

Xstrata Coal Pty Ltd's response to
the Australian Competition
Consumer Commission

**in relation to the ACCC Consultation Paper in relation to the
Australian Rail Track Corporation's proposed Hunter Valley Rail
Network Access Undertaking dated 16 September 2010**

Dated

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1 Introduction

1.1 Background

This response is submitted by Xstrata Coal Pty Limited (“**Xstrata**”) in response to the ACCC’s Consultation Paper in relation to the Australian Rail Track Corporation’s (“**ARTC**”) proposed Hunter Valley Rail Network Access Undertaking (the “Access Undertaking”).

Xstrata is generally supportive of the direction which has been taken by ARTC’s changes to the Access Undertaking. Xstrata has been an active participant in the previous consultations carried out on the Access Undertaking and the Indicative Access Holder Agreement (“**IAHA**”) and it has also participated in direct discussions with ARTC. Xstrata is pleased to see that a number of the issues which have been raised by it and the Hunter Valley Rail Access Task Force (“**HRATF**”) have been addressed by ARTC in both the Access Undertaking and the IAHA.

ARTC’s role in the Hunter Valley coal chain is particularly important given that the track infrastructure is now the sole item of shared infrastructure which is used by all of the participants in the Hunter Valley coal chain. With the addition of another Port terminal managed by Newcastle Coal Infrastructure Group (“**NCIG**”) to the Hunter Valley coal chain, it is not possible for a sole Port provider to undertake the role of co-ordinating the Network in isolation. ARTC’s role has therefore become more important. For this reason, Xstrata would encourage the ACCC to ensure that its decisions in relation to the ARTC Access Undertaking are consistent with the Capacity management provisions which have previously been approved by it in relation to the Port of Newcastle.

It is also important that the pace of adoption of the final Access Undertaking and IAHA should be accelerated as the port arrangements at PWCS and NCIG which form an integral part of the overall contract alignment required to increase the efficiency of the Hunter Valley coal chain have been in place since 1 January 2010 and cannot function to their full effectiveness without appropriate arrangements being in place in respect of the Network.

Xstrata hopes that it can continue to work together with ARTC in good faith to achieve the optimal outcomes for the Hunter Valley coal chain and thus benefit all participants in the system.

This submission sets out areas of particular concern to Xstrata. However, Xstrata also endorses the separate submission to be made by the HRATF. In particular, Xstrata relies on the submissions of the HRATF in relation to the pricing mechanism and the rate of return which are included in the Access Undertaking.

1.2 Discussions with ARTC

Xstrata has been engaged in discussions with ARTC on previous drafts of the Access Undertaking and the IAHA, and Xstrata acknowledges that considerable progress has been made on these documents as a result of these discussions. The issues which are raised in this paper have all previously been raised with ARTC

in the hope that the draft documents could be amended to take account of them. The issues which are contained in this submission are those which have not adequately been taken into account in the documents submitted for approval by ARTC.

1.3 Xstrata objectives

Xstrata's key objectives are in line with the coal chain principles which have been set out at paragraph 1.3 of the new draft of the Access Undertaking. Xstrata is seeking a consistent and workable outcome which will be of benefit to the whole coal chain. The functioning of the Hunter Valley coal chain as an integrated system benefits from the adoption of contracting models which take account of the whole coal chain by all of the infrastructure providers which operate each element of the coal chain.

Xstrata's key requirements of the Access Undertaking and IAHA are that they provide:

- (a) a high degree of certainty in relation to Xstrata's contractual entitlement to Capacity in respect of which it is the Access Holder;
- (b) a right to future capacity which is capable of being exercised with a high degree of certainty, including in relation to the timing of delivery. In order to ensure the availability of funding for Additional Capacity, users should have the right to provide the funding for the Additional Capacity they seek (and any other Capacity which is required to be created in order to produce the minimum efficient expansion which will allow ARTC to provide the Additional Capacity sought);
- (c) mechanisms which will incentivise ARTC to deliver Capacity in an efficient and effective way; and
- (d) mechanisms to ensure that accountability in relation to the creation or consumption of Capacity rests with the participant in the Hunter Valley coal chain which is responsible for that creation or consumption.

Subject to the achievement of these objectives through the amendment of the draft Access Undertaking and IAHA, Xstrata is willing to endorse them, and would not be opposed to the achievement by ARTC of the rate of return as set out within the draft Access Undertaking. Xstrata sets out in this submission the minimum requirements which would need to be addressed in order to satisfy it that its objectives were being met. Xstrata is also prepared to further discuss with ARTC alternative means of addressing Xstrata's objectives.

However, Xstrata's view is that if its objectives are not adequately addressed then this would lead to adverse outcomes for the Hunter Valley coal chain as a whole, leading to inefficiency and public detriments. Failure to address these issues may lead to cross subsidies between the users of the Network which will produce economic inefficiency and misallocation of resources, and will result in a vessel queue and deadweight losses arising through the payment of demurrage and forced reductions in production in the Hunter Valley.

1.4 Summary of Xstrata key recommendations

Issue	Recommendation	Reference
Tier One (Mandatory) Provisions	<ul style="list-style-type: none"> Xstrata favours ACCC determination of disputes related to these issues. Loss allocation principles should form part of the Access Undertaking to ensure that ACCC is accountable for implementing these provisions. 	Paragraph 2
WACC	<ul style="list-style-type: none"> Xstrata considers that the WACC proposed is too high on the basis of the presently proposed draft Access Undertaking and IAHA as ARTC does not assume significant risk. Xstrata would support the WACC proposed on the basis of the assumption of an appropriate degree of risk in accordance with the proposals set out in this submission. 	Paragraph 3
Pricing	<ul style="list-style-type: none"> Xstrata favours a Train Path pricing approach If this is not adopted then the efficient train size should be determined as soon as possible and in any event within 12 months, and brought into effect for the commencement of the third year of operation of the Access Undertaking. 	Paragraph 4
System Assumptions	<ul style="list-style-type: none"> The System Assumptions used for determining Capacity and Network Path Capability must include train entry and exit capability (even if not track related assumptions) 	Paragraph 5.1
Failure to accept HVCCC recommendation	<ul style="list-style-type: none"> Affected Access Holders to be informed of the reasons why ARTC does not accept a recommendation by HVCCC. 	Paragraph 5.2
Capacity Shortfalls	<ul style="list-style-type: none"> Short term shortfalls should be limited to 2 days ARTC to seek to minimise inequality over time 	Paragraph 5.3

Issue	Recommendation	Reference
Review of loss allocation	<ul style="list-style-type: none"> A key objective for the review to be carried out in accordance with section 5.9 of the Access Undertaking is for ARTC to work towards an integrated approach to losses of coal chain capacity taking account of the entire coal chain. 	Paragraph 5.4
Additional Capacity	<ul style="list-style-type: none"> RCG voting rights should be determined by current tonnage contractual entitlements ACCC should retain right to review Prudency of expenditure on request by the RCG or a user funder 	Paragraph 6.1
User Funding	<ul style="list-style-type: none"> ARTC to produce a detailed user funding deed to be approved by ACCC Differential pricing to be adopted for user funded infrastructure (funder's Access Charges not to include a return on capital, but other users of the Capacity created to pay Access Charges which include a return on funder's capital). Users to have an explicit right to fund at any point where ARTC refuses or delays funding. 	Paragraph 6.2
Performance Incentives	<ul style="list-style-type: none"> Xstrata is amenable to a performance incentive regime which rewards actual over-performance of the coal chain as a whole measured by delivered tonnage, but the regime should not create perverse incentives or allow "gaming" 	Paragraph 7
Tolerance	<ul style="list-style-type: none"> Xstrata's view is that a minimum level of Tolerance (TMTC) should be specified for each Pricing Zone and variations from this should require the approval of the RCG. 	Paragraph 9.2
Allocation Periods	<ul style="list-style-type: none"> The Allocation Period should revert to monthly once all PWCS users have monthly allocation at that terminal. 	Paragraph 9.3

