



Australian
Competition &
Consumer
Commission

Australian Competition and Consumer Commission

Position Paper

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

21 December 2010



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Glossary

24 December IAHA	The revised Indicative Access Holder Agreement provided to the ACCC by ARTC on 24 December 2009
2008 Interstate AU	ARTC's access undertaking accepted by the ACCC in 2008 for the Interstate network
ACCC	Australian Competition and Consumer Commission
Act, the	<i>Trade Practices Act 1974</i> (Cth)
AER	Australian Energy Regulator
AHA	Access Holder Agreement
ARTC	Australian Rail Track Corporation
BBM	Building Block Model
BPU	Base Path Usages
Capex	Capital Expenditure
CPI	Consumer Price Index
DRP	Debt Risk Premium
DTP	Daily Train Plan
GFC	Global Financial Crisis
GTKm	Gross Tonne Kilometres
HRATF	Hunter Rail Access Task Force (referred to by ARTC as Hunter Valley Rail Access Task Force - HVRATF)
HVAU, proposed 2010 HVAU	Proposed Hunter Valley Access Undertaking, as submitted to the ACCC by ARTC on 7 September 2010
HVCCC	Hunter Valley Coal Chain Coordinator
HVCCS	Hunter Valley Corridor Capacity Strategy
HVCN	Hunter Valley coal network
IAHA	The Indicative Access Holder Agreement attached to the proposed 2010 HVAU
IPART	Independent Pricing and Regulatory Tribunal
KPI	Key Performance Indicator
MRP	Market Risk Premium
MTP	Master Train Plan
Mtpa	Million tonnes per annum
NCIG	Newcastle Coal Infrastructure Group
Network	The Hunter Valley network to which the proposed HVAU applies
NMP	Network Management Principle
NPC	Network Path Capability, which is an element of the True-up Test
NSW Lease	ARTC's 60 year lease from the NSW

	Government of the NSW interstate rail network and the Hunter Valley network
NSWMC	New South Wales Minerals Council
NSWRAU	New South Wales Rail Access Undertaking – ARTC’s undertaking that presently applies to the Hunter Valley Network
Opex	Operating Expenditure
OSA, IOSA	The Operator Sub-Agreement for Indicative Services, annexed to the Indicative Access Holder Agreement
Part IIIA	Part IIIA of the <i>Trade Practices Act 1974</i> (Cth)
PN	Pacific National
PWCS	Port Waratah Coal Services
QR	Queensland Rail
RAB	Regulated Asset Base
RCG	Rail Capacity Group
TOP	Take or pay
TPA	<i>Trade Practices Act 1974</i> (Cth)
Train Path Schedule, TPS	Train Path Schedule
TUT	True-up Test
WACC	Weighted Average Cost of Capital

1 Executive Summary

1.1 Introduction

The Australian Rail Track Corporation (**ARTC**) submitted an access undertaking application to the Australian Competition and Consumer Commission (**ACCC**) on 7 September 2010. The ACCC is assessing whether it is appropriate to accept the proposed undertaking under Part IIIA of the *Trade Practices Act 1974 (Cth)* (**the Act**). The proposed undertaking is for the provision of access to the Hunter Valley Rail Network operated by ARTC in New South Wales.

The ACCC has chosen to release this Position Paper setting out its views on the proposed Hunter Valley access undertaking (the **proposed 2010 HVAU**). This is not a formal decision of the ACCC, but rather a statement of the ACCC's views on:

- matters of concern in relation to the previous version of the HVAU that the ACCC now considers to have been resolved;
- matters the ACCC considers remain outstanding; and
- a proposed way forward to address the matters outstanding and finalise the assessment of the 2010 HVAU.

1.2 ACCC's summary view

The ACCC considers that the general overall framework of the proposed 2010 HVAU would contribute to the economically efficient use and operation of the Hunter Valley rail network, and to efficient investment in new capacity. The overall framework would also contribute to an efficient end-to-end Hunter Valley coal chain from mine to port, consistent with the long-term solution for the coal chain. It would further contribute to efficient provision of services to other users such as passenger trains, non-coal freight trains (including container and grain trains) and domestic coal trains.

The proposed 2010 HVAU is more likely to be appropriate to accept than the Hunter Valley access undertaking submitted by ARTC in April 2009 (the **2009 HVAU**). The ACCC considers that many issues raised by the ACCC in its March 2010 Draft Decision on the 2009 HVAU have been satisfactorily addressed by ARTC in the new version of the undertaking.

The ACCC also considers that, in general, many features of the undertaking appear to be intended to address concerns raised by particular stakeholders and to facilitate an effective regulatory regime. In many instances the ACCC considers that the broad intent of these features is likely to be appropriate.

The ACCC does not, however consider that the proposed 2010 HVAU is yet, on its current drafting, appropriate to accept under the Act. While in many instances appropriate features are included, and the intent behind those features is appropriate, further revisions are necessary to ensure that the proposed 2010 HVAU effectively implements the underlying intent. Also, at the level of detail, there are some outstanding drafting issues to be resolved in order to effectively implement the

proposed arrangements. Such revisions are necessary for the proposed 2010 HVAU to be appropriate to accept.

The ACCC has, throughout this Paper, stated its position on particular issues and recommended revisions to the proposed 2010 HVAU to address any outstanding concerns. In doing so, the ACCC hopes to provide a path forward by which the assessment of the undertaking may be finalised in a timely fashion, and that new contracts may be signed where needed. The ACCC recognises that the speed at which this can be done rests in the hands of ARTC and, to some extent, the industry.

The ACCC also acknowledges the significant work involved in the development of the proposed 2010 HVAU, particularly the revisions ARTC has made to accommodate the recommendations made by the ACCC in its Draft Decision of March 2010, and the contribution by various parties to the resolution of outstanding issues.

1.3 Overview of the ACCC's assessment of the proposed 2010 HVAU

1.3.1 The proposed 2010 HVAU

ARTC's proposed 2010 HVAU regulates access to the Hunter Valley rail network and includes the following features:

- Regulation of ARTC's prices. This incorporates a revenue cap plus provisions for the determination and levying of access charges.
- A negotiate/arbitrate framework for negotiating access agreements, with the ACCC as arbitrator in the event of a dispute.
- An Indicative Access Holder Agreement (IAHA), which for coal access seekers is a rolling ten year take-or-pay agreement, as well as an indicative 'Operator Sub-Agreement' (OSA), whereby access rights are exercised via an accredited rail operator.
- Protocols for the allocation and management of capacity on the network.
- Processes for investment and creation of additional capacity on the network.
- Provisions relating to the operational management of, and scheduling of trains on, the network.

1.3.2 The legal test for assessment

Section 44ZZA(3) of the Act specifies that the ACCC may accept an access undertaking if it thinks it is 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.

1.3.3 Application of the legal test – general themes

In the March 2010 Draft Decision in relation to the 2009 HVAU, 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. 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).

The ACCC remains of this view. 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 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 where ARTC should not be obliged to go further.

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.

Supply chain alignment considerations to a large extent distinguish the assessment of the proposed Hunter Valley access undertaking from other access arrangements. Nonetheless, the ACCC considers that the proposed 2010 HVAU should also operate to promote efficiency and facilitate competition in related markets, as typically occurs under access regulation and as is recognised under section 44ZZA(3). The ACCC notes that these considerations particularly underpin the assessment of the financial model and pricing regime ARTC has proposed, as well as the investment framework under section 6.

Furthermore, in the March 2010 Draft Decision the ACCC emphasised ‘clarity and certainty’ as a relevant ‘other matter,’ and went on to identify a range of provisions of the 2009 HVAU which it considered either unclear or uncertain, and which it recommended be revised by ARTC. The ACCC maintains the view that sufficient clarity and certainty is critical to the operation of the proposed 2010 HVAU. The access arrangements proposed by the 2010 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. The ACCC considers that in many instances, the failure of the drafting of the undertaking to clearly and logically set out the proposed approach has contributed to the level of concern expressed by stakeholders, and to the view that while the underlying intent of the undertaking is appropriate, its implementation is not. In this Paper the ACCC has, therefore, attempted to set out its view on the operation of the proposed 2010 HVAU in order to increase the degree of clarity and certainty.

1.4 Significant issues in the assessment

1.4.1 Features of the proposed 2010 HVAU

As noted above, the ACCC considers that many features of the proposed 2010 HVAU appear to be intended to address concerns raised by particular stakeholders and to facilitate an effective regulatory regime. In many instances the ACCC considers that the broad intent of these features is likely to be appropriate. In particular, the ACCC notes that:

- Section 3 of the undertaking incorporates a negotiate/arbitrate framework to constrain ARTC from exerting undue bargaining power over access seekers during access negotiations.
- Section 4 incorporates a revenue cap and pricing methodologies to promote access pricing that is efficient and that reflects the cost of providing access to the network.
- Section 5, and related provisions in the Indicative Access Holder Agreement, include numerous provisions designed to facilitate alignment of capacity management on the Hunter Valley rail network with other components of the supply chain.
- Section 6 sets out a detailed process by which investment in the network to expand capacity may occur (as discussed further below), and which should promote the identification and delivery of additional capacity in response to demand, and the prudent and efficient investment in that capacity.

The ACCC has, however, identified revisions that should be made to these provisions in order for them to operate as intended, and to be appropriate to accept.

1.4.2 Transition and implementation

The ACCC acknowledges the submissions from access seekers expressing uncertainty as to how the proposed 2010 HVAU will practically operate, in particular how current users of the network will be transitioned to the new access arrangements.

The proposed 2010 HVAU introduces a new tripartite contracting structure for coal-related access agreements, whereby a coal producer may contract directly with ARTC for access rights to the network, and then exercise those rights via an accredited rail operator. The ACCC recognised in the Draft Decision that this structure is an appropriate feature, as it allows coal producers to have more control over their logistics requirements and may encourage competition into the above-rail market. The structure is, however, significantly different to the current bilateral structure whereby rail operators contract for access with ARTC, and those rail operators sell haulage to coal producers.

The ACCC acknowledges the concerns that ARTC has not articulated in the proposed 2010 HVAU how the new contracting structure will be implemented, or how users will be transitioned from the current regulatory regime administered by the Independent Pricing and Regulatory Tribunal (IPART) to the new HVAU. Further, concerns have been expressed that capacity entitlements under the new arrangements are yet to be confirmed, and that ARTC has failed to provide a clear indication of what the available capacity on the network is for 2011 and subsequent years. Suggestions have been made that ARTC should implement a detailed process for the nomination and allocation of capacity, similar to the process in place for capacity allocation at the Port Waratah Coal Services coal terminals.

The ACCC considers that it is not well-placed to design an effective transition and implementation plan to ensure the workability of ARTC's proposed 2010 HVAU. Part IIIA of the Act allows for access providers to voluntarily submit an access

undertaking for acceptance, not for the ACCC to impose a regime of its own design. The ACCC would also be reluctant to prescribe operational detail unilaterally where it lacks the requisite degree of expertise. Further, as an undertaking is proffered by the access provider, that provider should be able to articulate how its proposal is intended to operate in practice.

Nonetheless, the ACCC considers that key initial steps may facilitate transition and to some extent allay the concerns outlined above. These are:

- ARTC providing a public statement of the capacity on the Hunter Valley rail network for 2011 and the remainder of the regulatory period;
- 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; and
- ARTC providing to non-coal access seekers a written indication of their likely contractual arrangements and capacity entitlements.

The ACCC recognises that some of these steps are small increments, however, it may be the case that more effective and directed communication between the parties on these issues will begin to address the lack of clarity and certainty that currently exists.

The ACCC is reluctant at this stage to recommend wide-ranging revisions to the proposed 2010 HVAU to achieve effective transition and implementation, as to do so may have the perverse outcome of delaying implementation of the HVAU while those revisions are developed and adopted (if ARTC chose to adopt them). Nonetheless, if the non-binding approach outlined above fails to achieve a satisfactory degree of certainty, the ACCC could consider whether a more prescriptive approach would be appropriate.

It should also be emphasised that while coal producers have expressed concern with the lack of transition and implementation arrangements, similar concerns have been expressed by non-coal access seekers. The ACCC is therefore of the view that ARTC must take into account non-coal access seekers in resolving the transition and implementation concerns.

The ACCC notes that ARTC distributed on 10 December 2010 a letter to stakeholders outlining a proposed transition arrangement, for both coal and non-coal access seekers. The ACCC recognises that the letter incorporates some of the matters suggested in the preceding section, and welcomes ARTC's steps in this regard.

1.4.3 Liability and performance accountability

The proposed 2010 HVAU incorporates a complex regime regarding ARTC's liability for performance under its access agreements, including:

- 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 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 HVAU.

The ACCC has considered these elements together as an overall ‘package’ of measures to ensure accountability for ARTC’s performance under the proposed access arrangements. While certain elements may not, of themselves, necessarily be appropriate, taken holistically, and subject to ARTC making further revisions to ensure the effectiveness of the TOP rebate mechanism and to clarify the availability of equitable remedies, the ACCC considers that the overall approach is likely to be appropriate.

The ACCC notes that the liability provisions in the IAHA as proposed by ARTC considerably limit ARTC’s liability. In particular, 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 is a rebate of TOP charges. This is notable as the provision of Train Paths and Path Usages by ARTC to the Access Holder goes to the essence of the bargain between the two parties.

The ACCC consequently considers that, in order for this approach to be appropriate, the implementation of the TOP rebate mechanism must be sufficiently robust and transparent. It is the ACCC’s view that the TOP rebate provisions, including the system true-up test (TUT) that provides a critical input into the rebate calculation, as currently drafted, require further revisions to meet this standard. In particular, the ACCC considers that:

- greater objectivity is required in relation to the determination of ‘Network Path Capability’ under the system TUT;
- the TOP rebate mechanism should allow rebate accruals for certain circumstances where Tolerance is not made available; and
- ARTC’s calculations under the system TUT should be independently audited (with the cost of that audit included in the Regulatory Asset Base (RAB)).

If ARTC were to strengthen the operation of the TOP rebate provisions in this way, the ACCC considers that the proposed liability clauses in the IAHA would be likely to be appropriate.

The ACCC considers, however, that some clarification is also needed in relation to the availability of equitable relief under the contracts. It appears to the ACCC that there is some confusion amongst stakeholders as to whether it is open to Access Holders under the proposed liability regime to seek equitable relief from the courts in the case of a breach by ARTC. The ACCC notes that there does not appear to be any explicit exclusion of equitable relief in the relevant IAHA provisions, however for the

avoidance of doubt, and given the already substantial limitations of ARTC's liability, the ACCC recommends that the IAHA include explicit recognition of the availability of equitable remedies.

In relation to the other elements of the overall performance accountability scheme, the ACCC notes that the proposed KPIs are simply reporting obligations and that ARTC is yet to propose a performance incentive mechanism for inclusion in the HVAU. While in other contexts this may lead to a conclusion that the proposed arrangements are inappropriate to accept, this may not be the case in relation to the HVAU provided that the recommended revisions are made to strengthen the operation of the TOP rebate scheme described above, to clarify the availability of equitable remedies, and that ARTC submits a performance incentive proposal to the ACCC in a timely fashion.

1.4.4 Supply chain alignment

A general theme raised by a number of parties making submissions on the proposed 2010 HVAU is 'supply chain alignment,' and as outlined above, this is a key consideration in the ACCC's assessment. The ACCC recognises, however, that a number of individual issues are encompassed within this broader concern, 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.

The ACCC recognises that views on these issues continue to develop in light of further practical experience of the operation of the Hunter Valley coal chain under the 'long term solution.' The ACCC commented extensively on these issues in the March 2010 Draft Decision, and has considered these issues again where appropriate.

Ultimately, while the ACCC considers that some further revisions should be made to the proposed 2010 HVAU to further facilitate supply chain alignment, the undertaking is likely to be appropriate in relation to capacity management issues at least in the short term.

As stated in the Draft Decision, the ACCC considers that the undertaking should 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 proposed 2010 HVAU is not the most appropriate means by which to coordinate *all* industry-wide issues.

The ACCC therefore considers that the proposed 2010 HVAU in many instances appropriately accommodates supply chain alignment. This includes providing for appropriate consultation between ARTC and the HVCCC, and an appropriately balanced approach in relation to capacity management issues. Further, the undertaking provides for a review of the relevant loss allocation provisions within 12 months of commencement, thus allowing for further development over time.

1.4.5 Investment & capacity expansion

Investment in the Hunter Valley rail network to ensure efficient and timely capacity expansion has been raised by stakeholders as a key concern.

Concerns of coal producers

The ACCC understands 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 mines and 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 exist 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 compromise the overall performance of the coal chain.

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.

Proposed investment framework

On the ACCC's understanding of the relevant provisions of the HVAU, it appears that the investment framework put forward by ARTC involves three avenues by which additional capacity may be created:

- ARTC identifies, funds and constructs additional capacity;
- the HVCCC recommends an investment to provide additional capacity, and ARTC consents to providing that capacity if certain criteria are met; and
- an applicant seeks additional capacity, and ARTC consents to providing it if it is commercially viable to ARTC, or if the applicant agrees to meet the cost of the capacity, and if other criteria are also met.

Additionally, ARTC will seek the endorsement of the Rail Capacity Group (RCG) for all capacity expansion projects, and will plan expansions of capacity in cooperation with the HVCCC.

Appropriateness of the proposed framework

In summary, the ACCC considers that the investment framework in the proposed 2010 HVAU contains fundamental elements that are likely to be appropriate, but that the provisions are confusingly drafted and further revisions are required to ensure that the framework operates effectively and is thus appropriate to accept.

The underlying framework is likely to be 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 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 ability for users to step in and fund additional capacity that has gone through each of these stages and otherwise been considered not prudent nonetheless allows a user to guarantee its own capacity if all else fails. The ACCC recognises that this scenario is likely to be rare.

The ACCC considers however, that revisions are necessary to the proposed framework, particularly in relation to the timing and availability of the user-funding option, and the delivery of contracted additional capacity.

User-funding option

The inclusion of a user-funding option as part of the investment framework is likely to appropriately reflect the interests of supply chain alignment and access seekers, as well as promote efficient investment in infrastructure.

While the framework contemplates user-funding in some instances, the ACCC considers that the relevant provisions require revision to operate effectively and be appropriate to accept.

Section 6.2 of the proposed 2010 HVAU provides for an access seeker to fund additional capacity as part of the process of negotiating an access agreement, while it is also possible for a user to fund additional capacity where it has otherwise been deemed not prudent (that is, the scenario described above). Further, the Train Path Schedule to the IAHA contemplates user-funding occurring where ARTC ceases to commit to provide additional capacity it has relied upon to enter into Access Agreements.

While these options are appropriate, the ACCC considers that the user-funding option must in general operate as an alternative or fallback where ARTC decides not to fund capacity expansions itself. If the 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, a user-funding option that operated in this way should incentivise ARTC to make efficient and timely investment decisions. ARTC will not earn a return on user-funded contributions, hence ARTC should have some incentive to pursue capacity expansions in response to demand or otherwise forgo earning additional returns. That investment decisions require RCG endorsement should also incentivise ARTC to invest efficiently; that is, investment proposals are subject to scrutiny by users. The user funding option should therefore promote efficient investment in infrastructure, as reflected in the objects of Part IIIA.

The ACCC considers, however, that revisions are needed to ensure that the user-funding option operates in this manner. In particular, the ACCC considers that it must be clear when user-funding may occur, and that the decision by ARTC to consent to user-funding be made by reference to clear criteria.

At present, the ACCC considers that it is unclear and uncertain that user-funding may be pursued as an option other than in the circumstances noted above. While the ACCC recognises that user-funding may be appropriate in these circumstances, there may be adverse consequences where user-funding is left as a 'last resort' option, as appears to be contemplated. That is, access seekers are unlikely to obtain necessary certainty where ARTC has pursued an investment decision up to a particular point, and then decides it no longer wishes to proceed. If a period of months or years has elapsed, the timing mismatch between the delivery of the rail capacity and the complementary capacity may create inefficient outcomes for the Hunter Valley coal chain.

To avoid these outcomes, the ACCC considers that the undertaking must specify that a user-funding option may be pursued at an appropriately timely juncture in the planning and development of additional capacity. The ACCC recognises that, depending on the nature of the project and the stage of its development, the point at which funding decisions are made may vary. However, the ACCC considers that the 'project assessment' stage (referred to in section 6.4(f) of the HVAU), appears to be the appropriate juncture at which funding decisions are made, and where commitment to delivery of the capacity occurs.

Consequences of an effective user-funding option

The ACCC also considers 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.

Equitable reconciliation

A further consequence of user-funding is that the undertaking must include clear and certain provisions on how user contributions will be treated, and how access charges for user-funded capacity will be determined and collected.

The proposed 2010 HVAU includes provisions on these issues, and the ACCC considers that they are broadly likely to be appropriate. The ACCC does not consider it necessary at this stage for the undertaking to include a 'user-funding deed,' but recognises that where a user-funding agreement is created, it may establish a pro-forma that can be considered for inclusion at a later date.

Delivery of additional capacity

The ACCC considers that, once a decision has been made either by ARTC to fund the recommended additional capacity, or that ARTC should build it with user funding, there should be more certainty that additional capacity will actually be constructed. However, the stage at which delivery of capacity should be mandatory is once contracts have been signed; that is, if ARTC seeks to contract on the basis of future additional capacity, it should, under contract, commit to the delivery of that capacity.

What this means is that ARTC should not be able to reconsider the commercial viability of a project it has already agreed to fund, and on the basis of which it has entered contracts, at a later stage under the conditions precedent currently included in the Train Path Schedule of the IAHA. This is especially the case if in the interim other parties have needed to make complementary investments (such as in mines or port capacity, or rolling stock).

However, the actual terms on which delivery of the additional capacity occurs, including grounds for abandoning or reassessing a project due to changes in circumstances that are beyond ARTC's control, should be set out in the contracts between ARTC and the parties contracting for the capacity and, if relevant, any other providers of user funding. If they could not agree, the terms and conditions would be

subject to ACCC arbitration, in the normal manner. In so arbitrating, the ACCC would expect to adhere to the view expressed in its March 2010 Draft Decision that ARTC is not a construction company. The ACCC is of the view that any change in circumstances that affects the ability of ARTC to get funding, or which prevents ARTC from being able to complete the additional capacity on the terms agreed, can be appropriately dealt with contractually, but that the Project Completion Condition Precedent in the Train Path Schedule creates too much uncertainty.

The ACCC has noted elsewhere the view that ARTC should not be liable for damages for consequential economic loss. This would equally limit any monetary damages for non-performance of contracts for the delivery of additional capacity. The ACCC has also taken the view that a general exclusion on all non-financial remedies is not appropriate, so that parties could seek remedies such as specific performance or declarations from a court. In deciding whether to grant such remedies, the court could take into account the specific circumstances of the matter.

The ACCC considers that leaving these matters to the normal process of commercial contracts (backed up by arbitration) and the commercial courts is preferable to attempting to specify ex ante, perhaps years in advance of a need arising, all circumstances in which it would be reasonable for ARTC to not proceed.

1.4.6 Pricing certainty – determination of the efficient train configuration

The proposed 2010 HVAU incorporates the concept of an ‘Indicative Service,’ which is intended to reflect the most efficient train configuration to achieve optimum utilisation of coal chain capacity and the Hunter Valley network. The Indicative Service is used to calculate Indicative Access Charges, while charges for non-Indicative Services are intended to be calculated by reference to the Indicative Service. The proposed 2010 HVAU as currently drafted does not, however, include the characteristics of the Indicative Service, but rather refers to the ‘Interim’ Indicative Service.

In the March 2010 Draft Decision the ACCC considered that it was inappropriate that the 2009 HVAU did not include a process to determine the efficient train configuration, and ARTC has included in the 2010 HVAU a process by which the efficient train configuration will be determined.

The ACCC recognises that there is a general consensus that the efficient train configuration should be determined sooner rather than later, but that there should be appropriate grandfathering arrangements for users to transition to the new service, particularly where users have relied on statements by ARTC regarding pricing parity to make complementary investment.

The ACCC therefore considers that the proposed 2010 HVAU should be revised to achieve this outcome. In particular, the ACCC considers that ARTC should submit a proposed variation to the HVAU in relation to the efficient train configuration within six months of receiving relevant data from the HVCCC and, in any event, or no later than twelve months from the commencement of the HVAU. The relevant grandfathering provisions should operate until 30 June 2014.

The ACCC is also of the view that the process to determine the efficient train configuration should also determine the pricing approach that will send appropriate pricing signals regarding the efficient consumption of network capacity. Consequently, the ACCC considers that the process should determine whether 'gross tonne kilometres' are the most appropriate unit for pricing, or whether an alternative approach is more likely to promote efficient use of the network.

1.4.7 Rate of return

The ACCC considers that ARTC's proposed rate of return of 9.16% (real pre-tax WACC), is unlikely to appropriately reflect the commercial and regulatory risks ARTC faces. Instead, the ACCC considers that a rate of return (real pre-tax WACC) of 8.57% is more likely to be appropriate.

1.4.8 Proposed term of the HVAU

The ACCC considers that the appropriateness of the 10 year duration of the proposed 2010 HVAU is finely balanced, and the ACCC is yet to reach a view on this issue.

The ACCC acknowledges that the proposed 2010 HVAU includes several reviews, and also refers to features yet to be developed:

- section 4.16 provides for the determination of an efficient train configuration, and for subsequent variation of the undertaking to incorporate an Indicative Service description;
- section 5.9 provides for a review of the mechanisms for the identification and allocation of capacity losses;
- section 8.3 states that prior to acceptance of the undertaking, ARTC will propose one or more incentive mechanisms.

In addition, the IAHA also provides for reviews:

- clause 3.3(e) provides for, within 12 months of the commencement of the proposed 2010 HVAU, a review of the level of Tolerance available and for ARTC to provide a report to the Rail Capacity Group; and
- clause 16.8 provides for, by 31 December 2011, a review of the appropriate time period for ARTC to inform the HVCCC of its decision to approve or reject trades.

Assuming the proposed 2010 HVAU was otherwise appropriate, it would still include provisions recognising that certain features need to be reviewed and developed over time, leading to possible variations in the future.

Submissions on the proposed 2010 HVAU have also raised issues regarding supply chain alignment that were considered in the ACCC's Draft Decision in March 2010. These submissions in some instances reflect further consideration by stakeholders of the relevant issues, or in others further experience dealing with the practicalities of supply chain alignment since the commencement of the capacity framework arrangements in December 2009.

The ACCC recognises that some of the reviews outlined above have been included by ARTC in response to comments by stakeholders. This, however, also underscores the previous point that certain supply chain issues are dynamic, and that a firm position may not yet be settled.

These factors tend to suggest that it may not be appropriate to accept the proposed 2010 HVAU for a period of 10 years. The ACCC considers that a risk it identified in the Draft Decision – of an undertaking failing to remain appropriate for the entirety of its duration – may actually occur, perhaps even in the short term.

The ACCC also considers that the review proposed by section 2.3 of the proposed 2010 HVAU is not, in its current form, a sufficient answer to this concern. While the section provides that ARTC will undertake a review, as soon as practicable after the fifth anniversary of the HVAU's commencement, ARTC is under no obligation to submit a variation if it finds that changes are necessary. Further, given that the scheme of Part IIIA is for the access provider to voluntarily submit an access undertaking to the ACCC, ARTC would have the ability to decline to submit a variation if it was not in its interests to do so. These considerations also apply in relation to other provisions where ARTC is to conduct a review and thereafter submit proposed variations.

A shorter term undertaking may therefore be more appropriate in the circumstances. A shorter term mitigates the risk of putting in place ineffective arrangements that are unable to be changed, or only able to be changed where it is in ARTC's interest to do so. A shorter term would permit review of the undertaking by the ACCC after a few years of operation, and allow for the incorporation of developments in supply chain alignment. Further, a shorter term may facilitate contracting between ARTC and access seekers sooner than if the undertaking was to run for 10 years. That is, the ability of the ACCC to review and assess the operation of the undertaking after a relatively short period may allay some concerns that undesirable outcomes from the HVAU will be locked in for the long term.

An appropriate term for the proposed 2010 HVAU may be that which allows for the development of the matters in sections 4.16, 5.9 and 8.3, such that the subsequent undertaking would be a complete document that can operate for a time before being reassessed. The ACCC considers that a term of 5 years may achieve the appropriate balance. If at the conclusion of the 5 term it appears that the undertaking has operated effectively, a less extensive development and assessment process may be needed as has been the case for the proposed 2010 HVAU.

There are, however, countervailing considerations to a shorter duration undertaking. A major qualification is the consequence it may have for contracts executed by reference to that undertaking. The proposed 2010 HVAU includes rolling ten year indicative contracts, and the ACCC understands that many access seekers – particularly coal producers – are likely to enter long term contracts with ARTC. The ACCC recognised in the Draft Decision, and remains of the view, that the ability of parties to enter long term contracts under the proposed 2010 HVAU is likely to be appropriate, particularly as it provides certainty in relation to investment decisions and is reflective of the aims of the long term solution. Uncertainty may therefore arise in relation to those contracts at the point at which the HVAU is reassessed.

However, the ACCC considers that ‘locking in’ for 10 years an undertaking that ceases to be effective relatively shortly after acceptance is equally unlikely to provide certainty for long term contracts. Further, as the access agreements may be rolling agreements, at some point during the contract life the HVAU may undergo changes (clause 19.1 of the IAHA to some extent reflects this). It is also not unusual in access regimes for access contracts to extend beyond the term of the undertaking, provided there is appropriate interaction between the documents.

The ACCC also acknowledges that comprehensively ‘re-opening’ the proposed 2010 HVAU after five years may not be desirable, as the possibility of that occurring may contribute uncertainty and impact commercial decisions by interested parties (including ARTC). The ACCC is also cautious that the benefits sought to be achieved by the long term solution not be undermined by any uncertainty that may arise from a shorter term undertaking.

The ACCC considers that the appropriateness of the 10 year duration of the proposed 2010 HVAU is finely balanced, and the ACCC is yet to reach a view on this issue. The ACCC also notes that the final view on the appropriate term may necessitate consequential amendments to other parts of the undertaking.

1.4.9 Non-coal and domestic coal use of the Network

The ACCC also recognises the use of the network by services other than for the transport of coal for export. The ACCC considers that in many respects the proposed 2010 HVAU appropriately recognises the interests of these access seekers, including that:

- nothing in the proposed 2010 HVAU should operate to circumvent ARTC’s statutory obligation under the *Transport Administration Act 1988* (NSW) to prioritise passenger services; and
- ARTC has made amendments to the provisions in section 3 regarding the offer of access to recognise the circumstances of domestic coal access seekers.

ARTC has also sought to provide additional certainty to non-coal users of the Network by incorporating the Indicative Access Agreement from the 2008 Interstate Access Undertaking into the proposed 2010 HVAU as a ‘template’ for non-coal access rights. While this is a useful step, ARTC must also take into account the interests of non-coal access seekers in facilitating the transition of users to the new access arrangements, as discussed above.

1.5 Chapter summaries

The ACCC’s views are set out in the following chapters.

1.5.1 Chapter 2: Process, and Chapter 3: The Proposed Undertaking and the Legal Test

Chapter 2 outlines the ACCC’s process to date in assessing the proposed Hunter Valley access undertaking, and the indicative timeline for the remainder of the assessment. The chapter also describes the previous assessment of the 2009 HVAU,

and notes recent changes to Part IIIA of the Act that are relevant to the assessment of access undertakings.

Chapter 3 provides an overview of the proposed 2010 HVAU, as well as a discussion of the legal test the ACCC must apply to assess the undertaking, and the general themes of the analysis.

1.5.2 Chapter 4: Preliminary Matters

This chapter discusses all aspects of sections 1 and 2 of the proposed 2010 HVAU, other than section 2.4 (which is discussed in the **Negotiating for Access** chapter).

The ACCC considers that sections 1 and 2 are likely to be appropriate, subject to a final view on an appropriate term for the proposed 2010 HVAU.

1.5.3 Chapter 5: Financial Model

This chapter discusses the revenue cap ARTC has proposed in section 4 of the proposed 2010 HVAU to regulate access charges. The cap is determined by the application of the Building Block Model (BBM), but also includes use of 'loss capitalisation' to allow the later recovery of 'shortfalls' in access revenue that occurred in an earlier period.

The ACCC considers that ARTC's proposed approach to the financial model is likely to be appropriate, subject to revisions to ensure that:

- ARTC's intention is reflected in the drafting of the HVAU;
- loss capitalisation is confined to new investment in Pricing Zone 3;
- the definition of 'Out-turn Revenue' outlines how ARTC will allocate Access Revenues across the Segments in Pricing Zone 3;
- sections 4.3(a), 4.3(b) and 4.4 of the proposed 2010 HVAU are consistent in their treatment of cash flows;
- the ACCC may effectively perform the Annual Compliance Assessment;
- the approach to 'efficient costs' in section 4.4(b) is effective; and
- ARTC's real pre-tax WACC is 8.57 per cent.

1.5.4 Chapter 6: Pricing

This chapter discusses the other provisions in section 4 of the proposed 2010 HVAU, which deal with the determination of access charges. Relevant clauses of the IAHA are also discussed.

The ACCC considers that ARTC's proposed approach to determining and levying access charges is likely to be appropriate, subject to the following revisions:

Determination and implementation of the efficient train configuration

- In determining the efficient train configuration, ARTC should seek to determine the approach that ensures efficient consumption of Network capacity, and that sends price signals to facilitate the same. Consequently, the review should consider whether GTKm is the appropriate pricing unit.
- ARTC should submit to the ACCC a proposed variation to the HVAU regarding the efficient train configuration and appropriate pricing approach, within six months of receiving the relevant information from the HVCCC, and in any event within twelve months of the commencement of the undertaking.
- The HVAU should provide for ARTC to resubmit a variation to the ACCC if the first variation is not accepted.
- The HVAU should include an explicit transition mechanism for existing Access Holders who wish to adopt the efficient Indicative Service.
- The review should also consider appropriate charge differentiation factors in light of the Indicative Service.
- Grandfathering arrangements should apply until 30 June 2014 in order for relevant access holders and operators to transition their operations and adjust their business plans accordingly.

Other

- The HVAU should provide that Indicative Access Charges for Indicative Services are a factor ARTC may consider when formulating access charges for Non-Coal Access Rights.
- To ensure pricing certainty, the HVAU should explicitly state 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.
- A minor drafting change should be made to section 4.11.

1.5.5 Chapter 7: Negotiating for Access

This chapter discusses section 3 of the proposed 2010 HVAU, which includes provisions for the offer and negotiation of access rights, the assessment and allocation of capacity entitlements, and for arbitration by the ACCC in the event of a dispute.

The ACCC considers that many aspects of section 3 of the proposed 2010 HVAU are likely to be appropriate, as ARTC has adopted recommendations made by the ACCC in the March 2010 Draft Decision.

The ACCC considers, however, that the following revisions are necessary:

- a minor revision to ensure that the section on Prudential Requirements is objective;

- revisions to the Network Exit Capability condition precedent in the Train Path Schedule to ensure it operates consistently with the provisions of the HVAU;
- revisions to the confidentiality provisions to allow disclosure of confidential information to the ACCC and prevent other disclosures;
- a minor revision to permit Operator involvement in negotiation of the OSA, and in dispute resolution proceedings, with the consent of the Access Holder;
- steps to facilitate transition of users to the new access arrangements; and
- revisions to the mutually exclusive access applications provision to ensure its operation is clear and transparent.

1.5.6 Chapter 8: Agreements

This chapter discusses matters in relation to the IAHA and OSA attached to the proposed 2010 HVAU.

The ACCC reiterates its position from the March 2010 Draft Decision that, other than the Tier 1 provisions, the clauses of the IAHA and OSA are negotiable pursuant to the negotiate/arbitrate framework in the HVAU. The ACCC also acknowledges that ARTC has in many instances revised the agreements to address comments made in the Draft Decision.

The ACCC notes however that the clause of the IAHA dealing with the uplift into the agreements of changes resulting from revisions to the HVAU may require consequential amendments depending on the term of the HVAU. The ACCC also notes that revisions to the clauses dealing with Tolerance are necessary to ensure Tolerance does not fall below a specified minimum level.

1.5.7 Chapter 9: Performance and Accountability

This chapter considers elements of the proposed 2010 HVAU, IAHA and OSA that relate to ARTC's liability for performance.

The ACCC has considered these elements together as an overall 'package' of measures. While certain elements may not, of themselves, necessarily be appropriate, taken holistically, and subject to ARTC making further revisions to ensure the effectiveness of the take or pay (TOP) rebate mechanism and to clarify the availability of equitable remedies, the ACCC considers that the overall approach is likely to be appropriate.

Specific revisions in relation to the TOP rebate mechanism are:

- greater objectivity is required in relation to the determination of 'Network Path Capability' under the system true-up test (TUT);
- the TOP rebate mechanism should allow rebate accruals for certain circumstances where Tolerance is not made available; and

- ARTC's calculations under the system TUT should be independently audited (with the cost of that audit included in the RAB).

ARTC should also submit a performance incentive proposal to the ACCC in a timely fashion.

1.5.8 Chapter 10: Capacity Management

This chapter discusses a number of matters relating to management of capacity on the network, and which arising in relation to provisions of both the proposed 2010 HVAU and the IAHA.

System Assumptions

The ACCC welcomes the reference to System Assumptions in section 5.1 of the proposed 2010 HVAU.

The ACCC recommends however 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
- 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.

Consultation with the HVCCC

The ACCC is of the view that the proposed consultation process in sections 5.2(d) and (e) of the HVAU goes some way to dealing with concerns raised in the Draft Decision on the certainty and detail around the HVCCC consultation process.

The ACCC recommends however that ARTC revise the HVAU so that:

- ARTC is obliged to provide written reasons to the HVCCC when it disagrees with the HVCCC's assessment, who will pass on relevant information to affected Access Holders who are members of the HVCCC; and
- for those Applicants who are not members of the HVCCC, ARTC should be obliged to provide the Applicants with written reasons if requested as to why ARTC disagrees with the HVCCC's assessment.

In both cases, ARTC is not obliged to disclose any confidential information in providing those reasons.

Capacity reservation

The ACCC is of the view that the application of the capacity reservation mechanism to Non-coal Access Rights is inconsistent with the ACCC's views in its 2008 Interstate Access Undertaking Final Decision regarding a similar provision, and consequently the provision should be removed from the HVAU.

Allocation of existing capacity where there is an event leading to a shortfall

Sections 5.4 to 5.6 of the HVAU set out the protocols ARTC will apply when allocating capacity where there is an event leading to a Capacity Shortfall of five days or less, and of greater than five days.

The ACCC is of the view that in relation to shortfalls of five days or less:

- although there were arguments that the period be reduced to two days, there is at this point of time insufficient evidence to find the five day period inappropriate prior to the proposed review of the loss allocation mechanism in section 5.9; and
- that ARTC 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.

The ACCC also recommends that amendments be made that ARTC use its best endeavours, to the extent practicable, to not reduce contracted access rights from load points not affected by the Capacity Shortfall under section 5.5(a)(ii).

Capacity resumption (anti-hoarding provisions)

In response to the ACCC's view in the Draft Decision, ARTC amended clause 11.4 of the IAHA to include a positive obligation on ARTC to investigate circumstances where a coal producer has underutilised its capacity, without amending the 80 percent threshold for resumption.

The ACCC considers that the inclusion of a positive obligation on ARTC to investigate reasons why capacity was not utilised, in addition to an increase in the resumption threshold to 85 percent, should allow for the effective enforcement of the capacity resumption provisions in the case of genuine capacity hoarding, and provide a more appropriate balance between the interests of incumbent users of the network and new entrants.

Capacity trading and assignment

The ACCC recommends that clauses 16.6, 16.7 and 16.8 be included as Tier 1 (Mandatory) provisions. The ACCC is also of the view that there is no obvious reason why clause 16.3, relating to permanent trades, is not also a Tier 1 (Mandatory) provision.

In relation to permanent trades and assignments, the ACCC recommends:

- clause 16.1 be amended so the IAHA can only be assigned without consent of the Access Holder in the specific circumstances referred to in the NSW Lease and the assignment involves the transfer of the entire agreement; and
- clause 16.2 be amended to include a reasonableness requirement. The ACCC's view is that it would not be unreasonable for ARTC to refuse to consent to a transfer where the terms and conditions provided in the IAHA would be unsuitable for the proposed assignee.

In relation to temporary trades, the ACCC recommends:

- clause 16.4(a)(ii) be amended as a trade closer to the port can not be assumed to not impact on Coal Chain Capacity. The HVCCC consultation process in 16.6(c) should apply to all trades but ARTC can rely on the HVCCC's view as to the impact of a trade;
- clause 16.4(a)(iv) should be amended so that evidence of the HVCCC's acceptance of the trade will constitute the warranty required by ARTC under this provision;
- clause 16.4(d) should be amended so that ARTC is to seek and consider in good faith the views of the HVCCC in relation to all non-safe harbour trades regarding the impact on capacity. However, the ACCC considers that ARTC is not responsible for HVCCC delays regarding assessment of the impact of trades. If there is no response in two weeks ARTC could assume that the HVCCC has no concerns and ARTC can proceed with its own assessment; and
- clause 16.5(a) should 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.

The ACCC is also of the view that regardless of whether the IAHA is amended so that all trades go through the CTS Clearing House, clause 16.6(c) should be amended to clearly set out a specific obligation on ARTC to seek the views of the HVCCC and consider its views in good faith in relation to all trades under 16.3, 16.4(a) and 16.4(d). The 'safe harbour' stream of trading would be preserved by the HVCCC assessment under 16.4(a)(iv) constituting sufficient evidence that the trade will not impact capacity.

The ACCC is of the view that the IAHA should be further amended to clarify that under the review of the two week notice period under clause 16.8, ARTC should provide written reasons for its decision to reduce or maintain the two week period.

Mechanisms for identifying and assigning capacity losses and their review

ARTC has included a range of mechanisms by which an access seeker may be held accountable for losses in Network capacity, such as by running 'non-compliant' services (under clause 11.5 of the IAHA), or from cancellation of services (clause 11.6 of the IAHA). ARTC has also included a review of the cancellations and loss allocation mechanisms under section 5.9 of the HVAU.

In relation to the use of non-compliant services, the ACCC considers that:

- clause 11.5 be amended to provide that Access Holders can make use of different Operators without having to obtain consent from ARTC where the difference in the characteristics of the trains used do not have any impact on capacity;
- clause 11.5(c)(iii) may require amendment to avoid disincentives for access seekers to transfer to a more efficient service, where to do so would lead to a

reduction in TOP Charges. A preferable approach may be for the clause to provide that where a permanent change is sought, access charges will be recalculated on the basis of the new Service.

The ACCC is of the view that clause 11.6, which provides a mechanism by which a producer may bear the loss in capacity caused by its service cancellation, is appropriate as an interim measure, but that the following minor amendments should be made pending the outcome of the review under section 5.9 of the HVAU:

- ARTC should be obliged to notify an Access Holder where its Base Path Usages are to be removed under clause 11.6;
- the clause should clearly state that it is to be subject to review under the mechanism set out in section 5.9 of the HVAU;
- the interaction of clause 11.6 and the capacity shortfall provisions in clause 6 should be clarified to set out that an Access Holder cannot be penalised twice for the same event; and
- where the HVCCC advises that a cancellation has impacted on capacity and ARTC chooses not to remove BPUs, ARTC should be obliged to provide written reasons to the HVCCC (or to the Access Holder where they are not a member of the HVCCCC), with an appropriate confidentiality carve-out.

In relation to the review set out in section 5.9 of the HVAU, the ACCC recommends that if the HVCCC conducts an industry wide review within 12 months of the commencement date, then ARTC should participate in good faith in that review. However if this does not occur, then ARTC is to conduct the review as set out under section 5.9.

1.5.9 Chapter 11: Additional Capacity and Investment

This chapter considers section 6 of the proposed 2010 HVAU, which sets out the provisions relating to the creation of additional network capacity, and network connections.

Additional capacity

The ACCC considers that the investment framework in the proposed 2010 HVAU contains fundamental elements that are likely to be appropriate, but that further revisions are required to ensure the framework operates effectively and is appropriate to accept.

At a broad level, the ACCC is of the view that a revised HVAU must clearly and logically set out:

- the different available investment ‘mechanisms’ in their intended order of operation, that is:
 - that the Hunter Valley Corridor Capacity sets out the investment strategy for the Hunter Valley coal network;

- that ARTC may identify, fund and construct additional capacity;
- that the HVCCC may recommended investments to provide additional capacity; and
- that user-funding is available as an option in certain circumstances;
- the rights and obligations of all relevant parties under those different investment mechanisms, 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;
 - where an access seeker or group of access seekers ability 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.

While this should be the general aim of the ‘investment framework’ in the HVAU, the ACCC has also made the following specific recommendations to facilitate achieving this outcome.

Investments identified by ARTC or recommended by the HVCCC

The ACCC recommends the following amendments:

- Under the current drafting it is unclear 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). Therefore, 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.
- The HVAU should be amended so that it is clear when a point of commitment is reached in relation to a particular investment project, and consequently when user-funding may be triggered. It appears to the ACCC that a binding decision could be made at the ‘project assessment’ stage of the RCG process.
- The HVAU should clarify that the decision by ARTC whether to consent to proceed with a user-funded investment (as opposed to ARTC’s determination of whether to fund the project itself on commercial viability grounds) is made objectively by reference to clear criteria.
- It should be set out that where the applicable access holder(s) propose to meet the costs of the investment, ARTC and the applicable access holder(s) will use their best endeavours to enter into a user funding agreement within a specific timeframe.
- ARTC and access seekers should be able to negotiate terms around delivery of additional capacity that has been committed to under the HVAU processes; hence the Conditions Precedent to Delivery of Additional Capacity in the Train Path

Schedule should be removed. Any grounds for reassessing a project due to change in criteria 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.

The ACCC also considers that a number of specific amendments be made to:

- clarify how the current requirement for RCG endorsement in section 6.3(b)(i) interacts with ARTC's broader investment framework and the RCG process set out in 6.4(d);
- clarify the timeframes within which ARTC is obliged to provide a concept assessment report to the RCG under section 6.4(d) once it has received the HVCCC's recommendation;
- revise section 6.3(b)(iii) to clarify that ARTC's assessment of whether the provision of additional capacity is commercially viable, relates specifically to *ARTC's* commercial viability;
- revise section 6.3(b)(iv) to provide a reasonableness requirement in relation to the non-financial criteria by which ARTC will determine whether additional capacity should be provided;
- revise section 6.3(b)(iv)(D) so that it is clear that the interests contemplated under the 'legitimate business interests' can only be those not already addressed by the non-financial criteria at 6.3(b)(iv)(A) to (C). If ARTC is contemplating interests other than those already dealt with in the section, they should be specified; and
- provide that where ARTC has decided under section 6.3(b)(iv)(D) that the recommended additional capacity does compromise ARTC's legitimate business interests, ARTC should provide written reasons for that decision to the HVCCC and (where relevant) the applicable access holder(s).

Additional Capacity sought by Applicants

The ACCC also recommends that similar and consequential amendments to those set out above in relation to section 6.3 and 6.4 be made in relation to the relevant provisions in section 6.2(a) for additional capacity requested by Applicants.

The ACCC also considers that specific amendments be made to section 6.2 to:

- specify the timeframes within which ARTC is obliged to make a decision as to whether it will consent to the provision of additional capacity under section 6.2(a) once it has received a request; and
- strengthen ARTC's obligation to consult with the HVCCC in line with the recommendations made in relation to section 5.2(d) and (e) of the HVAU in the Capacity Management chapter.

Capital Contributions

The ACCC considers that section 6.2(g) should be amended to provide greater clarity as to what it means for ARTC to be ‘economically no worse off’ at section 6.2(g)(i).

The ACCC does not consider it necessary for the proposed 2010 HVAU to include a pro-forma user funding deed.

RCG process at section 6.4

The ACCC notes ARTC’s view that the timing of the consultation and approval process, and the delivery of capacity expansion projects, is in the hands of the RCG, and considers this to be appropriate.

However, the ACCC considers that it is not clear in the current drafting of section 6.4 that the RCG does have this ability, and that the HVAU should be amended to clearly specify that the RCG controls the timing of the various stages of industry consultation and that specific timeframes where there is an obligation on ARTC should be provided.

The ACCC also considers that:

- section 6.4(b)(ii)(C) should be amended so it is clear 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;
- any elements of the RCG Charter that are relevant to voting rights (in addition to those already set out at section 6.4) should be incorporated into the HVAU;
- section 6.4(c) should be amended to set out that ARTC is obliged to publish the Hunter Valley Corridor Capacity Strategy on its website as soon as possible after it is finalised each year under section 6.4(c)(iv)(C); and
- section 6.4(i) should be amended so that where the 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.

Network Connections

The ACCC considers that section 6.1 should be amended to clarify the general rule that applies to the ownership of connecting infrastructure under section 6.1.

1.5.10 Chapter 12: Network Transit Management

This chapter discusses section 7 of the proposed 2010 HVAU, which refers to the development of Master and Daily Train Plans, and the operation of the Network in accordance with Network Management Principles (the Principles themselves are in Schedule C).

The ACCC raised concerns with these aspects of the HVAU in the March 2010 Draft Decision, and considers that, in light of amendments and clarification from ARTC, these concerns have now been addressed.

1.5.11 Appendices

Two appendices, summarising submissions from ARTC and other interested parties, are available on the website (see link below).

1.6 Background to this Paper

1.6.1 ARTC's application

The proposed 2010 HVAU and associated documents, including the indicative agreements and submissions from ARTC, are available on the ACCC's website at:

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

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

1.6.2 ACCC consultation

The ACCC commenced a public consultation on the proposed 2010 HVAU on 16 September 2010, with a deadline for submissions of 11 October 2010. In response to several requests from interested parties, the ACCC extended the deadline for submissions to 25 October 2010.

Submissions received by the ACCC as part of the consultation are available on the ACCC's website at the link above.

1.6.3 Indicative timeline for assessment

The ACCC received the undertaking application from ARTC on 7 September 2010. Under section 44ZZBC(1) of the Act, the ACCC must make a decision in relation to the application within the period of 180 days starting at the start of the day the application was received (referred to as 'the expected period').

The Act also provides for 'clock-stoppers', meaning that some days will not count towards the 180 days of the expected period in certain circumstances. In particular, the clock is stopped where the ACCC publishes a notice inviting public submissions in relation to an undertaking application, or where the ACCC gives a notice requesting information in relation to an application.¹

On the basis of information currently available, the end of the expected period, taking into account the 40 day 'clock-stopper' for the initial consultation period is **14 April 2011**.

However, the ACCC will continue its approach of progressing the assessment in a timely fashion.

¹ See section 3 of this Paper for further information on these provisions of the Act.

1.7 Next steps

The ACCC is not proposing to formally consult on this Position Paper. However, ACCC staff are available to meet with interested parties to discuss the matters raised. Please refer to the contact details in the **Process** chapter if you wish to meet with the ACCC and discuss any of the matters raised in this Paper.

2 Process

Summary

This chapter outlines the ACCC's process to date in assessing the proposed Hunter Valley access undertaking, and the indicative timeline for the remainder of the assessment.

The chapter also describes the previous assessment of the 2009 HVAU, and notes recent changes to Part IIIA of the *Trade Practices Act 1974* (Cth) that are relevant to the assessment of access undertakings.

2.1 ACCC assessment of the undertaking – process overview

2.1.1 ARTC's application

ARTC provided the proposed 2010 Hunter Valley access undertaking (HVAU) to the ACCC on 7 September 2010. The undertaking and associated documents, including the Indicative Access Holder Agreement, Operator Sub-Agreement and submissions from ARTC, are available on the ACCC's website at:

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

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

2.1.2 ACCC assessment to date

The test the ACCC applies in deciding whether to accept an access undertaking is set out in section 44ZZA(3) of the *Trade Practices Act 1974* (Cth). Essentially, the ACCC may accept the undertaking if it thinks it appropriate to do so, having regard to various matters.

The ACCC commenced a public consultation on the proposed 2010 HVAU on 16 September 2010, with a deadline for submissions of 11 October 2010. In response to several requests from interested parties, the ACCC extended the deadline for submissions to 25 October 2010.

The ACCC received submissions from a number of parties during the consultation, and public submissions are available on the ACCC's website.

Submissions are referred to where applicable throughout this Position Paper, and summaries of submissions are included in **Appendix 1 (ARTC)** and **Appendix 2 (Third Parties)**.

2.1.3 Indicative timeline for further assessment

The ACCC received the undertaking application from ARTC on 7 September 2010. Under section 44ZZBC(1) of the Act, the ACCC must make a decision in relation to the application within the period of 180 days starting at the start of the day the application was received (referred to as ‘the expected period’).

The Act also provides for ‘clock-stoppers’, meaning that some days will not count towards the 180 days of the expected period in certain circumstances. In particular, the clock is stopped where the ACCC publishes a notice inviting public submissions in relation to an undertaking application, or where the ACCC gives a notice requesting information in relation to an application.²

On the basis of information currently available, the end of the expected period, taking into account the 40 day ‘clock-stopper’ for the initial consultation period, is **14 April 2011**.

2.2 Next steps

The ACCC is not proposing to formally consult on this Position Paper. However, ACCC staff are available to meet with interested parties to discuss the matters raised. Please refer to the contact details below if you wish to meet with the ACCC and discuss any of the matters raised in this Paper.

2.3 ARTC’s prior application

ARTC submitted to the ACCC a proposed access undertaking in relation to the Hunter Valley Rail Network on 22 April 2009 (**the April 2009 HVAU**). On 5 March 2010, the ACCC issued a Draft Decision in which it outlined its preliminary view that it would reject that proposed undertaking as being unlikely to be appropriate under Part IIIA of the Act. In response to the ACCC’s Draft Decision, ARTC withdrew the April 2009 HVAU.³ The following timeline sets out the key stages in the ACCC’s assessment of the previous April 2009 HVAU:

Timeline – April 2009 HVAU

23 April 2009	ARTC access undertaking application 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.

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

³ 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>.

- 10 February 2010 An ACCC Position Paper on Matters Other Than Price issued.
- 5 March 2010 ACCC Draft Decision issued. The preliminary ACCC view expressed is to reject the April 2009 HVAU.
- 5 – 31 March 2010 Public consultation on Draft Decision.
- 19 April 2010 April 2009 HVAU withdrawn by ARTC.

Material in relation to this assessment is available on the ACCC's website at:

<http://www.accc.gov.au/content/index.phtml/itemId/870137>

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 Rail Network Undertaking 2009.'

2.4 Recent changes to Part IIIA

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

2.4.1 Timeframes for ACCC decisions and clock-stoppers

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

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

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

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

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

- a decision is published under subsection 44ZZCB(4) deferring consideration of whether to accept the access undertaking, in whole or in part, while the ACCC arbitrates an access dispute.

2.4.2 Amendment notices

2.4.2.1 Changes to the Act

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

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

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

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

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

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

2.4.3 Other changes

2.4.3.1 Information requests

Section 44ZZBCA(1) provides that the ACCC may give a person a written notice requesting the person give to the ACCC, within a specified period, information of a kind specified in the notice that the ACCC considers may be relevant to making a decision on an access undertaking application.

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

2.4.3.2 Fixed principles

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

2.5 Further information

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

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

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

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

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

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3 The Proposed Undertaking and the Legal Test

Summary

This chapter provides an overview of the proposed 2010 Hunter Valley access undertaking, as well as a discussion of the legal test the ACCC must apply to assess the undertaking, and the general themes of the analysis.

3.1 Overview of the proposed access arrangements

The access arrangements proposed by ARTC are highly complex, comprising the Hunter Valley access undertaking (HVAU) document itself, the Indicative Access Holder Agreement (IAHA) and Operator Sub-Agreement (OSA). There are also complex interactions between the documents, and interactions with sections in Part IIIA of the *Trade Practices Act 1974* (Cth).

This part of the Position Paper provides a high-level summary of the proposed access arrangements, highlighting key elements and setting the structure for the ACCC's analysis. The ACCC has not included a detailed summary of the undertaking documents as it did in the March 2010 Draft Decision. Instead, relevant sections of the documents are summarised or extracted where appropriate in the subsequent analysis. The complete versions of the proposed 2010 HVAU, IAHA and OSA are available on the ACCC's website.

3.1.1 Overview

Broadly, the access arrangements proposed by ARTC comprise the following key features:

- preliminary matters regarding the operation and interpretation of the proposed HVAU;
- a cap on ARTC's allowable revenue and regulation of ARTC's pricing;
- processes for the negotiation of access contracts, and for arbitration by the ACCC in the event of a dispute between ARTC and access seekers;
- indicative access agreements;
- 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).

3.1.2 Preliminary matters

Important preliminary matters are set out in sections 1 and 2 of the proposed 2010 HVAU.

These include the Introduction and Objectives of the undertaking in section 1.1 and 1.2, which are important to understanding the overall intent, purpose and context of the undertaking, as well as to the interpretation of sections of the undertaking.

Section 2 describes the scope of the undertaking, which is an important delineation of the matters to which the undertaking legally applies, including the subject matter to which parties may seek access. Section 2.2 defines the term of the undertaking – proposed to be 10 years – and section 2.3 proposes a review of the undertaking after 5 years.

The ACCC provides views on these features in the **Preliminary Matters** chapter.

3.1.3 Pricing regulation

ARTC has proffered an undertaking that includes regulated prices, and key provisions regarding the price regulation framework are in section 4 of the proposed 2010 HVAU.

Conceptually, section 4 involves two elements – a cap on ARTC's allowable revenue, and mechanisms by which ARTC will determine access prices within that revenue cap.

Revenue cap

In relation to the revenue cap:

- section 4.3 describes the determination of the regulatory asset base (RAB);
- section 4.2 stipulates floor and ceiling revenue limits to which ARTC will be subject;
- section 4.7 relates to the rate of return ARTC seeks, and the calculation of the weighted average cost of capital (WACC) (the actual WACC proposal is set out in Appendix 3 to ARTC's September 2010 Explanatory Guide on the proposed HVAU);
- section 4.6 deals with depreciation; and

- section 4.4 describes ‘Economic Costs,’ while allocation of those costs is dealt with in section 4.5.

An ‘unders and overs’ mechanism that allows recoupment/paying back of revenue outside of the cap is provided for in section 4.8, while section 4.9 provides for an annual compliance assessment by the ACCC of ARTC’s RAB roll-forward. A feature of the RAB roll-forward is the ability of ARTC to capitalise into the RAB losses incurred in one regulatory period for recoupment in a later regulatory period. This feature is known as ‘loss capitalisation.’

These aspects of the proposed 2010 HVAU relating to the revenue cap are discussed in the **Financial Model** chapter.

Pricing methodology

The remainder of the provisions in section 4 of the undertaking describe the processes and methodologies ARTC proposes to follow in setting access prices.

The proposed 2010 HVAU distinguishes between prices (referred to as ‘Charges’) for Coal Access Rights and Non-Coal Access Rights, recognising that ARTC may include a take or pay (TOP) component as part of the price of Coal Access Rights. Section 4.12 sets out matters to which ARTC will have regard in determining prices, which include ‘cost elements’ (4.12(a)) and ‘objectives’ (4.12(b)).

The undertaking provides for the determination of ‘Indicative Access Charges’ for ‘Indicative Services,’ which would provide a reference point for other prices (that is, for *non*-Indicative Services). Section 4.13 describes how ARTC will determine, each year, the Indicative Access Charge for the Indicative Service, having regard to relevant System Assumptions. Section 4.18 describes the process ARTC will follow in ‘finalising’ the Indicative Access Charges.

These sections of the undertaking are cross-referenced in the Indicative Access Holder Agreement. In particular, schedule 3 to the IAHA sets out the calculations and procedures for the determination of access charges for a particular access seeker. The particular charges for an individual access holder are negotiable by reference to the HVAU, and subject to the undertaking’s dispute resolution procedures (see further below).

Prior to determining the Indicative Access Charge, however, ARTC must determine the Indicative Service. ARTC has not yet done this, and section 4.16 sets out the process by which it will occur. Essentially, ARTC will, in consultation with the HVCCC, determine an efficient train configuration that will optimise utilisation of coal chain capacity, and submit this configuration to the ACCC for approval as the Indicative Service.

In the period between the commencement of the HVAU and the actual determination of the Indicative Service (and therefore Indicative Charges), there will be ‘interim’ arrangements, as set out in section 4.17. These provide for ‘interim’ Indicative Charges and ‘interim’ Indicative Services. These will be superseded once the ‘final’ Service and Charges are determined.

The Indicative Access Charges and ‘interim’ Indicative Access Charges provide a pricing reference point, and section 4.14 provides that, where ARTC is formulating Charges for a service *other than* an Indicative Service, it may have regard to a range of charge differentiation factors. These factors include whether the access rights sought are coal (4.14(a)) or non-coal (4.14(b)). Limitations to charge differentiation are set out in section 4.15.

These pricing-related aspects of the proposed 2010 HVAU and IAHA are discussed in the **Pricing** chapter.

3.1.4 Negotiating and agreeing on access terms

In addition to regulating ARTC’s revenue and pricing, the proposed 2010 HVAU provides for ARTC to offer and negotiate terms and conditions of access with potential access seekers, culminating in the execution of an access agreement. This involves two broad elements:

- a process for the offer and negotiation of access, subject to arbitration by the ACCC in the event of a dispute between the parties; and
- indicative terms and conditions of access, as set out in the indicative agreements attached to the HVAU, the IAHA and IOSA.

Negotiating for access

The processes for the offer and negotiation of access, and the arbitration of disputes, are set out in section 3 of the proposed 2010 HVAU. Key provisions in this regard are:

- section 3.14, which sets out the offer of access ARTC will make to a potential access seeker, and which recognises a distinction between an offer of coal access rights and non-coal access rights;
- section 3.1, which obliges ARTC to negotiate access in good faith;
- sections 3.3 to 3.13, which set out the processes by which parties may apply for and negotiate access with ARTC; and
- section 3.15, which sets out the dispute resolution procedures to which parties may seek recourse in the event of dispute, including the possibility of arbitration by the ACCC.

Schedule A to the proposed 2010 HVAU is also significant. In the March 2010 Draft Decision, the ACCC recommended that certain provisions of the access agreements executed between ARTC and access seekers should be non-negotiable in order to facilitate the objectives of the long term solution and supply chain alignment.⁴ ARTC has adopted the ACCC’s recommendation and identified several provisions in the IAHA as ‘Tier 1 non-negotiable provisions.’ These provisions, together with the ‘Tier 2 negotiable provisions’ are set out in Schedule A.

⁴ ACCC, *Australian Rail Track Corporation Limited – Hunter Valley Coal Network Access Undertaking Draft Decision*, 5 March 2010, pp. 149-150

These matters are discussed in the **Negotiating for Access** chapter.

Terms and conditions of access – indicative agreements

Attached to the undertaking document are the IAHA and OSA, which set out indicative terms and conditions of access. Essentially, these terms are the standing or reference offer of access ARTC makes to access seekers who meet certain pre-conditions. Access seekers may also negotiate different terms with ARTC, provided they are not identified as mandatory in Schedule A of the undertaking.

Many clauses of the agreements relate to matters commonly encountered in commercial contracts, such as termination, dispute resolution, payment of charges, liability etc. That the agreements are included as part of an access regime, however, distinguishes certain clauses from what may otherwise be normal commercial practice.

The clauses of the agreements are also in some instances closely inter-related with sections of the undertaking itself. The ACCC has in these cases grouped together discussion of the relevant provisions of the undertaking and the agreements. This is particularly so for the capacity management provisions (see further below).

To the extent that clauses of the agreements are not discussed in other chapters, they are dealt with in the **Agreements** chapter. The following aspects are considered in that chapter:

- The role of the IAHA and OSA within the overall access regime.
- *Contract subject matter*: the subject matter of the contract executed between ARTC and an access seeker is the right to access the Hunter Valley rail network, and capacity on the network is allocated in the form of ‘train paths.’ Key provisions of the IAHA relating to train paths are clause 3, and the Train Path Schedule, which would set out the particular allocation granted to an access seeker.
- *Other contractual features*: the access agreements include clauses relating to termination, dispute resolution, contract term, payment of charges etc, and these are discussed in the chapter.

3.1.5 Liability and performance

ARTC has proposed a complex liability and performance regime under the access arrangements, with a number of provisions governing the liability of both ARTC and access seekers. Features of the regime include:

- a true-up test and TOP rebate of coal access charges, referred to in the proposed 2010 HVAU and the IAHA; and
- a contractual liability regime in the IAHA.

These features also interact with ARTC’s proposed approach to key performance indicators (KPIs) and performance incentives. Given this interaction the ACCC has,

in addition to examining each matter individually, considered the liability and performance regime holistically.

These issues are discussed in the **Performance and Accountability** chapter.

3.1.6 Management of capacity on the network

In addition to the regulation of prices and the negotiation of agreements between access provider and access seeker, ARTC's proposal also includes protocols for the allocation and management of Hunter Valley rail network capacity, and for the creation of additional capacity via investment.

Section 5 of the proposed 2010 HVAU includes provisions relating to capacity management, while other important provisions are included in the IAHA. These provisions refer to:

- the development and implementation of System Assumptions (section 5.1);
- the capacity analysis process, by which ARTC determines if capacity is available on the Network to satisfy an access seeker's request (section 5.2);
- the protocols for the allocation of existing and new capacity in the event of a capacity shortfall (sections 5.4-5.7);
- the circumstances in which a non-coal access seeker may reserve capacity, and the fee ARTC may levy for reservation (section 5.3);
- the protocols by which ARTC may resume capacity from an access seeker because of under-utilisation, and by which an access seeker may relinquish contracted capacity back to ARTC (section 5.8, and then clauses 11.4 and 11.1 of the IAHA respectively);
- processes for the trading of contracted capacity between access seekers (section 5.8, and then clause 16 of the IAHA); and
- circumstances where an access seeker may be held accountable for losses in Network capacity, such as by running 'non-compliant' services or from cancellation of services (clauses 11.5 and 11.6 of the IAHA respectively).

Various provisions also provide for the liaison between ARTC and the HVCCC, while section 5.9 provides for a review of the mechanisms in the undertaking dealing with the allocation of capacity losses.

These provisions are discussed in the **Capacity Management** chapter.

3.1.7 Capacity expansion and investment

In addition to the protocols for management of existing capacity, the proposed 2010 HVAU sets out a process by which additional capacity may be created.

Essentially, section 6 of the undertaking contemplates three options for the creation of additional capacity on the Hunter Valley rail network:

- where such capacity is identified, funded and constructed by ARTC;
- where it is identified and recommended by the HVCCC; and
- where it is sought and funded by an individual access seeker.

Section 6 also sets out detailed processes by which the proposals for investment in additional capacity may be assessed and endorsed by the Rail Capacity Group (RCG), a body of industry stakeholders.

Key aspects of the investment framework include:

- the criteria ARTC will use when determining whether to consent to capacity expansions; and
- funding and reconciliation principles for circumstances where an access seeker or a group of access seekers agrees to fund the expansion.

Also, section 6.1 refers to the situation where a party seeks to connect to the Hunter Valley rail network track that is not otherwise part of it.

The ACCC's view on these matters is set out in the **Additional Capacity and Investment** chapter.

3.1.8 Network transit management

ARTC has included in the proposed 2010 HVAU and indicative agreements matters of an operational nature relating to the running of the network. These matters are discussed in the **Network Transit Management** chapter.

3.2 Industry Background

The ACCC included an overview of ARTC and the Hunter Valley rail network in the March 2010 Draft Decision.

3.3 Part IIIA of the Trade Practices Act

The legislative framework for the ACCC's consideration of the proposed 2010 HVAU is set out in 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.

3.4 Section 44ZZA(3) – the legal test

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 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).

3.4.1 Application of the test – general themes

In the March 2010 Draft Decision in relation to 2009 HVAU, 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.⁵ 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).⁶

The ACCC remains of this view. 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 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.⁷ These challenges do not appear to have abated in the context of the proposed 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.

Supply chain alignment considerations to a large extent distinguish the assessment of the proposed Hunter Valley access arrangements from other access regimes. Nonetheless, the ACCC considers that the proposed 2010 HVAU should also operate to promote efficiency and facilitate competition in related markets, as typically occurs under access regulation and as is recognised under section 44ZZA(3).

As outlined above, an object of Part IIIA is to 'promote the economically efficient operation of, use of and investment in the infrastructure by which services are

⁵ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 41-52.

⁶ ACCC, Draft Decision on HVAU, 5 March 2010, p. 51.

⁷ ACCC, Draft Decision on HVAU, 5 March 2010, p. 51.

provided, thereby promoting effective competition in upstream and downstream markets.’ This consideration particularly underscores the pricing regime ARTC has proposed, including the process for the determination of an efficient train configuration and basis for pricing, as well as the processes for investment in new capacity. The ACCC considers that the proposed 2010 HVAU should provide for ARTC to operate the Hunter Valley rail network efficiently, for efficiency in the use of the network by users, and for efficient investment in new capacity. Achieving these outcomes would facilitate competition in relation to above rail markets, for coal or non-coal haulage, as well as for coal production and export. This is also likely to be in the public interest.

Finally, in the March 2010 Draft Decision the ACCC emphasised ‘clarity and certainty’ as a relevant ‘other matter,’ and went on to identify a range of provisions of the 2009 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 sufficient clarity and certainty is critical to the operation of the proposed 2010 HVAU. The access arrangements proposed by the 2010 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 many instances, however, the failure of the drafting of the undertaking to clearly and logically set out the proposed approach has contributed to the level of concern expressed by stakeholders, and to the view that while the underlying intent of the undertaking is appropriate, its implementation is not. In this Paper the ACCC has, therefore, attempted to set out its view on the operation of the proposed 2010 HVAU in order to increase the degree of clarity and certainty.

This is a general discussion of the matters under section 44ZZA(3) of the Act, to provide 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 following analysis.

