBCA(1) provides that the ACCC may give a person a written notice requesting the person give to the ACCC, within a specified period, information of a

kind specified in the notice that the ACCC considers may be relevant to making a decision on an access undertaking application.

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

3.3.3.2 Fixed principles

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