Issue	Recommendation	Reference
Network Path Capability	<ul style="list-style-type: none"> • ARTC's annual determination of Network Path Capability should be subject to annual review 	Paragraph 10.1
True-up Test	<ul style="list-style-type: none"> • The True-up Test should provide a TOP Rebate where an Access Holder does not utilise its Base Paths during any year in which ARTC has failed to make Tolerance (up to the Monthly Tolerance Cap)_ available in each Pricing Zone in each month. 	Paragraph 10.1
Capacity Trading Scheme	<ul style="list-style-type: none"> • Trades made within the rules of the CTS should be given effect to by the IAHA 	Paragraph 12.1
Novation of IAHA	<ul style="list-style-type: none"> • ARTC should not be permitted to novate its obligations without Access Holder consent 	Paragraph 12.2
Period of Access Undertaking	<ul style="list-style-type: none"> • Xstrata considers that a 10 year period without any requirement for an ACCC review is too long - 5 years would be more appropriate 	Paragraph 14
Train Path Schedules	<ul style="list-style-type: none"> • ARTC to provide individual Train Path Schedules to potential Access Holders prior to finalisation of the Access Undertaking 	Paragraph 15
Determination of Capacity	<ul style="list-style-type: none"> • ARTC to provide its initial determination of the Capacity of the Network prior to the finalisation of the Access Undertaking 	Paragraph 15

1.5 Approach

The approach taken in this paper has been to respond to those issues raised by the Consultation Paper on which Xstrata has a view in the order they are raised in that Consultation Paper.

1.6 Draft changes to Access Undertaking and IAHA

Where possible we have included the drafting which we would suggest be adopted in respect of each of our suggestions as an annexure to this submission. We also attach a draft User Funding Deed which gives an indication of the structure which such a document could adopt.

Xstrata Coal Pty Ltd's response to the Australian Competition Consumer Commission

Detailed responses to the ACCC Consultation Paper

2 Alignment measures

(Consultation Paper reference: paragraph 2.2)

Xstrata considers it appropriate that certain key items should be common between all Access Holder Agreements on the Network. Xstrata is broadly satisfied that those items are the ones identified as Tier One (Mandatory) Provisions. Xstrata is largely neutral as to whether these provisions should be contained within the Access Undertaking or contained within each of the Access Holder Agreements subject to a requirement of consistency (as ARTC has proposed). However, there are two provisos to this position.

ACCC has raised the issue as to whether it would be beneficial for these matters to be contained within the Access Undertaking and thus subject to ACCC arbitration rather than court determination. Xstrata believes that it would be beneficial if ACCC was to adopt this role. There are several reasons for this view. Xstrata considers that the ACCC would be better equipped to take account of the economic considerations which should be applied in relation to the functioning of the system. Xstrata also considers that the ACCC will develop a greater familiarity with the functioning of the Access Undertaking and the Access Holder Agreements as a whole. Finally, Xstrata considers that ACCC experience in determining disputes in relation to the Tier One (Mandatory) Provisions would be useful to it in determining other matters in relation to the Access Undertaking.

Key issue	
	Xstrata favours ACCC determination of disputes related to Tier One (Mandatory) Provisions.

The second issue relates to the loss allocation provisions set out at clause 11.6 of the IAHA. Xstrata's view is that it would be preferable for these provisions to be included in the Access Undertaking as it does not believe that their inclusion in Access Holder Agreements will be sufficient to ensure that ARTC actually gives effect to these provisions, which are key to improving coal chain performance and accountability. The benefit from the provisions results when ARTC holds an individual Access Holder accountable for losses that the relevant Access Holder is responsible for - i.e. when ARTC enforces the provisions against one Access Holder, then the other Access Holders benefit (not the Access Holder against which the provisions are being enforced). However, if the provisions are contained in an Access Holder Agreement (to which only ARTC and the Access Holder which caused the loss would be party), then the Access Holders who benefit from the enforcement of the provisions have no right to ensure that ARTC holds the Access Holder causing the loss accountable.

It would therefore be preferable if the loss allocation provisions contained in clause 11.6 of the IAHA were included in the Access Undertaking, along with the capacity shortfall provisions which have already been included. This would enable an avenue for recourse against ARTC by aggrieved Access Holders where ARTC is failing to give effect to the intent of those provisions by failing to use them to sanction Access Holders which cause losses of Coal Chain Capacity.

Key issue	Loss allocation provisions to be included in the Access Undertaking.
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As set out at paragraph 11.3 of this submission, Xstrata’s view is that the provisions of the Access Holder Agreement related to the determination of Allocation Periods should be included as Tier One (Mandatory) Provisions in the Access Undertaking. On the assumption that the ACCC will act as an arbitrator in respect of Tier One (Mandatory) Provisions then the provision requiring this to be the case may also require to be a Tier One (Mandatory) Provision.

Key issue	Tier One (Mandatory) Provisions to include determination of Allocation Period.
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3 Rate of return (WACC)

(Consultation Paper reference: paragraph 2.3)

On the basis of the current drafting, Xstrata considers that ARTC is not assuming any significant risks. On that basis, Xstrata considers that the rate of return being sought is excessive. Xstrata’s view is that in order to justify a rate of return above a risk free rate, ARTC must assume some risk in respect of its ability to deliver the Capacity it contracts to provide as set out in the Access Undertaking. In particular, Xstrata is concerned that the Rebate mechanics as they presently stand will not ever entitle Access Holders to any Rebate and therefore ARTC is not exposed to any risk in relation to its own failure to deliver the contracted Capacity, in particular because the flawed definition of Network Path Capability will always allow ARTC to claim that Train Paths are available even if they could never have been utilised. In addition, Xstrata is concerned that there will be no viable alternative to the approval of ARTC proposed projects through the RCG process which will render ARTC immune from any further consideration as to whether the projects proposed will provide value for money and also from any enquiry as to whether its project delivery has been effective or ineffective. Therefore, unless the proposals set out elsewhere in this document are adopted, Xstrata does not support the WACC proposed.

Key issue	<p>Xstrata considers that the WACC proposed is too high on the basis of the presently proposed draft Access Undertaking and IAHA as ARTC does not assume any risk.</p> <p>Xstrata would support the WACC proposed on the basis of the assumption of an appropriate degree of risk in accordance with the proposals set out in this submission.</p>
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Xstrata has reservations about the proposed approach of the ARTC as set out in section 4.7(c) of the Access Undertaking. It would be unusual for the granter of a voluntary Access Undertaking to reserve for itself the right to amend the Access Undertaking in the light of future decisions by the Australian Competition Tribunal. This approach introduces an undesirable element of uncertainty into the Access Undertaking.

4 Determination of the efficient train configuration, indicative service description and Indicative Access Charges

(Consultation Paper reference: paragraph 2.5)

Xstrata's position has always been that it would be preferable to adopt a per Train Path pricing model. The Access Holder is purchasing Train Paths and pricing on a per Train Path model would obviate the need for an efficient train size to be determined, as Access Holders would be incentivised to use the most efficient sized train in order to extract maximum value from the Train Paths they are buying.

