



Australian
Competition &
Consumer
Commission

Australian Competition and Consumer Commission

Decision

In relation to Australian Rail Track Corporation's Hunter Valley Rail Network Undertaking

29 June 2011



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1 Executive Summary

The Australian Competition and Consumer Commission (ACCC) decided, on 29 June 2011, to accept an access undertaking in relation to the Hunter Valley rail network from Australian Rail Track Corporation (ARTC). The undertaking was lodged with the ACCC on 23 June 2011, and is referred to in this document as the **June 2011 HVAU**. The ACCC has made the decision to accept the undertaking under section 44ZZA(3) of Part IIIA of the *Competition and Consumer Act 2010* (Cth) (**the Act**).

The ACCC's decision to accept the June 2011 HVAU follows extensive assessment throughout 2009, 2010 and 2011 of prior iterations of a Hunter Valley access undertaking, as well as extensive public consultation with stakeholders.

In summary, the ACCC considers that the June 2011 HVAU adequately addresses recommendations made by the ACCC in relation to those previous versions of the HVAU. Consequently, the ACCC considers that the June 2011 HVAU should operate to:

- promote the economically efficient use of, operation of and investment in the Hunter Valley rail network;
- facilitate alignment between elements of the Hunter Valley export coal supply chain, and thereby promote the objectives of the 'long term solution';
- appropriately recognise the interests of access seekers, including export coal, domestic coal and non-coal usage of the network;
- appropriately recognise the legitimate business interests of ARTC, including that ARTC obtain a return on its investment commensurate with the regulatory and commercial risks it faces; and
- provide an appropriately clear and certain framework for the regulation of the Hunter Valley rail network.

This document sets out the ACCC's reasons for deciding to accept the June 2011 HVAU.

1.1 Background

1.1.1 Industry context

ARTC is a Commonwealth Government owned corporation, established in 1998 for the purpose of managing and providing access to the National Interstate Rail Network. ARTC is vertically separated, providing 'below-rail' track access services and not 'above rail' services such as haulage. The Interstate Rail Network is subject to an access undertaking accepted by the ACCC on 31 July 2008.¹

¹ See the ACCC website at <http://www.accc.gov.au/content/index.phtml/itemId/789738> for further details.

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

The network is predominantly used to transport coal from mines in the Hunter Valley region to the Port of Newcastle for export. Approximately 16 coal producers have either existing or planned operations in the region, and it has been estimated that the coal shipped on the network equates to around \$9 billion worth of export earnings per annum.

Capacity management arrangements at the export coal loading terminals at the Port of Newcastle were authorised by the ACCC in December 2009, with the aim of improving overall supply chain performance and reducing ship queues forming off the coast of Newcastle. The aligned interaction between the rail network access undertaking and the authorised capacity arrangements at the port has been a key issue in the current assessment, and is discussed further below.

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

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

1.1.2 Process leading to this point

ARTC submitted the June 2011 HVAU to the ACCC on 23 June 2011.

Prior to that time ARTC had submitted to the ACCC two formal access undertaking applications in relation to the Hunter Valley rail network, one in April 2009 and another in September 2010. The ACCC considered that those applications were not appropriate to accept, and provided ARTC with extensive feedback on how those applications could be revised such that they would be likely to be accepted. The ACCC set out its views on the April 2009 application in a Position Paper (February 2010) and Draft Decision (March 2010), and its views on the September 2010 application in a further Position Paper (December 2010). The ACCC also conducted extensive consultation with stakeholders in relation to those prior applications.

The June 2011 HVAU incorporates revisions to accommodate the ACCC's views from those previous assessments. The issues addressed in the June 2011 HVAU have therefore been subject to thorough analysis and stakeholder consultation over the preceding two years.

Further detail on the steps that have lead to the ACCC's decision to accept the June 2011 HVAU is set out in the **Process** chapter.

1.2 Overview of the ACCC's assessment

1.2.1 The June 2011 HVAU

The 2011 HVAU is comprised of three key documents: the undertaking itself, the Indicative Access Holder Agreement (**IAHA**) and the Operator Sub Agreement (**OSA**). The access arrangements created by the June 2011 HVAU comprises the following key features:

- preliminary sections on the operation and interpretation of the HVAU;
- a process in section 3 for parties to apply for access with ARTC, and a negotiate/arbitrate framework, with ACCC arbitration as a back-stop, to facilitate agreement of mutually acceptable terms and conditions of access. Indicative agreements, the IAHA and OSA, are also attached.
- in section 4, a revenue cap and pricing methodologies to promote access pricing that is efficient and that reflects the cost of providing access to the network;
- a real pre-tax rate of return of 9.1%;
- liability and performance accountability/incentive measures with implications for both ARTC and access seekers;
- in section 5, and related clauses in the IAHA, numerous provisions regarding network capacity management, including provisions designed to facilitate alignment of capacity management on the Hunter Valley rail network with other components of the supply chain;
- processes for the investment in and creation of additional network capacity, set out in sections 7 to 11; and
- operational provisions regarding the management of trains on the network.

The ACCC also notes that section 2 of the June 2011 HVAU provides for an 'operative' commencement date of 1 July 2011. The June 2011 HVAU operates for a term of **five years**.

The ACCC has examined these aspects during its assessment of each iteration of the HVAU, and in its December 2010 Position Paper structured the assessment as set out in the list above. The ACCC adopts the same approach in this document, and further discussion of each element of the HVAU is set out in subsequent chapters.

1.2.1.1 Key revisions in the June 2011 HVAU

The June 2011 HVAU incorporates a range of revisions from and additions to the September 2010 HVAU. These include:

- a five year term (changed from the previously proposed ten year term);
- alignment of aspects of the financial model regulating ARTC's access revenues with existing regulatory arrangements;

- application of loss capitalisation to Pricing Zone 3 only;
- enhanced ACCC powers for assessment of ARTC's operational efficiency;
- a rate of return supported by export coal producers;
- a two-stage process for the determination of the efficient train configuration;
- grandfathering of pricing for certain services to facilitate regulatory transition for access seekers;
- independent price-related dispute resolution processes applying under long-term access agreements if no undertaking is in force under Part IIIA in relation to the Hunter Valley Rail Network;
- clearer integration of indicative access arrangements for non-coal access seekers;
- greater transparency in relation to ARTC assessment of mutually exclusive access applications;
- review of the system TUT;
- explicit recognition of the availability of equitable relief under access agreements;
- accrual of TOP rebates for 'Allowed Tolerance' path usages;
- audit of TUT compliance;
- processes to provide for consistency in System Assumptions as between HVCCC and ARTC, including for the resolution of disputes relating to System Assumptions, and for the application of the relevant Assumptions throughout access agreements and the system True-Up Test (TUT);
- revisions to enhance capacity management and capacity trading protocols; and
- extensively revised capacity investment framework.

These revisions are discussed in the following chapters.

The ACCC also notes that on 14 June 2011 ARTC circulated to stakeholders a letter outlining processes for the transition to the access arrangements under the June 2011 HVAU.

1.2.2 The legal test for assessment

Section 44ZZA(3) of the Act specifies that the ACCC may accept an access undertaking if it thinks it appropriate to do so, having regard to the matters specified in that section. Those matters are:

- the objects of Part IIIA in section 44AA of the Act, which are to:

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

In relation to the pricing principles, section 44ZZCA of the Act 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; 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.

1.2.3 Application of the test – general themes and specific issues

In its previous statements on the earlier versions of the HVAU, the ACCC has provided a general discussion of the matters in section 44ZZA(3) and how the ACCC

has taken them into account during its assessment.² The discussion in this document builds upon and reflects those earlier statements.

General ‘themes’ in the assessment have been that the June 2011 HVAU should:

- promote the economically efficient use of, operation of and investment in the Hunter Valley rail network;
- facilitate alignment between elements of the Hunter Valley export coal supply chain, and thereby promote the objectives of the ‘long term solution’;
- appropriately recognise the interests of access seekers, including export coal, domestic coal and non-coal usage of the network;
- appropriately recognise the legitimate business interests of ARTC, including that ARTC obtain a return on its investment commensurate with the regulatory and commercial risks it faces; and
- provide an appropriately clear and certain framework for the regulation of the Hunter Valley rail network.

Overall, the ACCC considers that the June 2011 HVAU appropriately provides for access to the Hunter Valley rail network, promotes the objectives of Part IIIA and recognises the interests of ARTC and access seekers. The pricing mechanisms in the June 2011 HVAU seek to ensure access charges that reflect efficient costs, while also allowing ARTC to obtain a return on its investment commensurate with commercial and regulatory risks. In particular, while the ACCC recognises that ARTC’s proposed rate of return has been endorsed by export coal users of the network, ARTC has also stated that non-coal users will not have pricing adjusted as a result of the agreed rate of return.³ The June 2011 HVAU should also facilitate supply chain alignment.

1.2.3.1 The long term solution and supply chain alignment

In the March 2010 Draft Decision the ACCC was of the view that the ‘long term solution’ for the Hunter Valley export coal supply chain, and the significance of the Hunter Valley rail network to that supply chain, were relevant ‘other matters’ to which to have regard. The ACCC also recognised the desirability of facilitating ‘alignment’ across the different elements of the supply chain to seek to achieve the objectives sought via the long term solution.⁴

A detailed overview of the long term solution is set out in the ACCC’s March 2010 Draft Decision at pages 41 to 47. In summary, however, it refers to steps taken by participants in the Hunter Valley export coal industry to address capacity constraints that have impacted the supply chain for several years. Key stages of this process have included:

² ACCC, Draft Decision (March 2010), pp. 38-58; ACCC, Position Paper (December 2010), pp. 50-51.

³ ARTC, 2011 HVAU Rate of Return Proposal (Public), 23 June 2011, pp. 2-3.

⁴ ACCC, Draft Decision, p. 47.

- a review of the coal chain operations in 2008 by the Hon. Nick Greiner AC, and the subsequent development of a framework to govern the expansion and management of the chain (**the Greiner Review**);
- the agreement of an Implementation Memorandum in April 2009 between export terminal operators Port Waratah Coal Services (**PWCS**) and Newcastle Coal Infrastructure Group (**NCIG**), and Newcastle Port Corporation (**NPC**), to address issues with capacity management at the port; and
- the authorisation by the ACCC in December 2009 of long term ‘Capacity Framework Arrangements’ agreed between and put forward by the port terminal operators and NPC.

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

The ACCC continues to view the promotion of alignment between the Hunter Valley rail network and other elements of the Hunter Valley coal chain as a key theme of its assessment. As set out in the Draft Decision at pages 47 to 51, the ACCC is of the view that the promotion of alignment reflects the interests of access seekers and the public interest, and is likely to promote the efficient operation of, use of and investment in the Hunter Valley rail network.

The ACCC also continues to recognise that these alignment considerations are to be viewed alongside the legitimate business interests of ARTC as the access provider, and the interests of parties using the network other than to transport coal (that is, non-coal users). In the December 2010 Position Paper, the ACCC made the following statements:

...There is a continued emphasis by coal producers on issues with the alignment of the supply chain, and there is an increasingly complex and sophisticated effort to seek to address those issues via the proposed [September] 2010 HVAU. In the Draft Decision the ACCC recognised the challenges of incorporating alignment considerations in to the 2009 HVAU, as issues relating to alignment were informed by the operational realities of the supply chain, and also likely to continue to develop over time. These challenges do not appear to have abated in the context of the proposed [September] 2010 HVAU.

ARTC has gone to some extent to facilitate outcomes in the interests of the broader coal supply chain, but the ACCC recognises that there are often points at which ARTC should not be obliged to go further. In this sense, the ACCC recognises an interaction between the interests of supply chain alignment and ARTC’s legitimate business interests. This interaction is perhaps most apparent in relation to the provisions regarding capacity management and investment, where attempts to achieve alignment should recognise ARTC’s position as lessee and manager of the network.

Additionally, while the predominant usage of the Hunter Valley network is for the transportation of coal to the Port of Newcastle for export, the network is also used by some non-coal traffic, and these users should not be overlooked under the proposed access arrangements. Further, while large quantities of coal transported are destined for export, the ACCC also recognises that coal is transported over the network to domestic locations, and that the requirements of that task should be accommodated. The interests of

rail operators should also be recognised. These considerations therefore reflect that interests of persons who might want access to the service – ‘access seekers’ – extend beyond usage of the network for export coal transportation.

The ACCC considers that these comments equally apply in relation to the June 2011 HVAU, although the ACCC recognises that, in light of ARTC’s incorporation of further revisions to the sections of the HVAU relating to capacity management and investment (discussed further below), further development has occurred and further certainty has been provided.

Alignment considerations manifest in numerous aspects of the HVAU, many of which relate to issues of capacity management:

- **Contracting structure:** The HVAU incorporates a tri-partite contracting structure under which coal producers may contract directly with ARTC, and exercise their access rights via an accredited rail operator. This approach was recommended by the Greiner Review. The HVAU also allows for the execution of long term take or pay contracts to underpin investment in the rail network. Further, this approach helps coal producers plan complementary long term investment in new mines, mine expansions, above rail and port terminal infrastructure, thereby also promoting efficient investment in Australia’s export infrastructure.
- **System Assumptions:** The HVAU incorporates a process by which ARTC will participate with other service providers in the development of ‘System Assumptions’ for the Hunter Valley coal chain. Consistent use of these common assumptions should facilitate the contracting of capacity on a whole of chain basis, and therefore promote alignment of contracted capacity entitlements and facilitate effective use of the chain overall. ARTC will seek to utilise the commonly agreed Assumptions when calculating capacity for the rail network. Where ARTC does not agree with the common assumptions, a dispute resolution process exists for the ACCC to determine which assumption should be used.
- **Consultation with the HVCCC:** The HVAU incorporates processes by which ARTC consults with the Hunter Valley Coal Chain Coordinator (HVCCC) on a range of capacity management issues, thereby seeking to achieve a coordinated approach to the planning and daily management of coal chain throughput.
- **Network Exit Capability:** The HVAU includes a requirement that parties seeking to enter an agreement for rail access rights to ship export coal also demonstrate an ability to unload their coal shipment at the Port of Newcastle, thereby aligning contractual entitlements. This requirement also seeks to promote the efficient use of the rail network (and supply chain) by discouraging access seekers over-contracting for rail capacity.
- **Consistent protocols for the management of capacity:** Section 5 of the HVAU sets out a range of protocols for the management of capacity on the rail network, many of which are incorporated into the IAHA as non-negotiable terms, thereby promoting a consistent approach to the capacity management issues among users.
- **Investment process:** The investment framework in sections 7 to 11 of the HVAU (discussed further below), seeks to promote aligned investment in new capacity on

the network, by providing for transparency, consultation and stakeholder engagement in relation to investment decisions, and the ability for users to step in and fund a particular expansion in the event that ARTC chooses not to.

These matters are discussed further in subsequent chapters of this document.

1.2.3.2 Efficiency in the use and operation of the network and the promotion of effective competition in upstream and downstream markets

While supply chain alignment considerations to a large extent distinguish the assessment of the HVAU from other access regimes, the ACCC continues to be of the view that HVAU should also operate to promote efficiency in the use and operation of the Hunter Valley rail network and promote competition in related markets. This is consistent with the objects of Part IIIA.

Consequently, the ACCC notes that the June 2011 HVAU includes a number of features that promote the efficient use and operation of the Hunter Valley rail network:

- The financial model and access charging regime in section 4 of the June 2011 HVAU regulate ARTC such that it recovers the efficient cost of providing access to the network.
- The ACCC conducts an annual compliance assessment of ARTC roll forward of the regulatory asset base (**RAB**), and the ACCC has the ability to disallow from inclusion in the RAB for the following period any operating expenditure ARTC has incurred inefficiently.
- Sections 4.17 and 4.18 provide for the determination of an Initial Indicative Service and a ‘final’ Indicative Service. The former will represent the most efficient consumption of coal chain capacity based on the current configuration of the coal chain, while the latter will represent the most efficient consumption of that capacity based on an ideal, optimised configuration. These Indicative Services will then provide the basis for access prices, thereby sending appropriate signals to users on the most efficient consumption of capacity. Mechanisms to transition the charging of access prices to this basis are also included.
- The incorporation of the supply chain alignment features outlined above should promote efficient use of the network by minimising network capacity losses that occur through misalignment of supply chain components.
- Clause 11.4 of the IAHA is an ‘anti-hoarding’ provision, and allows ARTC to remove capacity allocations from access rights holders who cannot, in certain circumstances, demonstrate a sustained need for that capacity. This provision should ensure capacity is available to those parties who want it.
- Clauses 11.5 and 11.6 of the IAHA provide for the variation or cancellation of access rights in circumstances where a user consistently runs services inconsistent with their contracted allocation. Such ‘inconsistent services’ are disruptive to the access rights of other network users, hence the risk of variation or cancellation

should encourage users to run services as allocated, and thereby promote an overall efficient use of the network.

- Clause 16 of the IAHA includes a number of provisions on the trading of capacity between access rights holders. Again, these provisions should facilitate the allocation of capacity to those parties who want it, and as trading occurs in consultation with the HVCCC, also an allocation that is consistent with an aligned supply chain.
- The IAHA seeks to make ARTC accountable for its performance in the delivery of track capacity through the payment of a rebate of take or pay (TOP) charges in certain circumstances. The rebate is calculated by reference to a System True Up Test (TUT), which, if successful, should partially incentivise ARTC to operate the network efficiently to avoid liability for capacity under-delivery.
- Section 13 of the June 2011 HVAU provides for the development of positive performance incentives, both applicable generally under the undertaking and specifically in relation to the System TUT, to incentivise ARTC to operate the rail network infrastructure efficiently.

The ACCC also considers that the efficiencies referred to above (and below in relation to investment), should promote effective competition in a number of upstream and downstream markets. While the ACCC has not conducted a market definition analysis (such as would occur under Part IV of the Act), and therefore not reached a conclusive view on what constitutes a particular upstream or downstream ‘market,’ the ACCC notes that access to the Hunter Valley rail network may have significance for competition between above rail operators for services to coal and non-coal users of the network, and for competition between coal producers for sales to domestic and export customers.

1.2.3.3 Efficient investment in infrastructure

Investment in additional capacity on the Hunter Valley rail network has been the subject of significant interest by stakeholders in the assessment of the April 2009 HVAU and September 2010 HVAU. The ACCC has provided extensive views on this issue in its previous public statements, and ARTC has made extensive revisions to the relevant provisions in the June 2011 HVAU.

While previous versions of the HVAU have included provisions dealing with the creation of additional capacity on the Hunter Valley rail network, coal producer stakeholders have expressed concern that those provisions were not sufficient to ensure timely and efficient investment in the network. In the December 2010 Position Paper, the ACCC recognised that:

...coal producers seek certainty that investment will occur to expand the capacity of the Hunter Valley rail network in alignment with capacity expansions at the coal terminals at the Port of Newcastle, thereby underpinning complementary investment in mine expansions.

The coal industry has, under the aegis of the long term solution, committed to significant investment in the coal terminals to increase overall supply chain output. Specifically, coal producers have entered long term ship-or-pay

contracts with terminal operators to underpin guaranteed capacity expansion over the next ten years.

The ACCC appreciates that, in light of these commitments, concerns exists that ARTC may not make complementary investment to expand the capacity of the rail network, or may not make such investment in a timely, coordinated fashion, and thereby the overall performance of the chain will be limited. Further, the proposed 2010 HVAU contemplates coal producers potentially entering 10 year take or pay contracts with ARTC to underpin rail network investment. The ACCC appreciates that, given these commitments, there is an expectation that investment in the rail network will occur as and when it is needed.⁵

In the June 2011 HVAU, the additional capacity investment framework proposed by ARTC seeks to address these concerns. The framework incorporates the following key features:

- Several pathways by which investment in additional capacity may be pursued, including at the instigation of ARTC, following recommendation by the HVCCC, or at the request of particular access seekers.
- Industry consultation and coordination, including consultation with the HVCCC, engagement with stakeholders via the Rail Capacity Group (**RCG**), and an ability for users to endorse the prudence of investment decisions.
- A user-funding option to allow users to fund investment in new network capacity in circumstances where ARTC chooses not to, and the negotiation of user-funding contracts with ACCC arbitration available in the event of a dispute.
- Clear and transparent decision-making criteria for ARTC when making investment related decisions.
- Provision for the negotiation and execution of contracts for capacity delivery and funding, and for ACCC arbitration in the event of a dispute.

These features are incorporated into the June 2011 HVAU in an extensively restructured and redrafted framework for investment, and the ACCC welcomes the increased clarity and certainty ARTC has brought to these provisions.

Given the revisions ARTC has made to the framework in the June 2011 HVAU, the ACCC considers that it is appropriate for several reasons.

First, it maintains an ability for ARTC to plan for and make investment decisions, and therefore exert appropriate control over significant commercial decisions that will impact its business operations. This is consistent with ARTC's legitimate business interests as lessee of the Network.

The framework also provides for ARTC to plan expansion decisions in cooperation with the HVCCC, have regard to the impact of capacity expansions on coal chain capacity overall, and engage in extensive consultation with access seekers and other

⁵ ACCC, Position Paper, p. 321.

stakeholders. ARTC's intentions in this regard are clearly in the interests of supply chain alignment and consistent with the aims of the long term solution, as well as in the interests of coal access seekers.

Further, the RCG process, and the provision for endorsement of capital expenditure, should promote efficient investment decisions and mitigate risks of 'gold-plating.' That is, the RCG process should provide users with the ability to veto inefficient investments proposed by ARTC.

The ability for ARTC to then seek the ACCC's view on the prudence of a non-endorsed investment should also safeguard against the possibility that efficient investment proposals are otherwise vetoed for non-legitimate reasons, such as via large network users seeking to competitively disadvantage smaller users.

The availability of user-funding is also appropriate, particularly as, under the June 2011 HVAU, it is available as an alternative or fallback where ARTC decides not to fund capacity expansions itself. Operating in this manner, the user-funding option should provide certainty to coal producers that rail network capacity expansions will occur, and thereby provide sufficient certainty to underpin complementary investment in new mines and mine expansions.

Further, the user-funding option should incentivise ARTC to make efficient and timely investment decisions. ARTC will not earn a return on user-funded contributions to capacity expansion, and should therefore have some incentive to pursue capacity expansions in response to demand or otherwise forgo earning additional returns. As investment decisions require RCG endorsement, this should also incentivise ARTC to invest efficiently; that is, investment proposals are subject to scrutiny by users, and as noted above, inefficient decisions may be vetoed. The user funding option should therefore promote efficient investment in infrastructure, as reflected in the objects of Part IIIA of the Act.

In sum, the investment framework in the June 2011 HVAU should provide for efficient investment in the Hunter Valley rail network, in response to increasing demand, and with appropriate recognition of the interests of relevant stakeholders.

Further, as noted above, the HVAU incorporates a tri-partite contracting structure under which coal producers may contract directly with ARTC under long term take or pay contracts, and exercise their access rights via an accredited rail operator. This approach helps coal producers plan complementary long term investment in new mines, mine expansions, above rail and port terminal infrastructure, thereby also promoting efficient investment in Australia's export infrastructure.

1.2.3.4 ARTC's legitimate business interests

The ACCC has had regard to ARTC's legitimate business interests in its assessment of the June 2011 HVAU.

As noted above, the ACCC recognises that while supply chain alignment is a key issue for coal producer access seekers, it must be recognised alongside ARTC's position as lessee of the Hunter Valley rail network. ARTC has gone to some extent to facilitate outcomes in the interests of the broader coal supply chain, but the ACCC recognises that there may be points at which the regime created by Part IIIA cannot

oblige ARTC to go further. This does not, however, prevent the ACCC from accepting the June 2011 HVAU, which incorporates further revisions to promote supply chain alignment that ARTC has chosen to put forward following discussions with industry.

Similarly, the ACCC considers that the investment framework provisions appropriately recognise the interests of the ARTC, maintaining for example an appropriate subjective discretion for ARTC in relation to decisions regarding the funding of new capacity. That is, the HVAU does not force ARTC to fund new investment projects, a step which could have significant consequences for ARTC's commercial position.

The ACCC also notes that the June 2011 HVAU includes a rate of return proposed by ARTC and supported by the majority of network users. Throughout the course of the assessment of the HVAU ARTC has made submissions to the effect that an appropriate rate of return is necessary to provide certainty that the planned investment program for the Hunter Valley rail network will occur. The ACCC considers that given the rate of return is proposed by ARTC, it should satisfy ARTC's concerns in this regard, and provide ARTC with a return commensurate with its commercial and regulatory risks.

1.2.3.5 Interests of non-coal and domestic coal access seekers

As noted earlier, the ACCC recognises that the Hunter Valley rail network is used by services other than for the transport of coal for export. These services include general and bulk freight (such as grain), passenger services, and the shipment of coal from the region's mines to domestic customers, such as power stations.

In the December 2010 Position Paper, the ACCC considered that in many respects the proposed September 2010 HVAU appropriately recognised the interests of these access seekers, including that:

- nothing in the proposed HVAU should operate to circumvent ARTC's statutory obligation under the *Transport Administration Act 1988* (NSW) to prioritise passenger services; and
- ARTC had made amendments to the provisions in section 3, regarding the offer of access, to recognise the circumstances of domestic coal access seekers.

These features remain in the June 2011 HVAU. ARTC has also made further revisions in the June 2011 HVAU to provide additional certainty on the indicative access agreement on offer for non-coal access seekers, and the ACCC also notes that non-coal applicants may seek arbitration under section 3.15 of the June 2011 HVAU in the event of a dispute over access terms. The ACCC also recognises ARTC's statement that non-coal users will not have pricing adjusted as a result of the agreed rate of return.⁶

⁶ ARTC, 2011 HVAU Rate of Return Proposal (Public), 23 June 2011, pp. 2-3.

1.2.3.6 Clarity and certainty

Finally, in the March 2010 Draft Decision and the December 2010 Position Paper the ACCC emphasised ‘clarity and certainty’ as a relevant ‘other matter,’ and went on to identify a range of provisions of the April 2009 HVAU and September 2010 HVAU which it considered either unclear or uncertain, and which it recommended be revised by ARTC.

In emphasising the need for clarity and certainty, the ACCC stated that the HVAU should provide for sufficient certainty and clarity in its terms, effect and operation, so as to:

- enable the access provider and access seekers to be sufficiently aware of their respective rights and obligations, and thereby avoid unnecessary costs, monetary or otherwise, when utilising the processes set out by the HVAU.
- enable the mediator and/or arbitrator appointed pursuant to the HVAU to quickly and effectively resolve any dispute that may arise between an access seeker and the access provider; and
- enable the ACCC to quickly and effectively resolve any potential enforcement concerns that may arise regarding potential non-compliance with the HVAU by ARTC.