4 Preliminary Matters

Summary

This chapter discusses all aspects of sections 1 and 2 of the proposed 2010 HVAU, other than section 2.4 (which is discussed in the **Negotiating for Access** chapter).

The ACCC considers that sections 1 and 2 are likely to be appropriate, subject to a final view on an appropriate term for the proposed 2010 HVAU.

4.1 Sections 1 and 2

Important preliminary matters are set out in sections 1 and 2 of the proposed 2010 HVAU. These include the Introduction and Objectives of the undertaking in section 1.1 and 1.2, which are important to understanding the overall intent, purpose and context of the undertaking, as well as to the interpretation of particular provisions.

Section 2 describes the scope of the undertaking, which is an important delineation of the matters to which the undertaking applies, including the subject matter to which parties may seek access.

Section 2.2 defines the term of the undertaking – proposed to be 10 years – and section 2.3 proposes a review of the undertaking after 5 years.

This chapter discusses all aspects of sections 1 and 2 of the proposed 2010 HVAU other than section 2.4 (reservation of non-coal access rights). This section is discussed in the **Negotiating for Access** chapter.

4.2 Preamble

Section 1 of the proposed 2010 HVAU is a Preamble, including an Introduction that provides background information and context, and Objectives. While section 1.1 is descriptive and places no obligations on ARTC, these provisions are relevant to the interpretation of the proposed 2010 HVAU.

4.2.1 Introduction

In the March 2010 Draft Decision, the ACCC considered that the Introduction to the 2009 HVAU was likely to be appropriate, subject to it including more explicit recognition of the use of the Hunter Valley rail network by non-coal users.⁸

The ACCC notes that ARTC has amended subsections 1.1(d) and (g) of the proposed 2010 HVAU to address this point by including more explicit reference to non-coal use of the network. In particular, subsection 1.1(d) now refers specifically to ARTC's obligation to provide and maintain priority for passenger services under the *Transport Administration Act 1988* (NSW). That subsection also now provides:

⁸ ACCC, *Australian Rail Track Corporation Limited – Hunter Valley Coal Network Access Undertaking Draft Decision*, 5 March 2010, p. 88.

ARTC also recognises that non-coal users of the Network require certainty of access and that the views of non-coal users are to be considered and taken into account in making future decisions to invest in new Capacity on the Network.⁹

In light of these amendments, the ACCC considers that the Introduction is more likely to be appropriate.

Passenger services

The ACCC notes that, during the consultation on the proposed 2010 HVAU, it received submissions from RailCorp, Transport New South Wales, and the Two More Trains for Singleton group regarding the use of the Hunter Valley rail network for passenger services.¹⁰

The ACCC recognises that ARTC is subject to a statutory obligation regarding the priority of passenger services under the *Transport Administration Act 1988* (NSW), and considers that nothing in the proposed 2010 HVAU should operate to circumvent that obligation.

As stated above, while the ACCC recognises that section 1.1 is descriptive and places no obligations on ARTC, it is relevant to the interpretation of the proposed 2010 HVAU, which the ACCC and/or a court would take into account when ruling on a dispute arising under the undertaking or the access agreements (as the case may be). It therefore underscores the access arrangements as a whole.

Further, the ACCC notes that, as an access seeker, RailCorp may take advantage of the processes in the proposed 2010 HVAU as applicable, including the dispute resolution and arbitration processes (if necessary). As an undertaking providing for access to below-rail services, it may therefore facilitate the provision of additional passenger services should relevant parties choose to pursue that course.

4.2.2 Objectives

In the March 2010 Draft Decision the ACCC considered that the reference to ‘reasonable costs’ in section 1.2(d)(i)(A) of the 2009 HVAU was ambiguous, both in relation to its actual meaning and its consistency with the pricing principles in section 44ZZCA of the Act.¹¹ The section provided that the intent of the 2009 HVAU was, among other things, to reach an appropriate balance between the public interest, the interests of access seekers, and ARTC’s legitimate business interests, the latter of which included the recovery of all reasonable costs associated with the granting of Access to the Network.¹²

In the proposed 2010 HVAU ARTC has amended the provision to refer to:

⁹ ARTC, *Hunter Valley Coal Network Access Undertaking*, 7 September 2010, section 1.1(d).

¹⁰ RailCorp, *Subject: Hunter Valley Access Undertaking*, 26 October 2010; Transport NSW, *re ARTC Hunter Valley Access Undertaking*, 29 October 2010; Two More Trains for Singleton, *Submission – Australian Rail Track Corporation proposed Hunter Valley Network Access Undertaking*, 1 October 2010.

¹¹ ACCC, *Draft Decision on HVAU*, 5 March 2010, p. 89.

¹² ARTC, *Hunter Valley Coal Network Access Undertaking*, 22 April 2009, section 1.2.

The recovery of at least sufficient revenue to meet the efficient costs associated with Access to the Network, having regard to the efficient operation of the Hunter Valley Coal Chain.¹³

The ACCC considers that the explicit recognition of efficiency brings the section in line with the pricing principles in the Act, and thereby clarifies its meaning. The ACCC considers that the Objectives of the proposed 2010 HVAU are likely to be appropriate.

The ACCC notes the submission from Aston Resources that section 1.2 ought to 'expressly highlight ARTC's responsibility to, subject to its legitimate business interests, provide infrastructure to support growing demand in the [Hunter Valley] region.'¹⁴ On this point the ACCC considers that section 1.2(d)(ii) is appropriate in its recognition of the public interest in (a) increasing competition and ensuring efficient use of resources, and (b) promoting economically efficient investment in, use and operation of, the Hunter Valley rail network as an element of the Hunter Valley Coal Chain.

4.3 Recognition of Coal Chain Principles

ARTC has introduced a new section 1.3 into the proposed 2010 HVAU to recognise 'coal chain principles.' The section provides:

In preparing the Access Undertaking, ARTC has sought to recognise the importance of the following principles to coal producers seeking to export coal to the Port of Newcastle:

- (a) coal producers require long term certainty of access to a contracted portion of Coal Chain Capacity, of which one component is contracted Capacity with ARTC;
- (b) the availability of a reliable process through which access to Capacity can be negotiated within the broader context of the Hunter Valley Coal Chain;
- (c) the development of a set of System Assumptions to apply across the Coal Chain and for ARTC to participate in the development of these System Assumptions in so far as they relate to the Network and to reflect relevant and agreed track related assumptions in Access Holder Agreements;
- (d) there should be workable alignment between the allocation and utilisation of Capacity and the allocation and utilisation of capacity at the coal terminals at the Port of Newcastle.¹⁵

The ACCC considers that the inclusion of these principles is likely to be appropriate. As stated in the March 2010 Draft Decision and in the **Proposed Undertaking and the Legal Test** chapter of this Paper, the access undertaking for the Hunter Valley rail network is an important aspect of the alignment of the coal supply chain and the long term solution. These principles reflect this consideration and are useful to the interpretation of the undertaking.

¹³ ARTC, 2010 HVAU, 7 September 2010, section 1.2(d)(i)(A).

¹⁴ Aston Resources, *Submission: ARTC proposed Hunter Valley Rail Network Access Undertaking*, 25 October 2010, p. 2.

¹⁵ ARTC, 2010 HVAU, 7 September 2010, section 1.3.

4.4 Contract Structure

Section 1.4 of the proposed 2010 HVAU describes the structure of contractual relationships available to 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 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 the March 2010 Draft Decision the ACCC considered that the proposed contractual structures were likely to be appropriate, as, in relation to coal access rights, being in the interests of alignment and the long term solution, and in relation to non-coal access rights, allowing for contractual arrangements suited to the circumstances of non-coal access seekers and ARTC.¹⁶

The ACCC did, however, qualify its view in relation to the tripartite structure for coal access rights, stating that the 2009 HVAU would be more likely to be appropriate if it provided for greater clarity around the role of Operators in the negotiation of access arrangements.¹⁷ Further discussion of this issue is to be found in the **Negotiating for Access** chapter.

4.5 Scope

Section 2.1 of the proposed 2010 HVAU defines the scope of the undertaking. In the March 2010 Draft Decision the ACCC considered that three issues derived from this section.

4.5.1 Clarity in definition

The ACCC stated in the March 2010 Draft Decision that it is important for the HVAU to include a clear specification of its scope, as the definition of the scope sets the boundaries for the operation of the undertaking, and delineates the subject matter to which access seekers may seek access.¹⁸ The scope also defines the extent of ARTC's

¹⁶ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 89-90.

¹⁷ ACCC, Draft Decision on HVAU, 5 March 2010, p. 90.

¹⁸ ACCC, Draft Decision on HVAU, 5 March 2010, p. 91.

obligations. The ACCC considered that the drafting of the definition of the scope of the 2009 HVAU was unclear and uncertain.¹⁹

ARTC has inserted a new section 2.1(b) in the proposed 2010 HVAU to provide:

The Network means the network of railway lines delineated or defined in **Schedule B**, excluding Annexure 1 to **Schedule B**, where Annexure 1 to **Schedule B** contains a map, being a representation of these railway lines for illustrative purposes only.

ARTC has also made consequential amendments to Schedule B, which now describes the Network as:

Mainline, crossing loops, dual gauge and turnouts as summarised below:

1. Islington Junction turnouts (116A points (164.690 km)/115A points (164.633 km)) to Port Waratah
 2. Scholey Street Junction turnouts (95 points (164.806 km)/98 points (164.804 km))(Via Coal) to Muswellbrook 288.800 km¹
 3. Hanbury Junction turnouts (137A points (168.955 km)/136A points (168.986 km)) to Kooragang Island
 4. Kooragang East Junction turnouts (142E points (168.968)/143E points (168.997 km) to Sandgate turnouts (181B points (171.334 km)/183D points (171.502))
 5. Muswellbrook 288.800 km to Ulan 435.300 km
 6. Muswellbrook 288.800 km to Gap² 416.000 km
- ¹ Includes Sandgate Flyover (for the purposes of **section 4 Pricing Principles** only) which forms part of ARTC Sector 938 Sandgate – Maitland (via Main)
- ² To the extent where the railway line joins the rail network owned by the Country Rail Infrastructure Authority.

The text in Annexure 1 of Schedule B now states:

See Map ARTCSHV (one (1) page) which has been provided as a separate map for illustrative purposes only, and forms part of this annexure.

The map represents the railway lines described at Schedule B as at the Commencement Date. This map may change over the Term. Applicants should refer to ARTC's website for an up to date map of the railway lines described at Schedule B.

The ACCC considers that the amendments to subsection 2.1(b) and Annexure 1 to Schedule B of the 2010 HVAU provide clarity to the definition of the scope of the Network, and are likely to be appropriate.

¹⁹ ACCC, Draft Decision on HVAU, 5 March 2010, p. 91.

4.5.2 Interaction of multiple access regimes

In the Draft Decision the ACCC noted that, if it accepted the HVAU, ARTC's rail networks would be regulated by at least the HVAU, the 2008 Interstate Access Undertaking (AU) and the New South Wales Rail Access Undertaking (NSWRAU) administered by the Independent Pricing and Regulatory Tribunal (IPART).²⁰

The ACCC also acknowledged the objective of achieving consistency between the HVAU, the 2008 Interstate AU and the NSWRAU to the extent possible and appropriate, noting that this is likely to be in the interests of access seekers as well as ARTC. The ACCC noted that it is undesirable for an access seeker to be subject to multiple regulatory access regimes when utilising a single segment of track or a single route, as this may result in additional cost and complexity. In some circumstances, however, this may be unavoidable. The ACCC recommended that the HVAU specify not just the segments of the 'Network' (as defined) that were within its scope, but also those that were outside its scope, and in doing so seek to minimise the number of regimes involved for a single journey.²¹

In the Explanatory Guide to its April 2009 HVAU, ARTC submitted that its objective is to have its rail networks governed by consistent access undertakings and contractual arrangements to the maximum extent appropriate.²² In response to the Draft Decision, ARTC submitted that it is experienced in dealing with the interaction of access regimes, a situation which it believes is not unusual or problematic. ARTC stated:

Following the introduction of the HVAU, ... approximately 40% of Non-Coal Services operating on the Hunter Valley Network will travel a route which crosses more than one undertaking. For some of these Services, jurisdiction under the HVAU will merely replace that under the NSW Rail Access Undertaking, meaning that the journey will be covered by the Interstate Access Undertaking and the HVAU. For others, the journey will be covered by the NSW Rail Access Undertaking, the Interstate Access Undertaking and the HVAU....

ARTC currently has executed around 14 access agreements with Non-Coal customers in NSW that cover operations on the NSW network covered by the NSW Rail Access Undertaking and the Interstate Access Undertaking without out [sic] any serious consequences.²³

Division 6 of Part IIIA of the Act provides for access providers to voluntarily submit access undertakings to the ACCC for assessment, and for the ACCC to decide whether it is appropriate to accept the undertaking. Part IIIA does not grant the ACCC the ability to design and implement an optimal access regime in a given set of circumstances. ARTC has chosen to submit separate undertakings to the ACCC in relation to its interstate and Hunter Valley networks, and other networks controlled by ARTC are within the ambit of access regimes not administered by the ACCC.

²⁰ ACCC, Draft Decision on HVAU, 5 March 2010, p. 56.

²¹ ACCC, Draft Decision on HVAU, 5 March 2010, p. 92

²² ARTC, Australian Rail Track Corporation Ltd - *Hunter Valley Access Undertaking 2009* - *Explanatory Guide*, 13 May 2009, p. 28.

²³ ARTC, *Response to the ACCC Draft Decision on the Hunter Valley Access Undertaking*, 31 March 2010, pp. 21-22.

The ACCC recognises that challenges are created by the interaction of the regulatory rail access regimes, particularly where those regimes may relate to a continuous journey. The ACCC also recognises, however, that the proposed 2010 HVAU is not of itself necessarily be inappropriate to accept as a result of these broader challenges. In particular, the ACCC notes that as it is the arbitrator under both the HVAU and the 2008 Interstate AU, it should be able to resolve access disputes should they arise in relation to either or both of those networks. The ACCC considers that ultimately it may be the case that optimally resolving the challenges of the interaction between the regimes requires a broader forum than the assessment of a particular undertaking.

4.5.3 Exclusion of extensions

In the March 2010 Draft Decision the ACCC outlined a number of concerns with section 2.1(b), which excluded 'Extensions' from the scope of the 2009 HVAU. These included:

- the possibility that the exclusion of Extensions may allow ARTC to frustrate access to the Network and charge monopoly returns, particularly where an Extension is required to be built on ARTC controlled land;
- the potential inconsistency between section 2.1(b) and the ability of the ACCC to make an arbitration determination under section 44V(2) of the Act requiring an access provider to extend a facility, as section 3.15(c)(ii)(G)(i) of the 2009 HVAU allowed the ACCC to deal with any matter in section 44V in relation to an arbitration occurring under the undertaking;
- the logical inconsistency between the exclusion of Extensions from the HVAU in section 2.1(b), and the inclusion of provisions allowing ARTC to charge prices for the use of Extensions in clause 5.7 of the Indicative Access Holder Agreement (IAHA); and
- the unclear interaction between the exclusion of Extensions and the provisions regarding Additional Capacity in section 6 of the HVAU.²⁴

The ACCC was therefore of the preliminary view that the provisions excluding 'Extensions' from the 2009 HVAU created significant uncertainty and were unlikely to be appropriate.

The ACCC also expressed the preliminary view that there was an inconsistency between the exclusion of 'Extensions' in section 2.1(b) and the contemplation in the section 9 definition of the term 'Extensions' that such 'Extensions' are proposed as part of an Access Application or during negotiations.²⁵ The ACCC acknowledges, however, that the definition of Extensions in section 9 is simply a definition of the term (that is, of what is excluded from the undertaking), and is likely to be appropriate.

Section 2.1(c) of the proposed 2010 HVAU maintains the exclusion of Extensions provision from the 2009 HVAU. ARTC submits that the ACCC's concerns regarding ARTC's potential ability to frustrate access or extract monopoly returns where an

²⁴ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 93-94.

²⁵ ACCC, Draft Decision on HVAU, 5 March 2010, p. 93.

'extension' is required to be built on ARTC controlled land are dealt with by section 6.1, which deals with Network Connections. Section 6.1 provides that track not forming part of the ARTC Network may connect to the Network where certain conditions are met. ARTC submits that the obligation under section 6.1 to connect a spur line to its Network, and the access seeker's ability to seek arbitration on any dispute resulting from this, ensure that ARTC cannot extract monopoly rents through withholding access to ARTC controlled land.²⁶

The ACCC considers that the connection provision provides some ability for access seekers to bypass ARTC in circumstances where new track is sought to be constructed that extends the Network. That is, rather than rely on ARTC to construct the track, the access seeker may itself construct the necessary track and connect that track to ARTC's Network under the aegis of the connection provision in section 6.1. This ability to 'bypass' mitigates the concern that ARTC may be able to use the exclusion of Extensions to frustrate access or seek to extract monopoly returns. This view is, however, subject to the ACCC's views on section 6.1 set out in the **Additional Capacity and Investment** chapter.

ARTC has not amended section 3.15(c)(ii)(G)(i) of the HVAU, which provides that the ACCC, when arbitrating a dispute arising under the proposed 2010 HVAU, may deal with any of the matters in section 44V of the Act. As indicated above, section 44V provides that an arbitration determination may deal 'with any matter relating to access by the third party to the service'; section 44V(2)(d) states that the determination may require the access provider to extend the facility, and section 44V(2)(da) states that the determination may require the access provider to permit interconnection. The ACCC therefore takes the view that the proposed 2010 HVAU permits resolution of a dispute regarding 'extensions' or 'connections' via an arbitration determination that ARTC extend the Network or permit interconnection.

The ACCC notes that ARTC has deleted clause 5.7 of the 2009 IAHA from the 2010 IAHA to remove the inconsistency identified by the Draft Decision. The ACCC considers that ARTC should also make consequential deletions to Schedules A:1 and A:2 to remove the references to charging for access to 'Extensions.'

ARTC has also amended the definition of Additional Capacity to clarify the interaction between the exclusion of 'Extensions' and the provisions regarding the creation of Additional Capacity. The definition of Additional Capacity now states:

“**Additional Capacity**” means, in relation to the Network, the capability of the Network to carry additional task by an enhancement or improvement of the infrastructure forming part of the Network or Associated Facilities.²⁷

In light of the amendments ARTC has made, the ACCC takes the view that the exclusion of 'Extensions' in section 2.1(c) of the proposed 2010 HVAU is likely to be appropriate.

²⁶ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 23.

²⁷ ARTC, 2010 HVAU, 7 September 2010, section 9.

4.6 Term, Grant, Duration and Review of the HVAU

In the March 2010 Draft Decision the ACCC recommended small changes to section 2.2(a) of the 2009 HVAU (which dealt with the commencement and operation of the undertaking) to clarify its operation and ensure consistency with the Act.²⁸ ARTC has made these small changes in the proposed 2010 HVAU. ARTC has also revised what were sections 2.2-2.4 of the 2009 HVAU, which dealt with the grant, term, expiry and review of the undertaking, to simplify their operation. The ACCC considers that these revisions are likely to be appropriate, as they essentially remove from the undertaking matters already addressed by the Act.

4.6.1 Term and Review

A more substantive issue is the proposed term of the undertaking. As with the 2009 HVAU, the term of the proposed 2010 HVAU is 10 years (see section 2.2). Section 2.3 states that, as soon as practicable after the 5th anniversary of the commencement date of the undertaking, ARTC will undertake a review.

March 2010 Draft Decision

In the March 2010 Draft Decision the ACCC stated:

The ACCC acknowledges that it is difficult to predict whether an access undertaking with a long term will continue to be appropriate for the entirety of its duration, particularly towards the end of its term, or whether circumstances will change such that different arrangements are desirable. The ACCC considers that a risk in accepting a long term undertaking may be to 'lock in' arrangements that over time cease to be suitable. Consequently, the ACCC considers that where a long term is proposed for an access undertaking, consideration should be given to whether and how the undertaking accommodates the possibility of changes in circumstances over time.²⁹

The ACCC stated that, in the circumstances, it may be desirable for the HVAU to include mechanisms that provide for developments and improvements in supply chain alignment over time, and that section 2.4 should be amended to provide that the 5 year review of the HVAU should consider whether the undertaking continues to operate effectively in facilitating the objectives sought to be achieved by coal chain alignment.³⁰ The ACCC considered that the inclusion of such a revision would also inform the ACCC's view of whether the proposed 10 year term is or is not likely to be appropriate.

Proposed 2010 HVAU

ARTC has amended the review provision of the undertaking to provide:

As soon as practicable after the fifth (5th) anniversary of the Commencement Date, ARTC will undertake a review of the Undertaking, in consultation with Access Holders and other stakeholders. The review will consider whether the Undertaking is operating effectively in light of the objectives of the Undertaking outlined under **section 1.2** and the coal chain principles recognised in **section 1.3** as well as any material impact that changes to

²⁸ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 94-95.

²⁹ ACCC, Draft Decision on HVAU, 5 March 2010, p. 95.

³⁰ ACCC, Draft Decision on HVAU, 5 March 2010, p. 95.

industry circumstances or Government legislation, rules or regulations may have on the extent to which the Undertaking reasonably meets those objectives and principles.³¹

The ACCC considers that this recognition of the objectives of the HVAU and the coal chain principles as part of the five year review is a positive step, and is likely to contribute to ensuring the effective operation of the HVAU over time.

Submissions on the proposed 2010 HVAU

Asciano and Xstrata both made submissions in relation to the duration of the proposed 2010 HVAU.

Asciano highlighted that the undertaking includes a number of reviews, which may result in amendments to the undertaking over its duration. Asciano submitted that the deferral of these matters suggests work remains to be done in relation to the HVAU, and that the consideration of these issues as isolated matters is less preferable than a final decision that considers all issues. Asciano expressed a preference that in future reviews of the HVAU, the 'decision-making in relation to specific undertaking components not be deferred or otherwise separated.'³²

Xstrata expressed concern with the duration of the proposed 2010 HVAU and the effectiveness of the proposed review provision in section 2.3:

The Access Undertaking does contain a provision requiring ARTC to undertake a review in consultation with Access Holders, but these [sic] 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.³³

Xstrata suggested that, in the absence of a review process that requires ARTC to adopt changes, a shorter duration for the proposed 2010 HVAU may be necessary.³⁴ Xstrata stated that:

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.³⁵

ACCC view

The ACCC considers that the appropriateness of the 10 year duration of the proposed 2010 HVAU is finely balanced, and the ACCC is yet to reach a view.

³¹ ARTC, 2010 HVAU, 7 September 2010, section 2.3(b).

³² Asciano, *Submission to the ACCC - ARTC 2010 Draft Hunter Valley Access Undertaking*, 25 October 2010, pp. 7-8.

³³ Xstrata, *Xstrata Coal Pty Ltd's response to the Australian Competition and Consumer Commission in relation to the ACCC Consultation Paper in relation to the Australian Rail Track Corporation's proposed Hunter Valley Rail Network Access Undertaking dated 16 September 2010*, 25 October 2010, p. 25.

³⁴ Xstrata, *Submission in Response to ACCC Consultation Paper*, 25 October 2010, p. 25.

³⁵ Xstrata, *Submission in Response to ACCC Consultation Paper*, 25 October 2010, p. 25.

The ACCC acknowledges that the proposed 2010 HVAU includes several reviews, and notes that it also refers to features yet to be developed:

- section 4.16 provides for the determination of an efficient train configuration, and for subsequent variation of the undertaking to incorporate an Indicative Service description (discussed further in the **Pricing** chapter);
- section 5.9 provides for a review of the mechanisms for the identification and allocation of capacity losses (discussed further in the **Capacity Management** chapter);
- section 8.3 states that prior to acceptance of the undertaking, ARTC will propose one or more incentive mechanisms (discussed further in the **Performance and Accountability** chapter).

Therefore assuming the proposed 2010 HVAU was otherwise appropriate, it would still include provisions recognising that certain features need to be reviewed and developed over time, leading to possible variations in the future.

In addition the Indicative Access Holder Agreement provides for additional reviews:

- clause 3.3(e) provides for, within 12 months of the commencement of the proposed 2010 HVAU, a review of the level of Tolerance available and for ARTC to provide a report to the Rail Capacity Group; and
- clause 16.8 provides for, by 31 December 2011, a review of the appropriate time period for ARTC to inform the HVCCC of its decision to approve or reject trades.

Submissions on the proposed 2010 HVAU have also raised issues regarding supply chain alignment that were considered in the ACCC's Draft Decision in March 2010. These submissions in some instances reflect further consideration by stakeholders of the relevant issues, or in others further experience dealing with the practicalities of supply chain alignment since the commencement of the capacity framework arrangements in December 2009.

The ACCC recognises that some of the reviews outlined above have been included by ARTC in response to comments by stakeholders. This, however, also underscores the previous point that certain supply chain issues are dynamic, and that a firm position may not yet be settled.

These factors tend to suggest that it may not be appropriate to accept the proposed 2010 HVAU for a period of 10 years. The ACCC considers that the risk it identified in the Draft Decision – of an undertaking ceasing to be appropriate for the entirety of its duration – may actually occur, perhaps even in the short term.

The ACCC also considers that the review proposed by section 2.3 of the proposed 2010 HVAU is not, in its current form, a sufficient answer to this concern. While the section provides that ARTC will undertake a review, as soon as practicable after the fifth anniversary of the HVAU's commencement, ARTC is under no obligation to submit a variation if it finds that changes are necessary. Further, given that the scheme of Part IIIA is for the access provider to voluntarily submit an access undertaking to

the ACCC, ARTC would have the ability to decline to submit a variation if it was not in its interests to do so. These considerations also apply in relation to other provisions where ARTC is to conduct a review and thereafter submit proposed variations. It is therefore not certain that section 2.3 would be adequate to address any concerns with the practical implementation of the proposed 2010 HVAU, or to ensure the incorporation of improvements to alignment over time.

A shorter term undertaking may therefore be more appropriate in the circumstances. A shorter term mitigates the risk of putting in place ineffective arrangements that are unable to be changed, or only able to be changed where it is in ARTC's interest to do so. A shorter term would permit review of the undertaking by the ACCC after a few years of operation, and allow for the incorporation of developments in supply chain alignment. Further, a shorter term may facilitate contracting between ARTC and access seekers sooner than if the undertaking was to run for 10 years. That is, the ability of the ACCC to review and assess the operation of the undertaking after a relatively short period may allay some concerns that undesirable outcomes from the HVAU will be locked in for the long term.

An appropriate term for the proposed 2010 HVAU may be that which allows for the development of the matters in sections 4.16, 5.9 and 8.3, such that the subsequent undertaking would be a complete document that can operate for a time before being reassessed. The ACCC considers that a term of 5 years may achieve the appropriate balance. If at the conclusion of the 5 term it appears that the undertaking has operated effectively, a less extensive development and assessment process may be needed as has been the case for the proposed 2010 HVAU.

There are, however, countervailing considerations to a shorter duration undertaking. A major qualification is the consequence it may have for contracts executed by reference to that undertaking. The proposed 2010 HVAU includes rolling ten year indicative contracts, and the ACCC understands that many access seekers – particularly coal producers – are likely to enter long term contracts with ARTC. The ACCC recognised in the Draft Decision, and remains of the view, that the ability of parties to enter long term contracts under the proposed 2010 HVAU is likely to be appropriate, particularly as it provides certainty in relation to investment decisions and is reflective of the aims of the long term solution. Uncertainty may therefore arise in relation to those contracts at the point at which the HVAU is reassessed.

However, the ACCC considers that 'locking in' for 10 years an undertaking that ceases to be effective relatively shortly after acceptance is equally unlikely to provide certainty for long term contracts. Further, as the access agreements may be rolling agreements, at some point during the contract life the HVAU may undergo changes. Clause 19.1 of the IAHA to some extent reflects this, providing for the uplift into executed access agreements of any changes to the Tier 1 (Mandatory) Provisions identified in Schedule A of the proposed 2010 HVAU. It is also not unusual in access regimes for access contracts to extend beyond the term of the undertaking, provided there is appropriate interaction between the documents.

The ACCC also acknowledges that comprehensively 're-opening' the proposed 2010 HVAU after five years may not be desirable, as the possibility of that occurring may contribute uncertainty and impact commercial decisions by interested parties (including ARTC). The ACCC is also cautious that the benefits sought to be achieved

by the long term solution not be undermined by any uncertainty that may arise from a shorter term undertaking.

The ACCC considers that the appropriateness of the 10 year duration of the proposed 2010 HVAU is finely balanced, and the ACCC is yet to reach a view on this issue. The ACCC also notes that the final view on the appropriate term may necessitate consequential amendments to other parts of the undertaking.

4.7 Insurance and Contact Details

The ACCC stated in the March 2010 Draft Decision that ARTC's proposed insurance arrangements in section 2.6, and the publication of information on ARTC's website as provided for in section 2.7(b), were likely to be appropriate. In light of other changes to the proposed 2010 HVAU these provisions have been renumbered to section 2.5 and 2.6 respectively.

5 Financial Model

Summary

Under section 4 of the proposed 2010 HVAU, ARTC has proposed the use of a revenue cap to regulate access charges. The cap is determined by the application of the Building Block Model (BBM). ARTC has also proposed the use of 'loss capitalisation', an extension to the BBM that allows for the later recovery of 'shortfalls' in access revenue that occurred in an earlier period.

The ACCC considers that ARTC's proposed approach to the financial model in section 4 of the proposed 2010 HVAU is likely to be appropriate, subject to revisions to ensure that:

- ARTC's intention is reflected in the drafting of the HVAU;
- loss capitalisation is confined to new investment in Pricing Zone 3;
- the definition of 'Out-turn Revenue' outlines how ARTC will allocate Access Revenues across the Segments in Pricing Zone 3;
- sections 4.3(a), 4.3(b) and 4.4 of the proposed 2010 HVAU are consistent in their treatment of cash flows;
- the ACCC may effectively perform the Annual Compliance Assessment;
- the approach to 'efficient costs' in section 4.4(b) is effective; and
- ARTC's real pre-tax WACC is 8.57 per cent.

5.1 Introduction

5.1.1 Overview of the Financial Model under section 4 of the HVAU

ARTC has proposed that access prices will be regulated pursuant to section 4 of the HVAU, which sets out a financial model (a revenue cap) together with principles and methodologies for determining access charges. This chapter discusses the financial model, while the following chapter, **Pricing**, discusses the principles and methodologies for determining charges.

5.1.2 The Building Block Model (BBM)

ARTC has proposed that its Access Revenues over the term of the HVAU for the Hunter Valley Railway Network will be constrained by a revenue cap determined by the application of a Building Block Model (BBM).

The BBM is a typical regulatory model used in Australia to constrain the pricing behaviour of a service provider utilising assets that have natural monopoly characteristics, and provides a framework to determine an economic cost of services provided in a period. By calculating an economic cost for the services provided in a period, it allows the revenue allowances for the service provider for the period to be determined. When implemented correctly, the BBM allows a regulated service

provider to expect when it invests that it will recover the present value of its investment over the life of the investment.

Key features of a BBM include:

- a value of the assets used to provide services, where these assets form the regulatory asset base (RAB);
- a useful economic life of assets;
- a path of change in the economic value of these assets over time (depreciation);
- a discount rate representing the opportunity cost of the capital that has been employed to build or purchase the assets, which is typically a regulated weighted-average cost of capital (WACC); and
- an expected value and timing of any cash flows that are expected to occur throughout the life of the assets.

Allowed revenues under the BBM for a period are equal to the economic cost calculated by reference to elements of the BBM. These allowed revenues comprise a return on capital (which is typically the product of WACC and the RAB), return of capital (depreciation), and operating expenditure.

5.1.3 Implementation of the BBM in the HVAU

ARTC's revenue cap is given effect under sections 4.1 to 4.8 of the HVAU. For the purposes of this revenue cap, ARTC provides that:

- assets have values determined in accordance with the RAB definitions in section 4.3;
- if access revenues in a period are less than the allowed revenues for that period, the shortfall may be capitalised for recovery in later periods by means of 'Loss Capitalisation';
- access revenues must not exceed Economic Cost (as defined) when the Ceiling Limit applies under section 4.2(c), and revenue from each Access Holder must under section 4.2(a) meet Direct Costs;
- 'Economic Cost' is comprised of the elements defined in section 4.4;
- ARTC's costs are allocated to the elements of Economic Cost using a cost allocation methodology contained in section 4.5;
- depreciation of assets included in the RAB is determined under section 4.6;
- ARTC's WACC is determined under section 4.7; and

- ARTC may utilise ‘unders and overs’ under section 4.8 to recover a shortfall in actual Access Revenues from, or refund Access Revenues that are in excess of, permitted Access Revenues in that year.

The HVAU also provides for monitoring and enforcement of ARTC’s compliance with the revenue cap by the ACCC under section 4.9.

5.1.4 Summary of ACCC views

In assessing the financial model in the proposed 2010 HVAU, the ACCC has had regard to the applicable pricing principles in section 44ZZCA of the Act. Specifically, the ACCC considers that the model should allow access charges to be set so as to generate expected revenue for ARTC that is at least sufficient to meet the efficient costs of providing access to the services contemplated by the HVAU, and for prices to include a return on investment commensurate with the regulatory and commercial risks involved.

The ACCC has also given regard to the interests of access seekers and the legitimate business interests of ARTC, as well as the extent to which the financial model and overall pricing regime is likely to promote the economically efficient operation of, use of and investment in infrastructure. Further, the ACCC has considered matters relating to clarity and certainty, both in relation to individual aspects of the model, and whether there is appropriate clarity and certainty around the ACCC’s ability to effectively discharge its role when undertaking the Annual Compliance under section 4.9.

The ACCC considers that the overall framework ARTC has proposed provides appropriate recognition of the above considerations, and is likely to be appropriate. The ACCC considers however, that section 4 requires revision to ensure that:

- ARTC’s intention is reflected in the drafting of the HVAU;
- loss capitalisation is confined to new investment in Pricing Zone 3;
- the definition of ‘Out-turn Revenue’ outlines how ARTC will allocate Access Revenues across the Segments in Pricing Zone 3;
- sections 4.3(a), 4.3(b) and 4.4 of the proposed 2010 HVAU are consistent in their treatment of cash flows;
- the ACCC may effectively perform the Annual Compliance Assessment; and
- the approach to ‘efficient costs’ in section 4.4(b) is effective; and
- ARTC’s real pre-tax WACC is 8.57 per cent.

These matters are discussed in further detail below.

5.2 Regulatory Asset Base

5.2.1 Introduction

The Regulatory Asset Base (RAB) is an integral part of a revenue cap pricing regime as, when used in conjunction with appropriate assumptions about the assets used to provide services included in the RAB, it allows the calculation of an economic cost of providing services by means of these assets for a period.

5.2.2 The RAB in the proposed 2010 HVAU

While the proposed 2010 HVAU incorporates a BBM, ARTC has also proposed features not typically seen in that model. ARTC has also used idiosyncratic terminology to define otherwise standard features.

Definition of the RAB

The RAB in the proposed 2010 HVAU is defined by reference to ‘Segments’ of the Hunter Valley rail network, which are set out in Schedule E to the HVAU. In total, ARTC has delineated 33 Segments.

As will be discussed further below, defining the RAB by reference to these Segments facilitates the determination of the economic cost to ARTC of providing access to a particular network user, and also aims to prevent cross-subsidisation between users.

Initial RAB value

The initial value of the RAB is determined as per section 4.3(a) of the proposed 2010 HVAU. The section states:

4.3 Regulatory Asset Base

(a) Determination of RAB

The Regulatory Asset Base (“**RAB**”) for a Segment or group of Segments, will be determined in accordance with this **section 4.3(a)**.

The initial value of the RAB (“**Initial RAB**”) will be:

- (i) in relation to those Segments that have been ascribed a regulatory asset value in accordance with the NSW Rail Access Undertaking in force at the time immediately preceding the Commencement Date, set at the value of those Segments determined in accordance with the NSW Rail Access Undertaking as at the Commencement Date and if the date those values took effect is earlier than the Commencement Date, that part of the Initial RAB will be rolled forward to the Commencement Date in accordance with the asset valuation roll forward principles under the NSW Rail Access Undertaking as at August 2010 or as otherwise agreed between ARTC and the Independent Pricing and Regulatory Tribunal to determine an opening Initial RAB;
- (ii) in relation to other Segments, initially valued using the depreciated optimised replacement cost method of valuing assets, and approved by the ACCC. The optimised replacement cost means the cost of replacement by commercially efficient

application of best known currently available technology based on existing capacity and performance characteristics of the asset.

Therefore, under section 4.3(a), ARTC attributes an Initial RAB to each Segment of the Hunter Valley Rail Network. Segments with a RAB under the NSW Rail Access Undertaking (NSWRAU) will retain this RAB at the Commencement Date of the HVAU, and Segments that do not have an associated RAB, their Initial RAB is to be a depreciated optimised replacement cost (DORC) valuation approved by the ACCC (this is discussed further below).

RAB roll-forward

ARTC has proposed that the RAB will be rolled-forward annually. This is also provided for under section 4.3(a), as follows:

RAB will be rolled forward annually according to the following methodology

$$RAB_{t \text{ start}} = RAB_{t-1 \text{ end}} =$$

$$(1 + WACC) \times RAB_{t-1 \text{ start}} - \text{Out-turn Revenue}_{t-1} + \text{Out-turn Opex}_{t-1} \\ + \text{Net Capex}_{t-1} + 0.5 \times WACC \times \text{Net Capex}_{t-1}$$

where:

$RAB_{t \text{ start}}$ is RAB at the start of the relevant calendar year (t) (which, for the first year following the Commencement Date, would be the Initial RAB).

$RAB_{t-1 \text{ end}}$ is the RAB at the end of the preceding calendar year (t-1).

$RAB_{t-1 \text{ start}}$ is the RAB at the start of the preceding calendar year (t-1).

WACC is the approved nominal pre tax Rate of Return as revised from time to time in accordance with **section 4.7**.

Out-turn Revenue_{t-1} is the total Access revenue earned by ARTC in the preceding calendar year (t-1) but will not include a Capital Contribution received from an Applicant or an Access Holder.

Out-turn Opex_{t-1} is the total operating expenditure incurred by ARTC in the preceding calendar year (t-1), on an industry efficient basis, determined in accordance with **section 4.4(b)**.

Net Capex_{t-1} is the net additions to the RAB in the preceding calendar year (t-1), that is out turn Capital Expenditure by ARTC less the written down value of any disposals during the preceding calendar year (t-1) on a Prudent basis, including interest cost incurred during construction up until 1 July in the calendar year the asset was commissioned, capitalised in the year the asset was commissioned and determined by reference to the relevant form of the Rate of Return (to the extent that Capital Expenditure is incurred on a Prudent basis, including interest cost), but will not include Capital Contributions.

Therefore, the RAB-roll forward involves:

- adding the return on capital (WACC x opening RAB) to the opening RAB value;
- subtracting actual revenue earned from the opening RAB value;

- adding actual operating expenses incurred to the opening RAB value;
- adding net capex (actual capex incurred less the written down value of any disposals) to the opening RAB value; and
- adding a half yearly adjustment of return on capital to the net capex incurred during the year.

Loss capitalisation

The RAB under section 4.3(a) tracks ARTC’s actual recovery of its assets. It is, in effect, a loss capitalisation account, which allows ARTC to determine whether it has unrecovered prior shortfalls in revenue. This tracking of unrecovered prior shortfalls in revenue allows for implementation of loss capitalisation, which is discussed below.

‘RAB Floor Limit’

ARTC has, in section 4.3(b), defined the ‘RAB Floor Limit.’ In a standard BBM, this aspect of the model would typically be referred to as the RAB.

Nonetheless, the ‘RAB Floor Limit’ under section 4.3(b) represents the recovery of assets ARTC should expect under a BBM, and ARTC’s expected recovery of the value of its assets under the BBM in each Segment is tracked by the RAB Floor Limit roll-forward in section 4.3(b).

The section states:

4.3 Regulatory Asset Base

...

(b) RAB Floor Limit

The RAB Floor Limit for a Segment or group of Segments will be:

as at the Commencement Date, the Initial RAB;

rolled forward annually according to the following methodology

RAB Floor Limit_{t start} = RAB Floor Limit_{t-1 end} =

$(1 + \text{CPI}_{t-1}) \times \text{RAB Floor Limit}_{t-1 \text{ start}} + \text{Net Capex}_{t-1} - \text{Depreciation}_{t-1}$

where:

RAB Floor Limit_{t start} is the RAB Floor Limit at the start of the relevant calendar year (t) (which, for the first year following the Commencement Date, would be the Initial RAB).

RAB Floor Limit_{t-1 end} is the RAB Floor Limit at the end of the preceding calendar year (t-1).

RAB Floor Limit_{t-1 start} is the RAB Floor Limit at the start of the preceding calendar year (t-1).

CPI_{t-1} is the inflation rate for the preceding calendar year (t-1), determined by reference to the CPI for the September quarter of that year.

Net Capex_{t-1} is the net additions to the RAB Floor Limit in the preceding calendar year (t-1) that is out-turn Capital Expenditure by ARTC less the written down value of any disposals during the preceding calendar year(t-1) on a Prudent basis, including interest cost incurred during construction up until 1 July in the calendar year the asset was commissioned, capitalised in the year the asset was commissioned and determined by reference to the relevant form of the Rate of Return (to the extent that Capital Expenditure is incurred on a Prudent basis, including interest cost), but will not include Capital Contributions.

Depreciation_{t-1} is Depreciation applicable to the RAB Floor Limit in the preceding calendar year (t-1).

Summary of the model

ARTC's proposed model therefore provides RAB and RAB Floor Limits for each of the Segments specified in Schedule E, where:

- RAB Floor Limits under section 4.3(b) represent the expected recovery of assets included in each RAB under a conventional BBM; and
- RABs under section 4.3(a) track ARTC's actual recovery of assets in each RAB, and include any unrecovered prior losses that have been 'capitalised'.

5.2.3 ACCC view

The ACCC provided views on several aspects of the above-outlined provisions in the March 2010 Draft Decision, and the ACCC notes that ARTC has in many instances revised the provisions to address the ACCC's concerns. The ACCC also notes that additional changes have been made to the provisions since the 2009 HVAU.

Initial RAB values

The ACCC was of the view that rolling forward asset values from the NSW Rail Access Undertaking (NSWRAU) for the initial RAB for those Segments that have a value under the NSWRAU was likely to be appropriate.³⁶ Also, the ACCC considered that using a DORC valuation to determine the initial RAB for other Segments was likely to be appropriate.³⁷

The ACCC did, however, comment that the HVAU should provide that DORC values must be approved by the ACCC.³⁸ The ACCC notes that this is now provided for under section 4.3(a)(ii).

Segments with no NSW asset valuation or DORC valuation

The ACCC notes that there are Segments included in Schedule E that have neither an NSWRAU asset valuation nor a DORC value proposed. These Segments are:

- 919 Morandoo & Bullock Island; and
- 923 Kooragang Island – Walsh Point.

³⁶ ACCC, *Australian Rail Track Corporation Limited – Hunter Valley Coal Network Access Undertaking Draft Decision*, 5 March 2010, p. 495.

³⁷ ACCC, *Draft Decision on HVAU*, 5 March 2010, p. 495.

³⁸ ACCC, *Draft Decision on HVAU*, 5 March 2010, p. 497.

The ACCC assumes, in the absence of either of these methods being used to determine an initial RAB value for these Segments, that ARTC does not intend for there to be an initial value for these Segments. Consequently, the ACCC considers that the Segments should be assigned a RAB value of zero, and that ARTC should only be allowed to recover operating expenditure in relation to these Segments.

The ACCC also notes that the Segments with no initial value for the RAB Floor Limit will have no initial RAB value under section 4.3(a).

Multiple RABs

ARTC's proposed 2009 HVAU included separate RABs for existing assets (ERAB) and new assets (IRAB). In the March 2010 Draft Decision, the ACCC considered that it was unlikely to be appropriate to include different RABs, as it would be difficult to differentiate the risks for existing and new assets, and as the extra regulatory uncertainty and risk that would be created would have a negative impact on competition in upstream and downstream markets.³⁹ The ACCC notes ARTC's changes to the initial value of the RAB under clause 4.3(a) to remove the distinction between existing and new assets. The ACCC notes, however, that the ERAB and IRAB may have application in light of its views on the use of loss capitalisation, which is discussed further below.

Written down value of disposals

The ACCC notes that, ARTC has proposed to account for asset disposals at written down value in both the RAB and the RAB Floor Limit roll-forward equations under sections 4.3(a) and 4.3(b) respectively.

The ACCC notes that the Australian Accounting Standards Board provides for asset disposals to be measured at the lesser of carrying amount and fair value less costs to sell.⁴⁰ The ACCC considers that the use of written down value therefore should be equivalent to the use of the carrying amount for ARTC.

The ACCC considers that it is appropriate for disposal of assets to occur at written down value for the purposes of the RAB and RAB Floor Limit in sections 4.3(a) and 4.3(b), as this is consistent with current accepted accounting practice.

Capital contributions of access seekers

In the March 2010 Draft Decision the ACCC considered that it was unlikely to be appropriate for capital contributions from access seekers to be included in the asset base.⁴¹ Underlying this point was the concern that ARTC should not be able to earn a return on contributions made by other parties.

The ACCC notes that ARTC has amended the definition of Net Capex in section 4.3(b) to remove Capital Contributions from the asset base, thereby addressing the ACCC comments in the Draft Decision. Further, ARTC has proposed that Out-turn revenue for a year under section 4.3(a) is total Access Revenue for that year, and does

³⁹ ACCC, Draft Decision on HVAU, 5 March 2010, p. 501.

⁴⁰ AASB, Compiled Accounting Standard AASB 5 Non-current Asset Held for Sale and Discontinued Operations, 23 February 2010, p.15.

⁴¹ ACCC, Draft Decision on HVAU, 5 March 2010, p. 496.

not include Capital Contributions. These revisions should prevent ARTC earning a return on contributions made by other parties.

The ACCC further discusses capital contributions from access seekers in the **Additional Capacity and Investment** chapter.

Interest during construction

In the March 2010 Draft Decision the ACCC considered that the principle of allowing ARTC to include interest during construction in the capital value of assets was likely to be appropriate, but expressed specific concerns in relation to the clarity of drafting, potential for double recovery, and efficiency implications of ARTC's implementation in the 2009 HVAU.⁴²

The ACCC notes that ARTC's revisions to the Net Capex definition in sections 4.3(a) and (b) and the Economic Cost definition in section 4.4 now require interest costs to be incurred on a Prudent basis, which addresses the ACCC's efficiency concerns.

ARTC's revisions also only allow interest cost to be incurred up to 1 July in the calendar year of commissioning, which the ACCC considers should be likely to resolve concerns of double recovery, provided that ARTC ensures consistency of treatment of interest cost in the Economic Cost definitions contained in section 4.4(a)(iii) and (vi) for the returns on Segment and non-Segment Specific Assets.

Therefore the ACCC considers that the amendments to the definition of Net Capex in sections 4.3(a) and 4.3(b), and Economic Cost in section 4.4, adequately address the ACCC's concerns expressed in the Draft Decision.

Definition of CPI

The ACCC notes that ARTC proposes to change the definition of CPI under section 4.3(b) to use Sydney all groups CPI, rather than the weighted average of eight capital cities all groups CPI, which was used in the 2009 HVAU. The ACCC also notes that this revised definition of CPI is consistent with ARTC's proposed changes to the definition of CPI under the IAHA.

The ACCC considers that this definition of CPI is likely to provide an appropriate inflation proxy for the purposes of the RAB Floor Limit roll-forward under section 4.3(b).

Ancillary services

In the March 2010 Draft Decision the ACCC was of the view that the 2009 HVAU did not include adequate measures to constrain the ARTC's ability to earn revenues from providing ancillary services. The ACCC considered that:

- ARTC should be restricted to charging an efficient price for ancillary services (such as services relating to the trading of train paths), or provide for earnings from ancillary services to be included within the definitions of revenue and cost employed under the 2009 HVAU; and

⁴² ACCC, Draft Decision on HVAU, 5 March 2010, p. 524.

- the ACCC should be granted the power to arbitrate where the access seeker disputes whether charges are efficient if the access seeker is required to acquire ancillary services as a pre-requisite to access to the Network.⁴³

The ACCC notes that ARTC attaches a particular interpretation to the meaning of an ancillary service. In the 2010 HVAU Explanatory Guide, ARTC stated:

- The ACCC's comments are predicated on the assumption that there are critical ancillary services which are necessary to enjoy the access rights and which will be charged separately from the access charges. This is not correct. The definition of Indicative Access Charges and Charges in the HVAU are defined by reference to Access Rights which in turn means the making available of paths and the right to use those paths by running trains. The services which ARTC must provide, and which are necessary to enjoy the access rights, are included in the price.
- The ACCC has given the example of a charge on trading. The IAHA does not include a charge for approving trades and ARTC does not intend to levy charges. The ability to trade Access Rights is necessary to enjoy those rights and, as such, the cost of providing that service is included in the price and recovered through the ceiling test.
- ARTC will have a separate agreement with operators for ancillary train movements (i.e. movements which cannot be attributed to an individual access holder) if necessary. Such services will not be carrying coal and will be treated the same as non-coal for pricing and ceiling test compliance.⁴⁴

The ACCC notes that ARTC has amended the definition of 'Out-turn Revenue' in the 2010 HVAU to mean the "total *Access* revenue earned by ARTC...". The ACCC considers that this revision, together with ARTC's explanation quote above, addresses the concerns expressed in the Draft Decision. Further, the ACCC considers that under the Annual Compliance assessment it may reconcile revenue against the applicable Ceiling Limits.

Consistency of amendments between section 4.3(a) and 4.3(b)

The ACCC notes that ARTC has amended the RAB under section 4.3(a) to provide for consistency with the amendments to the RAB Floor Limit under section 4.3(b), including providing for:

- capital contributions not to be included in the asset base;
- *prudent* interest incurred during construction; and
- disposal of assets at written down value.

The ACCC considers that these amendments are likely to be appropriate, subject to the ACCC's views below regarding loss capitalisation.

⁴³ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 514-515.

⁴⁴ ARTC, *Hunter Valley Access Undertaking - Explanatory Guide (September 2010)*, 7 September 2010, pp. 10-11.

Consistency of cash flows and half year return on capital expenditure

The ACCC considers that for the revenue cap created by the HVAU to operate effectively, the treatment of cash flows specified under sections 4.1 to 4.9 should be consistent with the BBM modelled by the RAB Floor Limit under section 4.3(b). This view is discussed further in section 5.9 below. In light of this view the ACCC also considers that ARTC's proposal to include a half-year return on capital expenditure commissioned during the year is unlikely to be appropriate. See section 5.9 below for further discussion.

5.3 Floor and Ceiling Limits

5.3.1 Proposed 2010 HVAU

Section 4.2 of the proposed 2010 HVAU specifies floor and ceiling revenue limits. These are:

- (a) Access revenue from every Access Holder must at least meet the Direct Cost imposed by that Access Holder.
- (b) For each Segment or group of Segments, Access revenue from Access Holders should, as an objective, meet the Incremental Cost of those Segments ("**Floor Limit**").
- (c) For any Access Holder, or group of Access Holders, Access revenue must not exceed the Economic Cost of the Segments which are required on a stand alone basis for the Access Holder or group of Access Holders ("**Ceiling Limit**") where the RAB for those Segments is equal to, or falls below, the RAB Floor Limit for those Segments at the end of the relevant calendar year.

Floor limit(s)

Section 4.2(a) provides that Access Revenue from an Access Holder must at least meet the 'Direct Cost' imposed by that Access Holder. Direct Cost is defined in section 9.1 as follows:

"**Direct Cost**" means maintenance expenditure, including major periodic maintenance that varies with usage of the Network, and may include other costs that vary with the usage of the Network but excluding Depreciation, assessed on an efficient basis where efficient costs will reflect the costs incurred by a prudent service provider, acting efficiently, in accordance with accepted good rail infrastructure practice, to achieve lowest sustainable cost of delivering rail infrastructure services, in the context of:

- (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;
- (c) ARTC's obligations arising under the law, applicable legislation (including regulations) or the NSW Lease; and
- (d) broader benefits that may arise from delivery through alliance or internally;

Section 4.2(a) implicitly therefore provides that Access Revenue must be sufficient for ARTC to recover at least certain variable costs associated with providing access to a given Access Holder.

Section 4.2(b), however, provides that, *as an objective*, for each Segment or group of Segments, Access Revenue from Access Holders should meet the Incremental Cost of those Segments. Incremental Cost is defined in section 9.1 as follows:

“Incremental Cost” means all costs that could be avoided in the medium term if a Segment was removed from the Network;

The interaction between the ‘operative’ and ‘objective’ floor limits is discussed in the ‘ACCC view’ section below.

Ceiling limit

Section 4.2(c) places a limit on the amount of Access revenue ARTC may recover. Under this section, Access revenues must not exceed the Economic Cost of the Segments which are required on a stand alone basis to provide services to any Access Holder or group of Access Holders, where the RAB for those Segments is equal to, or falls below, the relevant RAB Floor Limit.

The qualification to the Ceiling Limit — that is, that the limit applies where the relevant RAB is equal to or falls below the relevant RAB Floor Limit — enables the implementation of loss capitalisation. Provided that the Access Revenue earned is consistent with the recovery calculated under the RAB and RAB Floor Limits in sections 4.3(a) and 4.3(b) respectively, ARTC will be constrained to charge during the term of the HVAU no more than Access Revenue that would be allowed under a more typical BBM; that is, ARTC will recover up to Economic Cost, as provided for under section 4.2(c). Where, however, Access Revenue earned is not consistent with the recovery calculated under the RAB and RAB Floor Limits, the shortfall may be capitalised for recovery in later periods.

The use of loss capitalisation is discussed further below.

5.3.2 ACCC view – Floor Limit(s)

‘Objective’ floor limit and ‘operative’ floor limit

As outlined above, section 4.2 includes one floor limit as an objective, and another floor limit that may be described as ‘operative.’ That is, the ‘objective’ limit in section 4.2(b) refers to Incremental Cost, which is defined with less precision in the undertaking than is Direct Cost, which is the relevant standard under section 4.2(a). Further, section 4.2(b) refers to Access revenue in relation to the Incremental Cost of *Segments*, whereas section 4.2(a) refers to access revenue in relation to costs imposed by *Access Holders*.

In the March 2010 Draft Decision, the ACCC considered that it was likely to be appropriate for the Incremental Cost Floor Limit under section 4.2(b) to be an objective, as it may otherwise set a price floor that may not provide for efficient access in some circumstances.⁴⁵ For example, if the Incremental Cost Floor Limit was

⁴⁵ ACCC, Draft Decision on HVAU, 5 March 2010, p. 519.

not an objective, this could require ARTC to close an existing segment that is not able to recover the incremental cost from the users of the segment in the short term, but is likely to be able to recover the incremental cost in the long term. Further, if the incremental cost is higher than the short term cost of maintaining the segment and ARTC was bound to charge incremental cost, the increased charges could discourage traffic from utilising this sunk asset, and make the segment uneconomic to operate in the short term. The perverse effect in this example is that ARTC *could not permit* users who are able to pay the short term cost, but not the incremental cost, to use the segment and therefore the segment could become uneconomic to operate.

The ACCC acknowledges that there may also be public interest implications if the 'objective' in section 4.2(b) was expressed as binding. That is, there may be broader implications if ARTC decided to 'close down' segments of the Network that did not recover incremental cost. This may have particular consequences for non-coal use of the network such as passenger trains.

The ACCC notes that in its first iteration under the NSW Rail Access Regime, the incremental cost floor limit in the combinatorial model was 'binding' and not an 'objective'. However, in 1999 the NSW Government amended the NSW Rail Access Regime to limit the incremental cost floor to an 'objective' following the concerns raised by the National Competition Council when reviewing the application by the NSW Government to have the NSW Rail Access Regime certified.⁴⁶

In conducting the Annual Compliance Assessment under section 4.9 of the proposed 2010 HVAU, the ACCC will interpret the two floor limits in section 4.2 in accordance with this understanding. For clarity, however, it would be beneficial if the current order of subsections (a) and (b) of 4.2 was reversed, and the two provisions were included in a section separate from the Ceiling Limit. The ACCC considers that this will assist in the interpretation of the provisions in the future.

'Operative' floor limit – section 4.2(a)

In the March 2010 Draft Decision, the ACCC was of the view that the Direct Cost standard in section 4.2(a) would require ARTC to recover at least the short term marginal cost of access, and that this was likely to be appropriate.⁴⁷

The ACCC notes also that ARTC has amended the definition of Direct Cost to include other costs that vary with usage of the Network. The ACCC considers that this is likely to promote the economically efficient operation and use of infrastructure, as it reflects Access Holders essentially paying for the costs they impose upon ARTC and other Access Holders in using the Network.

5.3.3 ACCC view - Ceiling Limit

In the March 2010 Draft Decision, the ACCC considered that the Ceiling Limit in section 4.2(c) would impose an effective constraint on ARTC's maximum access revenue and hence was likely to be appropriate.⁴⁸ The ACCC remains of this view.

⁴⁶ IPART, *Aspects of the NSW Rail Access Regime – Final Report*, 28 April 1999, p. 8.

⁴⁷ ACCC, Draft Decision on HVAU, 5 March 2010, p. 519.

⁴⁸ ACCC, Draft Decision on HVAU, 5 March 2010, p. 515.

5.4 Economic Cost definition

5.4.1 Proposed 2010 HVAU

Section 4.4 of the proposed 2010 HVAU defines the term ‘Economic Cost.’ The section states:

- (a) For the purposes of this **section 4**, Economic Cost of a Segment means:
 - (i) Segment Specific Costs;
 - (ii) Depreciation of Segment Specific Assets;
 - (iii) a return on Segment Specific Assets, being determined by applying a real pre-tax Rate of Return to the value of Segment Specific Assets, where the value of those assets is determined in accordance with **section 4.3(b)**;
 - (iv) an allocation of Non-Segment Specific Costs;
 - (v) an allocation of depreciation of Non-Segment Specific Assets;
 - (vi) an allocation of return of Non-Segment Specific Assets, being determined by applying a real pre-tax Rate of Return to the value of Non-Segment Specific Assets, where the value of those assets will include the capitalisation of interest cost incurred during construction up until commissioning of the asset, capitalised at the time of commissioning and determined by reference to the relevant Rate of Return (to the extent that Capital Expenditure is incurred on a Prudent basis, including interest cost), but will not include any applicable Capital Contributions; and
 - (vii) the costs described in **sub-sections (a)(i) to (vi)** as applicable to Additional Capacity.
- (b) All costs described in **sub-sections (a)(i) and (iv)**, all applicable costs described in **sub-section (a)(vii)**, and all operating expenditure in **section 4.3(a)** are to be assessed on an efficient basis, where efficient costs will reflect the costs incurred by a prudent service provider, acting efficiently, in accordance with accepted good rail infrastructure practice, to achieve lowest sustainable cost of delivering rail infrastructure services, in the context of:
 - (i) the Hunter Valley Coal Chain where a key objective in maintenance planning is to maximise coal chain throughput and reliability;
 - (ii) ARTC’s obligations to maintain the Network having regard to the terms of applicable Access Agreements and Access Holder Agreements existing at the time;
 - (iii) ARTC’s obligations under the law, applicable legislation (including regulations) or the NSW Lease; and
 - (iv) broader benefits that may arise from delivery through alliance or internally.

All costs are to be assessed on a stand alone basis having regard to the factors identified in **sub-section (b)**.

5.4.2 ACCC view

In the March 2010 Draft Decision, the ACCC considered that the Economic Cost definition was likely to be appropriate, subject to ARTC addressing ACCC concerns about the timing of cash flows, treatment of capital expenditure and the treatment of interest during construction in the section.⁴⁹

The ACCC discusses the timing of cash flows in section 5.9 below, and discusses ARTC's revisions to section 4.4(b) regarding the efficiency of operating expenditure in section 5.11.3 below in the context of the Annual Compliance Assessment. The ACCC also considers that in order for the financial model to operate effectively, the various sections of the HVAU that incorporate the definition of Economic Cost should be consistent. This point is considered further at section 5.9 below.

The ACCC also notes ARTC's proposed amendments to section 4.4(a)(vi), which provide for an allocation of a return on non-Segment Specific Assets to include capitalisation of interest incurred during construction. While it is unclear what (if any) non-Segment Specific Assets ARTC considers are likely to be constructed and in respect of which ARTC would seek capitalisation of interest, the ACCC does not consider that, in principle, it is inappropriate for ARTC to include the opportunity cost (as calculated by reference to the allowed Rate of Return) of the funds utilised until commissioning, to the extent that this cost is prudently incurred.

Subject to the matters referred to above, the ACCC otherwise considers the Economic Cost definition to be appropriate.

5.5 Cost Allocation

In the ACCC Draft Decision on the 2009 HVAU, the ACCC considered that ARTC's cost allocation methodology in section 4.5 was likely to be appropriate.⁵⁰ The ACCC reiterates this view, and notes that this cost allocation methodology provides for determination of some of the values of elements of the Economic Cost definition contained in section 4.4.

5.6 Loss Capitalisation

5.6.1 Proposed 2010 HVAU

As noted above, ARTC's proposed financial model includes a loss capitalisation component. 'Loss capitalisation' is an extension to the BBM that provides for the later recovery of 'shortfalls' in access revenue that have occurred in an earlier period.

Loss capitalisation is implemented in the proposed 2010 HVAU in the following way. The Ceiling Limit under section 4.2(c) constrains ARTC if it has no unrecovered prior shortfalls in revenue. The RAB Floor Limit under section 4.3(b), which represents the recovery expected under a BBM, is compared to the RAB under section 4.3(a), which tracks ARTC's actual recovery of its assets, to determine whether ARTC has unrecovered prior shortfalls in revenue. As the shortfalls are determined by reference to the BBM, the Ceiling Limit prevents ARTC from recovering its assets faster than the BBM allows.

⁴⁹ ACCC, Draft Decision on HVAU, 5 March 2010, p. 525.

⁵⁰ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 523-524.

ARTC may therefore capitalise losses (shortfalls) where access revenues in a given period have been insufficient to recover the economic cost of the segment (as defined in section 4.4 of the HVAU).

5.6.2 March 2010 Draft Decision

In its March 2010 Draft Decision, the ACCC considered that the inclusion of loss capitalisation in ARTC's undertaking:

- transferred greater systematic risk from ARTC to its customers than would occur under a standard BBM, which should be considered in determining the appropriate return on capital;⁵¹
- facilitated ARTC's expectation of achieving a full economic return on its investments;⁵² and
- was likely to be appropriate if the degree of pricing uncertainty facing access seekers was addressed.⁵³

5.6.3 ACCC view

The underlying assumption of a Loss Capitalisation Model is that the regulated firm's projects will expect to make full recovery of economic cost over their life, notwithstanding that the firm may not be able to recover the appropriate quantum of economic cost during an earlier period or periods. The model intends though that the regulated firm will only have a temporary period to earn a return on a shortfall or loss, and that the period will end once full economic cost recovery begins.

The ACCC considers that it is appropriate for ARTC to be able to expect to achieve a full economic return on its assets, and that the financial model proposed by ARTC, combining a BBM with an appropriate loss capitalisation component, should, in general, facilitate this outcome.

Use of loss capitalisation in relation to Pricing Zone 3

ARTC has submitted that loss capitalisation is only likely to occur in relation to Pricing Zone 3.⁵⁴ Pricing Zone 3 is referred to as the 'unconstrained' part of the Hunter Valley Rail Network, as the Economic Cost of its Segments is greater than the Revenue received from Access Holders that utilise the zone. ARTC has stated:

... the proposed [access charges] in Pricing Zone 3 do not generate sufficient revenue to recover the Economic Cost of that part of the Network. As such the proposed [access charges] should be taken as being subject to the endorsement by the ACCC of the Loss Capitalisation approach proposed by ARTC as described at section 4.3 of the HVAU.⁵⁵

⁵¹ ACCC, Draft Decision on HVAU, 5 March 2010, p. 488.

⁵² ACCC, Draft Decision on HVAU, 5 March 2010, p. 488.

⁵³ ACCC, Draft Decision on HVAU, 5 March 2010, p. 491.

⁵⁴ ARTC, *Hunter Valley Access Undertaking - Explanatory Guide (Supplementary Information)*, 13 October 2009, p. 29.

⁵⁵ ARTC, 2009 HVAU Explanatory Guide (Supplementary Information), 13 October 2009, p. 29.

In the March 2010 Draft Decision, the ACCC recognised that, for this reason, loss capitalisation could be limited to operating in Pricing Zone 3.⁵⁶ The ACCC considered, however, that there were advantages in using a single pricing regime across the entire Network in terms of ‘regulatory burden,’ and in recognition of ‘common regulatory practice.’⁵⁷ The ACCC acknowledges though that the effect of the view expressed in the Draft Decision is to provide ARTC with the ability to use loss capitalisation across the entire Hunter Valley rail network, including in relation to existing assets.

The ACCC has reconsidered the preliminary view expressed in the Draft Decision in relation to loss capitalisation, and considers that in order for the undertaking to be appropriate, it should clearly state that ARTC may only utilise loss capitalisation in relation to new investment in Pricing Zone 3. The ACCC has revised its view for the following reasons.

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 allowing 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.

As ARTC has indicated, it does not expect to recover the economic cost of the network in Pricing Zone 3 in the immediate term. However, the ACCC understands that Pricing Zone 3 serves mines in the Gunnedah Basin, which include new mines by companies such as Whitehaven and Idemitsu, as well as potential new entrant Shenhua Coal.⁵⁸ The use of loss capitalisation in relation to Pricing Zone 3 may, therefore, facilitate ARTC investing in track infrastructure to service those mines, and therefore facilitate increased coal exports via the Port of Newcastle. This is consistent with a conservative application of the above understanding of loss capitalisation. Further, the ACCC considers that using loss capitalisation in relation to new investment in Pricing Zone 3 is consistent with the ACCC’s general views in the **Additional Capacity and Investment** chapter regarding investment in the Hunter Valley rail network, and should be seen in that light.

Pricing Zones 1 and 2, unlike Pricing Zone 3, are essentially existing assets, and are ‘constrained,’ that is, access revenues are sufficient or likely to be sufficient to recover economic cost. As such, there is no justification for using loss capitalisation in relation to these Zones.

Ultimately, the ACCC considers that loss capitalisation is a relatively new concept in the regulation of access pricing, and consequently a conservative approach should be taken at these early stages to mitigate the risk of regulatory uncertainty in later

⁵⁶ ACCC, Draft Decision on HVAU, 5 March 2010, p. 490.

⁵⁷ ACCC, Draft Decision on HVAU, 5 March 2010, p. 490.

⁵⁸ Gunnedah Shire Council, *Submission to the Standing Committee on Infrastructure, Transport, Regional Development and Local Government - Inquiry into the Impact of the Global Financial Crisis on Regional Australia*, 3 April 2009, p. 2.

decisions. These considerations outweigh the concerns in the Draft Decision regarding regulatory burden and common regulatory practice.

Consequences of confining loss capitalisation to Pricing Zone 3

The ACCC recognises that a consequence of explicitly confining the operation of loss capitalisation to Pricing Zone 3 may be the re-introduction of the ERAB and IRAB for that Pricing Zone, as in part contemplated by the April 2009 HVAU. ARTC stated in the Explanatory Guide accompanying the 2009 HVAU that:

To recognise the different risks faced through the operation of existing assets as opposed to new investments to facilitate capacity for mines in outer regions, ARTC is proposing to determine and capitalise economic losses to the existing and new assets separately....⁵⁹

Further, ARTC's submission in September 2009 stated that:

...there is sufficient justification to separate the RAB into the existing network assets and the investment in new assets. This is due to the increased focus of investment in immature outer Hunter Valley regions.⁶⁰

The ACCC therefore considers it may be appropriate for the ERAB and IRAB distinction to be reintroduced for Pricing Zone 3, though this distinction is not relevant to Pricing Zones 1 and 2. As noted, those zones are 'constrained' and should recover full economic cost, including on any new investment, relatively swiftly.

Whilst the ACCC considers that the ERAB and IRAB distinction could be reintroduced to Pricing Zone 3, this does not extend to the introduction of separate rates of return for existing and new assets. The ACCC considers that it is appropriate to determine a single WACC for the Network that provides for an overall return on investment that is commensurate with regulatory and commercial risks involved. ARTC's proposed WACC is discussed later in this chapter.

Further, the ACCC also notes that while the ERAB/IRAB distinction could be reintroduced to the HVAU for Pricing Zone 3, there may be other approaches to achieving the outcomes discussed.

The ACCC also considers that minor revisions in relation to revenue allocation are necessary, as discussed in the following section.

5.7 Revenue Allocation

5.7.1 Introduction

As discussed in the previous sections, the ACCC considers that aspects of the financial model put forward in the proposed 2010 HVAU are likely to be appropriate, subject to specified revisions.

⁵⁹ ARTC, 2009 HVAU Explanatory Guide, May 2009, p. 99.

⁶⁰ ARTC, *Response to Submissions to the ACCC on the Hunter Valley Access Undertaking*, 21 September 2009, p. 39.

The ACCC considers, however, that some scope remains in the proposed financial model for cross-subsidisation, as the Ceiling Limit does not always apply due to the implementation of loss capitalisation.

The ACCC considers that, as a matter of economic principle, cross-subsidisation does not occur between assets per se, but rather may occur between consumers of services. Cross-subsidisation cannot occur if the revenues of each service or each group of services are no greater than the stand-alone cost of that service or group of services.⁶¹

Therefore, in circumstances where ARTC is constrained by the Ceiling Limit under section 4.2(c) to charge any Access Holder or group of Access Holders no more than the stand-alone Economic Cost of Segments utilised, it should not be possible for cross subsidies to arise.