A Train Path based approach would incentivise the most efficient use of the Network. The maximum level of performance of the Network is expressed in terms of the number of Train Paths it can deliver based on the System Assumptions. Therefore, given that this is the constrained resource on the Network, the Access Charges should be set in a manner which incentivises the most effective use of this limited resource by charging for it directly. The most effective use of Train Paths (in terms of achieving the goal of the Hunter Valley coal chain, which is the handling of the greatest possible volume of coal) is likely to involve running trains which can carry the most coal per Train Path. That behaviour would allow the Hunter Valley coal chain as a whole to increase its capacity with the minimum possible requirement for expensive capital investment in the railway Network which is required to deliver additional Train Paths.

A GTK pricing approach does not take into account the efficiency with which the trains running on the Network consume the available Network Capacity. Broadly, the same charge would be paid by a larger number of smaller trains as a smaller number of larger trains, notwithstanding that the larger number of smaller trains actually consume more Network Capacity as each of them still consumes a Train Path. Therefore, a pricing approach based on GTK pricing will lock in a model which does not incentivise the most efficient and effective use of the Network. This pricing model does not result in any benefit to ARTC (given that the overall revenue derived by ARTC is limited by the revenue cap and not by the Access Charges which it is allowed to levy). The beneficiaries of the pricing model are those participants in the coal chain which are running inefficiently sized trains, which are paying less Access Charges than would otherwise be the case. The GTK based pricing regime leads to a cross subsidy whereby users of efficiently sized trains will be subsidising users of inefficiently sized trains. By reducing the incentive for the use of efficiently sized trains it will also reduce the carrying capacity of the Hunter Valley coal chain as a whole, and require greater capital investment in track Capacity in order to deliver the same tonnage of coal. This will increase costs for all users.

If necessary, there could be some recognition of increased maintenance costs faced by ARTC through the running of heavier trains. However, the operation

and maintenance costs form a relatively small part of the overall Access Charges and therefore the effect of this should be marginal.

Key issue	A pricing approach based on Train Paths leads to increased efficiency and avoids cross subsidy by efficient train users in favour of inefficient train users.
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Failing the adoption of a Train Path pricing model, Xstrata is very supportive of an efficient train size being determined as soon as possible after the implementation of the Access Undertaking. Xstrata considers that the determination of the efficient train size will be very beneficial as it will enable parties to ensure that the capital investments that they make in rolling stock are in efficient rather than inefficient rolling stock and that this will have benefits for the future efficiency of the Hunter Valley coal chain, as well as avoiding inefficient investment decisions. Xstrata understands that there may be some concerns in relation to already existing rolling stock which is being used on the network. Xstrata understands that it is desirable for the operators of rolling stock determined not to be efficient to have a period of adjustment to allow them to move to more efficient train sizes or otherwise defray any adverse impact on them of the determination of the efficient train size. However, any such adjustment should, in Xstrata's view, not interfere with the speedy determination and announcement of the efficient train size to ensure that ongoing investment in rolling stock is not misdirected. As such, Xstrata welcomes ARTC's commitment to determine the efficient train size within one year of satisfactory completion of modelling by the HVCCC, but would still regard the maximum four year period from the introduction of the Access Undertaking for the determination of an efficient train size to be too long.

Xstrata recommends that the maximum four year period for the determination of an efficient train size by ARTC should be reduced to 12 months from the date of approval of the Access Undertaking. The train size should then be brought into effect prior to the commencement of the third year of operation of the Access Undertaking.

Key issue	Assuming that an efficient train size must be determined, this should be done as soon as practicable and within 12 months at most and brought into effect for the commencement of the third year of operation of the Access Undertaking.
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5 Capacity management

(Consultation Paper reference: paragraph 2.7)

5.1 System Assumptions

Xstrata welcomes the introduction of the concept of System Assumptions into the Access Undertaking and the IAHA. It is not possible to establish the physically deliverable Capacity of the rail Network in terms of its ability to transport coal through running of Coal Trains without assessing the likely performance of other parts of the Hunter Valley coal chain. It is highly desirable that the planned performance of all parts of the coal chain should be agreed by all infrastructure operators and reflected in a set of System Assumptions which will enable

modelling and planning of future Capacity and Coal Chain Capacity on a consistent basis so as to ensure that contracted Coal Chain Capacity is always physically deliverable by the coal chain operating as a whole, and therefore that all contracts for each element of the coal chain (ie track, train and port) can be honoured.

However, Xstrata still has a concern with the way that System Assumptions are utilised by ARTC in determining Capacity and calculating Network Path Capability for the purposes of the calculation of the Rebate under the IAHA. In both of these cases, ARTC takes account only of the track related System Assumptions which are train lengths, train speeds, train axle loads, section run times and (for the purposes of the definition of Capacity) possessions of the network reasonable required by ARTC for maintenance, repair or enhancements, the operation of work trains, requirement for surge Capacity reasonably required to deliver reliable operations and forecast members losses.

Xstrata is concerned that a determination of the Capacity or of Network Path Capability which does not take account of the ability of trains to enter and exit the Network is not a realistic one. The ability of trains to enter and exit the Network is affected by the performance of other parts of the Hunter Valley coal chain such as loading points and the unloading facilities at Port. The ability of trains to enter and exit the system would also be affected by aspects of the Network such as the availability of passing loops and the location and use of shared facilities.

Xstrata's concern is that by disregarding the physical ability of trains to enter and exit the network, ARTC's definitions of "Capacity" and "Network Path Capability" may not in fact be capable of being delivered by the Hunter Valley coal chain. Xstrata is **not** seeking to make ARTC responsible for the performance of other aspects of the Hunter Valley coal chain or to oblige ARTC to make additional Capacity on the rail Network available to make good any defects in the functioning of these other parts of the Hunter Valley coal chain. These definitions would be related to the **assumed** level of performance of other parts of the coal chain and **not** their **actual** level of performance. In other words, performance above or below the assumed level of performance of any other part of the Hunter Valley coal chain would not be the responsibility of ARTC, but in ARTC's calculation of its Capacity or Network Path Capability, it would take into account the assumptions in respect of the entire Hunter Valley coal chain which are contained in the System Assumptions Document. The intention would be that the System Assumptions are common to all participants in the Hunter Valley coal chain - therefore that each participant in the Hunter Valley coal chain plans the operation of its assets in a way which is consistent with the planning of all of the other participants in the coal chain.

Therefore, Xstrata considers that in determining the number of Train Paths that it is able to contract for when determining the Capacity of the Network or when assessing the number of Train Paths which the Network would actually deliver in the calculation of Network Path Capability, ARTC must not disregard the ability of trains to enter and exit the Network. This ability is impacted by the expected level of performance of other aspects of the Hunter Valley coal chain. For example, ARTC should not assume that it can make 100 Train Paths available to a Port if in fact the unloading capability of the Port is only 50 trains per day.

If ARTC does not take the entry and exit capability into account, its assessment of the Network Capacity is likely to overstate the number of Train Paths which are capable of being utilised. By contracting a higher level of Train Paths than

can be actually utilised, ARTC would be leading to the situation where Access Holders cannot rely on the delivery by ARTC of the number of Train Paths contracted. This problem is exacerbated because, since the entry and exit capability would not be assessed in the determination of Network Path Capability, there would also be no Rebate payable by ARTC in these circumstances. This means that there is no commercial imperative for ARTC to avoid over-estimating the Capacity of the Network to deliver by disregarding the ability of trains to enter and exit the system and in fact there is a commercial incentive for ARTC to over-estimate this Capacity since the determination of the Rebate which would be payable in these circumstances would also be based on an over estimate of Network Path Capability.

Xstrata does not propose that all aspects of system performance should be adopted by ARTC in its determination of Capacity and Network Path Capability, although it is desirable for as complete a set of System Assumptions as possible to be used. Xstrata does consider that it is absolutely vital that when assessing these matters the ability of trains to exit and enter the Network should be taken account of as a track related System Assumption. This is notwithstanding that the ability of trains to enter and exit the Network may be affected (or even primarily determined) by the expected levels of performance by parts of the Hunter Valley coal chain infrastructure other than the track infrastructure.