The ACCC maintains the view that ensuring sufficient clarity and certainty is an important consideration in the context of the June 2011 HVAU. The access arrangements proposed by the HVAU are highly complex, in terms of the substantive issues involved, the interactions between the undertaking and the related documents, and the various processes by which the access arrangements are implemented. In some instances the arrangements propose features that are novel to access regulation. In its previous statements the ACCC was of the view that in many instances the failure of the drafting of the undertaking to clearly and logically set out the proposed approach contributed to a level of concern amongst stakeholders, and to a conclusion that while the underlying intent of the undertaking may have been appropriate, its implementation was not.⁷

In relation to the June 2011 HVAU, the ACCC recognises that ARTC has incorporated significant revisions to enhance the clarity and certainty of the documents, particularly in relation to the investment framework. The ACCC welcomes these changes.

1.3 Structure of this document

This document is structured as follows:

Chapter 2 is the ACCC’s formal decision to accept the June 2011 HVAU.

Chapter 3 sets out the process that has lead to the ACCC’s decision to accept the June 2011 HVAU, and deals with other procedural matters.

⁷ ACCC, Position Paper, p. 51.

Chapter 4 provides an overview of the June 2011 HVAU, and of the legal test that the ACCC applies when assessing an access undertaking under Part IIIA. The overview of the undertaking highlights changes that have been made since the previous version submitted in September 2010. The general application of the legal test in the context of the HVAU is also discussed.

Chapter 5 discusses ‘key’ issues with the assessment of the HVAU. The issues are ‘key’ in the sense that they have been the subject of significant debate among stakeholders during the assessment of the several iterations of the HVAU, or they relate to sections of the HVAU that have been significantly revised from the September 2010 version to the June 2011 version.

Chapter 6 discusses the remaining issues that were raised in the ACCC’s Position Paper of December 2010 and the relevant revisions by ARTC in the June 2011 HVAU.

2 Decision on June 2011 HVAU

Having regard to the matters listed in section 44ZZA(3) of the *Competition and Consumer Act 2010* (Cth), the ACCC thinks it appropriate to accept the June 2011 HVAU. Consequently, the ACCC has decided to accept the June 2011 HVAU.

The ACCC's reasons for this decision are set out in the following chapters.

3 Process

3.1 Introduction

On 23 June 2011 Australian Rail Track Corporation Limited (**ARTC**) lodged with the Australian Competition and Consumer Commission (**ACCC**) a proposed access undertaking for the Hunter Valley Rail Network (**the June 2011 HVAU**).

On 29 June 2011 the ACCC decided to accept that undertaking, and also published its decision on the ACCC website. This section outlines the process that has led to the ACCC's decision, including the assessment of previous versions of an undertaking for the Hunter Valley Rail Network.

3.2 ARTC's April 2009 HVAU

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**) for assessment under Part IIIA of the *Competition and Consumer Act 2010* (Cth) (**the Act**).⁸ ARTC provided complete pricing information essential to the ACCC's assessment on 13 October 2009.

On 10 February 2010 the ACCC released a Position Paper setting out its preliminary views on the non-price aspects of the April 2009 HVAU.

On 5 March 2010, the ACCC issued a full Draft Decision in which it outlined its preliminary view that it would reject the April 2009 HVAU as being unlikely to be appropriate to accept under Part IIIA of the Act.⁹

In response to the ACCC's Draft Decision, ARTC withdrew the April 2009 HVAU on 19 April 2010.¹⁰

3.3 ARTC's September 2010 HVAU

ARTC submitted a revised access undertaking to the ACCC on 7 September 2010 (**the September 2010 HVAU**) for assessment under Part IIIA of the Act.¹¹

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**). The ACCC was of the view that, while the September 2010 HVAU represented an advancement to the April 2009 version, further changes would be necessary for it to be appropriate to accept.

⁸ The Act was named *Trade Practices Act 1974* (Cth) at that time.

⁹ The ACCC notes that where this document refers to views of the ACCC from the March 2010 Draft Decision, if those views relate to non-price issues, those views were also expressed in the February 2010 Position Paper (with some exceptions). For simplicity the ACCC will cite only the Draft Decision.

¹⁰ 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>.

¹¹ Materials relating to the September 2009 HVAU are available on the ACCC's website at: <http://www.accc.gov.au/content/index.phtml/itemId/945831>.

3.3.1 April 2011 HVAU

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 sought to implement the ACCC's views from the December 2010 Position Paper.

The April 2011 HVAU was not formally a new undertaking application under the Act, and did not re-start the statutory timeframe for assessment. Rather, ARTC requested, and the ACCC 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 then engaged in a consultation process on the April 2011 HVAU, in which it sought views on the extent to which the drafting of the April 2011 HVAU appropriately implemented the recommendations set out in the December 2010 Position Paper. The ACCC sought comments on the April 2011 HVAU by 11 May 2011.

During this period ARTC also engaged with the New South Wales Minerals Council (NSWMC), a representative body for existing export coal producers in the Hunter Valley, on further revisions to the HVAU. These discussions yielded a further package of revisions which were circulated to stakeholders on 18 May 2011. Given these developments, the ACCC continued to accept submissions beyond the original 11 May 2011 deadline.

ARTC requested on 2 June 2011 a further clock-stopper to the statutory timeframe, to which the ACCC agreed on 8 June 2011. This had the effect of extending the decision-making timeframe to 30 June 2011.

ARTC and the NSWMC continued discussions on revisions to the HVAU into June 2011. These discussions culminated with a submission from the NSWMC on 14 June 2011 to the effect that an acceptable consensus had been reached on the outstanding matters.

3.4 ARTC's June 2011 HVAU

ARTC formally lodged a further version of the HVAU on 23 June 2011 (**the June 2011 HVAU**), at the same time as formally withdrawing the September 2010 HVAU application.

This June 2011 version incorporates changes to the HVAU made by ARTC in response to the ACCC's statements of February, March and December 2010, and arising from further engagement by ARTC with stakeholders.¹² It is this undertaking that the ACCC has assessed and accepted.

A summary of the HVAU is included in the following chapter.

¹² The June 2011 HVAU is in effect the April 2011 HVAU, with the further revisions that had been circulated for stakeholder comment in May/June 2011, plus some minor 'tidying-up' amendments.

3.5 Public consultation processes

The ACCC has engaged in extensive consultation on the successive iterations of the HVAU, and notes that submissions were provided 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.

Submissions on the April 2009 HVAU and September 2010 HVAU were taken into account and referred to in the ACCC's February 2010 Position Paper, March 2010 Draft Decision, and December 2010 Position Paper.

The ACCC published the April 2011 HVAU on its website for stakeholder consideration and drew attention to the key aspects of the undertaking that were significantly revised since the submission of the September 2010 HVAU. The ACCC also circulated to stakeholders revisions to the HVAU that had arisen from discussions between ARTC and the NSWMC in May 2011.

3.6 Public submissions received following December 2010 Position Paper

The ACCC received public submissions from the following parties in connection with the April 2011 HVAU and the May 2011 revisions:

- Asciano;¹³
- Bloomfield Collieries;¹⁴
- Coal & Allied;¹⁵
- Donaldson Coal;¹⁶
- NSWMC;¹⁷
- Port Waratah Coal Services (PWCS);¹⁸
- QR National Coal;¹⁹ and

¹³ Asciano, Submission in relation to Revised September 2010 HVAU, 11 May 2011; Asciano, Submission in relation to ARTC 17 May 2011 Suggested Revisions, 1 June 2011.

¹⁴ Bloomfield Collieries, Submission in relation to ARTC 17 May 2011 Suggested Revisions, 23 May 2011.

¹⁵ Coal & Allied, Submission in relation to ARTC 17 May 2011 Suggested Revisions, 20 May 2011.

¹⁶ Donaldson Coal, Submission in relation to ARTC 17 May 2011 Suggested Revisions, 24 May 2011.

¹⁷ NSWMC, Submission in relation to ARTC 17 May 2011 Suggested Revisions, 20 May 2011.

¹⁸ PWCS, Submission in relation to Revised September 2010 HVAU, 11 May 2011.

- Xstrata.²⁰

All of these submissions have been considered and taken into account in the ACCC's assessment of the June 2011 HVAU.

3.7 Confidential submissions

The ACCC notes that it received some confidential submissions as part of its consultation, from both ARTC and from third parties. In this regard, the ACCC notes that a party may request that the ACCC not make the whole or part of a submission public for confidentiality reasons. In the current context, however, only limited weight has been given to confidential submissions made in this process. The ACCC notes that the information provided to it on a confidential basis did not raise any new relevant issues that had not already been raised in public submissions to the ACCC.

Information about the collection, use and disclosure of information provided to the ACCC is set out in 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.

3.8 Timelines

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

¹⁹ QR National Coal, Submission in relation to Revised September 2010 HVAU, 11 May 2011; QR National Coal, Submission in relation to ARTC 17 May 2011 Suggested Revisions, 3 June 2011.

²⁰ Xstrata, Submission in relation to ARTC 17 May 2011 Suggested Revisions, 23 May 2011.

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. While the ACCC does not commence a formal consultation, parties are welcome to make submissions.
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.

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.
	Commencement of 180 day ‘expected period’ for assessment.
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.
	Clock-stopped for public consultation.
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, though in light of ongoing engagement between ARTC and stakeholders, ACCC continues to accept submissions.
2 June 2011	ARTC requests clock-stopper to expected period.
8 June 2011	ACCC agrees to clock-stopper, and expected period is extended to 30 June 2011.
23 June 2011	Withdrawal of ARTC’s September 2010 HVAU.

Timeline – June 2011 HVAU

23 June 2011	ARTC access undertaking relating to the Hunter Valley rail network (the June 2011 HVAU) submitted to the ACCC for assessment under Part IIIA of the Act.
29 June 2011	Decision to accept June 2011 HVAU.

3.9 Further information

The June 2011 HVAU and other relevant material, including previous versions of the HVAU, and submissions from ARTC and stakeholders, are available on the ACCC’s website at the following link:

<http://www.accc.gov.au/content/index.phtml/itemId/994049>

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 2011.'

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

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4 Overview of the undertaking and the legal test

4.1 Overview of the June 2011 HVAU

4.1.1 General scheme of the undertaking

ARTC's June 2011 HVAU regulates access to the Hunter Valley rail network, and broadly comprises the following key features:

- preliminary matters regarding the operation and interpretation of the proposed HVAU;
- a cap on ARTC's allowable revenue and principles and methodologies by which ARTC calculates access charges;
- processes for the negotiation of access contracts, and for arbitration by the ACCC in the event of a dispute between ARTC and access seekers;
- an ability for 'end users' to contract for rail capacity directly with ARTC under long term take or pay contracts, and for the exercise of access rights via accredited rail operators;
- an indicative access agreement, including a rail operator sub-agreement;
- liability and performance measures with implications for both ARTC and access seekers;
- protocols for the allocation and management of capacity on the Hunter Valley rail network;
- processes for the investment in and creation of additional network capacity; and
- operational provisions regarding the management of trains on the network.

In very basic terms, the proposed access arrangements regulate ARTC's pricing; aim to facilitate the agreement of mutually acceptable terms of access between ARTC and access seekers; and govern the management of capacity on the network, including the creation of additional capacity. Consideration is also given to the position of the rail network in the Hunter Valley coal supply chain, which includes liaison between ARTC and the Hunter Valley Coal Chain Coordinator (**HVCCC**).

4.1.2 New revisions included in the June 2011 HVAU

The June 2011 HVAU marks the culmination of an extensive process of development of the regulatory arrangements that will apply to the Hunter Valley Rail Network. Consequently, the June 2011 HVAU incorporates a range of revisions from and additions to the September 2010 HVAU. Key substantive changes in the June 2011 HVAU and associated indicative agreements that are discussed in the following chapters are:

- A five year term;
- Alignment of aspects of the financial model regulating ARTC's access revenues with existing regulatory arrangements;
- Application of loss capitalisation to Pricing Zone 3 only;
- Enhanced ACCC powers for assessment of ARTC's operational efficiency;
- A rate of return supported by export coal producers;
- A two-stage process for the determination of the efficient train configuration;
- Grandfathering of pricing for certain services to facilitate regulatory transition for access seekers;
- Independent price-related dispute resolution processes applying under long-term access agreements if no undertaking is in force under Part IIIA in relation to the Hunter Valley Rail Network;
- Clearer integration of indicative access arrangements for non-coal access seekers;
- Transition framework supported by export coal producers;
- Greater transparency in relation to ARTC assessment of mutually exclusive access applications;
- Review of the system TUT;
- Explicit recognition of the availability of equitable relief under access agreements;
- Accrual of TOP rebates for 'Allowed Tolerance' path usages;
- Audit of TUT compliance;
- Processes to provide for consistency in System Assumptions as between HVCCC and ARTC, including for the resolution of disputes relating to System Assumptions, and for the application of the relevant Assumptions throughout access agreements and the system True-Up Test (TUT);
- Revisions to enhance capacity management and capacity trading protocols; and
- Extensively revised capacity investment framework.

The June 2011 HVAU also includes a range of revisions that implement less substantive recommendations from the December 2010 Position Paper. These revisions are discussed in **Chapter 6**. In addition, the June 2011 HVAU incorporates minor drafting revisions arising from the extensive development of the HVAU that provide for consistency, clarity and certainty in its operation.

4.2 Legislative regime

The test the ACCC applies in deciding whether to accept an access undertaking is set out in section 44ZZA(3) of the *Competition and Consumer Act 2010* (Cth) (**the Act**), which is within Part IIIA of the Act.

Division 6 of Part IIIA provides that the provider of a service (or a person who expects to be the provider of a service) may give an undertaking to the ACCC in connection with the provision of access to the service. An undertaking may specify the terms and conditions on which access will be made available to third parties. The ACCC may accept the undertaking if it thinks it appropriate to do so having regard to the matters set out in section 44ZZA(3). If the ACCC accepts the undertaking, the provider is required to offer third party access in accordance with the undertaking. An access undertaking is binding on the access provider and can be enforced in the Federal Court upon application by the ACCC.

4.3 The legal test – section 44ZZA(3)

Section 44ZZA(3) of the Act provides that the ACCC may accept an access undertaking, if it thinks it appropriate to do so, having regard to the following matters:

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

In relation to the pricing principles, section 44ZZCA of the Act 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; 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.

The ACCC notes as a general comment that section 44ZZA(3) lists matters to which the ACCC is required to have regard, not criteria of which the ACCC must be satisfied. The test under section 44ZZA(3) is whether the ACCC thinks it ‘appropriate’ to accept the undertaking, having regard to the matters in section 44ZZA(3).

4.4 Application of the test to the HVAU – general themes

In its previous statements on the earlier versions of the HVAU, the ACCC has provided a general discussion of the matters in section 44ZZA(3) and how the ACCC has taken them into account during its assessment.²¹ The discussion in this document builds upon and reflects those earlier statements.

Also, it should be noted that this is a general discussion of the matters under section 44ZZA(3) of the Act, which provides an over-arching framework for the detailed analysis in the following chapters. The matters and this general discussion are therefore referred to where appropriate in the subsequent analysis.

4.4.1.1 The long term solution and supply chain alignment

In the March 2010 Draft Decision the ACCC was of the view that the ‘long term solution’ for the Hunter Valley export coal supply chain, and the significance of the Hunter Valley rail network to that supply chain, were relevant ‘other matters’ to which to have regard. The ACCC also recognised the desirability of facilitating ‘alignment’ across the different elements of the supply chain to seek to achieve the objectives sought by the long term solution.²²

A detailed overview of the long term solution is set out in the ACCC’s March 2010 Draft Decision at pages 41 to 47. In summary, however, it refers to steps taken by participants in the Hunter Valley export coal industry to address capacity constraints that have impacted the supply chain for several years. Key stages of this process have included:

²¹ ACCC, Draft Decision, pp. 38-58; ACCC, Position Paper, pp. 50-51.

²² ACCC, Draft Decision, p. 47.

- a review of the coal chain operations in 2008 by the Hon. Nick Greiner AC, and the subsequent development of a framework to govern the expansion and management of the chain (**the Greiner Review**);
- the agreement of an Implementation Memorandum in April 2009 between export terminal operators Port Waratah Coal Services (**PWCS**) and Newcastle Coal Infrastructure Group (**NCIG**), and Newcastle Port Corporation (**NPC**), to address issues with capacity management at the port; and
- the authorisation by the ACCC in December 2009 of long term ‘Capacity Framework Arrangements’ agreed between and put forward by the port terminal operators and NPC.

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

The ACCC continues to view the promotion of alignment between the Hunter Valley rail network and other elements of the Hunter Valley coal chain as a key theme of its assessment. As set out in the Draft Decision at pages 47 to 51, the ACCC is of the view that the promotion of alignment reflects the interests of access seekers and the public interest, and is likely to promote the efficient operation of, use of and investment in the Hunter Valley rail network.

The ACCC also continues to recognise that these alignment considerations are to be viewed alongside the legitimate business interests of ARTC as the access provider, and the interests of parties using the network other than to transport coal (that is, non-coal users). In the December 2010 Position Paper, the ACCC made the following statements:

...There is a continued emphasis by coal producers on issues with the alignment of the supply chain, and there is an increasingly complex and sophisticated effort to seek to address those issues via the proposed [September] 2010 HVAU. In the Draft Decision the ACCC recognised the challenges of incorporating alignment considerations in to the 2009 HVAU, as issues relating to alignment were informed by the operational realities of the supply chain, and also likely to continue to develop over time. These challenges do not appear to have abated in the context of the proposed [September] 2010 HVAU.

ARTC has gone to some extent to facilitate outcomes in the interests of the broader coal supply chain, but the ACCC recognises that there are often points at which ARTC should not be obliged to go further. In this sense, the ACCC recognises an interaction between the interests of supply chain alignment and ARTC’s legitimate business interests. This interaction is perhaps most apparent in relation to the provisions regarding capacity management and investment, where attempts to achieve alignment should recognise ARTC’s position as lessee and manager of the network.

Additionally, while the predominant usage of the Hunter Valley network is for the transportation of coal to the Port of Newcastle for export, the network is also used by some non-coal traffic, and these users should not be overlooked under the proposed access arrangements. Further, while large quantities of coal transported are destined for export, the ACCC also recognises that coal is transported over the network to domestic locations, and that the requirements of that task should be accommodated. The interests of

rail operators should also be recognised. These considerations therefore reflect that interests of persons who might want access to the service – ‘access seekers’ – extend beyond usage of the network for export coal transportation.

The ACCC considers that these comments equally apply in relation to the June 2011 HVAU, although the ACCC recognises that, in light of ARTC’s incorporation of further revisions to the sections of the HVAU relating to capacity management and investment (discussed further below), further development has occurred and further certainty has been provided.

Alignment considerations manifest in numerous aspects of the HVAU, many of which relate to issues of capacity management. These are discussed further in the following chapters.

4.4.1.2 Efficiency in the use and operation of the network and the promotion of effective competition in upstream and downstream markets

While supply chain alignment considerations to a large extent distinguish the assessment of the HVAU from other access regimes, the ACCC continues to be of the view that the HVAU should also operate to promote efficiency in the use and operation of the Hunter Valley rail network and promote competition in related markets. This is consistent with the objects of Part IIIA.

Consequently, the ACCC notes that the June 2011 HVAU includes a number of features that promote the efficient use and operation of the Hunter Valley rail network. These include provisions in the financial model and pricing sections of the HVAU, as well as the capacity management and performance and accountability provisions. These matters are discussed in the following chapters.

The ACCC also considers that the efficiencies referred to above (and below in relation to investment), should promote effective competition in a number of upstream and downstream markets. While the ACCC has not conducted a market definition analysis (such as would occur under Part IV of the Act), and therefore not reached a conclusive view on what constitutes a particular upstream or downstream ‘market,’ the ACCC notes that access to the Hunter Valley rail network may have significance to competition between above rail operators for services to coal and non-coal users of the network, and to competition between coal producers for sales to domestic and export customers.

4.4.1.3 Efficient investment in infrastructure

Investment in additional capacity on the Hunter Valley rail network has been the subject of significant interest by stakeholders in the assessment of the April 2009 HVAU and September 2010 HVAU. The ACCC has provided extensive views on this issue in its previous public statements, and ARTC has made extensive revisions to the relevant provisions in the June 2011 HVAU. The framework incorporates the following key features:

- Several pathways by which investment in additional capacity may be pursued, including at the instigation of ARTC, following recommendation by the HVCCC, or at the request of particular access seekers.

- Industry consultation and coordination, including consultation with the HVCCC, engagement with stakeholders via the Rail Capacity Group (**RCG**), and an ability for users to endorse the prudence of investment decisions.
- A user-funding option to allow users to fund investment in new network capacity in circumstances where ARTC chooses not to, and the negotiation of user-funding contracts with ACCC arbitration available in the event of a dispute.
- Clear and transparent decision-making criteria for ARTC when making investment related decisions.
- Provision for the negotiation and execution of contracts for capacity funding and delivery, and for ACCC arbitration in the event of a dispute.

In sum, the ACCC is of the view that the investment framework in the June 2011 HVAU should provide for efficient investment in the Hunter Valley rail network, and for an appropriate recognition of the interests of stakeholders.

First, the investment provisions maintain an ability for ARTC to plan for and make its own investment decisions, and therefore exert appropriate control over significant commercial decisions that will impact its business operations. This is consistent with ARTC's legitimate business interests as lessee of the network.

The framework also provides for ARTC to plan expansion decisions in cooperation with the HVCCC, have regard to the impact of capacity expansions on coal chain capacity overall, and engage in extensive consultation with access seekers and other stakeholders. ARTC's intentions in this regard are clearly in the interests of supply chain alignment and consistent with the aims of the long term solution, as well as in the interests of coal access seekers.

Further, the RCG process, and the provision for endorsement of capital expenditure, should promote efficient investment decisions and mitigate risks of 'gold-plating.' That is, the RCG process should provide users with the ability to veto inefficient investments proposed by ARTC.

The ability for ARTC to then seek the ACCC's view on the prudence of a non-endorsed investment should also safeguard against the possibility that efficient investment proposals are otherwise vetoed for non-legitimate reasons, such as via large network users seeking to competitively disadvantage smaller users.

The availability of user-funding is also appropriate, particularly as, under the June 2011 HVAU, it is available as an alternative or fallback where ARTC decides not to fund capacity expansions itself. Operating in this manner, the user-funding option should provide certainty to coal producers that rail network capacity expansions will occur, and thereby provide sufficient certainty to underpin complementary investment in new mines and mine expansions.

Further, the user-funding option should incentivise ARTC to make efficient and timely investment decisions. ARTC will not earn a return on user-funded contributions to capacity expansion, and should therefore have some incentive to pursue capacity expansions in response to demand or otherwise forgo earning

additional returns. As investment decisions require RCG endorsement, this should also incentivise ARTC to invest efficiently; that is, investment proposals are subject to scrutiny by users, and as noted above, inefficient decisions may be vetoed. The user funding option should therefore also promote efficient investment in infrastructure, as reflected in the objects of Part IIIA of the Act.

4.4.1.4 ARTC's legitimate business interests

The ACCC has had regard to ARTC's legitimate business interests in its assessment of the June 2011 HVAU.

As noted above, the ACCC recognises that while supply chain alignment is a key issue for coal producer access seekers, it must be recognised alongside ARTC's position as lessee of the Hunter Valley rail network. ARTC has gone to some extent to facilitate outcomes in the interests of the broader coal supply chain, but the ACCC recognises that there may be points at which the regime created by Part IIIA cannot oblige ARTC to go further. This does not, however, prevent the ACCC from accepting the June 2011 HVAU, which incorporates further revisions to promote supply chain alignment that ARTC has chosen to put forward following discussions with industry.

Similarly, the ACCC considers that the investment framework provisions appropriately recognise the interests of the ARTC, maintaining for example an appropriate subjective discretion for ARTC in relation to decisions regarding the funding of new capacity. That is, the HVAU does not force ARTC to fund new investment projects, a step which could have significant consequences for ARTC's commercial position.

The ACCC also notes that the June 2011 HVAU includes a rate of return proposed by ARTC and supported by the majority of network users. Throughout the course of the assessment of the HVAU ARTC has made submissions to the effect that an appropriate rate of return is necessary to provide certainty that the planned investment program for the Hunter Valley rail network will occur. The ACCC considers that given the rate of return is proposed by ARTC, it should satisfy ARTC's concerns in this regard, and provide ARTC with a return commensurate with its commercial and regulatory risks.

4.4.1.5 Interests of non-coal and domestic coal access seekers

As noted earlier, the ACCC recognises that the Hunter Valley rail network is used by services other than for the transport of coal for export. These services include general and bulk freight (such as grain), passenger services, and the shipment of coal from the region's mines to domestic customers, such as power stations.

In the December 2010 Position Paper, the ACCC considered that in many respects the proposed September 2010 HVAU appropriately recognised the interests of these access seekers, including that:

- nothing in the proposed HVAU should operate to circumvent ARTC's statutory obligation under the *Transport Administration Act 1988* (NSW) to prioritise passenger services; and

- ARTC had made amendments to the provisions in section 3 regarding the offer of access to recognise the circumstances of domestic coal access seekers.

These features remain in the June 2011 HVAU. ARTC has also made further revisions in the June 2011 HVAU to provide additional certainty on the indicative access agreement on offer for non-coal access seekers, and the ACCC also notes that non-coal applicants may seek arbitration under section 3.15 of the June 2011 HVAU in the event of a dispute over access terms. The ACCC also recognises ARTC's statement that non-coal users will not have pricing adjusted as a result of the agreed rate of return.²³

4.4.1.6 Clarity and certainty

Finally, in the March 2010 Draft Decision and the December 2010 Position Paper the ACCC emphasised 'clarity and certainty' as a relevant 'other matter,' and went on to identify a range of provisions of the April 2009 HVAU and September 2010 HVAU which it considered either unclear or uncertain, and which it recommended be revised by ARTC.

In emphasising the need for clarity and certainty, the ACCC stated that the HVAU should provide for sufficient certainty and clarity in its terms, effect and operation, so as to:

- enable the access provider and access seekers to be sufficiently aware of their respective rights and obligations, and thereby avoid unnecessary costs, monetary or otherwise, when utilising the processes set out by the HVAU.
- enable the mediator and/or arbitrator appointed pursuant to the HVAU to quickly and effectively resolve any dispute that may arise between an access seeker and the access provider; and
- enable the ACCC to quickly and effectively resolve any potential enforcement concerns that may arise regarding potential non-compliance with the HVAU by ARTC.