Although it is normally unnecessary to consider any allocation of revenue under a BBM, revenue must be allocated to the RAB for each Segment in Pricing Zone 3 under section 4.3(a) in order to determine each Segment's closing RAB value. Consequently, whether ARTC is constrained in relation to an Access Holder or group of Access Holders to charge no more than it would under its BBM in any period depends on previous usage of Segments and allocation of the resulting revenue.

If ARTC does not allocate sufficient revenue to Segment RABs in Pricing Zone 3, an artificially high shortfall of revenue appears to occur for that Segment, which ARTC may charge later users using Loss Capitalisation, and which may include costs that were imposed on ARTC by prior Access Holders. In circumstances such as this, later users of the Segments would pay above the stand alone Economic Cost of services provided to those users. Consequently, these later users of the service will cross-subsidise any earlier users, particularly where the earlier users no longer utilise the Network.

Consequently, the ACCC considers that minor amendments to the proposed financial model to specify how revenues will be allocated will address the issue and make the proposed 2010 HVAU more likely to be appropriate to accept.

5.7.2 Proposed revisions to clarify revenue allocation

The ACCC considers that in light of the revisions required to confine loss capitalisation to the IRAB in Pricing Zone 3, the revisions to clarify revenue allocation are:

- ARTC must allocate Access Revenue to each Segment used by an Access Holder in Pricing Zone 3 that is at least equal to the Direct Cost imposed on ARTC by that Access Holder on that Segment; and
- ARTC must allocate Access Revenue to the IRAB prior to allocating the ERAB in Pricing Zone 3.

The ACCC considers that these revisions can be made effective through a revision to the 'Out-turn revenue' definition in section 4.3(a).

⁶¹ Gerald R. Faulhaber, *Cross-Subsidy Analysis With More Than Two Services*, Journal of Competition Law and Economics 1(3) [2005], p. 441.

Each of these revisions is explained below.

ARTC to allocate revenue to cover Direct Costs to Segments

If ARTC did not allocate revenue to cover the Direct Costs of the relevant Segments in Pricing Zone 3, ARTC would have the ability to capitalise these Direct Costs into the RAB for later recovery from subsequent users of that Segment. Payment of these earlier Direct Costs imposed by a prior Access Holder would increase the Access Revenues of later Access Holders to above the stand alone Economic Cost of the Segments.

A cross-subsidy may therefore arise through time by later Access Holders paying Direct Costs that were imposed on ARTC earlier on that Segment by another Access Holder. This would not be in the interests of access seekers, particularly new entrants into Pricing Zone 3.

Consequently, the ACCC considers that it is necessary for ARTC to allocate to each Segment an amount of Access Revenues at least equal to the Direct Cost imposed by Access Holders on ARTC on that Segment.

ARTC to allocate revenue to the IRAB prior to allocating to the ERAB in Pricing Zone 3

ARTC has expressed concern with its ability to recover planned investment in Pricing Zone 3.⁶² The ACCC recognises this concern and, by ARTC applying loss capitalisation to this investment, ARTC increases its expectation that it will recover its investment included in the IRAB in Pricing Zone 3 over the life of the investment. The ACCC considers, however, that to ensure greater expectation of recovery, ARTC should apply Access Revenue to the IRAB first and apply any remaining revenue to the ERAB. This will ensure that the risk of ARTC not recovering its investment in Pricing Zone 3 will be minimised.

5.8 Depreciation

In the Draft Decision, the ACCC identified issues relating to the calculation of the Depreciation Allowance, and provision for the revision of mine life estimates, as expressed in section 4.6 of the HVAU.⁶³ Specifically, the ACCC considered that:

- the drafting of section 4.6(a) in the April 2009 HVAU may have permitted use of an estimate of remaining life of the assets not based on the ACCC approved methodology and mine lives, and that this was unlikely to be appropriate;⁶⁴
- section 4.6(b) was vague in relation to the factors to which ARTC would have regard to when determining asset lives, and disputes may result as to the average mine life;
- the drafting in section 4.6(b) omitted mines serviced by the Hunter Valley Network that are located outside the Hunter Valley; and

⁶² ARTC, 2009 HVAU Response to Submissions, 21 September 2009, p. 39.

⁶³ ACCC, Draft Decision on HVAU, 5 March 2010, p. 586.

⁶⁴ ACCC, Draft Decision on HVAU, 5 March 2010, p. 587.

- it was inappropriate for ARTC to not be required to submit revised mine life estimates for ACCC approval.⁶⁵

These matters appear to have been addressed in section 4.6 of the proposed 2010 HVAU.

The ACCC also notes that subject to ARTC providing for consistency in cash flows under the related provisions in section 4 considered in section 5.9 below, the ACCC otherwise considers section 4.6 to be appropriate .

In addition, the ACCC identified a number of issues concerning the underlying data used to calculate the mine life estimates put forward by ARTC in the Draft Decision.⁶⁶ ARTC has corrected and updated both production and reserves data in response to this view,⁶⁷ and the ACCC considers that these revisions adequately address concerns identified in the Draft Decision.

5.9 Consistency of cash flows throughout the revenue cap

As noted throughout this chapter, the relationships between the aspects of the financial model as set out in section 4 are complex. The ACCC considers that where sections 4.1 to 4.9 provide for cash flows to be treated in a specified way, this treatment should be consistent with the RAB Floor Limit under section 4.3(b), as the RAB Floor Limit determines the overall maximum allowable revenue for ARTC and is therefore a key regulatory constraint. Specifically, the ACCC considers that:

- ARTC's allowed revenues in accordance with the definition of Economic Cost in section 4.4 should match the implementation of the BBM in section 4.3(b); and
- Relaxation of the Ceiling Limit under section 4.2(c) should only occur where ARTC has experienced a shortfall in access revenues (loss capitalisation) in comparison to the revenue allowance that would be permitted under the BBM, as implemented in the RAB Floor Limit under section 4.3(b).

The ACCC considers that these revisions are necessary to ensure that the financial model is implemented with sufficient clarity and certainty. This is appropriate as the undertaking should clearly set out the model regulating ARTC's ability to levy access charges and earn revenue, and to enable the ACCC to undertake the annual compliance assessment effectively.

RAB to provide for net revenue to occur in the middle of the year

The ACCC notes the importance of the assumed timing of the receipt of Access Revenues under a BBM, as an access provider may actually charge in excess of the efficient cost of providing access if it receives its revenues earlier than anticipated by the BBM.

Section 4.3 states:

⁶⁵ ACCC, Draft Decision on HVAU, 5 March 2010, p. 587.

⁶⁶ ACCC, Draft Decision on HVAU, 5 March 2010, p. 589.

⁶⁷ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, Appendix 2, Table 5, p. 21.

(a) **Determination of RAB**

...

$RAB_t \text{ start} = RAB_{t-1} \text{ end} =$

$(1 + WACC) \times RAB_{t-1} \text{ start} - \text{Out-turn Revenue}_{t-1} + \text{Out-turn Opex}_{t-1}$
 $+ \text{Net Capex}_{t-1} + 0.5 \times WACC \times \text{Net Capex}_{t-1}$

The ACCC notes that the RAB roll forward equation under section 4.3 determines the closing RAB for a year by providing for ARTC to:

- earn a return on the prior year's RAB by increasing it by the rate of return;
- subtract net revenue (Out-turn Revenue – Out-turn Operating Expenditure) for that year;
- add capital expenditure in the middle of the year; and
- earn a return on capital expenditure commissioned in that year for a period of half a year.

The ACCC considers that if ARTC proposes to treat capital expenditure as occurring in the middle of the year and earn a return for a period of half a year, it should also treat net revenue as earned in the middle of the year. In order to achieve this, ARTC should amend the RAB roll forward equation in section 4.3(a) to apply the rate of return to net revenue for a period of half the year, as is the case for net capital expenditure.

The ACCC notes that this amendment recognises that ARTC under the HVAU actually earns revenues and incurs expenses over the course of the whole year, and should promote access revenue meeting the efficient costs of providing access by accounting for the value to ARTC of its actual receipt of net revenue before the end of the year.

RAB Floor Limit to include half year inflation of new capital expenditure

ARTC proposes that:

- capital expenditure should be included in the RAB under section 4.3(a) in the middle of the year that it is commissioned, and earn a return for half that year; and
- Depreciation is to be charged on capital expenditure for a period of half of the year that it is commissioned under section 4.6(d).

The ACCC considers that ARTC should amend the RAB Floor Limit roll forward under section 4.3(b) to provide for inflation for a period of half a year on assets commissioned that year in order to provide consistency with the treatment of return on, and depreciation of, this capital expenditure under the roll forwards of both the RAB and RAB Floor Limit in sections 4.3(a) and (b) respectively. This amendment should ensure that the Ceiling Limit constrains ARTC to Economic Cost where it has no unrecovered shortfalls in access revenues that it is permitted under the BBM implemented in section 4.3(b).

Operating expenditure in RAB consistent between section 4.3(a) and Economic Cost in section 4.4

The ACCC notes that operating costs included in the RAB roll forward in section 4.3(a) should correspond to certain elements included in the definition of Economic Cost under section 4.4.

The ACCC considers that ARTC should amend section 4.3(a) to ensure consistency in the treatment of Economic Cost and the RAB by providing for operating expenditure in the RAB roll forward under section 4.3(a) to be determined in accordance with sections 4.4(a)(i), (iv), (v), (vi) and (vii).

The ACCC notes that this amendment should ensure that Loss Capitalisation is implemented under the Ceiling Limit in section 4.2(c) by incorporation of no more and no less than the operating expenditure under section 4.4 that ARTC is permitted to allocate to Segments in the RAB under section 4.3(a).

Depreciation of Segment Specific Assets consistent between sections 4.3(b), 4.4(a)(ii) and 4.6.

The ACCC notes the importance of the depreciation allowances for allowed access revenues under a BBM, as an access provider may under or over recover the value of the assets used to provide services, and hence receive access revenues that may not meet the efficient cost of providing access to the assets modelled by the BBM.

The value of Depreciation of Segment Specific Assets in section 4.4(a)(ii) should be amended to provide for this value to be determined in a manner consistent with the RAB Floor Limit roll-forward in section 4.3(b) and the definition of Depreciation in section 4.6.

5.10 ‘Unders and overs’ accounting

Purpose of provision

The ‘unders and overs’ methodology is an important component of ARTC’s revenue cap, as under a revenue cap, the total revenue that the service provider may earn is fixed. As the quantity of services provided in a period may vary but the total revenue may not, the price per unit of service may vary, and in some circumstances the provider may ‘over’ or ‘under’ recover the relevant portion of total revenue. An unders and overs account therefore provides for:

- refunds of ‘overs’ to users of the service, where the price set at the start of the period results in the provider earning in excess of allowed revenues for the quantity actually provided; and
- collections of ‘unders’ from the users of the service by agreement, where the price set at the start of the period results in a shortfall in access revenues for the quantity actually provided.

Under the proposed 2010 HVAU, ARTC proposes that it will calculate the unders and overs amount as part of its submission to the ACCC’s annual compliance assessment under section 4.9, which is discussed in the next section. The ACCC also notes that the collection of actual revenue shortfalls in ‘unders’ may have an effect on the risk

facing ARTC for the purposes of calculating its WACC. This effect is considered in greater detail in the WACC section below.

Proposed 2010 HVAU

Section 4.8 of the proposed 2010 HVAU contains the unders and overs provisions:

4.8 Unders and overs accounting

- (a) Unders or overs accounting is the outcome of the reconciliation of Access revenue with applicable Ceiling Limits undertaken by ARTC as part of the annual ACCC compliance assessment under section 4.9. ARTC will calculate the total unders or overs amount as part of its submission to the ACCC (section 4.9(a)(ii)). The amount may need to be adjusted in accordance with a determination by the ACCC.
- (b) For each Constrained Coal Customer, ARTC will:
 - (i) establish a Constrained Coal Customer Account;
 - (ii) determine the annual allocation of the total unders or overs amount to each Constrained Coal Customer in accordance with the methodology specified at (iii);
 - (iii) determine an allocation of the total unders or overs amount, for each Constrained Coal Customer based on the proportion of revenue, paid for Access Rights over the Constrained Network, by each Constrained Coal Customer, net of any rebate of the take or pay component of the Charges paid to that Constrained Coal Customer following the application of the system wide true-up tests and the annual individual reconciliation, and where applicable, in accordance with the equitable allocation to be carried out under section 6.2(f) and (g);
 - (iv) add or subtract the annual allocation for the calendar year from the opening balance in each applicable Constrained Coal Customer Account in determining the closing balance of the applicable Constrained Coal Customer Account for that calendar year;
 - (v) advise each Constrained Coal Customer of the details of its Constrained Coal Customer Account; and
 - (vi) reconcile the Constrained Coal Customer Accounts by one of two methods, being:
 - (A) ARTC bringing the closing balance of each Constrained Coal Customer Account back to zero by refunding or collecting the applicable amount to or from, respectively, each Constrained Coal Customer; or
 - (B) mutual agreement between the parties, which must result in an outcome that is equitable for all Constrained Coal Customers.
- (c) For clarity, any refund provided to a Constrained Coal Customer under section 4.8(b)(vi)(A) will not exceed the total payments made by the Constrained Coal Customer in excess of Direct Costs in a calendar year.

ARTC therefore proposes to:

- keep a ‘Constrained Coal Customer Account’ for each ‘Constrained Coal Customer’;
- allocate unders or overs to Access Holders’ ‘Constrained Coal Customer Accounts’ based on respective proportions of revenues paid for access to the ‘Constrained Network’;
- bring the closing balance of each ‘Constrained Coal Customer Account’ to zero by refunding or collecting the applicable amount to or from the Access Holder unless mutually agreed otherwise; and
- not refund an Access Holder more than payments made in excess of Direct Cost.

ACCC view

In the March 2010 Draft Decision, the ACCC considered that:

- any rebate resulting from unders and overs should not provide any rebate of Direct Costs; and
- the methodology for calculating any unders and overs amount should be specified.⁶⁸

The ACCC notes that ARTC has included a new section 4.8(c) to provide clarity that an overs rebate will not provide any rebate of Direct Costs to Access Holders, and the ACCC considers that this addresses the concern in the Draft Decision.

The ACCC also notes that ARTC has amended section 4.8(b)(iii) to specify a methodology to determine unders and overs amounts, and likewise the ACCC considers that this addresses the concerns in the Draft Decision.

5.11 ACCC Annual Compliance Assessment

Section 4.9 of the HVAU provides for the ACCC to determine, based on relevant documentation provided by ARTC, whether ARTC has undertaken the roll-forward of the RAB and the RAB Floor Limit in accordance with the undertaking.

Broadly, the ACCC’s view is that section 4.9, together with new Schedule G would allow it to adequately assess whether ARTC has performed the RAB and RAB Floor Limit roll-forwards in accordance with the HVAU, subject to the revisions outlined below.

5.11.1 Information to be provided to the ACCC and timeframe for review

March 2010 Draft Decision

The ACCC identified in the Draft Decision that it was unclear whether ARTC was obliged under section 4.9 of the 2009 HVAU to provide all the documentation necessary for the ACCC to perform an annual compliance assessment.⁶⁹

⁶⁸ ACCC, Draft Decision on HVAU, 5 March 2010, p. 597.

Proposed 2010 HVAU

ARTC has provided under section 4.9(b) of the proposed 2010 HVAU for the documentation in Schedule G to be submitted to the ACCC as part of the annual compliance assessment. ARTC has also provided for indicative timing for the review under Section 5 of Schedule G.

Section 4.9(c) also provides for the ACCC to request further information from ARTC in order to carry out the compliance assessment, and for ARTC to use reasonable endeavours to provide the information to the ACCC as soon as reasonably practicable.

ACCC view

The ACCC considers that the inclusion of Schedule G, and importantly, provision for further information requests, to some extent addresses the ACCC's concern that it may not have access to information needed to undertake the assessment. Sections 1 and 2 of the Schedule, which outline reporting obligations and information to be provided by ARTC respectively, are likely to be appropriate.

The ACCC notes that ARTC has committed to use reasonable endeavours to provide information as soon as reasonably practicable in both section 4.9(c) and section 3 of Schedule G. The ACCC considers that this is likely to be appropriate, as ARTC should have an incentive to provide information to the ACCC promptly. That is, section 4.9(d)(v) provides that ARTC will revise the RAB and manage Constrained Coal Customer accounts in accordance with the ACCC's determination of the roll-forward.

While these aspects are likely to be appropriate, the ACCC considers that several provisions in the remaining sections of Schedule G are unlikely to be appropriate.

Section 3: Further information requests by the ACCC

Section 3 of Schedule G provides that:

3. Further information requests by the ACCC

- (a) If the ACCC requests further information from ARTC in order to carry out the compliance assessment under section 4.9, ARTC will use reasonable endeavours to provide the information sought by the ACCC as soon as practicable.
- (b) If the ACCC receives submissions from stakeholders which indicate noncompliance by ARTC, the ACCC will provide ARTC with a reasonable opportunity to respond to such comments.
- (c) If the ACCC finds that ARTC had not complied with the annual roll forward of the RAB or RAB Floor Limit or the ceiling test, there may be reasonable grounds to further consult with stakeholders in order for the ACCC to determine a complying value for the RAB or RAB Floor Limit, Access revenue or Full Economic Costs.
- (d) Further, if the ACCC decides to engage an expert consultant to assist with certain aspects of the annual compliance assessment, the ACCC

⁶⁹ ACCC, Draft Decision on HVAU, 5 March 2010, p. 597.

may request reasonable additional information from ARTC. Upon receipt of such a request, ARTC will use reasonable endeavours to provide the information to the ACCC as soon as practicable, subject to the ACCC demonstrating the effectiveness and appropriateness of any confidentiality arrangement between the ACCC and the expert consultant, and ARTC being satisfied with those arrangements.

Section 3(b) appears to require the ACCC to provide all submissions indicating non-compliance to ARTC, even those made in confidence. The ACCC considers that the section is therefore inappropriate and unnecessary, as the ACCC will determine how it will conduct the compliance assessment, and will always perform its functions in accordance with the principles of procedural fairness.

Similarly in relation to section 3(c), it is not appropriate for the proposed 2010 HVAU to fetter the ACCC's discretion in relation to performance of its functions. It will be for the ACCC to determine whether further consultation is necessary in light of the relevant circumstances.

The ACCC considers, however, that section 3(d) is not appropriate and that the words after "subject to" should be deleted. Firstly, the *Trade Practices Act* explicitly provides for the ACCC to engage consultants to give advice to, and perform services for, the Commission.⁷⁰ Moreover, the ACCC's external consultants, like its internal staff, are subject to a number of general prohibitions on making unauthorised disclosures of information.⁷¹ In any event, the ACCC will always treat confidential information in accordance with relevant legal requirements and in accordance with the *ACCC–AER Policy on the collection, use and disclosure of information*,⁷² as updated from time to time. Therefore, it is inappropriate for ARTC's compliance with an information request to be subject to 'the ACCC demonstrating the effectiveness and appropriateness of any confidentiality arrangement between the ACCC and the expert consultant, and ARTC being satisfied with those arrangements.'

Section: 5 Indicative timetable for annual review

Section 5 of Schedule G states:

5. Indicative timetable for annual review

- (a) Ideally, the annual compliance assessment should be completed within the calendar year following the year which is the subject of the review. Table 1 below is an indicative timetable that sets out the key steps in the annual compliance assessment and assigns a timeframe which the ACCC and ARTC will endeavour to adhere to.
- (b) Under some circumstances, adherence to the timetable will not be possible. For instance, it may be necessary to engage the assistance of independent experts to assist the ACCC in making its determinations. If such circumstances arise, the ACCC will advise ARTC and

⁷⁰ *Trade Practices Act 1974* (Cth), section 27A.

⁷¹ For example, s. 70 of the *Crimes Act 1914* (Cwlth); s. 13 of the *Public Service Act 1999* (Cwlth); regulation no. 2.1, of the *Public Service Regulations 1999* (Cwlth); *Privacy Act 1988* (Cwlth); and ss. 44AAF, 95ZP, 10.89, 155AAA and 155AA of the *Trade Practices Act*.

⁷² ACCC, *ACCC–AER information policy: the collection, use and disclosure of information*, 23 October 2008, <http://www.accc.gov.au/content/index.phtml/itemId/846791>.

stakeholders. ARTC may raise any circumstances that it believes may affect adherence in order to minimise any delays.

- (c) Where ARTC is able to provide conclusive evidence to the satisfaction of the ACCC that the RCG has endorsed the values contained in ARTC's submission to the ACCC for the Closing RAB and RAB Floor Limit, and that all relevant Access Holders have endorsed the total unders or overs amount, and that ARTC has complied in full with the annual RAB and RAB Floor Limit roll forward and ceiling test, this may obviate the need for the ACCC to conduct its own consultation and may shorten the actual length of the annual compliance assessment.

The section goes on to set out the proposed indicative timetable for the assessment.

The ACCC notes that, in some circumstances the annual compliance assessment could be completed within less than the timeframe contemplated by ARTC, and in other circumstances it may take longer, depending on the nature of the task. The ACCC therefore considers that section 5(a) of Schedule G should specify that the proposed timeframe is indicative only, and may be subject to change in light of the circumstances. Consequently, the ACCC also considers that section 5(b) should be removed, as it currently only contemplates where the assessment would take longer than anticipated, and that the section would be redundant in light of the changes to section 5(a).

The ACCC also considers that section 5(c) is inappropriate and should be deleted. As stated above, it is inappropriate for the undertaking to seek to fetter the ACCC's discretion as to how it may conduct the compliance assessment, which section 5(c) appears to do. As stated, it is possible that the compliance assessment may be undertaken in a shorter timeframe than that contemplated by ARTC, however this will be a matter to be determined by the ACCC in light of the relevant circumstances.

5.11.2 ACCC consideration of stakeholder submissions

March 2010 Draft Decision

In the Draft Decision, the ACCC considered that it was not appropriate to explicitly prevent the ACCC from having regard to submissions from interested parties in its assessment of ARTC's compliance with the Undertaking.⁷³

Proposed HVAU

ARTC has revised provisions in the HVAU that previously constrained the information the ACCC was permitted to have regard to in assessing ARTC's compliance with the Undertaking.

The ACCC may have regard to submissions of relevant industry participants in determining whether ARTC has complied with provisions of section 4.3 in rolling forward the RAB or RAB Floor Limit. However, where Capital Expenditure has been endorsed by the RCG, the ACCC will not consider whether that Capital Expenditure is Prudent.

⁷³ ACCC, Draft Decision on HVAU, 5 March 2010, p. 598.

ACCC View

The ACCC considers that the revisions remove the restriction that the provision previously placed on the ACCC, which addresses the concern expressed in the Draft Decision.

The ACCC notes that the provision prevents the ACCC from considering whether capital expenditure is prudent if it has been endorsed by the RCG. The ACCC does not consider that it would be appropriate for it to reconsider whether capital expenditure is prudent if it has been endorsed by the RCG, when properly constituted, provided that the RCG process provides for a suitably certain and transparent voting mechanism. This is discussed further in the **Additional Capacity and Investment** chapter.

5.11.3 Efficiency of operating expenditure and costs

Under the RAB roll-forward in section 4.3(a), ARTC includes actual operating expenditure incurred into the RAB. ‘Out-turn Opex_{t-1}’ is defined in section 4.3(a) as the total operating expenditure incurred by ARTC in the preceding calendar year, on an industry efficient basis, determined in accordance with section 4.4(b).

Further, Economic Costs determined under section 4.4(a) are also to be incurred on an efficient basis under section 4.4(b).

Therefore, regardless of whether the costs or operating expenditure is incurred under the standard BBM or loss capitalisation, it is required to be incurred on an efficient basis.

March 2010 Draft Decision

The ACCC considered that for the 2009 HVAU to be appropriate, it would need to:

- incorporate an incentive for ARTC to incur efficient operational expenditure;⁷⁴
- either define the meaning of ‘industry efficient basis’, or utilise a commonly used test for efficient operating expenditure;⁷⁵ and
- provide for the ACCC to assess, through its annual compliance assessment, whether operational expenditure has been efficiently incurred, coupled with suitable compliance powers.⁷⁶

Proposed HVAU

In response to the Draft Decision ARTC has inserted section 4.4(b) into the definition of Economic Cost in proposed 2010 HVAU:

4.4 Economic cost

...

⁷⁴ ACCC, Draft Decision on HVAU, 5 March 2010, p. 597.

⁷⁵ ACCC, Draft Decision on HVAU, 5 March 2010, p. 597.

⁷⁶ ACCC, Draft Decision on HVAU, 5 March 2010, p. 597.

- (b) All costs described in sub-sections (a)(i) and (iv), all applicable costs described in sub-section (a)(vii), and all operating expenditure in section 4.3(a) are to be assessed on an efficient basis, where efficient costs will reflect the costs incurred by a prudent service provider, acting efficiently, in accordance with accepted good rail infrastructure practice, to achieve lowest sustainable cost of delivering rail infrastructure services, in the context of:
 - (i) the Hunter Valley Coal Chain where a key objective in maintenance planning is to maximise coal chain throughput and reliability;
 - (ii) ARTC's obligations to maintain the Network having regard to the terms of applicable Access Agreements and Access Holder Agreements existing at the time;
 - (iii) ARTC's obligations under the law, applicable legislation (including regulations) or the NSW Lease; and
 - (iv) broader benefits that may arise from delivery through alliance or internally.

All costs are to be assessed on a stand alone basis having regard to the factors identified in sub-section (b).

ACCC view

The pricing principles in section 44ZZCA of the Act provide that access pricing regimes should provide incentives to reduce costs or otherwise improve productivity, while an object of Part IIIA is to promote the economically efficient operation of, use of and investment in infrastructure.

The ACCC is concerned that, if the proposed 2010 HVAU allows ARTC to incur inefficiently incurred operating expenditure, ARTC may not be incentivised to reduce cost, nor may the HVAU promote the efficient operation of the Hunter Valley rail network.

As discussed in the **Performance and Accountability** chapter, ARTC is yet to propose performance incentives for inclusion in the HVAU. The ACCC considers in that chapter that the absence of such incentives may not make the HVAU inappropriate to accept, provided there is a clear process for their inclusion at a later date, and provided the HVAU is otherwise appropriate.

The ACCC considers that, in the interim, revisions to the proposed 2010 HVAU are necessary in order for ARTC to be appropriately incentivised and for the HVAU to appropriately recognise the matters in the Act. These revisions will also ensure that the proposed 2010 HVAU addresses the concerns expressed by the ACCC in the March 2010 Draft Decision.

First, the ACCC considers that the concept of 'efficient' in section 4.4(b) is unlikely to be appropriate as a benchmark by which 'efficiency' is to be assessed. The ACCC considers that it is unclear what 'good rail infrastructure practice' entails and could be interpreted as having different meanings by different parties as it is undefined; consequently, this phrase should be removed. Further the ACCC notes that section 4.4(b)(iv) introduces a vague concept of 'broader benefits that may arise from delivery through alliance or internally.' The ACCC considers that this phrase is likewise vague and section 4.4(b)(iv) should be deleted.

Second, the ACCC reiterates the view from the Draft Decision that appropriate compliance powers be provided to the ACCC for the purposes of the annual compliance assessment. The ACCC considers that under annual compliance assessment it should have *explicit* powers to disallow inefficiently incurred operational expenditure and costs with reference to section 4.4(b).⁷⁷ This provision should be accompanied by a mechanism to return any excessive operating expenditure and costs to Network users, via the ‘unders and overs’ mechanism of the financial model or reduction of charges in the next period.

The ACCC considers that revisions to section 4.4(b) are necessary to ensure ARTC does not face incentives to inefficiently incur operating expenditure or costs, and to ensure that the HVAU operates consistently with the objects of Part IIIA. The ACCC recognises that, should ARTC put forward an appropriate performance incentive proposal, it may be appropriate to reconsider the appropriateness of these revisions.

For consistency, the ACCC requires the removal of the word ‘industry’ in the definition of Out-turn opex in section 4.3(a)(ii).

5.12 Rate of return (WACC)

5.12.1 Background

A firm’s weighted average cost of capital (WACC) is the value weighted risk-adjusted rate of return required by the debt and equity capital providers to the firm. It reflects the opportunity cost of capital; that is, the return investors would expect to earn by investing in the next best investment or equivalent risk.

The WACC is the critical input into the return on capital calculation for regulated firms. Under the weighted average cost of capital approach, the regulator is required to come to a decision about the appropriate expected rate of return required by investors to induce them to hold the securities of the firm. This is important as the allowed WACC facilitates the financing of a firm’s operations in capital markets. The WACC is also an essential input into a regulated firm’s revenue allowance which in turn sets regulated prices. Determination of the WACC typically aims to ensure that a firm receives a fair return on the capital invested in its regulated assets as determined by financial markets. This regulatory WACC should ensure that investment is efficient if regulated firms invest with rational expectations. An obvious and important implication is that the regulated WACC should be set on a forward-looking basis.

In general, the cost of capital is calculated as a ‘nominal vanilla’ WACC, in accordance with the following formula:

$$WACC = k_e \frac{E}{V} + k_d \frac{D}{V}$$

where:

k_e = the expected rate of return on equity or cost of equity

⁷⁷ ACCC, Draft Decision on HVAU, 5 March 2010, p. 597.

k_d	=	the expected rate of return on debt or cost of debt
E/V	=	the market value of equity as a proportion of the market value of equity and debt, which is $1 - D/V$
D/V	=	the market value of debt as a proportion of the market value of equity and debt

The cost of equity is to be determined using the CAPM, calculated in accordance with the following formula:

$$k_e = r_f + \beta_e \times MRP$$

where:

r_f	=	the nominal risk free rate of return
β_e	=	the equity beta
MRP	=	the expected market risk premium

The CAPM specifies a relationship between the expected return of an individual risky asset or business and the level of systematic (or non-diversifiable) risk. The higher (lower) the level of non-diversifiable risk the higher (lower) the required or expected rate of return. The CAPM provides no compensation for bearing non-systematic (or diversifiable) risk, on the assumption that investors can eliminate this risk costlessly by holding a well-diversified portfolio of assets. The level of systematic (or non-diversifiable) risk borne by an equity holder of a particular business is the product of the market risk premium (MRP) and the equity beta. The MRP represents the additional return that investors require and expect to earn for investing in a well diversified portfolio of assets, as compared with investing in a risk free asset. That is, the expected MRP is the premium that investors require over the risk free rate in order to be induced to invest in the market portfolio. The equity beta is a measure of the sensitivity of the return of a particular asset or business to the return on the market portfolio. An equity beta of less than one indicates that the asset has low systematic risk relative to the market (the market portfolio beta being equal to one). Conversely, an equity beta of more than one indicates the asset has a higher systematic risk relative to the market.

The expected cost of debt is to be calculated in accordance with the following formula:

$$k_d = r_f + DRP$$

where:

r_f	=	the nominal risk free rate of return
DRP	=	the debt risk premium

The expected cost of debt is determined by the benchmark credit rating and the corresponding observed debt risk premium (DRP) above the risk free rate.

5.12.2 The proposed 2010 HVAU

Section 4.7 of the proposed 2010 HVAU states:

- (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.
- (b) The Rate of Return will be reviewed by ARTC five years from the Commencement Date and a revised Rate of Return will be proposed for ACCC approval.

Section 4.7(a) therefore provides for the calculation of the Rate of Return by reference to the WACC, and section 4.7(b) provides for a review of the Rate of Return after five years from the Commencement Date.

ARTC's proposed WACC is set out in Appendix 3 to the 2010 HVAU Explanatory Guide. The relevant parameters are summarised in Table 5.1 below.

5.12.3 March 2010 Draft Decision and responses

In the March 2010 Draft Decision, the ACCC considered that the ARTC's proposed real pre-tax rate of return range of between 9.26 per cent and 10.97 per cent was too high, and well above a return commensurate with the commercial and regulatory risks associated with ARTC's current and likely future investments in the Hunter Valley rail network.

The ACCC considered instead that a real pre-tax rate of return of 7 per cent was more likely to be appropriate and commensurate with the relevant risks. In coming to this view, the ACCC considered the key features of the 2009 HVAU that limited the risk facing ARTC (which included the loss capitalisation, the revenue cap pricing regime, the use of long term take or pay contracts for coal producers, and the relatively short asset lives proposed for regulatory depreciation purposes).

The ACCC also took into account the effect of ARTC changing its proposed pricing regime in accordance with the ACCC's preliminary views on aspects of that regime, recognising that such changes may have resulted in ARTC bearing slightly greater risk. Specific amendments the ACCC recommended to the proposed pricing regime included:

- addressing price uncertainty facing coal access seekers in the IAHA;⁷⁸
- addressing price uncertainty facing non-coal access seekers;⁷⁹
- a limitation on how greatly the final Indicative Access Charges can increase relative to any published Interim Indicative Access Charges;⁸⁰
- addressing TOP and Non TOP charge uncertainty facing access seekers;⁸¹
- capping maximum annual TOP and Non-TOP charge increases over the life of any IAHA;⁸² and
- providing clarity and transparency on the determination of Network Path Capability and Tolerance Cap.⁸³

ARTC response

In response to the March 2010 Draft Decision, ARTC revised aspects of the pricing regime to accommodate some of the ACCC's concerns, and these matters are discussed in this chapter and the **Pricing** chapter.

In submitting the proposed 2010 HVAU, ARTC revised its WACC proposal, as summarised in table 5.1 below. ARTC expressed concern with the rate of return proposed by the ACCC in the Draft Decision, stating that ARTC is:

...in the process of investing heavily in the Hunter Valley Network and has a large future investment program. ...In the Draft Decision, the ACCC has proposed a rate of return that is 225 basis points below the low end of the range originally proposed by ARTC. ARTC estimates that the low end of the WACC range it originally proposed would be 9.75% (real-pre-tax) if measured on the same basis now. ARTC has now reduced its proposal above by around 60 basis points from the low end of its original proposal. Had the ACCC's proposal in the Draft Decision been measured now (using the AER precedent for gamma and debt risk premium), ARTC estimates that the real, pre-tax return would lie around 7.73%. This is still nearly 150 basis points below ARTC's revised proposal....

The magnitude of the gap between the ACCC's position in the Draft Decision and ARTC's reduced proposal now made is still of great concern to ARTC, particularly with respect to its ability to obtain financing to undertake the substantial investment program expected by the industry in order to meet expected future demand.

ARTC recognises that the revised Hunter Valley Access Undertaking now incorporates, at the industry's request, greater certainty and prescription around the ability of an applicant to fund an investment itself. Nevertheless, it

⁷⁸ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 477-490.

⁷⁹ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 477-490.

⁸⁰ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 667-670.

⁸¹ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 660-670.

⁸² ACCC, Draft Decision on HVAU, 5 March 2010, pp. 660-670.

⁸³ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 670-678.

is ARTC's strong expectation that it will be the party that the industry expects to fund, at least, the substantial majority of planned investment program...⁸⁴

Submissions in relation to the WACC

The ACCC received a small number of submissions from interested parties on the WACC during the consultation on the proposed 2010 HVAU.

Xstrata concurred with the ACCC's view in the Draft Decision that ARTC's proposed WACC was too high. Xstrata submitted that the 2010 HVAU and IAHA do not expose ARTC to commercial or regulatory risks that justify a WACC in the magnitude sought by ARTC.⁸⁵

Coal & Allied also submitted that ARTC is exposed to very little risk, due to the following mitigating factors:

- (a) Investment risk: All capital expenditure is vetted by either the RCG or the ACCC. Furthermore, ARTC retains the discretion as to whether it will fund an expansion, and prudent capital expenditure is reflected in the RAB.
- (b) Volume risk: In the constrained Network (Pricing Zones 1 and Zone 2), the revenue cap applies such that ARTC is not exposed to volume risk, unless volumes drop to such a degree that prices cannot be raised to the remaining customers without threatening their viability. In the unconstrained Network (Pricing Zone 3), a loss capitalisation model applies, allowing ARTC to recover revenue in future periods. Thus, ARTC's exposure to volume risk is minimal.
- (c) Asset stranding risk: Access Holders are already exposed to large long-term take or pay commitments at the port terminals, thus reducing ARTC's risk of asset stranding. C&A recognises the argument that the port terminals may themselves be subject to stranding risk, thus reducing the "comfort" that the rail owner might take from the existing port terminal contracts. However, C&A believes that this argument fails to recognise that both of the port terminals are producer-owned, making it even more difficult for the users of those port terminals to "strand" the assets, as they will likely have ongoing financial commitments in any event. By the end of 2010, the commitments at the port terminals total around 200Mt on 10 year rolling contracts, which is significantly more capacity than can be currently delivered by the track. Moreover, under section 3 of the Proposed HVAU, ARTC can refuse to provide Coal Access Rights to an Applicant who cannot demonstrate Network Exit Capability, further mitigating ARTC's risk of stranding.
- (d) Performance risk: Under the Proposed HVAU, ARTC carries minimal liability for underperformance. As outlined above in section 2, the only recourse for ARTC not delivering contracted paths remains the True-Up test and Annual Reconciliation process, where a rebate of TOP charges

⁸⁴ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, Appendix 3, pp. 28-29.

⁸⁵ Xstrata, *Xstrata Coal Pty Ltd's response to the Australian Competition and Consumer Commission in relation to the ACCC Consultation Paper in relation to the Australian Rail Track Corporation's proposed Hunter Valley Rail Network Access Undertaking dated 16 September 2010*, 25 October 2010, p. 9.

may be applicable. Furthermore, the current structure and mechanics of the True-Up Test offer little assurance that rebates will actually be paid.⁸⁶

Consequently, Coal & Allied considered that the ACCC's WACC recommendation is more appropriate than ARTC's proposal.⁸⁷

5.12.4 Overview of the ACCC's analysis

Relevant principles

The ACCC is assessing ARTC's proposed 2010 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.

The ACCC considers that, in assessing the proposed WACC under the 2010 HVAU, the most pertinent pricing principle is that set out in section 44ZZCA(a)(ii), that is, that regulated access prices should include a return on investment commensurate with the regulatory and commercial risks involved. This principle aligns with the comments above in the background section that a firm's WACC is the return investors would expect to earn by investing in the next best investment of equivalent risk.

The ACCC has, therefore, taken this principle into account in the assessment of ARTC's proposed rate of return, both overall and (where possible and relevant) for individual WACC parameters, and sought to determine whether ARTC's proposed return is commensurate with the regulatory and commercial risks involved in the present context.

Analytical constraints in relation to certain WACC parameters

The ACCC recognises that there are presently some limitations to the ability of the ACCC to form definitive views on particular WACC parameters. This arises due to recent statements by the Australian Competition Tribunal calling into question the methodologies and underlying data used to determine the value of gamma and the debt risk premium in certain decisions of the Australian Energy Regulator (AER).

ARTC has sought to recognise these considerations in the proposed 2010 HVAU, by including sections 4.7(c) to (e). These sections state:

- (c) If ARTC considers that the methodology for determining the value of either or both the debt risk premium or the imputation credits (gamma) applied by the ACCC in approving this Undertaking is inconsistent with the Australian Competition Tribunal's decisions or the Federal Court's decisions in respect of the Appeal Matters, then ARTC has the discretion to review the Rate of Return and propose a revised Rate of Return for ACCC approval based on the new or revised methodology for determining either or both the debt risk premium and gamma arising from those decisions or where the matter is remitted for reconsideration, any subsequent determination by the original decision

⁸⁶ Coal and Allied, *Submission in Response to the ACCC's Consultation Paper in relation to the Australian Rail Track Corporation's Proposed Hunter Valley Rail Network Access Undertaking*, 25 October 2010, pp. 87-88.

⁸⁷ Coal and Allied, *Submission in Response to ACCC Consultation Paper*, 25 October 2010, pp. 88.

maker. To avoid doubt, ARTC's review of the Rate of Return must otherwise adopt all the other WACC parameters previously accepted by the ACCC.

- (d) If a revised Rate of Return is approved by the ACCC under **section 4.7(c)**, it will be effective from the Commencement Date and apply retrospectively and any adjustments will be dealt with in a subsequent determination by the ACCC under **section 4.9** and reconciled through unders and overs accounting as provided under **section 4.8**.
- (e) Under this **section 4.7**, Appeal Matters means the following matters before the Australian Competition Tribunal pending as at the Commencement Date:
 - (i) *Application by ActewAGL Distribution Limited (ABN 76 670 568 688), ACT 1 of 2010;*
 - (ii) *Application by Energex Limited (ACN 078 849 055), ACT 2 of 2010;*
 - (iii) *Application by Ergon Energy Corporation Limited (ACN 087 646 062), ACT 3 of 2010;*
 - (iv) *Application by ETSA Utilities (ABN 13 332 330 749), ACT no 4 of 2010;*
 - (v) *Application by Jemena Gas Networks (NSW) Ltd (ABN 87 003 004 322), ACT 5 of 2010;*
 - (vi) *Energex Limited ACN 078 849 055 v The Australian Energy Regulator, Federal Court of Australia File: QUD191/2010; and*
 - (vii) *Ergon Energy Corporation Limited ACN 087 646 062 v Australian Energy Regulator, Federal Court of Australia File: QUD194/2010.*

The ACCC does not consider that ARTC's proposed solution is, however, appropriate, as it fails to ensure sufficient certainty in relation to a critical aspect of the undertaking's proposed pricing regime. Further, the proposed solution allows ARTC discretion to decide whether it will resubmit a revised rate of return, which the ACCC assumes ARTC would only do if the Australian Competition Tribunal (or the Federal Court) made a determination ARTC thought favourable.

The ACCC also considers that sections 4.7(c) to (e) are unnecessary, as the current constraints do not preclude an assessment of the proposed overall rate of return consistent with the pricing principle outlined above.

Proposed approach

As an alternative to ARTC's proposal, the ACCC considers that it may take a conservative and pragmatic approach to the assessment of certain parameters (in light of the current constraints), but nonetheless give regard to the over-riding principle that the rate of return should reflect the relevant regulatory and commercial risks.

The ACCC has in its assessment of the proposed 2010 HVAU emphasised the need for certainty, which it recognises is in the interests of ARTC and access seekers. In particular, the ACCC here recognises that postponing the assessment of individual

WACC parameters pending the outcome of the Australian Competition Tribunal proceedings may not provide appropriate certainty, at least in the short to medium term, and may delay ultimate resolution of the assessment of the HVAU. This is unlikely to reflect the interests of ARTC and access seekers, who would bear ongoing uncertainty in relation to an important regulatory instrument.

Consequently the ACCC considers that in light of the particular circumstances, and having regard to the pricing principles, the interests of access seekers, the legitimate business interests of ARTC and the importance of certainty, it is possible to assess the overall proposed rate of return taking into account a pragmatic and conservative approach on certain WACC parameters.

The ACCC recognises that this approach is very much informed by the particular circumstances at this point in time, and that section 44ZZA(3) allows the ACCC to have regard to a range of interests in assessing an access undertaking. The ACCC recognises that it may not be possible to adopt this approach in other circumstances, particularly where there is a different regulatory regime.

The ACCC has examined each of the proposed WACC input parameters and, where relevant their calculation methodology, in accordance with the approach outlined above. The ACCC has also had regard to changes to the proposed 2010 HVAU ARTC has made to respond to concerns expressed by the ACCC in the Draft Decision. Finally, the ACCC has also taken into account the recommended revisions to the proposed 2010 HVAU outlined in this and other chapters that the ACCC considers are necessary to make the undertaking appropriate to accept.

Summary of ACCC views

In summary, the ACCC considers that the following parameter estimates and/or methodologies are appropriate:

- Risk free rate: ARTC has now excluded the ‘convenience yield’ adjustment from the calculation of the risk free rate in light of the ACCC’s preliminary view in the March 2010 Draft Decision.
- Imputation factor (gamma): For consistency with ARTC’s Interstate Network gamma, ARTC proposes the use of a gamma of 0.5.
- Credit rating: ARTC’s credit rating of BBB is appropriate for the level of default risk that ARTC faces.
- Capital structure and gearing: The ACCC considers that a gearing ratio of 52.5 per cent debt to 47.5 per cent equity is likely to be appropriate given ARTC’s operations.
- Debt issuance costs: ARTC has revised their proposal and now considers that debt issuance costs of 9.5 per cent are appropriate, in light of the ACCC’s preliminary view in the March 2010 Draft Decision.

- Equity issuance costs: ARTC now appropriately proposes equity issuance costs of 3 per cent in light of the ACCC's preliminary view in the March 2010 Draft Decision.

In summary, the ACCC's preliminary view is that the following proposed WACC parameter estimates and/or methodologies are unlikely to be appropriate:

- Debt risk premium: while a proxy bond with a BBB credit rating is likely to be appropriate, the linear interpolation methodology proposed by ARTC lacks theoretical and empirical robustness and is not appropriate.
- Asset Beta: ARTC is able to transfer a significant proportion of demand risk to the access seekers through its use of TOP contracts and unders and overs accounting. There are also reasonable prospects that demand for export coal should be stable in the short to medium term. Therefore, ARTC's level of risk does not support an asset beta of 0.55, which overcompensates ARTC.
- Market risk premium: a MRP of 6.5 per cent is unlikely to be appropriate given the significant improvements in the Australian market conditions since early 2009. An MRP of 6 per cent is more likely to be appropriate.

The ACCC therefore considers that the overall return proposed by ARTC is inappropriate as it overcompensates ARTC for the risk that it faces. Instead, the ACCC considers that a real pre-tax WACC of **8.57** per cent is more likely to reflect a rate of return consistent with current market conditions and commensurate with the commercial and regulatory risk borne by ARTC.

The following table summarises ARTC's proposed WACC parameters and overall rate of return, and the ACCC's view on the same, as expressed in the March 2010 Draft Decision and in this Paper.

Table 5.1 - Summary and ACCC Position Paper December 2010 on WACC parameters as at 24 November 2010

Parameters	ARTC 2009 Proposal		ACCC draft decision March 2010	ARTC 2010 Proposal	ACCC position paper December 2010
	Lower Bound	Upper Bound			
Nominal risk free rate	4.95%	4.95%	4.35% ⁸⁸	4.97% ⁸⁹	5.36% ⁹⁰
Inflation	2.50%	2.50%	2.50%	2.50%	2.50%
Market risk premium	6.00%	7.00%	6.00%	6.50%	6.00%
Debt margin	3.36%	3.36%	4.05%	4.33%	4.33% ⁹¹
Debt raising costs	0.125%	0.125%	0.095%	0.095%	0.095%
Debt to total assets	50%	55%	50%	52.5%	52.5%
Equity to total assets	50%	45%	50%	47.5%	47.5%
Debt to equity	1.00	1.22	1.00	1.11	1.11
Gamma	0	0	65%	50%	50%
Tax rate	30%	30%	30%	30%	30%
Asset beta	0.5	0.6	0.50	0.55	0.45
Debt beta	0	0	0	0	0
Equity beta	0.99	1.32	1.00	1.15	0.94
Cost of equity (nominal post-tax)	10.88%	14.16%	10.33%	12.45%	11.00%
Cost of debt (nominal post-tax)	8.44%	8.44%	7.81%	9.40%	9.79%
Nominal post-tax WACC	9.66%	11.01%	9.07%	10.84%	10.36%
Nominal pre-tax WACC	11.99%	13.74%	9.67%	11.89%	11.29%
Real pre-tax WACC	9.26%	10.97%	7.00%	9.16%	8.57%

5.12.5 Risk Free Rate

In the March 2010 Draft Decision, the ACCC considered that ARTC's use of Australian Commonwealth Government Securities (CGS) as a proxy for the risk free

⁸⁸ Based on 20 day average for the period ending 31 March 2009.

⁸⁹ Based on 20 day average for the period ending 31 August 2010.

⁹⁰ Based on 20 day average for the period ending 23 November 2010. To be updated closer to the final decision.

⁹¹ The DRP was estimated using the approach discussed in section 5.12.9 below.

rate in Australia was appropriate because these securities are likely to be the closest instrument to a risk free asset observable in the Australian economy. In addition, CGS is the most commonly used proxy for the risk free rate both by regulators and the broader financial community. The ACCC considered it appropriate for ARTC to average the 10 year CGS rate over the period of 20 trading days as close to the commencement date of the 2010 HVAU as possible.⁹²

The ACCC considered however, that ARTC's proposed methodology of including a 'convenience yield' adjustment to the CGS rate was not appropriate. The ACCC considered that such an ad-hoc adjustment to the CGS was inconsistent with a sustainable, long term method to estimate the cost of capital for regulatory firms, created regulatory uncertainty, and was likely to deter efficient investment in and use of regulated infrastructure. The ACCC also noted that market conditions had improved significantly since the ARTC/Synergies review, which proposed the methodology, was submitted in April 2009.⁹³

In response to the ACCC's views, ARTC has now excluded the 'convenience yield' adjustment from the calculation of the risk free rate.⁹⁴ The ACCC considers that ARTC's revised methodology for estimating the risk free rate is likely to be appropriate.

5.12.6 Asset beta

March 2010 Draft Decision

In the March 2010 Draft Decision, the ACCC considered that it was not appropriate for ARTC to use an asset beta of 0.6. Instead, the ACCC was of the view that an appropriate asset beta for the Hunter Valley rail network would be in the range between 0.40 and 0.50.⁹⁵ The ACCC took the view that the highly conservative upper boundary of 0.5 would account for the possibility of any residual stranding risk that may exist in relation to the Hunter Valley rail network.⁹⁶ The ACCC's view was informed by regulatory decisions of the Queensland Competition Authority (QCA) in relation to QR's coal rail network, and of the Independent Pricing and Regulatory Tribunal (IPART) in relation to the Hunter Valley rail network.

Proposed 2010 HVAU and ARTC submissions

In response to the ACCC's Draft Decision, ARTC (and its consultant Synergies) took the view that the proposed asset beta by the ACCC did not adequately reflect the risks borne by ARTC. In particular, ARTC highlighted long term risks associated with its planned investment program. In summary, ARTC argued:

- Investors take a long term view in making investment decisions. The ACCC's demand and pricing considerations appear to be short, and have not addressed the potential impact of climate change on long-term outlook for coal. ARTC cited New South Wales Minerals Council (NSWMC) financial modelling showing that

⁹² ACCC, Draft Decision on HVAU, 5 March 2010, p. 536.

⁹³ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 535-538.

⁹⁴ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, Appendix 3, p. 26.

⁹⁵ ACCC, Draft Decision on HVAU, 5 March 2010, p. 562.

⁹⁶ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 562-563.

if an emissions trading scheme was introduced, 11 mines will close in NSW before 2015.

- Investors who make complementary investments also have concerns regarding the stranding risk associated with their investments. Investors expect higher returns on their investment in other unregulated parts of the coal supply chain, and this would have been reflected in commercial arrangements.
- Although the capital expenditure approval process ensures investment is incorporated into the RAB, stranding risk relates to ability to recover investment in the long run. ARTC is not guaranteed recovery unless coal volumes and access pricing are such that generated revenue is sufficient.
- Long term TOP contracts only guarantee the recovery of costs associated with assets in existence at the time of contract execution, and do not guarantee that volumes underpinning future investment will materialise. Therefore future revenues are exposed to the market during and beyond the term of the contracts and the regulatory period.
- The loss capitalisation approach addresses the impact of truncation of returns, which is a regulatory risk. It does not influence long term coal demand and pricing and so does not reduce stranding risk.
- The lower asset lives will reduce stranding risk only to the extent that they are conservative, but this is not clear to ARTC. The asset lives result from the higher forecasts of volume throughput that currently exists compared to those underpinning historical estimates.⁹⁷

In conclusion, ARTC submitted that an asset beta of 0.5 is not conservative, and even if it were, a gamma value of 0.65, as proposed by the ACCC in the Draft Decision, eliminated any conservatism.⁹⁸

For the purposes of the proposed 2010 HVAU, ARTC has proposed an asset beta of 0.55.⁹⁹

ACCC view

The ACCC has considered a range of factors in assessing the appropriate asset beta for the purposes of the proposed 2010 HVAU:

- the likely risks facing ARTC;
- factors that mitigate those risks, including features of the proposed 2010 HVAU;
- companies that may be relevant comparators to ARTC;
- comparable regulatory decisions.

⁹⁷ ARTC, *Response to the ACCC Draft Decision on the Hunter Valley Access Undertaking*, 31 March 2010, pp. 101 – 103.

⁹⁸ ARTC, *Response to the ACCC Draft Decision*, 31 March 2010, p. 104.

⁹⁹ ARTC, *2010 HVAU Explanatory Guide*, 7 September 2010, Appendix 3, p. 27.

Long term risks facing ARTC

The Hunter Valley rail network is predominantly used for the transportation of coal to the Port of Newcastle for export. The ACCC recognises that demand for access to the network by coal producers is to an extent derived demand referable to the overall demand for Australian coal exports.

ARTC has submitted that it faces long-term risks, especially stranding risk, if coal volumes do not materialise to provide requisite traffic on the network. That is, ARTC considers that access prices will not be sufficient to recover costs if coal demand decreases under unforeseeable circumstances.¹⁰⁰

The ACCC notes that, since its Draft Decision in March 2010, Australian thermal coal prices have risen steadily. As at 8 January 2010, thermal coal prices were approximately \$89.13 USD, and as at 5 November 2010, thermal coal prices were approximately \$104.88 USD.¹⁰¹ The ACCC considers that the steady increase in coal prices reflects ongoing strong demand from Asian countries as outlined below.¹⁰² Further, coal continues to be a major source of fuel for power plants and as an important raw material in the steelmaking industry.¹⁰³

With regards to the medium and long term, demand for coal exports from Australia is expected to continue as a result of increasing demand from developing economies. Coal-fired technology is the preferred energy production method due to low cost, reliable supply and a wide spread of producers. ABARE in its September 2010 Australian Commodities report signalled that:

World thermal coal trade is forecast to be supported by strong demand in Asia, particularly in China and India. The scheduled expansion of coal-fired electricity generation capacity in China and India is expected to result in demand for thermal coal increasing at a faster rate than their respective domestic production, leading to an increased reliance on imports. Reflecting assumed subdued economic growth in Europe, demand in the Atlantic market is forecast to recover only gradually during 2011.¹⁰⁴

ABARE further signalled that Australian thermal coal exports will continue to grow in the medium term:

In 2010-11, Australia's thermal coal production is forecast to increase by 15 per cent to 229 million tonnes. A number of coal projects are scheduled to commence production during the year, including Yancoal's Moolarben Stage 1, Whitehaven's Narrabi coal project and Syntech Resources' Cameby Downs. Expanded port capacity in New South Wales is also expected to encourage a number of coal producers to increase capacity utilisation at existing mines.¹⁰⁵

In its consultant report responding to the Draft Decision, Synergies (on behalf of ARTC) commented that the ACCC had not taken into account the impact of possible

¹⁰⁰ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, Appendix 3, pp. 16-17.

¹⁰¹ Global Coal Newcastle index, <http://www.globalcoal.com>.

¹⁰² ABARE, Australian Commodities, Vol 17 no 3, September quarter 2010, pp. 546-552.

¹⁰³ ABARE, Australian Commodities, Vol 17 no 3, September quarter 2010, pp. 546-552.

¹⁰⁴ ABARE, Australian Commodities, Vol 17 no 3, September quarter 2010, p. 546.

¹⁰⁵ ABARE, Australian Commodities, Vol 17 no 3, September quarter 2010, p. 551.

climate change policies on coal demand.¹⁰⁶ The ACCC recognises that such policies may have an impact on coal demand, perhaps most immediately in relation to domestic coal demand, but that such an impact is difficult to precisely quantify at the present time. The ACCC acknowledges though that this uncertainty may contribute to a quantum of risk.

The ACCC reiterates the view from the Draft Decision that the complementary sunk investment in mines and ports contributes to minimising the long-term risks faced by ARTC.¹⁰⁷ As part of the long term solution for the Hunter Valley coal chain, long-term capacity management arrangements have been authorised at the Port of Newcastle (20 years), and coal producers have entered long term TOP contracts with the port terminal operators to underpin investment and capacity expansion. Producers also intend to undertake significant investment in mine capacity expansions to increase output.

Features of the 2010 HVAU

ARTC has, however, included in the proposed 2010 HVAU features that are likely to mitigate its risks. The ACCC noted these features in the March 2010 Draft Decision.

The ACCC considers that the use of long term TOP contracts provides certainty on a significant proportion of ARTC's revenue. Consequently, ARTC has the ability to insulate itself from both volume and asset stranding risk, essentially allowing ARTC to realise a steady cash flow throughout the term of the HVAU. This is evident in Pricing Zones 1 and 2, where ARTC is able to recover its Economic Costs due to the sufficient volumes passing over the Segments. This is not necessarily the case in Pricing Zone 3, where revenues for current volumes of traffic are not sufficient to cover Economic Cost.

The use of loss capitalisation in Pricing Zone 3, should, however, mitigate the impact of under-recovery in that Zone. The ACCC recognises that the use of loss capitalisation does place downward pressure on ARTC's systematic risk (asset beta) because it reduces the likelihood that over the term of the regulatory period it cannot earn a return on its investment.

Asset lives are also estimated conservatively, based on an estimate of a 'remaining mine life' of 22 years. That is, for an investment that occurs immediately after the commencement date, the asset life is 22 years. For an investment that occurs seven years after the commencement date, the asset life is 15 years and the entire asset life may be covered by a TOP contract. Investments made immediately after the commencement date face the longest window of long-term risk. However, this long-term risk will probably be restricted to the window between the fifteenth year and twenty-second year of the asset life; that is, restricted to a window at the end of the investment life. The time-value of money implies that investors place less value on losses in the distant future and more value on losses in the near future. ARTC/Synergies' concession that the risks are primarily long-term, therefore, implies that the potential losses will be of less concern to investors than if the potential losses were short term.

¹⁰⁶ Synergies Economic Consulting, Response re WACC Issues, Attachment 5, March 2010, pp. 28-9.

¹⁰⁷ ACCC, Draft Decision on HVAU, 5 March 2010, p. 556.

ARTC also has the ability to require demonstration of financial viability from access seekers prior to entering access contracts (see section 3.4 of the HVAU). This includes, in the case of coal producers, the provision of either a Parent Guarantee or an Acceptable Credit Rating that ARTC deems satisfactory, while additional financial viability provisions are included in the Indicative Access Holder Agreement. These features are discussed in the **Negotiating for Access** chapter. The access arrangements therefore provide ARTC with the ability to protect itself against default risk.

ARTC may, however, be exposed to some residual counterparty default risk, either from the default of a single user or multiple users. In the first case though, if a single coal producer defaulted, it may be possible for an alternative coal producer to purchase and operate the mine. Further, a significant proportion of ARTC's track length has multiple users. In the second case, such multiple counterparty default would likely be triggered by an industry-wide change in circumstances. For example, it is possible that a more extreme version of the recent GFC could produce a significant number of defaults, in which case the risk facing ARTC would be systematic. The precise likelihood of such an occurrence is difficult to estimate, though at least in the short term the ACCC considers that it is unlikely.

Alternatively, multiple counterparty default could occur as a consequence of non-systematic risk, such as the introduction and widespread uptake of a coal substitute as an alternative energy source. Such an occurrence is also perhaps unlikely, at least in the near future. As outlined above, demand for Australian thermal coal appears strong, and the ACCC nonetheless notes this kind of event is a source of non-systematic risk, whereas only systematic risk is relevant to the assessment of asset beta.

Comparable companies' analysis

As noted in the March 2010 Draft Decision, the ACCC considers that the systematic risk of a rail infrastructure owner will rarely equate to the systematic risk of its mining customers.¹⁰⁸ The revenue of coal companies correspond directly with worldwide coal prices and demand, whereas rail infrastructure owners operating monopoly transportation services are not subject to such extensive demand risk, and can generally raise prices either in current or future periods to the extent demand does fall.¹⁰⁹ In addition, ARTC is proposing that access seekers will enter long term TOP contracts and this will transfer much of the risk it faces to the access seekers.¹¹⁰

In the Draft Decision the ACCC also considered that the use of overseas rail companies as potential comparators for the Hunter Valley rail network was unlikely to be appropriate, given the very different conditions in which those companies operate compared to ARTC in the Hunter Valley region. The ACCC stated that these include:

- Highly competitive markets. In particular, North American railways are likely to have higher market risk, because they often compete with one another due to parallel infrastructure (the same route can be serviced by multiple carriers) and

¹⁰⁸ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 558-560.

¹⁰⁹ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 558-560.

¹¹⁰ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 558-560.

also compete far more extensively with road transport (such as trucking services).¹¹¹

- Different product markets. Overseas rail operators transport a range of industrial, consumer, mineral and agricultural products such as freight, bulk minerals, grain and passengers. Coal does not represent a significant majority of the exports.¹¹²
- Different pricing practices. A majority of the overseas rail operators are exposed to fluctuating oil prices and have to implement fuel cost surcharges to reduce this risk. The railway operators also publish market based prices and estimated delivery times, and price revisions for coal traffic may be conducted more than once a year. These practices are likely to align the systematic risk of the railway companies with the market risk.¹¹³

Comparable regulatory decisions

Given the absence of company comparators for ARTC's Hunter Valley rail network asset beta, the ACCC in the Draft Decision considered that past regulatory precedent could inform the view on the appropriate asset beta.¹¹⁴

In the Draft Decision, the ACCC considered a number of past Australian railway regulatory decisions, while the ACCC notes that the QCA has recently made a decision in relation to QR's network.¹¹⁵ These decisions are outlined in Table 5.2 below:

¹¹¹ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 558-560.

¹¹² ACCC, Draft Decision on HVAU, 5 March 2010, pp. 558-560.

¹¹³ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 558-560.

¹¹⁴ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 560- 561.

¹¹⁵ QCA, *QR Network's 2010 DAU – Tariffs and Schedule F*, June 2010, pp. 47-50.

Table 5.2 - Australian rail determinations – beta estimates

Firm	Asset beta	Equity beta	Gearing	Decision
ACCC- ARTC Interstate ¹¹⁶	0.65	1.29	50	2008
QCA-QR Network ¹¹⁷	0.45	0.8	55	2010
QCA-QR Coal ¹¹⁸	0.50	0.90	55	2005
QCA-DBCT ¹¹⁹	0.50	1.0	60	2005
ESC-PN ¹²⁰	0.50	1.0	50	2006
IPART-ARTC/ HVCN ¹²¹	0.32-0.46	0.70-1.0	60-50	2009
IPART-ARTC/ HVCN ¹²²	0.32-0.46	0.70-1.0	60-50	2005
ERA–2009 WACC for TPI Railway ¹²³	1.00	1.43	30	2009
ERA-2008 WACC for the Freight ¹²⁴	0.60	1.0	35	2008

As noted in the Draft Decision, IPART’s previous decision on the Hunter Valley rail network determined an equity beta of 0.7 to 1.0, which translated into an asset beta of 0.32 to 0.46 according to the Monkhouse formula (with a gamma of 0.40 and a gearing of 55 per cent).¹²⁵ In addition, IPART applied an uplift of 60 basis points to the real pre-tax WACC increasing it from 7.4 per cent to 8 per cent, to account for the asymmetric risk faced by ARTC in relation to the Hunter Valley coal network.¹²⁶

Since the release of the March 2010 Draft Decision, the QCA has released a draft decision on QR Network’s 2010 Draft Access Undertaking.¹²⁷ In that Decision the QCA considered that an asset beta of 0.45 was appropriate. The QCA considered that regulated energy businesses were better comparators for QR Network than the coal

¹¹⁶ ACCC, *Final Decision - Australian Rail Track Corporation, Access Undertaking – Interstate Rail Network*, July 2008, p. 52.

¹¹⁷ QCA, *QR Network’s 2010 DAU – Tariffs and Schedule F*, June 2010, pp. 47-50.

¹¹⁸ QCA, *Decision, QR’s 2005 Draft Access Undertaking*, December 2005, p. 36.

¹¹⁹ QCA, *Final Decision, Dalrymple Bay Coal Terminal Draft Access Undertaking*, April 2005, p. 151.

¹²⁰ ESC, *Victorian Rail Access Regime - Pacific National Rail Access Arrangement - Final Decision*, May 2006, pp. 75 – 77.

¹²¹ IPART, *New South Wales Rail Access Undertaking – Review of the rate of return and remaining mine life from 1 July 2009*, August 2009, p. 6.

¹²² IPART, *Report on the Determination of Remaining Mine Life and Rate of Return from 1 July 2004*, May 2005, p. 13

¹²³ ERA, *The Pilbara Infrastructure (TPI) – Final Determination on the 2009 Weighted Average Cost of Capital for TPI’s Railway network*, 22 June 2009, p. 4.

¹²⁴ ERA, *2008 Weighted Average Cost of Capital for the Freight (WestNet Rail) and Urban (Public Transport Authority) Railway Networks*, 23 June 2008, pp. 2, 31 & 37.

¹²⁵ ACCC, *Draft Decision on HVAU*, 5 March 2010, p. 562.

¹²⁶ IPART, *Final Report and Decision - NSW Rail Access Undertaking - Review of Rate of Return and Remaining Mine Life from 1 July 2009*, August 2001 pp. 36-9.

¹²⁷ QCA, *QR Network’s 2010 DAU – Tariffs and Schedule F*, June 2010, pp. 49-50.

and railroad companies put forward by QR,¹²⁸ and that the relevant term to estimate the asset beta was the regulatory cycle.¹²⁹

The QCA also qualified its earlier December 2005 decision, stating:

The Authority accepts that its original, December 2005 decision might be questioned – both in terms of the size of the beta uplift and whether the beta parameter should have been used to encourage new investment.¹³⁰

The ACCC considers that IPART's 2009 decision on the Hunter Valley rail network and QCA's 2010 decision on QR's Network are the closest comparators for the 2010 HVAU. Under the IPART regime, the Hunter Valley rail network is regulated under a standard BBM with an 'unders' and 'overs' feature. Similarly, under QCA, QR's network is regulated under a standard BBM with an 'unders' and 'overs' feature. The QR undertaking also includes the ability to offer TOP access contracts.

Conclusion

The ACCC remains of the view that an asset beta in the range of 0.40 to 0.50 is likely to be appropriate for the proposed 2010 HVAU in the current circumstances. The ACCC considers though that the preliminary view in the Draft Decision that the asset beta be at the upper bound of the 0.40 to 0.50 range to be overly conservative.

As set out above, while the ACCC recognises that ARTC does face some risk, ARTC is able to mitigate this risk through its ability to use long term TOP contracts, the ability to require demonstration of financial viability from counter-parties prior to entering those contracts, and use of reduced asset lives. These arrangements in conjunction with the complementary sunk investment from the access seekers using ARTC's network, and the likely sustained coal demand over the medium term support an appropriate asset beta towards the lower end of the range. The ACCC notes that comparable regulatory decisions by the QCA and IPART suggest a beta value towards the lower half of the 0.40 to 0.50 range. The ACCC considers that an asset beta of **0.45** is likely to be appropriate.

While the ACCC recognises that this is a reconsideration of the preliminary view in the Draft Decision, it notes the discussion in section 5.12.4 above regarding the principle that ARTC's return be commensurate with the commercial and regulatory risks it faces. The assessment of the asset beta is, consistent with this approach, an input into the overall assessment of the proposed rate of return.

5.12.7 Market risk premium

March 2010 Draft Decision

In the March 2010 Draft Decision, the ACCC considered that a market risk premium (MRP) of 7 per cent, as proposed by ARTC, was not appropriate when having regard to:

- historical estimates of the MRP;

¹²⁸ QCA, *QR Network's 2010 DAU – Tariffs and Schedule F*, June 2010, p. 47.

¹²⁹ QCA, *QR Network's 2010 DAU – Tariffs and Schedule F*, June 2010, p. 48.

¹³⁰ QCA, *QR Network's 2010 DAU – Tariffs and Schedule F*, June 2010, p. 49.

- current studies of Australian market practitioners; and
- regulatory precedent.¹³¹

Instead, the ACCC considered that an MRP of 6 per cent was likely to be appropriate given recent regulatory determinations and improvements in the global economic outlook.¹³²

Proposed 2010 HVAU

In Appendix 3 to the 2010 HVAU Explanatory Guide, ARTC has revised its proposal and now considers that an MRP of 6.5 per cent is appropriate. ARTC reiterates its view expressed in response to the Draft Decision that global financial markets have not recovered to a level of substantial stability. In addition, ARTC considers that the compulsory WACCC review after five years will represent a more appropriate point at which an assessment can be made about stability.¹³³

ACCC view

The ACCC considers it is not appropriate to depart from its view expressed in the Draft Decision that an MRP of 6.0 per cent is appropriate given the significant improvements in Australian market conditions since early 2009.

The ACCC has taken into account ARTC's view that the current outlook for the global economic environment is uncertain. However, the ACCC notes that the references provided by ARTC's consultant Synergies, in support of its claim are with respect to the global economy as a whole. The ACCC has considered the state of the Australian capital market in determining the market risk premium. In its Statement of Monetary Policy in November 2010, the Reserve Bank of Australia (RBA) stated:

The Australian economy has grown at an around trend pace over the past year, supported by the high level of commodity prices, strong public investment and ongoing solid growth in the population. Employment growth has been strong, underpinning growth in household income, and consumer confidence remains high. While public spending made a significant contribution to aggregate demand in 2009 and early 2010, this impact is now lessening, with public investment estimated to now be declining as stimulus projects are completed. The expected rebalancing of public and private demand appears to be underway, with signs that private demand is firming. Household spending has been growing at a solid pace recently, although many consumers continue to take a more cautious approach to spending and borrowing than in earlier years. The outlook for business investment remains positive, especially in the resources sector, with the large rise in Australia's terms of trade boosting national income and demand.¹³⁴

The ACCC considers that the Australian economy has shown sufficient evidence of recovery that the market risk premium should again be considered in light of its long-term equilibrium of 6 per cent. The improvement since April 2009 is evident in terms of the tightening of credit spreads and increases in Commonwealth Government Security yields, which signal that the MRP is on track to return to the estimated long-run

¹³¹ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 565-569.

¹³² ACCC, Draft Decision on HVAU, 5 March 2010, pp. 565-569.

¹³³ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, Appendix 3, p. 20.