Key issue	The System Assumptions used to calculate Capacity and Network Path Capability must include an allowance in respect of the assumed ability of trains to enter and exit the Network.
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5.2 Consultation with the HVCCC

Xstrata welcomes the more detailed provisions in relation to consultation between ARTC and the HVCCC. However, Xstrata also considers it appropriate that the Access Holders which are affected by a decision of ARTC not to accept a recommendation by the HVCCC should be informed of the reasons why it has not accepted the recommendation where this would materially affect the contractual entitlement of the relevant Access Holder. This would allow an aggrieved Access Holder to dispute ARTC's failure to adopt the recommendation. Although Access Holders may have the right to appoint directors to the board of HVCCC, those persons may be restrained by confidentiality obligations from passing on the reasons for any such ARTC decision to their appointer.

Key issue	Affected Access Holders to be informed of the reasons why ARTC does not accept a recommendation by HVCCC which materially affect their contractual entitlement.
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5.3 Capacity shortfalls

Xstrata welcomes the reduction in the length of the period to which the "short term shortfall" provisions set out in sections 5.4 - 5.7 of the Access Undertaking and in clause 6.2 of the IAHA apply. Xstrata's view is that the short term shortfall period provisions should only apply for delays or shortfalls of up to two days in length. Shortfalls of more than two days in length are comparatively rare in the Hunter Valley coal chain and therefore Xstrata considers that it would be

not adverse to ARTC to restrict the application of the short term short fall provisions to shortfalls of two days or less. The advantage would be that the provisions requiring the equitable distribution of available Capacity in the event of a shortfall would be more frequently used, ensuring that Access Holders are treated fairly by ARTC.

Xstrata also considers that it would be appropriate for ARTC to provide details of how the capacity shortfall provisions are given effect to in each case, to ensure accountability and to enhance the predictability of this process for Access Holders through their becoming acquainted with ARTC’s likely courses of action.

Key issue	Five day period for “short term shortfall” provisions is too long - this should be two days. ARTC to publish details of allocation and reasons for the allocation.
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Notwithstanding whether Xstrata’s submission on the reduction of the period in which the short term short fall provisions are applicable is accepted, Xstrata considers that it would be appropriate to add a further qualification to the short term short fall provisions. This should be to the effect that, notwithstanding ARTC may in any particular shortfall period distribute Capacity on an otherwise than equitable basis, it should endeavour over time during different shortfalls to ensure that there is no consistent bias in the way that Access Holders are treated and that inequalities in each shortfall period should be allocated between Access Holders with a view to minimising inequalities arising when taking the shortfalls together. In other words ARTC should strive to “even out” inequality of treatment over time, where possible.

Key issue	ARTC to attempt to even out inequalities during short term shortfalls over time.
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5.4 Section 5.9

Xstrata considers that it is appropriate for a review of the provisions of clauses 11.5 and 11.6 of the IAHA to be provided for. It would be particularly desirable if the loss allocation principles in the IAHA could form part of a common system which dealt with all elements of the Hunter Valley coal chain. If different loss allocation methods are used (or if certain parts of the coal chain operate in a way which does not deal with losses of capacity caused by coal chain participants) then this will create considerable dislocations in the incentives for coal chain utilisation.

Key issue	A key objective for the review to be carried out in accordance with section 5.9 of the Access Undertaking is for ARTC to work towards an integrated approach to losses of coal chain capacity taking account of the entire coal chain.
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6 Additional Capacity

(Consultation Paper reference: clause 2.8)

6.1 RCG process

The latest draft of the Access Undertaking has changed the basis upon which membership entitlements and voting strength of members of the RCG will be assessed. The Access Undertaking now takes into account an assessment of potential contracted rail Capacity in the current year and also in the nine following years. Xstrata's view is that it would be more equitable to limit this to an assessment of the contracted Capacity in the current year. By requiring ARTC to make an assessment of what contracted Capacity is likely over future years, the risk is that the determination may be incorrect and therefore that parties who do not and never will have contracted Capacity on the network will have a right to be appointed to the RCG and role in the decision making process. This is not appropriate given that the decisions of the RCG will be reflected in changes to the Access Charges which are paid by those who currently have contracted Capacity. The immediate impact of an increase in Access Charges will only be felt by those parties which pay Access Charges - which is to say those with current contracted Access Rights. Those who do not have currently contracted Capacity should not be given a voice in determining whether this should be the case. If Capacity in future years is to be included in relation to future years, this should include only presently contracted Capacity.

Key issue	RCG membership and voting to be determined by currently contracted capacity, in the current year.
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Xstrata is also of the view that it may be beneficial to allow for a review by the ACCC upon completion of any particular project as to whether the expenditure was Prudent, notwithstanding that RCG approval has been obtained. This would be triggered either by the RCG or a relevant user funder appealing to the ACCC to determine whether ARTC on a project is Prudent.

The rail users which sit on the RCG group (or a user funder) may have little commercial alternative to approving all required additional Capacity in order to allow the expansion of the mines and access to the system. The RCG (or user funder) will have limited resources or ability to propose different alternative routes to the delivery of additional Capacity and it will also have limited information or means by which to access whether ARTC proposals represent the most efficient way of carrying out expansions. The Access Undertaking does not provide for the RCG or user funders to propose their own projects, and there is no practical alternative for an Access Seeker seeking rail capacity other than to acquire it from ARTC. Given that ARTC cannot be forced to provide any rail capacity, an Access Seeker effectively faces either having to approve the project put forward by ARTC or not being able to access any rail capacity. ARTC may therefore exploit its monopoly infrastructure provider position to propose "gold plated" projects which involve excessive capital investment, and rely on an RCG approval process or the approval of a user funder where the approval is given by parties which have no alternative but to approve. ARTC could use this power to increase its income and assets beyond that which would have been available if Capacity was made available more efficiently.

Therefore, Xstrata considers it may be appropriate following completion of a project for the ACCC to be able to review whether in fact the capital expenditure on the project was Prudent. This would provide a check which should ensure that ARTC does not abuse the power it possesses as a monopoly infrastructure provider to obtain approvals of expenditure as Prudent where this is not justified.

One benefit of carrying out a review at the completion of the project would be that it would be possible to assess whether the project had in fact delivered the additional Capacity which it was proposed to deliver. Xstrata considers that if not, there should be a process by which the ACCC can review whether the expenditure on the project was in fact Prudent. Clearly it is not Prudent to undertake capital expenditure which does not result in the planned additional Capacity being delivered.

Key issue	ACCC to have the right to review the Prudence of all projects (including user funded or RCG approved) following commissioning or request by the RCG or a user funder.
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6.2 User funding

Xstrata has continuing concerns as to how the user funding process will work where an Access Seeker is funding Capital Contributions. Xstrata considers that an appropriate approach would be for ARTC to be required to fully document the process which would be involved, including producing a draft User Funding Deed for approval by the ACCC within a defined period (say 6 months), setting out all the terms and conditions which would apply whenever an Access Seeker agreed to fund additional Capacity. This would be similar to the process which has recently been adopted in Queensland by the Queensland Competition Authority in its approval of QR Network’s Access Undertaking. Xstrata considers that user funding is an important right and presents a major means for ensuring that ARTC does not fail to invest in additional Capacity for the network. That being the case, the “high level” provisions which are set out in the Access Undertaking would benefit from being more fully developed into a document which could be used as the basis of negotiation and provide more certainty to possible user funders.