The ACCC maintains the view that ensuring sufficient clarity and certainty is an important consideration in the context of the June 2011 HVAU. The access arrangements proposed by the HVAU are highly complex, in terms of the substantive issues involved, the interactions between the undertaking and the related documents, and the various processes by which the access arrangements are implemented. In some instances the arrangements propose features that are novel to access regulation. In its previous statements the ACCC was of the view that in many instances the failure of the drafting of the undertaking to clearly and logically set out the proposed approach contributed to a level of concern amongst stakeholders, and to a conclusion that while the underlying intent of the undertaking may have been appropriate, its implementation was not.²⁴

²³ ARTC, 2011 HVAU Rate of Return Proposal (Public), 23 June 2011, pp. 2-3.

²⁴ ACCC, Position Paper, p. 51.

In relation to the June 2011, the ACCC recognises that ARTC has incorporated significant revisions to enhance the clarity and certainty of the documents, particularly in relation to the investment framework. The ACCC welcomes these changes.

5 Assessment of the June 2011 HVAU – ‘key’ issues

5.1 Introduction

While the preceding discussion outlined general themes for the assessment of the HVAU, the ACCC’s views on the particular provisions of the June 2011 HVAU are set out in this and the following chapter.

This chapter discusses issues that have been the subject of significant debate during the assessment of the HVAU, or which relate to sections of the HVAU that have been significantly revised from the September 2010 HVAU to the June 2011 HVAU. The following chapter discusses remaining issues that were raised in the ACCC’s December 2010 Position Paper. The inclusion of issues in this or the following chapter should not be taken as an indication of the ‘weighting’ the ACCC has given to a particular issue.

The discussion in these chapters should also be read in conjunction with the ACCC’s December 2010 Position Paper, and consequently the structure of the chapters follows that of the Position Paper.

5.2 Preliminary Matters

5.2.1 Term of the undertaking

ARTC has proposed that the June 2011 HVAU run for a period of five years. This is a change in position from the April 2009 HVAU and September 2010 HVAU, where ARTC had proposed an undertaking term of ten years.

In both the March 2010 Draft Decision and the December 2010 Position Paper, the ACCC expressed reservations with a ten year term, given that particular features of the undertaking (especially regarding ongoing operational issues on the coal network) are yet to be developed, that others are subject to review, and given the uncertainty around how parts of the undertaking will operate in practice. These considerations suggested that a term of ten years may not be appropriate, and that a shorter term may instead be appropriate.²⁵

However, the ACCC also acknowledged that a shorter term may not provide sufficient certainty to ARTC or access seekers, particularly in relation to investment decisions, if there was an expectation that the entire regulatory regime would be re-opened after a short period of time.²⁶

The ACCC did not, however, in either the Draft Decision or the Position Paper, provide a final view on what would be an appropriate term for the HVAU.

²⁵ ACCC, Draft Decision, p. 95; Position Paper, pp. 61-63.

²⁶ ACCC, Position Paper, pp. 63-4.

Following discussions with ARTC in connection with the April 2011 HVAU, the New South Wales Minerals Council (NSWMC) provided a submission to the ACCC supporting a five year term. The NSWMC stated:

‘...although NSWMC continues to have reservations about various aspects of the Revised April 2011 HVAU, there is recognition among industry participants of a need to move the HVAU process forward and to achieve at least some of the goals sought to be achieved by industry in the implementation of the HVAU.

...Although progress has been made in relation to the terms of the HVAU, including as a result of the HRATF’s discussions with ARTC over the last week, the HRATF believes this reduced term is appropriate given its continuing reservations in relation to aspects of the Revised April 2011 HVAU....’²⁷

Several individual coal producers also made public submissions to the ACCC supporting a five year term for the HVAU.²⁸

QR National Coal provided a submission in relation to the April 2011 HVAU supporting the ten year term as then proposed by ARTC, as well as supporting the expansion of the review of the undertaking that was proposed to occur after five years.²⁹

5.2.1.1 ACCC view

The ACCC considers that the five year term proposed by ARTC is appropriate, for the reasons outlined in the Position Paper, but particularly given the agreement between ARTC and the majority of access seekers on the issue.

While the ACCC recognises that in appropriate circumstances a longer term for an undertaking may provide greater certainty for investment decisions of both the access provider and access seekers, the facts of the current matter do not support this conclusion. The ACCC notes that the majority of access seekers have supported a five year undertaking, suggesting that long term investment certainty deriving from a long term undertaking was not a strong consideration on their part; ARTC has also chosen to submit a five year undertaking. The ACCC also notes that the June 2011 HVAU (as well as its previous incarnations) incorporates a number of reviews and contemplates a number of features yet to be developed, and consequently the ACCC considers that the June 2011 HVAU to some extent is a transitional step from the NSW Rail Access Undertaking under which ARTC is currently regulated. As such, the ACCC considers a shorter term is appropriate in the circumstances.

²⁷ NSWMC, Submission, 20 May 2011, p. 1.

²⁸ Bloomfield Collieries, Submission in relation to ARTC 17 May 2011 Suggested Revisions, 23 May 2011; Coal & Allied, Submission in relation to ARTC 17 May 2011 Suggested Revisions, 20 May 2011; Donaldson Coal, Submission in relation to ARTC 17 May 2011 Suggested Revisions, 24 May 2011. Xstrata, Submission in relation to ARTC 17 May 2011 Suggested Revisions, 23 May 2011.

²⁹ QR National Coal, Submission, 11 May 2011, p. 1.

5.2.2 Contract structure

Section 1.4 of the June 2011 HVAU describes various contracting structures that are available to potential access seekers:

- an access seeker seeking Coal Access Rights may enter an Access Holder Agreement directly with ARTC, provided the access rights are exercised through an Accredited Operator who has an Operator Sub-Agreement (OSA) with ARTC that has been endorsed by the access seeker);
- an Operator may enter an Access Holder Agreement with ARTC for Coal Access Rights, but will also need an OSA to exercise those rights;
- an Operator may enter a *single* Access Agreement for *non*-Coal Access Rights, which agreement confers both the access rights and the right to exercise those access rights; or
- an access seeker who is not an Operator may enter a single Access Agreement for non-Coal Access Rights *and* procure an Operator to exercise those rights, provided all the terms of the agreement are met by either the access seeker or the Operator.

In relation to the structures for Coal Access Rights, the ACCC noted in the March 2010 Draft Decision that the approach by which an access seeker may contract for rights directly with ARTC is consistent with the ‘Guiding Principles’ for contractual alignment included as Schedule 5 to the Implementation Memorandum for the long term solution. Specifically, Guiding Principle 1 provides that the onus is on the coal producer to secure commercial arrangements to transport coal from the mine to the ship.

The proposed contract structure under the HVAU provides for the producer to directly secure below rail capacity from ARTC, and the ACCC considers that this is likely to be appropriate as being in the interests of coal chain alignment. Further, this approach helps coal producers plan complementary long term investment in new mines, mine expansions, above rail and port terminal infrastructure, thereby also promoting efficient investment in Australia’s export infrastructure.

5.3 Financial Model

Section 4 of the June 2011 HVAU regulates ARTC’s access prices. The section includes a financial model (a revenue cap) together with principles and methodologies for determining access charges. The financial model in section 4 implements a revenue cap, which constrains the maximum access revenues ARTC may earn over the term of the HVAU in accordance with the application of a Building Block Model (BBM). The financial model also includes a ‘loss capitalisation’ component, which is discussed further below.

5.3.1 Consistency of the financial model

In the Position Paper, the ACCC noted the complex relationships between aspects of the financial model contained in section 4 of the September 2010 HVAU.³⁰ The ACCC considered that it was necessary for ARTC to make revisions to ensure that the model is implemented with sufficient clarity and certainty.³¹ These revisions included:

- providing for ARTC's allowed revenues to correspond with the implementation of the BBM in section 4;³²
- providing for the implementation of the BBM in section 4 to include half a year of inflation of capital expenditure;³³
- ensuring that the Ceiling Limit in section 4.3 is only relaxed where ARTC experiences an actual shortfall in access revenues relative to BBM allowed revenues (that is, where loss capitalisation occurs);³⁴
- recognising that ARTC actually earns revenues and incurs expenses over the course of the whole year, and reflecting this in the financial model;³⁵
- providing for operating expenditure included in allowed revenues to be consistent with the operating expenditure included in the Loss Capitalisation Model (LCM) roll-forward;³⁶ and
- ensuring that section 4 implements a consistent Depreciation approach.³⁷

5.3.1.1 June 2011 HVAU

In response to the Position Paper, ARTC has incorporated a range of changes into section 4 of the June 2011 HVAU. A number of these changes seek to address the ACCC's views in the Position Paper, whilst others seek to align the approach in the HVAU to the financial modelling included in the NSW Rail Access Undertaking (NSWRAU) that regulated ARTC's revenues prior to the HVAU.³⁸

Amendments included in the June 2011 HVAU that seek to directly address ACCC views include:

- Amending the definition of 'Out-turn Opex' under section 4.4(a), which now includes cross-references to a number of elements of 'Economic Cost' under section 4.5 that are included in ARTC's allowed revenues; and

³⁰ ACCC, Position Paper, p. 85.

³¹ ACCC, Position Paper, p. 85.

³² ACCC, Position Paper, p. 85.

³³ ACCC, Position Paper, p. 86.

³⁴ ACCC, Position Paper, p. 85.

³⁵ ACCC, Position Paper, pp. 85-86.

³⁶ ACCC, Position Paper, p. 87.

³⁷ ACCC, Position Paper, p. 87.

³⁸ Rail Infrastructure Corporation and Rail Corporation New South Wales, *NSW Rail Access Undertaking pursuant to Schedule 6AA of the Transport Administration Act 1988 (NSW)*, http://www.railcorp.info/_data/assets/file/0018/675/nsw_rail_access_undertaking.pdf.

- Defining ‘Depreciation’ in section 14 of the June 2011 HVAU, and utilising this concept for all references in section 4 of the HVAU to depreciation of assets included in the asset base under section 4.4(b).

ARTC has also revised the calculation method prescribed under section 4.5(a)(iii) to determine the ‘return on asset’ component of its allowed revenues. ARTC proposes that its return on assets should be calculated in the same manner as occurs under the NSWRAU, where the return is calculated by reference to the average of the starting and ending values of the asset base.

5.3.1.2 ACCC view

While ARTC has included amendments to the financial model in the June 2011 HVAU to address the views of the ACCC from the Position Paper, ARTC has also included amendments that seek to incorporate aspects of the financial model applying under the NSWRAU. The effect of this is that the June 2011 HVAU includes these ‘legacy’ elements while also incorporating new elements introduced for the purposes of the HVAU, such as the use of ‘loss capitalisation.’ In particular, the 2011 HVAU maintains an approach whereby the return on assets component of ARTC’s allowed revenues is calculated by reference to the average of the opening and closing asset base values, as was provided under the NSWRAU.

The ACCC considers that where ARTC has chosen to address specific ACCC views expressed in the Position Paper, the amendments included in the 2011 HVAU are appropriate. However, the ACCC has reservations about the elements of the financial model carried over from the NSWRAU, particularly when combined with the new elements introduced for the purposes of the HVAU.

In the Position Paper, the ACCC noted that, when implemented correctly, the BBM allows a regulated service provider to recover the present value of its investment over the life of the investment.³⁹ In order to determine whether there is an expectation that the present value of the investment will be recovered, it is necessary to consider the expected present value of the regulated firm’s revenue streams. The timing of the receipt of revenue is a key driver of the present value of a revenue stream, given the time value of money. While allowed revenues under a BBM are likely to be sensitive to the timing assumptions employed, the implementation of a BBM should not systematically result in a regulated firm expecting to achieve a non-zero present value from its investment.

The ACCC recognised these considerations in the Position Paper when taking the view that ARTC should account in the financial model for the value to ARTC of its actual receipt of revenues before the end of the year.⁴⁰ The ACCC considered that it was particularly pertinent to recognise this value in circumstances where ARTC is seeking to treat capital expenditure as occurring in the middle of a year.⁴¹

The ACCC notes that the financial model in the June 2011 HVAU continues to include inconsistent cash flow timing assumptions, as the model assumes that capex

³⁹ ACCC, Position Paper, pp. 65-66.

⁴⁰ ACCC, Position Paper, p. 86.

⁴¹ ACCC, Position Paper, p. 86.

occurs in the middle of the year while also assuming cash flows from revenue and operating expenses occur at the end of the year. In the absence of other compensating mechanisms, this mismatch provides a significant windfall gain (that is, compared to an approach where cash flows are aligned mid year). It also appears to the ACCC that the calculation of the return on assets using an arithmetic average of the opening and closing values of the asset base as specified in the HVAU is inaccurate. This misalignment of cash flows and rate of return averaging methodology results in a disconnect between the application of the loss capitalisation roll forward (RAB roll-forward) and ARTC's implementation of the building block roll forward (RAB Floor Limit), as well as a lack of precision in calculating ARTC's allowed revenues under the HVAU. This lack of precision may, in some circumstances, provide for undesirable incentives that may not promote economically efficient investment in infrastructure in accordance with section 44AA. The ACCC considers that it should be possible to achieve a much greater level of precision in this calculation with minimal additional complexity, and consequently the ACCC does not agree with ARTC's approach on these matters.

Despite these reservations, the ACCC considers that, on balance, it is appropriate at this stage to accept the financial model in the June 2011 HVAU. While the 'mechanics' of the implementation of the model are flawed, the ACCC is of the view that in the circumstances it provides an appropriate overall constraint on ARTC's revenues. Importantly, the ACCC recognises that the Hunter Valley Rail Network has been subject to regulation in accordance with the NSWRAU for some time and that a degree of imprecision in the mechanics of the financial model is tolerable in the context of a transition to the new and complex regime of the HVAU. That is, maintaining some alignment of the June 2011 HVAU with corresponding elements of the NSWRAU provides for a measure of continuity for parties during this transition, particularly ARTC, access seekers and rail operators. Further, other aspects of the 2011 HVAU are likely to undergo further development during the term of the undertaking, and in a similar vein the ACCC would expect that any subsequent undertaking from ARTC in relation to the Hunter Valley rail network would have no need to maintain links with the NSWRAU.

In the absence of the specific circumstances of this matter, the ACCC may be unlikely to accept a financial model of the kind contained in the June 2011 HVAU.

The ACCC therefore considers at this time that, on balance, its views in the Position Paper are adequately addressed in the June 2011 HVAU.

5.3.2 Loss Capitalisation

ARTC has incorporated the use of 'loss capitalisation' into the HVAU financial model, which would allow ARTC to include into the RAB and recover at a later period in time revenue shortfalls it had sustained during earlier periods.

In the Position Paper, the ACCC considered that the use of loss capitalisation should be confined to new investment in 'Pricing Zone 3'; that is, the region of the network where there is relatively lower demand for rail access services, and where ARTC would be most likely to under-recover in the short term, particularly in relation to

capital investments in new capacity.⁴² The ACCC also considered that the HVAU would require a number of consequential amendments to effectively implement this view, such as including asset bases for existing assets and new investment in Pricing Zone 3, and certain revenue allocation obligations on ARTC in relation to these asset bases.⁴³

The June 2011 HVAU confines the use of loss capitalisation to Pricing Zone 3, but applies in relation to both new investment and existing assets. ARTC submits that users in Pricing Zone 3 are supportive of this approach to loss capitalisation,⁴⁴ and the ACCC has received statements from Pricing Zone 3 users to this effect.

5.3.2.1 ACCC view

The ACCC reiterates its views from section 5.6.3 of the December 2010 Position Paper regarding the intent and application of loss capitalisation.⁴⁵ In particular, the ACCC notes that:

The intent of loss capitalisation is to allow under-recovery of economic cost for a period and then recovery of the relevant shortfall at a later date. In appropriate circumstances, loss capitalisation may therefore operate to facilitate investment in new assets where there is limited initial demand by allow initial under-recovery of relevant costs in the expectation of ‘making up’ the shortfall when demand reaches an appropriate level. Loss capitalisation may not, of course, be the only method of encouraging investment in these circumstances, and the particular form of its implementation may require scrutiny.⁴⁶

The ACCC therefore has some reservations with the proposal from ARTC that seeks to allow the capitalisation of losses in relation to existing assets in Pricing Zone 3. The ACCC is, however, prepared to accept incorporation of loss capitalisation as proposed in the June 2011 HVAU on the basis that users of the network in Pricing Zone 3 have provided to the ACCC statements not objecting to its implementation in this manner. The ACCC views this direct engagement from parties likely to be affected as critical to acceptance of the proposal ARTC has put forward, and emphasises that in other contexts a similar approach to loss capitalisation may not be regarded as acceptable.

In light of this, the ACCC considers that it is appropriate to accept the loss capitalisation approach as set out in the June 2011 HVAU, and that the consequential amendments concerning the separation of Pricing Zone 3 asset bases outlined in the Position Paper are unnecessary.

5.3.3 Efficiency

In the December 2010 Position Paper, the ACCC considered that it was necessary for ARTC to revise the definition of ‘economic cost’ in section 4.4 of the September 2010 HVAU, and to provide explicit powers for the ACCC to disallow inefficiently

⁴² ACCC, Position Paper, p. 81.

⁴³ ACCC, Position Paper, pp. 83-84.

⁴⁴ ARTC, Explanatory Guide - ARTC Response to ACCC HVAU Position Paper, 8 April 2011, p. 2.

⁴⁵ ACCC, Position Paper, pp. 80-82.

⁴⁶ ACCC, Position Paper, p. 81.

incurred operating expenditure as part of the annual compliance assessment. The ACCC considered these changes necessary in order to appropriately promote the efficient use and operation of, and investment in, the Hunter Valley rail network.⁴⁷

In the June 2011 HVAU, ARTC has proposed a more concise definition of Efficient under section 14:

“Efficient” means, in respect to costs and operating expenditure, costs incurred by a prudent service provider managing the Network, acting efficiently, having regard to any matters particular to the environment in which management of the Network including:

- (a) the Hunter Valley Coal Chain where a key objective in maintenance planning is to maximise coal chain throughput and reliability;
- (b) ARTC’s obligations to maintain the Network having regard to the terms of applicable Access Agreements and Access Holder Agreements existing at the time; and
- (c) ARTC’s obligations under the law, applicable legislation (including regulations) or the NSW Lease.

The undertaking also now provides that the ACCC shall determine whether ARTC has incurred Efficient costs and Efficient operating expenditure when conducting the annual compliance assessment under section 4.10(e):

The ACCC will determine whether ARTC has incurred Efficient costs and Efficient operating expenditure in accordance with **section 4.5(b)**, and determine the change (if any) to:

- (i) the total unders and overs amount or allocation; and
- (ii) closing RAB in **section 4.4(a)**,

that results from Economic Cost under **section 4.5(a)** only including Efficient costs and Efficient operating expenditure determined in accordance with **section 4.5(b)**.

The ACCC considers these revisions adequately address the concerns expressed in the Position Paper.

The ACCC also notes that section 4.5(b) of the June 2011 HVAU has been revised to allow for efficiency assessment of allocations of return on and depreciation of Non-Segment Specific Assets included in Economic Cost, and considers that it is appropriate for this section to do so. The ACCC notes ARTC’s submission that users of the Network may benefit from the scale of ARTC’s broader operations beyond the Hunter Valley in relation to these assets,⁴⁸ and will have regard to the potential for ARTC’s corporate operations to contribute to the efficient management of the Network when assessing these allocated amounts.

⁴⁷ ACCC, Position Paper, pp. 94-95.

⁴⁸ ARTC, June 2011 HVAU Amendments Listing and Explanation, p. 8.

5.3.4 Rate of Return

5.3.4.1 September 2010 HVAU and December 2010 Position Paper

ARTC's September 2010 HVAU included the following section 4.7(a) relating to the rate of return:

- (a) The Rate of Return will be equivalent to ARTC's weighted average cost of capital ("WACC") as accepted by the ACCC after consideration of all risks with the commercial environment in which ARTC operates on the Network, the elements of which will include:
 - (i) a capital asset pricing model ("CAPM") method of determining the cost of equity;
 - (ii) a debt to equity ratio which would be considered prudent for ARTC's business in relation to the Network by reputable lenders; and
 - (iii) an appropriate adjustment (beta) factor to the equity risk margin appropriate for investment in railway infrastructure forming part of the Network.

The section therefore provided for the calculation of the rate of return by reference to the WACC. At the time, ARTC proposed a real pre-tax WACC of 9.16%.

In the December 2010 Position Paper, the ACCC considered that a real pre-tax WACC of 8.57% was more likely to reflect a rate of return consistent with current market conditions and commensurate with the commercial and regulatory risks borne by ARTC.⁴⁹ In arriving at this view the ACCC applied the pricing principles specified in section 44ZZCA of the Act, and, where possible, also estimated individual WACC parameters by using the Capital Asset Pricing Model (CAPM).⁵⁰ The ACCC recognised that there were limitations to the application of the CAPM given the uncertainty around particular parameters the subject of proceedings in the Australian Competition Tribunal, and consequently the ACCC took a pragmatic and conservative approach supported by the matters set out in section 44ZZA(3).⁵¹

5.3.4.2 June 2011 HVAU

In the June 2011 HVAU ARTC has proposed that a real pre tax rate of return of 9.10 per cent should apply for the term of the undertaking.

ARTC has amended section 4.8 to specify that:

- the real pre-tax rate of return shall be 9.10 per cent; and
- the nominal pre-tax rate of return shall be 11.83 per cent.

In particular, ARTC now no longer references the rate of return under the HVAU to the WACC, as was the case in the September 2010 HVAU.

⁴⁹ ACCC, Position Paper, p. 103.

⁵⁰ ACCC, Position Paper, p. 103.

⁵¹ ACCC, Position Paper, pp. 100-103.

ARTC submits that the vast majority of the users of the Network that will be affected (likely to account for over 88% of all use of the Network in 2011) by the higher rate of return have expressed their support for a real pre-tax rate of return of 9.10 per cent.⁵²

ARTC also submits that this rate of return will not cause a pricing adjustment for non-coal users of the Network from the prices that would be paid by these users if the real pre-tax rate of return was 8.57 per cent.⁵³

ARTC further states that it considers that it is extremely unlikely that any user of the Network, other than coal producers, will be affected by this increase in the rate of return during the term of the June 2011 HVAU.⁵⁴

Existing coal producers on the Hunter Valley network have effectively endorsed ARTC's proposed rate of return (see further below).

5.3.4.3 ACCC view

The ACCC has assessed the June 2011 HVAU under section 44ZZA(3) of the Act, which allows the ACCC to accept the undertaking if it thinks it appropriate to do so, having regard to the matters specified in that section. One of the matters to which the ACCC must have regard under section 44ZZA(3) are the pricing principles specified in section 44ZZCA.

Section 44ZZCA(a)(ii) provides that regulated access prices should include a return on investment commensurate with the regulatory and commercial risks involved. As stated above, in the Position Paper the ACCC analysed the risks ARTC faced and the measures in the HVAU that mitigated those risks.⁵⁵ The ACCC also took into account the recommended revisions to the September 2010 HVAU, many of which have now been incorporated into the June 2011 HVAU.⁵⁶

A significant development since the release of the ACCC's December 2010 Position Paper has, however, been the engagement between ARTC and coal producers to finalise terms of what became the June 2011 HVAU. An outcome from this engagement was a submission to the ACCC from the NSWMC, on behalf of all existing export coal producers in the Hunter Valley, that it would not oppose the rate of return sought by ARTC if ARTC incorporated certain revisions into the 2011 HVAU.⁵⁷ The following individual coal producers also made public submissions endorsing the NSWMC view:

- Bloomfield Collieries;⁵⁸
- Coal & Allied;⁵⁹

⁵² ARTC, 2011 HVAU Rate of Return Proposal (Public), 23 June 2011, p. 3.

⁵³ ARTC, 2011 HVAU Rate of Return Proposal (Public), 23 June 2011, p. 4.

⁵⁴ ARTC, 2011 HVAU Rate of Return Proposal (Public), 23 June 2011, p. 3.

⁵⁵ ACCC, Position Paper, pp. 106-112.

⁵⁶ ACCC, Position Paper, p. 102.

⁵⁷ NSWMC, Submission in relation to ARTC 17 May 2011 suggested revisions, 20 May 2011, p. 2.

⁵⁸ Bloomfield Collieries, Submission in relation to ARTC 17 May 2011 Suggested Revisions, 23 May 2011.

- Donaldson Coal;⁶⁰ and
- Xstrata.⁶¹

ARTC has also incorporated into the June 2011 HVAU the changes sought by coal producers necessary to obtain endorsement of ARTC's proposed rate of return. On 13 June 2011, the NSWMC provided a submission to the ACCC recognising that the changes have been made, and thereby endorsing acceptance of the HVAU with ARTC's proposed rate of return.

However, the ACCC also recognises that not every user of the Network is party to the position agreed between ARTC and the NSWMC. The Network is also utilised by non-coal traffic, while future entrants not currently utilising the network may not necessarily support the proposed return. On balance, however, the ACCC notes in this regard that:

- the parties to the agreement are likely to pay the substantial majority of access revenues earned by ARTC during the term of the HVAU;⁶² and
- ARTC has submitted that the agreed rate of return will not cause prices to be adjusted for non-coal users of the Network.⁶³ These include passenger services, general and bulk freight.

The ACCC considers that, overall, it is appropriate to accept the 2011 HVAU with a 9.1 per cent real pre-tax rate of return. As mentioned above, the ACCC has in previous public statements assessed ARTC's proposed rate of return according to a financial analysis that is common to regulatory decision-making, and the ACCC has given regard to the relevant matters under section 44ZZA(3) of the Act. In taking this approach the ACCC has arrived at a view on an appropriate rate of return. This is a standard regulatory approach for estimating a rate of return for regulated service providers with market power.

However, the endorsement of ARTC's higher proposed rate of return by the majority of access seekers in this context is an important additional consideration, as it essentially reflects an agreement between ARTC and the largest group of users of the network. The 'premium' proposed to the ACCC's view on the rate of return also does not of itself appear unreasonable or excessive, as it reflects that ARTC has in turn agreed to assume additional obligations. While the financial analysis outlined above provides a proxy for what would be an efficient return in a competitive environment, in this case the agreement between ARTC and users adds an empirical dimension, in part reflecting a commercial agreement. The ACCC considers this to be a beneficial contribution to the rate of return assessment.