¹³⁴ RBA, *Statement on Monetary Policy*, November 2010, p. 31.

average MRP of 6 per cent. The uncertainties created as a result of the global financial crisis highlight the need to take long term historic averages into account when estimating long term MRP. Periods of significant fluctuating returns are not a new phenomenon, and the ACCC considers that the recent financial crisis has not resulted in a structural break in the forward looking long term MRP such as to justify setting the MRP above the long term MRP that previously prevailed.

The ACCC notes that an MRP of 6 per cent is also consistent with the ACCC's decision in relation to the Australian Postal Corporation's Price Notification for Letter Services (May 2010). In addition, while the AER has maintained a market risk premium of 6.5 per cent in its October 2010 final decisions for the Victorian electricity distribution network service providers,¹³⁵ the ACCC notes that in making this decision the AER has adopted the MRP value specified in its *Statement of Regulatory Intent* (released in May 2009), which set out WACC parameters that were estimated at a time of extreme uncertainty in Australian and global capital markets.

The ACCC considers that an MRP of 6 per cent will also be appropriate regardless of the term of the HVAU. The ACCC considers that the WACC may be reviewed at the expiration of the undertaking in light of any worsening financial market conditions, if any such conditions appear.

5.12.8 Imputation factor (gamma)

In the March 2010 Draft Decision, the ACCC considered that a gamma value of zero based on a foreign marginal investor assumption was not appropriate as it would create excessively high revenue ceilings, and was likely to overcompensate its investors. The ACCC proposed that a gamma value of 0.65 was more appropriate.¹³⁶

In Appendix 3 to the 2010 HVAU Explanatory Guide, ARTC states that there is no reliable evidence to support a gamma value of more than 0.5. ARTC has revised its initial proposal from a gamma of zero to a gamma of 0.5. ARTC considers that a gamma of 0.5 is appropriate for consistency purposes, as the Interstate Access Undertaking also applied a gamma value of 0.5.¹³⁷

The ACCC considers that, as gamma is one of the WACC parameters the subject of proceedings in the Australian Competition Tribunal, for the reasons outlined above in section 5.12.4 it would be appropriate to accept in relation to the HVAU at this point in time a gamma of 0.5. The ACCC notes that taking such an approach also ensures consistency with ARTC's Interstate Access Undertaking.

5.12.9 Debt risk premium

Standard regulatory practice in estimating an appropriate benchmark for a company's cost of debt is to determine a debt risk margin over and above the risk free rate. In the assessment of the proposed 2010 HVAU, to make such a decision two relevant issues need to be considered:

¹³⁵ AER, *Victorian electricity distribution network service providers – Distribution determination 2011–2015 – Final Decision*, October 2010, p. 489.

¹³⁶ ACCC, Draft Decision on HVAU, 5 March 2010, p. 577.

¹³⁷ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, Appendix 3, p. 21.

- is the benchmark credit rating proposed by ARTC based on comparable companies reflective of ARTC's 'notional' credit rating for the Hunter Valley business if it was rated and carried its proposed gearing level?; and
- is the debt proxy and the methodology for determining the debt margin proposed by ARTC appropriate?

Credit rating

In the March 2010 Draft Decision the ACCC considered that a proxy bond with a BBB credit rating was appropriate for estimating ARTC's WACC.¹³⁸ The ACCC's preliminary view was based upon the operating leverage and credit ratings of overseas rail operators using a capital structure of either 50 per cent debt to 50 per cent equity, or 55 per cent debt to 45 per cent equity. The ACCC considered that this estimate was conservative given that these overseas rail operators generally operated in highly competitive markets, catered to a range of product markets, and had pricing practices that aligned their risk to that of the market.¹³⁹

The ACCC reiterates its view that a proxy bond with a BBB rating is appropriate for ARTC.

Methodology

The ACCC noted in the March 2010 Draft Decision that while using 10 year maturity fair yields from Bloomberg to estimate the cost of debt was appropriate, as of 10 October 2007 Bloomberg ceased publishing its BBB rated fair yield curves beyond seven years. Consequently, the ACCC could no longer use the ten year BBB fair yield curve to extrapolate ARTC's cost of debt.¹⁴⁰

As a result, in the Draft Decision the ACCC adopted a methodology of adding the difference between a 7 year and 10 year AAA rated fair yield curve to a 7 year BBB rated fair yield curve to determine the spread.¹⁴¹

In Appendix 3 to the 2010 HVAU Explanatory Guide, ARTC proposes to calculate the cost of debt for a ten year BBB yield by extrapolating the 7 year BBB yield to the 10 year yield based on the difference between the 5 year and the 7 year BBB rate (using linear interpolation between the 5 year and 7 year spread with the Commonwealth Government Securities (CGS)).¹⁴² Using this methodology, ARTC proposed a debt risk premium of 4.33 per cent.

The ACCC notes that ARTC's proposed method of calculating the debt risk premium is problematic and may not be appropriate, as the simple linear interpolation assumes that the slope of the yield curve is constant from year five to year ten. The ACCC considers that this implicit assumption is unsound as it is well established both theoretically and empirically that yield curves are likely to be upward sloping with diminishing marginal increases.

¹³⁸ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 541-542.

¹³⁹ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 541-542.

¹⁴⁰ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 542-543.

¹⁴¹ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 542-543.

¹⁴² ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, Appendix 3, pp. 16-17.

The ACCC notes, however, that as of 22 June 2010 Bloomberg ceased publishing 10 year AAA rated fair yield curves, and on 19 August 2010 CBASpectrum ceased publication of its A rated fair value yield curve. This lack of data gives rise to challenges for re-creating the ACCC methodology utilised in the Draft Decision.

Further, the ACCC notes that the Australian Competition Tribunal in *Application by ActewAGL Distribution* [2010] ACompT 4 (17 September 2010) stated that due to the insufficient data to accurately estimate the debt risk premium using the difference in yield between a 7 year and 10 year AAA rated bond added to the difference in yield of a 7 year BBB rated bond, an average of the Bloomberg and CBASpectrum yield curves should be used.¹⁴³ In its reasons the Tribunal also encouraged the AER to investigate other methods to estimate the debt risk premium.¹⁴⁴

Moreover, the issue of estimating the debt risk premium is currently before the Australian Competition Tribunal in two separate sets of proceedings, in its review of electricity distribution determinations for Victoria¹⁴⁵ and a full access arrangement decision in respect of NSW gas distribution networks.¹⁴⁶

Therefore, in light of the absence of long term Bloomberg and CBASpectrum data, and the current litigation before the Australian Competition Tribunal, the ACCC considers that it would be difficult to arrive at a definitive estimate of the debt risk premium in the present context.

Nonetheless, the ACCC recognises that a conservative approach based on available data may be of use in assessing ARTC's proposed estimate. The ACCC examined where ARTC's proposed figure lay against three selected benchmarks:

- a 10 year BBB rated fair yield using the application of the ACCC's previously applied methodology, by adding the maximum difference between 10 year and 7 year AAA rated fair yields over a year (from 22 June 2009 to 22 June 2010), to the average of the last 20 trading days of BBB rated 7 year fair yields; ('ACCC's conservative estimate')
- a 7 year BBB rated fair yield using actual Bloomberg data over the average of the last 20 trading days;
- a 5 year BBB rated fair yield using actual Bloomberg data over the average of the last 20 trading days.

The ACCC notes that the appropriate estimate of the debt risk premium should be above the estimates for the 5 and 7 year BBB rated fair yields. This is because as the time to maturity increases on a bond, there is generally greater uncertainty in the market, which should be reflected in the premium required by investors.

¹⁴³ *Application by ActewAGL Distribution* [2010] ACompT 4, paragraph 80.

¹⁴⁴ *Application by ActewAGL Distribution* [2010] ACompT 4, paragraphs 73-77.

¹⁴⁵ *Application by United Energy Distribution Pty Limited* (File No. ACT 6 of 2010); *Spi Electricity Pty Ltd* (File No. ACT 7 of 2010); *Citipower Pty* (File No. ACT 8 of 2010); *Powercor Australia Limited* (File No. ACT 9 of 2010); and *Jemena Electricity Networks (Vic) Ltd* (File No. ACT 10 of 2010).

¹⁴⁶ *Application by Jemena Gas Networks(NSW)Ltd* (File No. ACT 5 of 2010).

As table 5.3 illustrates, the ACCC's conservative estimate (4.62) is indeed somewhat higher than the 5 year direct estimate (3.32), as well as the 7 year direct estimate (4.04). The ACCC observes that ARTC's estimate (4.33) falls between the ACCC's conservative estimate and the 5 and 7 year estimates, thus indicating that it is within the range of appropriate estimates and should not compromise an overall rate of return that is commensurate with ARTC's regulatory and commercial risks.

Table 5.3 – Debt risk premium estimates using different methodologies

Approach to estimation	Debt risk premium estimate
10 year estimate using ACCC methodology (ACCC's conservative estimate)	4.62
10 year estimate proposed by ARTC (in Appendix 3 to the Explanatory Guide)	4.33
7 year direct estimate	4.04
5 year direct estimate	3.32

Consequently, the ACCC considers that in the interests of facilitating prompt resolution of the assessment of the proposed 2010 HVAU (thereby providing regulatory certainty for ARTC and access seekers), ARTC's estimate of 4.33 per cent is appropriate for the calculation of an overall rate of return, even though this estimate uses data from a different averaging period and the ACCC does not approve ARTC's methodology.

As outlined in section 5.12.4 above, while this approach may not necessarily be appropriate in other circumstances, the ACCC considers that it is acceptable in the current context of the HVAU given the applicable statutory test and the relevant matters which the ACCC takes into account pursuant to section 44ZZA(3).

5.12.10 Debt issuance costs

In the March 2010 Draft Decision, the ACCC considered that the proposed debt issuance costs of 12.5 basis points per annum were unlikely to be appropriate, as it was likely to lead to ARTC receiving a return in excess of the commercial and regulatory risk for the rail operations in the Hunter Valley.¹⁴⁷

In Appendix 3 to the 2010 HVAU Explanatory Guide, ARTC has revised its view and proposes to use debt issuance costs of 9.5 basis points per annum, consistent with the ACCC's recommendation in the Draft Decision.¹⁴⁸

5.12.11 Equity Issuance Costs

In the March 2010 Draft Decision, the ACCC considered that an allowance of 5 per cent for equity raising costs was unlikely to be appropriate when having regard to the

¹⁴⁷ ACCC, Draft Decision, March 2010, pp. 544-545.

¹⁴⁸ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, Appendix 3, p. 17.

factors under section 44ZZA(3) of the Act and that 3 per cent was a more appropriate estimate using efficient benchmarks.¹⁴⁹

In Appendix 3 to the 2010 HVAU Explanatory Guide, ARTC revised its proposal to provide for equity issuance costs of 3 per cent, in line with the views in the Draft Decision.

5.12.12 Conclusion on the WACC/rate of return

The ACCC therefore considers that, in light of the discussion above, a real pre-tax WACC of **8.57** per cent is more likely to be appropriate.

5.12.13 A compulsory WACC review after 5 years

In the 2009 HVAU, ARTC proposed that the rate of return would be revised on 1 January in each year of the term of the HVAU to reflect changes in risk free rate and debt margin.¹⁵⁰

In the March 2010 Draft Decision, the ACCC considered it would more likely be appropriate if ARTC was compulsorily required to submit a revised WACC within five years from the commencement of the HVAU. The ACCC considered that an annual regulatory reset was inappropriate because it was likely to lead to a return in excess of the commercial and regulatory risk involved and as a result is unlikely to result in efficient use and investment in rail infrastructure and efficient complimentary investment.¹⁵¹

Subsequently, ARTC has revised section 4.7(b) in the 2010 HVAU to ensure that the WACC is compulsorily reviewed after five years from the Commencement Date and removed reference to the yearly review of the risk free rate and debt margin in section 4.7(d).

The ACCC notes however, that this provision is subject to the final view on the appropriate term for the 2010 HVAU as a whole.

¹⁴⁹ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 564-565.

¹⁵⁰ ARTC, *Hunter Valley Coal Network Access Undertaking*, 22 April 2009, section 4.7(d).

¹⁵¹ ACCC, Draft Decision on HVAU, 5 March 2010, p. 526.

6 Pricing

Summary

Section 4 of the proposed 2010 HVAU includes provisions for the determination of access charges. Clauses of the Indicative Access Holder Agreement are also relevant to access charges.

The ACCC considers that ARTC's proposed approach to determining and levying access charges is likely to be appropriate, subject to the following revisions:

Determination and implementation of the efficient train configuration

- In determining the efficient train configuration, ARTC should seek to determine the approach that ensures efficient consumption of Network capacity, and that sends price signals to facilitate the same. Consequently, the review should consider whether GTKm is the appropriate pricing unit.
- ARTC should submit to the ACCC a proposed variation to the HVAU regarding the efficient train configuration and appropriate pricing approach, within six months of receiving the relevant information from the HVCCC, and in any event within twelve months of the commencement of the undertaking.
- The HVAU should provide for ARTC to resubmit a variation to the ACCC if the first variation is not accepted.
- The HVAU should include an explicit transition mechanism for existing Access Holders who wish to adopt the efficient Indicative Service (i.e., transition to the efficient train configuration).
- The review should also consider appropriate charge differentiation factors in light of the Indicative Service.
- Grandfathering arrangements should apply until 30 June 2014 in order for relevant access holders and operators to transition their operations and adjust their business plans accordingly.

Other

- The HVAU should provide that Indicative Access Charges for Indicative Services are a factor ARTC may consider when formulating access charges for Non-Coal Access Rights.
- To ensure pricing certainty, the HVAU should explicitly state 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.
- A minor drafting change should be made to section 4.11.

6.1 Introduction

Section 4 of the proposed 2010 HVAU includes the provisions for the determination of access prices (or charges). The provisions relating to prices in section 4 of the HVAU complement the provisions relating to the financial model in that they set out the rules and processes for how ARTC will collect revenue from users of the network.

This chapter addresses issues relating to:

- the pricing objectives and structure of charges, both coal and non-coal;
- the determination of the Indicative Service and the Indicative Access Charges;
- Interim Indicative Access Charges payable for the Interim Indicative Service;
- Charge differentiation and the limits to charge differentiation; and
- determination and calculation of charges payable under the Indicative Access Holder Agreement; and

This chapter also explains how the proposed 2010 HVAU constrains ARTC's pricing and how the ACCC's concerns from the March 2010 Draft Decision have been addressed

6.1.1 Overview of the access pricing provisions

Structure of charges

The structure of coal and non-coal charges is outlined in Section 4.10 and 4.11 respectively. For Coal Access Rights, ARTC proposes to charge a two part tariff, with a 'take or pay' (TOP) fixed component, and a variable component (non-TOP) based upon actual usage, determined by distance and gross tonnes.

For Non-coal Access Rights ARTC proposes a multi-part tariff consisting of a flagfall component based on train/service type, variable cost component based upon actual usage measured by distance and gross tonnes, and a variable cost component for network occupancy.

Pricing objectives

ARTC includes pricing objectives in section 4.12 that it will employ to determine how the separate cost elements will be allocated as variable cost components (VCC), fixed cost components (FCC), and new capital cost components (NCC), as well as principles for the recovery of VCC, FCC and NCC through the charges.

Indicative Service and Indicative Access Charges

ARTC also includes section 4.16 in order to create reference services that ARTC will provide for access seekers seeking coal access rights with certain characteristics, known as Indicative Services.

ARTC provides that it will offer access rights for Indicative Services to access seekers who seek access rights for services with these characteristics. ARTC includes a procedure in section 4.18 to determine the prices for these reference services, known

as Indicative Access Charges. ARTC considers that the determination of the characteristics of these services is not possible at the present time, hence a procedure is included in section 4.16 for the determination of the Indicative Service.

Interim Arrangements

Until such a time as the Indicative Services can be finalised, ARTC includes characteristics of certain reference services under section 4.17, known as Interim Indicative Services.

Prices for access rights that apply from the Commencement of the undertaking to utilise services with the characteristics of Interim Indicative Services are also included as Interim Indicative Charges under section 4.17.

For the charges that apply to these reference services in later years, ARTC has provided under section 4.18 for the same procedure that is to be used for determining the Indicative Access Charges to be used to determine Interim Indicative Access Charges.

Charge differentiation

As the Indicative Services are for coal access rights to be utilised by a coal access seeker with certain characteristics, ARTC has included provisions governing how it will determine charges for access rights for other types of services, including non-coal services and non-indicative coal services.

ARTC includes charge differentiation factors that it may have regard to when determining charges for access rights other than for the Indicative Services in section 4.14. Different charge differentiation factors apply to coal and non-coal services. ARTC also provides under section 4.15 for limits on what it may have regard to when determining its charges for these non-reference services.

Pricing-related provisions in the IAHA

The Indicative Access Holder Agreement (IAHA) attached to the proposed 2010 HVAU also contains terms relating to access charges for coal access rights. The terms of the IAHA relating to price, including clause 5 and Schedule 3, refer to provisions of the HVAU in order to determine the prices payable by the Access Holder during each year of the agreement.

6.2 Pricing objectives and structure

Pricing objectives and structures set out in sections 4.10, 4.11 and 4.12 provide the detail regarding ARTC's approach to setting charges.

6.2.1 Pricing objectives

March 2010 Draft Decision

In the March 2010 Draft Decision, the ACCC considered that the pricing objectives in section 4.12 were likely to be appropriate, provided that the ACCC's concerns about

pricing uncertainty were addressed.¹⁵² In particular, the ACCC stated that the objectives should help ensure ARTC earns a return commensurate with the regulatory and commercial risks it faces. Further, the ACCC considered that the pricing objectives should promote allocative efficiency as they should allow ARTC to achieve full recovery of variable costs, as well as reduce the ‘hold up’ problem and provide an incentive for ARTC to efficiently invest in and maintain infrastructure.¹⁵³

Proposed 2010 HVAU

ARTC has proposed the same pricing objectives in section 4.12 of the 2010 HVAU that were proposed under the April 2009 HVAU.

4.12 Pricing Objectives

- (a) In determining Charges, ARTC will have regard to separate cost elements as follows:
 - (i) variable component of costs (“VCC”) being Direct Costs;
 - (ii) fixed component of costs (“FCC”) being fixed operating costs and Depreciation of, and return on, assets existing as at the Commencement Date; and
 - (iii) new capital component of costs (“NCC”) being Depreciation of, and return on, assets commissioned during the Term.
- (b) In determining Charges, ARTC will have regard to the following objectives:
 - (i) achieving full recovery of VCC from all Access Holders on the basis of actual network usage;
 - (ii) achieving maximum recovery of (or contribution to) FCC and NCC from all users;
 - (iii) provide certainty to ARTC through the application of a take or pay (“TOP”) component to fully recover NCC over the economic life of new investments, and recover some or all of FCC from applicable Access Holders (coal users) on the basis of forecasted network usage, or otherwise recover some or all of FCC on the basis of actual network usage;
 - (iv) the proportion of FCC recovered through a TOP component to be consistently applied to all Access Holders holding Coal Access Rights within a Pricing Zone; and
 - (v) provide for an open and equitable mechanism for the application of TOP Charges.

¹⁵² ACCC, *Australian Rail Track Corporation Limited – Hunter Valley Coal Network Access Undertaking Draft Decision*, 5 March 2010, pp. 623-624.

¹⁵³ ACCC, *Draft Decision on HVAU*, 5 March 2010, pp. 623-624.

ACCC view

The ACCC considers that these pricing objectives are still likely to be appropriate, provided that ARTC implements the additional amendments discussed in this Chapter, as well as amendments discussed in the **Financial Model** chapter.

6.2.2 Structure of Charges – Coal access rights

Proposed 2010 HVAU

Section 4.10 provides that charges for Coal Access Rights may be on the basis of a combination of actual usage and a take or pay (TOP) component. The actual usage component may be calculated as a function of distance and gross mass (\$/GTKm) for a pricing zone.

Section 4.10 Structure of Charges – Coal Access Rights

For Coal Access Rights:

- (a) Charges may be on the basis of a combination of:
 - (i) actual usage (being a function of distance and gross mass (\$/gtkm) for a Pricing Zone); and
 - (ii) a take or pay component for the Access Rights contracted for under the Access Holder Agreement irrespective of whether the Access Holder uses all or any of the Access Rights.
- (b) Notwithstanding a commitment by the Access Holder to pay the take or pay component of the Charge for Access Rights contracted for under the Access Holder Agreement, the Access Holder may be entitled to a rebate of the take or pay component of the Charges paid following the application of Pricing Zone-wide true-up tests and an annual individual reconciliation.

The section also provides (at section 4.10(b)) that, notwithstanding the Access Holder commits to payment a TOP component, it may be entitled to a rebate under the true-up test and annual reconciliation. This is discussed further in the **Performance and Accountability** chapter.

Submissions in response to the Consultation Paper

The ACCC received a number of submissions on the structure of coal charges in response to the September 2010 Consultation Paper, largely querying the use of GTKm as the pricing unit.

Asciano submitted that GTK pricing is not reflective of costs:

... Asciano does not believe that GTK is a major driver of fixed costs, and consequently basing fixed cost charging structures on GTK is an inefficient approach to cost recovery. The charging structure results in larger coal trains being charges a greater amount for the same train path ...¹⁵⁴

Xstrata submitted that GTK pricing sends incorrect pricing signals:

¹⁵⁴ Asciano, *Submission to the ACCC - ARTC 2010 Draft Hunter Valley Access Undertaking*, 25 October 2010, p. 12.

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 ...

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.¹⁵⁵

Coal & Allied submitted that pricing on a GTK basis does not promote the economically efficient operation of, use of and investment in the Hunter Valley rail network:

In each of its submissions to the ACCC in relation to ARTC's April 2009 HVAU, C&A has stated that the pricing approach adopted in any approved HVAU should reflect the actual consumption of Capacity in order to accurately send signals about efficient use of the Network. C&A remains strongly of the view that the current approach of pricing track access amongst various Indicative and non-Indicative Services, and solely on a GTK basis, does not promote the economically efficient operation of, use of and investment in the Network under s44ZZAA(a) of the TPA.¹⁵⁶

Further, Coal & Allied believes that pricing should reflect actual costs and that TOP charges should be recovered on a 'per train kilometre basis (path basis):

C&A understands that pricing on a "per train-kilometre" or "train-path" basis is the most commonly used pricing mechanism in Europe and the United States ...

Moreover, path-based pricing is aligned to ARTC's own approach to allocating costs across its Network as set out in clause 4.5(a)(iii) of the Proposed HVAU. Exhibit H below shows that only approximately 10% of ARTC's cost base is variable to GTKs, while the rest is linked mainly to track kilometres. Hence, cost-reflective pricing would charge for these costs based on Train Path kilometres.¹⁵⁷

ACCC view

The ACCC's preliminary views in its March 2010 Draft Decision were that:

- A two-part tariff was likely to be appropriate as it may promote investment and aid efficiency in the circumstances;¹⁵⁸

¹⁵⁵ Xstrata, *Xstrata Coal Pty Ltd's response to the Australian Competition and Consumer Commission in relation to the ACCC Consultation Paper in relation to the Australian Rail Track Corporation's proposed Hunter Valley Rail Network Access Undertaking dated 16 September 2010*, 25 October 2010, p. 10.

¹⁵⁶ Coal and Allied, *Submission in Response to the ACCC's Consultation Paper in relation to the Australian Rail Track Corporation's Proposed Hunter Valley Rail Network Access Undertaking*, 25 October 2010, p. 79.

¹⁵⁷ Coal and Allied, *Submission in Response to ACCC Consultation Paper*, pp. 79-80.

¹⁵⁸ ACCC, *Draft Decision on HVAU*, 5 March 2010, p. 610.

- ARTC's usage of GTKm based pricing was likely to be appropriate in the short term, provided that longer term price signals to run efficient trains were implemented;¹⁵⁹
- The use of TOP was likely to be appropriate as it should promote investment and alignment of the coal chain, provided that ARTC reduced the pricing uncertainty associated with TOP under the proposed long-term contracts;¹⁶⁰ and
- The general approach of providing for a rebate of TOP charges was appropriate.¹⁶¹

The ACCC retains its view from the Draft Decision that:

- Providing for a two-part tariff is likely to be appropriate;
- Providing for the use of TOP is likely to be appropriate; and
- Providing for rebate of take-or-pay charges in circumstances where ARTC fails to make a path usage available is likely to be appropriate.

On the issue of GTKm-based pricing, the ACCC considered in the Draft Decision that while it may be appropriate in the short term, this was subject to the implementation of longer term price signals to run efficient trains.¹⁶² This issue, which relates to the determination of the efficient train configuration, is discussed further below.

6.2.3 Structure of Charges – Non-coal access rights

March 2010 Draft Decision

The ACCC considered in the March 2010 Draft Decision that the key issue in relation to section 4.11 was whether the level of information in relation to Non-Coal Access Rights was sufficient to provide certainty to access seekers, yet still provide flexibility to ARTC to set prices to reflect the appropriate cost of using the Network for non-coal purposes.¹⁶³

The ACCC indicated in its Draft Decision that the HVAU was unlikely to be appropriate due to:

- the absence of an indicative access agreement for non-coal access rights;
- the lack of access price certainty for non-coal access seekers.¹⁶⁴

In relation to pricing certainty for non-coal users, the ACCC's preliminary view was that a cap on the price for access to the network by non-coal access seekers, in any

¹⁵⁹ ACCC, Draft Decision on HVAU, 5 March 2010, p. 612.

¹⁶⁰ ACCC, Draft Decision on HVAU, 5 March 2010, p. 613.

¹⁶¹ ACCC, Draft Decision on HVAU, 5 March 2010, p. 613.

¹⁶² ACCC, Draft Decision on HVAU, 5 March 2010, p. 612.

¹⁶³ ACCC, Draft Decision on HVAU, 5 March 2010, p.620.

¹⁶⁴ ACCC, Draft Decision on HVAU, 5 March 2010, p.614.

given period, to the level of full economic cost paid by coal access seekers in that period, would limit any price uncertainty for those access seekers.¹⁶⁵

Proposed 2010 HVAU

The ACCC notes that section 3.14 of the HVAU provides for a non-coal access agreement to be based on the Indicative Track Access Agreement included in ARTC's 2008 Interstate Access Undertaking. This is discussed further in the **Negotiating for Access** chapter.

The structure of charges for Non-Coal Access Rights under section 4.11 is essentially the same as proposed under the April 2009 HVAU. Section 4.11 provides that charges for Non-Coal Access Rights may comprise a variable component, a flagfall component, and an excess network occupancy component (ENOC). The ENOC is based upon the reasonable allowances for section run times for the applicable train service, dwells for crossing and passing other trains and an allowance for reasonable requirements for operational activities.

In response to the ACCC's views in the March 2010 Draft Decision regarding the lack of price certainty, ARTC has inserted section 4.11(b), which specifies that the Access revenue received from an Access Holder of Non-Coal Access Rights will be no higher than the average Access revenue received for Coal Access Rights, for a comparable journey.

ARTC has also included the allowance figures for the reasonable requirements for operational activities at section 4.11(c).

Section 4.11(i) also provides that notwithstanding the structure in the preceding provisions of the section, all elements of the Charge are open to negotiation.

ACCC view

Pricing certainty for non-coal access seekers

As outlined above, in response to the ACCC's concerns regarding pricing uncertainty for non-coal access seekers, ARTC has amended the drafting of section 4.11(b) in line with the ACCC's recommendation, to impose a limitation on the amount that non-coal access seekers could be charged.

The ACCC considers, however, that an alternative approach is likely to appropriately provide the requisite certainty to non-coal access seekers. That is, the ACCC considers that providing a 'reference link' between non-coal access prices and the relevant Indicative Access Charges should provide greater transparency and certainty for non-coal access seekers. Therefore, the ACCC considers that section 4.14(b) be revised to provide that the Indicative Access Charges for Indicative Services should be a factor ARTC may consider in formulating charges for Non-Coal Access Rights. This is also discussed under Charge Differentiation in section 6.5 below (and is subject to ARTC implementing changes to the financial model for the Indicative Access Charges). In light of this consideration, the approach in section 4.11(b) would no longer be necessary.

¹⁶⁵ ACCC, Draft Decision on HVAU, 5 March 2010, p. 621.

Negotiability of Non-coal access charges

Section 4.11(i) states that notwithstanding the structure outlined in section 4.11, all the elements of the non-coal charges are negotiable. The ACCC considers that it is appropriate that the structure of non-coal access charges is negotiable due to the other features of the HVAU that constrain ARTC. In particular, ARTC will still remain constrained by the revenue cap imposed by the BBM, and in light of the revisions recommended, there should be an appropriately transparent reference point for non-coal access charges. Further, section 4.14(d) allows an Access Holder to dispute charges imposed by ARTC (that are not indicative charges), with the dispute able to be resolved by ACCC arbitration as outlined in section 3.15(c).

Minor drafting change

The ACCC also notes a minor drafting issue in section 4.11. In particular, ARTC has amended section 4.11(e) to now refer to a flagfall component applicable to a relevant *Pricing Zone* and not a *Segment*. The ACCC assumes that this amendment is in light of ARTC's intention to apply charges based on Pricing Zones and not Segments. If this is ARTC's intention, then the ACCC considers that section 4.11(a)(ii) should also be amended to specify that the flagfall component is calculated with reference to a *Pricing Zone* and not a *Segment*, for consistency.

6.3 Indicative Access Charges and the Indicative Service

6.3.1 Indicative Access Charges

March 2010 Draft Decision

In the March 2010 Draft Decision the ACCC considered that an important factor in assessing whether the 2009 HVAU balanced the interests of the access provider, access seekers and the wider public interest, was whether the Indicative Access Charges and methodology for calculating those charges, were sufficiently transparent.¹⁶⁶

The ACCC considered that there was a need for further clarity concerning how ARTC would arrive at the Indicative Access Charge. Further, the ACCC considered that to achieve greater pricing certainty and avoid significant price shocks, ARTC should publish a firm range for where prices would fall, and specify maximum annual price increases over time that are not excessive.¹⁶⁷

Proposed 2010 HVAU

Section 4.13 provides for an Indicative Access Charge to be determined each year with reference to the Indicative Service, and having regard to the System Assumptions. ARTC notes that section 4.13(a) has been amended to include reference to the System Assumptions.¹⁶⁸

¹⁶⁶ ACCC, Draft Decision on HVAU, 5 March 2010, p. 627.

¹⁶⁷ ACCC, Draft Decision on HVAU, 5 March 2010, p. 628.

¹⁶⁸ ARTC, *Hunter Valley Access Undertaking - Explanatory Guide (September 2010)*, 7 September 2010, Appendix 1, p. 13.

Indicative Access Charges are to be determined each year in accordance with the process outlined in section 4.18. ARTC submits that subsections 4.18(a)-(d) have been amended to clarify the process that ARTC will follow in order to finalise the Indicative Access Charges each year, and specify the information to be provided to Access Holders. ARTC also submits that section 4.18(e) has been included to make clear that it cannot be required to provide information that would involve disclosure of confidential information.¹⁶⁹

The Indicative Access Charges will be based on the contracted coal volumes for that calendar year, any additional volumes that ARTC considers likely to be contracted coal volumes for that year and ARTC's forecast costs. ARTC will notify holders of access rights for Indicative Services by 1 November each year of aggregate coal volumes and annual forecast costs, in addition to the Indicative Access Charges.

ARTC has inserted section 4.19 in to the proposed 2010 HVAU to provide access holders with information about ARTC's forecasted expenditure and coal volumes. The section provides as follows:

4.19 Provision of forecast information and coal volumes

- (a) In addition to the information provided to each Access Holder of Coal Access Rights under **section 4.18(d)**, ARTC will provide to each Access Holder of Coal Access Rights before 1 November of each calendar year:
 - (i) ARTC's forecast annual total operating expenditure for each of the next 10 calendar years;
 - (ii) ARTC's forecast annual capital expenditure for each of the next 10 calendar years as set out in the most recent version of the Hunter Valley Corridor Capacity Strategy (including all RCG endorsed capital expenditure as provided for in that document); and
 - (iii) subject to **section 4.18(e)**:
 - (A) the aggregate annual coal volumes contracted by Access Holders for each of the next 10 calendar years; and
 - (B) the minimum aggregate annual coal volumes for all Access Holders for each of the next 10 calendar years, which will be determined by identifying the shortest possible term applicable to each Access Holder Agreement, should the Access Holder exercise any rights of early termination under that agreement.
- (b) The 10 year information provided by ARTC under this section will include information for the calendar year for which Indicative Access Charges or the Interim Indicative Access Charges, as applicable, are determined and information provided for under **section 4.18(d)**.

ARTC submits that the provision of this information would give access holders the same information about forecast expenditure and contracting volumes that would be used to inform any ARTC decision to increase access charges. ARTC submits,

¹⁶⁹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, Appendix 1, p. 19.

therefore, that the provision of this information, together with that outlined in section 4.18, mitigates the need for a cap on annual price increases.¹⁷⁰

ACCC view

The ACCC considers that having Indicative Access Charges as part of the undertaking will be beneficial, as it provides a degree of certainty for access seekers and ARTC regarding the charges that can apply for access to the Indicative Service. The inclusion of Indicative Access Charges may also reduce transaction costs because ARTC can charge a like price for services that share similar characteristics, as well as provide a reference point for which non-Indicative Services and Charges can be differentiated.

The ACCC notes that ARTC has clarified drafting in section 4.13 in response to the ACCC's view that it was not clear whether both the Indicative Access Charge and Indicative Service descriptions would be reviewed on an annual basis. The ACCC is satisfied that section 4.13 clearly provides for the access charge — and not the Indicative Service descriptions — to be determined on a yearly basis, and that changes to the Indicative Service are to be made by way of variation to the HVAU, and in accordance with the process set out in section 4.16.

The ACCC further notes that section 4.18 provides for arbitration by the ACCC where access holders constituting two thirds or more of the contracted GTKm for Indicative Services in the relevant Pricing Zone over the next calendar year, issue a dispute notice in relation to Indicative Access Charges. In the Draft Decision, the ACCC acknowledged stakeholders' concerns about the two thirds rule, though noted that the Annual Compliance Assessment allows for revenues in excess of ARTC's revenue ceiling to be returned to access seekers.¹⁷¹ Further, the ACCC notes that while the process in section 4.18 relates to the determination of Indicative Access Charges, individual access seekers are also able to dispute prices under their individual contracts with ARTC pursuant to the dispute resolution process in the undertaking.

The ACCC also recognises that ARTC has proposed to provide additional information under section 4.19 about its forecast expenditure and coal volumes. This should reduce information asymmetry between ARTC and access seekers, and provide additional certainty in relation to access charges.

The ACCC considers therefore that the arrangements for the determination of the Indicative Access Charges are likely to be appropriate.

6.4 Determination of the characteristics of the Indicative Service

The ACCC recognises, however, that the characteristics of the Indicative Service are yet to be determined, and that the proposed 2010 HVAU sets out a process by which this is to occur.

¹⁷⁰ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 25.

¹⁷¹ ACCC, Draft Decision on HVAU, 5 March 2010, p. 649.

6.4.1 March 2010 Draft Decision

The ACCC considered in its March 2010 Draft Decision that the provisions relating to Indicative Services were unlikely to be appropriate given the absence of a finalised Indicative Service. Consequently, the ACCC considered that:

- a mechanism should be included in the HVAU explicitly providing for development and implementation of Indicative Services through consultation with industry, subject to ACCC approval;¹⁷² and
- the date Indicative Service descriptions and related access charges will be proposed for consultation with industry should be specified, as should the date at which these will come into effect.¹⁷³

6.4.2 Proposed 2010 HVAU

The process for the determination of the Indicative Service is set out in section 4.16, which provides as follows:

4.16 Determination of the Indicative Service (efficient train configuration)

- (a) ARTC must develop, in consultation with the HVCCC, the proposed characteristics of the indicative service which ARTC considers will deliver the optimum utilisation of Coal Chain Capacity, given certain System Assumptions.
- (b) Within 12 months of ARTC being reasonably satisfied that the modelling undertaken by the HVCCC under section 4.16(a) is sufficiently robust to enable an efficient train configuration that optimises Coal Chain Capacity to be accurately determined and, in any event within four years of the Commencement Date, ARTC will:
 - (i) submit to the ACCC proposed characteristics of the indicative service developed in consultation with the HVCCC which ARTC considers will deliver the optimum utilisation of Coal Chain Capacity, given certain System Assumptions; and
 - (ii) seek the approval of the ACCC to vary this Undertaking to provide for the adoption of the proposed characteristics as those of the indicative service.
- (c) In consulting with the HVCCC, ARTC will:
 - (i) assist the HVCCC to undertake modelling; and
 - (ii) will follow the principles of consultation set out in Schedule F,

with the objective of determining the train configuration which will deliver optimum utilisation of Coal Chain Capacity and ARTC and will use its best endeavours to agree with the

¹⁷² ACCC, Draft Decision on HVAU, 5 March 2010, p. 628.

¹⁷³ ACCC, Draft Decision on HVAU, 5 March 2010, p. 628.

HVCCC the characteristics to be submitted to the ACCC as the proposed indicative service.

- (d) In support of its application to vary the Undertaking and the adoption of the characteristics proposed in section 4.16(b) as the indicative service, ARTC will submit to the ACCC:
 - (i) proposed characteristics of the Indicative Service which it considers will deliver optimum utilisation of Coal Chain Capacity including:
 - (A) maximum axle load;
 - (B) maximum speed;
 - (C) Train length; and
 - (D) section run times;
 - (ii) the proposed indicative access charges for the proposed indicative service; and
 - (iii) supporting documentation.
- (e) If the ACCC accepts the characteristics proposed by ARTC in consultation with the HVCCC as the Indicative Service, and accepts the variation sought by ARTC to this Undertaking, ARTC will:
 - (i) promptly publish on its website:
 - (A) the characteristics proposed under section 4.16(b) as the Indicative Service; and
 - (B) the indicative access charges accepted by the ACCC for the Indicative Service as the Indicative Access Charges, in the format set out in section 4.13(c).
 - (ii) offer the Indicative Access Charges to Applicants and Access Holders seeking Coal Access Rights for the Indicative Service to apply in the year immediately following the date the variation to the Access Undertaking accepting the Indicative Service and Indicative Access Charge comes into effect; and the annual process for the finalisation of Indicative Access Charges under section 4.18 will not apply to the determination of Indicative Access Charges for that year; and
 - (iii) determine Charges for Coal Access Rights other than Access Rights for the Indicative Service to apply in the year immediately following the date the variation to the Access Undertaking accepting the Indicative Service and Indicative Access Charge comes into effect, in accordance with section 4.14 and in doing so will take into account the Indicative Access Charges accepted by the ACCC in determining those Charges.
- (f) If the ACCC does not accept the train configuration proposed by ARTC:

- (i) the Interim Indicative Services and the Interim Indicative Access Charges will continue to apply; and
- (ii) ARTC may submit revised characteristics to the ACCC and seek the approval of the ACCC to vary this Undertaking to provide for the adoption of the revised characteristics as the indicative service.

6.4.3 Submissions in response to Consultation Paper

The ACCC received a number of submissions on this issue in response to the Consultation Paper.

Asciano expressed concern that a four year time frame is unacceptable for developing the efficient train configuration:

Much of the data is already held by HVCCC and /or the operators and, similarly, much of the modelling is already undertaken by the HVCCC and/or the operators. A maximum timeframe of 6 months would be [a] more appropriate time frame in which to undertake this modelling and seek ACCC approval. Asciano understands that current HVCCC congestion modelling highlights the significant impact of congestion throughout the coal chain ... Current congestion requires that efficient train configuration issues be resolved in the very near future, not within a four year time frame¹⁷⁴

Asciano also submitted that ARTC should be obliged to consult with the operators on system assumptions and other matters prior to finalising the efficient train configuration:

... As the operators operate the trains, and consequently have more detailed knowledge of train (as opposed to track) operations and issues, the ARTC should be obliged to consult with the operators prior to finalising its position on the efficient train configuration. Similarly, in considering the ARTC proposal the ACCC should seek input from train operators regarding the ARTC proposal. Depending on the final decision on efficient train configuration, the decision may have substantial consequences for operator investments and operators should be provided with an opportunity to comment on the proposal.¹⁷⁵

The NSW Minerals Council submitted that a delay in determining the efficient train configuration will prevent investment in the most efficient rolling stock.¹⁷⁶ The NSW Minerals Council also recognised that, conversely, ‘determining an Indicative Service which has different characteristics to the Interim Indicative Services will disadvantage those who have invested in rolling stock (with a working life of 15-20 years) in good faith in recent years.’¹⁷⁷ Consequently, the NSW Minerals Council proposed that the HVAU should provide for the following process:

¹⁷⁴ Asciano, Submission in Response to ACCC Consultation Paper, 26 October 2010, p. 7.

¹⁷⁵ Asciano, Submission in Response to ACCC Consultation Paper, 26 October 2010, p. 7.

¹⁷⁶ NSWMC, *Hunter Rail Access Task Force – Submission in Response to the Australian Competition and Consumer Commission’s Consultation Paper in relation to Australian Rail Track Corporation’s Proposed 2010 Hunter Valley Rail Network Access Undertaking*, 25 October 2010, p. 9.

¹⁷⁷ NSWMC, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 9.

- Conditional on grandfathering of existing rights as set out below, ARTC to promptly propose to the ACCC within a fixed period (e.g. in 1 year) the characteristics of, and charges for, the Indicative Service to facilitate rolling stock investment;
- Interim Indicative Services for existing and currently committed capacity to be grandfathered for a period of five years, consistent with ARTC's commitments to industry and the Commission's previous Draft Decision; and
- ACCC to consult with Access Holders and Access Seekers in considering ARTC proposals.¹⁷⁸

Coal & Allied submitted that the decision regarding any change to the efficient train configuration should be made as soon as possible to ensure that efficient investment can occur as soon as possible. Further, Coal & Allied submitted that to assist with Access Holders transitioning to the efficient train configuration, an appropriate 'grandfathering' regime should be implemented.¹⁷⁹

Coal & Allied also commented on ARTC's letter of 6 May 2009, in which it committed to maintain pricing parity for a period of five years. Coal & Allied submitted that:

... it was inappropriate for ARTC to make such a commitment after it had lodged its 2009 HVAU application with the ACCC. To the extent that this "commitment" suggests that ARTC is somehow able to limit the ACCC's ability to determine a different pricing structure that it regards as more appropriate, such a commitment may risk being misleading.

C&A believes that it would be inappropriate for the ACCC to give this commitment by ARTC any weight when having regard to the matters in s44ZZA(3) of the TPA. That is, this commitment should not limit the ACCC's consideration of what pricing approach would:

- (a) most appropriately promote the economically efficient operation of, use of and investment in the Network under s44ZZAA(a) of the TPA; and
- (b) be consistent with the pricing principles specified in s44ZZCA of the TPA.¹⁸⁰

Xstrata also recommended 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. Further, Xstrata commented that the train size should then be brought into effect prior to the commencement of the third year of operation of the Access Undertaking.¹⁸¹

6.4.4 ACCC view

Consistent with the view in the March 2010 Draft Decision, the ACCC considers that the determination and implementation of the efficient train configuration is a key component of the proposed 2010 HVAU. One of the objects of Part IIIA is to promote the economically efficient operation of, use of and investment in infrastructure by which services are provided, thereby promoting effective competition in upstream and

¹⁷⁸ NSWMC, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 9.

¹⁷⁹ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 84.

¹⁸⁰ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 84.

¹⁸¹ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, pp. 10-11.

downstream markets.¹⁸² The ACCC is required to have regard to this object when assessing undertakings under Part IIIA.

The ACCC considers that the determination of an Indicative Service is important to promote the efficient use of the Hunter Valley rail network, as the Indicative Service should be based on the most efficient consumption of rail capacity. While the determination of an efficient train configuration in part moves towards this outcome, the ACCC considers that the fundamental aim is to ensure that the undertaking provides appropriate price signals to ensure that network capacity is consumed efficiently.

The ACCC recognises, however, that some work remains to be done to achieve this outcome, and that the proposed 2010 HVAU incorporates a process to progress the issue. Absent the inclusion of a finalised Indicative Service, the ACCC considers that the proposed 2010 HVAU may nonetheless be appropriate to accept provided that there is:

- a robust process in place to determine and implement the Indicative Service, with a clear understanding of the appropriate scope for the process;
- an ability for Access Holders to transition to the Indicative Service once implemented, including a ‘grandfathering’ period for certain Access Holders.

These issues are discussed in the following sections.

Scope of the review process

The ACCC notes that section 4.16(a) provides for ARTC to develop ‘the proposed characteristics of the indicative service which ARTC considers will deliver the optimum utilisation of Coal Chain Capacity.’

As noted above, the ACCC considers that the determination of an ‘efficient train configuration’ goes part of the way to ensure the efficient utilisation of the Hunter Valley rail network, and in turn the Hunter Valley coal chain. However, the fundamental concern is to ensure efficient consumption of network capacity, and the provision of pricing signals that enable this outcome. The ACCC recognises that a number of concerns expressed by stakeholders in relation to the use of GTKm as a pricing unit go to this issue (see further above).

The ACCC therefore considers that section 4.16 should explicitly provide that the process for the determination of the efficient train configuration will also involve a determination of the pricing approach that will enable and incentivise efficient consumption of network capacity. The HVAU should, therefore, ultimately provide for the efficient use of infrastructure by ensuring that users pay charges reflective of their consumption of capacity. Consequently, the outcome of the review process under section 4.16 should resolve the issue of whether calculating access charges by reference to GTKm units promotes efficiency, or whether another approach is optimal.

¹⁸² *Trade Practices Act 1974* (Cth), section 44AA(a).

The ACCC also considers that the process should encompass charge differentiation factors as discussed further below.

Timeframe for the determination of the efficient train configuration

Section 4.16(b) of the 2010 HVAU states that ARTC will submit the proposed characteristics of the Indicative Service, and seek approval from the ACCC to incorporate these in the Undertaking:

[w]ithin 12 months of ARTC being reasonably satisfied that the modelling undertaken by the HVCCC under section 4.16(a) is sufficiently robust to enable an efficient train configuration that optimises Coal Chain Capacity to be accurately determined and, in any event within four years of the Commencement Date ...

The ACCC notes that the drafting of section 4.16(b) is inconclusive in that it nominates a timeframe, the start of which is marked by ARTC being ‘reasonably satisfied’ with the relevant HVCCC modelling. The section then goes on to state that the Indicative Service will be determined in any event within four years of the Commencement Date. That is, at the outer limit, ARTC will submit the Indicative Service characteristics within four years of the Commencement Date regardless of the outcome of the consultation process with the HVCCC.

The ACCC’s preliminary view, as expressed in the Draft Decision, was that ARTC should determine the Indicative Service characteristics within a five year period.¹⁸³ At the time of the March 2010 Draft Decision, the ACCC considered that parties may not have been in a position to determine an efficient train configuration in the short term, given continuing developments in the Hunter Valley.¹⁸⁴

In response to the Consultation Paper, interested parties expressed concern at ARTC’s proposed timeframe, with recommendations that the service be determined in a shorter period, but with appropriate transitioning for parties who may have invested on the basis of the current arrangements (see further above).

In light of these views, the ACCC considers that the development of the efficient train configuration should be undertaken expeditiously, to promote the efficient use of the Hunter Valley rail network as soon as possible, as well as to encourage efficient complementary investment by parties using the network (such as investment in rolling stock). The ACCC’s view is also informed by its understanding that long lead times are not required for the HVCCC to provide requisite data to ARTC to facilitate the process.

Consequently, the ACCC considers that ARTC should submit a proposed variation of the HVAU, regarding the efficient train configuration and appropriate pricing approach, to the ACCC within six months of receiving the relevant information from the HVCCC, and in any event within twelve months of the commencement of the undertaking.

¹⁸³ ACCC, Draft Decision on HVAU, 5 March 2010, p. 612.

¹⁸⁴ ACCC, Draft Decision on HVAU, 5 March 2010, p. 611.

Consultation with the HVCCC and others

Section 4.16 provides that ARTC must develop the characteristics of the Indicative Service in consultation with the HVCCC, and that ARTC will use its best endeavours to agree with the HVCCC in relation to those characteristics. Section 4.16(c)(ii) further provides that, in doing so, ARTC will follow the consultation principles in Schedule F.

The ACCC has considered the principles in Schedule F in the **Capacity Management** chapter. In relation to process in section 4.16, the ACCC considers that ARTC's commitment to develop the efficient train configuration in consultation with the HVCCC, and to use best endeavours to agree with the HVCCC on the characteristics to be submitted to the ACCC for approval, is appropriately robust.

The ACCC notes Asciano's submission that the consultation process should include an obligation to consult with Operators (see above). The ACCC accepts that Operators may be able to provide useful insights into the process, and that the determination of the efficient train configuration could have consequences for their operations and investment decisions. In preparing the variation for submission to the ACCC under section 4.16, the ACCC encourages ARTC to appropriately consult with all relevant parties, and the ACCC will take into consideration any views expressed by Operators during its own consultation process on the proposed variation submitted by ARTC.

ACCC approval of the Indicative Service characteristics

Section 4.16(b) of the HVAU commits ARTC to obtaining approval from the ACCC to incorporate the characteristics of the Indicative Service (and associated access charges) into the Undertaking.

It is proposed that section 4.16(f) provisions apply in the event that the Indicative Service and Access Charges are not accepted by the ACCC as follows:

- (f) If the ACCC does not accept the train configuration proposed by ARTC:
 - (i) the Interim Indicative Services and the Interim Indicative Access Charges will continue to apply; and
 - (ii) ARTC may submit revised characteristics to the ACCC and seek the approval of the ACCC to vary this Undertaking to provide for the adoption of the revised characteristics as the indicative service.¹⁸⁵

The ACCC considers that the process for approval of the proposed Indicative Service and charges by the ACCC, in the first instance, is likely to be appropriate.

The ACCC notes however, that in the event that the proposed efficient train configuration is not accepted, under section 4.16(f), there is no definitive commitment from ARTC to resubmit revised characteristics to the ACCC.

¹⁸⁵ ARTC, *Hunter Valley Coal Network Access Undertaking*, 7 September 2010, section 4.16(f).

The ACCC considers that the HVAU is more likely to be appropriate if it required 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. This is necessary to maintain the integrity of ARTC's commitment to determine and adopt the Indicative Service, as expressed elsewhere in section 4.16.

Adoption of the Indicative Service and Indicative Access Charge

The ACCC considers that the proposed 2010 HVAU must specify a clear mechanism for Access Holders to transition from the interim arrangements to efficient service once it has been determined. If this was not the case, the undertaking would essentially lock-in incumbent users to a potentially inefficient regime.

Section 4.16(e) provides that once the Indicative Service and Indicative Access Charge have been developed, and a variation to the HVAU has been approved by the ACCC, ARTC will:

- (i) promptly publish on its website:
 - (A) the characteristics proposed under section 4.16(b) as the Indicative Service; and
 - (B) the indicative access charges accepted by the ACCC for the Indicative Service as the Indicative Access Charges, in the format set out in section 4.13(c).
- (ii) offer the Indicative Access Charges to Applicants and Access Holders seeking Coal Access Rights for the Indicative Service to apply in the year immediately following the date the variation to the Access Undertaking accepting the Indicative Service and Indicative Access Charge comes into effect; and the annual process for the finalisation of Indicative Access Charges under section 4.18 will not apply to the determination of Indicative Access Charges for that year; and
- (iii) determine Charges for Coal Access Rights other than Access Rights for the Indicative Service to apply in the year immediately following the date the variation to the Access Undertaking accepting the Indicative Service and Indicative Access Charge comes into effect, in accordance with section 4.14 and in doing so will take into account the Indicative Access Charges accepted by the ACCC in determining those Charges.¹⁸⁶

The ACCC understands that these provisions essentially provide that ARTC will offer the Indicative Service and Indicative Access Charges – the efficient train configuration – to *new* Applicants for access rights, and will determine Charges for non-Indicative Services for new Applicants by reference to the as determined Indicative Service and Charges.

The ACCC also notes that ARTC's Explanatory Guide to the proposed 2010 HVAU states, with reference to section 4.16(e)(ii), that once the Indicative Service has been determined, only those access holders operating the Indicative Service will be entitled to the Indicative Access Charges.¹⁸⁷ The Explanatory Guide further states that access holders with Coal Access Rights for an Interim Indicative Service will not be entitled

¹⁸⁶ ARTC, 2010 HVAU, 7 September 2010, section 4.16(e).

¹⁸⁷ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 23.

to the Indicative Access Charge, except where the Interim Indicative Service and the Indicative Service are one and the same.¹⁸⁸

The purpose of the efficient train configuration is to achieve optimum utilisation of coal chain capacity, and to realise these efficiencies, the ACCC considers that the 'efficient' Indicative Service must be made available under the HVAU to both prospective and existing coal users of the Network. The ACCC considers that new users of the Network following determination of the efficient service are likely to represent a small percentage of the overall use, and therefore confining the service to these users is unlikely to contribute to an efficient outcome overall.

The ACCC considers that the proposed 2010 HVAU in its current form does not appear to provide any transition mechanism for existing Access Holders wishing to adopt the Indicative Service, and considers that the drafting in section 4.16(e)(ii) is ambiguous in this respect. These issues must be addressed in order for the undertaking to be appropriate to accept.

Grandfathering and transition

While the ACCC considers that the proposed 2010 HVAU should provide a means for existing Access Holders to transition to the efficient Indicative Service once determined, the ACCC also recognises that this must incorporate appropriate grandfathering arrangements for parties that have made investments on the basis of the current interim arrangements.

The ACCC noted in the Draft Decision that ARTC indicated 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 not less than five years.¹⁸⁹ In the letter ARTC also committed to maintaining pricing parity between the two key existing train types operating on the Hunter Valley for that period. In reliance on ARTC's statements, the ACCC acknowledges that parties have entered commercial arrangements; the NSW Minerals Council noted in its submission that 'determining an Indicative Service which has different characteristics to the Interim Indicative Services will disadvantage those who have invested in rolling stock (with a working life of 15-20 years) in good faith in recent years.'¹⁹⁰

The ACCC concurs with Coal & Allied's submission that the 6 May 2009 letter by ARTC should not limit the ACCC's consideration of the appropriate pricing approach under the proposed 2010 HVAU.¹⁹¹ The ACCC recognises that the letter was released after the April 2009 HVAU was submitted, and does not form part of the undertaking. However, the ACCC does recognise that parties have, in reliance on that letter, made significant commercial decisions, and that the interests of those access seekers are relevant.

The ACCC therefore considers that it is appropriate for the proposed 2010 HVAU to incorporate grandfathering arrangements to ensure that those parties that have invested in good faith on the basis of ARTC's statement have sufficient time to adjust

¹⁸⁸ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 23.

¹⁸⁹ ACCC, Draft Decision on HVAU, 5 March 2010, p. 611.

¹⁹⁰ NSWMC, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 9.

¹⁹¹ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 84.

to the new arrangements, once determined. The grandfathering should not impact the ability of other parties to move to the new arrangements based on the Indicative Service and corresponding pricing.

The ACCC considers that the grandfathering arrangements should apply until 30 June 2014 in order for access holders and operators to transition their operations and adjust their business plans accordingly.

Power to reconfigure services

In the March 2010 Draft Decision, the ACCC considered that it would be ‘highly desirable’ for ARTC to have an explicit power to reconfigure train services to promote efficient network usage.¹⁹² In light of the views above regarding the process and timeframes for determination of the efficient service, including the need for a process by which users may transition to the new arrangements once determined, the ACCC does not maintain this view.

6.5 Interim Indicative Access Charges

6.5.1 March 2010 Draft Decision

The ACCC’s preliminary views in its March 2010 Draft Decision were that:

- the HVAU should include base Interim Indicative Access Charges;¹⁹³ and
- ARTC should provide information demonstrating how the Interim Indicative Access Charges are calculated.¹⁹⁴

6.5.2 Proposed 2010 HVAU

ARTC proposes that the Interim Indicative Access Charges for Interim Indicative Services that will apply as at the Commencement Date shall be as contained in the table at section 4.17(c). ARTC proposes that the TOP and non-TOP prices in a Pricing Zone shall be the same TOP and non-TOP prices respectively for all services in that Zone. ARTC also proposes that the TOP price for Pricing Zones 1 and 2 shall be the same as at the Commencement Date.

4.17 Interim Indicative Services and Interim Indicative Access Charges

...

(c) The following Interim Indicative Access Charges for Interim Indicative Services will apply as at the Commencement Date.

Pricing Zone/Service	Non-TOP \$/kgtkm (ex GST)	TOP \$/kgtkm (ex GST)	Indicative Service Assumptions
In Pricing Zone 1			

¹⁹² ACCC, Draft Decision on HVAU, 5 March 2010, p. 612.

¹⁹³ ACCC, Draft Decision on HVAU, 5 March 2010, 646.

¹⁹⁴ ACCC, Draft Decision on HVAU, 5 March 2010, 646.

Indicative Service 1	0.782	6.798	30 tonne maximum axle load 60kph maximum speed (loaded) 80kph maximum speed (empty) 91 wagon train length section run times as per applicable Hunter Valley standard working timetable
Indicative Service 2	0.782	6.798	30 tonne maximum axle load 60kph maximum speed (loaded) 80kph maximum speed (empty) 74 wagon train length section run times as per applicable Hunter Valley standard working timetable
Indicative Service 3	0.782	6.798	25 tonne maximum axle load 80kph maximum speed (loaded) 80kph maximum speed (empty) 72 wagon train length section run times as per applicable Hunter Valley standard working timetable
In Pricing Zone 2			
Indicative Service 1	0.639	6.798	30 tonne maximum axle load 60kph maximum speed (loaded) 80kph maximum speed (empty) 91 wagon train length section run times as per applicable Hunter Valley standard working timetable
Indicative Service 2	0.639	6.798	30 tonne maximum axle load 60kph maximum speed (loaded) 80kph maximum speed (empty) 74 wagon train length section run times as per applicable Hunter Valley standard working timetable
In Pricing Zone 3			
Indicative Service 1	1.563	4.781	25 tonne maximum axle load 80kph maximum speed (loaded) 80kph maximum speed (empty) 72 wagon train length section run times as per applicable Hunter Valley standard working timetable

6.5.3 ACCC view

The ACCC notes that the April 2009 HVAU did not specify Interim Indicative Access Charges, and therefore the ACCC welcomes the specification of these charges in the proposed 2010 HVAU. Further, the ACCC notes that ARTC has amended section 3.14 to clarify that Applicants seeking Coal Access Rights may accept an offer for Indicative Services as well as Interim Indicative Services; section 4.17(d) also provides that ARTC will offer the Interim Indicative Access Charges to Coal Access Seekers during the interim period. This therefore clarifies that the Interim Indicative Access Charges are available to coal access seekers. Also, as discussed above, the proposed 2010 HVAU provides a process for the determination of the efficient train configuration, and therefore the Indicative Service, which will provide the basis for Indicative Access Charges (subject to the revisions recommended by the ACCC). Finally, the Interim Indicative Access Charges are subject to the ‘two-thirds’ arbitration process under section 4.18, which allows access seekers to dispute the determination of Indicative Access Charges (see section 4.18(h)). The ACCC notes

however, that an amendment may be required to the timeframes in section 4.18 to ensure that the section operates sensibly depending on the commencement date of the undertaking.

The ACCC therefore considers that the proposed 2010 HVAU provides an appropriate degree of certainty to address the concerns expressed in the Draft Decision.

6.6 Charge Differentiation

As not all access seekers will be seeking to use the reference, or Indicative Services, ARTC has proposed charge differentiation factors that it is to have regard to under section 4.14 when negotiating access prices for services other than the reference services, including non-coal and non-indicative coal services.

6.6.1 Charge differentiation for non-indicative Coal services

March 2010 Draft Decision

In the March 2010 Draft Decision, the ACCC considered that:

- benchmarking of non-Indicative Access Charges on Indicative Access Charges is appropriate to ensure fair and equitable charges among both indicative and non-indicative access seekers, to ensure transparent pricing and to provide a point of reference in the event of disputes;¹⁹⁵
- charge differentiation provisions should identify only those factors that give rise to different costs to the extent that they differ from the Indicative Service;¹⁹⁶
- charge differentiation on the basis of credit risk was unlikely to be appropriate, as it appeared unnecessary to protect ARTC's legitimate business interests;¹⁹⁷
- charge differentiation on the basis of the potential for growth of the business was unlikely to be appropriate, as it may favour new access seekers and inefficiently distort competition in upstream and downstream markets;¹⁹⁸
- a higher degree of pricing certainty should be afforded to non coal access seekers;¹⁹⁹
- a limitation on ARTC's ability to differentiate charges on the basis of marginal cost of production due to sunk investment should be included.²⁰⁰

Proposed HVAU

ARTC has made substantial amendments to the charge differentiation provisions under section 4.14.

¹⁹⁵ ACCC, Draft Decision on HVAU, 5 March 2010, p. 637.

¹⁹⁶ ACCC, Draft Decision on HVAU, 5 March 2010, p. 638.

¹⁹⁷ ACCC, Draft Decision on HVAU, 5 March 2010, p. 637.

¹⁹⁸ ACCC, Draft Decision on HVAU, 5 March 2010, p. 638.

¹⁹⁹ ACCC, Draft Decision on HVAU, 5 March 2010, p. 638.

²⁰⁰ ACCC, Draft Decision on HVAU, 5 March 2010, p. 639.

Section 4.14(a) outlines the factors that ARTC will have regard to when formulating charges for Coal Access Rights other than Coal Access Rights for an Indicative Service contracted for under an Indicative Access Holder Agreement (non-Indicative Coal services). ARTC has omitted from this list of factors outlined in the April 2009 version of the HVAU the following:

- potential for growth of the business
- opportunity costs to ARTC
- market value of the Train Path sought
- credit risk associated with the business.

Section 4.14(b) lists the factors to be taken into account when formulating charges for non-Coal Access Rights, and retains the above factors.

ARTC contemplates in both instances, to take into account factors relating to the physical characteristics of the service; the commercial impacts on ARTC's business; the logistical impacts on ARTC's business; Capital Contributions or other contributions by the Applicant to ARTC's costs; and the cost of any Additional Capacity.

Sections 4.14(c)-(e), which relate to optimising coal chain capacity and disputes, remain unchanged from the April 2009 HVAU.

Stakeholder submissions

The NSW Minerals Council has submitted a detailed view on charge differentiation. In particular, the NSW Mineral Council considers that the principles and criteria for charge differentiation and limits on charge differentiation in the HVAU are poorly defined:

... the range of factors remains too broad and their application in determining the differentials from the Indicative charges is completely unspecified. In this form, they provide no certainty that the price differentials will be determined on an equitable and efficient basis and no price signals to Access Holders and to future Access Seekers.

This is particularly critical because, after the Indicative Service defined, a substantial proportion of existing coal services will become non-Indicative Services and subject to charge differentiation. Furthermore, all coal services seeking and granted Access Rights in the period before the Indicative Service is determined by ARTC and accepted by the ACCC will not know what service characteristics they should be using to purchase rolling stock and otherwise structure their operations.

...

NSWMC acknowledges that, if ARTC is unable to determine the Indicative Service at this point it will also be unable to determine, at this point, appropriate price differentials reflecting variations in service characteristics. NSWMC therefore submits that the proposed 2010 HVAU should require ARTC to:

- Apply the same process as it applies to develop, in consultation with the HVCCC, the proposed characteristics of the Indicative Service under s 4.16 in order to develop the proposed service characteristic variations and price differentials for non-Indicative Services; and
- Submit to the ACCC, at the same time that it proposes the Indicative Service under s4.16, the proposed service characteristic variations and price differentials for non-Indicative Services and seek the approval of the ACCC to vary s 4.14 & 4.15 of the undertaking accordingly.²⁰¹

ACCC view

The ACCC's view that credit risk and potential for growth of the business were unlikely to be appropriate bases for charge discrimination had particular relevance for coal users of the Network.²⁰² The ACCC considers that the use of TOP contracts by coal users mitigates the need for further differentiation on the basis of credit risk; and differentiation on the basis of potential for growth of the business is considered inconsistent with the promotion of efficient upstream competition. The ACCC notes that these factors have been omitted from the charge differentiation factors for non-Indicative Coal services.

Moreover, these factors do not represent costs that are incurred by ARTC in providing a non-Indicative service. The ACCC reiterates its view expressed in the Draft Decision that non-Indicative coal access seekers should normally only incur extra charges that are related to the additional costs incurred by ARTC in providing these tailored services.²⁰³ On this basis, the ACCC also considers that the omission of market value of Train Paths (and implicitly, opportunity costs to ARTC) from the charge differentiation factors for non-Indicative coal services to be appropriate.

More broadly, and as submitted by the NSW Minerals Council, the ACCC considers that the charge differentiation factors do not provide sufficient clarity for non-Indicative coal users of the Network about how their charges will be calculated. The ACCC considers that for the HVAU to be appropriate, the factors for charge differentiation should use the Indicative Service as a reference point to then differentiate the costs of providing the non-Indicative Service. This will provide greater transparency to Access Holders using a non-indicative service as to how their charges have been determined. In addition, the price differentials for service characteristic variations would need to be specified, as currently, no guidance is provided as to the application of the charge differentiation factors and the ACCC considers that they provide ARTC with excessive scope for discretion in pricing.

The ACCC also considers that it would be appropriate for the proposed service characteristic variations and price differentials for non-Indicative coal services to be developed and implemented using the same processes that will be used to develop the Indicative Service and access charges, as discussed above.

²⁰¹ NSWMC, Submission in Response to ACCC Consultation Paper, 25 March 2010, p. 10.

²⁰² ACCC, Draft Decision on HVAU, 5 March 2010, p. 637.

²⁰³ ACCC, Draft Decision on HVAU, 5 March 2010, p. 638.

Marginal cost of mine production

The ACCC also notes that ARTC has added a constraint to section 4.15(b) to provide that it will not differentiate between:

- (b) ... Applicants for Coal Access Rights on the basis of the marginal cost of production of the mines being served by the Coal Access Rights sought, to the extent such information is known to ARTC.

This is consistent with the ACCC's view in the March 2010 Draft Decision,²⁰⁴ and therefore likely to be appropriate.

6.6.2 Charge differentiation for non-Coal Access Rights

In the Draft Decision, the ACCC considered that charge differentiation for non-coal access rights was unlikely to be appropriate, in particular potential for growth of the business and credit risk²⁰⁵.

In response to the Draft Decision, ARTC submitted that:

[t]hese are still important factors for Non-Coal users. ARTC does not have the ability to obtain Security as a condition precedent to an Access Agreement for Non-Coal users (the conditions precedent for Non-Coal users will be those set out in the Indicative Interstate TAA) and ARTC also considers it important that it has the flexibility to take into account the potential for a Non-Coal business to grow in the future when determining the initial charges for that user's access to the network. This is consistent with the Interstate Network for Non-Coal usage.²⁰⁶

The ACCC recognises that, in light of the distinction ARTC has now made between coal and non-coal access charge differentiators, the differentiators for non-coal are largely consistent with those in the 2008 Interstate Access Undertaking, and therefore likely to be appropriate.

6.7 Access Charges under the IAHA

The provisions in section 4 of the proposed 2010 HVAU relating to pricing interact with the relevant provisions in the IAHA regarding access charges.

Clause 5 of the IAHA states that an Access Holder must pay the Charges determined under Schedule 3 of the IAHA (and in accordance with clause 5). Among other matters, clause 5 goes on to specify the calculation for the payment of a TOP rebate and an Ad Hoc charge rebate.

Schedule 3 provides for the calculation of TOP, Non-TOP and Ad Hoc charges. For the first year of operation of the contract, the charges will be specified in the Train Path Schedule. For subsequent years, the charges will be determined in accordance with section 4 of the proposed 2010 HVAU, payable under the agreement.

The following sections provide an overview of the provisions for the calculation and payment of access charges under an IAHA.

²⁰⁴ ACCC, Draft Decision on HVAU, 5 March 2010, p. 639.

²⁰⁵ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 637-638.

²⁰⁶ ARTC, *Response to the ACCC Draft Decision on the Hunter Valley Access Undertaking*, 31 March 2010, p. 120.

6.7.1 TOP Charges

TOP Charges per Pricing Zone are calculated under clause 1.2 of Schedule 3 of the IAHA. The calculation involves multiplying the TOP Price for a Pricing Zone by the Monthly GTK for the Pricing Zone, as set out in the Access Holder's Train Path Schedule.

This TOP Price will be set out for the first year of the agreement in the Train Path Schedule, while clause 4 of Schedule 3 for provides that the price will be determined in accordance with the undertaking for each subsequent year.

A rebate for TOP charges is payable in some circumstances, and this is discussed in the **Performance and Accountability** chapter.

6.7.2 Non-TOP Charges

Schedule 3 of the IAHA provides that the total Non-TOP Charge for a Pricing Zone is to be the sum of the products of actual GTKs and Non-TOP Prices for that Pricing Zone. The Non-TOP Price for using a Path Usage is included in a Train Path Schedule for the first year of the agreement, while clause 4 of Schedule 3 for provides that the price will be determined in accordance with the undertaking for each subsequent year.

ARTC further provides that the Non-TOP Price for using an Ad Hoc Path Usage that is not included in a Train Path Schedule will be the price notified to an Access Holder.

6.7.3 Ad Hoc Charges

Ad Hoc charges are calculated in accordance with clause 3.1 of Schedule 3 of the IAHA. Clause 3.1 provides for this charge to be the sum of the products of actual GTKs and TOP Prices for each Pricing Zone spanned by the Train Path.

ARTC has also provided that this additional Ad Hoc charge will not be payable under clause 3.2 of Schedule 3 in one particular circumstance. That is, where the Access Holder has paid TOP charges for the path usage but the actual usage is an Ad Hoc usage because the Access Holder does not have a right to utilise this path usage due to a failure to satisfy the Network Exit Capability requirement.