The User Funding Deed need to take into account all commercially necessary terms. This would include for example conditions for drawdown of finance, project gateways requiring the approval of the funder to progress to each stage (concept, pre-feasibility, feasibility, design and construction), suitable oversight and information being provided. This should also include a more detailed statement of how user funded Capacity will be priced and how the user funder will earn a rebate on any usage of the Capacity it funds by another Access Holder.

Xstrata also believes that further development of the User Funder Deed should take account of tax benefits which may accrue to ARTC as a result of the user funding arrangements. The recently approved QR Network access undertaking contains a statement of principles which includes recognition of the fact that user funders should be entitled to receive the value of those tax benefits in respect of the Capacity it has funded. The further development of the user funder arrangements should also explore how the user funder can benefit from a priority right to the cash flow generated by the Capacity it funds, without being prejudiced by ARTC’s other financing arrangements, including on insolvency.

Key issue	ARTC should be obliged to produce a user funding deed for approval by ACCC within 6 months which will provide a detailed framework to govern user funded investments.
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Xstrata also has substantive concerns with the model which has been adopted. The means by which an Access Seeker's Capital Contribution would be recognised is not entirely clear from the draft Access Undertaking. It appears that the Capital Contribution would not be taken account of for the calculation of the Regulatory Asset Base for the purpose of calculating the Ceiling Limit. This would imply that any rate of return on the Contributed Capacity received from either the funding Access Seeker or another Access Seeker for access to the Capacity funded by the Capital Contribution would result in that part of the Network being a "Constrained Network" and may result in a payment to the user funder under the provisions of section 4.8 of the Access Undertaking. However, this model creates difficulties and uncertainties for the user funder arising from the lack of provisions in the Access Undertaking as to how the Access Charges are actually to be set. These difficulties may result in the user funder effectively subsidising ARTC or other Access Holders. Xstrata's view is that these difficulties must be addressed through an explicit requirement to set differential Access Charges between user funders and non user funders.

Where any user of the Capacity created by the Capital Contribution is operating an "Indicative Service", ARTC will be levying Indicative Access Charges. That being the case, if the funding user and another user are both utilising the relevant Capacity to run Indicative Services, each of them will be paying the same Indicative Access Charges. It is unclear how those Indicative Access Charges will be set. The Access Undertaking does not provide for the basis on which Indicative Access Charges must be set (since the regulatory model is regulation of a rate of return rather than user charges). ARTC is free to set Indicative Access Charges at any level, although of course if ARTC sets Indicative Access Charges at a rate which produces a rate of return in excess of the regulated rate, then it will be liable to repay some of those amounts in accordance with section 6.2(f) of the Access Undertaking. If the ARTC was to set an Indicative Access Charge which would produce only an amount sufficient to cover the ARTC's regulated rate of return on the Regulated Asset Base (which excludes the Capital Contribution), then there could be no possibility of the user funder achieving any return on its Capital Contribution where any Capacity is used by another Access Holder. That is because the Capital Contribution is disregarded for the purposes of calculating the regulated rate of return and therefore the Indicative Access Charges would not include a sufficient element of capital return to enable ARTC to pay any rebate to the user funder. Therefore, both the funding user and the non-funding user benefit from the Capital Contribution through a "return" accruing as a lower Access Charge.

Xstrata believes that it should be made clear that the Indicative Access Charges should be set on the basis that, where any other Access Holder uses the Capacity which has been funded by a user funder, a capital return will be achieved for the user funder at a rate equal to the regulated rate of return which ARTC would have been entitled to had ARTC funded the relevant Capacity. While Xstrata recognises that it is within ARTC's rights to fund Capacity and to charge an Access Charge which does not fully recover the regulated rate of return, leading to capitalised losses as has been the case in Pricing Zone 3, Xstrata does not consider it equitable that ARTC should be allowed to levy charges on such a basis for Capacity which has been funded by an Access Seeker or Access Holder. Given that the Capacity has been funded by an Access Seeker and not ARTC, the prerogative of setting Access Charges on that Capacity at a rate which will not recover such a rate of return should be that of the Access Seeker or Access Holder and not ARTC. Unless the user funder agrees otherwise, the rate of return should be at least equal to the regulated rate of return to which ARTC would have been entitled.

Further, Xstrata's view is that a Access Holder should, in relation to any Capacity it uses which is Funded by a Capital Contribution it has made, not be obliged to pay Access Charges to provide ARTC with any return on the Capital Contribution that it has made, even if this may be subject to payment of a rebate under section 6.2(f) of the Access Undertaking. This should be the case even though it may result in the Access Holder paying lower charges for an Indicative Service than the Indicative Access Charge which would be paid by a non-funding user. The reason for this is that to rely on the payment of a rebate exposes the user funder to risks associated with ARTC's management of that section of Capacity which may result in the rebate not being payable. For example, ARTC might not make Capacity in accordance with the contract it entered into, leading to Rebates being payable and ARTC not achieving a rate of return in excess of the regulated rate of return. The user funder would then be exposed to the risk that it would not receive any recognition for its Capital Contribution. If ARTC had set Access Charges which were in excess of the regulated rate of return in order to fund a payment to the user funder, this might mean the user funder paying Access Charges designed to realise a rate of return on its Capital Contribution, but failing to receive any such return. The user funder would be paying twice for the same capital. At least if the Access Charges for the user funder's own utilisation of the Capacity it had funded were set on the basis that there would be no inclusion of a rate of return on that capital, then it would not be exposed to that risk in relation to its own payment of Access Charges. ARTC should still set Access Charges for any other users of user funded infrastructure based on realising a rate of return for the user funder, as set out above.

Key issue	Capacity generated by user funding should be subject to differential pricing - the user which funds will pay an Access Charge which does not include any return on the capital contributed by the user, and other Access Holders will pay an Access Charge which provides for a return on the capital invested by the funding user equal to the regulated return which ARTC would have been able to achieve.
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It should also be clear that the option to user fund would arise at any stage during the approval process of a project - including where the RCG has failed to approve a project as Prudent. This right should also arise where it becomes clear that ARTC is effectively refusing to implement a project through allowing unreasonable delays to occur in the project process.

Key issue	Access Seekers to have the right to user fund at any point in project development, including where ARTC is unreasonably delaying a project.
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6.3 Certainty of delivery

Once ARTC has commenced the delivery of a project in accordance with section 6 of the Access Undertaking, the project should be dealt with in accordance with that section. At present an element of uncertainty is introduced through ARTC's ability to refuse to meet the CPs in the Train Path Schedules of the Access Holders who have contracted for the relevant Capacity based on commercial grounds. The IAHA should not contain any provision which would interfere with the regime which has already been established in accordance with section 6 of the Access Undertaking. A condition precedent which merely refers to the completion of the relevant project is sufficient to address ARTC's legitimate concerns.

Key issue

ARTC should not be permitted to include any commercial viability condition precedent in the Train Path Schedule of any Access Holder Agreement.

7 Performance measures and incentives

(Consultation Paper reference, paragraph 2.9)

Xstrata believes that it is appropriate for ARTC to adopt a performance incentive scheme. However, it has considerable concerns about the design of such a scheme and the necessity for avoiding perverse incentives which may encourage ARTC to over contract Capacity on the Network in order to earn performance incentives, whether or not such Capacity can actually be delivered.