⁵⁹ Coal & Allied, Submission in relation to ARTC 17 May 2011 Suggested Revisions, 20 May 2011.

⁶⁰ Donaldson Coal, Submission in relation to ARTC 17 May 2011 Suggested Revisions, 24 May 2011.

⁶¹ Xstrata, Submission in relation to ARTC 17 May 2011 Suggested Revisions, 23 May 2011.

⁶² ARTC, ARTC 2011 HVAU Rate of Return Proposal (Public), 23 June 2011, p. 3.

⁶³ ARTC, ARTC 2011 HVAU Rate of Return Proposal (Public), 23 June 2011, p. 4.

It is important to emphasise though that had the ACCC not previously conducted its own analysis of the rate of return, it would have had reservations with merely accepting an ‘agreed’ position, as it is not true that in all circumstances an agreed rate of return between an access provider and a group of access seekers will be appropriate to accept. For example, an agreed rate of return may not necessarily promote the efficiency and competition objectives of Part IIIA, the public interest, or the interests of all access seekers if, for instance, it would merely exemplify an exercise of market power by the access provider, or be passed through as significant price increases for downstream consumers.

The ACCC also wishes to note that, as the 2011 HVAU now includes a specified rate of return, finalisation of an ACCC view on individual WACC parameters has not been necessary.

5.4 Pricing

5.4.1 Determination of the efficient train configuration (Indicative Service)

5.4.1.1 Position Paper

In the Position Paper, the ACCC noted that the September 2010 HVAU did not include final characteristics for an Indicative Service, but provided for access charges to be calculated by reference to ‘Interim’ Indicative Services. The ACCC considered that the determination of an Indicative Service for inclusion in the HVAU important to promote the efficient use of the Hunter Valley rail network, as the Indicative Service should provide appropriate price signals to encourage efficient consumption of rail capacity.⁶⁴

While the September 2010 HVAU did not include a finalised Indicative Service, the ACCC considered that it may nonetheless be appropriate to accept provided that there was:

- a robust process to determine and implement the Indicative Service;
- an ability for Access Holders to transition to the Indicative Service once implemented, including a ‘grandfathering’ period for certain Access Holders.⁶⁵

The ACCC considered the process proposed under the 2010 HVAU to determine the Indicative Service, and considered that in order for this process to be appropriate, it should:

- require ARTC to submit revised Indicative Service characteristics in the event its initial proposal is not accepted by the ACCC, within a timeframe specified by the ACCC;⁶⁶

⁶⁴ ACCC, Position Paper, p. 133.

⁶⁵ ACCC, Position Paper, p. 134

⁶⁶ ACCC, Position Paper, p. 137.

- provide for a clear transition mechanism for existing Access Holders to adopt the Indicative Service;⁶⁷
- require ARTC to consider whether the use of gross-tonne kilometres (gtkm) to calculate access charges promotes efficiency, or whether another approach is optimal;⁶⁸ and
- oblige ARTC to submit a variation to the HVAU to include efficient final Indicative Service characteristics within six months of receiving relevant information from the HVCCC, and in any event submit this variation within twelve months of the commencement of the undertaking.⁶⁹

The ACCC also considered that ARTC should appropriately consult with all relevant parties, including Operators, when consulting to determine its proposal to incorporate the Indicative Service into the HVAU.⁷⁰

5.4.1.2 June 2011 HVAU

Since the release of the ACCC's December 2010 Position Paper, engagement has occurred between ARTC and coal producers to finalise terms of what became the June 2011 HVAU. One result of this engagement is in the inclusion of a revised process for determination of the Indicative Service in the June 2011 HVAU.

The June 2011 HVAU provides for multi-stage approach for determination of the Indicative Service. The undertaking now provides for determination of an 'Initial' Indicative Service and associated charges within 5 months, based on existing HVCCC modelling and coal chain infrastructure constraints (section 4.17), and the determination of a 'Final' Indicative Service, to occur when enhanced optimisation modelling is available within 30 months (section 4.18).

ARTC submitted that it was advised by coal producers of their need for early advice of what constitutes the efficient train configuration, and consequently proposed this multi-stage approach.⁷¹ ARTC submitted industry has recognised that:

- early advice may not deliver an Indicative Service and Indicative Access Charge that provide for optimal utilisation of coal chain capacity in all circumstances, but it will deliver a practicably achievable outcome on the basis of existing HVCCC modelling and existing coal chain infrastructure constraints;⁷² and
- the Indicative Service and Indicative Access Charge may be revised when more thorough and comprehensive optimisation modelling has been undertaken in the future.⁷³

⁶⁷ ACCC, Position Paper, p. 138.

⁶⁸ ACCC, Position Paper, p. 134.

⁶⁹ ACCC, Position Paper, p. 135.

⁷⁰ ACCC, Position Paper, p. 136.

⁷¹ ARTC, Letter re suggested revisions to April 2011 HVAU, 17 May 2011, p. 5.

⁷² ARTC, Letter re suggested revisions to April 2011 HVAU, 17 May 2011, p. 5.

⁷³ ARTC, Letter re suggested revisions to April 2011 HVAU, 17 May 2011, p. 5.

ARTC has also made a number of other amendments to the June 2011 HVAU to address views expressed in the Position Paper:

- ARTC has inserted section 4.18(b)(i), which provides that ARTC will consult with the HVCCC, Access Holders and Operators to determine the indicative service, and whether gtkm is the appropriate pricing unit.
- ARTC has included an obligation under section 4.18(f) to submit a revised variation to include final Indicative Service characteristics in the HVAU to the ACCC in the event that ARTC's initial variation is not accepted.

ARTC has provided under section 4.18(e)(ii) that it will offer Indicative Services to Access Holders with existing contracted train paths when the Indicative Service comes into effect.

5.4.1.3 Stakeholder views

NSWMC

The NSWMC submitted during the development of the June 2011 HVAU that a key issue to be addressed was the nature and process for ARTC's determination of the most efficient train size and the appropriate pricing basis for rail paths.⁷⁴

The ACCC understands that the multi-stage process for determining the Indicative Service under the June 2011 HVAU was developed by ARTC in consultation with the NSWMC, as the representative of all existing coal producers.

NSWMC recognises that the June 2011 HVAU progresses the issues raised in this submission in its subsequent submission of 13 June 2011.⁷⁵

Asciano

Asciano submits that the process for determining the efficient train configuration under the 2011 HVAU:

- Does not adequately recognise the link between determination of the Final Indicative Service and coal chain optimisation;⁷⁶
- Creates uncertainty by allowing for determination of Final Indicative Services after commencement of the HVAU;⁷⁷
- Provides for a timeframe for determination of Final Indicative Services that is in excess of twelve months in the Position Paper, and postpones this determination until December 2013;⁷⁸ and

⁷⁴ NSWMC, Submission in relation to ARTC 17 May 2011 Suggested Revisions, 20 May 2011, pp. 2-3.

⁷⁵ NSWMC, Further submission in relation to ARTC 17 May 2011 Suggested Revisions, 13 June 2011, p. 1.

⁷⁶ Asciano, Submission in relation to ARTC 17 May 2011 Suggested Revisions, 1 June 2011, p. 2.

⁷⁷ Asciano, Submission in relation to ARTC 17 May 2011 Suggested Revisions, 1 June 2011, p. 2.

⁷⁸ Asciano, Submission in relation to ARTC 17 May 2011 Suggested Revisions, 1 June 2011, p. 2.

- Does not implement efficient pricing.⁷⁹

Asciano also queries the level of complexity involved in determining Final Indicative Services, and notes that delays in determination exacerbate congestion.⁸⁰

QR National Coal

QR National Coal submitted that the determination of Initial Indicative Services creates additional uncertainty for coal producers and an additional layer of complexity for transition.⁸¹

5.4.1.4 ACCC view

The ACCC notes that the June 2011 HVAU contemplates a multi-stage approach to the development of an Indicative Service and price signals to promote efficient consumption of capacity. This approach provides for evolution of reference coal services under the HVAU as follows:

- Interim Indicative Services to apply from commencement in accordance with section 4.19;
- Initial Indicative Services to be developed within 5 months in accordance with section 4.17; and
- Final Indicative Services to be developed within 30 months in accordance with section 4.18.

This approach differs from the process under the 2010 HVAU, as it now provides for:

- Determination of service characteristics for efficient utilisation of coal chain capacity within existing infrastructure constraints within 5 months; and
- Additional detail about the scope of the process for determination of Final Indicative Services, which is to be completed within 30 months.

The ACCC appreciates that determination of optimal service characteristics that promote efficient utilisation for an optimised coal chain may be a complex exercise, and considers that it is appropriate for ARTC and industry to have 30 months for development of coal chain modelling and thorough consultation. While the ACCC recognises that this approach results in delayed determination of Final Indicative Services beyond the 12 month period contemplated by the Position Paper, the ACCC notes that this approach is supported by coal producers who will ultimately be using the service. Further, within the context of a now five year undertaking, the determination of the Initial and 'Final' Indicative Services are essentially transitional steps leading to the determination of an optimal configuration that should be included in any future undertaking.

⁷⁹ Asciano, Submission in relation to ARTC 17 May 2011 Suggested Revisions, 1 June 2011, p. 2.

⁸⁰ Asciano, Submission in relation to ARTC 17 May 2011 Suggested Revisions, 1 June 2011, p. 2.

⁸¹ QR National Coal, Submission in relation to ARTC 17 May 2011 Suggested Revisions, 3 June 2011, pp. 1-2.

In the interim, it is also appropriate that service characteristics that promote the efficient use of the current infrastructure are determined. This provides for the first stage of a transition towards service characteristics that will ultimately promote the efficient operation of, use of and investment in infrastructure.

Consequently, the ACCC considers that this multi-stage approach provides a suitably robust approach to determination of Indicative Services, as it provides for:

- accelerated identification of Initial Indicative Service characteristics, which should provide pricing signals regarding the efficient consumption of coal chain capacity within the constraints of the existing infrastructure; and
- comprehensive determination of Final Indicative Service characteristics, which should promote the efficient consumption of coal chain capacity with optimized coal chain infrastructure.

The ACCC also considers that ARTC has adequately addressed other specific ACCC views in relation to the determination of Final Indicative Services expressed in the Position Paper.

The ACCC considers that section 4.18(e)(ii) provides for existing users to transition to the Indicative Service, and thus adequately addresses the concerns expressed in the Position Paper. The ACCC therefore considers that this section is appropriate.

The ACCC considers that section 4.18(b)(i) should provide for adequate consultation with industry stakeholders when developing the final Indicative Service, and notes that the ACCC may undertake public consultation in relation to a subsequent variation application by ARTC. The ACCC further considers that section 4.18(b)(i) provides for a suitable review of the appropriateness of the gtkm pricing unit. The ACCC therefore considers that section 4.18(b)(i) is appropriate.

The ACCC also considers that section 4.18(f) should provide for the implementation of the efficient train configuration to occur expeditiously once this configuration has been determined, and is therefore appropriate.

5.4.2 Grandfathering arrangements

5.4.2.1 December 2010 Position Paper

The ACCC considered in the Position Paper that while the HVAU should provide a means for existing Access Holders to transition to the Indicative Service once implemented, the ACCC also recognised that this should incorporate appropriate ‘grandfathering’ arrangements for parties that had made investments on the basis of interim arrangements.⁸²

The ACCC acknowledged in the Position Paper that parties have entered commercial arrangements in reliance on statements made by ARTC in a letter of 6 May 2009, that it was committing to not changing the basis of its GTKm based pricing for a period of

⁸² ACCC, Position Paper, p. 138.

not less than five years, and that it was to maintain pricing parity between the two key existing train types operating in the Hunter Valley for that period.⁸³

In the Position Paper the ACCC noted that the 6 May 2009 letter should not limit its consideration of the appropriate pricing approach under the HVAU, but also recognised that parties have, in reliance on the letter, made significant commercial decisions, and that the interests of access seekers are relevant.⁸⁴

The ACCC considered that it was appropriate for the HVAU to incorporate grandfathering arrangements to ensure that those parties that had invested in good faith on the basis of ARTC's statement have sufficient time to adjust to the new arrangements, once determined. The grandfathering should not, however, impact the ability of other parties to move to the new arrangements based on the Indicative Service, and the corresponding pricing. The ACCC also considered that the grandfathering should apply until 30 June 2014 to allow sufficient time for parties to adjust.⁸⁵

5.4.2.2 June 2011 HVAU

In the June 2011 HVAU, ARTC has included a charge differentiation factor in section 4.15(a)(iii) that states TOP and Non-TOP prices may be the same for both Interim Indicative Services in Pricing Zones 1 and 2 until 31 December 2014. The section states:

- (a) In formulating its Charges for Coal Access Rights other than Coal Access Rights for an Indicative Service contracted for under an Indicative Access Holder Agreement, ARTC will:
 - ...
 - (iii) for the purpose of assisting transition between regulatory and contractual arrangements and to remove uncertainty to support investment decisions relating to Trains, charge the same price for the two primary existing services using the Network as at the Commencement Date in accordance with **sub-paragraphs (A) and (B)** below during the Regulatory Transition Period:
 - (A) the Charges for the services described in **section 4.19(c)** as Interim Indicative Service 1 and Interim Indicative Service 2 in Pricing Zone 1 may be the same, and the Charges for Interim Indicative Service 1 and Interim Indicative Service 2 in Pricing Zone 2 may be the same, notwithstanding those services will no longer constitute Interim Indicative Services after the Interim Period; and
 - (B) for the purposes of this **section 4.15(a)(iii)**, Charges are taken to mean the unit TOP price and unit Non-TOP price.

⁸³ ACCC, Position Paper, p. 138.

⁸⁴ ACCC, Position Paper, p. 138.

⁸⁵ ACCC, Position Paper, p. 138.

5.4.2.3 ACCC view

The ACCC considers that section 4.15(a)(iii) is appropriate as a grandfathering mechanism that recognises the interests of access seekers, and in the event of a pricing related access dispute would interpret the section in this way. The ACCC considers it a matter for ARTC that a commitment was made outside of the scope of what was submitted as part of the undertaking application in April 2009, and that ARTC is concerned with maintaining that commitment.

While section 4.15(a)(iii) is expressed to operate until 31 December 2014, rather than 30 June 2014 as recommended in the Position Paper, the ACCC is satisfied that, given the HVAU provides for pricing to be calculated by reference to calendar rather than financial years, this is not inappropriate.

5.4.3 Future pricing once HVAU expires

In the Position Paper, the ACCC noted that access agreements may continue for a period beyond the term of the September 2010 HVAU. ARTC had consequently used a specially defined term for ‘Access Undertaking’ in clause 4 of Schedule 3 to the IAHA; that is, providing that setting of prices and resolution of disputes would be dealt with by reference to a Part IIIA undertaking while one was in force, or otherwise by reference to ‘access protocols published by ARTC after consultation with Access Holders.’ The ACCC expressed concern that this approach would essentially leave pricing under executed access agreements to ARTC’s discretion following the expiry of the HVAU, if it were not replaced by another Part IIIA undertaking.⁸⁶

In response, ARTC has inserted clause 4.2 into Schedule 3 of the IAHA. This clause provides for the access protocols, which are determined by ARTC in consultation with industry, to include an effective resolution process for pricing disputes:

4.2 Dispute resolution under access protocols

If the Access Undertaking comprises the access protocols published by ARTC (in the circumstances contemplated by the definition of Access Undertaking under **clause 1.1**), ARTC will include in those access protocols, an effective resolution process to provide for binding determination by an independent arbitrator of any disputes between the Access Holder or ARTC in relation to the Prices.

The ACCC recognises that an approach by which ARTC lost any ability to set prices once the HVAU expired would create significant risk for ARTC. Such an approach would, however, incentivise ARTC to prepare and submit a revised undertaking to replace the June 2011 HVAU in a timely fashion. Nonetheless, the ACCC considers that the requirement for the access protocols to include binding determination by an independent arbitrator in the event of dispute on prices is a sufficient approach, as it provides some recourse for access seekers, pending either the resubmission by ARTC of a further Part IIIA undertaking, or an application for declaration of the Hunter Valley rail network.

⁸⁶ ACCC, Position Paper, p. 147.

5.5 Negotiating for Access

5.5.1 Non-coal users

The Hunter Valley rail network, while predominantly used to ship export coal from the region's mines to the Port of Newcastle for export, is also used by non-coal traffic.

In the December 2010 Position Paper, the ACCC was of the view that appropriate incorporation into the HVAU framework of the Indicative Access Agreement from ARTC's 2008 Interstate Access Undertaking may be sufficient to provide an 'indicative non-coal access agreement.' The ACCC noted that while ARTC had gone some way to providing for this in the September 2010 HVAU, it had not addressed a number of inconsistent interactions between the HVAU document and the Indicative Access Agreement from the Interstate Undertaking.⁸⁷

In the June 2011 HVAU, ARTC has included provisions in section 3.14(b)(ii) to better facilitate the integration of the Interstate Indicative Access Agreement into the HVAU framework. The section provides that ARTC will offer applicants seeking non-coal access rights:

...an Access Agreement on the terms and conditions contained in the Indicative Interstate Access Agreement but amended to:

- (i) define the network covered by the Access Agreement as the Network subject to this Undertaking;
- (ii) incorporate those provisions identified as Tier 1 (mandatory) Non Coal Provisions in **Schedule A:2**;
- (iii) delete the section relating to extensions and additional capacity (being clause 4.7 as at the Commencement Date) to the extent it relates to the Network;
- (iv) any other amendments reasonably considered necessary to take into account the particular circumstances of the Hunter Valley and to be consistent with the terms of this Undertaking,

but to avoid doubt the Access Rights sought by the Applicant will not be considered an indicative service for the purposes of the Indicative Interstate Access Agreement and those terms and conditions applicable to an indicative service in the Indicative Interstate Access Agreement will not apply;⁸⁸

The ACCC considers that these changes should better integrate the Interstate Indicative Access Agreement into the HVAU framework. The ACCC also notes that applicants may seek arbitration under section 3.15 of the HVAU in the event of a dispute.

5.5.2 Transition arrangements

In the December 2010 Position Paper the ACCC extensively discussed the issue of the practical implementation of the proposed undertaking, including the transition of

⁸⁷ ACCC, Position Paper, pp. 163-165.

⁸⁸ ARTC HVAU section 3.14(b)(ii)(A).

existing users of the network to the new access and contractual arrangements.⁸⁹ The ACCC also discussed this issue in the March 2010 Draft Decision.

In the Position Paper, the ACCC outlined the following initial steps for ARTC to take to facilitate transition to the new access arrangements and which may, to some extent, allay stakeholder concerns:

- ARTC providing a non-binding public statement of the capacity on the Hunter Valley rail network for 2011 and the remainder of the regulatory period, including also the relevant assumptions on which ARTC has based its estimate;
- coal producer access seekers providing to ARTC non-binding capacity nominations for 2011 and the remainder of the regulatory period;
- ARTC providing to each coal producer access seeker non-binding train path schedules outlining the capacity entitlements of that coal producer for 2011 and the remainder of the regulatory period;
- ARTC making revisions to section 3.13 of the proposed 2010 HVAU, regarding mutually exclusive access applications, in line with the ACCC's views below; and
- ARTC providing to non-coal access seekers a written indication of their likely contractual arrangements and capacity entitlements.⁹⁰

The ACCC was of the view that it would consider whether a more prescriptive approach to transition would be necessary if these smaller steps failed to achieve a satisfactory degree of certainty.⁹¹

On 10 December 2010, ARTC provided a letter to stakeholders outlining its proposed transition arrangements. ARTC provided a further letter on 20 April 2011, following the submission of the April 2011 HVAU.

ARTC circulated a further transition proposal on 13 June 2011, following discussions with the NSWMC. This proposal incorporates, for coal access rights the following features:

- Coal producers will be required to demonstrate to ARTC that they have network exit capability via written confirmation from the HVCCC that there is sufficient Coal Chain Capacity to offload the anticipated coal associated with the requested Path Usages at the relevant discharge points.
- Given current modelling and previous non-binding nominations, ARTC expects that producers who enter into contracts either before or after the HVAU commences will have unconditional track capacity rights for 2011 for all below rail requirements.

⁸⁹ ACCC, Position Paper, pp. 177-189.

⁹⁰ ACCC, Position Paper, p. 186.

⁹¹ ACCC, Position Paper, p. 186.

- Assuming projects identified in the Corridor Capacity Strategy for 2012 are delivered as projected, ARTC expects that there will be adequate track capacity to cover applications for 2012 as well.
- At the request of industry, ARTC has published its general capacity review of the Hunter Valley rail network for the 10-year period from 2011 via the Corridor Capacity Strategy dated March 2011.
- There is no intention that producers who contract early with ARTC will be able to avoid conditions associated with additional capacity by being the 'first to contract.'
- Negotiations for access applications will be undertaken in accordance with the process set out in the HVAU. Therefore, assuming a commencement date of 1 July 2011:
 - ARTC proposes that producers will provide ARTC with revised indicative Train Path nominations or confirmation of their previous nominations within 30 business days from 1 July 2011 and work towards providing an indicative Train Path Schedule within this transition period (from 1 July to 12 August 2011).
 - Within 30 business days from the end of this transition period (by 23 September 2011), ARTC will provide indicative Train Path Schedules and work with producers towards agreeing final Train Path Schedules.
 - At 30 business days from the end of the transition period, ARTC will deem and acknowledge the nominations received within the transition period and associated Train Path Schedules to be Access Applications submitted by the producers in accordance with the HVAU unless a producer notifies ARTC otherwise.
 - At 23 September 2011, ARTC will advise industry, in relation to the remainder of 2011 the applicable: Maintenance Months, Maintenance Losses; Network Path Capability and the Monthly Tolerance Cap.
 - From 23 September to 23 December 2011 (unless extended by the parties), ARTC and the Applicant will conduct negotiations and enter into an Access Agreement. The dispute resolution provision in the HVAU will apply to these negotiations.
- The current arrangements whereby producers obtain track access indirectly through their haulage contracts with QR National, Pacific National and Freightliner will continue to apply until producers are transitioned over to AHAs.

In relation to non-coal access rights, the proposal incorporates the following features:

- Non-coal users are not required to adopt the AHA/OSA model, but can if requested.

- ARTC does not intend to renegotiate the longer term contracts some non-coal users have that are based on the Interstate Track Access Agreement.
- Non-coal users on short term extensions of existing contracts can negotiate for access under the principles set out in the HVAU once the HVAU commences.
- ARTC will reserve at no charge, for 30 business days (from 1 July to 12 August), existing train paths used by non-coal users under agreements existing immediately before commencement of the HVAU where they are to be used for substantially the same purpose as the pre-existing train paths.
- Non-coal users can still seek access in accordance with the NSW RAU prior to commencement of the HVAU. However, ARTC will negotiate in line with the proposed approach in the HVAU, with the resultant contracts being able to operate under the HVAU.

5.5.2.1 ACCC view

The ACCC notes that ARTC has, as a result of discussions with industry, agreed to a transition process that contains the following broad features:

- Coal producers to provide indicative Train Path nominations within 30 business days of commencement of the HVAU;
- ARTC to provide indicative Train Path Schedules within 60 business days. ARTC will treat those nominations and Train Path Schedules as an Access Application under the HVAU;
- After 60 business days, ARTC will advise industry of, amongst other things, network capacity and the applicable tolerance;
- The Applicant to negotiate with and enter into contracts with ARTC within a 3 month period (23 September to 23 December 2011) unless the period is extended by agreement.

The ACCC welcomes the additional detail that industry and ARTC have agreed to in relation to the proposed transitional arrangements that are intended to apply as users of ARTC's Hunter Valley rail network are transferred from the regulatory regime set out in the NSW RAU to that in the HVAU.

The ACCC is therefore of the view that the proposed approach to transition provides both non-coal users and coal producers with an appropriate level of certainty as the intended timeframes are reasonable and should facilitate effective transition.

The ACCC also welcomes ARTC's statement that existing users of the network who take advantage of the transition process that has been set out in the letter of 13 June 2011 will receive equitable treatment as part of the transition to the new arrangements. This should allay concerns that certain users of the network will receive more favourable treatment as a result of contracting early with ARTC.

The ACCC also notes that agreement on an appropriate transition proposal was one of the NSWMC's conditions to supporting ARTC's proposed rate of return.

5.5.3 Mutually exclusive access applications

Section 3.13 of the June 2011 HVAU addresses the situation where ARTC receives two or more access applications based on existing capacity and ARTC cannot reasonably accommodate each. ARTC designates such applications as being 'mutually exclusive.'

In the December 2010 Position Paper the ACCC was of the view that section 3.13 created significant uncertainty, particularly seen in the context of the transition to the new access arrangements set up by the HVAU. The ACCC noted that it was unclear what constituted 'mutually exclusive access applications,' including the points in time at which such applications may arise, and that the section lacked transparency as to how ARTC would implement the 'net present value test' to resolve such conflicts. The ACCC recommended that the section be revised to provide greater clarity and certainty.⁹²

In the June 2011 HVAU, ARTC has revised section 3.13 to provide greater clarity and certainty. The ACCC notes that the section now:

- specifies what may constitute a 'Mutually Exclusive Access Application' and when it may occur;
- obliges ARTC, if requested, to provide reasonable assistance to an access seeker to identify whether an application can be amended such that it will not constitute a Mutually Exclusive Access Application; and
- provides for ARTC to offer to pro-rate access rights in situations where conflicting applications constitute a comparable present value to ARTC.

The ACCC considers that the revisions to the section have addressed the comments from the Position Paper regarding the ambiguity of the section.

5.5.4 Network Exit Capability and Capacity Condition Precedent

5.5.4.1 June 2011 HVAU

Following discussions between ARTC and the NSWMC, ARTC has incorporated revisions to the 'Capacity Condition Precedent' in clause 4.1 of the Train Path Schedule to the IAHA. In previous versions of the IAHA, the equivalent to this provision required an access holder utilising coal access rights to demonstrate 'Network Exit Capability' in relation to their rail network capacity allocation; that is, an ability to offload the anticipated coal volume associated with the relevant track capacity allocation at a discharge point at the Port of Newcastle.

In the IAHA attached to the June 2011 HVAU, the Network Exit Capability requirement remains, but the provision has been revised to provide that the access

⁹² ACCC, Position Paper, p. 188.

holder must also provide written confirmation from the HVCCC that there is sufficient coal chain capacity to offload the anticipated coal volume (see clause 4.1(a)(ii)).