The ACCC notes that the Ad Hoc charge calculated under clause 3.1 is equivalent to the TOP charge that would have applied if this path usage was included in Monthly GTK for a Pricing Zone in the Access Holder's Train Path Schedule. Also, where the Access Holder does not pay an additional charge for an Ad Hoc path usage it has already paid a TOP charge for that path usage, the effective price paid for access is the TOP charge.

6.7.4 Invoicing

Clauses 5.2 and 5.3 of the IAHA provide for the invoicing and payment of charges.

6.7.5 Rebates for Ad Hoc charges

A rebate of Ad Hoc charges is available in some circumstances.

In order to determine the charges that are payable for an Access Holder, ARTC proposes a methodology in clause 3.4 of the IAHA to determine how path usages are to be treated. This provision enables determination of any additional charges payable for Ad Hoc Path Usages under clause 5.3(a)(ii).

The clause provides for path usages to be treated in an order of priority of Base Path usages, Tolerance usages, and Ad Hoc usages. This clause is subject to traded paths being treated as base path usages of the original Access Holder in accordance with clause 16.5.

It is possible under clause 3.4 that some path usages may be initially treated as Ad Hoc in a year where the Access Holder does not actually operate a service for all contracted path usages. ARTC provides for a mechanism under clause 5.4(b) so that any additional Ad Hoc charges paid are rebated where the Access Holder does not actually utilise their contracted path usages, and this effectively treats these Ad Hoc path usages as base path usages.

The ACCC considers that this provision has a similar effect to clause 3.2 of Schedule 3 of the IAHA because it prevents an Access Holder paying twice for what is, in effect, the same path usage. The combined effect of clauses 2.1, 3.1 and 3.2 of Schedule 3 of the IAHA, as well as clause 5.4(b) of the IAHA, is to create a framework that accounts for the possibility that paths may be provided in different ways at different times throughout the year. The ultimate effect across the whole contract year is that the Access Holder will be charged TOP for contracted path usages and Ad Hoc charges for any additional path usages.

6.7.6 Interaction with the HVAU

Access charges for an individual access holder for the initial contract year may be negotiated pursuant to the processes in the proposed 2010 HVAU. In the event that the parties are in dispute, the dispute may be referred to the ACCC for arbitration for resolution in accordance with section 3.15(c).

For subsequent contract years, clause 4 of Schedule 3 to the IAHA provides that TOP and Non-Top prices will be determined in accordance with section 4 of the HVAU.

Further, clause 4.1(c) of Schedule 3 provides that any disputes in relation to Prices (including any time limits or thresholds for raising disputes), will be resolved pursuant to the dispute resolution process in the HVAU (rather than the process under the access agreement). Consequently, any disputes in relation to prices for years after the initial contract year may be arbitrated by the ACCC.

ACCC's view

The ACCC considers that the interaction between the IAHA and the proposed 2010 HVAU in relation to charges is broadly appropriate. In general terms, the undertaking sets out the principles and methodologies for determining prices, both Indicative Access Charges and negotiated, non-Indicative Access Charges, which are reflected in the IAHA. The ACCC considers that there is effective interaction between the documents under the proposed arrangements. In particular, the ACCC considers it appropriate that the IAHA explicitly recognises that disputes in relation to Prices may be resolved via the dispute resolution process pursuant to the HVAU, including in

subsequent contract years. Access seekers therefore have the ability to seek ACCC arbitration on prices, which should provide certainty that prices will be determined strictly in accordance with the HVAU.

The ACCC notes, however, that Access Agreements may continue to operate beyond the term of the proposed 2010 HVAU. ARTC has consequently used a specially defined term for ‘Access Undertaking’ in clause 4 of Schedule 3 in relation to the determination of prices and the arbitration of disputes; that is, the clause provides that these matters will be determined by reference to an accepted Part IIIA undertaking, or if one such undertaking is not in force, ‘access protocols published by ARTC after consultation with Access Holders, under which ARTC agrees to offer access to the Network from time to time.’

The ACCC is concerned that this approach essentially leaves pricing in ARTC’s discretion following the expiry of the proposed 2010 HVAU, assuming it is not replaced by another Part IIIA undertaking. The ACCC considers that this arrangement is inappropriate because it shifts a substantial amount of risk from ARTC onto Access Holders and therefore does not balance the interests of Access Holders and ARTC. The ACCC recognises however that an appropriate response to this concern will depend upon the final view taken on the appropriate term of the proposed 2010 HVAU.

6.8 Pricing uncertainty

The ACCC expressed a number of concerns in the March 2010 Draft Decision about the extent of pricing uncertainty facing Access Holders under the proposed access arrangements, including in relation to:

- the appropriateness of the loss capitalisation model;²⁰⁷
- the appropriateness of TOP contracts;²⁰⁸
- the relationship between non-coal and coal charges;²⁰⁹
- the methodology for calculating Indicative Access Charges;²¹⁰
- Non-Indicative Charges;²¹¹
- Interim Indicative Charges;²¹²
- the process for finalising Indicative Charges;²¹³
- joint liability of Access Holders;²¹⁴ and

²⁰⁷ ACCC, Draft Decision on HVAU, 5 March 2010, p. 491.

²⁰⁸ ACCC, Draft Decision on HVAU, 5 March 2010, p. 613.

²⁰⁹ ACCC, Draft Decision on HVAU, 5 March 2010, p. 621.

²¹⁰ ACCC, Draft Decision on HVAU, 5 March 2010, p. 639.

²¹¹ ACCC, Draft Decision on HVAU, 5 March 2010, p. 639.

²¹² ACCC, Draft Decision on HVAU, 5 March 2010, p. 646.

²¹³ ACCC, Draft Decision on HVAU, 5 March 2010, p. 649.

- the lack of an obligation on ARTC to publish long term forecasts.²¹⁵

6.8.1 ACCC's views

The ACCC considers that a number of revisions to the proposed 2010 HVAU to a large extent address the ACCC's concerns outlined in the Draft Decision. These revisions in conjunction with the existing mechanisms in the 2010 HVAU, and the ACCC's proposed recommendations set out in the **Financial Model** chapter, should provide sufficient certainty in relation to access charges.

Specifically, the ACCC notes that under the proposed 2010 HVAU:

- Via the financial model in section 4:
- imposes a revenue cap that restricts ARTC's access revenues to 'allowable revenue' as determined by the BBM;
- incorporates a combinatorial model (floor and ceiling limits) that binds ARTC's access revenues to Economic Cost; and
- in light of the ACCC's proposed revisions, confines the use of loss capitalisation to new investment in Pricing Zone 3;
- requires that Capital Expenditure be prudent before inclusion in the RAB, with input and endorsement from users via the RCG process;
- in light of the ACCC's proposed revisions, provides for operating expenditure to be efficient, and allows the ACCC via the Annual Compliance Assessment to disallow inefficient operating expenditure;
- includes reference Interim Indicative Access Charges;
- includes a process for determining the Indicative Service (efficient train configuration) and Indicative Access Charges, including the most efficient pricing unit;
- provides for price differentiation to occur by reference to the factors in section 4, which, in light of the ACCC's proposed revisions, are also subject to review as part of the efficient train configuration determination process;
- provides for parties to seek arbitration of an access dispute by the ACCC in accordance with section 3.15;
- provides for ACCC to arbitrate the level of Indicative Access Charges where two thirds of access seekers dispute the charges in a particular Pricing Zone, in accordance with section 4.18(f); and

²¹⁴ ACCC, Draft Decision on HVAU, 5 March 2010, p. 668.

²¹⁵ ACCC, Draft Decision on HVAU, 5 March 2010, p. 669.

- provides for the ACCC to arbitrate price-related disputes arising under coal access agreements in accordance with clause 4.1(c) of Schedule 3 of the IAHA.

Consequently, and subject to the matters discussed in the following sections, the ACCC considers that the proposed 2010 HVAU (with the implementation of the ACCC's recommendations) is likely to provide sufficient pricing certainty to access seekers regarding the determination and levy of access charges.

ARTC excusing TOP obligations

The ACCC, notes however, that if ARTC's excuses an Access Holder from its TOP obligations, this may create pricing uncertainty for the remaining Access Holders.

The ACCC is particularly concerned that if ARTC excuses an Access Holder from its TOP obligations, it could recover these TOP charges by increasing the charges for remaining Access Holders, as the Ceiling Limit in section 4.2(c) effectively holds the remaining Access Holders liable for the full Economic Cost of all Segments utilised for the duration of the IAHA.

In order to address this area of uncertainty, the ACCC considers 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.

ARTC's proposed price cap

Finally, the ACCC notes that ARTC proposes under section 4.2(d) that it shall not increase its prices by more than 25 per cent each year for a Pricing Zone where previous unrecovered shortfalls are included in the RAB for that Pricing Zone.

4.2 Floor and Ceiling Limits

...

- (d) If the RAB in a Pricing Zone is greater than the applicable RAB Floor Limit in a calendar year, ARTC will not increase the Indicative Access Charge or the Interim Indicative Access Charges, as applicable, in that Pricing Zone for that calendar year by more than 25% from the previous calendar year.

ARTC has included this revision in the 2010 HVAU in response to the ACCC's concerns regarding the level of pricing uncertainty facing Access Holders under the HVAU. The ACCC considers, however, that given the mechanisms in place in the proposed 2010 HVAU, as well as the further revisions recommended by the ACCC in this Paper, to mitigate the level of pricing uncertainty, section 4.2(d) is now unnecessary and should be removed.

7 Negotiating for Access

Summary

Section 3 of the proposed 2010 Hunter Valley access undertaking includes provisions for the offer and negotiation of access rights, the assessment and allocation of capacity entitlements, and for arbitration by the ACCC in the event of a dispute.

The ACCC considers that many aspects of section 3 of the proposed 2010 HVAU are likely to be appropriate, as ARTC has adopted recommendations made by the ACCC in the March 2010 Draft Decision.

The ACCC considers, however, that the following revisions are necessary:

- A minor revision to ensure that the section on Prudential Requirements is objective.
- Revisions to the Network Exit Capability condition precedent in the Train Path Schedule to ensure it operates consistently with the provisions of the HVAU.
- Revisions to the confidentiality provisions to allow disclosure of confidential information to the ACCC and prevent other disclosures.
- A minor revision to permit Operator involvement in negotiation of the Operator Sub-Agreement, and in dispute resolution proceedings, with the consent of the Access Holder.
- Steps to facilitate transition of users to the new access arrangements.
- Revisions to the mutually exclusive access applications provision to ensure its operation is clear and transparent.

7.1 Introduction

The proposed 2010 HVAU provides for ARTC to offer and negotiate terms and conditions of access with potential access seekers, culminating in the execution of an access agreement. This involves two broad elements:

- a process for the offer and negotiation of access rights, subject to arbitration by the ACCC in the event of a dispute between the parties; and
- indicative terms and conditions of access, as set out in the indicative agreements attached to the HVAU, the Indicative Access Holder Agreement (IAHA) and Operator Sub-Agreement (OSA).

The processes for the offer and negotiation of access rights, and the arbitration of disputes, are set out in section 3 of the proposed 2010 HVAU. Key provisions in this regard are:

- section 3.14, which sets out the offer of access ARTC will make to a potential access seeker, and which recognises a distinction between an offer of coal access rights and non-coal access rights;
- section 3.1, which obliges ARTC to negotiate access in good faith;
- sections 3.3 to 3.13, which set out the processes by which parties may apply for and negotiate access rights with ARTC; and
- section 3.15, which sets out the dispute resolution procedures to which parties may seek recourse in the event of dispute, including the possibility of arbitration by the ACCC.

This chapter discusses these and other aspects of the proposed 2010 HVAU. Closely related to this discussion is that in the following **Agreements** chapter regarding the IAHA and OSA.

7.2 Offer and negotiation of access

In the March 2010 Draft Decision the ACCC was of the view that the scheme for the offer and negotiation of access rights proposed in the 2009 HVAU, while in principle likely to be appropriate, was very complex, with confusion and uncertainty as to how the undertaking actually operated to facilitate access.²¹⁶ The ACCC recommended a range of revisions to section 3 of the 2009 HVAU to address these clarity and certainty concerns.²¹⁷

7.2.1 ARTC's offers of access

Section 3.14 of the proposed 2010 HVAU sets out the offers of access ARTC is obliged to make to access seekers, and is therefore an important aspect of the overall access regime. ARTC has made several revisions to subsections 3.14(b) and (c), which now state:

- (b) Subject to **section 3.14(c)**, ARTC will offer Applicants the choice of the following as an Access Agreement:
 - (i) for Applicants seeking Coal Access Rights:
 - (A) the Indicative Access Holder Agreement subject to the Applicant satisfying the Network Exit Capability requirement in **section 3.7(a)(ix)**, the prudential requirements in **section 3.4(e)** and seeking Access Rights intended for the operation of Indicative Services or Interim Indicative Services;
 - (B) an updated Access Holder Agreement to reflect agreed amendments to the Indicative Access Holder Agreement. A negotiated Access Holder Agreement will incorporate those clauses from the Indicative Access Holder Agreement identified as Tier 1 (mandatory) provisions in **Schedule A:1** and will, (unless otherwise agreed between

²¹⁶ ACCC, *Australian Rail Track Corporation Limited – Hunter Valley Coal Network Access Undertaking Draft Decision*, 5 March 2010, p. 146.

²¹⁷ ACCC, *Draft Decision on HVAU*, 5 March 2010, pp. 146-153.

ARTC and the Applicant) at least address those provisions identified as Tier 2 (negotiable) provisions in **Schedule A:1**, as applicable to the destination of the Coal Access Rights sought. The details of **Schedule A:1** do not provide an exhaustive list of the issues that may be included in an Access Holder Agreement; or

- (C) current available market terms and conditions in the form of an Access Holder Agreement which had been negotiated and agreed by ARTC and an Access Holder in accordance with **section 3.14(b)(i)(B)**, as published on ARTC's website, as applicable.
- (ii) for Applicants seeking Non-Coal Access Rights:
- (A) subject to the Applicant satisfying those prudential requirements in **section 3.4(e)(i), (ii) and (iv)**, 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; and
 - (ii) incorporate those provisions identified as Tier 1 (mandatory) Non Coal Provisions in **Schedule A:2**,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
 - (B) an updated Access Agreement to reflect agreed amendments to the terms and conditions of the Indicative Interstate Access Agreement. A negotiated Access Agreement will incorporate those provisions identified as Tier 1 (mandatory) Non- Coal provisions in **Schedule A:2** and will, unless otherwise agreed between ARTC and the Applicant, at least address those provisions identified in **Schedule A:2** as Tier 2 (negotiable) Non Coal provisions; or
 - (C) the current available market terms and conditions in the form of an Access Agreement for Non-Coal Access Rights which had been negotiated and agreed by ARTC and an Access Holder in accordance with **section 3.14(b)(ii)(B)** as published on ARTC's website, as applicable.
- (c) ARTC must offer the Indicative Access Holder Agreement to an Applicant for Coal Access Rights if the Applicant:
- (i) seeks Access Rights for the operation of Indicative Services or Interim Indicative Services;
 - (ii) meets the Network Exit Capability requirement in **section 3.4(d)** and the prudential requirements in **section 3.4(e)**;
 - (iii) either:

- (A) the Network has sufficient Available Capacity to meet the Applicant's needs; or
- (B) ARTC consents to provide Additional Capacity to meet the Applicant's needs in accordance with **section 6.2** or **section 6.3**; ...²¹⁸

In summary, ARTC will offer to an Applicant seeking **Coal Access Rights** one of three options:

- 1 The Indicative Access Holder Agreement (IAHA), where the Applicant seeks to run Indicative Services or Interim Indicative Services (and subject to the Applicant satisfying the other requirements in section 3.14(b)(i)(A)).
- 2 An updated Access Holder Agreement, being an IAHA amended to reflect changes negotiated and agreed between ARTC and the access seeker.
 - Certain provisions, however, are non-negotiable in order to facilitate the interests of supply chain alignment and the long-term solution. These provisions are set out in Schedule A:1 (see further below).
 - Parties seeking Coal Access Rights other than for export via the Port of Newcastle may negotiate and agree appropriate changes.
- 3 'Current available market terms and conditions' as applicable, being a previously negotiated and agreed Access Holder Agreement, which will be made available on ARTC's website.

Similarly, ARTC will offer an Applicant seeking Non-Coal Access Rights one of three options:

- 1 The Indicative Interstate Access Agreement (which is attached to ARTC's 2008 Interstate Access Undertaking), amended to refer to the Hunter Valley rather than the Interstate Network, and to incorporate the Tier 1 (mandatory) Non-Coal provisions in Schedule A:2 (subject to the Applicant satisfying the other requirements in section 3.14(b)(ii)(A)).
- 2 An updated Access Agreement, being an Indicative Interstate Indicative Access Agreement amended to reflect changes negotiated and agreed between ARTC and the access seeker. Certain provisions, however, are non-negotiable, being those provisions identified as such in Schedule A:2.
- 3 'Current available market terms and conditions' as applicable, being a previously negotiated and agreed Access Agreement, which will be made available on ARTC's website.

The ACCC reiterates its comments from the March 2010 Draft Decision regarding the likely appropriateness of the inclusion of an Indicative Service and the ability for parties to negotiate arrangements suited to their circumstances.²¹⁹ The ACCC considers that, in revising section 3.14, ARTC has increased the clarity and certainty of the access arrangements available pursuant to the undertaking.

²¹⁸ ARTC, *Hunter Valley Coal Network Access Undertaking*, 7 September 2010, section 3.14(b) and (c).

²¹⁹ ACCC, *Draft Decision on HVAU*, 5 March 2010, pp. 146-8.

7.2.2 Coal Access Rights: alignment of key provisions between access seekers

The ACCC considers that ARTC's revisions to section 3.14 clarify that an access seeker for Coal Access Rights may:

- obtain indicative terms and conditions of access as set out in the IAHA where access is sought to run an Indicative Service (or Interim Indicative Service); or
- negotiate terms and conditions appropriate to the access seeker's circumstances where they seek to run a service other than an Indicative Service (which includes a coal service other than to the Port of Newcastle for export), *but* remain subject to common provisions with other access seekers to ensure the effective operation of the Hunter Valley coal chain overall (see further below); or
- obtain terms and conditions as negotiated by another access seeker where applicable.²²⁰

March 2010 Draft Decision

In the March 2010 Draft Decision the ACCC provided the view that the ability of access seekers to negotiate terms and conditions suited to their particular circumstances should be subject to an important qualification in this context. The ACCC stated that the interests of the Hunter Valley coal supply chain and the long term solution are likely to be better served, where appropriate, by consistent, commonly understood terms and conditions of access to the rail network. That is, it is unlikely to be in the interests of supply chain alignment for parties to negotiate and agree non-aligning rail access terms that frustrate the objectives of the long term solution. The ACCC identified terms relating to capacity management as being those most relevant to achieving alignment outcomes. The ACCC emphasised in the Draft Decision, and emphasises again in this Position Paper, that this approach arises because of the particular circumstances of the Hunter Valley rail network and the long term solution.²²¹

The ACCC received several responses to the Draft Decision supporting its view in relation to the alignment of key provisions.²²²

Proposed 2010 HVAU

In the proposed 2010 HVAU, ARTC has made revisions to Schedule A and section 3.14 of the HVAU 'to identify those terms in the IAHA which it considers need to be consistent across all Access Holder Agreements for Coal Access Rights to ensure

²²⁰ Subject to the access seeker meeting other relevant requirements.

²²¹ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 149-150

²²² NSW Minerals Council Hunter Rail Access Task Force, *Submission to Australian Competition and Consumer Commission regarding the Draft Decision in relation to Australian Rail Track Corporation Hunter Valley Coal Network Access Undertaking*, 1 April 2010, p. 8; QRN Coal, *Submission on the Draft Decision on the Hunter Valley Coal Network Access Undertaking*, 30 March 2010, p. 1; RailCorp, *Hunter Valley Rail Network – ARTC Proposed Access Undertaking – RailCorp Submission in Response to the ACCC Draft Decision*, 31 March 2010, p. 8; Xstrata, *Submission in Response to ACCC Draft Decision on ARTC Hunter Valley Coal Network Access Undertaking*, Attachment 1, 8 April 2010, p. 5.

workable alignment.’ These provisions are designated as ‘Tier 1 (Mandatory Provisions)’ and are as follows:

- 1 IAHA Clause 1.5: Tier 1 Mandatory Provisions [#]
 - 2 IAHA Clause 3.1: Grant of Train Paths for transport of coal IAHA
 - 3 IAHA Clause 3.2: Annual Determination of BPU, MTC and NPC [#]
 - 4 IAHA Clause 3.3: Tolerance
 - 5 IAHA Clause 3.4: Identification of Path Usages [#]
 - 6 IAHA Clause 3.6: Availability Exceptions [#]
 - 7 IAHA Clause 3.14: Network Exit Capability requirement
 - 8 IAHA: Clause 5.4: Calculation of TOP Rebate and Ad-Hoc Charge Rebate [#]
 - 9 IAHA Clause 6: Capacity shortfall [#]
 - 10 IAHA Clause 11.1(b)(iii) Variation of a Train Path for the purposes of maximising the use and reliability of the Network [#]
 - 11 IAHA Clause 11.4: Removal of Path Usages for under-utilisation
 - 12 IAHA Clause 11.5: Use of Non-Compliant Services [#]
 - 13 IAHA Clause 11.6: Cancellations of services [#]
 - 14 IAHA Clause 15: Confidentiality
 - 15 IAHA Clause 16.4: Temporary Trade of Path Usages
 - 16 IAHA Clause 16.5: Treatment of Traded Path Usages
 - 17 IAHA Clause 19.1 New or varied Access Undertaking [#]
 - 18 IAHA Train Path Schedule: Clause 4.1 Network Exit Capability Condition Precedent; Clause 4.2 Removal of path usages for failure to satisfy Network Exit Capability Condition Precedent
 - 19 IAHA Schedule 2: System true-up test [#]
 - 20 IAHA Schedule 3: Clause 4.1(c) Determination of TOP Price_{PZ} and Non-TOP Price_{PZ}, - dispute resolution provisions. [#]
- * Except if the Access Holder Agreement is for Access Rights to transport coal to a destination other than the Port of Newcastle, in which case:
- the Tier 1 (mandatory) provisions are items 1, 3, 5, 6, 8, 9, 10, 12, 13, 17, 19, 20 [that is, provisions marked above with #]

- items 2, 4, 7, 11,14, 15, 16 and 18 will be treated as Tier 2 (negotiable) provisions.²²³

ARTC proposes that Schedule A will also identify ‘Tier 2 (negotiable) provisions’, which are provisions to be addressed in an access agreement, unless the parties agree otherwise.

Submissions on Consultation Paper

Coal & Allied submitted that the Tier 1/Tier 2 approach in the proposed 2010 HVAU adds a layer of complexity to the contracting process and queried the extent to which a process of negotiation is realistic or appropriate:

As ARTC is operating under a revenue cap, it would appear that ARTC would have little to gain by offering different terms (for example, as to liability) to different Access Seekers. Therefore, C&A queries whether ARTC will in practice be willing to extensively negotiate the terms of any particular AHA.

C&A suggests that only a limited number of clauses of the Proposed IAHA be negotiable, as narrowing the scope of negotiation would help expedite the contract negotiating process and assist with ensuring that the rights of Access Holders are on equal, aligned terms.²²⁴

Coal & Allied also considered that there is significant uncertainty as to how certain of the Tier 2 provisions could be negotiated by Applicants. For example, Coal & Allied suggested that the provisions relating to Charges (point 6 of the Tier 2 provisions) must be the same across Access Holders, and that it is unclear how Applicants could negotiate with ARTC in relation to ARTC's obligations under the NSW Lease, its Environment Licence or its passenger priority obligations. Coal & Allied stated that it intends to pursue the issue of negotiation of such provisions with ARTC.²²⁵

Xstrata considered it appropriate for certain key items to be common between all Access Holder Agreements on the Network. Xstrata stated it was broadly satisfied that those items are the ones identified as Tier 1 (Mandatory) Provisions, and was largely neutral as to whether these provisions should be contained within the undertaking or within each Access Holder Agreement as ARTC has proposed. Xstrata's position was subject to two provisos – first, that the ACCC have the ability to arbitrate disputes regarding the aligned provisions, and second, that the loss allocation provisions in clause 11.6 of the IAHA be included in the undertaking itself.²²⁶ (These provisos are discussed, respectively, in section 7.2.3 below and in the **Capacity Management** chapter).

²²³ ARTC, 2010 HVAU, 7 September 2010, Schedule A:1.

²²⁴ Coal and Allied, *Submission in Response to the ACCC's Consultation Paper in relation to the Australian Rail Track Corporation's Proposed Hunter Valley Rail Network Access Undertaking*, 25 October 2010, p. 27.

²²⁵ Coal and Allied, *Submission in Response to ACCC Consultation Paper*, 25 October 2010, p. 27.

²²⁶ Xstrata, *Xstrata Coal Pty Ltd's response to the Australian Competition and Consumer Commission in relation to the ACCC Consultation Paper in relation to the Australian Rail Track Corporation's proposed Hunter Valley Rail Network Access Undertaking dated 16 September 2010*, 25 October 2010, p. 8.

ACCC view

The ACCC considers that ARTC's proposed approach is in line with the views outlined above (and in the Draft Decision) regarding supply chain alignment.

The ACCC acknowledges Coal & Allied's submission that the Tier 1/Tier 2 approach adds a layer of complexity to the undertaking, and other submissions suggesting that certain clauses identified as 'negotiable' instead be included as 'non-negotiable.' The ACCC also recognises that ARTC is unlikely to negotiate into access agreements clauses that are inconsistent with its legal obligations, such as in relation to passenger priority or arising under the NSW Lease.

However, consistent with other undertakings, the inclusion of an indicative agreement allows parties who wish to take a standard offer to do so, whilst allowing others who need different arrangements to negotiate them, with the fallback of arbitration if required.

The inclusion of Tier 1 provisions is an additional layer of complexity, which accommodates supply chain alignment considerations into the negotiate/arbitrate access framework ARTC has put forward. The ACCC considers it appropriate to maintain a negotiate/arbitrate framework for non-Tier 1 provisions to recognise the different circumstances of access seekers, including domestic coal and non-coal use of the Network. The use of the negotiate/arbitrate framework in the proposed 2010 HVAU also facilitates interaction with ARTC's 2008 Interstate Access Undertaking, which likewise adopts a negotiate/arbitrate framework.

The table below sets out the chapters of this Paper in which ACCC discusses the Tier 1 (Mandatory) provisions. The ACCC also considers that all provisions of the IAHA relating to capacity assignment and trading be designated Tier 1, and this is discussed in the **Capacity Management** chapter.

Table 7.A: ACCC views on Tier 1 (Mandatory) provisions

Clause of IAHA	Chapter of Position Paper
1.5 Tier 1 Mandatory Provisions	Negotiating for Access
3.1 Grant of train paths	Agreements
3.2 Annual determination of BPU, MTC and NPC	Agreements
3.3 Tolerance	Agreements
3.6 Availability Exceptions	Agreements
3.14 Network Exit Capability	Negotiating for Access
5.4 TOP and Ad Hoc Charge Rebate	Pricing, Performance and Accountability
6 Capacity Shortfall	Capacity Management

11.1(b)(iii) Variation of train path to maximise use and reliability of Network	Capacity Management
11.4 Removal of Path Usages for under-utilisation	Capacity Management
11.5 Use of Non-Compliant Services	Capacity Management
11.6 Cancellation of Services	Capacity Management
15 Confidentiality	Negotiating for Access
16.4 Temporary Trade of Path Usages	Capacity Management
16.5 Treatment of Traded Path Usages	Capacity Management
19.1 New or varied Access Undertaking	Agreements
Schedule 2 True-up test	Performance and Accountability
Schedule 3 clause 4.1(c) Determination of TOP and non-TOP prices	Pricing

7.2.3 Dispute resolution on the Tier 1 terms

March 2010 Draft Decision

In the Draft Decision the ACCC provided the view that the 2009 HVAU should specify that disputes in relation to ‘aligning’ capacity management provisions be dealt with under the dispute resolution process in the HVAU, rather than under an Access Agreement, in order to maintain the effectiveness of the aligned approach.²²⁷

Proposed 2010 HVAU

In response, ARTC submitted that it understood that the ACCC’s primary concern in including the Tier 1 mandatory provisions in the HVAU was to ensure a consistent interpretation of the provisions in order to avoid the risk of misalignment. ARTC considered, however, that the risk of conflicting interpretations was very low, given that disputes post-execution of an access agreement were likely to be resolved via court proceedings or independent expert determination. ARTC also did not consider it necessary for the ACCC to be involved in arbitrating a dispute specific to an Access Holder which may have no implications beyond that individual Access Holder.²²⁸

Instead, ARTC proposed that it be under an obligation to inform the ACCC if a dispute arises in relation to Tier 1 provisions under an AHA which ARTC reasonably considered could have a broader adverse impact on Coal Chain alignment. If so,

²²⁷ ACCC, Draft Decision on HVAU, 5 March 2010, p. 153.

²²⁸ ARTC, *Response to the ACCC Draft Decision on the Hunter Valley Access Undertaking*, 31 March 2010, p. 31-32.

ARTC would facilitate, to the extent it is possible, the ACCC making submissions on the issue before an expert or court.²²⁹

ARTC has not included such an obligation in the revised IAHA. Instead, ARTC has included the following new clause 1.5, which relates to the interpretation of the Tier 1 provisions:

- (a) To the extent that any part of this agreement, including any term of the Train Path Schedule, is inconsistent with a Tier 1 (Mandatory) Provision, the Tier 1 (Mandatory) Provision will prevail.
- (b) Any clause of this agreement which is a Tier 1 (Mandatory) Provision will be interpreted by reference to the objectives of the Access Undertaking, and the coal chain principles recognised by ARTC in the Access Undertaking.

Submissions on Consultation Paper

Coal & Allied supported the ACCC's preliminary view that the provisions relating to the management of capacity on the Hunter Valley network should be included in the HVAU and mirrored in Access Holder Agreements; and that disputes in relation to the mirrored capacity management provisions dealt with under the arbitration provisions in section 3.15 of the proposed 2010 HVAU.²³⁰

Coal & Allied provided extensive reasons to support this position:

C&A believes that, as the Tier 1 mandatory provisions represent the most important provisions in the Proposed IAHA, disputes in relation to these provisions should be resolved under the dispute resolution process that is best suited to the parties' needs. C&A considers that the dispute resolution provisions under the Proposed HVAU are preferable to those in Proposed IAHA for the following reasons:

- (a) arbitration is likely to be quicker and cheaper than court proceedings and C&A believes that it is in the interests of both parties to the dispute to have the dispute resolved as soon as practicable;
- (b) the ACCC is the most appropriate body to adjudicate any access dispute given:
 - (i) it is the body that will approve an HVAU and IAHA (if it chooses to do so) and is, therefore, more familiar with these documents than a court;
 - (ii) the role of the ACCC in an arbitration also gives the ACCC greater opportunity to monitor:
 - (A) ARTC's compliance with the implemented HVAU and any Access Holder agreement; and
 - (B) whether the HVAU is "working", which will be relevant to the review of the HVAU provided for in section 2.3(b) of the Proposed HVAU; and

²²⁹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 32.

²³⁰ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 68.

- (iii) that ACCC arbitration should result in a greater chance of consistency of interpretation of the Tier 1 provisions which would minimise the risk of misalignment; and
- (c) the arbitration provisions in section 3.15(c) of the Proposed HVAU coupled with the ACCC arbitration procedure in Division 3 Subdivision D of Pt IIIA of the TPA:
- (i) provide for the ACCC not being bound by technicalities, legal forms or rules of evidence (s44ZF(1)(a) of the TPA);
 - (ii) place a positive obligation on the ACCC to proceed as quickly as is possible and consistent with a fair and proper assessment of the matter (section 3.15(c)(ii)(D)(i) of the Proposed HVAU and s44ZF(1)(b) of the TPA);
 - (iii) allow the ACCC to determine the periods that are reasonably necessary for the fair and adequate presentation of the respective cases of the parties and require that the cases be presented within those periods (s44ZF(2) of the TPA);
 - (iv) in addition to (ii) and (iii) above, allow the ACCC to do all such things as are necessary or expedient for a speedy hearing and determination of the access dispute (s44ZG(1)(f) of the TPA);
 - (v) require the ACCC to present its determination in a draft form to the parties and hear argument from the parties before making a final determination. No such opportunity will be afforded the parties under court proceedings (section 3.15(c)(ii)(D)(v) of the Proposed HVAU);
 - (vi) allow persons to apply to the ACCC to join as parties to an arbitration if certain "interest" criteria are met. C&A believes the opportunity that third parties have to join an arbitration under these provisions is clearly preferable to ARTC's proposal that it be under an obligation to inform the ACCC if a dispute arises in relation to Tier 1 provisions which ARTC reasonably considers could have a broader adverse impact on Coal Chain alignment and that ARTC would facilitate, to the extent it is possible, the ACCC making submissions. C&A considers that this proposal:
 - (A) is not binding on ARTC as it is currently provided for in either the Proposed HVAU or IAHA;
 - (B) provides ARTC with too much discretion as to when it will invite the ACCC to become involved in a dispute;
 - (C) is unclear, as what would constitute a 'broader adverse impact' on Coal Chain alignment is open to interpretation;
 - (D) does not allow for the joining or involvement of other interested parties apart from the ACCC; and
 - (E) limits the involvement of the ACCC to making submissions facilitated 'to the extent it is possible' by ARTC and so may not result in any ACCC submissions being made despite ARTC informing the ACCC of the dispute.

C&A is, therefore, of the view that ARTC's approach is inappropriate as the interests of Access Holders, Access Seekers, the public and ARTC will be better served by having the most important terms of an Access Holder agreement being subject to the Proposed HVAU arbitration process that is conducted by the most appropriate body in the circumstances and is quicker, cheaper and allows for greater involvement by the parties and interested person in the process than the court proceedings provided for in the Proposed IAHA.²³¹

Xstrata also considered that it would be beneficial for the ACCC to arbitrate disputes in relation to the Tier 1 provisions, rather than have those disputes resolved via court determination. Xstrata submitted that the ACCC would be better equipped to take account of the economic considerations relevant to the functioning of the system, and that the ACCC would develop a greater familiarity with the functioning of the undertaking and the Access Holder Agreements as a whole. Xstrata also considered that ACCC experience in determining disputes in relation to the Tier 1 provisions would be useful to it in determining other matters in relation to the undertaking.²³²

ACCC view

Section 3.15 of the proposed 2010 HVAU states that:

If any dispute arises under this Undertaking or in relation to the negotiation of Access Rights between an Applicant and ARTC ("**Dispute**") then, unless otherwise expressly agreed to the contrary by both parties, such Dispute will be resolved in accordance with this **section 3.15**...

Disputes in relation to an Access Agreement once executed will be dealt with in accordance with the provisions of that Access Agreement and are not dealt with under this Undertaking....

This approach is consistent with the aim of an access undertaking to facilitate agreement of mutually acceptable terms and conditions of access between the parties. That is, the access undertaking sets out processes for the negotiation of access, with recourse to independent arbitration in the event of dispute, thereby aiming to equalise the bargaining relationship between access provider and access seeker. The process should culminate in the execution of a mutually acceptable agreement. Thereafter, the parties may enforce their contractual rights independent of the access undertaking.

While the ACCC recognises that the circumstances of the Hunter Valley access undertaking may suggest a departure from this standard approach, the ACCC considers that its view on the proposed term of the HVAU is relevant to this issue. As noted in the **Preliminary Matters** chapter, the ACCC considers that there are finely balanced arguments on the appropriate term for the HVAU. 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.

²³¹ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, pp. 68-70.

²³² Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 8.

7.2.4 'Essential elements'

In the March 2010 Draft Decision the ACCC expressed the view that the inclusion in Schedule A to the 2009 HVAU of 'Essential Elements' was unnecessary in light of the inclusion of an Indicative Access Holder Agreement (and other 'Indicative' provisions), and that certain 'elements' may be inappropriate as merely preserving a bargaining position for ARTC.²³³

ARTC has revised Schedule A to the proposed 2010 HVAU to clarify that the Schedule sets out the non-negotiable alignment provisions and those other provisions of an access agreement that are negotiable. In light of these amendments, the ACCC considers that ARTC has clarified the role and purpose of the Schedule, and emphasised the negotiability of the Tier 2 provisions.

7.2.5 Coal Access Rights: domestic coal

The ACCC received submissions in response to the March 2010 Draft Decision stating that the Draft Decision did not fully address issues relating to 'domestic coal' access seekers, that is, access seekers using the Hunter Valley rail network for the transportation of coal to a destination other than the Port of Newcastle.

Asciano and Macquarie Generation commented that the domestic coal task differs to the export coal task. Differentiating features included:

- different usage patterns;
- different contracting time frames; and
- less ability to trade paths given the unique destination of the service.

Consequently, provisions in the 2009 HVAU and IAHA regarding trading of train paths, capacity resumption and the term of the access agreement may not be suited to domestic coal users.²³⁴ Macquarie Generation urged for flexibility for domestic coal users in negotiating for access rights with ARTC.²³⁵

As set out above, section 3.14(b)(i)(B) of the proposed 2010 HVAU now provides that ARTC will offer as an access agreement:

...an updated Access Holder Agreement to reflect agreed amendments to the Indicative Access Holder Agreement. A negotiated Access Holder Agreement will incorporate those clauses from the Indicative Access Holder Agreement identified as Tier 1 (mandatory) provisions in **Schedule A:1** and will, (unless otherwise agreed between ARTC and the Applicant) at least address those provisions identified as Tier 2 (negotiable) provisions in **Schedule A:1, as applicable to the destination of the Coal Access Rights sought**. The details of **Schedule A:1** do not provide an exhaustive list of the issues that may be included in an Access Holder Agreement,²³⁶

²³³ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 150-152.

²³⁴ Asciano, *Submission to the ACCC - ARTC 2010 Draft Hunter Valley Access Undertaking*, 25 October 2010, pp. 21-22.

²³⁵ Macquarie Generation, *Australian Rail Track Corporation Limited Hunter Valley Coal Network Access Undertaking – Draft Decision 5th March 2010*, 23 March 2010.

²³⁶ ARTC, 2010 HVAU, 7 September 2010, section 3.14(b)(i)(B) [underlining added].

The underlined text is intended to recognise that access seekers seeking an Access Holder Agreement for the transport of coal to a location other than the Port of Newcastle – i.e., domestic coal – may negotiate and agree terms and conditions with ARTC, subject to the agreement including the Tier 1 (mandatory) provisions specified in Schedule A:1.

Schedule A:1 (which is set out above), lists the mandatory terms for export coal agreements, and then states:

- * Except if the Access Holder Agreement is for Access Rights to transport coal to a destination other than the Port of Newcastle, in which case:
 - the Tier 1 (mandatory) provisions are items 1, 3, 5, 6, 8, 9, 10, 12, 13, 17, 19, 20
 - items 2, 4, 7, 11, 14, 15, 16 and 18 will be treated as Tier 2 (negotiable) provisions.²³⁷

Consequently, ARTC has designated that the provisions of the IAHA relating to capacity resumption and trading are negotiable for domestic coal users. The term of the access agreement is also negotiable pursuant to the general negotiate/arbitrate framework.

In its submission on the Consultation Paper Asciano welcomed the changes ARTC has made to the proposed 2010 HVAU to facilitate the transport of domestic coal, in particular removing certain provisions from Tier 1 (Mandatory) status where an agreement is sought for domestic coal use. Asciano noted however that domestic coal users have less ability than export coal users to trade paths, and may have different contracting time frames to export coal users (that is, less than the indicative 10 years). Asciano therefore urged ARTC to ‘continue to be flexible when negotiating contracts to meet the needs of domestic coal users.’²³⁸ The ACCC did not receive other submissions on the treatment of domestic coal under the undertaking.

ARTC’s proposed changes recognise that not all mandatory provisions are relevant to the circumstances of the domestic coal haulage task and are likely to be appropriate.

7.2.6 Non-Coal Access Rights

March 2010 Draft Decision

In the Draft Decision, the ACCC was of the preliminary view that ARTC should include an indicative access agreement for non-coal access rights in the HVAU.²³⁹ The ACCC noted that, given the variety of non-coal services on the network, such an agreement need not necessarily specify an ‘indicative non-coal service’, but could specify a number of other indicative terms and conditions of access, particularly in light of ARTC’s intention to base non-coal access agreements on the indicative agreement in the 2008 Interstate AU.²⁴⁰

²³⁷ ARTC, 2010 HVAU, 7 September 2010, Schedule A:1.

²³⁸ Asciano, Submission in Response to ACCC Consultation Paper, 26 October 2010, p. 15.

²³⁹ ACCC, Draft Decision on HVAU, 5 March 2010, p. 152.

²⁴⁰ ACCC, Draft Decision on HVAU, 5 March 2010, p. 152.

Proposed 2010 HVAU

As set out above, ARTC has amended section 3.14 of the proposed 2010 HVAU to clarify the options available to an Applicant seeking non-coal access rights. Specifically, a non-coal access seeker may:

- obtain terms and conditions of access as set out in the Indicative Access Agreement attached to the 2008 Interstate AU, amended to refer to the Hunter Valley Network and to incorporate the Tier 1 (mandatory) Non-Coal Provisions in Schedule A:2; or
- negotiate terms and conditions appropriate to their circumstances where they seek access, *but* remain subject to the mandatory provisions in Schedule A:2 and, unless agreed otherwise, at least address the non-mandatory matters in Schedule A:2 ; or
- if applicable, obtain terms and conditions as negotiated by another access seeker.²⁴¹

The mandatory provisions set out in Schedule A:2 are:

- 1 IAHA Clause 6: Capacity shortfall provisions which are aligned and consistent with those set out in **section 5.4, 5.5 and 5.6** of this Undertaking; and
- 2 A provision equivalent to clause 19.1(b) of the IAHA setting out that any changes to a Tier 1 (mandatory) Non-Coal Provision identified in an Access Undertaking accepted by the ACCC, will be automatically incorporated into the Access Agreement.

ARTC submitted that it does not intend to make any other amendments to the terms of the 2008 Interstate AU Indicative Access Agreement.²⁴²

ACCC view

The ACCC recognises the use of the Hunter Valley rail network by non-coal traffic in addition to the use for the transportation of coal, and takes into account the interests of non-coal users under section 44ZZA(3)(c) of the Act.

While the ACCC stated in the Draft Decision that the HVAU should include an indicative access agreement for non-coal access seekers, the ACCC recognises that an appropriate incorporation of the Indicative Access Agreement from the 2008 Interstate AU may be sufficient. The Interstate Indicative Access Agreement was considered by the ACCC as part of its assessment of the 2008 Interstate AU. Also, the specific obligation in section 3.14(b)(ii)(A) of the proposed 2010 HVAU that ARTC offer the agreement is more certain that ARTC's original mere intention to do so, where that intention was not reflected in the 2009 HVAU.

The ACCC also notes ARTC's submission:

²⁴¹ Subject to the access seeker meeting other relevant requirements.

²⁴² ARTC, *Hunter Valley Access Undertaking - Explanatory Guide (September 2010)*, 7 September 2010, p. 10.

... in practice nearly all applicants for Non-Coal Access Rights on the Hunter Valley will already have a Track Access Agreement for the Interstate network and ARTC proposes to simply add a schedule to these agreements to cover the transportation of goods on the Hunter Valley network, which will extend the definition of Network and to include the capacity shortfall provisions identified as the only Tier 1 (mandatory) provision for Non-Coal Access Rights.²⁴³

However, the ACCC considers that ARTC's proposed approach to non-coal access agreements is not entirely satisfactory. While ARTC proposes to amend the Network definition and include 'mandatory' capacity shortfall and uplift terms in the modified Interstate Access Agreement, it is not clear how other provisions of that agreement apply in relation to the Hunter Valley network. For example (and this should not be taken to be a complete list of the potentially problematic interactions between the Interstate Access Agreement and the proposed 2010 HVAU):

- clause 2.1(b) of the Interstate Access Agreement contemplates the grant of a 'Scheduled Train Path' to the access seeker, which is different to the 'path usage' allocation provided under the IAHA under the HVAU;
- it is not clear how the provisions relating to pricing in clause 4 of the Interstate Access Agreement interact with the pricing sections of the HVAU;
- clause 4.7, relating to extensions and additional capacity, appears to be inconsistent with the HVAU; and
- it is not clear how the KPI provisions in the Interstate Access Agreement interact with the KPI provisions of the HVAU.

The ACCC considers that the negotiate/arbitrate framework of both the Hunter Valley and Interstate access undertakings assists to some extent in addressing these matters, as both undertakings provide for the negotiation of access agreements suited to the particular circumstances of the (non-coal) access seeker.

The issues with the contractual arrangements for non-coal access seekers also go to the general level of uncertainty with the implementation of the proposed 2010 HVAU, including the transition of existing users of the network to the new regulatory regime. This issue is discussed further below. The ACCC therefore considers that in addressing the concerns with the practical operation of the proposed 2010 HVAU, as discussed below, ARTC must take into account non-coal access seekers and address the uncertainties described above.

Reservation of non-coal train paths

Section 2.4(b) of the proposed 2010 HVAU provides for the reservation of non-coal train paths for 30 Business Days following the commencement of the undertaking:

ARTC will reserve, at no charge, existing train paths used for non-coal traffic under agreements existing immediately before the Commencement Date. ARTC will reserve the existing train paths for the purpose of making them available to Applicants who submit an Access Application for Non-Coal Access Rights, to be used for substantially the same purpose and in respect of

²⁴³ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 10.

the same end-market as the existing train paths, within 30 Business Days from the Commencement Date. To avoid doubt, an Applicant seeking access to a reserved train path under this section will be offered an Access Agreement in accordance with **section 3.14(b)** and will be able to negotiate the terms and conditions of that Access Agreement in accordance with **section 3** of the Undertaking.

In the March 2010 Draft Decision, the ACCC considered that the drafting of (as it was then) section 2.5(b) created uncertainty around the nature of access agreements for non-coal access rights by suggesting that non-coal access seekers would not have the ability to negotiate with ARTC in relation to their access arrangements.²⁴⁴

In response, ARTC submitted that the principle behind section 2.5(b) was that all non-coal users will be guaranteed to have equivalent rights of access to the Network to those which exist immediately prior to the commencement of the HVAU. ARTC submitted that this will ensure that Train Paths allocated to non-coal users are 'reserved' for the 30 day window, that the terms and conditions will be offered in accordance with section 3.14 and may be negotiated. ARTC submits that it will amend the drafting of section 2.5(b) to clarify that the offered terms are negotiable in accordance with the HVAU.²⁴⁵

The ACCC considers that ARTC's revisions have clarified the operation of the section, and that the section may facilitate the transition of non-coal network users to the new access arrangements. However, this view is subject to resolution of the larger issues with the practical implementation of the proposed 2010 HVAU (including transitional arrangements), which is discussed below.

7.2.7 Clarification that the negotiation, dispute resolution and arbitration provisions of the HVAU apply to Interim arrangements

In the Draft Decision the ACCC provided the view that it was unclear how the interim arrangements in section 4 of the 2009 HVAU interacted with the offer of access provisions in section 3.14(c), and whether ARTC would be obliged to offer the IAHA prior to determination of Indicative Services. The ACCC considered that the 2009 HVAU should clearly specify that the negotiation, dispute resolution and arbitration provisions of the HVAU are applicable in relation to 'Interim' arrangements.²⁴⁶

In response, ARTC submitted that it was its intention that section 3 apply to negotiations for access to Interim Indicative Services.²⁴⁷ ARTC has revised section 3.14 of the proposed 2010 HVAU to clarify that an Applicant seeking Interim Indicative Services may be offered the IAHA (see above).

Taken in conjunction with the wording in section 3.15 that specifies that disputes arising in relation to the negotiation of Access Rights under the Undertaking may be resolved via the dispute resolution process, ARTC's revision addresses the ACCC's concern.

²⁴⁴ ACCC, Draft Decision on HVAU, 5 March 2010, p. 153.

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

²⁴⁶ ACCC, Draft Decision on HVAU, 5 March 2010, p. 149.

²⁴⁷ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 29.

7.3 Prudential requirements

Section 3.4(e) of the proposed 2010 HVAU specifies ‘prudential requirements’ access seekers may be required to meet prior to contracting with ARTC. The section is as follows:

- (e) At any time, before or during the negotiation process, ARTC may require the Applicant to demonstrate to ARTC that it is able to meet the following prudential requirements:
 - (i) the Applicant must be Solvent;
 - (ii) the Applicant, or a Related Body Corporate of the Applicant, must not be currently, or have been in the previous (2) years, in Material Default of any agreement with ARTC, or any agreement in accordance with which access to rail infrastructure not managed by ARTC has been provided to the Applicant or a Related Body Corporate of the Applicant;
 - (iii) the Applicant has an Acceptable Credit Rating or will agree to provide credit support in the form of a Security or a Parent Guarantee before the Access Agreement becomes effective; and
 - (iv) the Applicant must be able to demonstrate to ARTC that it has a legal ownership structure with a sufficient capital base and assets of value to meet the actual or potential liabilities under an Access Agreement, including timely payment of access charges and payment of insurance premiums and deductibles under the required policies of insurance.

In the Draft Decision, the ACCC noted that the inclusion of some form of prudential requirements in the HVAU is likely to reflect the legitimate business interests of ARTC. That is, ARTC should not be obliged to negotiate with every potential access seeker regardless of their financial standing, as this could expose ARTC to commercial risks. The ACCC also considered that prudential requirements should not be so onerous as to discourage legitimate access seekers.²⁴⁸

The ACCC considered that section 3.4(e) of the 2009 HVAU, which was substantively the same as section 3.4(e) above, set a particularly high standard for access seekers to meet prior to negotiating with ARTC (that is, the access seeker must satisfy all four requirements in paragraphs (i) to (iv)). The ACCC considered that the requirements in section 3.4(e)(iii), regarding an Acceptable Credit Rating, Security or Parent Guarantee were unlikely to be appropriate, as they would potentially increase the costs of access for a potential access seeker (that is, the cost of obtaining a credit rating).²⁴⁹ The ACCC concluded that such matters may appropriately be included as pre-conditions to the performance of obligations under the access agreement, and therefore the subject of negotiation prior to execution of such an agreement.²⁵⁰

In response, ARTC submitted that section 3.4(e) does not require the Applicant to meet specified criteria, including the provision of Security or Parent Guarantee at the negotiation stage, but that ARTC is entitled to ask for ‘a demonstration of

²⁴⁸ ACCC, Draft Decision on HVAU, 5 March 2010, p. 160.

²⁴⁹ ACCC, Draft Decision on HVAU, 5 March 2010, p. 160.

²⁵⁰ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 160-161.

creditworthiness' and seek a commitment to provide the security in the access agreement. ARTC stated that the provision of credit support and the level is negotiable, although creditworthiness will be critical to ARTC entering into long term take or pay contracts which are the basis for large investments. ARTC proposed to clarify the wording of the section.²⁵¹

The ACCC reiterates the view from the Draft Decision that while some form of prudential requirements are appropriate, they should not be so onerous as to discourage legitimate access seekers. To elaborate, the ACCC considers it would also be inappropriate for an access provider to rely on onerous prudential requirements to frustrate access by a party, such as to unreasonably demand higher standards of prudence where an access seeker can clearly establish its creditworthiness. In the present context, for example, it may be excessive for ARTC to require an access seeker to demonstrate satisfaction of a number of requirements in section 3.4(e) where that access seeker's creditworthiness is reasonably and sufficiently established by satisfaction of less than that number.

The ACCC accepts ARTC's clarification that access seekers are not required to satisfy each requirement in section 3.4(e) prior to entering access negotiations with ARTC, and that the provision and level of credit support under an access agreement is negotiable. The ACCC notes that ARTC is required under section 3.1 of the proposed 2010 HVAU to negotiate access agreements in good faith, and that any dispute arising under the undertaking, or in relation to the negotiation of access, may be subject to dispute resolution under section 3.15. These factors mitigate potential concerns that ARTC may use the section to frustrate access.

The ACCC notes that ARTC has not substantively altered the wording of section 3.4(e) (as it indicated it would in its response to the Draft Decision), and considers that there is scope for the drafting of the section to be improved. For instance, it is not entirely clear from the face of the section what a 'demonstration' of creditworthiness would entail, nor how the section interacts with clauses 2.2 and 7 of the Indicative Access Holder Agreement, which relate to similar matters. Those clauses of the IAHA are, however, negotiable by virtue of section 3.14 of the proposed 2010 HVAU, and the ACCC would expect the application of section 3.4(e) to occur in accordance with the views set out above.

The section is therefore unlikely to be inappropriate merely because its drafting could be improved, subject to one exception. The ACCC considers that the section may appropriately be revised to specify that:

'...ARTC may require the Applicant to demonstrate to ARTC's reasonable satisfaction that it is able to meet the following prudential requirements...'

The underlined words introduce an objective element to the section.

Finally, the ACCC notes that section 3.4(e) provides ARTC with the ability to satisfy itself that counter-parties to access agreements are of sufficient financial viability to meet their contractual obligations. Indeed, ARTC indicated that this is 'critical' to it entering long term take-or-pay contracts with access seekers. As set out in the

²⁵¹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 38.

Financial Model chapter, the section therefore provides ARTC with considerable ability to mitigate default risk, and is of relevance to the assessment of ARTC’s rate of return.

7.4 Additional alignment considerations

7.4.1 Network exit capability

The proposed 2010 HVAU includes provisions relating to ‘Network Exit Capability’, which is defined as:

- (a) in the case of Coal Access Rights sought or obtained for the purpose of transporting each cargo of coal to the Port of Newcastle, sufficient capacity allocated to that Access Holder at a coal terminal at the Port of Newcastle to offload the coal transported, or if the Access Holder is an Operator, the Coal Customer on whose behalf the Coal Access Rights are to be used has sufficient capacity at a coal terminal at the Port of Newcastle to enable the Operator to offload the coal transported; and
- (b) in the case of Coal Access Rights sought or obtained for the purpose of transporting each cargo of coal to a destination other than the Port of Newcastle, an ability to off load the coal transported from the Network at that particular destination,²⁵²

A network exit capability requirement is included in two provisions of the proposed 2010 HVAU –

Section 3.4(d):

Where an Applicant intends to seek Coal Access Rights, ARTC may require the Applicant to provide sufficient evidence to the reasonable satisfaction of ARTC that it will have sufficient Network Exit Capability, for the lesser of the proposed contracted period for the Train Paths or ten years from the time when the Coal Access Rights will be available for use. Where the Coal Access Rights sought are for the purpose of transporting coal to the Port of Newcastle, ARTC may require the Applicant to provide a copy of its contract with the relevant port company establishing the Applicant’s ability to offload the anticipated coal at the Port of Newcastle.

And section 3.7, subsections (a)(ix) and (b):

- (a) Requests for Access Rights are to be submitted to ARTC prepared in written form and clearly state that the Access Application is made in accordance with this Undertaking and is accompanied by the following information:
 - ...
 - (ix) where an Applicant is seeking Coal Access Rights:
 - (A) subject to **section 3.7(b)**, confirmation that the Applicant will have sufficient Network Exit Capability, for the lesser of the proposed contracted period for the Train Paths or ten years from the time when the Coal Access Rights will be available for use. Where the Coal Access Rights

²⁵² ARTC, 2010 HVAU, 7 September 2010, section 9.1.

sought are for the purpose of transporting coal to the Port of Newcastle, ARTC may require the Applicant to provide a copy of its contract with the relevant port company establishing the Applicant's ability to offload the anticipated coal at the Port of Newcastle; and

- (B) any advice provided by the HVCCC on the impact of the Access Rights sought on Coal Chain Capacity, on the operating requirements needed to deliver Coal Chain Capacity, and on whether the Applicant has sufficient Network Exit Capability to enable the utilisation of the Coal Access Rights sought.
- (b) If the Coal Access Rights sought are for the purpose of transporting coal to the Port of Newcastle, ARTC may accept an Access Application which does not meet the requirements of **section 3.7(a)(ix)(A)** provided the Applicant is able to establish to ARTC's reasonable satisfaction that it is negotiating with the relevant port company to obtain sufficient Network Exit Capability to offload the anticipated coal volumes at the Port of Newcastle.

Further, clause 3.14 of the IAHA also includes a network exit capability requirement:

- (a) If the Access Holder is seeking to transport a particular cargo of coal to the Port of Newcastle and the HVCCC or a Terminal Operator advises ARTC that the Access Holder does not have sufficient Network Exit Capability to offload the anticipated coal at a coal terminal at the Port of Newcastle, then ARTC is not obliged to make available a Path Usage to the Access Holder for the period where it does not have sufficient Network Exit Capability.
- (b) To avoid doubt, the Access Holder's obligation to pay TOP Charges is not reduced as a result of ARTC not making available Path Usages under **clause 3.14(a)**.

Clause 4.1 of the Train Path Schedule then includes Network Exit Capability as a Condition Precedent:

- (a) ARTC's obligation to first make available the Path Usages in **clause 3** of this **Schedule** and the Access Holder's entitlement to have access to the Path Usages in **clause 3** is conditional upon the Access Holder providing evidence to the reasonable satisfaction of ARTC that it has sufficient Network Exit Capability, based on the applicable Service Assumptions, to offload the anticipated coal associated with those Path Usages at the discharge point specified in **clause 3** of this **Schedule** for a period of at least 10 years from the applicable Start Date.
- (b) Where the Path Usages are for the purpose of transporting coal to a coal terminal at the Port of Newcastle, ARTC will be satisfied that the Access Holder has sufficient Network Exit Capability if the Access Holder provides ARTC with a copy of an executed contract with a Terminal Operator which provides for sufficient terminal allocations to offload the anticipated coal for a period of 10 years from the applicable Start Date.
- (c) If the Access Holder is able to provide evidence to the reasonable satisfaction of ARTC that it has sufficient Network Exit Capability to offload some but not all of the anticipated coal associated with the Path Usages at the discharge point specified in **clause 3** of this **Schedule**,

based on the applicable Service Assumptions, for a period of at least 10 years from the Start Date, the Network Exit Capability condition will be considered satisfied in respect of those number of Path Usages identified in **clause 3** of this **Schedule** which ARTC considers equivalent to the Access Holder's Network Exit Capability.

- (d) In determining the number of Path Usages which are equivalent to the Access Holder's Network Exit Capability, under **clause 4.1** and **clause 4.2** of this **Schedule**, ARTC may have regard to, and is entitled to rely on, recommendations by the HVCCC.
- (e) This condition precedent is for the benefit of ARTC and may only be waived by ARTC. ARTC must promptly notify the Access Holder of the satisfaction or waiver of this condition precedent.

Clause 4.2 of the Train Path Schedule then allows for ARTC to remove path usages if the Access Holder cannot demonstrate satisfaction of the condition.

Submissions on Consultation Paper

Aston Resources expressed concerns that a strict application of the network exit capability requirement may have adverse consequences for a new entrant such as itself. In particular, Aston submitted that a strict application of the requirement 'could decrease the value of the capacity assignment/trading mechanisms at the port', meaning that where extra port capacity becomes available because of compression, an access seeker may not be able to take advantage of it because of timing mismatches with the availability of rail capacity.²⁵³

Coal & Allied commented that the drafting in the proposed 2010 HVAU suggests that an Applicant may be required to demonstrate Network Exit Capability at five different stages. Coal & Allied also submitted that the drafting of section 3.14 appeared to suggest that certain contracts did not require Network Exit Capability as a pre-condition (those described in sections 3.14(b)(i)(B) and (C)). Coal & Allied was of the view that ARTC should only allow an Applicant to enter into a contract for Capacity if it demonstrates that it has Network Exit Capability to match Path Usages. Otherwise, certain Access Holders could over contract, leading to misalignment.²⁵⁴

ACCC view

The ACCC reiterates 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.²⁵⁵

The ACCC concurs with Coal & Allied's observation that sections 3.14(b)(i)(B) and (C) do not make explicit reference to Network Exit Capability. However, earlier provisions recognise that Applicants seeking Coal Access Rights will have to provide evidence to demonstrate the requirement. On this point the ACCC notes ARTC's clarification that, if an Applicant has provided evidence of Network Exit Capability as

²⁵³ Aston Resources, *Submission: ARTC proposed Hunter Valley Rail Network Access Undertaking*, 25 October 2010, p. 3.

²⁵⁴ Coal and Allied, *Submission in Response to ACCC Consultation Paper*, 25 October 2010, p. 28.

²⁵⁵ ACCC, *Draft Decision on HVAU*, 5 March 2010, pp. 159-160.

part of an Access Application, it is unlikely ARTC would seek the evidence again, subject to any change in circumstances.²⁵⁶

The language of the provisions on network exit capability, other than as set out in the Train Path Schedule, does not suggest the degree of strictness postulated by Aston. The ACCC notes that the Network Exit Capability requirement in the proposed 2010 HVAU provides some discretion for ARTC in relation to what is sufficient to demonstrate the capability, and likewise in clause 3.14 of the IAHA, ARTC retains discretion around whether a path usage is to be made available. While it is important for an access seeker to demonstrate Network Exit Capability in relation to Coal Access Rights, an executed port contract with capacity entitlements is not the only acceptable indicator.

The ACCC notes, however, that the ‘condition precedent’ version of the Network Exit Capability requirement is stricter than the versions expressed elsewhere. In particular, the clause specifies that the Access Holder must demonstrate an Exit Capability for 10 years from the Start Date. This does not reflect section 3.4(d) of the HVAU, which provides that Exit Capability may be demonstrated ‘for the lesser of the proposed contracted period for the Train Paths or ten years from the time when the Coal Access Rights will be available for use.’ The ACCC considers that the Condition Precedent version of the Network Exit Capability requirement be revised to ensure consistency with section 3.4(d).

7.4.2 Consultation with HVCCC

Section 3 of the proposed 2010 HVAU includes provisions that acknowledge the role of the Hunter Valley Coal Chain Coordinator (HVCCC) and refer to consultation between ARTC and the HVCCC in certain circumstances (see for example sections 3.1 and 3.6).

In the March 2010 Draft Decision the ACCC provided the view that provisions in the HVAU regarding ARTC’s consultation with the HVCCC were vague and did not impose any express obligation on ARTC to actually consult with the HVCCC in relation to how an Access Application will impact on Coal Chain Capacity. The ACCC recommended that ARTC expand the HVCCC consultation obligation to specify the processes ARTC would follow.²⁵⁷

Schedule F of the proposed 2010 HVAU sets out the principles for consultation between ARTC and the HVCCC, and the ACCC has provided views on that Schedule in the **Capacity Management** chapter.

7.4.3 Clarification of ‘reasonable and effective participation’ in an Initial review

In the Draft Decision the ACCC gave the view that ARTC’s requirement for ‘reasonable and effective participation’ by ‘other Hunter Valley Coal Chain Participants’ in an initial review of Capacity (as specified in section 3.6(c)), was vague and gave the ARTC considerable discretion not to participate in the review.²⁵⁸

²⁵⁶ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 37.

²⁵⁷ ACCC, Draft Decision on HVAU, 5 March 2010, p. 159.

²⁵⁸ ACCC, Draft Decision on HVAU, 5 March 2010, p. 157.

The ARTC has proposed to include a description of ‘effective and reasonable participation’ by ARTC and other relevant Hunter Valley Coal Service Providers as follows:²⁵⁹

For the purposes of this section 3.6, effective and reasonable participation by ARTC and the other relevant Hunter Valley Coal Chain Service Providers means the provision of information to the Applicant, and where requested, the provision of information to the HVCCC, which it reasonably considers necessary to enable the HVCCC to advise the Applicant of the operating requirements to deliver the throughput sought and to carry out an assessment of the impact of the Access Rights sought on Coal Chain capacity.

ARTC has also changed the reference to the undefined term ‘Hunter Valley Coal Chain Participants’ to the defined term ‘Hunter Valley Coal Chain Service Providers’ (which means those participants in the Hunter Valley Coal Chain who provide rail or port infrastructure or port services to facilitate the movement of coal through the Hunter Valley Coal Chain).²⁶⁰

The ACCC considers that the revisions clarify the intent and operation of the section and are likely to be appropriate. The section is, however, relevant to the overall implementation of the proposed 2010 HVAU, which is discussed below.

7.5 Dispute resolution and arbitration

Section 3.15 of the proposed 2010 HVAU sets out the dispute resolution and arbitration provisions, which are substantively unchanged from the 2009 HVAU. In the Draft Decision the ACCC provided the following views:

- subject to qualifications, the coverage of the dispute resolution and arbitration provisions was likely to be appropriate;
- the dispute resolution process was likely to be appropriate;
- it was appropriate for the ACCC to be the arbitrator; and
- the arbitration process was likely to be appropriate.²⁶¹

The reasoning for these views is set out in the Draft Decision.

In response to the Draft Decision, RailCorp queried whether it was able to access the dispute resolution provisions in the HVAU.²⁶² Section 3.15 of the proposed 2010 HVAU provides:

If any dispute arises under this Undertaking or in relation to the negotiation of Access Rights between an Applicant and ARTC (“**Dispute**”) then, unless otherwise expressly agreed to the contrary by both parties, such Dispute will be resolved in accordance with this **section 3.15**...

²⁵⁹ ARTC, 2010 HVAU, 7 September 2010, section 3.6(d).

²⁶⁰ ARTC, 2010 HVAU, 7 September 2010, section 9.

²⁶¹ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 153-4.

²⁶² RailCorp, Submission in Response to ACCC Draft Decision, 31 March 2010, pp. 7-10.

The ACCC's view is that, provided that the dispute in question was within the scope of the undertaking, RailCorp could take advantage of the dispute resolution process.

7.6 Involvement of Operator in negotiations and dispute resolution

In its Draft Decision, the ACCC was of the view that the 2009 HVAU did not adequately elucidate the extent to which Operators may be involved in the negotiation of the OSA, or have recourse to the dispute resolution provisions of section 3.15. The ACCC considered that the HVAU would be more likely to be appropriate if it gave greater recognition to the ability of an Operator to take part in negotiations of an OSA, including the practicalities of how tripartite negotiations were likely to occur, and if it provided that the dispute resolution and arbitration provisions apply to disputes involving an Operator.²⁶³

In response, ARTC submitted that it expects that a tripartite approach will be followed for negotiations, and where the Operator wants to negotiate the terms of the OSA, the Operator will, through or on behalf of the Access Holder, take part in negotiations. ARTC further submitted that nothing in the HVAU precludes tripartite negotiations.²⁶⁴

In relation to disputes, ARTC submitted that the Operator may be party to a dispute through the Access Holder with ARTC if they are unable to agree on the terms of the OSA.²⁶⁵ ARTC argued that:

As the Operator does not have rights of access to the Network independent of the Access Holder and does not hold Capacity on the Network, it is not appropriate for the Operator to have a right to bring a dispute independently of the Access Holder.²⁶⁶

In response to the Draft Decision, stakeholders expressed support for more explicit recognition of an Operator's ability to be involved in negotiation of the OSA,²⁶⁷ and to have recourse to dispute resolution and arbitration under the HVAU.²⁶⁸ QR National Coal reiterated its support for this position in its submission on the ACCC's Consultation Paper.²⁶⁹ QR National Coal commented that:

...in light of the fact that the Operator must comply with obligations in the AHA and assist the Access Holder, where the Operator is not the Access Holder, it is necessary for them to be involved in discussions at least about operational components of the AHA.²⁷⁰

²⁶³ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 157-158.

²⁶⁴ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 35.

²⁶⁵ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 32.

²⁶⁶ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 32.

²⁶⁷ QRN Coal, Submission on the Draft Decision, 30 March 2010, p. 2 and Peabody, *Australian Rail Track Corporation Limited Hunter Valley Coal Network Access Undertaking Submissions of Peabody Australia Mining Limited in response to the Australian Competition and Consumer Commission's draft decision (5 March 2010)*, 31 March 2010, p. 3.

²⁶⁸ QRN Coal, Submission on the Draft Decision, 30 March 2010, p. 2 and Peabody, Submissions in Response to ACCC Draft Decision, 31 March 2010, p. 3.

²⁶⁹ QR National Coal, *QR National Coal's Submission to the Hunter Valley Access Undertaking*, 25 October 2010, p. 3.

²⁷⁰ QR National Coal, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 3.

Asciano made a similar submission, informed by discussions with ARTC and coal miners as to how the new contracting structure will operate in practice:

...the operator is providing services under the terms of the AHA, but the operator is not necessarily permitted to view the AHA. Asciano believes that if triangular contracting is to be workable in the long term the operator must have a right to view the AHA as agreed between the ARTC and the access holder prior to it being able to execute and agree the OSA....[A]s the operator is required to act in accordance with the AHA agreed by ARTC and the access holder, and indeed will be in breach of its own OSA if it breaches the AHA, Asciano believes it is only reasonable and appropriate that the operator have a right to view this document.... In addition, the operator should be made aware of any amendments to any AHA ... so it can understand any implications the amendments may have on its obligations.²⁷¹

ARTC has not made any revisions in the proposed 2010 HVAU to clarify the extent of the Operator's involvement.

ACCC view

The ACCC reiterates the view from the Draft Decision that Operators are access seekers, and that the interests of access seekers must be taken into account in assessing whether an undertaking is appropriate to accept under section 44ZZA(3). The ACCC acknowledges that where an Access Holder seeks to exercise access rights via an Operator, the nature of the access relationship is different to, and the interests of Operators as access seekers not necessarily the same as, where the Operator holds access rights directly.

Nonetheless, it is clear that the OSA imposes obligations on the Operator, and it is therefore appropriate for the proposed 2010 HVAU to recognise that Operators may be involved in the negotiation of the OSA, and that the dispute resolution and arbitration provisions apply in relation to an OSA, where relevant.