Xstrata's view is that any performance incentive which provides for an increased rate of return should be linked to an increased level of actual throughput by trains utilising the Network, measured by the tonnage of coal delivered to the Port. Actual throughput is capable of being conclusively measured and Xstrata considers that it is not possible for ARTC to "game" a performance incentive system which is based on actual throughput. By contrast, if a performance incentive regime exists which were based on other factors, for example the contracted throughput which ARTC makes available, or other aspects of the performance of the Network viewed in isolation which did not necessarily translate into better utilisation of the Hunter Valley coal chain, the incentive would be for ARTC to perform to those measures without this necessarily resulting in increase throughput tonnage of coal which is the standard by which the Hunter Valley Coal Chain should be measured (since that is the purpose for which it operates). For example, the risk in allowing ARTC a benefit through a performance incentive on the basis of making additional contracted Capacity available would be that ARTC would enter into such contracts and claim the performance incentive notwithstanding that, for example, the Capacity was not capable of being utilised due to other constraints on the Network. This is particularly the case given the concerns expressed above, at paragraph 6.1 of this submission, in relation to the use of only track-related System Assumptions for the calculation of Capacity and Network Path Capability.

In Xstrata's view, it would be appropriate to approve the current draft of the Access Undertaking subject to the future development and approval of an appropriate performance incentive structure.

However, Xstrata understands that ARTC may propose models which allow ARTC to achieve a performance incentive based only on its own performance and not reflecting the performance of the coal chain as a whole. While ARTC would make the case that it should only be held accountable for its own levels of performance, if this is not reflected in the performance of the coal chain as a whole then there is no benefit conferred on the Access Holders. Xstrata would strongly oppose ARTC achieving any performance incentive where its performance has not in fact conferred any benefit on any Access Holder. A performance incentive which only takes account of ARTC's performance encourages ARTC to seek to shift the blame for any underperformance to other participants in the coal chain and therefore to claim that it is still entitled to a performance incentive. This incentive produces adverse consequences for the running of the coal chain as a whole and Xstrata considers that it is essential that this must be avoided. On the other hand, incentives which are linked to actual throughput encourage ARTC to work with all other participants in the coal chain in order to actually achieve enhanced throughput. The function of the coal chain

is to deliver coal for export, and any performance incentive which is not aligned to that objective threatens to produce perverse incentives which may damage the performance of that function, which Xstrata would strongly oppose.

Key issue	<p>Appropriate performance incentives to be adopted should provide an additional return to ARTC only when the actual tonnage of coal throughput handled by the coal chain as a whole exceeds contracted levels.</p> <p>Xstrata considers that the appropriate path forward is for ARTC to propose various models of performance incentive for consultation and eventual approval and adoption.</p> <p>Xstrata would strongly oppose any performance incentive scheme which would confer a performance incentive on ARTC in the absence of improved performance of the coal chain as a whole.</p>
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8 System assumptions

(Consultation Paper reference: paragraph 2.10)

This issue has already been dealt with at paragraph 6.1 of this submission.

9 Access rights under the IAHA

(Consultation Paper reference: paragraph 2.12)

9.1 Annual calculation process

Xstrata's comment on clauses 3.1 - 3.5 of the IAHA is that the annual calculations of Base Paths, Monthly Tolerance Cap, etc, should be notified to the Access Holders at least by 30th September in the year preceding the relevant year. This is to enable proper planning to be put in place, including planning of mine production, utilisation of other operators and utilisation of Port Capacity.

Key issue	<p>Access Holders to be informed of Base Paths, Monthly Tolerance Cap and other annually calculated variables at least by 30 September in the preceding year.</p> <p>At the very least an indicative figure should be given, even if subject to later adjustment.</p>
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9.2 Tolerance

In addition, Xstrata believes that there should be a minimum level of Tolerance established within the Target Monthly Tolerance Cap, and that any decision by ARTC to move to a lower level of TMTC should require the approval of the RCG. The availability of a minimum level of Tolerance is essential in order for Access Holders to have a reasonable degree of certainty that they will be able to utilise the Capacity they hold on the Network. There is an unavoidable level of fluctuation in the utilisation of the Hunter Valley Coal Chain and this requires ARTC as the access provider to be able to make available a certain level of Tolerance in each Allocation Period within each Pricing Zone. ARTC should

include within either the IAHA or the Access Undertaking, a statement of the minimum TMTC which would apply.

The review proposed in accordance with clause 3.3(e) of the IAHA should be used as part of the process of reviewing whether the TMTC has been set at an appropriate level.

Key issue	Minimum level of Tolerance for each Pricing Zone to be included, which may only be reduced with RCG approval.
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9.3 Allocation Periods

Clause 3.5 of the IAHA defines Allocation Periods as Monthly or Quarterly on the same basis as is currently used by PWCS. However, it may be the case that PWCS will determine in the future that all users will utilise their Port allocations on a Monthly basis, rather than allowing small producers to utilise allocation on a quarterly basis as is currently the case. In the case of the NCIG terminal, all users are allocated Port Capacity on a monthly basis. Therefore, in order to assist in the alignment of the ARTC contracts with the Port contracts, Xstrata submits that if PWCS moves to a system of monthly allocation for all users, this should also be reflected in the ARTC IAHA. Xstrata's view is that this should be written in to the IAHA to ensure that if and when PWCS makes this determination, the Allocation Periods used by ARTC will change at the same time.

Xstrata also submits that the Allocation Period which is used for Coal Access Rights is an important element of the Access Holder Agreement, By allowing some Access Holders Allocation Periods which are longer than those used by others, the Access Holders with the longer periods will benefit from an increased level of flexibility in the utilisation of their Access Rights. This will impact adversely on the Capacity which is available to other Access Holders. Therefore, Xstrata submits that the provisions of the Access Holder Agreement in relation to Allocation Period should be included as Tier 1 (Mandatory) Provisions in the Access Undertaking.

Key issue	Where PWCS moves to monthly allocations for all users, all Access Holder Agreements should also move to monthly allocation.
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10 TOP Rebate, true-up test and liability regime

(Consultation Paper reference, paragraph 2.13)

10.1 TOP Rebate

Xstrata's comment on the true-up test and calculation of TOP rebate is dealt with at paragraph 6.1 of this submission above. Essentially Xstrata is concerned that the calculation of Network Path Capability does not take any account of the entry and exit of trains onto the Network.

In addition, Xstrata suggests that the annual calculation of Network Path Capability should be the subject of an ability by Access Holders to refer the matter to an independent expert for review. Other pricing matters are able to be

referred to an independent expert for review and it is possible that where a subsequent pricing dispute is referred to the independent expert he may come to a view as to whether ARTC has calculated Network Path Capability correctly. However, Xstrata's view is that it would be of benefit to allow a review to take place of Network Path Capability when announced, prior to the year in which it applies, as this will create greater certainty for users of the Network.

Key issue	Determination of Network Path Capability should be subject to independent expert review.
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Xstrata also considers that the calculation of the TOP Rebate does not fully take account of the ARTC requirement to provide Tolerance. Although the Monthly Tolerance Cap is taken account of in the calculation of the System Availability Shortfall for a Period, if an Access Holder has received its Base Path entitlements in that Period, then it will not receive a TOP Rebate even where ARTC has failed to make paths available. Xstrata does not expect to receive a TOP Rebate where, over the course of an entire year, it has received its entire allocation of Base Paths. However, it may have been relying on the provision of Tolerance to make up for its inability to utilise Base Paths in a previous Period (this is the purpose of the Tolerance). In that situation, it would already have paid for the Base Paths it was unable to utilise, and then would be unable to make them up using Tolerance (which is supposed to be provided for this purpose), and ARTC would not suffer any consequence.

Given that Tolerance is to be made available, Xstrata considers it unsatisfactory that ARTC should be indifferent as to whether or not it is delivered, due to the failure of the True-up Test to take Tolerance into account.

Key issue	The True-up Test should provide a TOP Rebate where an Access Holder does not utilise its Base Paths during any year in which ARTC has failed to make Tolerance (up to the Monthly Tolerance Cap)_ available in each Pricing Zone in each month.
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10.2 Liability regime

Xstrata considers that the liability cap of \$2 million contained at clause 13.4 of the IAHA is low in the context of the IAHA.