5.5.4.2 ACCC view

In the December 2010 Position Paper, the ACCC reiterated its view from the Draft Decision that a ‘network exit capability’ requirement is likely to be appropriate, particularly as being in the interests of supply chain alignment.⁹³ The ACCC was also of the view that it was appropriate for the requirement to include some flexibility to accommodate different circumstances of different access seekers.⁹⁴

The ACCC considers that the addition to the Network Exit Capability requirement in the IAHA attached to the June 2011 HVAU is appropriate, again reflecting the interests of supply chain alignment. The ACCC notes that the provision was supported by the NSWMC, representing existing export coal producers. The clause is also not mandatory for non-coal users or domestic coal users. Further, the ACCC consulted on the clause with stakeholders in the context of the assessment of a notification under section 93(1) of the Act lodged by ARTC on 7 June 2011.⁹⁵

5.6 Performance and Accountability

In the December 2010 Position Paper, the ACCC considered the elements of ARTC’s September 2010 HVAU, IAHA and OSA that related to liability for performance as an overall ‘package’ of measures.⁹⁶ The elements considered were:

- the liability provisions in the IAHA and OSA;
- the take-or-pay (TOP) rebate mechanism in the IAHA;
- the Key Performance Indicators (KPIs) under the September 2010 HVAU and referred to in the IAHA; and
- the performance incentives referred to under section 8.3 and section 2 of Schedule D of the September 2010 HVAU (see further below).⁹⁷

The ACCC considered that while certain elements may not, of themselves, necessarily be considered appropriate, taken holistically, and subject to ARTC making certain further revisions, the overall approach was likely to be appropriate.⁹⁸

⁹³ ACCC, Position Paper, p. 171.

⁹⁴ ACCC, Position Paper, p. 172.

⁹⁵ ARTC, N95429, 7 June 2011, available on the ACCC’s public notifications register. Under this notification ARTC proposed to supply services under agreements consistent with the Indicative Access Holder Agreement subject to the condition that relevant access holders demonstrate sufficient network exit capability at the Port of Newcastle and obtain and provide evidence or advice from the HVCCC in relation to the impact on Coal Chain Capacity. On 29 June 2011 the ACCC advised ARTC it would not take any further action in relation to the notified conduct at that stage.

⁹⁶ ACCC, Position Paper, p. 214.

⁹⁷ ACCC, Position Paper, p. 214.

⁹⁸ ACCC, Position Paper, p. 215.

The ACCC noted that the liability provisions in the IAHA as proposed by ARTC considerably limited ARTC's liability, and that the sole remedy for any conduct or incident which results in ARTC failing to make Train Paths or Path Usages available to an Access Holder was a rebate of TOP charges.⁹⁹

The ACCC considered that it was necessary for ARTC to make a number of revisions to the TOP rebate provisions, including the system true-up test (TUT) as a critical input into the rebate calculation, in order to ensure the TOP rebate mechanism was sufficiently robust and transparent.¹⁰⁰

The ACCC therefore considered that revisions to the regime were required to:

- recognise the availability of non-monetary equitable remedies under the IAHA;¹⁰¹
- provide for greater objectivity in relation to the determination of 'Network Path Capability' under the system TUT;¹⁰²
- provide for the accrual of rebates under the TOP rebate mechanism for certain circumstances where Tolerance is not made available;¹⁰³
- include an independent audit of ARTC's calculations under the system TUT; and
- provide for the submission of a comprehensive performance incentive proposal to the ACCC in a timely fashion.¹⁰⁴

ARTC has incorporated amendments to the performance and accountability regime under the 2011 HVAU that seek to address the ACCC views expressed in the Position Paper. In addition, ARTC has provided for a review of the system TUT after two full calendar years.

The revisions to the 2011 HVAU that address ACCC views in the Position Paper are considered below.

5.6.1 Recognition of equitable remedies

In the Position Paper, the ACCC identified the need for ARTC to clarify the availability of equitable remedies for the overall performance and accountability regime to be considered appropriate.¹⁰⁵

In response, ARTC has inserted clause 13.1(b) into the June 2011 IAHA, which provides:

- (b) To avoid doubt, **clause 13.1(a)(vi)** does not prevent the Access Holder from seeking equitable non-monetary relief, including an injunction or

⁹⁹ ACCC, Position Paper, p. 215.

¹⁰⁰ ACCC, Position Paper, p. 215.

¹⁰¹ ACCC, Position Paper, p. 215.

¹⁰² ACCC, Position Paper, p. 215.

¹⁰³ ACCC, Position Paper, p. 215.

¹⁰⁴ ACCC, Position Paper, p. 216.

¹⁰⁵ ACCC, Position Paper, p. 215.

declaration, in relation to a breach or anticipated breach of this agreement by ARTC except that such relief cannot include any form of damages or monetary compensation for a failure to provide a Path Usage or an obligation on ARTC to make a replacement Path Usage available

The ACCC considers that this clause is likely to provide sufficient recognition of the ability for parties to seek equitable non-monetary relief in circumstances where it is appropriate for parties to do so.

5.6.2 TOP rebates and the system true up test (TUT)

5.6.2.1 Overview of the mechanism

The payment of TOP rebates for failure to deliver path usages is the sole mechanism in the IAHA by which ARTC is held accountable for its performance under contract.

The implementation of this approach is highly complex, and the ACCC here sets out a general summary.

Circumstances where an Access Holder is entitled to a rebate

Clause 5.4 of the IAHA provides for the payment of a ‘TOP Rebate’ following the completion of the Annual Reconciliation process, which is informed by the ‘system true-up test’ (TUT) performed in accordance with Schedule 2 of the IAHA.

Accrual and calculation of the rebate – the system true-up test

The system TUT provides for the calculation and accrual of a rebate an Access Holder may be entitled to under clause 5.4.

Clause 2 of the Schedule provides that, at the end of each allocation period (monthly or quarterly), ARTC will carry out the system TUT for each Pricing Zone to determine the aggregate ‘System Availability Shortfall’ for all Access Holders with the relevant allocation period.

The System Availability Shortfall is determined by comparing the ‘Network Path Capability’ (or NPC) with the ‘Total Path Usages’ required (or TPR). In simple terms, the comparison is intended to determine whether there was, for the relevant period, sufficient capacity on the Network to deliver all contractual entitlements, taking into account reductions in capacity caused by maintenance, usage by non-coal trains and other factors.

In determining the TPR, the TUT assesses whether ARTC made available sufficient capacity in the Pricing Zone to meet:

- (a) the BPUs [Base Path Usages] it contracted to provide to access holders;
- (b) the Pricing Zone MTC [Monthly Tolerance Cap] (i.e. ARTC’s commitment to all access holders as a group);
- (c) any additional (i.e. Ad Hoc) coal paths provided;
- (d) the system losses caused by other parties (the lesser of actual and forecast losses);

- (e) actual system losses caused by ARTC (both maintenance and operational); and
- (f) commitments to non-coal traffic.¹⁰⁶

However, to the extent that any paths identified by ARTC as ‘system losses’ or ‘ARTC maintenance’ and included in the TPR are due to an ‘Availability Exception,’ they will be subtracted from the TPR.¹⁰⁷ Essentially this means that events outside of ARTC’s control do not impact the TUT calculations.

The NPC is determined under clause 2.3 of Schedule 2. ARTC submits that NPC is a functional measure of the number of coal paths a Pricing Zone is capable of providing in a particular period.¹⁰⁸ Specifically:

In determining the NPC of a Pricing Zone, ARTC will determine how many Functional Coal Paths the Pricing Zone is capable of providing on the assumption that the Network was only used for Coal Trains and the Coal Train used complied with the track related System Assumptions and any other measure of Network performance which ARTC reasonably considers will have an impact on the capacity of the Network (after consultation with the HVCCC).

ARTC will assess the number of Functional Coal Paths available in each Pricing Zone at a particular point in that Pricing Zone. The use of a single point estimate is a necessary proxy as capacity within a Pricing Zone will change with infrastructure capability changes through that zone (e.g. signalling headways, number of tracks etc). An alternative option to a single point measure would be ‘average’ capacity which would reflect the capacity at each junction and weighted towards the amount of traffic at each junction. However, such an approach would involve complex judgments as to how planned capacity losses (e.g. planned maintenance outages or system losses) should be allocated and the adoption of arbitrary assumptions given the multiplicity of sources and sinks for coal traffic. ARTC’s view is that a single point estimate will deliver a superior (more accurate) estimate of capacity than a weighted average estimate. ARTC understands that this approach is consistent with capacity reporting undertaken by the HVCCC.¹⁰⁹

‘Functional Coal Paths’ are then defined in clause 2.3(b) of Schedule 2:

...a Functional Coal Path is one which is capable of being used by a Coal Train which complies with the track-related System Assumptions, which are elements (f) - (j) of the Relevant System Assumptions.¹¹⁰

Where a System Availability Shortfall is found to exist for a Pricing Zone for a particular period, then an Access Holder will accrue a rebate of the ‘Train Path TOP Charge’ paid for each Train Path within that Pricing Zone for that period (calculated by a formula in clause 2.4 of Schedule 2). The Shortfall is allocated between Access Holders who did not use their BPU’s in the relevant period in proportion to their share

¹⁰⁶ ARTC, *Hunter Valley Access Undertaking - Explanatory Guide (September 2010)*, 7 September 2010, p. 48.

¹⁰⁷ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, pp. 48-9.

¹⁰⁸ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 52.

¹⁰⁹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 52.

¹¹⁰ ARTC, *Access Holder Agreement for Indicative Services in the Hunter Valley*, 23 June 2011, Schedule 2, clause 2.3(b).

of the sum of all individual shortfalls.¹¹¹ The June 2011 HVAU includes a process for an Access Holder to seek the inclusion of certain Tolerance path usages (known as ‘Allowed Tolerance’) in that Access Holder’s individual shortfall, and thus accrue a rebate of the Train Path TOP Charge paid for these Tolerance path usages.¹¹²

Where no Shortfall is found to exist, rebates do not accrue.

Annual Reconciliation

Under the Annual Reconciliation process, ARTC will then determine whether the ‘Actual Path Usages’ (or APU) used by the Access Holder during the year was equal to or exceeded its ‘Annual Contracted Path Usages’ (or ACP). ARTC states that this reflects that any shortfall in an Access Holder’s use of its Base Path Usages may be balanced by additional path usage in a subsequent period via the use of Tolerance or Ad Hoc Path Usages.¹¹³

An Access Holder may be entitled to a TOP Rebate if the Actual Path Usages is less than the Annual Contracted Path Usages, in which case the Rebate will be equal to the lesser of:

...the rebate applicable for the annual deficiency in contracted Path Usages for that Train Path in the Pricing Zone and the sum of the accrued system rebates under **Schedule 2** in respect of that Train Path in the Pricing Zone...¹¹⁴

That is, to the extent that an Access Holder is entitled to a rebate under clause 5.4, it is determined by reference to the TOP Charges paid for the Train Path in that Pricing Zone.¹¹⁵

ARTC proposes that the TOP Rebate payable under Clause 5.4 to an Access Holder under the Annual Reconciliation process will be the lesser of the annual shortfall rebate and the accrued TUT rebates. Consequently, if an Access Holder uses all its Base Path Usages, or has not accrued TUT rebates, ARTC is not intended to have any liability to that Access Holder for any failure to make path usages available.

If an Access Holder is entitled to a rebate for a particular year, then ARTC will make a payment within 20 Business Days of completing the Annual Reconciliation.¹¹⁶

5.6.2.2 NPC and System Assumptions

In the Position Paper, the ACCC considered that Network Path Capability must be determined as objectively as possible to ensure the effective operation of the TUT, and hence the effectiveness of the TOP rebate mechanism.¹¹⁷

In the 2011 HVAU, ARTC has provided for Access Holder Agreements to reflect a subset of System Assumptions, known as Relevant System Assumptions. ARTC has

¹¹¹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 49.

¹¹² ARTC, 2011 IAHA, 23 June 2011, clauses 2.4(a) and 2.5..

¹¹³ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 49.

¹¹⁴ ARTC, 2011 IAHA, 23 June 2011, clause 5.4(c).

¹¹⁵ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 49.

¹¹⁶ ARTC, 2010 IAHA, 7 September 2010, clause 5.4(d).

¹¹⁷ ACCC, Position Paper, p. 230.

also revised the process for development of System Assumptions under section 5.1, which is discussed further below at 5.7.2.

QR National Coal submitted that it supports promoting the use of consistent System Assumptions by the HVCCC and ARTC in accordance with the approach included in the 2011 HVAU.¹¹⁸

The ACCC considers that these revisions appear to provide for enhanced objectivity in the determination of Network Path Capability. While the ACCC continues to have some reservations about whether these revisions are sufficient to ensure that key input into the system TUT will be objectively determined by ARTC, the ACCC also recognises that the system TUT is a novel performance and accountability approach and may, if it operates as intended, promote the efficient operation and alignment of the coal chain.

5.6.2.3 Tolerance

In the Position Paper, the ACCC considered that it was necessary for ARTC to provide for the accrual of rebates under the TOP rebate mechanism where an Access Holder seeks to rely on the provision of Tolerance to make up for an inability to use Base Path Usages in a previous Period, but the Tolerance is not made available.¹¹⁹

ARTC has included a new clause 2.5 in the system TUT contained in Schedule 2 of the June 2011 IAHA that provides for an Access Holder to accrue a rebate for 'allowed tolerance' in prescribed circumstances.

Clause 2.5 sets out a process whereby the Access Holder may provide information to ARTC in order to make a claim for allowed tolerance, which will be included in the rebate accrual under clause 2.4 if the Access Holder demonstrates the claim meets the criteria for inclusion.

ARTC has also made a number of consequential amendments to Schedule 2 in order to recognise the inclusion of allowed tolerance in the mechanics of the system TUT.

The ACCC considers that the revisions are appropriate to address the ACCC view expressed in the Position Paper, and provide for adequate inclusion of tolerance in the system TUT and TOP rebate mechanism.

5.6.2.4 Independent Audit of the system TUT

In the Position Paper, the ACCC considered that the system TUT should be subject to audit by an appropriately qualified independent party in order to ensure the integrity of the test and avoid perceptions of conflicts of interest on the part of ARTC.¹²⁰

In response ARTC has provided for an independent audit of its compliance with the obligations in relation to the system wide TUT, to occur on an annual basis under section 4.10(f) of the June 2011 HVAU.

¹¹⁸ QR National Coal, Submission in relation to ARTC 17 May 2011 Suggested Revisions , 3 June 2011, p. 1.

¹¹⁹ ACCC, Position Paper, p. 231.

¹²⁰ ACCC, Position Paper, p. 232.

ARTC has also included consequential amendments to the information it is required to provide to the ACCC under Schedule G of the 2011 HVAU (relating to the Annual Compliance Assessment by the ACCC) to reflect its inclusion of an independent third party audit of the TUT.

The ACCC considers that these amendments adequately address the ACCC view expressed in the Position Paper, and are appropriate.

5.6.2.5 Review of the TUT

The June 2011 HVAU includes in section 13.4 a review of the system TUT. The section provides for a review of the operation and effectiveness of the system TUT in consultation with stakeholders under section 13.4 after 2 calendar years, and submission of a variation application to the ACCC, or publication by ARTC of reasons why it does not consider that a variation is appropriate.

The ACCC considers that the system TUT is an innovative but complex feature of the HVAU, and while it may work to ensure ARTC is accountable for its performance, it is untested. A review of the system TUT in light of practical experience of the operation of the HVAU is therefore a valuable and appropriate inclusion. The ACCC would expect the review to demonstrate that the TUT has worked as intended, and has provided an appropriate mechanism by which to ensure ARTC's accountability. If this is revealed not to be the case, the ACCC may at the relevant time re-examine the appropriateness of the TUT and TOP rebate scheme in the context of ARTC's performance and accountability framework. At this stage, however, when combined with the revisions made to address the ACCC views in the Position Paper, the ACCC considers that the inclusion of the review supports a conclusion that the performance and accountability framework is appropriate.

5.6.3 Positive performance incentives

In the Position Paper, the ACCC noted there was general consensus among ARTC and stakeholders that suitably designed performance incentive mechanisms would be appropriate for inclusion in the HVAU, and that the ACCC shared this view.¹²¹

The ACCC considered 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.¹²²

In the June 2011 HVAU, ARTC has included:

- under section 13.3 of the HVAU, a process for the development, in consultation with stakeholders, of 'non-system TUT incentives' that will be submitted for ACCC approval within 12 months via a variation to the HVAU;
- development of system TUT-related incentives in consultation with stakeholders under section 13.5 for inclusion in the HVAU concurrent with or subsequent to

¹²¹ ACCC, Position Paper, p. 236.

¹²² ACCC, Position Paper, p. 236.

the review of the operation and effectiveness of the system TUT, or publication of reasons by ARTC explaining why it does not consider that it is appropriate to include these incentives.

The ACCC considers that the inclusion of these processes within the HVAU should provide for the timely development of appropriate incentive proposals.

The ACCC maintains its view as to the importance of the inclusion of incentives in the HVAU that should promote the economically efficient operation and use of infrastructure, consistent with the objects of Part IIIA, and should encourage ARTC to reduce costs and improve productivity, consistent with the pricing principles in section 44ZZCA of the Act.

As ARTC has yet to develop incentive proposals in accordance with the HVAU, the ACCC does not at this time have a view as to what specific incentive mechanisms may be appropriate for inclusion in the HVAU.

5.7 Capacity Management

This section discusses a number of matters relating to management of capacity on the network, and which arise in relation to provisions of both the June 2011 HVAU and the attached IAHA. The ACCC commented extensively on these matters in the March 2010 Draft Decision and the 2010 Position Paper.

5.7.1 Supply chain alignment

5.7.1.1 Background

In the March 2010 Draft Decision and the December 2010 Position Paper, the ACCC considered that coal supply chain alignment and the objectives of the long term solution for the Hunter Valley coal chain were relevant ‘other matters’ to which to have regard. See also the discussion above in the **Overview of the Undertaking and Legal Test chapter**.

The ACCC also recognised that these matters were to be considered alongside the legitimate business interests of ARTC as the access provider, and the interests of parties using the network other than to transport coal (that is, non-coal users).

As stated in the March 2010 Draft Decision and reiterated in the December 2010 Position Paper, the ACCC considers it to be appropriate that the undertaking not set overly prescriptive rules in relation to operational detail, but rather maintain the ability for ARTC to flexibly and pragmatically manage the operation of its leased network. The ACCC also considers that while ARTC’s network is a key part of the Hunter Valley coal chain, the June 2011 HVAU is not the appropriate vehicle by which to coordinate *all* industry-wide issues.

The ACCC continues to be of these views. The ACCC also commends the emphasis by ARTC on supply chain alignment issues, and the complex and sophisticated effort to address these issues via the June 2011 HVAU.

5.7.1.2 Revisions in the June 2011 HVAU further facilitate supply chain alignment

The ACCC recognises that within the broader concept of ‘supply chain alignment,’ a number of individual issues are encompassed, many relating to capacity management.

Issues grouped under this heading include:

- the accurate calculation of available capacity on the network, including the development of ‘System Assumptions’ to ensure rail capacity aligns with port capacity;
- the protocols for allocating shortfalls of capacity on the network, both for available and additional capacity;
- the rules for the resumption of unused capacity (which are designed to prevent hoarding);
- the rules for the trading and assignment of capacity between access seekers; and
- the mechanisms by which users are held accountable if they cause a disruption to the overall throughput of the network.

In the December 2010 Position Paper the ACCC considered that some further revisions should be made to the proposed 2010 HVAU to further facilitate supply chain alignment. The ACCC is of the view that the June 2011 HVAU has appropriately incorporated further revisions, including providing for appropriate consultation between ARTC and the HVCCC, and for a review of the relevant loss allocation provisions within 12 months of commencement, thus allowing for further development over time. These and other revisions are discussed further in the following chapter.

5.7.2 System Assumptions

In the March 2010 Draft Decision and the December 2010 Position Paper, the ACCC agreed that the principle regarding System Assumptions is an important aspect of the Guiding Principles for contractual alignment, and was of the view that the principle should be reflected in the HVAU.¹²³

In the Position Paper, the ACCC recommended that ARTC amend the HVAU:

- to include a more specific delineation of those System Assumptions that are agreed to with the HVCCC and those ‘Track Related System Assumptions’ that are reasonably determined by ARTC (which must then be published); and
- to include that any obligation on ARTC to determine capacity under the HVAU or IAHA be calculated by reference to the System Assumptions and Track Related System Assumptions.¹²⁴

¹²³ ACCC, Draft Decision, p. 466; ACCC, Position Paper, p. 242.

¹²⁴ ACCC, Position Paper, p. 246.

5.7.2.1 June 2011 HVAU

ARTC has amended the definition of ‘System Assumptions’ in section 14.1 of the June 2011 HVAU so that:

“**System Assumptions**” means the assumptions for the Hunter Valley Coal Chain as detailed in the System Assumption Document as varied from time to time, including:

- (a) interface and live run losses between each element in the Hunter Valley Coal Chain;
- (b) agreed operating mode of the Hunter Valley Coal Chain;
- (c) surge and tolerance requirements;
- (d) capacities of fixed infrastructure;
- (e) rolling stock requirements;
- (f) vessel requirements;

except if not agreed to by ARTC, then those System Assumptions reasonably determined by ARTC from time to time and published on its website in accordance with **section 5.1(c)(iii)**, unless otherwise determined in accordance with **section 5.1(g)**.

“**Relevant System Assumptions**” means the following assumptions provided to, or agreed with, the HVCCC and published on ARTC's website (subject to any confidentiality restrictions) or as determined under **section 5.1**:

- (a) ARTC track including path numbers;
- (c) live run management;
- (d) ARTC system losses;
- (d) maintenance intervention;
- (e) train parking capacity (for shut downs);
- (f) section run times;
- (g) maximum train length;
- (h) maximum train axle load;
- (i) maximum train speed; and
- (j) any other assumptions reasonably determined by ARTC from time to time as necessary for the purposes of determining Capacity.

In addition, ARTC has amended section 5.1(b) of the 2011 HVAU to state that the Capacity Analysis process under section 5.2 will reflect the publicly available Relevant System Assumptions.

Following discussions with the NSWMC, ARTC has also included in sections 5.1(c)-(j) a dispute resolution process in the event that ARTC does not agree with an

Assumption included in the System Assumptions Document. Under the process, a dispute may in relevant circumstances be notified to the ACCC for resolution under the arbitration process in section 3.15 of the HVAU. The ACCC will determine which is the more reasonable between the Assumption included in the System Assumptions Document and an ARTC-proposed alternative assumption. Once the determination is made, the chosen Assumption will then be used for the purposes of the HVAU.

The ACCC notes that there is a 'carve out' in section 5.1(d), such that where ARTC disagrees with an assumption on the basis of safety, or that it would have an adverse commercial impact for ARTC, the dispute may only go to whether ARTC acted reasonably in relying on those grounds, rather than to ARTC's reasoning itself. A carve out to the carve out is however provided in section 5.1(d)(ii), such that ARTC may not rely on the 'adverse commercial impact' ground to the extent that the adverse commercial impact would arise under the operation of the system TUT.

Under section 5.1(g), when arbitrating a dispute as to the appropriate assumption, the ACCC must take into account:

- (i) the context of the daily operations of the Hunter Valley Coal Chain at the time of the publication of the System Assumptions Document (as applicable), including for the purposes of accurately determining Capacity;
- (ii) the interests of:
 - (A) Access Holders with Coal Access Rights for export coal;
 - (B) Access Holders with Coal Access Rights for domestic coal;
 - (C) other users of the Network; and
 - (D) ARTC

including whether ARTC or another party will be materially disadvantaged, including in the context of, and basis upon, which ARTC or the party entered into Access Agreement or Access Holder Agreement and where applicable in applying assumptions in the system true up test under Schedule 2 of the Access Holder Agreements which are different to those to which ARTC or another party has previously agreed and relied upon in entering Access Holder Agreements.

5.7.2.2 ACCC view

The ACCC is of the view that the amendments which distinguish between System Assumptions that are agreed to by ARTC with the HVCCC (and other relevant service providers), and the Relevant System Assumptions that are to be reasonably determined by ARTC if they cannot be agreed to with the HVCCC, including the obligation to publish those Relevant System Assumptions, provides an appropriate degree of transparency to access seekers where ARTC chooses to develop assumptions that are not included in the System Assumptions Document. The ACCC also considers that these amendments recognise ARTC's concern that it not be obliged to accept and apply System Assumptions dictated by another organisation, but provide that ARTC will participate in the development of the System Assumptions Document.

The ACCC is also of the view that the dispute resolution process in section 5.1 – which is essentially a codification of the existing process in section 3.15, but tailored to apply specifically in relation to System Assumptions – incorporates a balance between ARTC’s legitimate business interests and the interests of supply chain alignment. That is, the ACCC recognises that ARTC should not be held accountable for the performance of elements of the Hunter Valley coal supply chain that are beyond the control of ARTC; however, as a key service provider in the Hunter Valley coal chain, ARTC’s effective participation in issues regarding alignment is critical to ensure the effective performance of the chain as a whole.

The ACCC would have been concerned if the ‘adverse commercial impact’ carve out in section 5.1(d)(ii) had remained unqualified, as the fundamental purpose of the TUT is to create a risk of adverse commercial consequences for ARTC (that is, the payment of a rebate) in order to incentivise performance. The qualification to the carve out (which excludes the TUT) addresses this point, although the ACCC is also aware that the incorporation of certain System Assumptions into the HVAU may have a distorting effect on the TUT calculations, particularly if ARTC is sought to be held accountable for elements of the supply chain over which it has no control. The ACCC considers that the matters that the ACCC must take into account when arbitrating a dispute, as specified under section 5.1(g), recognise that a balance needs to be drawn between the interests of the parties, and the ACCC would expect to examine the appropriate balance in the circumstances of any dispute.

The ACCC also notes that agreement on the drafting of section 5.1(d)(ii) was one the NSWMC’s conditions to supporting ARTC’s proposed rate of return.

5.7.3 Capacity Trading

In the December 2010 Position Paper, the ACCC made a number of recommendations in relation to the rules in the IAHA for the trading and assignment of track related capacity between access seekers.

By way of summary, the ACCC is of the view that ARTC has adopted the substance of the recommendations made in relation to the trading provisions in the June 2011 HVAU by:

- Including a number of clauses from the IAHA that relate to trading as Tier 1 (mandatory) provisions;
- Amending the IAHA so that ARTC can only transfer the agreement without consent of the Access Holder in specific circumstances (primarily where management of the network has changed);
- Imposing an obligation on ARTC to not unreasonably withhold consent to a request by an Access Holder to transfer rights under the relevant Access Agreement;
- Requiring ARTC to seek, and consider in good faith, the views of the HVCCC in relation to all trades under clauses 16.3 and 16.4 of the IAHA as to the impact of trades on both Coal Chain Capacity and the Capacity entitlements of other access holders; and

- Clarifying the timing of the review of the two week notice period for non-safe harbour trades and obliging ARTC to provide written reasons for its decision to reduce or maintain the two week period at the conclusion of the review.