The ACCC also recognises though that in most cases there should be an alignment of interests between the Access Holder and the Operator to obtain mutually satisfactory access arrangements. The ACCC is not proposing that the undertaking encroach into the commercial arrangements between the Access Holder and the Operator, such as where an Access Holder wishes to deal with multiple Operators for competitive reasons. Further, the ACCC accepts that perverse outcomes may arise where, in the context of an Access Holder seeking to exercise access rights via an Operator, the Operator seeks to negotiate or utilise the dispute resolution process independently of the Access Holder. Consequently, it is likely to be appropriate if the necessary amendments provide for the involvement of the Operator in the relevant processes with the consent of the Access Holder.

As currently drafted, the proposed 2010 HVAU does not adequately recognise the participation of Operators in the negotiation and dispute resolution process in this regard. The ACCC again notes that the definition of Applicant in section 9.1 states:

“Applicant” means the person seeking Access Rights under **section 3**, and to become an Access Holder and, to avoid doubt, *does not include an Operator seeking to enter into an Operator Sub-Agreement* [emphasis added];

²⁷¹ Asciano, Submission in Response to ACCC Consultation Paper, 26 October 2010, p. 5.

The ACCC also notes that the dispute resolution clause in the OSA (clause 17) contemplates the involvement of both Operator and Access Holder in the dispute resolution processes, suggesting that it is not an impractical or unfeasible situation.

The ACCC reiterates the view from the Draft Decision that the proposed 2010 HVAU would be more likely to be appropriate if it gave greater recognition to the ability of an Operator to take part in negotiations of an OSA, and if it provided that the dispute resolution and arbitration provisions apply to disputes involving an Operator and negotiation of the OSA. The ACCC considers that relatively minor amendments could address these concerns.

7.7 Confidential information

In its Draft Decision, the ACCC found that it is appropriate for the 2009 HVAU to include provisions dealing with the treatment of confidential information, as recognised by section 3.5. The ACCC did not, however, provide a view on whether section 3.5 of the 2009 HVAU was appropriate, as the ACCC took the view that it may be appropriate for the confidentiality provisions in the HVAU to reflect the agreed position between ARTC and industry that was under development subsequent to the submission of the 2009 HVAU.²⁷²

In response, the NSWMC submitted that section 3.5 of the HVAU should be amended to mirror the confidentiality provisions in clause 15 of the 24 December IAHA.²⁷³

The ACCC considers that section 3.5 is likely to be appropriate subject to the revisions discussed below.

First, the ACCC considers that section 3.5(d)(v) should be revised to allow for the provision of confidential information to the ACCC upon its request, rather than “where required under the Access Undertaking”. The ACCC considers it unlikely to be appropriate for the undertaking to limit the ability of the ACCC to obtain confidential information from the parties to circumstances where it is specifically required by the HVAU. The proposed 2010 HVAU is intended to operate for several years, and there may be circumstances where the ACCC requires access to confidential information beyond what is specified in the undertaking. The ACCC will treat any confidential information in accordance with its *Information Policy*²⁷⁴ on the collection, use and disclosure of information, available on the ACCC’s website, and as revised from time to time.

Second, the ACCC considers that section 3.5(d)(iii) requires revision to avoid the disclosure, via the RCG process, of competitively sensitive information among competing participants in the Hunter Valley coal industry (be they coal producers, rail operators, or otherwise competitive). The ACCC also considers that disclosure of competitively sensitive confidential information to the HVCCC should also be subject to the HVCCC entering appropriate confidentiality arrangements to prevent

²⁷² ACCC, Draft Decision on HVAU, 5 March 2010, p. 158.

²⁷³ NSWMC, *Explanatory Comments for NSWMC mark-up of the ARTC Access Holder Agreement*, Attachment D, 1 April 2010, p. 3.

²⁷⁴ ACCC/AER, *Information Policy – The collection, use and disclosure of information*, 2008; current version available at: <http://www.accc.gov.au/content/index.phtml/itemId/846791>.

dissemination of such information among competitors (as was provided for in the 2009 HVAU).

Finally, the ACCC considers that section 3.5(a) of the proposed 2010 HVAU should be revised to ensure that the terms 'Provider' and 'Receiver' reflect the provision of information to and from ARTC and the access seeker. The ACCC considers it is unlikely to be appropriate for section 3.5 to be relied upon to permit disclosure of confidential information between access seekers, particularly where those access seekers are competitors.

These considerations also apply to clause 15 of the IAHA and clause 18 of the OSA.

7.8 Practical implementation of section 3, including transitional arrangements

7.8.1 Provisions of the undertaking

Section 3 of the proposed 2010 HVAU contains a number of provisions setting out the process for the application and negotiation of access rights, including the assessment and allocation of capacity entitlements. These provisions include:

- section 3.6, which refers to an 'initial review' where Coal Access Rights are sought, involving consultation with the HVCCC;
- sections 3.9, which refers to the 'determination of capacity,' and notes that an Applicant may request Additional Capacity where it has been informed by ARTC that there is insufficient Available Capacity;
- section 3.10, which refers to the preparation of an 'indicative access proposal';
- sections 3.11 and 3.12, which refer to negotiation between ARTC and the Applicant; and
- section 3.13, which refers to allocations of capacity where there are 'mutually exclusive' applications.

Sections 2.4 (Existing agreements and rights) and section 5.2 (Capacity analysis) are also relevant to practical implementation and operation of the proposed 2010 HVAU. Section 2.4 is referred to above, and section 5.2 is discussed in the **Capacity Management** chapter. Section 5.3, regarding reservation of capacity for non-coal access rights, is also discussed in the **Capacity Management** chapter.

As will be shown in the discussion, concerns with the practical implementation and operation of the proposed 2010 HVAU extend beyond particular provisions, including also the interaction between provisions and the transition to the new access arrangements.

The proposed 2010 HVAU does not include transitional arrangements. While ARTC in its Explanatory Guide explained how certain regulatory arrangements (that is, the performance of the annual compliance assessment in section 4.9) will transition from

IPART to the ACCC,²⁷⁵ it did not provide any explanation of how contractual arrangements will transition to the new regime.

7.8.2 March 2010 Draft Decision

In the Draft Decision, the ACCC was of the preliminary view that there was uncertainty as to the practical operation of section 3 of the HVAU, regardless of whether the process in that section applied to an initial access application or an application for additional access rights.²⁷⁶ Given this uncertainty, the ACCC could not conclude that the processes and timeframes proposed in the section were appropriate. However, the ACCC considered that if ARTC were to provide greater clarity and certainty around the practical operation and implementation of the section, then it may be more likely to be appropriate.²⁷⁷

Submissions from third parties responding to the Draft Decision endorsed the ACCC's concerns,²⁷⁸ while ARTC did not consider that the concerns with the absence of transitional arrangements were justified.²⁷⁹ ARTC instead provided a diagram setting out the process in section 3.²⁸⁰

7.8.3 Submissions on the proposed 2010 HVAU

Submissions responding to the ACCC's Consultation Paper have raised a number of issues with the implementation of the proposed 2010 HVAU, including with the transition of existing users of the network to the new access and contractual arrangements.

Asciano

Asciano in its submission noted that it has commenced discussions with coal miners and ARTC in the context of the contracting structure proposed in the undertaking. Asciano submitted that its early experience raises concerns:

... about how these structures will operate, and in particular the need for improved transitional provisions and the need to reconsider the nature of obligations placed on the operator by the Access Holder Agreement, when the operator is not a party to this agreement.²⁸¹

Asciano noted that while ARTC had in its supporting submissions to the proposed 2010 HVAU provided an extensive guide to the transition of the regulatory arrangements for the Hunter Valley, a similar explanation was needed on the practical operation of the HVAU in general, and the contractual arrangements and contractual transition in particular.²⁸²

²⁷⁵ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, Appendix 5.

²⁷⁶ ACCC, Draft Decision on HVAU, 5 March 2010, p. 156.

²⁷⁷ ACCC, Draft Decision on HVAU, 5 March 2010, p. 157.

²⁷⁸ Asciano, *Submission to the ACCC - ARTC 2009 Draft Hunter Valley Access Undertaking - Response to the ACCC Draft Decision*, Public Version, 31 March 2010, p. 22; RailCorp, *Submission in Response to ACCC Draft Decision*, 31 March 2010, p. 10;

²⁷⁹ ARTC, *Response to the ACCC Draft Decision*, 31 March 2010, p. 33.

²⁸⁰ ARTC, *Response to the ACCC Draft Decision*, 31 March 2010, Attachment 3.

²⁸¹ Asciano, *Submission in Response to ACCC Consultation Paper*, 26 October 2010, p. 3.

²⁸² Asciano, *Submission in Response to ACCC Consultation Paper*, 26 October 2010, p. 5.

Asciano submitted that the Hunter Valley may in the near future have trains operating under the ARTC-operator contracting model, and under the ARTC-access holder-operator contracting model. Further, the same operator may run trains under both models. Asciano expressed concern that the lack of transitional arrangements creates significant potential for uncertainty, such as in relation to use of train path allocations under the different contractual models. Asciano submitted that transitional provisions should be part of the HVAU document package and be provided in advance of the execution of an AHA or OSA for any party.²⁸³

Asciano also reiterated its view that the time period for the preparation of an indicative access proposal under the undertaking is unreasonably long.²⁸⁴

Aston Resources

Aston Resources provided comments as a new entrant into the Hunter Valley coal chain. Aston commented on several aspects of section 3 of the proposed 2010 HVAU, including that:

- there should be a more prescriptive process for ARTC to follow in negotiating for access;
- the process in section 3.6 for an initial review where Coal Access Rights are sought should be strengthened;
- the Network Exit Capability requirement should not be strictly interpreted; and
- section 3.13, regarding applications for mutually exclusive Access Rights lacks transparency, and that such applications for track capacity be differentiated using a similar set of priority rules to that used by PWCS under the Capacity Framework Arrangements (which focus on the viability of the access seeker, rather than the prospective value to ARTC).²⁸⁵

Coal & Allied

Coal & Allied identified as a key concern that, under the new arrangements, coal producers require greater certainty of contracted volumes on the rail network. This include that there is 'no transparency (or specific proposal) for the transition from the current arrangements to the initial allocation of tonnes under the Proposed HVAU.'²⁸⁶ Coal & Allied noted that while ARTC had set out a proposal for the transition of the annual compliance assessment function, it had not provided any provisions on the transitional arrangements for access seekers.²⁸⁷

Coal & Allied noted that Hunter Valley coal producers have now been through two rounds of port nominations at the Port of Newcastle coal terminals, which involves a commitment of almost 200Mtpa of port capacity under 10 year rolling take-or-pay contracts, valued at more than \$10 billion. Coal producers are seeking to make additional investments in coal mining operations to take full advantage of their port

²⁸³ Asciano, Submission in Response to ACCC Consultation Paper, 26 October 2010, pp. 5-6.

²⁸⁴ Asciano, Submission in Response to ACCC Consultation Paper, 26 October 2010, p. 15.

²⁸⁵ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, pp. 2-4.

²⁸⁶ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 15.

²⁸⁷ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 16.

entitlements, and consequently require sufficient track capacity to match the port allocation. Coal & Allied considered that if track and port allocations do not match, the misalignment could result in inefficient mine and port investments.²⁸⁸

In the absence of a specific proposal for initial capacity allocation, Coal & Allied submitted that section 3.13 of the proposed 2010 HVAU (relating to mutually exclusive access applications) was the only provision that indicated ARTC's methodology where there is insufficient Available Capacity for all Applicants.²⁸⁹ Coal & Allied reiterated its previous submissions that the process described in the section 'does not ensure a transparent and equitable outcome for all Access Seekers that aligns with port terminal contracts.' Coal & Allied expressed concern that if section 3.13 were to drive initial capacity allocations:

...Applicants would have no certainty as to the process to be applied by ARTC in assessing those applications, which could represent a very sizeable level of throughput, perhaps 200Mtpa, or more. That would...be contradictory to the ARTC objective of establishing a "workable, open, non-discriminatory, efficient and inclusive process for lodging and processing applications for Access Rights", as stated in section 1.2(b) of the Proposed HVAU.²⁹⁰

Coal & Allied also commented on the interaction between the processes in section 3, 5 and 6 of the proposed 2010 HVAU, which relate to the application for and allocation of capacity, the negotiation of access rights, and the creation of additional capacity. In summary, Coal & Allied identified the following issues with the processes:

- the process for identifying whether Additional Capacity is required to fulfil an Access Application is ill-defined;²⁹¹
- the Applicant has limited visibility as to whether any Additional Capacity is required to satisfy its Application;²⁹²
- the process and sequence of steps set out in the undertaking for contracting are complex and unclear, including that it is unclear at what point an agreement would actually be signed;²⁹³
- it is unclear whether the negotiation of an access proposal would be put on hold while the Additional Capacity process in section 6.2 of the undertaking would take place.²⁹⁴

²⁸⁸ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, pp. 15-16.

²⁸⁹ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 17.

²⁹⁰ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 32.

²⁹¹ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 24.

²⁹² Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, pp. 24-25.

²⁹³ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, pp. 25-26.

²⁹⁴ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 26.

In the context of discussing the implementation of the undertaking, Coal & Allied also commented on the negotiability of the proposed IAHA and strictness of the Network Exit Capability requirement. These comments are addressed above.

(Coal & Allied provided a detailed proposal for the transition of access seekers to the arrangements under the proposed 2010 HVAU, and for initial and subsequent allocations of track capacity. See below for further discussion of this proposal.)

New South Wales Minerals Council

The New South Wales Minerals Council (NSWMC) commented that the proposed 2010 HVAU does not provide for the transition from current track access arrangements to the initial allocation of Available Capacity under the undertaking, nor for the allocation of Additional Capacity in the future to align with the allocation of capacity increases at the port terminals.²⁹⁵ The NSWMC submitted that transparent processes for the initial and subsequent nomination and allocation of rail capacity must be included in the undertaking, and should be aligned with the similar processes at the port terminals.²⁹⁶ The NSWMC noted that Hunter Valley coal producers have committed, under long term take-or-pay contracts, to port terminal capacity allocations well in excess of current track capacity, but have no certainty that they will be able to contract for track capacity into the future.²⁹⁷

The NSWMC also submitted that the process for determining whether Additional Capacity is required for an access seeker is not clear. The NSWMC considered that:

- the requirement for the initial review in section 3.6 unnecessarily duplicates the assessment of 'Available Capacity' in section 3.9(c); and
- the priorities for allocation of Additional Capacity among coal access seekers are not defined, except under section 3.13 (regarding mutually exclusive applications), which allows ARTC wide discretion to allocate Access Rights which would not align with the access priorities for port terminal access.²⁹⁸

Port Waratah Coal Services

Port Waratah Coal Services (PWCS) submitted that the lack of transition arrangements is particularly significant for the Hunter Valley coal industry, as the capacity allocation process at the port terminals is underway and PWCS customers have committed to take-or-pay obligations without the assurance of matching below-rail capacity.²⁹⁹ PWCS suggested that almost 200Mtpa of port terminal capacity could be under firm take-or-pay contracts by end 2010, emphasising the urgency of matching these volumes with below-rail capacity.³⁰⁰ PWCS submitted that it is unclear what the outcome of processes in section 3 to 6 of the proposed 2010 HVAU

²⁹⁵ NSWMC, *Hunter Rail Access Task Force – Submission in Response to the Australian Competition and Consumer Commission’s Consultation Paper in relation to Australian Rail Track Corporation’s Proposed 2010 Hunter Valley Rail Network Access Undertaking*, 25 October 2010, p. 6.

²⁹⁶ NSWMC, *Submission in Response to ACCC Consultation Paper*, p. 6.

²⁹⁷ NSWMC, *Submission in Response to ACCC Consultation Paper*, p. 6.

²⁹⁸ NSWMC, *Submission in Response to ACCC Consultation Paper*, p. 6.

²⁹⁹ PWCS, *Submission in Relation to Australian Rail Track Corporation’s proposed Hunter Valley Rail Network Access Undertaking*, 25 October 2010, p. 3.

³⁰⁰ PWCS, *Submission in Response to ACCC Consultation Paper*, 25 October 2010, p. 4.

would be, particularly the approach to dealing with mutually exclusive applications requiring Additional Capacity.³⁰¹ PWCS considered that there appears to be a risk that allocations of rail capacity would not be aligned to producers' terminal allocations.³⁰² PWCS also submitted that the proposed 2010 HVAU needs to provide certainty as to how ongoing requests for capacity will be handled, that is, after the transition period.³⁰³

QR National Coal

QR National Coal submitted that the drafting of the IAHA and OSA is primarily on the basis of producers holding access rights and does not adequately consider where the Operator holds access rights on behalf of producers. Consequently, QR National Coal 'strongly recommended' that further consideration be given to drafting to accommodate that arrangement.³⁰⁴ QR National Coal also reiterated its view that a more equitable approach to resolving mutually exclusive access applications would be based on the order in which applications were received, rather than on the basis of 'most favourable to ARTC.'³⁰⁵

Xstrata

Xstrata commented that it has not been provided with definitive Train Path Schedules for its Access Holder Agreement. Xstrata stated that it is difficult to assess whether the operation of the HVAU and IAHA is in line with its expectations until ARTC releases further information about the available capacity on the network. To provide greater certainty over how the HVAU and IAHA would actually operate in practice, Xstrata submitted that ARTC should provide details of its current assessment of network capacity, and provide draft Train Path Schedules to all Access Holders prior to finalisation of the HVAU.³⁰⁶

7.8.4 ACCC view

Concerns with the implementation of the proposed 2010 HVAU, and the lack of a transition plan

The submissions from interested parties summarised above indicate a high degree of uncertainty amongst access seekers about how the proposed 2010 HVAU is intended to operate in practice. This includes coal access seekers, non-coal access seekers and rail operators. The uncertainty extends to the initial implementation of the undertaking and transition of current arrangements to the new regime; the allocation of capacity on the Network; the operation of the undertaking over time, including the process for the creation of additional capacity; the precise nature of the contractual arrangements that will exist pursuant to the undertaking; and how particular provisions of the undertaking will work in practice.

The ACCC acknowledges that the proposed access arrangements are highly complex, in part reflecting their development within the context of the overall Hunter Valley coal chain and the objectives of achieving alignment between service providers. The

³⁰¹ PWCS, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 4.

³⁰² PWCS, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 4.

³⁰³ PWCS, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 5.

³⁰⁴ QR National Coal, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 3.

³⁰⁵ QR National Coal, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 4.

³⁰⁶ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 25.

arrangements introduce a new tripartite contracting structure for coal access rights that differs from the current bilateral agreement structure. Non-coal use of the network is an additional consideration, as is the interaction between the proposed 2010 HVAU and other access regimes to which ARTC is subject. This complexity should not, however, prevent the proposed access arrangements from working effectively.

It is in the interests of access seekers for there to be clarity and certainty around the implementation and operation of ARTC's proposed access arrangements. The proposed 2010 HVAU contemplates coal access seekers entering rolling 10 year take or pay contracts, and submissions noted above have commented on the substantial financial commitment this entails for coal producers. Access seekers using the network for non-coal traffic should also have sufficient clarity and certainty on how the undertaking will affect their rights and obligations, particularly as those access seekers may use the Hunter Valley network in conjunction with other networks and therefore encounter complex interacting regulatory and contractual arrangements.

It is also in ARTC's interests for there to be a certain and unambiguous understanding amongst stakeholders of how the proposed 2010 HVAU will be implemented. If not, ARTC may incur costs where parties seek arbitration of disputes that could have been avoided. More fundamentally, the ACCC would be concerned if ARTC is unable to demonstrate how the proposed 2010 HVAU will operate in practice, given that ARTC has proposed the undertaking for acceptance.

Suggestions from stakeholders

Interested parties have put forward suggestions on how the practical implementation and operation of the proposed 2010 HVAU may occur, including for the transition of current network users to the new arrangements. The ACCC appreciates the contributions these parties have made to facilitating the workability of ARTC's proposed access arrangements.

PWCS

PWCS suggested that a separate process be implemented to handle the transition to the new arrangements. Without wishing to be overly prescriptive (recognising it is a matter to be settled between the producers and ARTC), PWCS suggested the following principles:

- all producers treated equally if nominations for rail capacity are submitted by an agreed deadline;
- nominations for track capacity submitted with firm terminal contracts (or other Network Exit Capability) be given priority over nominations from others without firm Network Exit Capability;
- if all nominations having firm Network Exit Capability can be satisfied (after considering the "feasibility" of expansions) then all such capacity nominations will be matched;
- if there is not enough capacity available (or able to be built) to satisfy all nominations with Network Exit Capability, then an agreed set of protocols for

scaling back track access would be applied (but those scaled back would have first rights to Additional Capacity when it becomes available).³⁰⁷

Coal & Allied

Coal & Allied provided a detailed submission setting out a plan for the implementation of the proposed 2010 HVAU, including for the transition of current users of the network to the new arrangements. The plan was proposed as a potential solution to Coal & Allied's concern regarding the need for certainty of contracted volumes.

The following extract conveys the key principles of Coal & Allied's proposal:

- (a) Nominations for Capacity will be made on an annual basis, with all nominations for Path Usages to be submitted within the same month each year, shortly after PWCS port allocations have been confirmed. Non-coal Access Seekers would nominate to the extent not already contracted. ARTC and HVCCC would then conduct the Capacity Analysis to determine whether existing and planned Capacity is sufficient to meet the track nominations, and whether additional capacity is required. Priority would be preserved for passenger Trains.
- (b) The Capacity Analysis referred to in (a) above could be relatively quick, as it would build off the information and analysis in the Hunter Valley Corridor Capacity Strategy document, which would be prepared and circulated to the industry in advance of the Nominations process
- (c) After ARTC and HVCCC have completed the Capacity Analysis and issued Indicative Access Proposals with track allocations, Access Seekers enter into contracts for all allocated Path Usages, regardless of whether they are Path Usages for Capacity Entitlements, Additional Capacity, or a new category of Path Usages called Pending Capacity:
 - (i) Additional Capacity is identical to the Capacity that ARTC has labelled "Tranche 2" in the Train Path Schedule in the Proposed IAHA (that is, the Access Holder is contractually bound on a take or pay basis for that Capacity and ARTC's contractual obligation is subject to a range of conditions precedent). When the conditions precedent for Additional Capacity are satisfied and the project reaches the implementation phase, the Additional Capacity automatically converts into Pending Capacity.
 - (ii) Pending Capacity is Capacity for which ARTC is contractually bound to complete the construction of that Capacity. The only conditions precedent for Pending Capacity are those related to the timing of the completion of construction of that Capacity. When Pending Capacity is commissioned, that Capacity automatically converts into Capacity Entitlements.
 - (iii) Capacity Entitlements are identical to the Capacity that ARTC has labelled "Tranche 1" in the Train Path Schedule.
- (d) Once AHAs have been entered into by Access Holders, the track investment process is initiated. ARTC retains discretion throughout the track investment process, in a manner similar to that proposed in the Proposed HVAU [and] ... [t]here are several criteria that must be

³⁰⁷ PWCS, Submission in Response to ACCC Consultation Paper, 25 October 2010, pp. 4-5.

satisfied before Additional Capacity is converted into Pending Capacity. However, once Additional Capacity becomes Pending Capacity, ARTC is contractually bound to complete the construction of that Capacity.

- (e) HVCCC can recommend the construction of Additional Capacity at any time, whether in conjunction with or outside of the annual Nomination, Track Investment and Contracting Framework.³⁰⁸

Coal & Allied also submitted that its proposed process could be adapted to form a transition process for the first year of operation of the undertaking.

C&A envisages that the initial round of nominations would be made in accordance with the proposed Framework, essentially as the first, annual nomination for track Capacity. Although the proposed period for nominations, Capacity Analysis and contracting might be extended for the first time the Framework is implemented, the process would otherwise essentially be identical to the process that would be applied each subsequent year.

With regard to any access agreements that are entered into under the NSWRAU from now until an HVAU comes into force, C&A proposes that ARTC should seek to include in any access agreement an “uplift clause” that automatically varies key clauses of the access agreement to be consistent with an IAHA that is accepted by the ACCC. Although contractual terms related to allocations of Capacity should be preserved, the terms related to key matters such as Capacity management, rebates, liability and pricing should be subject to an automatic variation.

This methodology is consistent with the approach taken by ARTC in the 23 December 2009 draft IAHA that was circulated by ARTC to the industry, which contemplated the parties entering into the agreement before an HVAU was approved and which included an uplift clause C&A considers this approach appropriate given that ARTC has lodged an access undertaking application with the ACCC and, therefore, ARTC and Access Seekers should start planning towards the acceptance and implementation of an HVAU.³⁰⁹

While it is not the ACCC’s role to formally assess these proposals under the Act, the ACCC recognises and appreciates the contribution of Coal & Allied and PWCS in offering solutions to their concerns with ARTC’s proposed undertaking.

The way forward

The ACCC acknowledges that, in light of the complexity of the proposed access regime, the development of transition/implementation arrangements is also complex.

The ACCC is not well-placed to design an effective transition and implementation plan to ensure the workability of ARTC’s proposed 2010 HVAU. Part IIIA of the Act allows for access providers to voluntarily submit an access undertaking for acceptance, not for the ACCC to impose a regime of its own design. The ACCC would also be reluctant to prescribe operational detail unilaterally where it lacks the requisite degree of expertise. Further, as an undertaking is proffered by the access provider, that provider should be able to articulate how its proposal is intended to operate in practice. ARTC should therefore take steps to address the uncertainty that exists in relation to the implementation of its undertaking.

³⁰⁸ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 33.

³⁰⁹ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 18.

Nonetheless, the ACCC considers that key initial steps may facilitate transition and to some extent allay the concerns outlined above. These are:

- 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.

The ACCC recognises that some of these steps are small increments, however, it may be the case that more effective and directed communication between the parties on these issues will begin to address the lack of clarity and certainty that currently exists.

The ACCC is reluctant at this stage to recommend wide-ranging revisions to the proposed 2010 HVAU to achieve effective transition and implementation, as to do so may have the perverse outcome of delaying implementation of the HVAU while those revisions are developed and adopted (if ARTC chose to adopt them). Nonetheless, if the non-binding approach outlined above fails to achieve a satisfactory degree of certainty, the ACCC could consider whether a more prescriptive approach would be appropriate. At this stage, revisions to section 3.13 of the proposed 2010 HVAU, as discussed below, are important to addressing the current concerns.

It should also be emphasised that while coal producers have expressed concern with the lack of transition and implementation arrangements, similar concerns have been expressed by non-coal access seekers (see further the discussion in section 7.2.6 above). The ACCC is therefore of the view that ARTC must take into account non-coal access seekers in resolving the transition and implementation concerns.

ARTC's letter of 10 December 2010

The ACCC notes that ARTC distributed on 10 December 2010 a letter to stakeholders outlining a proposed transition arrangement, for both coal and non-coal access seekers. The ACCC recognises that the letter incorporates some of the matters suggested in the preceding section, and welcomes ARTC's steps in this regard.

Mutually exclusive access applications

In the submissions summarised above in section 7.8.3, concerns were raised with the operation of section 3.13 of the proposed 2010 HVAU, regarding the treatment of 'mutually exclusive' access applications.

Section 3.13 states:

- (a) Where two or more Applicants have submitted an Access Application for mutually exclusive Access Rights to Available Capacity existing and commissioned at the time each of the Access Applications is received, each Applicant will be notified as soon as practicable after ARTC has identified that the Access Rights sought are mutually exclusive Access Rights.
- (b) Subject to **section 3.13(c)**, where two or more Applicants have submitted an Access Application for mutually exclusive Access Rights, ARTC will allocate Access Rights to the Applicant who accepts an Access Agreement with ARTC which, in the opinion of ARTC, is most favourable to it. Ordinarily, but without limiting ARTC's discretion in this regard, ARTC would make such a decision based on the Access Agreement that represented the highest present value of future returns to ARTC after considering all risks associated with the Access Agreement.
- (c) An Applicant will not be allocated Coal Access Rights unless it is able to satisfy the Network Exit Capability requirement in **section 3.7(a)(ix)**.
- (d) If, at any time during the negotiation period, a dispute arises between the parties which, after reasonable negotiation, the parties are unable to resolve to their mutual satisfaction, then either party may seek to resolve the dispute in accordance with the dispute resolution process outlined in **section 3.15**.
- (e) To avoid doubt, if an Access Holder seeks to renew Coal Access Rights in accordance with a specific right of renewal provided in its Access Holder Agreement, that request for a renewal will not be treated as an Access Application and will have, to the extent provided in the Access Holder Agreement, priority over an Access Application for Access Rights which are mutually exclusive with the Coal Access Rights sought to be renewed.

The mutually exclusive concept is also incorporated into clause 2.5 of the Train Path Schedule, in relation to Extensions of the Schedule where ARTC has received conflicting requests for capacity.

In the March 2010 Draft Decision, the ACCC expressed a range of preliminary views on the appropriateness of section 3.13 of the 2009 HVAU.³¹⁰ Essentially, the ACCC acknowledged that resolving conflicting applications on the basis of highest present value of future returns would generally have the effect of allocating capacity to access seekers with the highest willingness to pay, and therefore should be efficient for the coal supply chain.³¹¹ The ACCC stated, however, that ARTC must make the operation of section 3.13 'clear and transparent.'³¹²

Consistent with the view that the section be made more clear and transparent, the ACCC considers that appropriate to assess section 3.13 in light of the over-arching concerns with the implementation of the proposed 2010 HVAU. Therefore, while the ACCC recognises that, theoretically, allocation of conflicting capacity requests to

³¹⁰ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 657-659.

³¹¹ ACCC, Draft Decision on HVAU, 5 March 2010, p. 658.

³¹² ACCC, Draft Decision on HVAU, 5 March 2010, p. 659.

users on the basis of willingness to pay should be efficient, there are countervailing considerations in the present context.

The ACCC considers that if sufficient track capacity was always available to accommodate all access seekers, then section 3.13 would be redundant. There may, however, be circumstances where there is a genuine conflict between access applications. The ACCC notes ARTC's explanation in 2009 that mutually exclusive applications are highly unlikely to occur, as it is ARTC's policy to ensure track capacity matches port terminal capacity.³¹³ ARTC has revised section 3.13 from the 2009 HVAU to limit its application to where there is insufficient Available Capacity, and this is an appropriate revision to clarify the section's application.

Nonetheless, neither section 3.13, nor any other section the proposed 2010 HVAU, defines with precision what constitutes 'mutually exclusive Access Rights,' and it is therefore unclear and uncertain how the section would in practice be invoked. For example, it is unclear whether Applications submitted several months or even days apart could nonetheless still give rise to 'mutually exclusive Access Rights.' ARTC has introduced section 3.13(d), which states that renewals of existing access rights would have priority over a 'new' Application, and while this provides some insight, it also raises additional concerns (discussed below) and the overall position remains unclear.

The proposed test for resolving conflicting applications in section 3.13 also creates uncertainty. Section 3.13(b) provides that where there is a conflict, ARTC will allocate rights to the Applicant who accepts an Access Agreement most favourable to ARTC. While the section states that 'ordinarily' this will be the Agreement that represents the 'highest present value of future returns to ARTC after considering all the risks associated with the Access Agreement,' ARTC's discretion is entirely unfettered.

Seen in the context of the concerns regarding the practical implementation and operation of the proposed 2010 HVAU, section 3.13 contributes to the overall lack of clarity and certainty. The section confers upon ARTC an ability to allocate access rights as it sees fit where there are 'mutually exclusive' applications. While this would appear not to occur in relation to Additional Capacity, and while renewals of Access Rights would have priority over 'new' requests, there is otherwise no transparency, certainty or objectivity as to when a 'mutually exclusive' situation would occur.

Furthermore, the ACCC has some concerns that, under the section and the related clause of the Train Path Schedule, existing users of the Network would be preferred to new Applicants. This may have the effect of disadvantaging or deterring new entrants, which may not be in the interests of access seekers or the promotion of competition.

The ACCC therefore considers that section 3.13 should be revised to provide much more clarity and certainty on its application, including what constitutes a 'mutually exclusive' scenario, and how such a scenario would be resolved in relation to coal access seekers, domestic coal access seekers, non-coal access seekers, incumbent users and new entrants (or any combination thereof). Consequential amendments will

³¹³ ARTC, *Response to Submissions to the ACCC on the Hunter Valley Access Undertaking*, 21 September 2009, p. 17.

also be required to the Train Path Schedule. The ACCC considers that if the section cannot be expressed with sufficient clarity and certainty, and otherwise address the ACCC's concerns outlined above, an alternative approach may be necessary.

8 Agreements

Summary

This chapter discusses matters in relation to the Indicative Access Holder Agreement (IAHA) and Operator Sub-Agreement (OSA) attached to the HVAU.

The ACCC reiterates its position from the March 2010 Draft Decision that, other than the Tier 1 provisions, the clauses of the IAHA and OSA are negotiable pursuant to the negotiate/arbitrate framework in the HVAU. The ACCC also acknowledges that ARTC has in many instances revised the agreements to address comments made in the Draft Decision.

The ACCC notes however that the clause of the IAHA dealing with the uplift into the agreements of changes resulting from revisions to the HVAU may require consequential amendments depending on the term of the HVAU. The ACCC also notes that revisions to the clauses dealing with Tolerance are necessary to ensure Tolerance does not fall below a specified minimum level.

8.1 Negotiate/arbitrate framework and indicative arrangements

The access arrangements put forward by ARTC involve a ‘negotiate/arbitrate’ component. Section 3 of the proposed 2010 HVAU obliges ARTC to make an offer of access to an applicant who satisfies certain pre-conditions, and to negotiate in good faith with an applicant to agree mutually acceptable terms and conditions of access. If the parties fall into dispute, they may have recourse to arbitration by the ACCC. The ACCC’s views on the negotiate/arbitrate component are set out in the **Negotiating for Access** chapter, both of this Position Paper and the Draft Decision.

ARTC has also proposed a set of ‘indicative arrangements,’ including Indicative Access Charges based on an Indicative Service (or Interim Indicative Charges and Service depending on the timeframe), and an Indicative Access Holder Agreement (IAHA) and Operator Sub Agreement (OSA). In the Draft Decision, the ACCC outlined its preliminary view on the role and interaction of the indicative arrangements with the negotiate/arbitrate framework. The ACCC recognised that including ‘indicative arrangements’ in the HVAU provided a degree of certainty about the terms and conditions of access on offer, and that the indicative arrangements could constitute a ‘standing offer’ an access seeker could accept without the need for negotiation with ARTC, thereby reducing transaction costs and the potential for delay. The ACCC also recognised that, to the extent that an access seeker seeks terms and conditions of access more suited to their circumstances, and which would not be served by the indicative arrangements, the indicative arrangements are a starting or reference point for negotiation with ARTC. Such negotiations may be limited to specific matters or specific terms, hence transaction costs and potential delays are again reduced. Negotiations would however, be in relation to subject matter as

defined in the scope of the HVAU, as the processes in the undertaking would not apply to matters beyond its scope.³¹⁴ The ACCC reiterates this view here.

The ACCC also recognised in the Draft Decision that the ability of access seekers to negotiate terms and conditions of access suited to their circumstances should be qualified in order to give effect to supply chain alignment considerations.³¹⁵ In response, and to accommodate the ACCC's view, ARTC clarified that certain provisions of the IAHA are non-negotiable. See the **Negotiating for Access** chapter of this Position Paper for further discussion of this issue.

In summary, the HVAU therefore provides for the offer and negotiation of access and arbitration by the ACCC in the event of dispute, with indicative arrangements that may form a reference point for negotiations, and with certain limitations to negotiation that are permissible to facilitate coal supply chain alignment.

The ACCC has, throughout this Position Paper, and in the previous Draft Decision, provided views on the Tier 1 (Mandatory) provisions of the IAHA. Given that these provisions will be applicable to many access seekers, and will be non-negotiable under the processes in section 3 of the proposed 2010 HVAU, it is clearly important that they are appropriate.

The ACCC outlined its approach to the negotiable provisions of the agreements in the Draft Decision. During public consultation on the 2009 HVAU, the ACCC received several submissions raising concerns with aspects of the IAHA and the OSA. The ACCC considered that in many instances it was not necessary to provide a view in relation to those concerns, given the indicative nature of the agreements and the ability of parties to negotiate mutually acceptable terms and conditions via the processes in the undertaking (other than the 'non-negotiable alignment' provisions). Nonetheless, the ACCC recognised that providing a view on certain issues may reduce the possibility of delay in negotiations and the likelihood of disputes arising, thereby lowering transaction costs and ensuring a more effective undertaking.³¹⁶ The ACCC outlined its views on these provisions in the Agreements and Network Transit Management chapters of the Draft Decision. The ACCC chose not to address explicitly in the Draft Decision comments from stakeholders raising minor drafting or typographical errors with the IAHA and OSA, instead assuming that ARTC would correct such errors in revised versions of the IAHA and OSA.³¹⁷

In this Position Paper the ACCC has provided views on the Tier 1 (non-negotiable) provisions, and in this chapter provides views on certain Tier 1 provisions as well as 'key' provisions of the IAHA. Provisions dealing with the 'subject matter' of the agreement between ARTC and the parties – the allocation of train paths – are Tier 1 and are discussed below. The ACCC has not provided views on other, negotiable provisions of the agreements, and emphasises again that parties may seek arbitration in relation to those provisions if they cannot reach agreement.

³¹⁴ ACCC, *Australian Rail Track Corporation Limited – Hunter Valley Coal Network Access Undertaking Draft Decision*, 5 March 2010, pp. 222-223.

³¹⁵ ACCC, *Draft Decision on HVAU*, 5 March 2010, pp. 149-150.

³¹⁶ ACCC, *Draft Decision on HVAU*, 5 March 2010, p. 222.

³¹⁷ ACCC, *Draft Decision on HVAU*, 5 March 2010, p. 222.

Concerns with ‘consistency’

In response to the Draft Decision, ARTC expressed concern that in some instances the ACCC took a position different to the decision on the 2008 Interstate Access Undertaking without explaining why the particular circumstances of the Hunter Valley network informed a change in position.³¹⁸

The ACCC does not agree that the approach in the Draft Decision was inconsistent with the approach in relation to the 2008 Interstate Access Undertaking. Both the HVAU and the Interstate AU incorporate a negotiate/arbitrate framework with indicative agreements. In the April 2008 Draft Decision on the Interstate AU (which was subsequently endorsed in the July 2008 Final Decision), the ACCC stated that:

The ACCC considers that the purpose of the Undertaking’s negotiation framework is to assist access seekers to conclude a set of agreed access terms and conditions with ARTC. These terms and conditions are then embodied in a contractual relationship between ARTC and an operator known as an access agreement.

In assessing whether the [Indicative Access Agreement] IAA is appropriate the ACCC has considered whether it balances certainty for access seekers with sufficient flexibility so access seekers can negotiate the terms and conditions that would best meet their needs. While some submissions argued that the IAA should set standard terms and conditions for all services, not just indicative services, the ACCC considers that this is not necessary to ensure effective negotiation and recognises that there are benefits in access seekers having the capacity to negotiate outside the IAA.

The Undertaking clearly provides for access seekers to negotiate outside the IAA and develop an agreement different to that of the IAA. Such flexibility can ensure access terms and conditions meets the needs of individual operators and respond to changing market needs over the ten year term of the December Undertaking. ...³¹⁹

These comments are consistent with the comments outlined above and, the comments in in the Draft Decision regarding the negotiability of provisions under the IAHA and OSA. The ACCC recognises that the proposal ARTC has put forward under both undertakings is to allow negotiation of terms in the indicative agreements, other than the Tier 1 terms of the IAHA under the proposed 2010 HVAU. The ACCC notes that ARTC has not identified any instances where amendments to the HVAU suggested by the ACCC in the Draft Decision would prevent ARTC from complying with a particular clause in the 2008 Interstate AU and Interstate Indicative TAA or vice versa.

8.1 Subject matter of the IAHA

Clause 3 of the IAHA, and the Train Path Schedule deal with the ‘subject matter’ of the IAHA, and are therefore significant to the overall bargain between ARTC and the access seekers.

³¹⁸ ARTC, *Response to the ACCC Draft Decision on the Hunter Valley Access Undertaking*, 31 March 2010, pp. 16-17.

³¹⁹ ACCC, *Final Decision – Australian Rail Track Corporation – Access Undertaking – Interstate Rail Network*, July 2008, pp. 237-238.

Clause 3 includes provisions relating to the allocation and ‘sculpting’ of train paths and path usages, as well as the determination of tolerance, while the Train Path Schedule will ultimately set out the particular allocations made to an individual access holder.

8.1.1 All provisions related to ‘sculpting’ the Annual Contracted Path Usages and the Tolerance Model should be included in the HVAU

In the March 2010 Draft Decision the ACCC was of the view that it may be appropriate to include provisions relating to the ‘sculpting’ of the annual contracted path usages and the Tolerance model in the HVAU itself which can then be mirrored in access agreements, in order to ensure consistent application of capacity management / network transit management protocols across access seekers on the network.³²⁰

It is the ACCC’s view that the amendments to Schedule A:1 to the HVAU to include clauses 3.1, 3.2, 3.3, 3.4 and 3.6 as ‘Tier 1 (mandatory) provision’ – which must be included in all Coal Access Agreements – deals with the concerns raised in the March 2010 Draft Decision.

8.1.2 Annual Determination of BPU, MTC and NPC

8.1.2.1 Clause 3.2 - Contract year defined as Calendar Year

In the March 2010 Draft Decision the ACCC was of the view that the April 2009 HVAU did not deal with the possibility that the first year in which the provisions will need to apply may start prior to the beginning of a calendar year.³²¹

The ACCC is of the preliminary view that the amendments set out in clause 3.2 of the IAHA, which provide that where the initial Contract Year is not a calendar year, ARTC agrees to follow a revised process in determining the monthly base path usages, deals with the concerns raised in the March Draft Decision.

8.1.2.2 Clause 3.2(b)(ii)(D) – Alignment of coal Path Usages with Port Allocations Usages

In the March 2010 Draft Decision, the ACCC was of the view that the proposed amendments to the principles by which ARTC will determine the Access Holder’s Base Path Usages for the following Contract Year (in what is now clause 3.2(b)(ii)(D) of the IAHA), be made to provide greater certainty that consultation with the HVCCC has the objective of aligning the producer’s Path Usages with the producers vessel nomination expectations.³²²

The ACCC is of the view that the amendments in clause 3.2(b)(ii)(D), which require ARTC to consult with the HVCCC with the objective of aligning coal Path Usages with port allocations, deal with the concerns raised in the March Draft Decision in relation to concerns regarding the consideration of alignment between the producer’s Path Usages and the producers vessel nomination expectations.

³²⁰ ACCC, Draft Decision on HVAU, 5 March 2010, p. 446.

³²¹ ACCC, Draft Decision on HVAU, 5 March 2010, p. 446.

³²² ACCC, Draft Decision on HVAU, 5 March 2010, p. 445.

8.1.2.3 Clause 3.2(c) – Notifying the Access Holder of the NPC, MTC and BPU

Clause 3.2(c) provides for a notification process for Network Path Capability, Monthly Tolerance Cap and Base Path Usages as follows:

3.2 Annual Determination of BPU, MTC and NPC

- (c) For each Contract Year subsequent to the first Contract Year, ARTC will use reasonable endeavours to notify the Access Holder by 30 September of the previous Contract Year but in any event before the commencement of the Contract Year, of the:
- (i) Network Path Capability in each Pricing Zone for each Period of the Contract Year, determined in accordance with **clause 2.3** of **Schedule 2**;
 - (ii) the Monthly Tolerance Cap in each Pricing Zone for each Month of the Contract Year, determined in accordance with **clause 3.3**; and
 - (iii) Base Path Usages for the Contract Year.
 - (iv) If the Access Holder disputes the Base Path Usages, it must notify ARTC of that dispute under **clause 14** within one month of being notified and the dispute will be determined by expert determination in accordance with **clause 14.4**. If the Access Holder does not notify a dispute within this time, it is deemed to have accepted the Base Path Usages.

Therefore, ARTC proposes that:

- it will notify Access Holders before the commencement of each contract year what the NPC, MTC and BPUs will be for that year; and
- Access Holders must notify ARTC of any dispute relating to determination of BPUs within one month of ARTC's notification to the Access Holder.

ARTC submissions

ARTC submits that '[f]or every year except the first contract year, ARTC will use reasonable endeavours to publish the MTC (for each month and for each pricing zone) [and Network Path Capability and Base Path Usages] by 30 September of the previous contract year and in any event prior to the commencement of the contract year. ARTC considers it important that this flexibility is retained given the uncertainties surrounding an untested practice.'³²³

ARTC also submits that '[f]or the first contract year, this timetable is clearly not practical and the MTC for each Pricing Zone in each month will be notified by ARTC to the access holder prior to the commencement of the agreement.'³²⁴

Stakeholder submissions

³²³ ARTC, *Hunter Valley Access Undertaking - Explanatory Guide (September 2010)*, 7 September 2010, pp. 36-37.

³²⁴ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, pp. 36-37.

Xstrata submits that the ‘annual calculations of Base Paths, Monthly Tolerance Cap’ and other annually calculated variables ‘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.’³²⁵

Xstrata also submits that ‘[a]t the very least an indicative figure should be given, even if subject to later adjustment.’³²⁶

Xstrata proposes that in ‘clause 3.2(c), after “30 September of the previous Contract Year” the drafting should be amended to add “(and must provide indicative figures by that date if the final figures are not provided)”’.³²⁷

ACCC view

The ACCC accepts ARTC’s view that the 30 September timetable for the calculation and notification to Access Holders of the NPC, MTC and BPUs are not likely to be relevant for the first contract year and also accepts that ARTC requires flexibility as to the date at which it is obliged to provide these final calculations in subsequent contract years given the potential uncertainties around this operation of this new process.

It also appears to the ACCC that the amendments in clauses 3.2(b) and 3.2(c), which set out the missing information from clauses 3.2(a) and 3.2(c) in the April 2009 IAHA, deals with the concerns raised in the March Draft Decision in relation to this missing information.

8.1.3 Clause 3.3: Tolerance

Clause 3.3 provides for determination of Tolerance and the Monthly Tolerance Cap (MTC).

ARTC submissions

ARTC submits that it has ‘provided a detailed methodology as to how it will determine the MTC for each month’ by first identifying the ‘Target MTC’.³²⁸

A target MTC for each Pricing Zone for each Contract Year (Target Monthly Tolerance Cap or TMTC) will be identified in the Hunter Valley Corridor Capacity Strategy published in the previous year. As set out in the definition of TMTC, the target figure will be included in the Hunter Valley Corridor Capacity Strategy after consultation with the RCG. The level of TMTC will in practice reflect the amount of capacity that the industry is prepared to build to provide for system flexibility to meet demand variation. The industry will be able to fund Additional Capacity in order to increase the level of tolerance available to the system.

³²⁵ Xstrata, *Xstrata Coal Pty Ltd’s response to the Australian Competition and Consumer Commission in relation to the ACCC Consultation Paper in relation to the Australian Rail Track Corporation’s proposed Hunter Valley Rail Network Access Undertaking dated 16 September 2010*, 25 October 2010, p. 20.

³²⁶ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 20.

³²⁷ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 29.

³²⁸ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 36.

The maximum TMTC for each Contract Year is 10%. This will act as a cap in the event that industry elects to create a higher level of system capacity. Given that each access holder is entitled to no more than 10% of their average path usages as tolerance in any one period, and the likelihood that not all access holders will require tolerance in any given month, a TMTC (or MTC) higher than 10% would not offer access holders greater flexibility by way of tolerance. Additional capacity in excess of 10% could still be available for ad hoc usage.³²⁹

Secondly, ARTC submits that it will sculpt the MTC for each month of the contract year:

to reflect the maintenance requirements in each month and the expected impact this will have on capacity in that Pricing Zone. For example, in one month the MTC in Pricing Zone 1 may only be 8% due to the maintenance requirements in that month (i.e. it is a Maintenance Month) and in a subsequent month, the MTC in Pricing Zone 1 may be 12%. This process will be similar to the sculpting of each access holder's contracted entitlement into BPU carried out under clause 3.2(b) of the 2010 IAHA and will be carried out at the same time. Similarly, the MTC sculpting process would target the TMTC for the full year.

The TMTC set out in the Hunter Valley Corridor Capacity Strategy may rely upon additional capacity to be created by a project which has not yet been commissioned. For example, the RCG may have endorsed a new project in Pricing Zone 1 which has the purpose of creating an additional 2% of capacity to be available as tolerance thereby increasing the TMTC to say, 10%, as set out in the Hunter Valley Corridor Capacity Strategy. If that project is not due to be commissioned until May 2012, ARTC will, in determining the MTC for the months January - May 2012, be required to sculpt the MTC around a target which it believes reasonably reflects the track capacity available for tolerance prior to the completion of the project. In this example, ARTC would sculpt around an 8% target for January - May 2012, rather than the 10%. The MTC sculpted for the subsequent months will reflect the higher target of 10%. If the project creating the additional capacity for the purposes of tolerance is delayed and the additional capacity is not available by June 2012, ARTC will advise the access holders of the revised MTC for that Pricing Zone, prior to the commencement of each month.³³⁰

Stakeholder submissions

Coal and Allied

Coal and Allied submits that it 'is concerned that the definition of "TMTC" currently gives ARTC the discretion to set the TMTC at any level, although not greater than 10%, only having regard to consultations with the RCG (but not requiring RCG approval).'³³¹

³²⁹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, pp. 36-37.

³³⁰ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, pp. 36-37.

³³¹ Coal and Allied, *Submission in Response to the ACCC's Consultation Paper in relation to the Australian Rail Track Corporation's Proposed Hunter Valley Rail Network Access Undertaking*, 25 October 2010, p. 47.

Coal and Allied submits that it is ‘possible for ARTC to set the TMTC at a level that is less than the industry’s requirements (even to a zero level) which would impact on the flexibility needed in the Coal Chain.’³³²

Coal and Allied therefore submit that it is ‘appropriate to set a minimum TMTC, and require ARTC to seek approval from the RCG in order to set the TMTC below this level.’³³³

QR National Coal

QR National Coal submit that it is ‘questioned how fair allocation of tolerance to all Access Holders will be ensured when some producers will have a monthly allocation and others will have a quarterly allocation of Base Path Usages. This arrangement has not been considered in the current drafting and needs to be clarified.’³³⁴

Xstrata

Xstrata submits 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.’³³⁵

Xstrata submit that 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.’³³⁶

Xstrata submits that 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.’³³⁷

Xstrata submits that ARTC should ‘include within either the IAHA or the Access Undertaking, a statement of the minimum TMTC which would apply.’³³⁸

Xstrata propose that the definition of TMTC be amended to include ‘after paragraph (b): “but must in any event be not less than: Pricing Zone 1 []% Pricing Zone 2 []% Pricing Zone 3 []%’.³³⁹

ACCC view

The ACCC notes concerns of interested parties to ensure that the Monthly Tolerance Cap will provide sufficient Tolerance paths to promote supply chain alignment. The ACCC considers the importance of Tolerance for alignment of the supply chain and ARTC’s liability for failing to make Tolerance path usages available in the **Performance and Accountability** chapter.

³³² Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 47.

³³³ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 47.

³³⁴ QR National Coal, *QR National Coal’s Submission to the Hunter Valley Access Undertaking*, 25 October 2010, p. 13.

³³⁵ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 20.

³³⁶ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 20.

³³⁷ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 20.

³³⁸ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 21.

³³⁹ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 29.

The ACCC notes that capability of the Network to deliver Tolerance will be determined by capital investment in capacity.. The ACCC however recognises concerns of interested parties that the IAHA may allow ARTC to reduce the Monthly Tolerance Cap to a level that may compromise supply chain alignment objectives. The ACCC notes that ARTC’s proposed implementation of the Monthly Tolerance Cap in clause 3.3 may allow ARTC to set the Monthly Tolerance Cap at zero and not incur liability for TOP rebates (see further the discussion in the **Performance and Accountability** chapter). The ACCC does not consider that it is appropriate for ARTC to have what appears to be such a significant discretion in this regard. Given the importance of Tolerance to achieving coal chain alignment, the ACCC considers that the IAHA should provide greater recognition of the need for sufficient Tolerance to be made available in each period.

The ACCC concurs with the suggestion that a minimum level of Tolerance be set, in order to provide certainty for access seekers. The RCG should then provide the relevant forum within which to discuss changes to the level of Tolerance via the construction of Additional Capacity. That is, the ACCC understands that a consequence of setting a minimum level of Tolerance may be a requirement for ARTC to seek to construct, and the RCG to endorse, Additional Capacity projects to ensure that level of certainty.

8.1.3.1 Clause 3.3(e) – Review of the Tolerance level

In the March 2010 Draft Decision, the ACCC was of the view that the proposed amendments to the 24 December IAHA under which ARTC would commence a review of the level of tolerance available (which was developed on the basis of campaign railing) and provide a report to the RCG summarising the results of this review, was more likely to be appropriate if the intended consultation process as part of the review was clearly set out.³⁴⁰

ARTC submits that subsection 3.3(e) has been amended ‘to update the timetable for the review of tolerance given the delay in the commencement of the 2010 HVAU and signing of the AHAs. The timing of the tolerance review will coincide with the proposed review of cancellations in the 2010 HVAU.’³⁴¹

Xstrata submits that 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.’³⁴²

It is the ACCC’s view that the amendments in clause 3.3(e) of the IAHA deal with the concerns raised in the March Draft Decision in relation to the review of the level of available Tolerance. The ACCC notes that as the clause is included in the access agreements, Access Holders will be able to enforce it via court proceedings should ARTC not comply.

³⁴⁰ ACCC, Draft Decision on HVAU, 5 March 2010, p. 447.

³⁴¹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, Appendix 1, p. 53.

³⁴² Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 21.

8.1.4 Clause 3.5 Allocation Period

Clause 3.5 of the IAHA provides for the identification of ‘Allocation Periods’ for Access Holders (that is, monthly or quarterly).

The ACCC notes Xstrata’s comment that ‘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’, and that ‘if PWCS moves to a system of monthly allocation for all users, this should also be reflected in the ARTC IAHA.’³⁴³

The ACCC is of the view that this change is unnecessary as clause 3.5(c) only provides a right for an Access Holder to elect an Allocation Period of a Quarter for a particular Contract Year where the default position is a monthly period under clause 3.5(e).

8.1.5 Clause 3.6 Availability Exceptions

8.1.5.1 Clause 3.6(a) – Notice as to Availability Exceptions

In the March 2010 Draft Decision the ACCC was of the view that under the IAHA ARTC should use its best endeavours to give notice to the access holder when the availability of a path usage will be subject to an availability exception and that the exception will only apply to the extent that its occurrence prevents ARTC from delivering the particular path usage in question.³⁴⁴

It is the ACCC’s view that the amendments to clause 3.6(a), which set out that the Availability Exceptions will only apply to the extent that the occurrence of the Availability Exception prevents ARTC (acting reasonably) from making that particular Train Path or Path Usage available to the Access Holder, deal with the concerns raised in the March 2010 Draft Decision.

It is also the ACCC view that, given the clear nature of the limitation now set out in clause 3.6(a), and ARTC’s explanation that in many circumstances it will not be possible to provide advance notice (when required for safety related reasons), that the recommendation regarding reasonable notice to an Access Holder about an impending Availability Exception is no longer necessary.³⁴⁵

8.1.5.2 Clause 3.1(b) of the OSA

It appears to the ACCC that the amendments to clause 3.1(b) of the IOSA that set out that the Availability Exceptions will only apply to the extent that the occurrence of the Availability Exception prevents ARTC (acting reasonably) from making that particular Train Path or Path Usage available to the Access Holder, deals with the concerns raised in the March Draft Decision in relation to limiting the applicability of the Availability Exceptions.

It also appears to the ACCC that, given the clear nature of the limitation now set out in clause 3.1(b), and ARTC’s explanation that in many circumstances it will not be

³⁴³ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 21.

³⁴⁴ ACCC, Draft Decision on HVAU, 5 March 2010, p. 448.

³⁴⁵ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 82.

possible to provide advance notice (when required for safety related reasons) as set out in its response³⁴⁶ to the March Draft Decision, that the recommendation regarding reasonable notice to an operator about an impending Availability Exception is no longer necessary.

8.1.5.3 Clause 3.6(b) – Multiple Access Agreements

In the March 2010 Draft Decision the ACCC was of the view that clause 3.6(b) be amended so it is clear that access holders may have an additional access agreement with ARTC under which they can access the Hunter Valley network.³⁴⁷

It is the ACCC's preliminary view that the amendments in clause 3.6(b) of the IAHA, which set out that an Access Holder may access the Network under a separate valid and binding access holder agreement, deal with the concerns raised in the March Draft Decision.

8.2 Train Path Schedule

The Train Path Schedule (TPS) attached to the IAHA sets out the Access Holder's entitlements to train Path Usages which service particular mines. Specifically, the Train Path Schedule sets out the terms and conditions relating to:

- the commencement of: (i) the right to use path Usages; and (ii) the obligation to pay TOP Charges for Path Usages; and
- the annual renewal of the Train Path Schedule and its extension in circumstances where the Access Holder has not exercised its rights under the annual renewal process (including where another application for mutually exclusive rights has been received).

The ACCC also notes that under the TPS there are two 'streams' of contracted Path Usages:

- Under clause 3.2, Path Usages contained in Tranche 1 relate to existing Capacity, which is Available Capacity that has been contractually allocated to the Applicant. Once the IAHA is signed, ARTC is bound to provide those Path Usages in accordance with the IAHA and the TPS.
- Under clause 3.3 of the TPS, Path Usages contained in Tranche 2 relate to Capacity that is yet to come into existence.
 - Under the proposed 'investment framework' in the HVAU, this would represent capacity identified by ARTC as one of the preferred options under the corridor capacity strategy which would then go through the RCG process under section 6.4(d) of the HVAU, Additional Capacity recommended by the HVCCC under section 6.3(b) or Additional Capacity sought by an individual Applicant under section 6.2(a). As a result of the ACCC's recommendations in relation to those sections of the HVAU, any of these options can be funded by either ARTC or can be 'user-funded' where ARTC does not wish to fund.

³⁴⁶ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 84.

³⁴⁷ ACCC, Draft Decision on HVAU, 5 March 2010, p. 448.

- The Path Usages listed in Tranche 2 are subject to a ‘Project Completion Condition Precedent’ in clause 4.3 of the TPS. Unless the conditions set out in clause 4.3 are satisfied (including that the project has been completed), ARTC is not obliged to provide access to those Path Usages. The ACCC has recommended a number of amendments to the Project Completion Condition Precedent, which are discussed in greater detail in the **Additional Capacity and Investment** chapter.
- Both ‘streams’ of Path Usages listed are also subject to the Network Exit Capability Condition Precedent. This is an obligation on the Access Holder to provide evidence that it has sufficient capacity to offload the anticipated coal associated with those Path Usages. The Network Exit Capability requirement is discussed in greater detail in the **Negotiating for Access** chapter. Where this condition is not satisfied, ARTC can (in certain circumstances) delete those Path Usages from the TPS.

March 2010 Draft Decision and responses

In the March Draft Decision, the ACCC noted that the Train Path Schedule contained substantial drafting notes and examples and that as a result, it was difficult for the ACCC to identify with certainty what ARTC was proposing to be contained in all Train Path Schedules, and what would differ on a case-by-case basis.³⁴⁸

ARTC submits generally that the Train Path Schedule (TPS) is critical to the agreement and that drafting notes simply provide an explanation of how it operates to enable an understanding of how charges are calculated and examples of conditions precedent to the entitlement of a tranche of Path Usages. ARTC submits that significant changes were made to the 24 December IAHA after consultation with stakeholders, ‘review of the PWCS Long Term Ship or Pay Agreement and related protocols and attempts by ARTC to clarify the obligations set out in the earlier version.’³⁴⁹

In its submission in response to the March Draft Decision, Xstrata noted that it considers that the operation of the Train Path Schedules may impede the ability of Access Holders to utilise different Operators to service the same Train Path. Xstrata wishes ‘to have sufficient flexibility to change the nominated Operator servicing each Train Path and the proportions of Path Usages consumed by each Operator which services each Train Path on a daily basis’ to allow flexibility in Operator deployment and increase competition.³⁵⁰

In relation to the Network Exit Capability Condition Precedent (clause 4.1 of the 2009 TPS), NSWMC submitted that ‘where requested to do so by an Access Holder and subject to Available Capacity, ARTC should be obliged to grant Path Usages to enable the Access Holder to fully utilise its port capacity’ and that ‘clauses 4.1 and

³⁴⁸ ACCC, Draft Decision on HVAU, 5 March 2010, p. 450.

³⁴⁹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 82.

³⁵⁰ Xstrata, *Submission in Response to ACCC Draft Decision on ARTC Hunter Valley Coal Network Access Undertaking*, Attachment 1, 8 April 2010, p. 8.

4.2 of the Train Path Schedule should be clarified so that they do not limit the operation of clause 3.14 of the agreement during the Term.’³⁵¹

ACCC view

Clause 1.4 of the IAHA - Schedule Priority

In the March 2010 Draft Decision the ACCC was of the view that clause 1.4 was included to provide certainty as to how the IAHA is intended to operate by specifying that the TPS will take priority over the body of the agreement to the extent that any inconsistency arises between them.

While the ACCC notes the view of QR National Coal that it may be difficult to assess the impact of clause 1.4 in the absence of specific examples of possible inconsistencies, the ACCC accepts that the amendments to clause 1.4, and the inclusion of clause 1.5, which specifies that the TPS will not override any Tier 1 (Mandatory) Provisions in the HVAU, deal with any concerns in relation to agreements being entered into which could affect supply chain alignment. Further, the ACCC reiterates the position in the March 2010 Draft Decision that the inclusion of inconsistent provisions in the TPS would always require the consent of the relevant Access Holder. The ACCC also notes that clause 1.4 is a negotiable provision.

Clause 2.5 of the TPS – ‘Mutually Exclusive’ applications

Aston Resources notes that ‘[c]lause 2.5 of the Train Path Schedule ... provides access holders that have failed to renew their entitlements with priority in the event that another access holder applies for mutually exclusive path usages within 3 years of the following the expiry of the access holder’s 10 year term’ and submits ‘that an access holder that has failed to exercise its annual right of renewal should not be given automatic priority over a new entrant.’³⁵²

The ACCC has recommended a number of amendments to the ‘mutually exclusive’ application provisions in section 3.13 of the HVAU, and these will likely require consequential amendments to clause 2.5 of the TPS. These recommendations are discussed in greater detail in the **Negotiating for Access** chapter.

8.3 Other key provisions

This section of the chapter deals with the remaining provisions of the agreements in line with the ACCC’s approach outlined in the introductory section **Error! Reference source not found.**above.

8.3.1 Term of agreements

Provisions of the agreements

Clause 2 of the IAHA and the OSA deal with the term of the agreements.

³⁵¹ NSWMC, *Explanatory Comments for NSWMC mark-up of the ARTC Access Holder Agreement*, Attachment D, 1 April 2010, p. 12.

³⁵² Aston Resources, *Submission: ARTC proposed Hunter Valley Rail Network Access Undertaking*, 25 October 2010, p. 9.

The IAHA commences at the Commencement Date and terminates by virtue of either clause 2 (which relates to expiry of the agreement) or clause 12 (which relates to termination other than expiry).

The Commencement Date is defined as ‘the date the agreement is signed by both parties.’³⁵³ In the Draft Decision the ACCC commented on the definition of ‘Commencement Date’ in the IAHA and OSA, and considers those definitions in the 2010 IAHA and OSA appropriate.³⁵⁴

Clause 2.3 of the IAHA now states:

Each Train Path Schedule:

- (a) ...;
- (b) ...;
- (c) specifies a 10 year Initial Term for access to a Train Path and Path Usages which may be annually renewed by an Access Holder for each year which is 10 years in advance of the Contract Year in which the Renewal Notice is submitted; and
- (d) provides that, in certain circumstances set out in the Train Path Schedule if the Access Holder has failed to renew the Train Path Schedule, ARTC will provide the Access Holder with the opportunity, during the period until five years before the Train Path Schedule is due to expire, to extend the Train Path Schedule for a period of not less than one year and not more than three years notwithstanding that the Access Holder has failed to submit a Renewal Notice.

Clause 2.3 provides that, subject to clause 12.7 (which relates to the effect of termination), the agreement automatically terminates upon the expiry of all the Train Path Schedules.

ACCC view

In the Draft Decision the ACCC recognised that while the ability for ARTC to offer long term contracts under the HVAU was appropriate, it was desirable that ‘the HVAU retain some flexibility as to contract length to allow individual access seekers to negotiate agreements which meet their specific needs, such as a shorter term agreement in a case where a mine has a shorter remaining mine life’.³⁵⁵

In response to the Draft Decision ARTC indicated that it is prepared to negotiate shorter term agreements with access seekers, but that this does not need to be contemplated in the IAHA. ARTC also proposed to revise the OSA such that it does not specify a term.³⁵⁶ Anglo Coal and the New South Wales Minerals Council

³⁵³ ARTC, *Access Holder Agreement for Indicative Services in the Hunter Valley*, 7 September 2010, clause 1.1.

³⁵⁴ ACCC, Draft Decision on HVAU, 5 March 2010, p. 245.

³⁵⁵ ACCC, Draft Decision on HVAU, 5 March 2010, p. 224.

³⁵⁶ ARTC, Response to the ACCC Draft Decision, 31 March 2010, pp. 40-41.

(NSWMC) submitted that indicative terms and prices should be offered to producers whose mine life is shorter than 10 years.³⁵⁷

As in the Draft Decision, the ACCC considers that the indicative term proposed for the IAHA is likely to be appropriate. The ACCC notes that the term of the agreement is a negotiable provision, such that parties may negotiate different terms to suit their circumstances, and that negotiations could also extend to notice periods.

8.3.2 Uplift – incorporating changes over time

Provisions of the agreements

Clause 19.1 of the IAHA deals with the circumstance where a new or varied HVAU is accepted by the ACCC during the term of the agreement. Clause 19.1(b) states:

- (b) The parties agree that:
 - (i) any changes to a Tier 1 (Mandatory) Provision or the addition of a new Tier 1 (Mandatory) Provision in the indicative access agreement included in an Access Undertaking accepted by the ACCC as contemplated under **clause 19.1(a)**, will be automatically incorporated into this agreement, on the date the new or varied Access Undertaking comes into effect; and
 - (ii) to the extent there are changes to any other provisions of the indicative access agreement included in an Access Undertaking accepted by the ACCC under **clause 19.1(a)** which are inconsistent with this agreement, the parties will negotiate in good faith to modify this agreement to reflect the amendments to the indicative access holder agreement included in the Access Undertaking which are necessary or desirable for ARTC to safely and efficiently manage the Network and recover its costs while retaining, to the extent possible, the commercial and economic position of both parties arising from the agreement, and if the parties cannot agree, then the dispute will be a Dispute to be resolved in accordance with **clause 14**; and
 - (iii) if this agreement contains a provision which is not contained in the indicative access agreement and is not inconsistent with any provision of the indicative access agreement, that provision will be retained unless the parties agree otherwise.

ACCC view

This approach is broadly consistent with the ACCC's view in the Draft Decision. The ACCC stated in the Draft Decision that, in light of the approach whereby certain provisions of the IAHA should be non-negotiable to facilitate alignment objectives, it is appropriate to confine any an automatic uplift to those provisions.³⁵⁸ Further:

It is unnecessary to automatically uplift other terms, and instead appropriate to merely provide parties with an ability to renegotiate the agreement pursuant to the new access undertaking, taking into account any changes in circumstances.³⁵⁹

³⁵⁷ See submissions in Appendix 2.

³⁵⁸ ACCC, Draft Decision on HVAU, 5 March 2010, p. 225.

³⁵⁹ ACCC, Draft Decision on HVAU, 5 March 2010, p. 225.

The ACCC recognises however that consequential amendments may be required to this provision in light of the final view on the appropriate term of the HVAU.

8.3.3 Financial viability

In addition to the prudential requirements in the HVAU, the IAHA and OSA contain provisions regarding the financial viability of the Access Holder. The intention of these is to ensure that the counter-party to an access agreement is sufficiently creditworthy to meet its obligations under the agreement.

This section addresses issues relating to:

- the Acceptable Credit Rating requirement and Parent Guarantee provisions (clauses 2.2 and 7 of the IAHA); and
- provisions for the handling of Security by ARTC (clause 7 of the IAHA).

8.3.3.1 Credit rating and Parent Guarantee

March 2010 Draft Decision

In the Draft Decision, the ACCC considered that the provisions in the IAHA requiring an Acceptable Credit Rating or Parent Guarantee were potentially onerous and prescriptive.³⁶⁰ Specifically, the ACCC considered that the requirement for Access Holders to obtain and maintain a credit rating under clause 2.2 of the IAHA represented a significant cost to access holders.³⁶¹

The ACCC also noted that the Parent Guarantee appeared to extend beyond a situation where the Access Holder or operator fails to meet its obligations under the relevant agreement.³⁶²

Provisions in the agreements

Clause 2.2 is a condition precedent that states

- (a) If, at the Commencement Date, the Access Holder has a credit rating below the Acceptable Credit Rating and the Access Holder has not delivered a Parent Guarantee or Security for an amount of at least three months' TOP Charges to ARTC, then clauses 3 to 11 do not take effect until this condition precedent is satisfied.
- (b) The condition precedent is for the benefit of ARTC and may only be waived by ARTC.
- (c) If the condition precedent is not satisfied within one month of the Commencement Date, ARTC may terminate this agreement on written notice to the Access Holder.³⁶³

Relevant terms are defined in the IAHA as follows:

³⁶⁰ ACCC, Draft Decision on HVAU, 5 March 2010, p. 236.

³⁶¹ ACCC, Draft Decision on HVAU, 5 March 2010, p. 236.

³⁶² ACCC, Draft Decision on HVAU, 5 March 2010, p. 236.

³⁶³ ARTC, 2010 IAHA, 7 September 2010, clause 2.2(a)-(c).