Key issue	The monetary liability cap is low in the context of the Access Holder Agreement.
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11 Accountability for performance measures

(Consultation Paper reference, paragraph 2.14)

11.1 Non-Compliant Services

Xstrata is satisfied with the provisions regarding the use of Non-Compliant Services on the Network provided that it is made clear in the IAHA that a mere utilisation of one Operator's trains rather than another Operator's trains does not constitute use of a Non-Compliant Service, provided that the characteristics of each train are reasonably consistent or that any difference in the characteristics of the train does not have any impact on the Capacity of the Network or of the coal

chain as a whole or on any other user's utilisation of either Capacity or coal chain Capacity.

Key issue	Use of a different Operator should not of itself be regarded as a Non-Compliant Service, provided characteristics of the trains used are reasonably consistent.
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11.2 Loss allocation

In relation to the loss allocation provisions which are set out at clause 11.6 of the IAHA, Xstrata has already expressed the view that these provisions should be included in the Access Undertaking. However, Xstrata also has reservations as to whether these provisions will function as effectively as would be desirable in incentivising behaviour which will minimise losses of Coal Chain Capacity. Xstrata has previously outlined to ARTC a "Scheduled Path Cap" approach which provided. Xstrata considers that the Scheduled Path approach would be less reliant on the exercise of ARTC discretion and therefore provide a more certain incentive for promoting desirable behaviours.

Key issue	A "Scheduled Path" approach would be preferable to the allocation of cancellation losses presently adopted by clause 11.6 of the IAHA.
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12 Assignment and trading

(Consultation Paper reference, paragraph 2.15)

12.1 CTS Clearing House

Xstrata does not consider that the provisions in relation to the use of the CTS Clearing House are appropriate. In previous discussions and in all previous drafts of the IAHA, the ARTC has committed to allowing the trading of rail Capacity through the CTS system. Xstrata views this as appropriate, given that ARTC has been a participant in the development of the system, and is a shareholder in HVCCC which will be the system administrator. It is clearly highly desirable to allow the trading of both Port and Rail Capacity together through a single system as this will be of great assistance in ensuring the alignment of different elements of the Hunter Valley Coal Chain. The latest iteration of the IAHA places a limitation on the operation of the CTS system in relation to rail Capacity in that rail Capacity may only be transferred through the CTS system where the requirements of the IAHA are also satisfied. This may include a requirement for an up to 2 week approval process for certain transfers as set out in clause 16.4(d). For example, this may apply where Capacity is transferred from a loading point which is nearer to the Port to one which is further away. Given that ARTC has participated in and approved the rules of the CTS system, Xstrata considers that it would be appropriate that all transactions which are carried out in accordance with those rules should be approved for the purposes of the IAHA.

The CTS rules allow short term trading on two days notice and long term trading on 5 days notice, irrespective of the details of the transfer. These rules have been in operation since 1 January 2010 and many trades have been carried out under them. This should illustrate that the requirements of the IAHA are too restrictive and can be relaxed without this having an adverse effect on ARTC's operations.

Key issue	Trading in accordance with the CTS rules to be allowed under the Access Holder Agreement. IAHA requirements should be updated in accordance with the CTS rules.
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12.2 Assignment and novation

Xstrata is also concerned in relation to the terms of new amendments to clause 16.1 in relation to the assignment and novation of the IAHA. This clause is very broad and allows the assignment or novation with all the rights and benefits accruing to ARTC under the IAHA to another party without any requirement for consent by the Access Holder. The Access Holder therefore has no assurance that the recipient of those rights and benefits would be in a position to provide ongoing access to the Network or would have sufficient financial, operational or technical capability to act as a counterpart to the IAHA. Xstrata considers that there should be a requirement for consent by the Access Holder before there can be any transfer of the IAHA to another party or that if ARTC requires the right to be able to transfer the IAHA to another party without Access Holder consent, the relevant party or parties should be specifically named within the agreement in order to give the Access Holder certainty that those parties are appropriate.

Key issue	Access Holder consent to be required for a transfer of ARTC's obligations under the Access Holder Agreement.
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13 Changes over time

(Consultation Paper reference, paragraph 2.16)

Xstrata does consider that it is appropriate that if there are changes to the Tier One (Mandatory) Provisions in the Access Undertaking that these should automatically be reflected in the IAHA and each other Access Holder Agreement so as to ensure that consistency is maintained. It is necessary for the equitable operation of all Access Holder Agreements that certain key provisions should be common to all Access Holder Agreements so as to ensure consistent treatment. Xstrata also considers it appropriate that Access Holder Agreements should be able to be amended in accordance with ACCC approved amendments to the Access Undertaking from time to time to ensure that flexibility is retained in order to improve the functioning of the Network and the coal chain as a whole.

Key issue	Xstrata supports updating of all Access Holder Agreements from time to time in accordance with changes to the Tier One (Mandatory) Provisions of the Access Undertaking.
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14 Period of Access Undertaking

In previous submissions, Xstrata suggested that a review of the provisions of the Access Undertaking and the IAHA should occur after 1 year and 5 years, with any disagreement between the Access Holders and ARTC being referred to the ACCC for a binding determination. This has not been accepted by ARTC and the ACCC's view also seems to be that this cannot be insisted upon in a

voluntary undertaking. Xstrata is still of the view that a full review is necessary. The Access Undertaking does contain a provision requiring ARTC to undertake a review in consultation with Access Holders, but there is no mechanism by which ARTC could be forced to accept a change to the Access Undertaking or IAHA if changes were desirable from the perspective of an increase in the efficiency of the Hunter Valley coal chain, or to ensure the workability of the provisions of the Access Undertaking or IAHA.

In the absence of a review procedure which could require ARTC to adopt changes, the only way to trigger a full review of all the provisions of the Access Undertaking is for the term of the Access Undertaking to be of a more limited duration. The risk of unsatisfactory provisions being included in an Access Undertaking of ten years' duration is too great. Xstrata notes that the term of the QR Network access undertaking is three years. However, in accordance with its proposal in relation to a review, Xstrata proposes that the term of the ARTC Access Undertaking could be as long as five years.

Key issue	In the absence of a suitable review regime (i.e. one which does not rely on ARTC to initiate and conduct the review) a ten year period for the Access Undertaking is too long.
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15 Provision of Train Path Schedules and Capacity assessment

Xstrata has still not been provided with definitive Train Path Schedules for its Access Holder Agreement. It is difficult for Xstrata to assess whether the operation of the Access Undertaking and IAHA is in line with its expectations until ARTC releases further information about the Capacity which ARTC believes is available on the Network. Xstrata submits that ARTC should be obliged to publish its current assessment of the Network's Capacity (calculated on the basis of all relevant System Assumptions, including those related to the entry and exit of trains from the system) prior to the final approval of the Access Undertaking. This should ensure that there is a greater degree of certainty over how the Access Undertaking and IAHA would actually operate in practice.

Key issue	ARTC should provide details of its current assessment of Network Capacity and provide draft Train Path Schedules to all Access Holders based on the draft Access Undertaking before it is finalised.
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Draft changes to documents

1 Determination of efficient train configuration

In section 4.16(b) of the Access Undertaking replace:

“within 12 months of ARTC being satisfied”

with:

“within 6 months of ARTC being satisfied”

and replace:

“in any event within four years:

with:

“in any event within 12 months”

In section 4.16, insert after paragraph (e) a new paragraph (ea):

“(ea) ARTC must use all reasonable endeavours to ensure that the Indicative Access Charges are brought into effect in accordance with section 4.16(e)(i) on the 1 January prior to the third anniversary of the coming into force of this Access Undertaking.