A more detailed discussion of the ACCC's views in relation to the specific trading provisions that have been included in the June 2011 HVAU are set out in the following chapter.

5.7.3.1 Clause 16.5 IAHA – Treatment of Traded Paths

In the December 2010 Position Paper, the ACCC recommended that clause 16.5(a) of the IAHA be amended so that where an unconditional Base Path Usage is traded, it will be deemed to be used by the Former Access Holder except in the circumstances where a Capacity Shortfall is caused by ARTC that prevents the new Access Holder from using that traded Path Usage.¹²⁵

The ACCC maintains some concern that the drafting of clause 16.5 of the IAHA may act as a disincentive to the trading of paths between Access Holders, as ARTC may have limited incentives to make traded path usages available if it does not face the risk of accruing TOP rebates in relation to these path usages. However, the ACCC notes that ARTC has provided in the 2011 HVAU for a review of the system TUT to occur after two calendar years and that this review will be informed by practical experience of the operation of the system TUT, including the extent of capacity trading and practical availability of traded paths. The ACCC considers that the inclusion of this review, when coupled with uncertainty about the likely extent of capacity trading under the HVAU, sufficiently mitigates this concern to allow this provision to be considered appropriate without amendment at this time.

The ACCC notes, however, that it may be appropriate to revisit this matter in light of practical experience of the operation of capacity trading under the system TUT.

5.7.4 Anti-hoarding provision

Under section 5.7(a) of the June 2011 HVAU, which interacts with clause 11.4 of the IAHA, ARTC may reduce the Capacity Entitlement of an Access Holder where the Access Holder has under-utilised the Capacity Entitlement granted to it under an Access Agreement.

In the December 2010 Position Paper, the ACCC recommended that ARTC should not be obliged to resume capacity in specific circumstances but should have a positive obligation to investigate reasons why capacity was not utilised, in addition to increasing the resumption threshold to 85 percent.¹²⁶

The ACCC reiterates its views from the Position Paper, and notes that ARTC has made the recommended amendments to clause 11.4 of the IAHA in the June 2011 HVAU, including changing the resumption threshold to 85 percent.

¹²⁵ ACCC, Position Paper, p. 289.

¹²⁶ ACCC, Position Paper, p. 272.

5.8 Additional Capacity and Investment

Investment in additional capacity on the Hunter Valley rail network has been the subject of significant interest by stakeholders in the assessment of the April 2009 HVAU and September 2010 HVAU. The ACCC has provided extensive views on this issue in its statements, and ARTC has made extensive revisions to the relevant provisions in the June 2011 HVAU.

Previous versions of the HVAU have included provisions dealing with the creation of additional capacity on the Hunter Valley rail network. Coal producer stakeholders have expressed concern, however, that those provisions were not sufficient to ensure timely and efficient investment in the network. In the December 2010 Position Paper, the ACCC recognised that:

...coal producers seek certainty that investment will occur to expand the capacity of the Hunter Valley rail network in alignment with capacity expansions at the coal terminals at the Port of Newcastle, thereby underpinning complementary investment in mine expansions.

The coal industry has, under the aegis of the long term solution, committed to significant investment in the coal terminals to increase overall supply chain output. Specifically, coal producers have entered long term ship-or-pay contracts with terminal operators to underpin guaranteed capacity expansion over the next ten years.

The ACCC appreciates that, in light of these commitments, concerns exists that ARTC may not make complementary investment to expand the capacity of the rail network, or may not make such investment in a timely, coordinated fashion, and thereby the overall performance of the chain will be limited. Further, the proposed 2010 HVAU contemplates coal producers potentially entering 10 year take or pay contracts with ARTC to underpin rail network investment. The ACCC appreciates that, given these commitments, there is an expectation that investment in the rail network will occur as and when it is needed.¹²⁷

The additional capacity investment framework proposed by ARTC in the June 2011 HVAU attempts to address these concerns and incorporates the following key features:

- Pathways by which investment in additional capacity may be pursued, including at the instigation of ARTC, the HVCCC or access seekers.
- Industry consultation and coordination, including via the Rail Capacity Group (RCG).
- A user-funding option to allow users to fund investment in new network capacity in the event that ARTC chooses not to.
- Clear criteria by reference to which ARTC will make investment related decisions.

¹²⁷ ACCC, Position Paper, p. 321.

- Provision for the negotiation and execution of contracts for capacity delivery and funding, and for ACCC arbitration in the event of a dispute.

Aspects of the features have been incorporated in response to the ACCC's views in the December 2010 Position Paper, and these are discussed in the following sections.

5.8.1 Overall investment framework – pathways for investment

5.8.1.1 December 2010 Position Paper

In the December 2010 Position Paper the ACCC was of the view that while the investment provisions in the September 2010 HVAU contained fundamental elements that were likely to be appropriate, further revisions were required to ensure that the framework operated effectively. The ACCC noted that the degree of concern expressed by stakeholders over investment and additional capacity issues had been heightened by the ambiguity of the drafting of the relevant provisions.¹²⁸

The ACCC provided the broad view that any revised HVAU must clearly and logically set out the different available investment pathways in their intended order of operation, namely:

- that the Hunter Valley Corridor Capacity Strategy, published annually by ARTC, sets out the investment strategy for the Hunter Valley coal network;
- that ARTC may identify, fund and construct additional capacity;
- that the HVCCC may recommend investments to provide additional capacity; and
- that user-funding is available as an option in certain circumstances.¹²⁹

The Position Paper also stated that the rights and obligations of all relevant parties under those different investment mechanisms must be clearly and logically set out, including:

- when ARTC is obliged to fulfil obligations and make decisions, as well as when ARTC will be bound by its decisions, and the criteria on which those decision will be made; and
- when the ability of an access seeker or group of access seekers to fund an investment will be triggered, including the criteria on which ARTC will base its decision on whether to consent to the investment, and the principles of equitable reconciliation that will apply to a user funded investment.

5.8.1.2 June 2011 HVAU

ARTC has implemented these broad recommendations in the June 2011 HVAU by restructuring and redrafting the investment framework provisions. Whereas prior versions of the HVAU set out the investment framework in section 6, ARTC has now restructured the framework across several sections as follows:

¹²⁸ ACCC, Position Paper, p. 326.

¹²⁹ ACCC, Position Paper, pp. 317, 324-25.

- Section 7: Overview – provides an overview of the framework outlined in detail in sections 8 to 11;¹³⁰
- Section 8: Project Initiation – sets out the pathways by which investment in additional capacity may occur (that is, as part of the Hunter Valley corridor capacity strategy, recommended by the HVCCC, requested by an applicant for additional capacity, or identified by ARTC), and obliges ARTC to prepare a concept assessment report in relation to the relevant projects for endorsement by the Rail Capacity Group (**RCG**);
- Section 9: Industry Consultation – provides a staged process for the development and implementation of a project in consultation with industry via the RCG, commencing with concept assessment. The consultation process involves a number of stages where the RCG is asked to endorse the project to proceed to the next stage;¹³¹
- Section 10: User Funding Option – sets out the process whereby, if ARTC elects not to fund all or part of a project, users may fund and ARTC will be obliged to undertake the project as the result of a user funding agreement or arbitration. Also sets out the capital contribution principles by which a contributor to investment in additional capacity will achieve an ‘equitable reconciliation’ of their contribution; and
- Section 11: ARTC decision-making under the capacity investment framework – sets out how ARTC will decide to consent to additional capacity and ARTC’s decision-making process in relation to funding projects.

5.8.1.3 ACCC view

The ACCC is of the view that the restructuring of the capacity investment framework in the June 2011 HVAU significantly improves its clarity, and provides greater certainty as to its operation. In particular, the revisions in section 8 more clearly delineate the various pathways by which investment in additional capacity may occur, and the processes, rights and obligations involved in each option.

The ACCC provides further views on individual aspects of the revised framework in this and the following chapter.

5.8.2 Industry consultation - RCG process and voting rights of ‘new entrants’

5.8.2.1 June 2011 HVAU

Section 9 of the June 2011 HVAU deals with industry consultation on additional capacity projects. It provides for the convening of RCG meetings, voting rights of RCG members, and the endorsement by the RCG of investment projects through several stages of project development and implementation.

¹³⁰ ARTC, Explanatory Guide - ARTC Response to ACCC HVAU Position Paper, 8 April 2011, p. 25.

¹³¹ ARTC, Explanatory Guide - ARTC Response to ACCC HVAU Position Paper, 8 April 2011, p. 26.

5.8.2.2 ACCC view

The ACCC set out a view on the RCG process in the December 2010 HVAU, including recognising the benefits of investment decisions being made in consultation with relevant stakeholders.¹³² The June 2011 HVAU incorporates recommendations made by the ACCC in the Position Paper, and these are detailed in the following chapter.

The ACCC wishes to highlight, however, a change that has been made following discussions between ARTC and the NSWMC.

Section 9.2 sets out the constitution and voting rights of RCG members. Section 9.2(f) provides that:

In determining voting entitlement, other than for the purposes of endorsing project assessment at section 9.4(d) and any stage beyond that, ARTC may, at its discretion, include any coal gtkm in the Pricing Zone which ARTC reasonably expects will become contracted coal gtkm, for the current calendar year or for any of the following nine calendar years, immediately following the completion of the proposed project. To avoid doubt ARTC may, in exercising this discretion, determine that a prospective access holder which is not a current member of RCG has a voting entitlement.

The intent of this provision is for potential new entrants – that is, parties that have not yet entered access agreements to become ‘Access Holders’ – to have an opportunity to participate in the RCG process. In the Position Paper the ACCC considered that this was appropriate.¹³³

The ACCC also recognised, in relation to the equivalent provision in the September 2010 HVAU, the concerns of stakeholders that the inclusion in the RCG process of parties without contracted entitlements had the potential for perverse outcomes; that is, a party without a contractual commitment for access charges may be involved in endorsement of a project but subsequently not enter the market, thereby leaving incumbent parties with higher access prices to pay for the new capacity.¹³⁴

The ACCC considered that the original version of section 9.2(f) provided an appropriate balance between the interests of new entrants and incumbents. Following discussions between the NSWMC and ARTC, the text in italics in the extract above was added to the section. The ACCC does not consider that this new text alters its earlier view. Rather, the new text simply clarifies a point in project development at which decisions regarding investment in new capacity are likely to have a material impact on access charges paid by users with contractual entitlements.

5.8.3 ‘Point of commitment’ by ARTC

In the December 2010 Position Paper, the ACCC was of the view that the September 2010 HVAU should be amended so that it is clear when a point of commitment was reached in relation to a particular investment project; that is, the point at which ARTC would choose to fund and progress a project, or choose not to continue and allow for

¹³² ACCC, Position Paper, pp. 322-323.

¹³³ ACCC, Position Paper, p. 385.

¹³⁴ ACCC, Position Paper, p. 385.

user-funding. It appeared to the ACCC that a binding decision to commit to provide that capacity could be made at the ‘project assessment’ stage of the RCG process.¹³⁵

The June 2011 HVAU incorporates new provisions that oblige ARTC to state, at each stage of project development, its intentions as to whether it will fund the next stage in the process. These new obligations are in sections 9.3(c), 9.4(c), 9.5(c) and 9.6(b)(i)(B)).

The ACCC is of the view that these obligations are appropriate, as they provide greater certainty and transparency to access seekers on the decisions ARTC makes in relation to additional capacity investment. If at any stage throughout the RCG process ARTC decides not to fund a project, it is also required to promptly inform the relevant parties of its decision. While the ACCC took the view in the Position Paper that there should be a single point of commitment, the ACCC considers that ARTC’s approach provides for flexibility in determining what that point should be, which may vary depending on the particular project, and is therefore appropriate.

5.8.4 User-funding

5.8.4.1 Availability of user-funding

In the December 2010 Position Paper, the ACCC emphasised the need for the investment framework to clearly specify the availability of user-funding. While the ACCC recognised that the September 2010 HVAU provided for user-funding in certain circumstances, it considered that user-funding must in general operate as an alternative or fallback where ARTC decides not to fund capacity expansions itself. The ACCC was of the view that if a user-funding option operated in this manner, it should provide certainty to coal producers that rail network capacity expansions will occur, and thereby provide sufficient certainty to underpin complementary investment in new mines and mine expansions. Further, it should also incentivise ARTC to make efficient and timely investment decisions. That is, ARTC will not earn a return on user-funding contributions, hence ARTC should have some incentive to pursue capacity expansions in response to demand or otherwise forgo earning additional returns. As investment decisions require RCG endorsement, this should also incentivise ARTC to invest efficiently; that is, investment proposals are subject to scrutiny by users.¹³⁶

In the June 2011 HVAU the provisions relating to user-funding are set out in section 10. The section provides that, if ARTC chooses not to fund a project development stage, or ceases development of a project, then ARTC and a ‘Contributor’ willing to fund the project may negotiate a user-funding agreement. The section goes on to set out how the Contributor may recover its contribution, and provides for dispute resolution pursuant to the arbitration process under section 3.15 of the HVAU in the event of a dispute.

The ACCC is of the view that this clear statement of the availability of user-funding, in the event that ARTC decides not to proceed with a project, appropriately addresses the comments made in the Position Paper.

¹³⁵ ACCC, Position Paper, p. 318, 330-331.

¹³⁶ ACCC, Position Paper, p. 324.

5.8.4.2 User funded capital contributions and ‘equitable reconciliation’

In the December 2010 Position Paper the ACCC recognised that a consequence of including user-funding provisions in the HVAU was that there should be clear and certain provisions on the treatment of user contributions, and how access charges for user-funded capacity will be determined and collected.¹³⁷ The ACCC was of the view that the ‘equitable reconciliation’ provisions in the September 2010 HVAU were largely appropriate, and the ACCC reiterates its views on those provisions here.¹³⁸

The ACCC did, however, take the view that further clarification was needed around the requirement that ARTC be ‘economically no worse off’ as a result of equitable reconciliation. The ACCC was concerned that this objective may operate to limit the usefulness of user-funding, as given that ARTC will not earn a return on user-funded contributions, it would in one sense be ‘worse off.’ The ACCC understood however that ARTC’s intent with the provision was for ARTC’s return on existing assets not to be reduced as a result of capital contributions from an Access Holder.¹³⁹

ARTC has included, at section 10.2(b), a definition of ‘economically no worse off’ to clarify that the phrase has this intended meaning.

5.8.5 ARTC decision-making criteria

5.8.5.1 General

In the December 2010 Position Paper, the ACCC provided views on the decision-making criteria ARTC should adopt when making investment decisions. In particular, the ACCC stated that:

... if the user-funding option is effective, the undertaking does not need to be highly prescriptive in respect of ARTC’s own commercial decision-making criteria. As noted above, it is appropriate for the undertaking to allow ARTC to make decisions regarding the running of its business, especially commercially significant decisions relating to major investment.

If the user-funding option is effective, it is likely to be appropriate for ARTC to exercise subjective discretion in relation to the commercial viability of Additional Capacity sought by an Applicant, or recommended by the HVCCC, where ARTC is deciding whether to fund the Additional Capacity. ARTC should be incentivised to exercise its discretion properly in these circumstances or risk forgoing a return on the investment project.

On the other hand, it will be important that where ARTC has chosen not to fund and users are resorting to user funding, the decision of ARTC whether to proceed to physically build in that circumstance is based on objective grounds. In any event, that decision would be subject to ACCC arbitration in the normal manner.¹⁴⁰

¹³⁷ ACCC, Position Paper, p. 325.

¹³⁸ ACCC, Position Paper, pp. 372-374.

¹³⁹ ACCC, Position Paper, p. 374.

¹⁴⁰ ACCC, Position Paper, p. 325.

The ACCC provided detailed recommendations on implementing this approach,¹⁴¹ many of which have been incorporated into the June 2011 HVAU and are detailed in the following chapter.

The ACCC notes however, that ARTC has revised the investment framework to set out its decision-making criteria in a new section 11. The section distinguishes between ‘Technical Criteria’, which ARTC will assess on an objective basis, and ‘Financial Criteria,’ which ARTC will assess on a subjective basis, consistent with the ACCC’s views.

5.8.5.2 Legitimate business interests

One of the ‘Technical Criteria’ that ARTC may consider in deciding to proceed with an investment project is whether the infrastructure required to provide the additional capacity does not otherwise compromise ARTC’s legitimate business interests, except that this will not include consideration of any of the factors included under the Financial Criteria.

The September 2010 HVAU also included a similar reference to ‘legitimate business interests’, and in the December 2010 Position Paper, the ACCC accepted that it is reasonable that ARTC be able to consider whether a recommendation by the HVCCC or a request by an Applicant for Additional Capacity compromises its ‘legitimate business interests,’ whether it is being funded by ARTC or is subject to a user-funding agreement.

The ACCC recommended, however, that the HVAU be amended so that it is clear that the interests contemplated under the ‘legitimate business interests’ criterion can only be those not already covered by the financial criteria, and that if ARTC was contemplating interests other than those already dealt with in the section, they should be specified.

The ACCC welcomes the specification that ‘legitimate business interests’ as contemplated under the Technical Criteria do not incorporate those already dealt with under the Financial Criteria, and this is consistent with the ACCC’s view. The ACCC also notes that:

- If ARTC decides not to proceed with a Project on the grounds that it does not satisfy the Technical Criteria, including whether ARTC’s legitimate business interests would be compromised, ARTC must provide the relevant party with written reasons why its legitimate business interests would be compromised (section 11.1(a)).
- Because ARTC’s decision not to proceed on a particular ground must be in ARTC’s ‘reasonable opinion’ (section 11.1(a)), if the relevant party receives ARTC’s written reasons and is of the view that ARTC’s opinion is not reasonable, that party may dispute ARTC’s decision (section 11.1(b)).
- A dispute over whether ARTC’s legitimate business interests would be compromised will be arbitrated under the dispute resolution provisions in the

¹⁴¹ ACCC, Position Paper, pp. 349-359.

HVAU, with the ACCC as the ultimate arbitrator of whether ARTC's opinion that its legitimate business interests would be compromised is reasonable.

The ACCC is therefore of the view that the incorporation of the phrase 'legitimate business interests' in this context is appropriate.

5.8.6 Capacity delivery - commercial viability conditions precedent

In the December 2010 Position Paper, the ACCC was of the view that ARTC and access seekers should be able to negotiate terms around delivery of additional capacity that has been committed to under the HVAU investment processes.

The ACCC consequently recommended that the conditions precedent to the delivery of Additional Capacity included in the 'Train Path Schedule' to the Indicative Access Holder Agreement should be removed. These conditions precedent provided that, notwithstanding that a party had entered an access contract on the basis of new capacity coming online in the future, if ARTC considered that a listed or new project was no longer commercially viable to ARTC when it is due to be completed (having regard to ARTC's total investment program and the availability and cost of capital to ARTC when compared to the rate of return approved under the HVAU), then ARTC would:

- offer the Access Holder the opportunity to make a capital contribution to the project, in which case the principles applicable to capital contribution in the HVAU would apply; or
- if requested by the Access Holder, enter into good faith negotiations with the aim of securing alternative funding arrangements to deliver a particular project.

The ACCC understands that these conditions are designed to deal with the situation where there is a time lapse between when additional capacity has been agreed to under the terms of the HVAU, and when construction of the Additional Capacity is to be finalised, during which time the cost of funding to ARTC changes, rendering the project no longer commercially viable to ARTC based on its previous assessments of the cost of funding.

The ACCC also noted that any grounds for reassessing a project due to change in circumstances that are beyond ARTC's control (for example, a change in ARTC's ability to get funding preventing ARTC from being able to complete the project on the terms agreed) should be negotiable and set out in the agreements between ARTC and the parties contracting for the capacity.

5.8.6.1 The June 2011 HVAU

ARTC has not removed the conditions precedent from the Train Path Schedule as recommended in the Position Paper. Rather, ARTC submits that 'the increased clarity around the user recovery options and the obligation to negotiate a user funding agreement should sufficiently deal with the ACCC's concerns.'¹⁴² Further, ARTC submits that it 'has dealt with the uncertainty issue in the HVAU via the Revised

¹⁴² ARTC, Explanatory Guide - ARTC Response to ACCC HVAU Position Paper, 8 April 2011, p. 28.

Investment Framework in the HVAU and the commercial viability Condition Precedent now reflects the intent to the Revised Investment Framework.¹⁴³ ARTC also accepts that the commercial viability Condition Precedent remains a negotiable clause in the contract, with recourse to the ACCC as arbitrator in the event of dispute.¹⁴⁴

5.8.6.2 ACCC view

The ACCC notes ARTC's acceptance that the commercial viability provisions set out in clauses 4.4(a)(iii) and 4.4(b) of the Train Path Schedule in the IAHA are negotiable clauses and that in negotiating this clause in relation to an individual agreement, the relevant access seeker has recourse to the ACCC as arbitrator in the event of dispute. It is also assumed that, particularly in the case of user-funded additional capacity, in practice a more detailed construction and development timetable would be developed for each project.

The ACCC therefore reiterates its view that clauses 4.4(a)(iii) and 4.4(b) of the Train Path Schedule are indicative provisions only and may be subject to genuine contractual negotiations to reflect the applicable circumstances for ARTC and the relevant access seeker. In this regard these provisions are appropriate.

¹⁴³ ARTC, Explanatory Guide - ARTC Response to ACCC HVAU Position Paper, 8 April 2011, p. 28.

¹⁴⁴ ARTC, Explanatory Guide - ARTC Response to ACCC HVAU Position Paper, 8 April 2011, p. 28.

6 Assessment of the June 2011 HVAU – other issues

The following table sets out the ACCC's view on how issues raised in the December 2010 Position Paper have been resolved in the June 2011 HVAU. Issues discussed in the previous chapter are cross-referenced. Many of the issues discussed in this chapter are either of a minor nature, non-controversial, or go to matters of drafting. As in the previous chapter, issues in the table are organised according to the chapters within which they appeared in the Position Paper. If an issue has been discussed in the previous chapter of this Decision, it is cross-referenced.

Issue	Position Paper Ref	ARTC response and ACCC view
4 Preliminary Matters		
HVAU term	PP Ch 4, p. 61.	This aspect of the June 2011 HVAU is discussed in Chapter 5.
5 Financial Model		
Consistent implementation of Interest during Construction (IDC) for Segment and Non-Segment Specific Assets The ACCC considered that IDC should be implemented in a consistent fashion when calculating returns on Segment and non-Segment Specific Assets respectively under the definition of Economic Cost contained in sections 4.4(a)(ii) and 4.4(a)(vi) of the September 2010 HVAU.	PP Ch 5.2, p. 73.	Under the June 2011 HVAU, ARTC has revised the definition of Non-Segment Specific Assets under section 14 to provide that these assets are not Segment Specific Assets. In addition, ARTC has revised the implementation of IDC under section 4.5(a)(vi) in relation to these assets. The ACCC notes that as Non-Segment Specific Assets, by definition, are not Segment Specific Assets under the June 2011 HVAU, the ACCC considers that ARTC has adequately addressed the views in the Position Paper.
Consistent inclusion of opex in the RAB	PP Ch 5.9,	This aspect of the June 2011 HVAU is discussed in Chapter 5.

	p. 87.	
Timing of cash flows in Financial Model	PP Ch 5.9, p. 86.	This aspect of the June 2011 HVAU is discussed in Chapter 5.
Segments without valuation The ACCC noted that no DORC or NSWRAU valuations were proposed for two Segments in Schedule E of the September 2010 HVAU, and that in the absence of such, these Segments should be assigned a RAB value of zero.	PP Ch 5.3, p. 72.	The ACCC considers that removal of these Segments from the 2011 HVAU negates the need for RAB values for these Segments at this time.
Depreciation of Segment Specific Assets	PP Ch 5.9, p. 87.	This aspect of the June 2011 HVAU is discussed in Chapter 5.
Clarification of ACCC annual compliance assessment process The ACCC considered revisions to section 3 of Schedule G of the September 2010 HVAU were required in order to: <ul style="list-style-type: none"> ▪ Clarify that the ACCC is not required to provide to ARTC any submissions made in confidence to the ACCC; ▪ Clarify that the ACCC's discretion in relation to performance of its functions under the HVAU is not fettered; and ▪ Require ARTC to provide information to consultants engaged by the ACCC, who are subject to a number of general prohibitions on making unauthorised disclosures of 	PP Ch 5.11, pp. 90-92.	The ACCC considers Schedule G of the June 2011 HVAU incorporates appropriate revisions that address the view expressed in the Position Paper.

<p>information.</p> <p>The ACCC also considered that section 5(c) of this Schedule was an inappropriate constraint on the ACCC's performance of its functions under the HVAU and should be deleted.</p>		
<p>Clarify ACCC annual compliance assessment timetable is indicative only</p> <p>The ACCC considered that Section 5(a) of Schedule G of the September 2010 HVAU should specify that the proposed timeframe is indicative only, and that section 5(b) should be removed as it was redundant.</p>	<p>PP Ch 5.11, p. 92.</p>	<p>The ACCC considers Schedule G of the June 2011 HVAU incorporates appropriate revisions that address the view expressed in the Position Paper.</p>
6 Pricing		
Grandfathering arrangements	<p>PP Ch 6.4, p. 138.</p>	<p>This aspect of the June 2011 HVAU is discussed in Chapter 5.</p>
Pricing under IAHA where no Part IIIA Access Undertaking in force	<p>PP Ch 6.7, p. 147.</p>	<p>This aspect of the June 2011 HVAU is discussed in Chapter 5.</p>
<p>ARTC not to excuse TOP obligations</p> <p>The ACCC considered that ARTC should not be entitled to increase access charges for an Access Holder where ARTC has agreed to reduce some or all of another Access Holder's TOP liability relating to common Segments.</p>	<p>PP Ch 6.8, p. 149.</p>	<p>ARTC has proposed under section 4.9(d) of the June 2011 HVAU that if it elects to waive TOP charges for the sole benefit of an Access Holder, it cannot recover these waived TOP charges through Unders and Overs, or increased TOP charges for other parties. Section 4.9(e) provides that ARTC shall not be taken to have waived TOP charges for the sole benefit of an Access Holder if the waiver occurs under clause 11 of the IAHA and, in ARTC's reasonable opinion, it will</p>

		<p>result in use of a more efficient service.</p> <p>The ACCC considers that it is appropriate for the HVAU to provide for price signals for parties to utilise more efficient services, and that ARTC's proposed amendments should promote the efficient operation of, use of and investment in infrastructure, while still providing sufficient price certainty for persons wanting access to the service.</p> <p>Consequently, the ACCC considers that these amendments adequately implement the view expressed in the Position Paper.</p>
Determination of the efficient train configuration (Indicative Service)	PP Ch 6.4, p. 135.	This aspect of the June 2011 HVAU is discussed in Chapter 5.
Removal of unnecessary price cap <p>The ACCC considered that the HVAU should provide sufficient price certainty without the price cap proposed under Section 4.2(d), and that this section should therefore be removed.</p>	PP Ch 6.8, p. 149.	The price cap has been removed in the June 2011 HVAU, which the ACCC considers addresses the view in the Position Paper.
ARTC should consider the Indicative Access Charge when determining charges for Non-Coal access rights <p>The ACCC suggested that ARTC may be able to provide greater pricing certainty for non-coal access seekers by determining charges for Non-Coal access rights with regard to Indicative Access Charges for Indicative Services.</p>	PP Ch 6.2, p. 126.	The ACCC does not consider that it is necessary for ARTC to incorporate this suggestion in order for the 2011 HVAU to be considered appropriate, as the charge differentiation provisions in relation to non-coal access rights, as well as the availability of dispute resolution, are sufficient.