Acceptable Credit Rating means a minimum long term credit rating of either BBB from Standard & Poors or Baa2 from Moody's;

Parent Guarantee means a guarantee given by a Related Body Corporate of the Access Holder who has an Acceptable Credit Rating in substantially the same form set out in the Access Undertaking;

Security means an unconditional and irrevocable bank guarantee, letter of credit, performance or insurance bond issued by a bank holding an Australian banking licence or such other reputable person or institution accepted by ARTC and which is in a form reasonably satisfactory to ARTC.³⁶⁴

Clause 7 sets out further provisions regarding credit support during the life of the agreement. The clause deals with the provision of security, and the circumstances in which ARTC may draw upon and/or repay that security.

Stakeholder submission

In relation to the condition precedent (clause 2.2), ARTC submitted that it is 'making a long term investment programme and it is not inappropriate that ARTC has the ability to require a creditworthy counterparty.'³⁶⁵ Further, ARTC submitted that there were clear options available when neither the Access Holder, nor its Parent has an Acceptable Credit Rating. In addition, ARTC noted that the conditions precedent in the IAHA are not Tier 1 provisions, and are therefore negotiable.³⁶⁶

In its response to the Draft Decision, ARTC also submitted that the Parent Guarantee is 'standard form guarantee' and made the following comments:

- It is necessary that the Guarantor indemnify ARTC if an obligation that the Access Holder/Operator would otherwise have under the Agreement, or that the Guarantor would otherwise have under clause 2.2 of the Parent Guarantee, is void, voidable or unenforceable.
- It is a critical element of a Guarantee that the Guarantor is liable for variations to the relevant agreement. Without such liability, the protection afforded by the Guarantee could be avoided by the Access Holder/Operator amending the underlying agreement.³⁶⁷

Xstrata commented in response to the Draft Decision that a requirement for Access Holders to have a credit rating was excessive.³⁶⁸

ACCC view

The ACCC notes that Access Holders may still be required under the 2010 IAHA to obtain and maintain an Acceptable Credit Rating, however the ACCC also acknowledges that there are alternatives available under the IAHA to obtaining a credit rating. Moreover, as non-Tier 1 provisions, the clause relating to credit support are negotiable.

³⁶⁴ ARTC, 2010 IAHA, 7 September 2010, clause 1.1.

³⁶⁵ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 49.

³⁶⁶ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 49.

³⁶⁷ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 49.

³⁶⁸ Xstrata, Submission in Response to ACCC Draft Decision, Attachment 1, 8 April 2010, p. 7.

With regard to the provisions relating to the Parent Guarantee, the ACCC accepts ARTC's explanation of their intended purpose,³⁶⁹ and acknowledges that the Parent Guarantee itself is a negotiable document.

8.3.3.2 Handling of Security by ARTC

Clause 7 also contains provisions regarding the circumstances where ARTC draws on, repays and reviews the amount of, the Security (clauses 7.1 to 7.3). Clause 4 of the OSA includes similar provisions relating to credit support.

March 2010 Draft Decision

In the Draft Decision, the ACCC noted that ARTC was able to draw on Security on the last Business Day prior to expiry of the Security unless a replacement security has been provided at least three days prior to expiry, irrespective of whether monies are owed, under clause 7.1(e) of the IAHA. The ACCC considered that these provisions appeared disproportionately favourable to ARTC.³⁷⁰

The ACCC noted the NSWMC's concern that the amount by which Security may be increased by review was specified in clause 7.1(b) was uncapped, and the review was not subject to the dispute resolution procedures.³⁷¹

Similarly, the 2009 OSA left blank the amount of Security that may be requested under clause 4.1(a), and the results of a 12 monthly review of the Security amount would not be subject to dispute resolution 4.1(b).³⁷²

Stakeholder submissions

QR National reiterated views expressed by stakeholders in response to the 2009 IAHA:

It is not considered acceptable for ARTC to draw down on security in the event that monies are outstanding on termination of the agreement. It would be more appropriate for invoices to be issued for any outstanding monies, particularly in the first instance.³⁷³

ARTC, however, did not believe that drawing on security irrespective of whether monies are owed under clause 7.1(e) of the 2009 IAHA, disproportionately favoured ARTC:

Where the Security is about to expire, ARTC is able to draw down that Security to ensure it is covered in the interim period and, following the amendments in the December IAHA, it is clear that the drawn security will be promptly repaid once replacement Security is provided.³⁷⁴

QR National submitted further that:

³⁶⁹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 49.

³⁷⁰ ACCC, Draft Decision on HVAU, 5 March 2010, p. 237.

³⁷¹ ACCC, Draft Decision on HVAU, 5 March 2010, p. 237.

³⁷² ACCC, Draft Decision on HVAU, 5 March 2010, p. 237.

³⁷³ QR National Coal, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 16.

³⁷⁴ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 49.

Clauses in relation to return of security, ARTC's right to draw down on security and the dispute resolution provisions must all survive termination or expiry of the Agreement. These provisions must be amended to allow for this arrangement.³⁷⁵

ACCC view

The ACCC notes that ARTC has made several revisions to the relevant clauses to address matters raised by stakeholders and in the Draft Decision.

The ACCC acknowledges the addition to clause 7.1(e) of the IAHA, that ARTC must promptly repay the Security drawn once the replacement Security is provided.

The ACCC considers that the amendment to clause 7.1(b) to provide that, where the amount of Security will be reviewed, the review will reflect any increase in TOP Charges, addresses the ACCC's comment in the Draft Decision that there was no cap on the amount by which Security could be increased in the 2009 IAHA.³⁷⁶

The ACCC notes clauses 7.1(b) and 7.2(b) and (e) of the 2010 IAHA are not subject to the dispute resolution provisions at clause 14. ARTC considered that this represents an appropriate balance of risk given that the amount of Security is capped and there is no subjectivity involved.³⁷⁷ The ACCC takes the view that this is unobjectionable as the amount of Security is linked to TOP increases and calculated accordingly.

The ACCC notes that clause 4.1(c) of the 2010 OSA provides that the amount of Security requested is not subject to dispute resolution, provided it falls below the maximum level of security determined under 4.1(b). Clause 4.1(b) of the 2010 OSA has been amended to provide that Security will be linked to CPI increases, and so that the amount of Security requested is an amount not exceeding \$2 million. As above, the ACCC takes the view that this is likely to be appropriate as the amount of Security is capped.

In relation QR National's concerns relating to provisions surviving termination or expiry of the agreement, as noted above, the ACCC notes that clauses 7.1(g) and 7.2(h) address the return of Security and ARTC's right to draw down on security and provide that those clause survive expiry of the agreement.

8.3.4 Dispute resolution

Dispute resolution procedures are outlined in clause 14 of the IAHA and clause 17 of the OSA.

March 2010 Draft Decision

The ACCC's view in the Draft Decision was that the general schemes for dispute resolution in clause 14 of the 2009 IAHA, and clause 17 of the 2009 OSA, appeared to be appropriate, although there was an issue in relation to specific matters which have been expressly removed from the scope of the general dispute resolution regime. The ACCC considered that the agreements should provide that all disputes arising

³⁷⁵ QR National Coal, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 16.

³⁷⁶ ACCC, Draft Decision on HVAU, 5 March 2010, p. 237.

³⁷⁷ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 50.

under an executed agreement can be dealt with via the dispute resolution process in the agreement.³⁷⁸

Stakeholder view

ARTC submitted in response to the ACCC's view in the Draft Decision that there were only two areas in the IAHA where the IAHA dispute resolution provisions do not apply:

- an Access Holder is unable to dispute an invoice for TOP Charges except for manifest error (clause 5.2), as there is no subjective assessment involved; and
- the dispute resolution provisions in the HVAU apply to TOP price disputes as the rules and timeframes set out in the HVAU are more appropriate given TOP prices will be charged to a number of different Access Holders.³⁷⁹

ACCC view

The ACCC notes that disputing an invoice for manifest error is different to disputing the amount of TOP Charges generally. The ACCC accepts the explanation from ARTC that TOP Charges are determined by reference to an agreed calculation, as set out in the Train Path Schedule and that there is no subjective assessment involved.³⁸⁰ Therefore clause 5.2 of the 2010 IAHA is likely to be appropriate.

The ACCC discusses the application of the undertaking's dispute resolution provisions to price-related disputes in the **Pricing** chapter.

The ACCC notes that there are additional provisions that are excluded from the dispute resolution provisions in the 2010 IAHA and 2010 OSA:

- Credit support clauses 7.1(b) and 7.2(b) and (e) of the 2010 IAHA (discussed above).
- Clause 11.6 of the 2010 IAHA which deals with cancellation of services (discussed in the **Capacity Management** chapter).
- The review of security, found in the credit support provisions in clause 4.1 of the 2010 OSA (discussed above).

8.3.5 Suspension and termination

Clause 12 of the IAHA, and clause 14 of the OSA contain provisions for the termination and suspension of the agreements. Issues were identified by stakeholders and the ACCC in relation to the termination provisions in the 2009 versions of both the IAHA and the OSA.

8.3.5.1 Immediate termination when ceasing to carry on business

Clause 12.2(b) of the IAHA provides that a party has the right to immediately terminate the agreement by notice in writing to the other party if the other party ceases to carry on business.

³⁷⁸ ACCC, Draft Decision on HVAU, 5 March 2010, p. 238.

³⁷⁹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 50.

³⁸⁰ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 50.

In the Draft Decision, the ACCC considered that the while the intent behind clause 12.2(b) was clear, greater specificity in the drafting could reduce the scope for disputes over what constitutes ‘ceasing to carry on business’.³⁸¹

NSWMC submitted in response to the Draft Decision that parties should not be entitled to immediately terminate the agreement unless the other party *permanently* ceases to carry on business. NSWMC submitted that ‘ARTC should not be entitled to terminate the agreement in circumstances where a mine is subject to a temporary shut down and the Access Holder continues to pay TOP Charges’.³⁸²

ARTC submitted in response to the Draft Decision, that ‘the phrase “ceasing to carry on business” is often used in contracts and other legal documents as indicia of insolvency’ and should be interpreted in accordance with general law rules of interpretation.³⁸³

The ACCC expects that the term ‘ceasing to carry on business’ as it appears in the IAHA would be interpreted according to its common legal understanding, as alluded to by ARTC.³⁸⁴ The ACCC also expects that ARTC would act in good faith to consider the circumstances of the business, and whether those circumstances warranted immediate termination of the agreement, given the purpose of the provisions.

8.3.5.2 Termination of an AHA when NSW Lease terminated

Clause 12.3 of the IAHA provides that ARTC may terminate

...

- (ii) this agreement on notice to the Access Holder if the NSW Lease is terminated by either party to that lease and not promptly replaced by a new lease or rights enabling ARTC to grant access rights to the Network.³⁸⁵

In the Draft Decision, the ACCC agreed with stakeholders that an Access Holder should be allowed to terminate the agreement if the NSW Lease expires, or if ARTC loses the right to grant access to Network under clause 12.3(a)(ii) of the 2009 IAHA.³⁸⁶

In response to the Draft Decision, the NSWMC submitted that clause 12.3 of the 2009 IAHA

only allows termination if the NSW Lease is ‘not promptly replaced by a new lease or rights’ allowing ARTC to continue its obligations. There is no reason why the Access Holder should not be entitled to terminate in these circumstances and a right should therefore have been inserted allowing the Access Holder to do so.³⁸⁷

³⁸¹ ACCC, Draft Decision on HVAU, 5 March 2010, p. 239.

³⁸² NSWMC, *Access Holder Agreement for Indicative Services in the Hunter Valley marked up version*, Attachment C, 1 April 2010, p. 47.

³⁸³ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 52.

³⁸⁴ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 52.

³⁸⁵ ARTC, 2010 IAHA, 7 September 2010, clause 12.3(a)(ii).

³⁸⁶ ACCC, Draft Decision on HVAU, 5 March 2010, p. 239.

³⁸⁷ NSWMC, Explanatory Comments AHA mark-up, Attachment D, 1 April 2010, p. 8.

The NSWMC also submitted that 'ARTC has agreed that Liability for TOP Charges ceases on termination of the agreement where the termination arises out of clause 12.3.³⁸⁸

In response to the ACCC 2010 Consultation Paper, QR National reiterated the views expressed by other stakeholders in regards to the 2009 IAHA:

[C]ause [12.3] should be amended to enable the Access Holder to terminate the Agreement if ARTC's lease is terminated or if ARTC loses its right to grant access to the network; and

ARTC's liability must not be excluded particularly if these events occur as a result of ARTC's default, negligence or wrongdoing.³⁸⁹

ARTC submitted in response to the Draft Decision that it was not practical to allow an Access Holder to terminate an AHA simply because the NSW Lease is terminated because 'if the NSW Lease terminates and is not replaced, either the Access Agreements will novate to the new lessor or new lessee or ARTC has the right to terminate the agreements and Access Holders will not be liable for future TOP.'³⁹⁰

The ACCC accepts ARTC's explanation of the operation of the provision, and understands that access agreements would most likely novate to a new party in the event that ARTC ceased to be lessor of the Network.

8.3.5.3 Managing the Network

Clause 12.1(d) of the IAHA specifies that the termination for breach of the agreement, including where ARTC is the defaulting party, will not affect its rights and powers to manage the Network. A similar provision is include as clause 14 of the OSA.

In the Draft Decision, the ACCC acknowledged that clause 12.1(d) of the 2009 IAHA was intended to operate so that ARTC's ability to manage the Network, and its rights and obligations under other agreements is not affected by it breaching an AHA with a particular Access Holder.

The ACCC was of the view, however, that the inclusion of particular words (that is, 'this agreement'), could have the effect of nullifying the Access Holder's ability to suspend or terminate the agreement where ARTC is default. In the absence of ARTC providing a justification for these words, the ACCC considered it would provide greater certainty if they were deleted.³⁹¹

ARTC submitted that it did not intend to amend clause 12.1(d) relating to its ongoing right to manage the network as it 'needs to retain the ability to continue to manage the Network including under that AHA even if one Train Path Schedule is terminated.'³⁹²

The ACCC recognises that ARTC has revised the clause as follows to address the concerns outlined in the Draft Decision:

³⁸⁸ NSWMC, AHA mark-up, Attachment C, 1 April 2010, p. 49.

³⁸⁹ QR National Coal, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 16.

³⁹⁰ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 52.

³⁹¹ ACCC, Draft Decision on HVAU, 5 March 2010, p. 239.

³⁹² ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 52.

- (d) Notwithstanding that ARTC may be the defaulting party, nothing in **clause 12.1(b)** derogates from or affects ARTC's rights and powers to manage the Network- ~~and any of its other rights or powers~~ under this agreement or any other agreement with any other person, including any access holder agreement with any other access holder.

8.3.5.4 Termination under the OSA

Clause 14 of the 2010 OSA sets out circumstances in which the OSA may be terminated. In particular, clause 14.2 relates to 'immediate termination,' and the original version of the clause allowed immediate termination of an OSA where the Operator had had any of its other OSAs terminated by ARTC under clause 14.1 (which relates to termination for breach).

In the Draft Decision, the ACCC considered that the clause was excessive, as the circumstances giving rise to a breach by an Operator of one OSA may not necessarily impact upon its performance under another, and that an ability by ARTC to immediately terminate or suspend an OSA for what may be an unrelated reason could have drastic consequences for the performance of the supply chain.³⁹³

The ACCC notes that ARTC has, in the 2010 OSA, revised clause 14.2 to remove the provision allowing immediate termination where an Operator has had another OSA terminated by ARTC. The ACCC welcomes this revision.

8.3.6 Suspension in the IAHA and OSA

Under clause 12.6(a) of the IAHA (mirrored in the OSA), the Access Holder's right to use the Network ceases during suspension, however the clause does not provide for rights to be reinstated when the suspension is lifted.

The ACCC took the view that the clause should better specify that an Access Holder's right to use the Network will be reinstated once the period of suspension ends, and that an amendment to recognise this would add clarity.³⁹⁴

ARTC submitted that it did not consider that the ACCC's proposed recommendation to clause 12.6(a) was necessary. It submitted that clause 12.6(a) of the 2009 IAHA makes it clear that ARTC is able to suspend the IAHA 'but only to the extent such obligations relate to the cause giving rise to the right to terminate and only until such time as the cause giving rise to terminate is remedied.'³⁹⁵

The ACCC accepts ARTC's explanation of the operation of the clause.

8.3.7 Confidentiality

The ACCC refers to its views in the Negotiation for Access chapter in relation to the confidentiality provisions in the IAHA and OSA.

8.3.8 Operators

In the March 2010 Draft Decision, the ACCC noted some concerns expressed by stakeholders in relation to provisions in the IAHA regarding the nomination of

³⁹³ ACCC, Draft Decision on HVAU, 5 March 2010, p. 240.

³⁹⁴ ACCC, Draft Decision on HVAU, 5 March 2010, p. 239.

³⁹⁵ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 52.

Operators (clause 4). The ACCC also recognised that ARTC had revised clause 4 in a subsequent iteration to address the concerns expressed.³⁹⁶ The ACCC notes that these revisions are included in the September 2010 version of the IAHA.

8.3.9 Variation

Clause 21.1 of the IAHA provides for a variation to be made to the agreement, where the variation is made in writing and is signed by the parties:

Subject to any variation of this agreement made in accordance with clause 19, the variation or waiver of a provision of this agreement, or a party's consent to a departure from a provision by another party, will be ineffective unless in writing, signed by the parties.³⁹⁷

In the Draft Decision, the ACCC considered that clause 21.1 should provide for the involvement of the Operator in negotiations regarding variation of an agreement, particularly to the extent that any variation would impact upon the Operator's rights and obligations under the OSA.³⁹⁸

In its response to the Draft Decision, ARTC submitted that it did not propose to amend clause 21.1 to allow for involvement of the Operator in negotiations concerning variations to the IAHA.³⁹⁹

ARTC submitted that the limited agency provisions (clause 4.6 of the IAHA) were the only provisions that would have an impact on the Operator. ARTC proposed to amend clause 3.2 of the OSA to address any concern that an Access Holder may want to amend the scope of the limited agency in the IAHA.

QR National reiterated concerns expressed by stakeholders in the Draft Decision. In its response to the 2010 Consultation Paper, QR National submitted:

The current drafting of [clause 21.1] (particularly in light of Clause 2.16 under which the AHA and OSA form one agreement) would enable the Access Holder and ARTC to any the agreement. The implication of this provision is that any such variations could have a significant impact on the Operator, without needing the Operator's agreement or prior written consent. This clause needs to be amended to include the Operator in any discussions to vary the agreement which impact on the Operator.⁴⁰⁰

The ACCC acknowledges ARTC's amendment to clause 3.2 of the OSA, and the intention that this clarifies the Operator's status for the purposes listed. The ACCC also considers that it is for the Access Holder to determine the level of involvement of the Operator in relation to variation discussions, as ultimately it will be in the Access Holder's interests to ensure their contractual arrangements with their chosen Operator work effectively.

³⁹⁶ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 242-243.

³⁹⁷ ARTC, 2010 IAHA, 7 September 2010, clause 21.1.

³⁹⁸ ACCC, Draft Decision on HVAU, 5 March 2010, p. 248.

³⁹⁹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 57.

⁴⁰⁰ QR National Coal, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 16.

9 Performance and Accountability

Summary

This chapter considers elements of the proposed 2010 HVAU, Indicative Access Holder Agreement (IAHA) and Operator Sub-Agreement (OSA) that relate to ARTC's liability for performance.

The ACCC has considered these elements together as an overall 'package' of measures to ensure accountability for ARTC's performance under the proposed access arrangements. While certain elements may not, of themselves, necessarily be appropriate, taken holistically, and subject to ARTC making further revisions to ensure the effectiveness of the take or pay (TOP) rebate mechanism and to clarify the availability of equitable remedies, the ACCC considers that the overall approach is likely to be appropriate.

Specific revisions in relation to the TOP rebate mechanism are:

- greater objectivity is required in relation to the determination of 'Network Path Capability' under the system true-up test (TUT);
- the TOP rebate mechanism should allow rebate accruals for certain circumstances where Tolerance is not made available; and
- ARTC's calculations under the system TUT should be independently audited (with the cost of that audit included in the RAB).

ARTC should also submit a performance incentive proposal to the ACCC in a timely fashion.

9.1 Introduction

9.1.1 Elements of the proposed access arrangements

This chapter considers elements of the proposed 2010 HVAU, Indicative Access Holder Agreement (IAHA) and Operator Sub-Agreement (OSA) that relate to ARTC's liability for performance. These elements are:

- 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 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 HVAU.

9.1.2 Summary of ACCC views

The ACCC has considered these elements together as an overall ‘package’ of measures to ensure accountability for ARTC’s performance under the proposed access arrangements. While certain elements may not, of themselves, necessarily be appropriate, taken holistically, and subject to ARTC making further revisions to ensure the effectiveness of the TOP rebate mechanism and to clarify the availability of equitable remedies, the ACCC considers that the overall approach is likely to be appropriate.

The ACCC notes that the liability provisions in the IAHA as proposed by ARTC considerably limit ARTC’s liability. In particular, 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 is a rebate of TOP charges. This is notable as the provision of Train Paths and Path Usages by ARTC to the Access Holder goes to the essence of the bargain between the two parties.

The ACCC consequently considers that, in order for this approach to be appropriate, the implementation of the TOP rebate mechanism must be sufficiently robust and transparent. It is the ACCC’s view that the TOP rebate provisions, including the system true-up test (TUT) which is a critical input into the rebate calculation, as currently drafted, require further revisions to meet this standard. In particular, the ACCC considers that:

- greater objectivity is required in relation to the determination of ‘Network Path Capability’ under the system TUT;
- the TOP rebate mechanism should allow rebate accruals for certain circumstances where Tolerance is not made available; and
- ARTC’s calculations under the system TUT should be independently audited (with the cost of that audit included in the RAB).

If ARTC were to strengthen the operation of the TOP rebate provisions in this way, the ACCC considers that the proposed liability clauses in the IAHA would be likely to be appropriate.

The ACCC considers, however, that some clarification is also needed in relation to the availability of equitable relief under the contracts. It appears to the ACCC that there is some confusion amongst stakeholders as to whether it is open to Access Holders under the proposed liability regime to seek equitable relief from the courts in the case of a breach by ARTC.⁴⁰¹ The ACCC notes that there does not appear to be any explicit exclusion of equitable relief in the relevant IAHA provisions. However, for the avoidance of doubt, and given the already substantial limitations of ARTC’s liability, the ACCC recommends that the IAHA include explicit recognition of the availability of equitable remedies.

⁴⁰¹ See for example, Coal and Allied, *Submission in Response to the ACCC’s Consultation Paper in relation to the Australian Rail Track Corporation’s Proposed Hunter Valley Rail Network Access Undertaking*, 25 October 2010, pp. 55-57.

In relation to the other elements of the overall performance accountability scheme, the ACCC notes that the proposed KPIs are simply reporting obligations and that ARTC is yet to propose a performance incentive mechanism for inclusion in the HVAU. While in other contexts this may lead to a conclusion that the proposed arrangements are inappropriate to accept, this may not be the case in relation to the HVAU provided that the recommended revisions are made to strengthen the operation of the TOP rebate scheme described above, to clarify the availability of equitable remedies, and that ARTC submits a performance incentive proposal to the ACCC in a timely fashion.

9.2 Liability under the IAHA

9.2.1 Relevant provisions

Clause 13 of the IAHA sets out the liability provisions applicable to ARTC and the Access Holder. Specifically:

- There is a mutual release of liability under clause 13.1. The clause states that, pursuant to the mutual liability release, the Access Holder releases ARTC from any Claims or Liability, arising under the contract or otherwise, relating to various matters including:
 - Incidents (which is defined to mean a breakdown, accident or emergency on the Network which involves an Operator and which causes or may reasonably be expected to pose a danger of causing, inter alia, personal injury, material damage to the Network or property); and
 - Any breach of the agreement which causes ARTC to fail to make a Path Usage or Train Path available (save for the Access Holder's entitlement to a TOP rebate under clause 5.4 of the IAHA).
- ARTC and the Access Holder exclude all liability to each other for Consequential Loss under clause 13.3; and
- ARTC and the Access Holder cap any liability that may otherwise arise between each other in accordance with a Mutual Liability Cap under clause 13.4.

The combined effect of the provisions in clause 13, when read together with clause 5.4(h), is that ARTC may only incur liability to an Access Holder for:

- A failure to make Path Usages or Train Paths available, but the only remedy is any TOP rebate ARTC may be required to pay under clause 5.4;
- Liability caused by Fraudulent or Wilful Misconduct, but subject to the exclusion of Consequential Loss under clause 13.3;
- Breach of a condition or warranty implied by law which cannot by law be excluded, but where limitation is permissible, liability is limited pursuant to clause 13.2 to the resupply of the relevant services or the payment of the cost of having the relevant services supplied again, at ARTC's discretion; and

- Liability for any residual Claims that are not covered by the mutual liability release in clause 13.1, except in respect of Fraudulent or Wilful Misconduct, is subject to an annual cap being the lesser of \$2 million (CPI indexed) or the amount of TOP charges for that contract year (see clause 13.4).

9.2.2 March 2010 Draft Decision

The ACCC provided preliminary views on aspects of the proposed liability regime under the IAHA in the March 2010 Draft Decision, including on the mutual liability release, the approach to consequential loss, and the liability cap.

In summary, in relation to the liability releases, the ACCC's preliminary views were that:

- the liability release in the IAHA was unlikely to be appropriate as it effectively released ARTC from liability for performance of its obligations under the agreement;⁴⁰²
- it was unlikely to be appropriate for ARTC to be released from liability for loss and damage caused by its negligence;⁴⁰³ and
- a more balanced approach to liability in the IAHA, which recognised the interests of access seekers as well as ARTC, was more likely to be appropriate.⁴⁰⁴

In relation to the approach to consequential loss, the ACCC considered that it was likely to be appropriate for the IAHA to exclude certain consequential loss, provided that the term Consequential Loss was appropriately defined.⁴⁰⁵ However, the ACCC's preliminary view was also that the operation of the provision in the 2009 IAHA was uncertain, as the definition of Consequential Loss appeared to extend the normal understanding of the term to incorporate liability for direct or immediate losses.⁴⁰⁶ The ACCC also considered that an exhaustive definition of Consequential Loss was more likely to be appropriate.⁴⁰⁷

In relation to the liability cap, the ACCC's preliminary views were that:

- it may be appropriate for the IAHA to include a liability cap, if the amount of cap was set at an appropriate level;⁴⁰⁸ and
- a cap of the lesser of \$2 million and the amount of TOP charges may be too low to provide the correct incentives for ARTC to meet its obligations.⁴⁰⁹

⁴⁰² ACCC, *Australian Rail Track Corporation Limited – Hunter Valley Coal Network Access Undertaking Draft Decision*, 5 March 2010, pp. 226 and 229.

⁴⁰³ ACCC, Draft Decision on HVAU, 5 March 2010, p. 229.

⁴⁰⁴ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 226 and 229.

⁴⁰⁵ ACCC, Draft Decision on HVAU, 5 March 2010, p. 231.

⁴⁰⁶ ACCC, Draft Decision on HVAU, 5 March 2010, p. 231.

⁴⁰⁷ ACCC, Draft Decision on HVAU, 5 March 2010, p. 231.

⁴⁰⁸ ACCC, Draft Decision on HVAU, 5 March 2010, p. 226.

⁴⁰⁹ ACCC, Draft Decision on HVAU, 5 March 2010, p. 230.

9.2.3 Submissions subsequent to the Draft Decision

ARTC

In response to the Draft Decision, ARTC submitted that the mutual liability release in clause 13 of the 2009 IAHA is fundamental to the risk allocation put forward, and that the remedy for any conduct or incident which results in ARTC failing to make Path Usages available is a rebate under the TUT.⁴¹⁰

ARTC further submitted that:

- it is not willing to accept liability for damage or loss of goods on a train, where the coal on just one coal train could have a value of \$500,000 to \$1M;⁴¹¹
- it understands that Operators do not generally accept liability for damage to the goods transported and sees no reason why it should do so when it is under a regulated return regime;⁴¹²
- paragraph (a) of the definition of consequential loss only excludes losses which may reasonably be supposed to have been in the contemplation of the parties where those losses are ones which do not flow naturally from the breach and might otherwise be recoverable under the second limb of *Hadley v Baxendale*;⁴¹³
- the consequential loss definition in paragraph (a) does not exclude liability for property damage or personal injury if it flows naturally from the breach;⁴¹⁴
- the definition is not exhaustive and this is consistent with standard drafting practice for such definitions;⁴¹⁵ and
- it does not propose to limit the definition of consequential loss any further.⁴¹⁶

Submissions from interested parties

Stakeholders generally supported the ACCC's preliminary views from the March 2010 Draft Decision, including:

- Coal & Allied submitting that the definition of Consequential Loss was overly broad and should not incorporate matters that usually are regarded as direct losses;⁴¹⁷
- Peabody submitting that the definition of Consequential Loss should omit sub-clause (c) as the definition is either ambiguous or so broad that any form of damage would fall within the definition;⁴¹⁸ and

⁴¹⁰ ARTC, *Response to the ACCC Draft Decision on the Hunter Valley Access Undertaking*, 31 March 2010, p. 44.

⁴¹¹ ARTC, *Response to the ACCC Draft Decision*, 31 March 2010, p. 46.

⁴¹² ARTC, *Response to the ACCC Draft Decision*, 31 March 2010, p. 46.

⁴¹³ ARTC, *Response to the ACCC Draft Decision*, 31 March 2010, pp. 45-6.

⁴¹⁴ ARTC, *Response to the ACCC Draft Decision*, 31 March 2010, p. 46.

⁴¹⁵ ARTC, *Response to the ACCC Draft Decision*, 31 March 2010, p. 46.

⁴¹⁶ ARTC, *Response to the ACCC Draft Decision*, 31 March 2010, p. 46.

⁴¹⁷ Coal and Allied, *Submission in Response to Draft Decision on Australian Rail Track Corporation Hunter Valley Coal Network Access Undertaking*, 31 March 2010, p. 5.

- Xstrata submitting that the definition of Consequential Loss should be a closed list, and damages for death and personal injury should not be limited by these provisions.⁴¹⁹

Xstrata also expressed concern that the significant limitations on ARTC's liability meant that there is no clear remedy if ARTC administered the Network in a way that is less favourable to it than to other access holders.⁴²⁰

Aston Resources submitted that the TOP rebate is insufficient recompense where ARTC's failure to provide a Train Path is grossly negligent or wilful.⁴²¹

Submissions were also made that the amended liability cap is too low, and alternative suggestions included that the cap be a year's TOP charges; at least \$20 million (which should be subject to indexation) and a percentage of the annual TOP charges. Stakeholders also suggested that the cap should not exclude third party claims such as personal injury, death and lost property.⁴²² Coal & Allied submitted that it would be appropriate for a liability cap to be linked to TOP charges:

C&A believes that a liability cap linked solely to TOP charges is appropriate, as originally set out by ARTC in clause 13.3 of the 23 April 2009 version of the IAHA, which provided a cap of a year's TOP charges. However, C&A could be satisfied with a lower level of TOP charges, for example, 50% of the Access Holder's annual TOP charges (uncapped).

If, instead, the ACCC considers a specific monetary amount as being the appropriate cap, C&A believes that this amount should be indexed not by CPI, but by the annual percentage increase in the TOP charges. For example, if an Access Holder's TOP charges are increased by 25%, then there should be a 25% increase to ARTC's liability cap.⁴²³

9.2.4 ACCC view

The ACCC considers that the overall performance accountability framework put forth by ARTC is an important element of the proposed access arrangements. That is, while the proposed arrangements should facilitate ARTC and access seekers reaching mutually acceptable terms and conditions of access (including in relation to price), it is also important that once agreement has been reached, ARTC performs its contractual obligations and is appropriately liable if it fails to do so.

⁴¹⁸ Peabody, *Australian Rail Track Corporation Limited Hunter Valley Coal Network Access Undertaking Submissions of Peabody Australia Mining Limited in response to the Australian Competition and Consumer Commission's draft decision (5 March 2010)*, 31 March 2010, p. 4.

⁴¹⁹ Xstrata, *Submission in Response to ACCC Draft Decision on ARTC Hunter Valley Coal Network Access Undertaking*, Attachment 1, 8 April 2010, p. 7.

⁴²⁰ Xstrata, *Submission in Response to ACCC Draft Decision*, Attachment 1, 8 April 2010, p. 5.

⁴²¹ Aston Resources, *Submission: ARTC proposed Hunter Valley Rail Network Access Undertaking*, 25 October 2010, p. 9.

⁴²² Peabody, *Australian Rail Track Corporation Limited Hunter Valley Coal Network Access Undertaking Submissions of Peabody Australia Mining Limited in response to the Australian Competition and Consumer Commission's draft decision (5 March 2010)*, 31 March 2010, p. 4 and Xstrata, *Submission in Response to ACCC Draft Decision*, Attachment 1, 8 April 2010, p. 7.

⁴²³ Coal and Allied, *Submission in Response to ACCC Consultation Paper*, 25 October 2010, pp. 55-57.

The ACCC notes that clause 13 of the IAHA is a Tier 2 ‘negotiable’ provision, hence access seekers have the ability to negotiate different liability arrangements with ARTC. Nonetheless, ARTC has in its submissions indicated a reluctance to revise the liability provisions, and clause 13 clearly interacts with the Tier 1, non-negotiable provisions relating to the TOP rebate and system true-up test.

The ACCC takes the view that the combined effect of the liability provisions in clause 13, when read together with clause 5.4(h) of the IAHA, is to considerably limit ARTC’s liability should it fail to perform under the access arrangements. As outlined above, the combined effect is that ARTC may only incur liability to an Access Holder for:

- a failure to make Path Usages or Train Paths available, but the only remedy is any TOP rebate ARTC may be required to pay under clause 5.4;
- liability caused by Fraudulent or Wilful Misconduct, but subject to the exclusion of Consequential Loss under clause 13.3;
- breach of a condition or warranty implied by law which cannot by law be excluded, but where limitation is permissible, liability is limited pursuant to clause 13.2 to the resupply of the relevant services or the payment of the cost of having the relevant services supplied again, at ARTC’s discretion; and
- liability for any residual Claims that are not covered by the mutual liability release in clause 13.1, except in respect of Fraudulent or Wilful Misconduct, is subject to an annual cap being the lesser of \$2 million (CPI indexed) or the amount of TOP charges for that contract year (see clause 13.4).

However, the ACCC notes that ARTC has revised clause 13.1 from the version included in the 2009 IAHA. ARTC has revised clause 13.1(a)(vi), which originally excluded ARTC liability relating to ‘breaches of this agreement,’ which the ACCC considered in the Draft Decision to be an inappropriately broad release.⁴²⁴ The provision now refers to ‘any breach of this agreement which directly or indirectly causes ARTC to fail to make a Path Usage or Train Path available to the Access Holder...’. The ACCC also notes that the provisions relating to liability for Fraudulent or Wilful Misconduct are new additions to the IAHA not present in the 2009 version. The ACCC welcomes their inclusion as introducing a more balanced approach as suggested in the March 2010 Draft Decision.

The ACCC remains of the view from the Draft Decision that the ARTC should not be liable for ‘consequential loss’, provided it is appropriately defined. The ACCC reiterates that if ARTC was liable for loss of profits and economic loss of coal miners, the financial quantum of such liability could be very high, which could have implications for ARTC’s ability to operate the network and therefore for coal chain throughput overall. The ACCC notes ARTC’s further explanation of the definition of Consequential Loss in the IAHA, that is, that paragraph (a) of the definition:

- only excludes losses which may reasonably be supposed to have been in the contemplation of the parties where those losses are ones which do not flow

⁴²⁴ ACCC, Draft Decision on HVAU, 5 March 2010, p. 229.

naturally from the breach and might otherwise be recoverable under the second limb of *Hadley v Baxendale*,⁴²⁵ and

- does not exclude liability for property damage or personal injury if it flows naturally from the breach.⁴²⁶

While ARTC has not revised the definition of Consequential Loss in the IAHA, the ACCC does not propose to provide further detailed comments in the context of this Position Paper. Ultimately, clause 13.3, as well as the definition of Consequential Loss, is a Tier 2 provision which the parties can negotiate to arrive at a mutually acceptable outcome. Similarly, the ACCC considers that the amount of the liability cap may be negotiated between the parties.

The ACCC notes Coal & Allied's submission that Access Holders should have the right to seek equitable relief from ARTC as part of the overall liability regime.⁴²⁷ While it does not appear to the ACCC that equitable relief is explicitly excluded from the IAHA, the ACCC acknowledges that it is not clear whether it is an option open to Access Holders. The ACCC therefore recommends that the IAHA include explicit recognition of the availability of equitable (non-monetary) remedies.

Such recognition is also necessary to ensure certainty for the delivery of contracted Additional Capacity. As set out in the **Additional Capacity and Investment** chapter, the ACCC considers that, where ARTC seeks to contract on the basis of capacity expected to be created by future investment projects, conditions regarding the delivery of that capacity should be negotiable between the parties, with the availability of appropriate contractual remedies to provide additional certainty.

While the ACCC recommends more explicit acknowledgement of equitable remedies, it also recognises that there may be a distinction between the availability of those remedies for Path Usages contracted on the basis of unconditional Available Capacity and other circumstances. That is, equitable remedies may not be of practical use in relation to a failure by ARTC to make available an unconditional Path Usage, as the need for that particular Usage may depend on a particular point in time. Consequently, it may be appropriate for the TOP rebate to be sole remedy for ARTC's failure to perform in such circumstances. The ACCC is not, however, best placed to devise the particular drafting to address such subtle distinctions.

Ultimately, while the ACCC acknowledges and welcomes that ARTC has made revisions to the liability provisions in the IAHA to provide a more balanced approach, it remains the case that the key mechanism by which ARTC will accrue liability should it fail to perform obligations going to the essence of the access agreement – the provision of Train Paths and Path Usages – is a rebate of take-or-pay charges. Consequently, the ACCC is of the view that the mechanism for the determination of the rebate should be sufficiently transparent and robust. This is discussed further below.

⁴²⁵ ARTC, Response to the ACCC Draft Decision, 31 March 2010, pp. 45-6.

⁴²⁶ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 46.

⁴²⁷ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 56.

Liability under the OSA

In relation to the OSA, clause 15 of the 2010 OSA sets out the relevant liability and indemnity provisions between ARTC and the Operator pursuant to an OSA. The ACCC's preliminary view in the Draft Decision was that, in general, the equivalent provisions were suitably defined and generally balanced as between the parties, and likely to be appropriate.⁴²⁸ The ACCC maintains this view in relation to the 2010 OSA.

9.3 Take-or-pay (TOP) rebates

9.3.1 Relevant provisions

As noted, the proposed access arrangements provide for the payment of a rebate of TOP charges as the sole remedy where ARTC has failed to make available a Path Usage or a Train Path. 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 the 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 '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 Pricing Zone to meet:

- (a) the BPU's [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);

⁴²⁸ ACCC, Draft Decision on HVAU, 5 March 2010, p. 234.

- (e) actual system losses caused by ARTC (both maintenance and operational); and
- (f) commitments to non-coal traffic.⁴²⁹

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.⁴³⁰ 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.⁴³¹ 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.⁴³²

‘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 (g) to (j) of the definition of System Assumptions and any other measure of performance that ARTC reasonably considers has an impact on the Capacity of the Network, following consultation with the HVCCC.⁴³³

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

⁴²⁹ ARTC, *Hunter Valley Access Undertaking - Explanatory Guide (September 2010)*, 7 September 2010, p. 48.

⁴³⁰ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, pp. 48-9.

⁴³¹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 52.

⁴³² ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 52.

⁴³³ ARTC, *Access Holder Agreement for Indicative Services in the Hunter Valley*, 7 September 2010, Schedule 2, clause 2.3(b).

Holders who did not use their BPUs in the relevant period in proportion to their share of the sum of all individual shortfalls.⁴³⁴

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.⁴³⁵

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...⁴³⁶

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.⁴³⁷

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.⁴³⁸

9.3.2 Submissions from interested parties

Aston Resources

Aston Resources queried whether the TUT appropriately incentivised Access Holders to utilise their Base Path Usages:

As currently formulated, an access holder may accrue a rebate under the TUT regardless of whether or not it actually sought to use all of its Base Path Usages (BPUs). Aston Resources is of the opinion that this is an unfair advantage in circumstances where a producer has, because of cancellations or otherwise, failed to use its access rights. Access holders should be incentivised to use or trade their BPUs (to avoiding “gaming” or the hoarding

⁴³⁴ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 49.

⁴³⁵ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 49.

⁴³⁶ ARTC, 2010 IAHA, 7 September 2010, clause 5.4(c).

⁴³⁷ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 49.

⁴³⁸ ARTC, 2010 IAHA, 7 September 2010, clause 5.4(d).

of capacity). Access holders should not be effectively “rewarded” (in the form of a rebate) in circumstances where they cannot provide a reasonable explanation for the non-use of a path. Aston Resources is of the opinion that the real purpose of the rebate is to provide compensation where the non-use of a path is due to an act or omission of ARTC or a network failure.⁴³⁹

Coal & Allied

Coal & Allied made submissions in relation to several aspects of the TOP rebate scheme and system TUT.

Determination of Network Path Capability

Coal & Allied commented that it is critical that NPC accurately and transparently represents the usable capacity of the Network, ‘since it is directly used to determine whether there has been a System Availability Shortfall (SAS).’⁴⁴⁰

Coal & Allied expressed concerns that a single point may not remain representative of capacity in a Pricing Zone over time, and that a mechanism should be included to adjust the point of estimate during the life of the agreement.⁴⁴¹

Coal & Allied also emphasised the importance of factors beyond track-related System Assumptions for determining whether a path is actually usable for a Coal Train, as a ‘useable’ Train Path ‘requires both an available load point at the mine and dump slot at the terminal.’⁴⁴²

Coal & Allied proposed that ARTC should acknowledge other System Assumptions that impact usability of track for Coal Trains in the definition of NPC, and provide for greater correspondence between its determination of NPC and HVCCC capacity modelling and recommendations. Specifically, Coal & Allied submitted that:

- (a) ARTC acknowledge other System Assumptions which impact the useability of track for Coal Trains, as provided by the HVCCC, in the definition of NPC contained in section 2.3 of Schedule 2 of the Proposed IAHA.
- (b) ARTC bases the determination of NPC according to the projected demand for each load point (as indicated by the signed track contracts), as is consistent with HVCCC annual capacity modelling methodologies.
- (c) ARTC be required to apply the recommendations of the HVCCC in determining NPC.⁴⁴³

Treatment of Tolerance

Coal & Allied submitted that the system TUT should better incorporate Tolerance in the determination of rebate accruals.

Coal & Allied submitted that Tolerance is provided on a system-wide basis to provide flexibility to manage the use of coal access rights between periods. Coal & Allied recognised that Tolerance is:

⁴³⁹ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 9.

⁴⁴⁰ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 43.

⁴⁴¹ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 44.

⁴⁴² Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 43.

⁴⁴³ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 46.

... a means of smoothing the use of BPUs across Periods and that it is not an entitlement to additional paths above contracted BPUs over the year; rather, it is only a right to the time-shifting of BPUs from one Period to another.⁴⁴⁴

Coal & Allied emphasised the importance of Tolerance for effective operation of the Coal Chain:

- (a) Providing Tolerance is necessary given the different bases for recording allocation usage across components of the Hunter Valley Coal Chain – that is, coal is railed over the course of a week for a vessel joining the queue at a specific time. As a result, a vessel arriving at the end of a month to use that month’s allocation will always load coal hauled by Trains which run at the beginning of the following month, given a reasonable queue length.
- (b) Tolerance allowance on the track promotes alignment across the Hunter Valley Coal Chain by matching tolerance provided in port terminal contracts – Access Holders are entitled to a certain level of tolerance at the port terminal to maximise allocation usage between months. That is, Producers can bring forward capacity usage at the port terminal if the remaining allocation in a month is insufficient to fill a vessel.
- (c) Tolerance enables Access Holders to manage capacity issues which may emerge in the Hunter Valley Coal Chain. For example, Tolerance can be used to deal with times when the vessel queue exceeds ideal levels, or there is misalignment in the sculpting of allocation across the track and terminal.⁴⁴⁵

Coal & Allied submitted that Access Holders ‘ultimately pay for the flexibility granted by Tolerance, since the cost of capacity built to accommodate Tolerance is embedded in the Access Charges.’⁴⁴⁶

Coal & Allied also considered that removal of Tolerance from TOP Rebate accruals results in ARTC not always being held liable for the entire Capacity Shortfall it causes:

...although Tolerance is considered in the first stage of the True-Up Test, where the Capacity Shortfall is determined, it has been removed from the second stage of the True-Up Test, that is, in the allocation of TOP Rebate accruals...The fundamental issue with the True-Up Test in its current form is that ARTC is not always held liable for the entire Capacity Shortfall it causes...⁴⁴⁷

Therefore, Coal & Allied argued that rebates for unused Tolerance paths should be allocated on a prorata basis, and that if ARTC does not include Tolerance in the TUT rebates, it could retain revenue from Train Paths it does not supply.⁴⁴⁸ Appropriate treatment of Tolerance under the TUT would be to provide a rebate accrual for

⁴⁴⁴ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 46.

⁴⁴⁵ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, pp. 46-47.

⁴⁴⁶ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, pp. 46-47.

⁴⁴⁷ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 48.

⁴⁴⁸ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, pp. 48, 50.

Tolerance-related shortfalls to Access Holders that have not reached their limit of Tolerance for that period. Further:

Tolerance-related rebate accruals (that is, System Period Tolerance Rebates) are distributed to Access Holders within the tested Pricing Zone, not based on specific Train Paths, since Tolerance within an Access Holder's allowance can be used on any Train Path within a Pricing Zone.⁴⁴⁹

Total Path Usages Required (TPR)

Coal & Allied also submitted that it is unclear how ARTC will determine the values of elements of Total Path Usages Required, and that the HVCCC should be the source for information for certain inputs into this definition.⁴⁵⁰

Audit of TUT

Coal and Allied submits that, given the importance of the TUT for ARTC's liability for failing to make Train Paths available, the TUT should be audited by an independent third party, with the process being overseen by the HVCCC.⁴⁵¹

NSWMC

The NSWMC submitted that it is critical that the TUT ensures ARTC is accountable for any Shortfalls it causes, as it is the only compensation for Access Holders where ARTC fails to make Train Path Usages available.⁴⁵²

The NSWMC also submitted that to be effective to incentivise ARTC, the true-up test used to calculate the TOP rebate should be transparent and verified by the HVCCC, and that the determination of Network Path Capability should align with HVCCC capacity modelling. The NSWMC noted that no rebates will be paid if the Network Path Capability is overestimated.⁴⁵³

The NSWMC also emphasised the importance of Tolerance to allow Access Holders to accommodate the variability of the Coal Chain. The NSWMC submitted that:

Tolerance is a key system-wide right which allows Access Holders to adjust the use of their allocated BPUs between Periods in order to accommodate the variability of the Hunter Valley Coal Chain. As Access Holders will pay for Tolerance as part of the Access Charges ARTC should be required to compensate Access Holders if it does not make Tolerance train path usages available.⁴⁵⁴

The NSWMC also suggested that, in order for the TUT to be an effective incentive for ARTC, it must be transparent with independent verification.⁴⁵⁵

⁴⁴⁹ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 51.

⁴⁵⁰ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 45.

⁴⁵¹ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 51.

⁴⁵² NSWMC, *Hunter Rail Access Task Force – Submission in Response to the Australian Competition and Consumer Commission's Consultation Paper in relation to Australian Rail Track Corporation's Proposed 2010 Hunter Valley Rail Network Access Undertaking*, 25 October 2010, p. 8.

⁴⁵³ NSWMC, Submission in Response to ACCC Consultation Paper, p. 8.

⁴⁵⁴ NSWMC, Submission in Response to ACCC Consultation Paper, p. 8.

⁴⁵⁵ NSWMC, Submission in Response to ACCC Consultation Paper, p. 8.

Xstrata

Xstrata submitted that ARTC should have regard to the ability of trains to enter and exit the Network when determining Network Path Capability, otherwise ARTC may over-contract the capacity which is 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.⁴⁵⁶

Xstrata submitted that the ability of trains to enter and exit the Network should be taken account of as a track-related System Assumption.⁴⁵⁷ Xstrata stressed that it:

... 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.⁴⁵⁸

Xstrata also suggested that the determination of Network Path Capability be subject to review by an independent expert.⁴⁵⁹

Further, Xstrata also considered that the calculation of the TOP rebate does not fully take account of ARTC's requirement to provide Tolerance. Specifically:

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

⁴⁵⁶ Xstrata, *Xstrata Coal Pty Ltd's response to the Australian Competition and Consumer Commission in relation to the ACCC Consultation Paper in relation to the Australian Rail Track Corporation's proposed Hunter Valley Rail Network Access Undertaking dated 16 September 2010*, 25 October 2010, pp. 12-13.

⁴⁵⁷ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 13.

⁴⁵⁸ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 12.

⁴⁵⁹ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 22.

delivered, due to the failure of the True-up Test to take Tolerance into account.⁴⁶⁰

9.3.3 ACCC view

Introduction

As noted, the ACCC's view is that it is likely to be appropriate for the TOP rebate to be the sole remedy for ARTC failing to make available a Path Usage or a Train Path, provided that the mechanism for determining the rebate is sufficiently robust and transparent.

As a preliminary observation the ACCC notes that the System True-up Test, which is a critical input into the determination of the TOP rebate, is essentially a proxy for an actual, objective assessment of whether Train Paths and Path Usages have been made available by ARTC. That is, under a take-or-pay contract, a counter-party pays for a service regardless of whether it is used, but should be entitled to rely on that service being provided when needed. Therefore, in a strict sense, the TUT should determine whether ARTC has in fact made available the Train Paths and Path Usages it has contracted to provide, regardless of whether Access Holders actually use those Paths or Usages. ARTC has submitted, however, that in light of the approach whereby there is an allocation of Access Rights as Path Usages, rather than scheduled train paths, it is not possible to objectively determine when those Usages are actually made available:

...[A]s the failure to provide a path usage arises prior to the allocation of the path to an access holder (except in the 'live operation' period), it is impossible to identify which access holder did not receive the path. This can be contrasted to the position under the arrangements on the Interstate network where the failure to provide a particular path can be directly related to a contractual obligation to provide a scheduled path to the operator.⁴⁶¹

Consequently, the TUT incorporates assumptions which designate the 'use' of Path Usages as a proxy for whether those Usages were 'made available,' and the 'non-use' of Path Usage as a proxy for when those Usages were not 'made available.'

The ACCC accepts that there are challenges in objectively determining whether Train Paths or Path Usages were made available by ARTC, but considers that a consequence of those challenges is that the precision of the TUT is diminished. Consequently, emphasis should be placed on ensuring other elements of the test are robust. In particular, the ACCC considers that revisions are required to:

- improve the objectivity of the determination of Network Path Capability;
- ensure rebates accrue for failure by ARTC to make available Tolerance in certain circumstances; and
- provide for the independent audit of the TUT calculations.

⁴⁶⁰ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 22.

⁴⁶¹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 48.

Network Path Capability

The ACCC considers 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. Otherwise, the system TUT may never reveal an actual System Availability Shortfall, and ARTC may never be accountable under what is the primary liability mechanism for ARTC failing to make available Train Paths or Path Usages.

The ACCC has in the **Capacity Management** chapter made recommendations regarding the definition of System Assumptions and determinations of capacity under the proposed 2010 HVAU. In particular, the ACCC considered that determinations of rail network capacity should take into account interactions with other components of the supply chain, and reference the System Assumptions overall, not simply the Track-Related System Assumptions.

These considerations apply to the determination of Network Path Capability under Schedule 2 of the IAHA. Specifically, the ACCC considers that the determination of Network Path Capability should take into account realistic assumptions about the capacity of the Network in order to provide a more robust and objective calculation.

Tolerance

The ACCC recognises that there is disagreement over the extent to which a failure by ARTC to provide Tolerance should contribute to a rebate accrual. The ACCC concurs with suggestions by stakeholders that the system TUT and TOP rebate should provide accountability where ARTC fails to make available Tolerance, albeit only in specific circumstances.

Fundamentally, there appears to be consensus on the purpose and use of Tolerance under the proposed access arrangements. ARTC submits that Tolerance is designed to provide Access Holders with flexibility in relation to the timing of their use of contracted Path Usages, and is not an entitlement to additional path usages:

As set out in the explanatory guide submitted to the ACCC with the 2009 HVAU, the purpose of Tolerance is to enable the access holder to adjust its contracted path usages from one period to the next, rather than provide additional path usages to top up the annual contracted requirement.⁴⁶²

This is consistent with Coal & Allied's submission, referred to above, that Tolerance is:

... a means of smoothing the use of BPUs across Periods and that it is not an entitlement to additional paths above contracted BPUs over the year; rather, it is only a right to the time-shifting of BPUs from one Period to another.⁴⁶³

Tolerance may, therefore, be characterised as a socialised entitlement available to Network users in certain circumstances to facilitate the practical logistics task when operating on the coal chain.

⁴⁶² ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 50.

⁴⁶³ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 46.

ARTC has, however, made strong submissions that it should not be obliged to provide a rebate where Tolerance is not made available. ARTC has argued that it is ‘inappropriate for an access holder which used all of its BPU but did not use its “share” of MTC [the Monthly Tolerance Cap] (including when an access holder did not want it) to accrue a rebate.’⁴⁶⁴

The ACCC does not consider, however, that stakeholders are seeking a rebate for Tolerance where Base Path Usages are otherwise fully utilised over the course of the year. As identified by Xstrata and Coal & Allied, the concern is rather that a situation may arise 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. As Xstrata submitted:

In that situation, [the Access Holder] 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.⁴⁶⁵

The ACCC considers that ARTC’s concerns with providing a rebate accrual for Tolerance may derive from the assumptions incorporated into the system TUT whereby ‘use’ or ‘non-use’ of a Path Usage is taken as a proxy for whether a Path Usage is ‘made available’ or ‘not made available.’ ARTC submitted that it expects that most Access Holders will not require Tolerance in any given month, and it should not be required to rebate TOP charges where Tolerance is not *used*;⁴⁶⁶ ARTC further submitted it is not appropriate to assume that the reason why Tolerance Paths were not *used* is because ARTC did not make them available (as is the case with BPUs).⁴⁶⁷ The ACCC concurs that, ideally, rebates should not be payable where Path Usages are not utilised, nor should failure to utilise an Usage lead to an assumption that the Usage (or Tolerance usage) was not made available. Rather, an objective determination of whether the Usage was actually made available would be preferable. However, as discussed above, the ACCC recognises that ARTC is making assumptions along these lines as a result of practical challenges in objectively determining whether Usages were in fact made available. The ACCC considers that the concerns expressed by stakeholders are in relation to the practical situation where Tolerance is actually not made available, and where as a result there are implications for coal shipments in that period. That is, the concerns do not incorporate ARTC’s assumptions that a failure by an Access Holder to use a Path Usage equates to the Usage not being made available.

Ultimately, the ACCC considers that the situation described by Coal & Allied and Xstrata – 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 – is one that could have considerable practical consequences for Access Holders. The ACCC is therefore of the view that it should be taken into account in the system TUT and the TOP rebate mechanism by providing for an appropriate rebate accrual where that Tolerance is not made available. The ACCC considers that revising the TOP rebate mechanism to provide for this situation will

⁴⁶⁴ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 50.

⁴⁶⁵ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 22.

⁴⁶⁶ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 50.

⁴⁶⁷ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 51.

improve its operation, which is in line with the ACCC's overall view that the broad liability exclusion is likely to be appropriate provided that the TOP rebate mechanism is sufficiently robust. Further, the ACCC considers that the particular mechanics by which the system TUT and the TOP rebate scheme are implemented should not preclude the access arrangements ensuring ARTC's accountability for a situation where its failure to meet its obligations may have significant practical consequences for Access Holders.

Finally, the ACCC notes ARTC's submission that apportioning Tolerance amongst Access Holders would require ARTC to commit to provide each Access Holder with additional capacity, and therefore:

- if Access Holders want firm rights to additional capacity, they should contract for this capacity as base bath usages; and
- this approach would inevitably lead to over investment in excess capacity that is only needed for some access holders in any given month.⁴⁶⁸

The ACCC does not agree with these comments, and considers that the situation described may be effectively accommodated into the system TUT and TOP rebate mechanism without these outcomes arising. The ACCC recognises in this regard that Coal & Allied has put forward suggestions for revising the TUT to address the concerns expressed.

Independence and objectivity

As the TOP rebate mechanism is the sole remedy for Access Holders where ARTC fails to make Train Paths or Path Usages available, any perception of a conflict of interest on the part of ARTC should be avoided by ensuring the TUT is subject to an appropriate level of independent scrutiny. The ACCC notes that under clause 2.6 of Schedule 2, ARTC has proposed to publish the results of the TUT for each Pricing Zone and notify Access Holders of accrued rebates within two weeks of the end of each period. While this provides transparency on the results of the TUT, the ACCC acknowledges the concerns of interested parties that the TUT calculations should be subject to audit and review by an independent party.

The ACCC agrees that the TUT calculations should be subject to audit by an independent party, to ensure the integrity of the test and avoid perceptions of conflicts of interest on the part of ARTC. The ACCC does not consider that ARTC's business auditor is appropriate to perform the role, nor does the ACCC consider that the HVCCC is the appropriate party, as both may suffer from the same perception of a conflict. Instead, the ACCC considers that an appropriately qualified independent party should perform the function.

The cost of the audit should be met by ARTC, though the ACCC recognises that this could impose an additional burden on ARTC under the regulatory arrangements. Therefore, the ACCC is of the view that ARTC should be entitled to include the cost of the audit into the RAB as operational expenditure. The cost will be subject to the Annual Compliance Assessment process discussed in the **Financial Model** chapter.

⁴⁶⁸ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 51.

Finally, to ensure the effectiveness of the review, it should be provided that where the independent audit reveals a discrepancy with ARTC's own calculations, appropriate adjustments are made to the rebate entitlements of Access Holders.

9.4 Key Performance Indicators (KPIs)

9.4.1 March 2010 Draft Decision

The ACCC noted in the Draft Decision that the 2009 version of the HVAU simply stated that ARTC would develop KPIs, but did not set out a process and timeframe for development of or matters to be covered by those KPIs.⁴⁶⁹ The ACCC was of the view that the HVAU should include KPIs, and that KPIs specific to an Access Holder Agreement or OSA should be negotiated prior to execution of that agreement along with negotiation of other relevant matters.⁴⁷⁰

9.4.2 Proposed 2010 HVAU

KPIs under the undertaking

Section 8.1 of the proposed 2010 HVAU now provides that ARTC will report (on its website) on its performance against 'Network KPIs'.

The KPIs are set out in Schedule D to the HVAU, and are in categories of Network Performance, System Performance, Unit Cost, Workable Alignment, the Rail Capacity Group, and Track Condition.

ARTC's proposed Network Performance KPIs consist of:

- Transit Time – Infrastructure Configuration Capability;
- Transit Time - Infrastructure Practical Capability;
- Maximum Axle load;
- Maximum Speed; and
- Train Length.

The System Performance KPIs proposed by ARTC in Schedule D consist of:

- Transit Time – Scheduled/Actual;
- Infrastructure Maintenance Requirement (planned/actual);
- Coal Chain Losses – ARTC cause; and
- Coal Chain Losses – non-ARTC cause.

Unit Cost KPIs proposed by ARTC in Schedule D are:

⁴⁶⁹ ACCC, Draft Decision on HVAU, 5 March 2010, p. 472.

⁴⁷⁰ ACCC, Draft Decision on HVAU, 5 March 2010, p. 232.

- Infrastructure Maintenance per GTK;
- Network Control and Operations Cost per train km;
- Operating Cost per GTK; and
- Capital Cost per GTK.

The other specific KPIs included in Schedule D are:

- Workable Alignment- Coal Throughput (tonnes) – actual/planned;
- Rail Capacity Group - Project Implementation Delay (not Prudent); and
- Track Condition - Track quality measured by index.

ARTC has included some further details of calculation methodology for the Network KPIs in Schedule D:

- Its desire for consistency with KPI reporting under the Interstate Access Undertaking, having regard to the benefits and costs of different KPIs to suit particular commercial or operational circumstances;⁴⁷¹
- recognise the presence of applicable System Assumptions, as implemented through the TUT.⁴⁷²

KPIs under the agreements

ARTC has also proposed an obligation for it to negotiate KPIs in AHAs in good faith under section 8.2 of the HVAU. The section also provides for:

- a specific objective for negotiating KPIs, which is to have a consistent set of KPIs for all Access Holders that are also consistent with a number of other indicator and reporting mechanisms, including those in the track related System Assumptions and the NSW Lease;
- recognition of an objective for KPIs under AHAs for Coal Access Rights to be consistent with coal chain performance indicators and any incentives and measures of ARTC's performance under the IAHA, including the system wide true-up test (TUT);
- provision for KPIs under an AHA for Coal Access Rights to be a subset of the Network KPIs in Schedule D of the HVAU unless otherwise agreed; and
- an ability for an applicant to request inclusion of Operators in negotiation of KPIs for inclusion in an AHA.

⁴⁷¹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 35.

⁴⁷² ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 35.

ARTC also provides an obligation to report periodic performance against KPIs at the request of the Access Holder in clause 3.13 of the 2010 IAHA. Clause 3.13 also provides for parties to:

- meet at least once per year to discuss actual performance against KPIs;
- (if requested by either party) include Operators in any review of performance against KPIs; and
- review KPIs in good faith at least once every two years, or following the review of Network KPIs under the HVAU, and

ARTC has also provided for the Operator to participate in the negotiations to agree, or the reviews of, KPIs under clause 3.10 of the 2010 OSA.

9.4.3 ACCC view

Section 8.1 of the proposed 2010 HVAU obliges ARTC to report on KPIs, but there are no explicit consequences if ARTC does not meet the relevant standards. In its July 2008 Final Decision on the ARTC Interstate Access Undertaking, the ACCC considered that performance indicator reporting is one means of curtailing the potential for ARTC to compromise its service quality in lieu of profit in the circumstances of the Interstate Network.⁴⁷³ The approach to KPIs in the proposed 2010 HVAU may not necessarily provide strong incentives for ARTC in the absence of other incentive mechanisms. This consideration underscores the need for the TOP rebate mechanism and TUT to be appropriately robust.

Nonetheless, the ACCC notes that a number of the Network KPIs in the proposed 2010 HVAU are similar to those reported by ARTC under the Interstate Access Undertaking, including Transit Time, Track Condition, and Unit Cost KPIs. The ACCC recognises that there are benefits in these KPIs being consistent with those in the Interstate Access Undertaking, including in terms of the administrative task for ARTC and in terms of consistency for access seekers using both Networks.

The ACCC also notes that ARTC has proposed additional KPIs to apply to the Hunter Valley which appear to be track metrics that are particularly relevant to a commodity network. These metrics include project implementation delay and coal chain loss and throughput metrics. Further, ARTC proposes to report Maximum Axle Load, Speed and Train Length metrics for each Pricing Zone, which may assist in the development of the efficient train configuration under the HVAU.

The ACCC notes that under section 8.2 of the 2010 HVAU there is reduced scope for negotiation of KPIs for individual AHAs for coal access rights if it is an objective that these KPIs are consistent with the Network KPIs in the HVAU. This is appropriate, as it links contractual KPIs to the undertaking and provides some certainty that particular KPIs can readily be included in an agreement.

⁴⁷³ ACCC, *Final Decision on ARTC Access Undertaking for Interstate Rail Network*, July 2008, p. 68.

The ACCC also notes submissions by parties on the involvement of Operators in negotiating and determining KPIs.⁴⁷⁴ The ACCC notes that section 8.2(c) of the proposed 2010 HVAU and clause 3.13(c) of the IAHA appropriately address this point by providing for the involvement of Operators in certain circumstances.

9.5 Performance incentives to be proposed by ARTC

ARTC has proposed under section 8.3 of the proposed 2010 HVAU that it will comply with the performance incentive schemes included in section 2 of Schedule D. ARTC has yet to put forward a performance incentive scheme, and in making a submission on the ACCC's consultation on the HVAU has submitted that it:

- is in the process of developing positive incentive schemes with a view to having them included in the final approved undertaking;⁴⁷⁵
- is preparing a paper for further discussion in relation to positive incentive mechanisms, and will take into account stakeholder views in order to incorporate mechanisms into the HVAU;⁴⁷⁶ and
- considers that it is important to allow time to develop and consult on appropriate mechanisms and therefore intends to provide a formal proposal to the ACCC in 2011.⁴⁷⁷

Other parties, including Coal & Allied, Xstrata and the NSWMC are broadly supportive of ARTC including appropriate incentive mechanisms in the proposed 2010 HVAU.⁴⁷⁸

The ACCC notes the general consensus among ARTC and stakeholders that suitably designed performance incentive mechanisms would be appropriate for inclusion in the HVAU. The ACCC is also of this view. In particular, such incentives should promote the economically efficient operation and use of infrastructure, consistent with the objects of Part IIIA, and encourage ARTC to reduce costs and improve productivity, consistent with the pricing principles in section 44ZZCA.

The ACCC does not at this time have a view as to what incentive mechanisms may be appropriate for inclusion in the HVAU, and while ARTC has yet to put forward a proposal, 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. The absence of an incentive scheme in the HVAU as currently drafted also underscores the necessity of ensuring the TOP rebate mechanism and TUT are appropriately robust.

⁴⁷⁴ QR National Coal, *QR National Coal's Submission to the Hunter Valley Access Undertaking*, 25 October 2010, p. 3.

⁴⁷⁵ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 36.

⁴⁷⁶ ARTC, *Australian Rail Track Corporation Ltd – ARTC Hunter Valley Coal network Access Undertaking – Response to ACCC Consultation Paper*, 18 October 2010, p. 4.

⁴⁷⁷ ARTC, *Submission in Response to ACCC Consultation Paper*, 18 October 2010, p. 4.

⁴⁷⁸ NSWMC, *Submission in Response to ACCC Consultation Paper*, p. 11; Coal and Allied, *Submission in Response to ACCC Consultation Paper*, 25 October 2010, p. 10; Xstrata, *Submission in Response to ACCC Consultation Paper*, 25 October 2010, p. 19.

10 Capacity Management

Summary

System Assumptions

The ACCC welcomes the reference to System Assumptions in section 5.1 of the proposed 2010 HVAU.

The ACCC recommends however that ARTC amend the HVAU to include: (i) 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 (ii) 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.

Consultation with the HVCCC

The ACCC is of the view that the proposed consultation process in sections 5.2(d) and (e) of the HVAU goes some way towards dealing with the concerns raised in the Draft Decision on providing greater certainty and detail around the HVCCC consultation process.

The ACCC recommends however that ARTC amend the HVAU so that: (i) ARTC is obliged to provide written reasons to the HVCCC when it disagrees with the HVCCC's assessment, who will pass on relevant information to affected Access Holders who are members of the HVCCC; (ii) for those Applicants who are not members of the HVCCC, ARTC should be obliged to provide the Applicants with written reasons if requested as to why ARTC disagrees with the HVCCC's assessment. In both cases, ARTC is not obliged to disclose any confidential information in providing those reasons.

Capacity reservation

The ACCC is of the view that the application of the capacity reservation mechanism to Non-coal Access Rights is inconsistent with the ACCC's views in its 2008 Interstate Access Undertaking Final Decision regarding a similar provision and considers the provision should be removed from the HVAU.

Allocation of existing capacity where there is an event leading to a shortfall

The ACCC notes that sections 5.4 to 5.6 of the HVAU set out the protocols ARTC will apply when allocating capacity where there is an event leading to a Capacity Shortfall of: (i) five days or less; and (ii) greater than five days.

The ACCC is of the view that in relation to shortfalls of five days or less: (i) although there were arguments that the period be reduced to two days, there is at this point of time insufficient evidence to find the five day period inappropriate prior to the proposed review of the loss allocation mechanism in section 5.9; and (ii) that ARTC 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.

The ACCC also recommends that amendments be made to oblige ARTC to use its best endeavours, to the extent practicable, to not reduce contracted access rights from load points not affected by the Capacity Shortfall under section 5.5(a)(ii).

Capacity resumption (anti-hoarding provisions)

The ACCC notes that in response to the ACCC's view in the Draft Decision, ARTC amended clause 11.4 of the IAHA to include a positive obligation on ARTC to investigate circumstances where there a coal producer has underutilised their capacity, without amending the 80 percent threshold for resumption.

The ACCC acknowledges that devising an appropriate and practical approach to capacity resumption is complex given the range of interests that need to be taken into account, noting submissions received highlighting the difference in interests between incumbent users of the network and new entrants.

While ARTC will not be required to resume capacity in specific circumstances as a result of the ACCC's recommendations, the inclusion of a positive obligation on ARTC to investigate reasons why capacity was not utilised, in addition to an increase in the resumption threshold to 85 percent, should allow for the effective enforcement of the capacity resumption provisions in the case of genuine capacity hoarding, and provide a more appropriate balance between the interests of incumbent users of the network and new entrants.

Capacity Trading

The ACCC notes that the revised provisions relating to the trading of track related capacity in the proposed IAHA reflect an addressing of the concerns raised by the ACCC in the Draft Decision and further industry developments in relation to the trading of capacity across the Hunter Valley supply chain.

The ACCC recommends that clauses 16.6, 16.7 and 16.8 be included as Tier 1 (Mandatory) provisions. The ACCC is also of the view that there is no obvious reason why clause 16.3, relating to permanent trades, is not also a Tier 1 (Mandatory) provision.

In relation to permanent trades, the ACCC recommends:

- Clause 16.1 be amended so the IAHA can only be assigned without consent of the Access Holder in the specific circumstances referred to in the NSW Lease and the assignment involves the transfer of the entire agreement; and

- Clause 16.2 be amended to include a reasonableness requirement. The ACCC's view is that it would not be unreasonable for ARTC to refuse to consent to a transfer where the terms and conditions provided in the IAHA would be unsuitable for the proposed assignee.