2 System Assumptions

2.1 Access Undertaking

In the Access Undertaking, in the definition of “Capacity” insert after “Capacity” in the second line:

“in the case of Coal Trains subject to the maximum number of Coal Trains which can be accommodated by the Hunter Valley Coal Chain on the assumption that all elements of the Hunter Valley Coal Chain perform in accordance with the System Assumptions”

and replace paragraph (a) with:

“the System Assumptions”

2.2 IAHA

In the IAHA:

update the definition of “Capacity” as in the Access Undertaking

in Schedule 2 paragraph 2.3(a)(iv) and (b) delete “track related” each time that it occurs, and in paragraph 2.3(b) delete “which are elements (g) to (j) of the definition of System Assumptions”

3 Consultation with the HVCCC

In the Access Undertaking, Schedule F, add the following bullet point:

“Where ARTC provides any reasons for a failure to accept the view of the HVCCC and either ARTC or the HVCCC considers that the decision may materially adversely affect the contractual entitlements of any Access Holder, or its ability to utilise Train Paths, then ARTC must inform the relevant Access Holder of its reasons for that failure to accept the HVCCC’s recommendation and inform the Access Holder of the date by which the HVCCC has been asked to reconsider its recommendation. ARTC must consider any submission made by the relevant Access Holder on or prior to that date.”

4 Capacity Shortfalls

4.1 Access Undertaking

In sections 5.5 and 5.6 delete “five days” each time it appears and insert “two days”.

In section 5.5(a) add a further subsection (iii) as follows:

“(iii) ARTC must endeavour to exercise its discretion in accordance with paragraph (ii) reasonably and equitably over time, so that to the extent possible where a number of Capacity Shortfalls of a duration of two days or less are considered in aggregate, the allocation of Capacity approximates to the position which would have applied had the Capacity Shortfalls been dealt with in accordance with section 5.6.”

4.2 IAHA

In clauses 6.2 and 6.3 delete “five days” each time it appears and insert “two days”.

In clause 6.2(a) add a further subsection (iii) as follows:

“ARTC must endeavour to exercise its discretion in accordance with paragraph (ii) reasonably and equitably over time, so that to the extent possible where a number of Capacity Shortfalls of a duration of two days or less are considered in aggregate, the allocation of Capacity approximates to the position which would have applied had the Capacity Shortfalls been dealt with in accordance with clause 6.3.”

5 Section 5.9 review

In section 5.9 of the Access Undertaking, in paragraph (c)(ii)(A) replace “Available Capacity” and “Capacity” with “Coal Chain Capacity” and delete paragraph (c)(ii)(B) and replace it with the following:

“the reasonable costs of administering the proposal will be recoverable by ARTC through charges made for Capacity”

6 RCG voting

In the Access Undertaking, in section 6.4(b)(v) delete “subject to section 6.4(b)(vi)” and delete section 6.4(b)(vi).

7 ACCC review of Prudency

In the Access Undertaking:

insert at the beginning of section 6.4(h)(ii);

“Subject to section 6.5,”

and add the following section 6.5:

“6.5 ACCC review of Prudency

- (a) The RCG may refer any project endorsed by it to the ACCC for a determination of whether the costs incurred in respect of that project are Prudent, at any time whether before during or after the commissioning of the project.
- (b) An Access Seeker or Access Holder may refer any project which it has agreed to fund to the ACCC for a determination of whether the costs incurred in respect of that project are Prudent, at any time whether before during or after the commissioning of the project.
- (c) The ACCC shall, in determining whether the costs are Prudent, have regard to:
 - (i) whether the actual costs of the project and the Capacity it creates, and its other effects upon the Hunter Valley Coal Chain as a whole, are as represented by ARTC at each stage during the project approval process; and
 - (ii) whether a reasonable rail network operator in the position of ARTC would have undertaken the project, and if not whether it would have undertaken some other project, and if some other project would have been undertaken, the costs of that alternative project and the Capacity which would have been created by it.
- (d) The ACCC may consider submissions by all interested parties.
- (e) If the ACCC considers that the costs of the project are not Prudent, then it must substitute its assessment of the costs of the project which would be Prudent (which may be the costs of an alternative project which the ACCC considers that a reasonable rail network operator in the position of ARTC would have undertaken such a project rather than the project that ARTC in fact undertook).
- (f) The costs determined as prudent by the ACCC in accordance with this section will apply for all purposes in connection with this Access Undertaking.”

8 Right to user fund

Add at the end of section 6.2(a):

“Where at any stage the Applicant determines that it is willing to meet the cost of the Additional Capacity, it shall notify ARTC and section 6.2(a)(i)(B) may apply. Section 6.2(a)(i)(B) will apply if ARTC has indicated that it is unwilling to consent to the provision of Additional Capacity in accordance with section 6.2(b)(i)(A), whether through a statement to that effect or through the abandonment of any project which is required to be undertaken in order to deliver the Additional Capacity, including where RCG approval has not been forthcoming in respect of the relevant project. If ARTC unreasonably delays in undertaking any project it shall be considered to have abandoned it. Where section 6.2(a)(i)(B) applies the providing the requirements of section 6.2(a)(ii) are met then ARTC must consent to the provision of Additional Capacity.”

9 CPs in Train Path Schedule

In the Train Path Schedule of the IAHA, delete paragraph 4.3(a)(iii) and (b). In paragraph (d) add after “RCG submissions”:

“or the Access Holder agreeing to meet the cost of the Additional Capacity in accordance with section 6.2(a)(i)(B) of the Access Undertaking”

10 Indicative figures

In the IAHA, in clause 3.2(c), after “30 September of the previous Contract Year” add “(and must provide indicative figures by that date if the final figures are not provided)”

11 Minimum Tolerance

In the IAHA, the definition of TMTC, add after paragraph (b):

“but must in any event be not less than:

Pricing Zone 1	[]%
Pricing Zone 2	[]%
Pricing Zone 3	[]%

12 Allocation Period

In the IAHA, in clause 3.5(b) add at the beginning of that paragraph “Subject to paragraph (ca)” and then add the following paragraph (ca) after the existing paragraph (c):

“(ca) The Access Holder’s Allocation Period will be no greater than the maximum allocation period which is relevant to any capacity which the Access Holder has contracted with any Terminal Operator. If the Access Holder does

not demonstrate otherwise then ARTC must assume that the relevant period is monthly.”

13 Independent expert review of Network Path Capability

In the IAHA, Schedule 2 paragraph 2.3 add after paragraph (c):

“(d) Any Dispute in respect of the determination of Network Path Capability must be referred to an independent expert in accordance with clause 14.4.”

14 Non-compliant Service

In the IAHA, in the definition of “Non-Compliant Service” add at the end of paragraph (a) before the word “and”:

“, except that if the failure to comply with the Service Assumptions consists of the Service being operated by a different Operator and the other characteristics of the Service are not materially different to those which would have applied had the nominated Operator operated the Service then this does not constitute a Non-Compliant Service”

15 Trades in accordance with CTS Rules

In the IAHA, delete clauses 16.6(a) and (b) and insert:

“(b) Where a Trade is carried out in accordance with the rules of the CTS Clearing House then, notwithstanding the provisions of clause 16.4, the Trade has effect for the purpose of this agreement.”

16 Consent requirement for novation

In the IAHA, in clause 16.1 delete “by prior written notice to the Access Holder” and insert “with the prior written consent of the Access Holder (which must not be unreasonably withheld or delayed)” and delete “is deemed to have given its consent to an assignment and novation of this agreement and”.

17 Period of Access Undertaking

In the Access Undertaking, section 2.2(a)(i) delete “tenth (10th)” and replace with “fifth”.