<p>Consistent references to non-coal flagfall component</p> <p>The ACCC noted an inconsistent reference in section 4.11 of the September 2010 HVAU, where the flagfall component was determined by reference to a relevant Segment, rather than a relevant Pricing Zone.</p> <p>The ACCC considered that ARTC should revise the HVAU to provide for the non-coal flagfall to be calculated and applied on a consistent basis.</p>	<p>PP Ch 6.2, p. 127.</p>	<p>The ACCC considers that the amendments incorporated into the June 2011 HVAU adequately address the ACCC view in the Position Paper.</p>
<p>Review of GTK-based pricing</p>	<p>PP Ch 6.4, p. 134.</p>	<p>This aspect of the June 2011 HVAU is discussed in Chapter 5.</p>
<p>Operator consultation during determination of efficient train configuration (Indicative Service)</p>	<p>PP Ch 6.4, p. 136.</p>	<p>This aspect of the June 2011 HVAU is discussed in Chapter 5.</p>
<p>Mandatory resubmission of efficient train configuration (Indicative Service) variation application</p>	<p>PP Ch 6.4, p. 136.</p>	<p>This aspect of the June 2011 HVAU is discussed in Chapter 5.</p>
<p>Option to transition to efficient train configuration (Indicative Service) for existing Access Holders</p>	<p>PP Ch 6.4, p. 137.</p>	<p>This aspect of the June 2011 HVAU is discussed in Chapter 5.</p>
<p>Timeframe for determining Interim Indicative Access Charge</p> <p>The ACCC suggested that ARTC may need to revise the timeframes in section 4.18 of the September 2010 HVAU to ensure that the section will operate as intended, depending on when the undertaking commences.</p>	<p>PP Ch 6.5, pp. 140-141.</p>	<p>The ACCC considers that section 4.20(h) of the June 2011 HVAU provides for the charge determination process to operate as intended.</p>

Improved clarity for calculation of non-Indicative charges The ACCC considered that the charge differentiation factors under the September 2010 HVAU did not provide sufficient clarity and transparency for non-Indicative coal users of the Network about how their charges will be calculated, including the specification of price differentials.	PP Ch 6.5, p. 143.	The ACCC considers that the June 2011 HVAU adequately addresses the concern expressed in the Position Paper by providing for users of non-Indicative services to negotiate with ARTC, and to seek ACCC arbitration in the event of a dispute.
7 Negotiating for Access		
Network Exit Capability	PP Ch 7.4, p. 172.	This aspect of the June 2011 HVAU is discussed in greater detail in Chapter 5.
Clarification for ‘mutually exclusive’ access applications	PP Ch 7.8, p. 187.	This aspect of the June 2011 HVAU is discussed in Chapter 5.
Dispute resolution on the Tier 1 terms The ACCC noted in the Position Paper that if an appropriate degree of certainty could be achieved via an appropriate term for the HVAU, it may not be necessary for the ACCC to have a continuing role arbitrating disputes on Tier 1 terms. The ACCC’s view on this issue will therefore depend on the final view taken on the term of the HVAU.	PP Ch 7.2, p. 161.	ARTC has proposed a term of five years for the June 2011 HVAU, which is discussed in greater detail in Chapter 5. The ACCC considers that the five year term proposed by ARTC is appropriate. For the reasons given in the Position Paper, the ACCC does not consider it necessary for the ACCC to have a continuing role arbitrating disputes on Tier 1 terms.
Access agreements for non-coal services	PP Ch 7.2, p. 165.	This aspect of the June 2011 HVAU is discussed in Chapter 5.
Reservation of non-coal paths	PP Ch 7.2,	The ACCC considered In the Position Paper that the September 2010 HVAU revisions to the non-coal path

	p. 166.	reservation provision may facilitate the transition of non-coal users to new access arrangements, provided that issues regarding the practical implementation of the HVAU (including transitional arrangements) were addressed. Transition is discussed in Chapter 5.
Prudential Requirements – ‘ARTC’s reasonable satisfaction’ ARTC to amend section 3.4(e) on Prudential Requirements to insert ‘to ARTC’s reasonable satisfaction’ to introduce an objective element to the section.	PP Ch 7.3, p. 167.	The ACCC notes that ARTC has amended section 3.4(e) of the June 2011 HVAU as recommended in the Position Paper. For the reasons set out in the Position Paper, the ACCC is of the view that the revisions are appropriate.
Involvement of Operator in negotiations and dispute resolution ARTC to give greater recognition to the ability of an Operator to take part in negotiations of an OSA and provide that the dispute resolution and arbitration provisions apply to disputes involving an Operator and negotiation of the OSA.	PP Ch 7.6, p. 175.	The ACCC notes that ARTC is of the view that ‘the existing wording permits Operator involvement in negotiation of the OSA. ARTC does not wish to strengthen the Operators role to the extent that an operator may negotiate the OSA with the Access Holder.’ ¹⁴⁵ The ACCC also notes that ARTC has included section 3.15(b) in the HVAU which sets out that an Operator may, with the Access Holder’s consent, participate in a dispute notified by the Access Holder in relation to the OSA. The ACCC accepts ARTC’s view in relation to providing additional strengthening the role of the Operator in negotiations, as the revisions to section 3.15(b) provide

¹⁴⁵ ARTC, Explanatory Guide - ARTC Response to ACCC HVAU Position Paper, 8 April 2011, p. 12.

		Operators with greater recognition in dispute resolution and for that reason, and the reasons provided in the Position Paper, considered to be appropriate.
Confidentiality The ACCC considered that it was necessary for ARTC to amend the confidentiality provisions of the HVAU, IAHA and OSA to: <ul style="list-style-type: none"> ▪ Provide for disclosure of confidential information to the ACCC; ▪ Provide for references to ‘Providers’ and ‘Receivers’ of confidential information to refer to transmission of confidential information between ARTC and Access Seekers only; and ▪ Prevent disclosure of competitively sensitive information among competing participants of the HVCCC and RCG. 	PP Ch 7.7, pp. 176-177.	The ACCC notes that ARTC has revised section 3.5 in the June 2011 HVAU as recommended in the Position Paper. The ACCC notes that equivalent revisions are incorporated in clause 15 of the IAHA and clause 18 of the OSA. The ACCC considers that these amendments adequately address the concerns expressed in the Position Paper.
Transition	PP Ch 7.8, p. 185.	This aspect of the June 2011 HVAU is discussed in Chapter 5.
8 Agreements		
IAHA to provide for a minimum Monthly Tolerance Cap The ACCC considered that it was appropriate for a minimum level of Tolerance for each period to be set to provide certainty for Access Seekers, and that the RCG would be an appropriate	PP Ch 8.1, p. 198.	The ACCC considers that the revised definition of the Target Monthly Tolerance Cap (TMTC) included in the June 2011 HVAU adequately addresses the views expressed in the Position Paper.

forum to determine any changes to this level through the construction of Additional Capacity.		
Consequential changes to uplift provisions The ACCC considered that, in order to facilitate achievement of alignment objectives, consequential amendments may be required to the provision in the IAHA that provides for automatic uplift of Tier 1 (Mandatory) Provisions, depending on the final view on the appropriate term of the HVAU.	PP Ch 8.3, p. 204.	The ACCC considers that this provision is appropriate.
9 Performance and Accountability		
Transparency and objectivity of Network Path Capability determination	PP Ch 9.3, p. 229.	This aspect of the June 2011 HVAU is discussed in Chapter 5.
Rebates for failing to provide certain Tolerance path usages	PP Ch 9.3, p. 231.	This aspect of the June 2011 HVAU is discussed in Chapter 5.
Independent audit of system TUT	PP Ch 9.3, p. 232.	This aspect of the June 2011 HVAU is discussed in Chapter 5.
Clarify availability of equitable remedies under access agreements	PP Ch 9.2, p. 219.	This aspect of the June 2011 HVAU is discussed in Chapter 5.
Inclusion of performance incentives	PP Ch 9.5, p. 235.	This aspect of the June 2011 HVAU is discussed in Chapter 5.

10 Capacity Management		
Relationship between System Assumptions and track-related System Assumptions	PP Ch 10.2, p. 246.	This aspect of the June 2011 HVAU is discussed in Chapter 5.
Use of System Assumptions to determine Capacity	PP Ch 10.2, p. 247.	This aspect of the June 2011 HVAU is discussed in Chapter 5.
Written reasons to be given to HVCCC / relevant Applicant who is not a member of the HVCCC where ARTC disagrees with HVCCC ARTC to be obliged to provide written reasons to the HVCCC (or an Applicant where that Applicant is not a member of the HVCCC) when ARTC disagrees with the HVCCC's assessment within 10 Business Days of receipt of that assessment. There is no obligation to disclose confidential information.	PP Ch 10.3, p. 251.	ARTC has amended section 5.2(d)(iii) of the June 2011 HVAU to set out that: ...where ARTC disagrees with the view expressed by the HVCCC, ARTC will provide the HVCCC (and if requested, to the Applicant where that Applicant is not a member of the HVCCC) with written reasons, subject to confidentiality restrictions, why it disagrees with the HVCCC's assessment within 10 Business Days of receipt of that assessment, or such other period as agreed with the HVCCC and will ask the HVCCC to consider ARTC's reasons and provide its revised view within a specified timeframe. The ACCC is of the view that section 5.2(d)(iii) of the June 2011 HVAU conforms to the relevant recommendations in the Position Paper.
Capacity Reservation mechanism to be removed The provision regarding the capacity reservation mechanism to Non-Coal Access Rights should be removed from the HVAU.	PP Ch 10.4, p. 254.	The section on Capacity Reservation for Non-Coal Access Rights has been removed from the June 2011 HVAU.

<p>Capacity shortfall – Allocation other than on an equitable basis only if consistent with efficient utilisation of Capacity and Coal Chain Capacity</p> <p>ARTC should only be able to allocate capacity other than on an equitable basis in the short term if it is consistent with the objective of ensuring efficient utilisation of Capacity and Coal Chain Capacity during the Capacity Shortfall and after considering recommendations provided by the HVCCC.</p>	<p>PP Ch 10.5, p. 264.</p>	<p>ARTC has amended section 5.4(a)(ii) of the June 2011 HVAU so that it sets out that:</p> <p>‘Capacity remaining after the allocation of Capacity under sub-section (a)(i) will be allocated to Access Holders at ARTC’s discretion. In exercising its discretion, ARTC must take into account its contractual obligations under Access Agreements but may allocate Capacity other than on an equitable basis if it is consistent with the objective of ensuring efficient utilisation of Capacity and Coal Chain Capacity during the Capacity Shortfall and after considering any recommendations provided by the HVCCC under section 5.3(a)(ii).’</p> <p>The ACCC is of the view that section 5.4(a)(ii) of the June 2011 HVAU conforms to the relevant recommendations in the Position Paper.</p>
<p>Capacity shortfall – Best endeavours obligation to minimise affected access seekers when reallocating capacity</p> <p>ARTC to be obliged to use its best endeavours when exercising its discretion to allocate capacity under the shorter term capacity shortfall provisions, to the extent practicable, to not reduce contracted access rights from load points not affected by the Capacity Shortfall.</p>	<p>PP Ch 10.5, p. 264.</p>	<p>ARTC has included section 5.4(a)(iii) in the June 2011 HVAU which sets out a best endeavours obligation to not reduce availability of contracted access rights from load points not affected by shorter term Capacity Shortfalls.</p> <p>The ACCC is of the view that section 5.4(a)(iii) of the June 2011 HVAU conforms to the relevant recommendations in the Position Paper.</p>
<p>Capacity shortfall – Minor changes</p> <p>Section 5.5(a)(ii) of the September 2010 HVAU and clause</p>	<p>PP Ch 10.5, p. 265.</p>	<p>ARTC has amended clauses 6.2(a)(ii) and 6.2(a)(iii) of the IAHA to align to section 5.4(a)(ii) and 5.4(a)(iii) in the June 2011 HVAU and amended sections 5.4(a)(ii) of the HVAU as</p>

<p>6.2(a)(ii) of the IAHA are not the same. Amend so that ARTC's intended wording is reflected in both provisions.</p> <p>Section 5.5(a)(ii) contains a reference to 'subsection (a)'. This provision be amended so that it accurately refers to 'subsection (a)(i)' as appears to have been intended.</p>		<p>recommended.</p> <p>The ACCC is of the view that these minor amendments to the June 2011 HVAU conform to the relevant recommendations in the Position Paper.</p>
Threshold for capacity resumption	PP Ch 10.7, p. 272.	This aspect of the June 2011 HVAU is discussed in Chapter 5.
<p>Certain trading provisions to be included as Tier 1 (mandatory) provisions</p> <p>ARTC to include clauses 16.6, 16.7 and 16.8 as Tier 1 (mandatory) provisions.</p> <p>ACCC also noted that there is no obvious reason why clause 16.3, relating to permanent trades, is not a Tier 1 (mandatory) provision.</p>	PP Ch 10.9, p. 274.	<p>The ACCC notes that ARTC has included clauses 16.6 and 16.8 as a Tier 1 (mandatory) provisions, and that clause 16.7 has also been included as a Tier 1 provision to the extent it relates to clause 16.4.</p> <p>Further, the ACCC notes ARTC's argument that 'it has not included clause 16.3 of the IAHA as it does not see any coal chain alignment issues arising if an Applicant sought to have different arrangements (or no arrangement at all).'¹⁴⁶ The ACCC agrees that inclusion of these particular provisions relating to permanent trades are not necessary for the purposes of consistent application of capacity management protocols across relevant coal access seekers.</p> <p>Therefore, the ACCC is of the view that the amendments including clauses 16.6, 16.7 and 16.8 as Tier 1 (mandatory) provisions conforms to the relevant recommendations in the</p>

¹⁴⁶ ARTC, Explanatory Guide - ARTC Response to ACCC HVAU Position Paper, 8 April 2011, p. 20.

		Position Paper.
<p>Circumstances in which ARTC can assign or novate AHA without Access Holder consent</p> <p>Clause 16.1 to be amended so the IAHA can only be assigned or novated without Access Holder consent only in (i) the specific circumstances referred to in the NSW Lease and (ii) the assignment involves the transfer of the whole of the access agreement.</p>	PP Ch 10.10, p. 278.	<p>ARTC has amended clause 16.1(a)(i) of the IAHA to permit assignment or novation without consent where the management of the relevant Network is transferred to another party. ARTC is of the view that this ‘is intended to cover the circumstances where ARTC sells or is directed to sell its assets. In such cases, ARTC requires the ability to assign or novate, without consent, those interests and rights under the AHA that are attached to the assets being sold.’¹⁴⁷</p> <p>The ACCC is of the view that ARTC’s amendments to clause 16.1(a)(i), including the amendments covering the circumstances where ARTC has transferred management of the Network, conform to the relevant recommendations in the Position Paper.</p>
<p>Requests to transfer rights by an Access Holder not to be unreasonably withheld</p> <p>Clause 16.2 of the IAHA to be amended to include an obligation on ARTC to not unreasonably withhold consent to a request by an Access Holder to transfer rights under the relevant Access Agreement.</p>	PP Ch 10.10, p. 279.	<p>ARTC has amended clause 16.2 of the IAHA contained in the June 2011 HVAU so that it sets out that:</p> <p>‘Except as set out in clause 16.3 and clause 16.4, the Access Holder may not license, assign, novate, sell, trade, sub-licence or otherwise dispose (“transfer”) of this agreement, its interest in the subject matter of this agreement or any right under this agreement without the prior written consent of ARTC, such consent not to be unreasonably withheld.’</p>

¹⁴⁷ ARTC, Explanatory Guide - ARTC Response to ACCC HVAU Position Paper, 8 April 2011, p. 20.

		The ACCC is of the view that the amendments to clause 16.2 of the IAHA conforms to the relevant recommendations in the Position Paper.
ARTC to seek HVCCC views on all trades Clause 16.6(c) of the IAHA to be amended so that the views of the HVCCC are sought in relation to all trades (where relevant) under clauses 16.3 and 16.4. ARTC to continue to be able to rely on the HVCCC's view as to the impact of a trade.	PP Ch 10.12, p. 282.	ARTC has amended clause 16.6(c) of the IAHA so that the HVCCC's view will be sought on the impact of trades where relevant. The ACCC is of the view that the amendments to clause 16.6(c) of the IAHA conform to the relevant recommendations in the Position Paper.
HVCCC acceptance of a 'safe harbour' trade will constitute evidence that the trade will not adversely impact Coal Chain Capacity Clause 16.4(a)(iv) of the IAHA to be amended so that evidence of the HVCCC's 'acceptance of the trade' will constitute the warranty required by ARTC that the trade will not adversely impact Coal Chain Capacity.	PP Ch 10.12, p. 284.	ARTC has amended clause 16.4(a)(iv) of the IAHA to treat acceptance of the trade by the HVCCC as an acceptable form of evidence required for a trade to be considered 'safe harbour.' The ACCC is of the view that the amendments to clause 16.4(a)(iv) of the IAHA conform to the relevant recommendations in the Position Paper.
All non-safe harbour trades to be considered by the HVCCC Clause 16.4(d) of the IAHA to be amended so that ARTC is obliged to seek and consider in good faith the recommendations of the HVCCC in relation to all non-safe harbour trades as to the impact on capacity.	PP Ch 10.12, p. 287.	ARTC has amended clauses 16.6(c) and 16.4(d)(i) of the IAHA so that all non-safe harbour trades will be considered by the HVCCC as to the impact of the trade on Coal Chain Capacity, and the Capacity entitlements of other access holders. ARTC has included amendments to section 16.4(d)(i) to provide an entitlement for ARTC to refuse a non safe harbour

		trade if no HVCCC advice is received. ¹⁴⁸ The ACCC is of the view that the amendments to clauses 16.6(c) and 16.4(d)(i) of the IAHA conform to the relevant recommendations in the Position Paper.
Treatment of traded path usages under the system TUT	PP Ch 10.13, p. 289.	This aspect of the June 2011 HVAU is discussed in Chapter 5.
Trading - Consultation with HVCCC Clause 16.6(c) of the IAHA to be amended to clearly set out a specific obligation on ARTC consult with the HVCCC and consider its views in good faith in relation to all trades under 16.3, 16.4(a) and 16.4(d) as to the impact of trade on capacity. The reference to ‘clause 16.4(c)’ in clause 16.6(b) is incorrect and should instead refer to clause 16.4(a).	PP Ch 10.14, p. 293.	ARTC has amended clause 16.4(a)(iv) and 16.6(c) of the IAHA as sought and also amended clause 16.4(b) of the IAHA as sought. The ACCC is of the view that the amendments to clauses 16.6(c), 16.4(a) and 16.4(d)(i) of the IAHA conform to the relevant recommendations in the Position Paper.
Publication of written reasons following review of timing for non-safe harbour trades Clause 16.8 of the IAHA to be amended so that ARTC is obliged to provide written reasons for its decision whether to reduce or maintain the two week decision period for approval of non-safe harbour trades.	PP Ch 10.15, p. 295.	ARTC has amended clause 16.8 of the IAHA as sought and clarified the time by which the review must be conducted. The ACCC is of the view that the amendments to clauses 16.8(a) and (c) of the IAHA conform to the relevant recommendations in the Position Paper.

¹⁴⁸ ARTC, Explanatory Guide - ARTC Response to ACCC HVAU Position Paper, 8 April 2011, p. 21.

<p>Consent not required for a change in rail Operators where there is no impact on capacity</p> <p>Clause 11.5 of the IAHA be amended to provide that Access Holders can make use of different Operators without having to obtain consent from ARTC to use a Non-Compliant Service where the difference in the characteristics of the trains utilised by the different Operators does not have any impact on capacity.</p>	<p>PP Ch 10.17, p. 300.</p>	<p>ARTC has amended clause 11.5(a)(ii) of the IAHA to have the effect of deeming that the use or operation of a Non-Compliant Service will not have an adverse impact on Capacity, Coal Chain Capacity or the Capacity entitlement of another access holder, where the Non-Compliant Service has the same Service Assumptions.</p> <p>The ACCC is of the view that the amendments to clause 11.5(a)(ii) of the IAHA conform to the relevant recommendations in the Position Paper.</p>
<p>Ability of ARTC to withhold consent where reduction in TOP charges</p> <p>The ACCC noted in the Position Paper that clause 11.5(c)(iii) of the IAHA could be amended so that where an Access Holder seeks to permanently vary a service, the access charges for the new service would be determined annually in accordance with the relevant process under the IAHA rather than ARTC having the ability to withhold consent on the basis that the variation leads to a reduction in TOP Charges.</p>	<p>PP Ch 10.17, p. 300.</p>	<p>ARTC has included a new clause 11.5(d) in the IAHA to provide that ARTC will not unreasonably withhold its consent to a permanent change to the Service Assumptions for a Train Path that would lead to a reduction in TOP Charges if, in ARTC's reasonable opinion reached in consultation with the HVCCC, the variation involves the transfer to a Service which provides for more efficient use of Capacity or Coal Chain Capacity.</p> <p>The ACCC is of the view that the amendments to clause 11.5(d) of the IAHA should alleviate the disincentive effect of the previous drafting and therefore conform to the relevant recommendations in the Position Paper.</p>
<p>ARTC to notify Access Holder where its BPU's are to be removed</p> <p>Clause 11.6 to be amended so ARTC is obliged to notify an Access Holder where its Base Path Usages are to be removed</p>	<p>PP Ch 10.18, p. 309.</p>	<p>ARTC has amended clause 11.6(d) of the IAHA contained in the June 2011 HVAU so that it sets out that:</p> <p style="padding-left: 40px;">'If Base Path Usages are removed in accordance with this clause 11.6(c), ARTC will delete the number of removed Path Usages from the Access</p>

under this provision.		<p>Holder's Annual Contracted Path Usages in the relevant Train Path Schedule by notice to the Access Holder. To avoid doubt, a cancellation or a reduction of Path Usages made available to the Access Holder as a result of a Capacity Shortfall under clause 6 will not constitute a cancellation under this clause 11.6.'</p> <p>The ACCC is of the view that the amendments to clause 11.6(d) of the IAHA conform to the relevant recommendations in the Position Paper.</p>
<p>Clause 11.6 to be subject to review mechanism in section 5.8 of the HVAU</p> <p>Clause 11.6 of the IAHA to clearly state that the provision is to be subject to review under the mechanism set out in section 5.8 of the HVAU.</p>	PP Ch 10.18, p. 309.	<p>ARTC has amended clause 11.6(j) of the IAHA contained in the June 2011 HVAU to provide that 'This clause 11.6 is subject to any changes arising from the review under section 5.8 of the Access Undertaking.'</p> <p>The ACCC is of the view that the amendments to clause 11.6(j) of the IAHA conform to the relevant recommendations in the Position Paper.</p>
<p>Clarification of the interaction between clause 11.6 and 6 of the IAHA</p> <p>IAHA to be amended to clarify the interaction of clause 11.6 of the IAHA and the capacity shortfall provisions in clause 6 to set out that an Access Holder cannot be penalised twice for the same event.</p>	PP Ch 10.18, p. 309.	<p>ARTC has amended clause 11.6(d) of the IAHA to state that, for the avoidance of doubt, a cancellation or a reduction of Path Usages made available to the Access Holder as a result of a Capacity Shortfall under clause 6 will not constitute a cancellation under this clause 11.6.</p> <p>The ACCC is of the view that the amendments to clause 11.6(d) of the IAHA conform to the relevant recommendations in the Position Paper.</p>

<p>Written reasons to be provided where ARTC decides not to remove BPUs where HVCCC has advised a cancellation has an impact on capacity</p> <p>Clause 11.6 of the IAHA, to be amended so that where the HVCCC informs ARTC that a cancellation has impacted on Capacity, Coal Chain Capacity, or the Capacity entitlement of another Access Holder, and ARTC chooses not to remove Base Path Usages, ARTC to provide written reasons within a specific timeframe to the HVCCC (or to the Access Holder where they are not a member of the HVCCC). There should be no obligation to provide confidential information.</p>	<p>PP Ch 10.18, p. 309.</p>	<p>ARTC has amended clause 11.6(f) of the IAHA contained in the June 2011 HVAU so that it sets out that:</p> <p style="padding-left: 40px;">‘If ARTC is informed by the HVCCC that the cancellations reported in this clause 11.6 have had, in the reasonable opinion of the HVCCC, an impact on Capacity, Coal Chain Capacity or the Capacity entitlement of another access holder, but ARTC has not removed Base Path Usages from the Access Holder, then ARTC will provide written reasons for its decision not to remove Base Path Usages from the Access Holder to:</p> <p style="padding-left: 40px;">(i) the HVCCC; or</p> <p style="padding-left: 40px;">(ii) if requested, the Access Holder where it is not a member of the HVCCC, subject to any confidentiality restrictions,</p> <p style="padding-left: 40px;">within 10 Business Days of making that decision.’</p> <p>The ACCC is of the view that the amendments to clause 11.6(f) of the IAHA, alongside the inclusion of the 10 Business Day timeframe, conform to the relevant recommendations in the Position Paper.</p>
<p>HVAU review of mechanism to identify and assign capacity losses</p> <p>Where HVCCC conducts an industry wide review within 12 months of the commencement date of the HVAU, ARTC to participate in good faith in that review and where a proposal is developed that includes proposed amendments to the HVAU,</p>	<p>PP Ch 10.19, p. 314.</p>	<p>ARTC has amended section 5.8(b)(i) of the June 2011 HVAU(old section 5.9(b)(i) of the September 2010 HVAU) to provide for ARTC to participate in good faith in, and consider any proposals arising from, and industry wide review that may be conducted by the HVCCC.</p> <p>The ACCC also notes that ARTC’s consultation process</p>

<p>any such proposal to be considered under the existing mechanisms set out in section 5.8.</p>		<p>provides for the HVCCC to make submissions. ARTC has amended section 5.8(c) of the June 2011 HVAU (old section 5.9(c) of the September 2010 HVAU) to explicitly recognise a submission arising from any HVCCC review.</p> <p>The ACCC is of the view that sections 5.8(b)(i) and 5.8(c) of the June 2011 HVAU conform to the relevant recommendations in the Position Paper.</p>
<p>A robust consultation process for review of mechanism to identify and assign capacity losses</p> <p>The review of the loss allocation mechanisms in the HVAU to be amended to set out a more robust and specific consultation mechanism, such as that included at section 5.2(d) of the September 2010 HVAU.</p>	<p>PP Ch 10.19, p. 315.</p>	<p>ARTC has amended section 5.8 of the June 2011 HVAU so that it sets out that it will:</p> <p>‘(b)(ii) invite the HVCCC, Access Holders and other Hunter Valley Coal Chain service providers to:</p> <p>(A) provide their views of whether particular actions or omissions of Access Holders or their Operators (such as cancellation of scheduled Services) have a material impact on Capacity, Coal Chain Capacity or the Capacity entitlement of Access Holders; and</p> <p>(B) submit proposals for a suitable framework to address any adverse impact on Capacity caused by such actions or omissions including any rules for the allocation of losses of Capacity to the responsible Access Holder,</p> <p>within a specified time (which must not be less than six weeks).’</p>

		<p>...</p> <p>(c) ARTC will in good faith consider any proposals arising from the HVCCC review (if carried out) or the submissions and proposals provided to ARTC within a specified time pursuant to ARTC's review (as applicable) and if ARTC reasonably determines, following consultation with the HVCCC (and further consultation with other stakeholders at ARTC's discretion) [that if certain conditions are satisfied, submit a variation to the ACCC in line with the proposals];</p> <p>...</p> <p>(e) If ARTC decides not to submit a variation application to the ACCC under section 5.8(c), ARTC must, by no later than two years from the Commencement Date publish, subject to confidentiality restrictions, a report on its website setting out its reasons for rejecting any proposals developed or submitted under section 5.8(b).</p> <p>The ACCC is of the view that section 5.8 of the June 2011 HVAU (in particular, sections 5.8(b)(ii), 5.8(c) and 5.8(e)) conform to the relevant recommendations in the Position Paper.</p>
<p>Scope of the review</p> <p>Section 5.8(a) of the HVAU to specify sections of the proposed HVAU and clauses of the IAHA or OSA that are likely to come within the scope of the review. This is not to be an exhaustive</p>	<p>PP Ch 10.19, p. 315.</p>	<p>ARTC has amended section 5.8(a) in the June 2011 HVAU to provide that the review will include those processes outlined in clause 11.6 of the Indicative Access Holder Agreement.</p> <p>The ACCC is of the view that section 5.8(a) of the June 2011</p>

list.		HVAU conforms to the relevant recommendations in the Position Paper.
11 Additional Capacity & Investment		
Sections 6.2, 6.3 and 6.4 need to be redrafted to improve clarity	PP Ch 11, p. 317; p. 327.	This aspect of the June 2011 HVAU is discussed in Chapter 5.
Clarify ability of users to fund investment where ARTC decides not to fund Clarify that user-funding may be pursued as a general option in circumstances where ARTC has decided that it does not wish to fund a particular investment (either under the HVCCS or via a recommendation by the HVCCC). The HVAU should clarify that where ARTC decides that it will not fund the investment, then the applicable access seekers will have the ability to meet the cost of the investment.	PP Ch 11.2.3, p. 337.	Sections 7.2(c), 7.5, and 10 provide that user-funding is available at any development stage if ARTC advises it will not fund all or part of an investment. The ACCC is of the view that sections 7.2(c), 7.5, the sections within the Project Development Stages where ARTC will indicate that it will fund a project, and sections 10 and 11.2 of the June 2011 HVAU conform to the relevant recommendations in the Position Paper. This aspect of the June 2011 HVAU is also discussed in Chapter 5.
Clarify when user funding is triggered	PP Ch 11.2.3, p. 337.	This aspect of the June 2011 HVAU is discussed in Chapter 5.
ARTC's decision to proceed with a user-funded investment to be made objectively The HVAU should clarify that the decision by ARTC whether to consent to proceed with a user-funded investment (as	PP Ch 11.3.4, pp. 364-365.	ARTC has included sections 7.4(d) and 11.1 and the new definition for 'Technical Criteria' to cover this recommendation. ARTC also notes that the definition of Technical Criteria applies to ARTC's decision to consent to a

<p>opposed to ARTC's determination of whether to fund the project itself on commercial viability grounds) is made objectively by reference to clear criteria.</p>		<p>project (based on ARTC's reasonable opinion).¹⁴⁹</p> <p>The ACCC is of the view that:</p> <ul style="list-style-type: none"> ▪ the inclusion of the definition of Technical Criteria in section 14; ▪ the obligation in section 11.1(a) that those Technical Criteria are assessed in 'ARTC's reasonable opinion'; ▪ alongside ARTC's obligation in the same section to give written reasons for its decision not to proceed; and ▪ that relevant parties have the right to exercise the dispute resolution provisions in the HVAU in order to resolve a dispute over whether or not the Technical Criteria were satisfied (section 11.1(b)); <p>conform to the relevant recommendations in the Position Paper. This aspect of the June 2011 HVAU is also discussed in Chapter 5.</p>
<p>Best endeavours to be used to enter into a user funding agreement within a reasonable time</p> <p>It should be set out that where the applicable access holder(s) propose to meet the costs of the investment, ARTC and the</p>	<p>PP Ch 11.2.3, p. 337.</p>	<p>ARTC notes that where the user funding option is triggered, the Revised Investment Framework includes an obligation on ARTC to negotiate in good faith a user funding agreement, provide an indicative timeframe and use reasonable</p>

¹⁴⁹ ARTC, Explanatory Guide - ARTC Response to ACCC HVAU Position Paper, 8 April 2011, p. 27.

applicable access holder(s) will use their best endeavours to enter into a user funding agreement within a specific timeframe.		endeavours to adhere to the agreed timeframe (see section 10.1). ¹⁵⁰ The ACCC is of the view that section 10.1 of the June 2011 HVAU conforms to the relevant recommendations in the Position Paper.
Remove commercial viability Condition Precedent (CP) from Train Path Schedule	PP Ch 11.2.3, p. 338; PP Ch 11.5, p. 399.	This aspect of the June 2011 HVAU is discussed in Chapter 5.
Clarifying interaction of RCG endorsement process with broader investment framework Clarify how the requirement for RCG endorsement interacts with ARTC's broader investment framework and the RCG process. Ensure that the HVCCC may recommend an investment to provide Additional Capacity to the Network to ARTC at any time. Ensure the projects recommended or requested will go through	PP Ch 11.2.3, p. 336.	ARTC notes that these 'points have been clarified in sections 7.2(a), 7.3, 8.3 and 9.3 of the Revised Investment Framework. That is: <ul style="list-style-type: none"> ▪ The HVCCC may at any time recommend to ARTC a Project which may, but does not need to be, a Project identified in the Hunter Valley corridor capacity strategy.¹⁵¹ ▪ If the HVCCC makes such a recommendation, ARTC will consult with the HVCCC to develop the Project and will use reasonable endeavours to agree with the HVCCC an

¹⁵⁰ ARTC, Explanatory Guide - ARTC Response to ACCC HVAU Position Paper, 8 April 2011, p. 28.

¹⁵¹ ARTC, Explanatory Guide - ARTC Response to ACCC HVAU Position Paper, 8 April 2011, p. 28.

the RCG process.		<p>estimated cost and timeframe to prepare a Concept Assessment Report for that Project.¹⁵²</p> <ul style="list-style-type: none"> ▪ If the HVCCC pays the agreed costs, ARTC will prepare a Concept Assessment Report for that Project and use reasonable endeavours to do so in the agreed timeframe. These costs will be refunded if the RCG endorses those costs and for the Project to proceed to project feasibility.¹⁵³ <p>The ACCC also notes that ‘ARTC has ... included a similar process for projects initiated by an Applicant to proceed to Concept Assessment (see section 8.4).’¹⁵⁴</p> <p>The ACCC is of the view that sections 7.2(a), 8.3, 8.4 and 9.3 in the June 2011 HVAU conform to the relevant recommendations in the Position Paper.</p>
<p>Timeframe within which ARTC obliged to provide concept assessment report</p> <p>Clarify the timeframes within which ARTC is obliged to provide a concept assessment report to the RCG once it has</p>	PP Ch 11.2.3, pp. 337-338.	<p>ARTC notes that it ‘does not consider it appropriate to incorporate a fixed timeframe for develop[ment] of a Concept Assessment Report.... ARTC will consult with the HVCCC to develop the Project and will use reasonable endeavours to agree with the HVCCC (or the Applicant) an estimated cost</p>

¹⁵² ARTC, Explanatory Guide - ARTC Response to ACCC HVAU Position Paper, 8 April 2011, p. 28.

¹⁵³ ARTC, Explanatory Guide - ARTC Response to ACCC HVAU Position Paper, 8 April 2011, p. 28.

¹⁵⁴ ARTC, Explanatory Guide - ARTC Response to ACCC HVAU Position Paper, 8 April 2011, p. 29.

received the HVCCC's recommendation / request.		<p>and timeframe to prepare a Concept Assessment Report for that Project (see new sections 8.3(b) and 8.4(a)).¹⁵⁵</p> <p>The ACCC notes that the June 2011 HVAU requires ARTC to use reasonable endeavours to agree with the HVCCC (or Applicant) the cost and timeframe within which it will prepare a Concept Assessment Report and for ARTC to use reasonable endeavours to deliver that report in the agreed timeframe.</p> <p>The ACCC is of the view that sections 8.3(b) and (c), and 8.4(a) and (b) in the June 2011 HVAU conform to the relevant recommendations in the Position Paper.</p>
<p>CI 6.3 – User funding where ARTC does not fund an HVCCC recommended project</p> <p>Given the significant uncertainty caused by the drafting of the September 2010 HVAU in relation to ARTC's intention for a 'user funded' mechanism under section 6.3(b), the ACCC is of the view that a clearer 'user funded' mechanism for HVCCC recommended Additional Capacity given ARTC's broader 'investment framework', would be for the HVAU to be amended in the manner set out.</p>	<p>PP Ch 11.2.3, p. 344.</p>	<p>ARTC notes that it has adopted a 'clearer approach to seeking RCG endorsement, given ARTC's broader 'investment framework' ... so it is clear that:'</p> <ul style="list-style-type: none"> ▪ The HVCCC may recommend an investment to provide Additional Capacity to the Network to ARTC at any time [section 8.3]; ▪ ARTC will prepare a concept assessment report in relation to that recommended Additional Capacity ... within a specific timeframe [section 8.3(b) and (c)]. ▪ The project will go through the RCG process. ARTC will assess whether or not it will fund the project in line with the [Financial] criteria ... at each project stage. If ARTC decides that it is not willing to fund the investment, then the applicable Access Holder(s) will have the ability to agree to meet the cost of the Additional Capacity [section

¹⁵⁵ ARTC, Explanatory Guide - ARTC Response to ACCC HVAU Position Paper, 8 April 2011, p. 29.

		<p>10].</p> <ul style="list-style-type: none"> ▪ Where ARTC has assessed that it is willing to fund the investment, ARTC will also consider whether the recommended Additional Capacity satisfy, in the reasonable opinion of ARTC, the range of objective non-financial criteria [Technical Criteria] [sections 7.4(d) and 11.1]. ▪ Where the applicable Access Holder(s) have agreed to meet the cost of the recommended Additional Capacity, then ARTC will consider whether the recommended Additional Capacity satisfy, in the reasonable opinion of ARTC, the range of non-financial criteria [Technical Criteria] [sections 7.4(d) and 11.1]. ▪ Where the applicable Access Holder(s) have agreed to meet the cost of the recommended Additional Capacity, ARTC and the applicable Access Holder(s) must enter into a user funding agreement within a specific timeframe [section 10.1]. ▪ Where ARTC has decided to fund the recommended Additional Capacity at each project stage, ARTC should be obliged to construct that Additional Capacity. Any change in circumstances that affects the ability of ARTC to get funding which prevents ARTC from being able to complete the Additional Capacity on the terms agreed can be appropriately dealt with in a commercial contract [see above under the heading Commercial viability conditions precedent].¹⁵⁶ <p>The ACCC is of the view, for the reasons given in the body of this decision, the sections listed in the square brackets above as set out the June 2011 HVAU conform to the relevant</p>
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¹⁵⁶ ARTC, Explanatory Guide - ARTC Response to ACCC HVAU Position Paper, 8 April 2011, p. 29-30.

		recommendations in the Position Paper.
Financial Criteria (previously commercial viability criteria) Clarify that ARTC's assessment of whether the provision of additional capacity is commercially viable, relates specifically to <i>ARTC's</i> commercial viability.	PP Ch 11.2.4, p. 350.	ARTC has included the concept of 'commercial viability' into a generic 'Financial Criteria' concept that it will apply to its decision to fund a project at each consultation stage (section 11.2). The ACCC is of the view that section 11.2 and the definition of Financial Criteria included in section 14 of the June 2011 HVAU conform to the relevant recommendations in the Position Paper.
A reasonableness requirement for non-financial criteria Include a reasonableness requirement in relation to the non-financial criteria by which ARTC will determine whether additional capacity should be provided.	PP Ch 11.2.4, p. 354.	ARTC has included section 11.1(a), which 'clarifies that the Technical Criteria will be applied objectively (i.e. in ARTC's reasonable opinion) to its decision to consent to a project at each industry consultation stage.' ¹⁵⁷ The ACCC is of the view that section 11.1(a) and the definition of Technical Criteria included in section 14 of the June 2011 HVAU conform to the relevant recommendations in the Position Paper.
Legitimate business interests under section 6.3(b)(iv)(D)	PP Ch 11.2.4, p. 358.	This aspect of the June 2011 HVAU is discussed in Chapter 5.

¹⁵⁷ ARTC, Explanatory Guide - ARTC Response to ACCC HVAU Position Paper, 8 April 2011, p. 29-30.

Written reasons to be given under section 6.3(b)(iv)(D) where compromises legitimate business interests	PP Ch 11.2.4, p. 359.	This aspect of the June 2011 HVAU is discussed in Chapter 5.
Additional Capacity sought by Applicants Similar changes to those made to additional capacity requested by the HVCCC and to the industry consultation process to apply to requests by Applicants for additional capacity.	PP Ch 11.3, p. 363.	<p>ARTC notes that ‘[a]ll the amendments made to address the ACCC’s issues in relation to projects initiated by the HVCCC have been similarly addressed for those projects initiated by an Applicant (see sections 7 and 8.3 of the Revised Investment Framework).’¹⁵⁸</p> <p>The ACCC acknowledges that the provisions in the June 2011 HVAU that have been amended from the September 2010 version of the HVAU by which recommendations from the HVCCC for additional capacity are dealt with, and the revised industry consultation process, also apply to requests for additional capacity by Applicants.</p> <p>Therefore, the ACCC is of the view that these amendments included in the June 2011 HVAU conform to the relevant recommendations in the Position Paper.</p>
Timing of user funding once request received from an Applicant Specify the timeframes within which ARTC is obliged to make a decision as to whether it will consent to the provision of additional capacity once it has received a request from an	PP 11.3.3, p. 363.	ARTC notes that section 8.4(a) ‘now provides that ARTC will consult, and use reasonable endeavours to agree, with the Applicant, a timeframe to prepare a Concept Assessment Report. In addition ARTC will provide a[n Applicant] with an indicative timetable and will use best endeavours to adhere to that timeframe [section 10.1] ... and keep the Applicant

¹⁵⁸ ARTC, Explanatory Guide - ARTC Response to ACCC HVAU Position Paper, 8 April 2011, p. 31.

Applicant.		<p>informed of the progress of the application through the RCG process (section 8.4(e)).’¹⁵⁹</p> <p>ARTC also notes that it ‘has committed to promptly notify the RCG and the Applicant (if applicable) if it decides not to fund [or continue to fund] a Project stage [section 11.2]’.¹⁶⁰</p> <p>The ACCC notes that the June 2011 HVAU requires ARTC to use reasonable endeavours to agree with the Applicant the cost and timeframe within which it will prepare a Concept Assessment Report and for ARTC to use reasonable endeavours to deliver that report in the agreed timeframe. This report will then go through the industry consultation process at section 9.3.¹⁶¹</p> <p>The ACCC is of the view that sections 8.4(a) and (b) in the June 2011 HVAU conform to the relevant recommendations in the Position Paper.</p>
<p>Consultation with HVCCC</p> <p>Strengthen ARTC’s obligation to consult with the HVCCC in line with the recommendations made in relation to section 5.2(d) and (e).</p>	PP 11.3.3, p. 366.	<p>ARTC notes that section 8.4 ‘now provides that ARTC will consult, and use reasonable endeavours to agree a timeframe, with the Applicant, and consult with the HVCCC where appropriate.’¹⁶²</p> <p>The ACCC is of the view that section 8.4(a) of the June 2011</p>

¹⁵⁹ ARTC, Explanatory Guide - ARTC Response to ACCC HVAU Position Paper, 8 April 2011, p. 31.

¹⁶⁰ ARTC, Explanatory Guide - ARTC Response to ACCC HVAU Position Paper, 8 April 2011, p. 31.

¹⁶¹ ARTC, Explanatory Guide - ARTC Response to ACCC HVAU Position Paper, 8 April 2011, p. 32.

¹⁶² ARTC, Explanatory Guide - ARTC Response to ACCC HVAU Position Paper, 8 April 2011, p. 32.

		HVAU, which obliges ARTC to consult (where appropriate) with the HVCCC, in combination with the process set out in section 9 for RCG endorsement, conform to the relevant recommendations in the Position Paper.
Capital contributions - Definition of economically no worse off Provide greater clarity as to what it means for ARTC to be 'economically no worse off'.	PP 11.3.6, p. 374.	ARTC notes that it has 'clarified the concept of 'economically no worse off' at section 10.2(b)'. ¹⁶³ The ACCC is of the view that the definition of 'Economically No Worse Off' in section 10.2(b) of the June 2011 HVAU conforms to the relevant recommendations in the Position Paper.
Explicit recognition of user funding agreement and availability of ACCC arbitration The HVAU should explicitly refer to the fact that ARTC and the relevant user funders will enter an agreement governing the user-funding arrangements. Explicit recognition that negotiation of the agreement is subject to ACCC arbitration may incentivise parties to reach agreement in a timely fashion.	PP 11.3.6, p. 376.	ARTC has amended sections 7.5(b) and (c), section 10.1 and 10.4 so that they collectively refer to relevant user funders entering into an agreement governing the user-funding arrangements, with the negotiation of the agreement being subject to ACCC arbitration. The ACCC is of the view that sections 7.5(b) and (c), section 10.1 and 10.4 of the June 2011 HVAU conform to the relevant recommendations in the Position Paper.
Clarification of RCG control of timing of project stages Clarify that the RCG controls the timing of the various stages of industry consultation and that specific timeframes where there	PP 11.2, p. 343.	ARTC has amended the HVAU 'in relation to the timing of capacity development and the consultation process by including in the scope of endorsement at each stage an endorsement of the proposed timeframe for the next stage of

¹⁶³ ARTC, Explanatory Guide - ARTC Response to ACCC HVAU Position Paper, 8 April 2011, p. 32.

is an obligation on ARTC should be provided.		<p>process development [sections 9.3(d)(ii), 9.4(d)(ii), 9.5(d)(ii) and 9.6(b)].¹⁶⁴</p> <p>The ACCC acknowledges that in order to move through the various stages of project development, where RCG endorsement is required, ARTC will be required to seek endorsement of ARTC's proposed timeframes to undertake the next stage of project development.</p> <p>The ACCC is of the view that sections 9.3(d)(ii), 9.4(d)(ii), 9.5(d)(ii) and 9.6(b) of the June 2011 HVAU conform to the relevant recommendations in the Position Paper.</p>
<p>Voting process in the RCG</p> <p>Clarify that the party who is representing those access holders with less than 7 per cent of contracted coal GTK on the Network may split its vote according to the percentage of contracted coal GTK held by each represented access holder if requested.</p>	PP 11.4.2, p. 385.	<p>ARTC notes that it has addressed this issue at section 9.2(b)(iii) of the June 2011 HVAU.¹⁶⁵</p> <p>The ACCC is of the view that section 9.2(b)(iii) of the June 2011 HVAU conforms to the relevant recommendations in the Position Paper.</p>
<p>RCG Charter elements relevant to voting rights to be included in HVAU</p> <p>Any elements of the RCG Charter that are relevant to voting rights should be incorporated into the HVAU.</p>	PP 11.4.2, p. 385.	<p>ARTC notes that it has considered the amendments to the 2010 HVAU proposed by the ACCC but is of the view that they would be restrictive on the operation of the RCG, as the change would require that:</p> <p>any time any minor adjustment to relevant voting elements in the RCG</p>

¹⁶⁴ ARTC, Explanatory Guide - ARTC Response to ACCC HVAU Position Paper, 8 April 2011, p. 32.

¹⁶⁵ ARTC, Explanatory Guide - ARTC Response to ACCC HVAU Position Paper, 8 April 2011, p. 33.

		<p>Charter changes, would result in the RCG Charter being inconsistent with the voting provisions of the HVAU, which will require a variation to the HVAU. ARTC and Industry may therefore be restricted in its ability to modify the functioning of the RCG to ensure it is an efficient and effective arrangement.¹⁶⁶</p> <p>The ACCC accepts ARTC's view that any remaining elements in the RCG Charter relevant to voting rights do not need to be included in the HVAU as the ACCC is of the view that the current terms contained in the June 2011 HVAU with regards to the RCG voting process will override any changes made to the RCG Charter that are inconsistent with what has been included in the HVAU.</p>
<p>Publishing of Corridor Capacity Strategy</p> <p>ARTC to be obliged to publish the Hunter Valley Corridor Capacity Strategy on its website as soon as possible after it is finalised each year.</p>	<p>PP 11.4.4, p. 387.</p>	<p>ARTC notes that that it has addressed this issue in section 8.1(e) of the June 2011 HVAU by setting out that:¹⁶⁷</p> <p style="padding-left: 40px;">‘ARTC will publish the Hunter Valley corridor capacity strategy on its website, which will include its assessment of Capacity based on the Relevant System Assumptions, as soon as practicable after it is finalised each year under section 8.1(d)(iii).’</p> <p>The ACCC is of the view that section 8.1(e) of the June 2011 HVAU conforms to the relevant recommendations in the Position Paper.</p>

¹⁶⁶ ARTC, Explanatory Guide - ARTC Response to ACCC HVAU Position Paper, 8 April 2011, p. 33.

¹⁶⁷ ARTC, Explanatory Guide - ARTC Response to ACCC HVAU Position Paper, 8 April 2011, p. 33.

<p>RCG veto rights</p> <p>Where relevant users are willing to fund a project on a ‘non-RAB’ basis to the extent required to keep charge increases at 10 per cent, then the RCG should not veto the construction of that additional capacity.</p>	<p>PP 11.4.10, p. 393.</p>	<p>ARTC notes that it has addressed this issue in section 9.8(c) of the June 2011 HVAU by setting out that:¹⁶⁸</p> <p style="padding-left: 40px;">‘To avoid doubt, sub-section (a) will apply if a Contributor agrees to fund Additional Capacity such that the increase in the Indicative Access Charge for that Pricing Zone is equal to or less than 10%.’</p> <p>The ACCC is of the view that section 9.8(c) of the June 2011 HVAU conforms to the relevant recommendations in the Position Paper.</p>
<p>Train Path Schedule Condition Precedents not to apply where capacity funded by a user</p>	<p>PP 11.5, p. 398.</p>	<p>This aspect of the June 2011 HVAU is discussed in Chapter 5.</p>
<p>Network Connections</p> <p>Strengthen ARTC’s obligation to consult with the HVCCC under section 6 in line with recommendations made in relation to the specified consultation obligations in the HVAU (contained in section 5.2(d)).</p> <p>Clarify the general rule that applies to the ownership of connecting infrastructure.</p> <p>For the avoidance of doubt, clarify that the dispute resolution</p>	<p>PP 11.6, p. 401; pp. 404-405</p>	<p>ARTC notes that it has:</p> <ul style="list-style-type: none"> ▪ ‘amended [the consultation requirements in] section 5.2(d)(iii) of the 2010 HVAU as sought, and has included a cross reference at section 6(a)(ii) of the 2010 HVAU to strengthen ARTC obligation to consult’;¹⁶⁹ ▪ ‘included a new section 6(c) of the 2010 HVAU to reflect the rule to apply to ownership of connecting infrastructure’;¹⁷⁰ and ▪ ‘included a new section 6(e) of the 2010 HVAU to clarify the application of dispute resolution [to dispute in relation to network

¹⁶⁸ ARTC, Explanatory Guide - ARTC Response to ACCC HVAU Position Paper, 8 April 2011, p. 33.

¹⁶⁹ ARTC, Explanatory Guide - ARTC Response to ACCC HVAU Position Paper, 8 April 2011, p. 34.

¹⁷⁰ ARTC, Explanatory Guide - ARTC Response to ACCC HVAU Position Paper, 8 April 2011, p. 34.

provisions in the HVAU apply to disputes under section 6.1 of the HVAU.		connections under section 6]. ¹⁷¹ The ACCC is of the view that the amendments contained in sections 5.2(d)(iii), 6.2(a)(ii), 6(c) and 6(e) of the June 2011 HVAU conform to the relevant recommendations in the Position Paper.
12 Network Transit Management		<i>Not applicable – no recommendations made in Position Paper</i>

¹⁷¹ ARTC, Explanatory Guide - ARTC Response to ACCC HVAU Position Paper, 8 April 2011, p. 34.