In relation to temporary trades, the ACCC recommends:

- Clause 16.4(a)(ii) be amended as a trade closer to the port can not be assumed to not impact on Coal Chain Capacity. The HVCCC consultation process in 16.6(c) should apply to all trades but ARTC can rely on the HVCCC's view as to the impact of a trade.
- Clause 16.4(a)(iv) should be amended so that evidence of the HVCCC's acceptance of the trade will constitute the warranty required by ARTC under this provision.
- Clause 16.4(d) should be amended so that ARTC is to seek and consider in good faith the views of the HVCCC in relation to all non-safe harbour trades regarding the impact on capacity. However, the ACCC considers that ARTC is not responsible for HVCCC delays regarding assessment of the impact of trades. If there is no response in two weeks ARTC could assume that the HVCCC has no concerns and ARTC can proceed with its own assessment.
- Clause 16.5(a) should 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.

The ACCC is also of the view that regardless of whether the IAHA is amended so that all trades go through the CTS Clearing House, the ACCC recommends that clause 16.6(c) be amended to clearly set out a specific obligation on ARTC to seek the views of the HVCCC and consider its views in good faith in relation to all trades under 16.3, 16.4(a) and 16.4(d). The 'safe harbour' stream of trading would be preserved by the HVCCC assessment under 16.4(a)(iv) constituting sufficient evidence that the trade will not impact capacity.

The ACCC is of the view that the IAHA should be further amended to clarify the operation of the review of the two week notice period under clause 16.8, primarily that ARTC be obliged to provide written reasons for its decision to reduce or maintain the two week period.

Mechanisms for identifying and assigning capacity losses and their review

The ACCC notes that ARTC has included a range of mechanisms by which an access seeker may be held accountable for losses in Network capacity, such as by running 'non-compliant' services (under clause 11.5 of the IAHA) or from cancellation of services (clause 11.6 of the IAHA). ARTC has also included a review of the cancellations and loss allocation mechanisms in the HVAU and IAHA under section 5.9 of the HVAU.

In relation to the use of non-compliant services, the ACCC recommends that:

- Clause 11.5 be amended to provide that Access Holders can make use of different Operators without having to obtain consent from ARTC where the difference in the characteristics of the trains used do not have any impact on capacity.
- Clause 11.5(c)(iii) may require amendment to avoid disincentives for access seekers to transfer to a more efficient service, where to do so would lead to a reduction in TOP Charges. A preferable approach may be for the clause to provide that where a permanent change is sought, access charges will be recalculated on the basis of the new Service.

In relation to the mechanism by which ARTC can require a producer to bear the loss in capacity caused by their cancellation under clause 11.6 of the IAHA, the ACCC has recognised that this clause is an attempt to incorporate a key feature of the long term solution for the Hunter Valley coal chain, but that there is disagreement about the mechanics of the proposal, not the intent of the proposal.

As a result, the ACCC is of the view that the proposal is an appropriate interim measure that will be reviewed as part of the review in section 5.9 of the HVAU, but that the following minor amendments should be made:

- ARTC should be obliged to notify an Access Holder where its Base Path Usages are to be removed under clause 11.6.
- Clause 11.6 should clearly state that it is to be subject to review under the mechanism set out in section 5.9 of the HVAU.
- The interaction of clause 11.6 and the capacity shortfall provisions in clause 6 should be clarified to set out that an Access Holder cannot be penalised twice for the same event.
- Where the HVCCC advises that a cancellation has impacted on capacity and ARTC chooses not to remove BPUs, ARTC should be obliged to provide written reasons to the HVCCC (or to the Access Holder where they are not a member of the HVCCCC). The ACCC accepts the need for an appropriate confidentiality carve-out.

In relation to the review set out in section 5.9 of the HVAU, the ACCC recommends that if the HVCCC conducts an industry wide review within 12 months of the commencement date, then ARTC should participate in good faith in that review. However if this does not occur, then ARTC is to conduct the review as set out under section 5.9.

10.1 Introduction

In addition to the regulation of prices and the negotiation of agreements between access provider and access seeker, ARTC's proposal also includes protocols for the allocation and management of Hunter Valley rail network capacity, and for the creation of additional capacity via investment.

10.1.1 Overview of provisions

The capacity management provisions in section 5 of the proposed 2010 HVAU operate in conjunction with the terms and conditions relating to capacity management in the proposed Indicative Access Holder Agreement (IAHA) and Operator Sub-Agreement (OSA). These provisions refer to:

- the development and implementation of System Assumptions (section 5.1);
- the capacity analysis process, by which ARTC determines if capacity is available on the Network to satisfy an access seeker's request, and consultation with the HVCCC (section 5.2);
- the protocols for the allocation of existing and new capacity in the event of a capacity shortfall (sections 5.4-5.7);
- the circumstances in which a non-coal access seeker may reserve capacity, and the fee ARTC may levy for reservation (section 5.3);
- the protocols by which ARTC may resume capacity from an access seeker because of under-utilisation, and by which an access seeker may relinquish contracted capacity back to ARTC (section 5.8, and then clauses 11.4 and 11.1 of the IAHA respectively);
- processes for the trading of contracted capacity between access seekers (section 5.8, and clause 16 of the IAHA);
- circumstances where an access seeker may be held accountable for losses in Network capacity, such as by running 'non-compliant' services or from cancellation of services (clauses 11.5 and 11.6 of the IAHA respectively);
- a review of the mechanisms for identifying and assigning capacity losses (section 5.9).

10.1.2 ACCC's summary view

The provisions relating to Capacity Management are important to achieving overall supply chain alignment. A number of individual issues are encompassed under this, which 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.

As stated in the March 2010 Draft Decision, the ACCC considers that the undertaking should 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, particularly given the uncertainties that arise as a result of the new regulatory regime. The ACCC also considers that while ARTC's network is a key part of the Hunter Valley coal chain, the proposed 2010 HVAU is not the most appropriate means by which to coordinate *all* industry-wide issues. Rather, there is an interaction between ARTC's interests as the lessee and manager of the Network and the broader supply chain considerations, and the proposed 2010 HVAU should seek to appropriately reconcile those interests.

Therefore, while the ACCC considers that some further revisions should be made to the proposed 2010 HVAU to further facilitate supply chain alignment, the undertaking is broadly likely to be appropriate in relation to capacity management issues at least in the short term.

10.2 System Assumptions

10.2.1 March 2010 Draft Decision

In the March 2010 Draft Decision, 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 in order to facilitate alignment.⁴⁷⁹

The ACCC also agreed that ARTC should not be bound by System Assumptions dictated by another organisation, but was of the view that if ARTC was involved in the development of System Assumptions, and the preparation of the System Assumptions Document, there should be no reason why ARTC could not comply with those assumptions.⁴⁸⁰

The ACCC also noted that it recognised the dynamic nature of System Assumptions, and was of the view that a mechanism by which System Assumptions may be updated over time to respond to changes in coal chain performance would be desirable.⁴⁸¹

10.2.2 The proposed 2010 HVAU

Under section 5.1(a) of the proposed 2010 HVAU, ARTC will participate in the development of System Assumptions with the HVCCC and other service providers, using reasonable endeavours to agree on those assumptions

Under section 5.1(b) of the proposed 2010 HVAU, ARTC will have regard to the System Assumptions in carrying out its Capacity Analysis under section 5.2 of the

⁴⁷⁹ ACCC, *Australian Rail Track Corporation Limited – Hunter Valley Coal Network Access Undertaking Draft Decision*, 5 March 2010, p. 466.

⁴⁸⁰ ACCC, *Draft Decision on HVAU*, 5 March 2010, p. 466.

⁴⁸¹ ACCC, *Draft Decision on HVAU*, 5 March 2010, p. 466.

proposed 2010 HVAU and ARTC will reflect the track related System Assumptions in the Access Holder Agreements.

10.2.3 ARTC submissions

ARTC notes that section 5.1(b) of the proposed amendments attempts to ensure ‘that an agreed set of System Assumptions is applied across the Hunter Valley Coal Chain.’⁴⁸²

ARTC also submits that it is ‘critical that ARTC is not forced into accepting and applying track related System Assumptions which it does not agree with.’⁴⁸³ ARTC argues this is ‘important because there is no agreed mechanism as to how System Assumptions will be determined and there is [a] ... possibility that the HVCCC could adopt System Assumptions that ARTC does not agree with.’⁴⁸⁴

ARTC also submits that ‘[i]t is ... necessary for ARTC to reserve the ability to determine additional track related System Assumptions which may not be contained in the System Assumptions document. The ... System Assumptions referred to in the PWCS Long Term Ship or Pay Agreement ... are port centric and do not specifically identify the track related assumptions that need to be developed.’⁴⁸⁵ ARTC submits that ‘[i]f the HVCCC fails to identify these specific assumptions, ARTC needs a backstop where it is able to determine these assumptions itself.’⁴⁸⁶

ARTC is of the view that ‘[c]hanges to the definition of System Assumptions may also have implications on ARTC’s ability to deliver its contractual entitlements as the System Assumptions determine ARTC’s assessment of Capacity in the contract.’⁴⁸⁷

10.2.4 Stakeholder views

Coal & Allied

Coal & Allied ‘accepts that ARTC should not be bound to determine the available amount of network capacity based on System Assumptions dictated by another organisation. However, as is the case with the Port Waratah Coal Service, ARTC will have the ability to advise the HVCCC of the System Assumptions that should be used with regard to track services.’⁴⁸⁸

Coal & Allied also submits that since ‘the potential consequence of using misaligned System Assumptions across the Coal Chain could be extremely severe (as it has been at the Dalrymple Bay Coal Terminal), Coal & Allied does not consider section 5.1(b)

⁴⁸² ARTC, *Hunter Valley Access Undertaking - Explanatory Guide (September 2010)*, 7 September 2010, p. 26.

⁴⁸³ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 26.

⁴⁸⁴ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 26.

⁴⁸⁵ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 27.

⁴⁸⁶ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 27.

⁴⁸⁷ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 27.

⁴⁸⁸ Coal and Allied, *Submission in Response to the ACCC’s Consultation Paper in relation to the Australian Rail Track Corporation’s Proposed Hunter Valley Rail Network Access Undertaking*, 25 October 2010, p. 71.

is appropriate as it only requires ARTC to 'have regard' to the System Assumptions in carrying our Capacity Analysis.⁴⁸⁹

Instead, Coal & Allied propose that:

- (a) ARTC be bound to provide System Assumptions to the HVCCC for the purposes of developing the System Assumptions Document and participate in the development of a System Assumptions Document as reasonably required by the HVCCC;
- (b) the definition of 'System Assumptions' be amended to state that to the extent that the System Assumptions Document reflects the Assumptions provided by ARTC, ARTC should be bound to accept those System Assumptions; and
- (c) the definition of 'System Assumptions' be amended to delete the word 'including' in reference to track related assumptions and instead, in the interests of certainty, provide an exhaustive list of track related assumptions that are not otherwise dealt with in the System Assumptions Document.⁴⁹⁰

HVCCC

The HVCCC submits that 'ARTC's commitment to participate in the development of System Assumptions via the HVCCC [in] Clause 5.1 is appropriate.'⁴⁹¹ In addition, the HVCCC submits that as it is 'of the view that the incorporation of System Assumptions in the proposed 2010 HVAU is mandatory' therefore 'the proposed clauses referencing the Systems Assumptions [including clause 5.1] are appropriate.'⁴⁹²

QR National Coal

QR National Coal submits that, on the basis 'that [the] HVCCC includes Terminal Operators and ARTC, we believe that Operators and other services providers should be explicitly included in the consultation on the System Assumption Document.'⁴⁹³

Xstrata

Xstrata 'welcomes the introduction of the concept of System Assumptions into the Access Undertaking and the IAHA.'⁴⁹⁴ However Xstrata also notes that it 'is not possible to establish the physically deliverable Capacity of the rail Network ... without assessing the likely performance of other parts of the Hunter Valley coal chain.'⁴⁹⁵

⁴⁸⁹ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 71.

⁴⁹⁰ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 71.

⁴⁹¹ HVCCC, *Submission Re: ARTC 2010 Hunter Valley Access Undertaking (2010 HVAU)*, 25 October 2010, p. 2.

⁴⁹² HVCCC, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 3.

⁴⁹³ QR National Coal, *QR National Coal's Submission to the Hunter Valley Access Undertaking*, 25 October 2010, p. 13.

⁴⁹⁴ Xstrata, *Xstrata Coal Pty Ltd's response to the Australian Competition and Consumer Commission in relation to the ACCC Consultation Paper in relation to the Australian Rail Track Corporation's proposed Hunter Valley Rail Network Access Undertaking dated 16 September 2010*, 25 October 2010, p. 11.

⁴⁹⁵ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 11.

Xstrata submits therefore that it is ‘highly desirable that the planned performance of all parts of the coal chain ... be agreed by all infrastructure operators and reflected in [the] ... System Assumptions which will ... ensure that contracted Coal Chain Capacity is always physically deliverable by the coal chain ... as a whole, and ... that all contracts for each element ... (i.e. track, train and port) can be honoured.’⁴⁹⁶

Xstrata remains concerned ‘with the way that System Assumptions are utilised by ARTC in determining Capacity’ whereby ‘ARTC takes account only of the track related System Assumptions’.⁴⁹⁷ Xstrata submits ‘that a determination of the Capacity ... which does not take account of the ability of trains to enter and exit the Network is not a realistic one’ as ‘the ability of trains to enter and exit the Network is affected by the performance of other parts of the Hunter Valley coal chain’.⁴⁹⁸ Consequently, ‘by disregarding the physical ability of trains to enter and exit the network, ARTC’s definitions of “Capacity” ... may not in fact be capable of being delivered by the Hunter Valley coal chain.’⁴⁹⁹

Xstrata notes that it 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’

Rather, Xstrata submits that it is seeking:

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 ... [which are] common to all participants in the Hunter Valley coal chain.’⁵⁰⁰

To accommodate this view into the HVAU, Xstrata submits that the definition of Capacity should be amended in the HVAU and IAHA so that:

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”.⁵⁰¹

10.2.5 ACCC view

The ACCC welcomes the addition of section 5.1 in the 2010 HVAU, which specifies that ‘ARTC will participate in the development of System Assumptions via the

⁴⁹⁶ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, pp. 11-12.

⁴⁹⁷ 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, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 12.

⁴⁹⁸ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 12.

⁴⁹⁹ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 12.

⁵⁰⁰ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 12.

⁵⁰¹ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 26.

HVCCC' as varied from time to time, and that System Assumptions are recognised as a fundamental part of the HVAU by being included in the definition of the System Assumptions Document. The ACCC notes that these inclusions raise the profile of System Assumptions in the operation of the 2010 HVAU.

The ACCC notes ARTC's argument that ARTC should not be forced into 'accepting and applying track related System Assumptions which it does not agree with.'⁵⁰² This is consistent with the ACCC's view in the March 2010 Draft Decision that ARTC not be bound by System Assumptions dictated by another organisation.

However, the ACCC considers that the wide discretion given to ARTC under the current drafting of section 5.1 may be inconsistent with facilitating coal chain alignment, as the use of misaligned System Assumptions by service providers in the coal chain would compromise a coordinated approach. The ACCC notes Guiding Principle 5 of the Contractual Alignment Principles attached to the Long Term Solution Implementation Memorandum, which provides that:

The responsibility of the Track and Terminal Service Providers to jointly operate in accordance with the System Assumptions is best achieved by planning and operating the system in a coordinated and co-operative manner.⁵⁰³

The ACCC is of the view that the nature of the obligations on ARTC under section 5.1 of the HVAU, and definitions in the HVAU and the IAHA, can be strengthened without 'forcing' ARTC to accept and apply System Assumptions it does not agree with.

The ACCC notes that in the development of the System Assumptions Document via the HVCCC, various service providers in the Hunter Valley coal chain will have the ability to advise the HVCCC of the system assumptions that should be used with regard to their services.

Therefore, the ACCC considers that the definition of System Assumptions should be amended to distinguish between System Assumptions that are agreed to by ARTC with the HVCCC (and other relevant service providers), and the Track Related System Assumptions that are to be reasonably determined by ARTC. More specifically, that ARTC should amend the HVAU and IAHA so that there is a separate definition of Track Related System Assumptions, which should state that:

- the Track Related System Assumptions set out in the System Assumptions Document (that is, if ARTC has agreed to them); or
- if not agreed to by ARTC and set out in the System Assumptions document, then as reasonably determined by ARTC and published on ARTC's website.

The ACCC considers that this approach should provide additional transparency where ARTC chooses to develop assumptions not included in the System Assumptions document.

⁵⁰² ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 26.

⁵⁰³ PWCS, NCIG and NPC, Implementation Memorandum, Schedule 5, April 2009, p. 45.

The ACCC is also of the view that wherever there is an obligation on ARTC to determine capacity under the HVAU or the IAHA (for example, under the Capacity Analysis provisions in section 5.2 of the HVAU, or the determination of Network Path Capability in Schedule 2 to the IAHA), that ARTC must calculate that capacity in accordance with the System Assumptions, not simply the Track Related System Assumptions. The ACCC also considers that a transparent, objective determination of rail network capacity, taking into account interactions with other supply chain components, should ensure the efficient use of the Hunter Valley rail network. Further, the ACCC recognises that the System Assumptions and the determination of capacity also underpin key aspects of the proposed 2010 HVAU, including the determination of the efficient train configuration and the true-up test calculations. In order for these provisions to be appropriate, they must be based upon an appropriate determination of capacity, otherwise their operation may not reflect operational reality and may lead to inefficiency. The ACCC recommends ARTC pursue appropriate revisions through the proposed 2010 HVAU and related agreements in line with these views.

The ACCC considers that this approach to System Assumptions would be more likely to facilitate coal chain alignment and promote the economically efficient operation of the Network, while also recognising ARTC's interests. That is, these amendments recognise ARTC's concern that it not be obliged to accept and apply System Assumptions it does not accept, but notes that ARTC will participate in the development of the System Assumptions Document, and incorporate those 'acceptable' System Assumptions into the HVAU. But where agreement cannot be reached on the System Assumptions, that ARTC determines the Track Related System Assumptions, which are publicly available so that all relevant parties are aware of what assumptions ARTC is using to determine the capacity of the Network.

Finally, the ACCC notes QR National Coal's view that Operators and other services providers should be explicitly included in the consultation on the System Assumptions Document. It appears to the ACCC that the development of the System Assumptions Document is a process run by the HVCCC, and while the ACCC encourages consultation with all relevant service providers, the HVAU cannot be used to impose obligations on the HVCCC.

10.3 Capacity Analysis and consultation with the HVCCC

Section 5.2 of the HVAU proposes that ARTC will undertake a Capacity Analysis as part of preparing an Indicative Access Proposal. As part of this analysis, ARTC will consult with the HVCCC on the availability of and impact on Coal Chain Capacity. This will identify whether there is sufficient Available Capacity to meet an Applicant's requirements and, if not, to what extent Additional Capacity will be required.

10.3.1 March 2010 Draft Decision and ARTC's response

In the March 2010 Draft Decision the ACCC was of the view that there should be greater detail and clarity around ARTC's obligation to consult with the HVCCC in section 5.2(d).⁵⁰⁴

⁵⁰⁴ ACCC, Draft Decision on HVAU, 5 March 2010, p. 298.

ARTC submits that during ‘consultation with the HRATF, the industry sought a general requirement that, in addition to providing reasons to the HVCCC as to why ARTC did not follow the HVCCC’s views, ARTC should also provide written reasons to affected Access Holders.’ ARTC does not consider this necessary, submitting that:

[a]part from the additional administrative burden this would place on ARTC, and the need to deal with specific confidentiality requirements, ARTC considers that this is inconsistent with the purported need to have a central coordinating body for the purposes of consultation in the first place.⁵⁰⁵

10.3.2 Stakeholder views

Aston Resources

Aston Resources submits that where ‘ARTC disagrees with the HVCCC’s comments on the availability of Coal Chain Capacity, it should be **required** to provide reasons why it disagrees with the assessment **both** to the HVCCC **and to the access seeker**’ [emphasis in original].⁵⁰⁶ Aston submits that, given ‘the HVCCC’s central role in modelling and coordinating coal chain capacity, ARTC should not have discretion as to whether it provides reasons to the HVCCC and the access seeker should be given an opportunity to review and consider those reasons.’⁵⁰⁷

Coal & Allied

Coal & Allied submits that under the wording in Schedule F of the HVAU, ARTC will ‘ultimately **not** be obliged to follow ... the HVCCC’s recommendations or advice in relation to any matter’ [emphasis in original].⁵⁰⁸ Further, ‘Access Holders ... have no recourse for any decision that ARTC makes that is not in accordance with HVCCC recommendations’.⁵⁰⁹

Coal & Allied argue that given ‘the HVCCC’s role as an independent integrated body (including representatives from all producers and Hunter Valley Coal Chain Service Providers, including ARTC) and that ARTC is a regulated, but not producer-owned, participant in the Coal Chain ... ARTC should be under greater obligation than it currently proposes in the Proposed HVAU to accept the [HVCCC’s] recommendations’.⁵¹⁰

In response to ARTC’s rejection of the suggestion that it provide reasons to affected Access Holders where it disagrees with the HVCCC’s view, Coal & Allied submits that ARTC’s reasons for its rejection are inadequate, because:

- (a) as the Government-owned Corporation responsible for the management of the Hunter Valley Coal Rail Network, ARTC should be required to undertake administrative tasks that ensure there is a sufficient level of transparency in relation to its reasons for disagreeing with the HVCCC’s recommendations and advice;

⁵⁰⁵ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, [Appendix 1], p. 7.

⁵⁰⁶ Aston Resources, *Submission: ARTC proposed Hunter Valley Rail Network Access Undertaking*, 25 October 2010, p. 4.

⁵⁰⁷ Aston Resources, *Submission in Response to ACCC Consultation Paper*, 25 October 2010, p. 4.

⁵⁰⁸ Coal and Allied, *Submission in Response to ACCC Consultation Paper*, 25 October 2010, p. 71.

⁵⁰⁹ Coal and Allied, *Submission in Response to ACCC Consultation Paper*, 25 October 2010, p. 72.

⁵¹⁰ Coal and Allied, *Submission in Response to ACCC Consultation Paper*, 25 October 2010, p. 72.

- (b) any specific confidentiality requirements should not outweigh the need for transparency and form such a barrier that ARTC should not be required to provide its reasons to affected Access Holders (within the bounds of steps taken to protect confidential and sensitive information); and
- (c) any perceived inconsistency does in fact not exist, but even if it did, should not outweigh the need for transparency.⁵¹¹

In relation to the consultation provision Coal & Allied instead propose that:

- (a) ARTC be bound to accept the HVCCC's recommendations or advice in relation to the following matters:
 - (i) determining/confirming NPC on the basis of information provided by ARTC;
 - (ii) determining/confirming who are “affected producers” for the purposes of clause 6;
 - (iii) determining when Path Usages are not to be made available under clause 3.14 of the IAHA for lack of Network Exit Capability; and
 - (iv) specifying the non-rail parameters to be applied in determining the efficient Train configuration;
- (b) for those matters not listed above, in all instances where ARTC disagrees with the recommendations or advice it receives from the HVCCC, ARTC be required to publish on its website detailed reasons for its rejection within one week of its rejection; and
- (c) in the alternative to (b), ARTC be required to provide the HVCCC with its reasons as to why ARTC did not follow the HVCCC's recommendations and allow the HVCCC to distribute those reasons to HVCCC members. C&A has approached the HVCCC with this proposed solution and the HVCCC has indicated its willingness to participate.⁵¹²

HVCCC

The HVCCC submits that ‘ARTC’s commitment to consult with HVCCC as part of undertaking its capacity analysis and the proposed process [under clause 5.2(d)] ... is appropriate.’⁵¹³ The HVCCC also submits that the ‘principles setting out the process by which ARTC will consult with HVCCC [under Schedule F] ... are appropriate and are likely to ensure effective consultation between ARTC and HVCCC.’⁵¹⁴

QR National Coal

QR National Coal submits that it supports ‘the principles in Schedule F as appropriate and likely to be effective.’⁵¹⁵

⁵¹¹ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 72.

⁵¹² Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 73.

⁵¹³ HVCCC, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 2.

⁵¹⁴ HVCCC, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 3.

⁵¹⁵ QR National Coal, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 10.

RailCorp

RailCorp submits that the amendments to section 5.2 have ‘reinforced RailCorp concerns that the determination of available capacity for non coal users (including passenger services) is restricted by the HVCCC view of the impact of granting such capacity on the Coal Chain Capacity.’⁵¹⁶ RailCorp argues that this is contrary to ARTC’s obligations in regard to passenger priority and, notes that the passenger priority obligation is not recognised in section 5.2.⁵¹⁷

Xstrata

Xstrata ‘welcomes the more detailed provisions in relation to consultation between ARTC and the HVCCC.’⁵¹⁸

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.’⁵¹⁹ Xstrata submits that 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.’⁵²⁰

Xstrata also submits that Schedule F of the HVAU should be amended to include 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.⁵²¹

10.3.3 ACCC view

Consultation with HVCCC per section 5.2

In the March 2010 Draft Decision the ACCC was of the view that the HVAU should not impose strict rules which oblige ARTC to comply with the HVCCC’s views.⁵²² Therefore, the ACCC recommended that ARTC’s obligations be set out in a clear and transparent manner. The ACCC was of the view that this approach to consultation with the HVCCC would provide ARTC with sufficient operational flexibility to manage the below rail Hunter Valley rail network so as to maximise its efficient

⁵¹⁶ RailCorp, *Subject: Hunter Valley Access Undertaking*, 26 October 2010, p. 5.

⁵¹⁷ RailCorp, *Submission in Response to ACCC Consultation Paper*, p. 5.

⁵¹⁸ Xstrata, *Submission in Response to ACCC Consultation Paper*, 25 October 2010, p. 13.

⁵¹⁹ Xstrata, *Submission in Response to ACCC Consultation Paper*, 25 October 2010, p. 13.

⁵²⁰ Xstrata, *Submission in Response to ACCC Consultation Paper*, 25 October 2010, p. 13.

⁵²¹ Xstrata, *Submission in Response to ACCC Consultation Paper*, 25 October 2010, p. 27.

⁵²² ACCC, *Draft Decision on HVAU*, 5 March 2010, p. 442.

operation by allowing ARTC to take into account any changes in circumstances that may occur over the life of the HVAU. The ACCC was also of the view that this should provide access seekers with sufficient certainty and clarity in the terms, effect and operation of the key processes by which ARTC has agreed to consult with the HVCCC.⁵²³

The ACCC notes that in response to the March 2010 Draft Decision, the proposed 2010 HVAU now includes two ‘streams’ of consultation.

The first approach is set out in section 5.2(d), and obliges ARTC to seek the HVCCC’s views, consider those views in good faith when provided within a particular timeframe, and provide reasons (either orally or in writing) as to why ARTC disagrees with the HVCCC’s assessment (if ARTC reasonably considers there to be sufficient time to do so given the particular circumstances of the Access Application).

The second approach is set out in Schedule F, and is a catchall process that applies where a specific process is not referred to in a provision of the HVAU itself. The wording in Schedule F grants ARTC the discretion to decide whether or not it will consult with the HVCCC in relation to an aspect of the HVAU or the IAHA, and what type of consultation may be appropriate in the circumstances.

Neither stream of consultation requires ARTC to accept the HVCCC’s views, simply to consider the view put forward in good faith.

The ACCC considers that the amendments in section 5.2(d) and (e), which set out further detail on ARTC’s obligation to consult with the HVCCC, go some way towards dealing with the concerns raised in the March 2010 Draft Decision on providing greater certainty and detail around the HVCCC consultation process.⁵²⁴ However the ACCC is also of the view that certain aspects of ARTC’s obligation to consult with the HVCCC should be strengthened.

The ACCC considers that section 5.2(d)(iii), which provides that ARTC will provide reasons where it disagrees with the HVCCC only where ‘ARTC reasonably considers there is sufficient time given the particular circumstances of the Access Application including the timeframe in section 3.9’, is unlikely to be appropriate. The capacity analysis referred to in section 5.2 occurs as part of the preparation of an Indicative Access Proposal: this is explicitly stated in section 5.2(a). In that context, section 3.9(b) provides ARTC with the ability to extend the time taken to prepare an Indicative Access Proposal on the grounds of the complexity of an Access Application, a delay from obtaining information from the HVCCC or the Applicant or other extenuating circumstances. In light of this ability to extend the period, ARTC should not have further discretion to not provide reasons for disagreeing with the HVCCC based on lack of sufficient time to do so.

Additionally, as set out in the March 2010 Draft Decision, a goal of robust consultation in this context is to provide access seekers with sufficient certainty and clarity as to the terms, effect and operation of the key processes by which ARTC will

⁵²³ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 442-443.

⁵²⁴ ACCC, Draft Decision on HVAU, 5 March 2010, p. 298.

consult with the HVCCC.⁵²⁵ The ACCC notes that in addition to setting out procedural steps, a robust consultation mechanism should provide the means by which relevant parties whose interests are affected are adequately informed of the outcome of the consultation.

The ACCC therefore considers section 5.2(d) should be further amended so that, under section 5.2(d)(iii), ARTC be obliged to provide written reasons to the HVCCC as to why it disagrees with the HVCCC's assessment within 10 Business Days of its receipt of that assessment, or such other period as agreed with the HVCCC.

The ACCC notes the suggestions from interested parties that where ARTC disagrees with the HVCCC's recommendation pursuant to section 5.2, in addition to providing reasons to the HVCCC, ARTC should also provide those reasons to the Applicant making the Access Application. However, the ACCC understands that the HVCCC is able to pass on all relevant information to affected Access Holders who are members of the HVCCC, and is able to take into account relevant confidentiality considerations. Therefore, the ACCC is of the view that ARTC need only be obliged to provide written reasons to the HVCCC.

However, as noted, the capacity analysis referred to in section 5.2 is conducted as part of the preparation of an Indicative Access Proposal and may be completed for access seekers who are not members of the HVCCC. Applicants in this position will have an interest in ARTC's reasons why it is choosing to disagree with a recommendation of the HVCCC. In this situation, ARTC should also be obliged to provide written reasons to the Applicant. The ACCC notes that while this obligation places an additional administrative requirement on ARTC, it is likely to be negligible, particularly as this obligation will only apply in limited circumstances.

The ACCC notes ARTC's submission that there may be specific confidentiality requirements in relation to the provision of such reasons. Consequently, the ACCC considers that ARTC's obligations to provide reasons to the HVCCC or the relevant Applicant, be qualified such that ARTC is not obliged to disclose any confidential information in providing those reasons.

Finally, in response to RailCorp's specific concern regarding the determination of Available Capacity for non-coal users of the Network, the ACCC is of the view that when conducting a Capacity Analysis under section 5.2, ARTC is only required to consult with the HVCCC under section 5.2(d) and take into account its comments on the availability of Coal Chain Capacity, not the broader concept of Capacity (as defined in the proposed 2010 HVAU), which incorporates non-coal access rights. Therefore, the HVCCC's view is not determinative in this context of ARTC's Capacity Analysis under section 5.2 in relation to non-coal users of the Network.

Schedule F – Consultation Principles

In respect of the principles to guide ARTC / HVCCC consultation set out in Schedule F of the proposed 2010 HVAU, the ACCC is of the view that this Schedule provides ARTC with a 'fall-back' consultation mechanism that grants ARTC the discretion to decide whether or not it will consult with the HVCCC in relation to a relevant aspect

⁵²⁵ ACCC, Draft Decision on HVAU, 5 March 2010, p. 298.

of the HVAU or the IAHA, and for ARTC to decide what type of consultation may be appropriate in the circumstances.

The ACCC is of the view that given that Schedule F will only apply where there is no specific consultation mechanism specified in the HVAU or IAHA, this approach provides ARTC with the necessary flexibility to consult with the HVCCC in a truncated manner where circumstances dictate its necessity, and is for this reason appropriate.

10.4 Capacity reservation

Section 5.3 of the proposed 2010 HVAU is a provision that allows Applicants to reserve Capacity for Non-Coal Access rights, and for ARTC to levy a fee for that reservation.

10.4.1 March 2010 Draft Decision

In the March 2010 Draft Decision the ACCC was of the view that the equivalent section to 5.3 was likely to be appropriate subject to the following amendments:

- to alleviate concerns over the extent to which ARTC is able to sell reserved capacity that would not be utilised otherwise for more than marginal cost of providing this capacity, the provision should be amended so that ARTC can sell the capacity at incremental cost or above and not be financially penalised;
- if ARTC intends there to be a presumption that non-reserved capacity is sold first, then the HVAU should clearly state this in order to limit disputes; and
- that the reservation provisions apply to the reservation of capacity which is to be created prior to usage by the applicant, provided a reservation fee is only payable from the date the capacity exists for use.⁵²⁶

10.4.2 Proposed 2010 HVAU

The ACCC notes that section 5.3(a) of the proposed 2010 HVAU has been amended so that it now only applies to reservation of Capacity where an Applicant seeks Non-Coal Access Rights. Under this provision, where an Applicant seeks to execute an agreement for Non-Coal Access Rights more than 6 months prior to utilising those rights, ARTC may, at its absolute discretion, charge a 'reservation fee.'

The section states that the fee will:

- have regard to the opportunity cost forgone in relation to the 'reserved' Access Rights (including the revenue forgone from utilisation of those reserved access rights by another user), the period of reservation and other demand for the Access Rights;
- be no greater than 75% of the Indicative Access Charge applicable to the Pricing Zone in which the Access Rights are sought, had those rights been Coal Access

⁵²⁶ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 652-653.

Rights utilised by the most commonly used Indicative Service for the period of reservation;

- be reduced to the extent of any utilisation of the reserved Access Rights during the period, less the Direct Cost of the utilisation during the period; and
- if the reserved rights are dependent on Additional Capacity, that the Reservation Fee not be payable until the Additional Capacity is available for use.

Section 5.3(c) states that Access Rights will be granted first to Available Capacity that is not reserved capacity. 'Reserved Access Rights' will be taken to have been utilised once there is no longer sufficient Available Capacity remaining unutilised to enable the use of the Reserved Access Rights by the Access Holder reserving them.

10.4.3 ARTC's submission

ARTC submits that section 5.3 has been amended to limit the section's application to Non-coal Access Rights, and that this change was made in response to coal producer concerns that the concept of capacity reservation was inconsistent with the approach to coal contracting in the proposed 2010 HVAU.⁵²⁷ ARTC submits that other amendments have been made to accommodate recommendations made by the ACCC in the Draft Decision.⁵²⁸

10.4.4 ACCC view

The ACCC considers that the removal of the capacity reservation mechanism (and fee) for Coal Access Rights is appropriate, as this is consistent with ARTC's general aim of the HVAU to ensure that sufficient capacity is available on the Hunter Valley rail network in line with expansions in other parts of the supply chain.

However, the ACCC notes that, as the provision now applies only in relation to Non-Coal Access Rights, its inclusion in the HVAU is inconsistent with the ACCC's views in the 2008 Interstate Access Undertaking Final Decision regarding a similar provision. In those decisions the ACCC considered that the disadvantages of such a fee outweighed its advantages, and consequently it was inappropriate to accept.⁵²⁹ The ACCC therefore considers that the provision be removed from the proposed 2010 HVAU.

10.5 Events Leading to Shortfalls in Existing Capacity

Sections 5.4, 5.5. and 5.6 of the proposed 2010 HVAU set out the principles by which ARTC will identify and manage events that result in shorter term and longer term shortfalls in existing Capacity.

10.5.1 Identifying shortfalls in existing capacity

In the March 2010 Draft Decision, the ACCC was of the view that the processes by which ARTC will determine that there is a shortfall in capacity are unclear and are not in the interests of access seekers. As an Access Holder's right to access the Hunter

⁵²⁷ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, [Appendix 1], p. 21.

⁵²⁸ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, [Appendix 1], pp. 20-21.

⁵²⁹ See Interstate Final Decision, (July 2008) p. 55-6; Interstate Draft Decision (April 2008), p. 184-7.

Valley rail network may be significantly impacted under these provisions, the ACCC considered that the process ARTC intends to apply in making the assessment as to the shortfall in Capacity should be set out in greater detail to provide greater clarity.⁵³⁰

ARTC's submissions

ARTC submits that it 'has uplifted the Capacity shortfall provisions set out in the December version of the IAHA [including those that set out the process by which a shortfall in existing capacity is identified] into the HVAU. It is important for the Capacity shortfall provisions to be included in the 2010 HVAU as they will apply to both coal and non-coal users.'⁵³¹

ARTC also submits that it has 'amended subsection 5.4(a)(ii) to recognise ARTC's commitment to consult with the HVCCC will be covered by the consultation obligations set out in Schedule F of the 2010 HVAU.'⁵³²

The proposed amendments to section 5.4 of the HVAU are:

5.4 Identification of Shortfall in existing Capacity

- (a) If, at any time during a month, ARTC identifies that there is likely to be a shortfall in Capacity to meet all remaining unconditional Capacity entitlements held by all Access Holders in that month, after taking into account likely usage of Access Holders with an allocation period of a quarter, and the shortfall arises other than as a result of planned maintenance, ("Capacity Shortfall") then ARTC will:
 - (i) as soon as reasonably practicable, inform each Access Holder (if affected), coal terminal operators at the Port of Newcastle and the HVCCC of the expected duration of the Capacity Shortfall but to avoid doubt, ARTC's representation of the expected duration of the shortfall is not binding on ARTC; and
 - (ii) subject to ARTC meeting its obligations under section 5.5 and section 5.6, consult with the HVCCC in accordance with the principles in Schedule F with the objective of coordinating its response to the Capacity Shortfall with the other Hunter Valley Coal Chain Service Providers.
- (b) For the purposes of this section 5, the Capacity entitlement held by an Access Holder will be considered an unconditional Capacity entitlement if all conditions precedent to the conferral of that Capacity entitlement on the access holder under the terms of the relevant access agreement, including the completion of designated projects, have been satisfied, or waived by ARTC.

Stakeholder views

Coal & Allied

Coal & Allied submits that 'while the Capacity Shortfall provisions in the [proposed 2010 HVAU] ... have been improved, they will not sufficiently promote the

⁵³⁰ ACCC, Draft Decision on HVAU, 5 March 2010, p. 300.

⁵³¹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, [Appendix 1], p. 22.

⁵³² ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, [Appendix 1], p. 22.

economically efficient operation of ARTC's Network or appropriately take account of the interests of Access Holders for the following reasons:

- (a) It is not clear how ARTC will identify Capacity Shortfalls under clause 6.1. Without ARTC providing transparency over this process there is scope for ARTC to claim that there is no issue with available track capacity, only with Access Holders' ability to use that capacity. In such a situation Access Holders would not be in a position to test ARTC's claim. Nor is ARTC's decision subject to review.
- (b) It is not clear when ARTC will test for Capacity Shortfalls under clause 6.1.⁵³³

Coal & Allied propose that:

- (a) ARTC be required to publish as soon as practicable, but in any event within two weeks, the basis on which it has identified a Capacity Shortfall and should be required to do so within a month of the event. By doing so, Access Holders will be able to better understand how ARTC identifies a Capacity Shortfall.
- (b) ARTC be under a positive obligation to continually monitor and report available Capacity to HVCCC – it is not enough for ARTC to inform others only after it identifies that there is likely to be a shortfall. This obligation can be included as a further provision in section 5.4 of the Proposed HVAU and clause 6.1 of the Proposed IAHA.⁵³⁴

HVCCC

The HVCCC submits that 'ARTC's commitment to consult with HVCCC with the objective of coordinating its response to a shortfall in existing Capacity [Clause 5.4 (a)] and ARTC's commitment to promptly inform HVCCC of the result of the allocation of Capacity {Clauses 5.5, 5.6 and 5.7} is appropriate.'⁵³⁵

PWCS

PWCS submits that it was 'envisaged that an individual producer's right to coal chain capacity would not be affected by the performance of another producer (or their service provider), and that those responsible for causing losses in system capacity would wear the impact of doing so. This intent was then reflected in the Long-Term Ship or Pay contracts entered into between PWCS and producers.'⁵³⁶

PWCS also submits that the proposed 2010 HVAU 'falls short of this objective in a number of areas' including that 'there should be a stronger, more positive obligation on ARTC to identify shortfalls in the first instance; the current wording suggests the ARTC only needs to act if they identify a shortfall, but does not obligate them to continually monitor track operations to ensure shortfalls will be recognised as and when they occur'.⁵³⁷

⁵³³ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 61.

⁵³⁴ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, pp. 62-63.

⁵³⁵ HVCCC, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 2.

⁵³⁶ PWCS, *Submission in Relation to Australian Rail Track Corporation's proposed Hunter Valley Rail Network Access Undertaking*, 25 October 2010, p. 6.

⁵³⁷ PWCS, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 7.

ACCC views

It is the ACCC's view that the amendments in section 5.4 of the proposed 2010 HVAU, , go a certain way towards dealing with the concerns raised in the March 2010 Draft Decision in relation to there needing to be a clear mechanism for the identification of shortfalls in existing capacity.⁵³⁸

The ACCC notes the submissions that section 5.4 should set out how or when during the relevant month ARTC will actually identify that there is a shortfall in capacity. The ACCC considers however, that at this point in time it is unnecessary for the proposed 2010 HVAU to be more prescriptive in relation to the process ARTC will follow to identify a shortfall. The relevant sections of the undertaking and IAHA set out how ARTC will respond to a capacity shortfall once identified, and subject to the amendments recommended in this Position Paper, those provisions are likely to be appropriate. The ACCC also notes that the undertaking provides for ongoing consultation between ARTC and the HVCCC, both in relation to the various consultation obligations and as a result of the liaison around the daily scheduling of trains. The ACCC considers that potential shortfalls in rail capacity should be identified pursuant to this interaction between the two entities.

The ACCC acknowledges however, that a positive obligation on ARTC to seek out potential shortfalls may be beneficial, and may promote more proactive interaction between the various Hunter Valley supply chain participants. The desirability of such a provision may, however, more appropriately be considered as part of the review of the mechanisms for identifying and assigning loss of capacity on the network, as contemplated in section 5.9. That is, the ACCC does not consider that the lack of such a positive obligation at this stage would, of itself, make it inappropriate to accept the proposed 2010 HVAU.

10.5.2 Events leading to capacity shortfalls of less than five days and allocation of Capacity other than on a pro-rata contractual basis

In the March 2010 Draft Decision, the ACCC noted that ARTC proposed to amend section 5.5 to reduce the length of the time of a short term shortfall from 7 to 5 days or less.⁵³⁹ The ACCC notes that the proposed 2010 HVAU has shortened this period to 5 days.

In addition the ACCC was of the view that it was unclear why ARTC included an ability to simply 'take into account' its contractual obligations to access holders [under section 5.5(a)(ii) of the proposed 2010 HVAU], and that instead ARTC should amend the HVAU so that the rationale for the required flexibility and objective of the provision was clear and certain. The ACCC notes that the proposed 2010 HVAU has provided greater detail in relation to the rationale for this flexibility and the objective of the provisions relevant to the allocation of capacity other than on an equitable contractual basis.

The proposed amendments to section 5.5 of the HVAU are:

5.5 Event leading to Capacity Shortfall of less than five days

⁵³⁸ ACCC, Draft Decision on HVAU, 5 March 2010, p. 300.

⁵³⁹ ACCC, Draft Decision on HVAU, 5 March 2010, p. 301.

- (a) If ARTC expects that an event resulting in a Capacity Shortfall will be for a duration of five days or less and there will be insufficient Capacity to meet all remaining unconditional Capacity entitlements held by all Access Holders in that Month after taking into account likely usage of Access Holders with an allocation period of a quarter, ARTC will allocate the Capacity available in accordance with the following principles:
 - (i) Capacity will be allocated first to passenger services in accordance with ARTC's obligations under section 88L of the *Transport Administration Act 1988 (NSW)*; and
 - (ii) Capacity remaining after the allocation of Capacity under subsection (a) 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 (for example, minimising the number of Access Holders affected) but may allocate Capacity other than on an equitable basis if it is consistent with the objective of ensuring efficient utilisation of the Network during the Capacity Shortfall and after considering any recommendations provided by the HVCCC under section 5.4(a)(ii).
- (b) ARTC will promptly inform the HVCCC of the result of the allocation of Capacity under section 5.5(a).

ARTC submissions

ARTC notes that it 'has clarified the titles of sections 5.5 and 5.6 to make it clear it is the duration of the event leading to the capacity shortfall that is relevant - not the capacity shortfall itself.'⁵⁴⁰

ARTC has also amended the section to reflect the shorter 5 day period.⁵⁴¹

ARTC also submits that '[s]ubsection 5.5(a)(ii) has been amended to make it clear that ARTC's objective is to ensure the Network is efficiently utilised during the period of the short term temporary shortfall and that with this objective in mind, ARTC has a discretion to allocate the remaining Capacity as it sees fit, but taking into account ARTC's contractual obligations.'⁵⁴²

In addition, ARTC submits that it has 'included subsection 5.5(b) to address ACCC's concern that ARTC inform the HVCCC of the result of the capacity shortfall. The same change is made at section 5.6(b) and 5.7(b)'.⁵⁴³

Stakeholder views

Coal & Allied

Coal & Allied notes that ARTC has made 'certain amendments to the Capacity Shortfall provisions in sections 5.4 – 5.7 of the proposed HVAU and clause 6 of the proposed IAHA.'⁵⁴⁴ Coal & Allied submits that the 'principal amendment made is to

⁵⁴⁰ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, [Appendix 1], p. 22.

⁵⁴¹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, [Appendix 1], p. 22.

⁵⁴² ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, [Appendix 1], p. 22.

⁵⁴³ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, [Appendix 1], p. 22.

⁵⁴⁴ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 61.

reduce the "short-term shortfall" period from seven days or less to five days or less.⁵⁴⁵

Coal & Allied is of the view that 'while the Capacity Shortfall provisions in the Proposed HVAU and Proposed IAHA have been improved, they will not sufficiently promote the economically efficient operation of ARTC's Network or appropriately take account of the interests of Access Holders for the following reasons:

- (c) The Capacity Shortfall provisions grant ARTC too much discretion. C&A believes that there are very few events that would result in a Capacity Shortfall of greater than five days. Consequently, ARTC will have discretion to allocate losses for almost all events that result in a Capacity Shortfall. To put this into perspective, a Capacity Shortfall lasting for five days would result in approximately 1.4Mt of lost throughput, which is worth approximately \$70 million in lost profits for the industry.⁵⁴⁶

...

- (d) Under clause 6.2(b) of the draft IAHA lodged by ARTC dated 23 December 2009 (*23 December IAHA*) [which is now clause 6.2(a)(ii) of the IAHA and section 5.5(a)(ii) of the proposed 2010 HVAU], when allocating capacity ARTC was required to take into account the impact on the efficient utilisation of "Capacity and Coal Chain Capacity". However, under the Proposed HVAU and Proposed IAHA ARTC has removed the requirement to take into account the impact on Coal Chain Capacity and is instead only required to take into account the impact on its Network.

In its Explanatory Guide, ARTC has not explained its reasons for removing this requirement. In the absence of a reasonable explanation, C&A considers the removal of this requirement as inappropriate. If ARTC is not required to take into account Coal Chain Capacity when exercising its discretion in allocating Capacity, there is real potential for misalignment along the Coal Chain.

- (e) ARTC is not expressly required to seek to minimise the number of affected Access Holders when exercising its discretion. Further, for events leading to a Capacity Shortfall of greater than five days, ARTC is obliged to allocate Capacity in accordance with the principle that contracted path usages from unaffected load points will not be reduced (see section 5.6(a)(ii) of the Proposed HVAU and clause 6.3(a)(ii) of the Proposed IAHA). However, no such principle exists in relation to Capacity Shortfalls of less than five days, which, as described above, C&A believes will constitute almost all Capacity Shortfalls. C&A considers that there is a consequent risk that ARTC will exercise its discretion to reduce contracted path usages from unaffected load points for events lasting less than five days.

...

- (g) As the shortfall and compression provisions in the Draft Undertaking and PWCS Terminal Access Protocol are not aligned, the treatment of capacity shortfalls by ARTC does not appropriately balance the interests of the various producers and ARTC. The proposed

⁵⁴⁵ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 61.

⁵⁴⁶ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 61.

arrangements mean that producers will be subject to two different sets of provisions which may prove problematic in practice.⁵⁴⁷

In relation to the allocation of shorter term capacity shortfalls under section 5.5 of the proposed 2010 HVAU, Coal & Allied propose that:

- (c) ARTC only be able to allocate Capacity at its discretion for events leading to Capacity Shortfalls of less than two days rather than five days.
- (d) The obligation on ARTC to take into account the impact on Coal Chain Capacity when allocating Capacity be reinserted such that ARTC is obliged to ensure, as far as is practicable, that the Network is efficiently used and the overall impact on Coal Chain Capacity throughput is minimised. As ARTC is already required to consult with the HVCCC when it identifies a Capacity Shortfall, ARTC could easily request the HVCCC's recommendation for allocating Capacity in a way that takes into account the impact on Coal Chain Capacity.
- (e) Clause 5.5(a)(ii) of the Proposed HVAU and clause 6.2(a)(ii) of the Proposed IAHA be amended so that ARTC is obliged to allocate Capacity in accordance with the principle that contracted path usages from unaffected load points will not be reduced.
- (f) ARTC act on the HVCCC's recommendation as to what an "affected load point" is. If ARTC fails to act on a recommendation, it should ... publish to the industry the reasons for not doing so.

...
- (h) The language of clause 3.14(a) of the Proposed IAHA be amended so that ARTC 'must not' make Path Usages available where the Access Holder does not have sufficient Network Exit Capability.
- (i) Section 5.5(a)(ii) of the Proposed HVAU be made consistent with clause 6.2(a)(ii) of the Proposed IAHA.⁵⁴⁸

NSWMC

The NSWMC submits that the proposed review in section 5.9 of the HVAU should propose a solution to its concern that the 'five day period for Capacity Shortfall events currently proposed in s 5.5 [and] 5.6 of the proposed 2010 HVAU and clause 6 of the proposed IAHA will, in practical terms, have the effect of providing ARTC with total discretion to allocate all likely shortfalls in track capacity, with no regard to either "at fault" or "affected producers", potentially leading to inequitable outcomes'.⁵⁴⁹

PWCS

PWCS submits that it was 'envisaged that an individual producer's right to coal chain capacity would not be affected by the performance of another producer (or their service provider), and that those responsible for causing losses in system capacity

⁵⁴⁷ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 62.

⁵⁴⁸ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 63.

⁵⁴⁹ NSWMC, Submission in Response to ACCC Consultation Paper, p. 10.

would wear the impact of doing so. This intent was then reflected in the Long-Term Ship or Pay contracts entered into between PWCS and producers.⁵⁵⁰

PWCS also submits that the proposed 2010 HVAU ‘falls short of this objective in a number of areas’ including that clause 6 in the IAHA and section 5.5 in the proposed 2010 HVAU ‘provide ARTC with effectively total discretion to allocate shortfalls relating to events with a shortfall of five days or less.’⁵⁵¹

PWCS submits that in its ‘experience, nearly all track shortfalls are cleared within five days or less, so the Clause has the effect of enabling ARTC to distribute capacity losses as they see fit, regardless of the cause of a loss, or the producers affected.’⁵⁵²

RailCorp

RailCorp submits that it ‘is concerned that the amendments to clauses 5.4, 5.5 and 5.6 need further amendment to make it clear that in the event of a capacity shortfall capacity will be allocated first to passenger services and that there will be no reduction of passenger services during the this period. RailCorp believes that this was the intent of the original clause.’⁵⁵³

Xstrata

Xstrata submits that it ‘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.’⁵⁵⁴

However, Xstrata also submits 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.’⁵⁵⁵

Xstrata submits that 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.’⁵⁵⁶

Xstrata also submits 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.’⁵⁵⁷

Xstrata submits that regardless of whether its 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

⁵⁵⁰ PWCS, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 6.

⁵⁵¹ PWCS, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 7.

⁵⁵² PWCS, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 7.

⁵⁵³ RailCorp, Submission in Response to ACCC Consultation Paper, p. 5.

⁵⁵⁴ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 13.

⁵⁵⁵ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, pp. 13-14.

⁵⁵⁶ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 14.

⁵⁵⁷ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 14.

short fall provisions.⁵⁵⁸ Xstrata submit that 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.’⁵⁵⁹

Xstrata also submits that the HVAU should be amended so that:

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.”⁵⁶⁰

Xstrata also submits that clauses 6.2 and 6.3 of the IAHA should be similarly amended.⁵⁶¹

ACCC views

The ACCC considers that the amendments in section 5.5(a)(ii) of the proposed 2010 HVAU go a certain way to addressing the uncertainty in the previous drafting where ARTC could exercise its discretion to allocate capacity other than on a pro-rata contractual basis.⁵⁶² The ACCC recognises that including wording relating to the rationale for and objective behind the flexibility in the provision that allows ARTC to ‘take into account’ its contractual obligations when allocating remaining unconditional Capacity, provides additional clarity.

As noted in the March 2010 Draft Decision, the ACCC understands that the purpose of section 5.5 is to provide ARTC with flexibility when reallocating capacity in response to a short term shortfall, thereby allowing, in certain limited circumstances, ARTC to coordinate a speedy response in consultation with the HVCCC and to minimise any potential losses in supply chain efficiency that may have been created by the shortfall. The ACCC understands that ARTC’s ability to ‘get the system up and running efficiently again’ in this specific and limited set of circumstances may be hampered by a requirement in the HVAU that ARTC must distribute the available capacity on a pro-rata basis in accordance with Access Holders’ contractual rights.

The ACCC continues to accept ARTC’s requirement, as was noted in the March 2010 Draft Decision, that in allocating remaining capacity other than on an equitable contractual basis that has occurred as a result of a short term shortfall, ARTC must

⁵⁵⁸ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 14.

⁵⁵⁹ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 14.

⁵⁶⁰ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 27.

⁵⁶¹ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 27.

⁵⁶² ACCC, Draft Decision on HVAU, 5 March 2010, pp. 300-301.

have an ability to exercise this discretion in order to maximise the efficient utilisation of the supply chain. However, the ACCC is also of the view that the drafting of this provision can be further amended to provide greater certainty and clarity as to the operation of the reallocation provision in section 5.5 as a whole.

Five day period

The ACCC notes that interested parties have suggested that the five day period referred to in section 5.5 be reduced to two days.

The ACCC acknowledges that a reduction from five days to two days may provide a more appropriate balance, in the longer term, between the interests of Access Holders having their Capacity allocated on an equitable basis and ARTC's ability to coordinate a speedy response in consultation with the HVCCC in order to minimise any potential losses in supply chain efficiency that may have been created by the shortfall.

However, the ACCC is of the view that at this point in time, there is insufficient evidence not to find the five day period appropriate in the short term (namely the period prior to the review process set out in section 5.9 of the HVAU), particularly as only a small percentage of events are likely to be affected by this period not being shortened (i.e. those events between 2 and 5 days). As noted by Xstrata, '[s]hortfalls of more than two days in length are comparatively rare in the Hunter Valley coal chain'.

The desirability of such a reduction may, however, more appropriately be considered as part of the review of the mechanisms for assigning loss on the network, as contemplated in section 5.9. That is, the ACCC does not consider that the lack of such a reduction at this stage would, of itself, make the proposed 2010 HVAU inappropriate to accept.

Allocating capacity in a manner consistent with the objective of ensuring efficient utilisation of the Network during the Capacity Shortfall

The ACCC notes that in the April 2009 HVAU, when ARTC exercised its discretion to allocate capacity other than on an equitable contractual basis, it was required to take into account 'any impact on the efficient utilisation of Capacity and Coal Chain Capacity' [under section 5.3(a)(ii) of the April 2009 HVAU, which is now section 5.5(a)(ii) of the proposed 2010 HVAU].

The ACCC also notes that in section 5.5(a)(ii) of the proposed 2010 HVAU, when ARTC is to exercise its discretion to allocate capacity other than on an equitable contractual basis, it can now do so 'if it is consistent with the objective of ensuring efficient utilisation of the Network ...'.

The ACCC is of the view that this amendment has inappropriately weakened the boundaries of ARTC's discretion in this context and increased the potential for misalignment, which is not in the interests of the economically efficient operation of the supply chain. The definitions of 'Capacity' and 'Coal Chain Capacity' combined refer to a wider supply chain concept than the 'Network' alone and better encompass

the system wide capacity of the Hunter Valley Coal Chain ‘including below rail, above rail and port services’.⁵⁶³

Therefore, the ACCC’s view is that ARTC should amend section 5.5(a)(ii) so that when exercising its discretion to allocate capacity other than on an equitable contractual basis, it can only do so ‘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 5.4(a)(ii)’.

Minimising the number of affected access holders and ensuring the discretion is exercised in a non-biased manner

The ACCC notes that it has been suggested that when exercising its discretion to allocate capacity under the shorter term capacity shortfall provisions in section 5.5, that ARTC be obliged to ‘allocate Capacity in accordance with the principle that contracted path usages from unaffected load points will not be reduced’ and that ARTC must ‘act on the HVCCC’s recommendation as to what an “affected load point” is’.⁵⁶⁴ It has also been suggested that ARTC be obliged to publish details of how the capacity shortfall provisions are given effect in each instance and that ARTC should be obliged to endeavour over time to ensure that there is no consistent bias in the way that Access Holders are treated.⁵⁶⁵

The ACCC is of the view that imposing a strict requirement on ARTC that there would be no reduction in contracted path usages from “unaffected load points” (as informed by the HVCCC) when allocating capacity under section 5.5 could potentially undermine the effectiveness of ARTC having discretion under this provision where the main purpose of section 5.5 is to allow ARTC to quickly minimise any potential short term losses in supply chain efficiency in the most efficient way possible.

However, the ACCC does consider that the provision should be amended so that ARTC is required to use its best endeavours, to the extent practicable, to not reduce contracted access rights from load points not affected by the Capacity Shortfall, so as to minimise the number of affected access seekers when exercising its discretion under section 5.5(a)(ii).

In addition, the ACCC does not consider an amendment to require ARTC to publish details as to how it allocated capacity under section 5.5 necessary, nor to include a specific requirement that ARTC endeavour over a longer period to ensure that there is no consistent bias in the way that Access Holders are treated under section 5.5. The ACCC considers that each short term Capacity Shortfall and the response by ARTC is likely to be distinctive in each instance. As a result, such a requirement would be unlikely to provide Access Holders with any predictive benefit as to how ARTC will act in any particular situation. Further, as a result of the recommended amendment, ARTC will only be able to 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 Shortfall. As a result, any scope for ARTC to act in a

⁵⁶³ ARTC, *Hunter Valley Coal Network Access Undertaking*, 7 September 2010, section 9.1.

⁵⁶⁴ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 63.

⁵⁶⁵ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 14.

manner that is consistently biased towards a particular producer or group of producers would be limited.

Other matters

The ACCC notes that parties have raised the point that as the shortfall and compression provisions in the proposed 2010 HVAU are not aligned with the PWCS Terminal Access Protocols, there is the potential for misalignment as a result of the two different sets of provisions.⁵⁶⁶ The ACCC considers that this concern is dealt with via the Network Exit Capability requirement, which provide that ARTC may not make path usages available where an Access Holder does not have sufficient matching port capacity.

The ACCC also notes RailCorp's concern that the amendments to section 5.5 need further amendment to make it clear that in the event of a capacity shortfall, capacity will be allocated to passenger services during this period. The ACCC is of the view that section 5.5(a)(i) sufficiently sets out that in the event of a shortfall, 'Capacity will be allocated first to passenger services in accordance with ARTC's obligations under section 88L of the *Transport Administration Act 1988 (NSW)*'.⁵⁶⁷

Finally, the ACCC notes that section 5.5(a)(ii) of the proposed 2010 HVAU and clause 6.2(a)(ii) of the proposed IAHA are not the same. The ACCC recommends that ARTC's intended wording be reflected in both provisions. In addition, it is noted that section 5.5(a)(ii) contains a reference to 'subsection (a)'. The ACCC recommends that this provision be amended so that it accurately refers to 'subsection (a)(i)' as appears to have been intended.

10.5.3 Capacity shortfall provisions should only apply to 'affected users' (section 5.6)

In the March 2010 Draft Decision the ACCC was of the view that under section 5.6 it was unclear whether or not ARTC intended the capacity shortfall provisions to apply to all access holders or just those Access Holders whose Capacity has been directly affected by the shortfall. In light of this, the ACCC considered that an approach that socialises the shortfall in capacity across affected Access Holders as likely to be considered appropriate, provided (amongst other things) it is clear and certain who will constitute an 'affected access holder'.⁵⁶⁸

ARTC submissions

ARTC submits that the 'amendments to this section [5.6 of the HVAU] clarify that an Access Holder will be an affected Access Holder where the impact of the Incident occurs between the load point and the exit point and the Access Holder has some remaining contractual entitlement to Path Usages in the Period.'⁵⁶⁹

⁵⁶⁶ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 63.

⁵⁶⁷ RailCorp, Submission in Response to ACCC Consultation Paper, p. 5.

⁵⁶⁸ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 299-300.

⁵⁶⁹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, [Appendix 1], p. 23.

Stakeholder views

Coal & Allied

Coal & Allied proposed that ARTC be 'bound to accept the HVCCC's recommendations or advice in relation to ... (ii) determining/confirming who are "affected producers" for the purposes of clause 6 [and section 5.6 of the HVAU].'⁵⁷⁰

Coal & Allied also submitted that ARTC should 'act on the HVCCC's recommendation as to what an "affected load point" is' and if 'ARTC fails to act on a recommendation, it should ... publish to the industry the reasons for not doing so.'⁵⁷¹

RailCorp

RailCorp submits that it 'is concerned that the amendments to clauses 5.4, 5.5 and 5.6 need further amendment to make it clear that in the event of a capacity shortfall capacity will be allocated first to passenger services and that there will be no reduction of passenger services during the this period. RailCorp believes that this was the intent of the original clause.'⁵⁷²

Transport NSW

Transport NSW 'welcomes the amendments to clauses 6.2(a)(i) and 6.3(a)(i) of the Indicative Access Holder Agreement which now mirror sections 5.5 and 5.6 of the proposed Undertaking and provide that, where there is a shortfall in capacity, available capacity is to be allocated first to passenger services in accordance with ARTC's obligations under section 88L of the *Transport Administration Act*.'⁵⁷³

ACCC views

It appears to the ACCC that the amendments in section 5.6 of the proposed 2010 HVAU provide a greater degree of clarity in relation to who will be an 'affected user' for events leading to Capacity Shortfalls of greater than five days, and therefore deals with the concerns raised in the March 2010 Draft Decision in relation to it being unclear whether the capacity shortfall provisions applied to all Access Holders' Train Paths (including those whose Train Paths are not affected by the shortfall).⁵⁷⁴

The ACCC notes the view of Coal & Allied that ARTC should be bound to accept the HVCCC's recommendations or advice in relation to determining / confirming the 'affected producers' in a capacity shortfall situation (or that ARTC should be required to publish reasons for not accepting the HVCCC's views). The ACCC also notes however the accepted view amongst industry (based on submissions received to the ACCC's 2010 Consultation Paper) is that there are very few Capacity Shortfalls that would continue for longer than 5 days.

In light of this, it is the ACCC's view that a further explicit requirement mandating ARTC to engage in a consultation process with the HVCCC in all instances in order to determine / confirm the 'affected producers' appears to be impractical. The ACCC is of the view that the existing obligation on ARTC to consult with the HVCCC under

⁵⁷⁰ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 73.

⁵⁷¹ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 63.

⁵⁷² RailCorp, Submission in Response to ACCC Consultation Paper, p. 5.

⁵⁷³ Transport NSW, *re ARTC Hunter Valley Access Undertaking*, 29 October 2010, p. 2.

⁵⁷⁴ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 299-300.

section 5.4(a)(ii) of the HVAU, in combination with the requirement on ARTC to inform the HVCCC of the result of the allocation of Capacity under section 5.6(b), provides ARTC with the necessary flexibility to consult with the HVCCC to the extent appropriate given the specific circumstances of a particular shortfall, in order to best co-ordinate its response. The ACCC is also of the view that requiring ARTC to accept a recommendation from the HVCCC regarding affected Access Holders may not give ARTC the ability to adequately consider the interests of non-coal access seekers during the period of the capacity shortfall.

Finally, the ACCC notes RailCorp's concern that the amendments to section 5.6 need further amendment to make it clear that in the event of a capacity shortfall, capacity will first be allocated to passenger services during this period. The ACCC is of the view that section 5.6(a)(i) sufficiently sets out that in the event of a shortfall, 'Capacity will be allocated first to passenger services in accordance with ARTC's obligations under section 88L of the *Transport Administration Act 1988 (NSW)*'.⁵⁷⁵

10.5.4 Mechanism to facilitate contractual alignment where Capacity is reallocated under the capacity shortfall provisions

It was the ACCC's view in the March 2010 Draft Decision that the HVAU should include a mechanism that requires ARTC to consult with the HVCCC where there is to be a reduction in access holders' below rail access rights as a result of the capacity shortfall provisions being utilised in order to attempt to minimise any losses in supply chain efficiency.⁵⁷⁶

It is the ACCC's view that the amendments to the Capacity Shortfall provisions, including the consultation mechanism provided in section 5.4(a)(ii) and Schedule F of the HVAU (when identifying the shortfall), and the obligation on ARTC to inform the HVCCC of the result of any reallocation of Capacity under sections 5.5, 5.6 and 5.7, deals with the concerns raised in the March 2010 Draft Decision in relation to the Capacity Shortfall provisions being exercised and resulting in a reduction in access holder's below rail access rights – alleviating concerns around possible misalignment between below rail and port access rights.

10.6 Shortfalls in Additional Capacity

Section 5.7 of the HVAU provides a mechanism to allocate Capacity on an equitable pro-rata basis where there is a delay in the completion of a project creating Additional Capacity, or a project creating Additional Capacity creates less Capacity than expected.

In the March 2010 Draft Decision, the ACCC recommended that section 5.7 of the HVAU include a mechanism that requires ARTC to consult with the HVCCC when there has been a reduction in Access Holders' expected below rail access rights to Coal Chain Capacity as a result of a shortfall in the creation of Additional Capacity in order to attempt to minimise any losses in supply chain efficiency.⁵⁷⁷ The ACCC also notes that a further amendment has been made in the proposed 2010 HVAU to clarify

⁵⁷⁵ RailCorp, Submission in Response to ACCC Consultation Paper, p. 5.

⁵⁷⁶ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 301-302.

⁵⁷⁷ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 302-303.

that section 5.7 applies in the situation where a project, when completed, creates less capacity than was originally expected.

ARTC submits that it has amended section 5.7 of the HVAU ‘in response to producers’ concerns that this provision does not address the scenario where a shortfall arises because a project delivers less than expected capacity.’⁵⁷⁸ ARTC submits that it has also ‘included subsection [5.7(b)] ... to address ACCC’s concern that ARTC inform the HVCCC of the result of the capacity shortfall.’⁵⁷⁹

The HVCCC submitted that ‘ARTC’s commitment to promptly inform [the] HVCCC of the result of the allocation of Capacity {Clauses 5.5, 5.6 and 5.7} is appropriate.’⁵⁸⁰

The ACCC considers that the amendments in section 5.7 of the proposed 2010 HVAU, specifically the obligation on ARTC to inform the HVCCC of the result of any allocation of Capacity under section 5.7, adequately deal with the concerns raised in the March 2010 Draft Decision in relation to potential misalignment resulting from there being a shortfall in the creation of Additional Capacity.

10.7 Capacity Resumption

Under section 5.8(a) of the 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. Clause 11.4 of the IAHA is identified as a Tier 1 mandatory term in Schedule A:1 of the HVAU.

Under the proposed amendments, the resumption provisions will only be triggered where an Access Holder has not utilised their path usage 80 per cent of the time over a six month period (or for smaller producers, two consecutive quarterly periods).

Further, where an Access Holder has failed the above requirement, ARTC must request that the Access Holder provide reasons demonstrating a sustained requirement for the Path Usages not utilised in the previous six months.

10.7.1 March 2010 Draft Decision

In the March 2010 Draft Decision, the ACCC was of the view that:

- the provisions relating to capacity resumption in the April 2009 IAHA appeared to have been inappropriately weakened in the revised December IAHA and may not have allowed for the effective enforcement of the capacity resumption provisions by ARTC;⁵⁸¹
- it may be appropriate to include provisions relating to capacity management (which would include capacity resumption) in the HVAU itself, which can then be

⁵⁷⁸ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010,[Appendix 1] , p. 23.

⁵⁷⁹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010,[Appendix 1] , p. 22.

⁵⁸⁰ HVCCC, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 2.

⁵⁸¹ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 304-306.

mirrored in access agreements, in order to ensure consistent application of capacity management protocols across access seekers on the network;⁵⁸²

- given the importance of contractual alignment to the efficient operation of the Hunter Valley coal chain, the HVAU should include a mechanism that requires ARTC to consult with the HVCCC when there is to be a reduction in Access Holders' below rail access rights as a result of the capacity resumption provisions being utilised;⁵⁸³ and
- the criteria or processes ARTC intended to use to make an assessment that a quantity of coal is 'substantially consistent' with the capacity of a train under clause 11.4(d)(ii) of the IAHA and that the meaning of the term was unclear.⁵⁸⁴

10.7.2 ARTC submission

In response to the Draft Decision, ARTC has amended clause 11.4 as set out above. ARTC submitted that this amendment is aimed at strengthening the anti-hoarding provisions without amending the threshold for resumption.⁵⁸⁵

ARTC has also identified clause 11.4 as a Tier 1 (Mandatory) provision in Schedule A:1.

10.7.3 Stakeholder views

In response to the Draft Decision, the ACCC received a number of submissions disagreeing with the ACCC's view in relation to the amendments made to the 24 December IAHA that the thresholds in clause 11.4 had been inappropriately weakened.

Macquarie Generation

Macquarie Generation submitted that it 'disagrees with the ACCC's decision in this regard' and that to 'ensure a stable supply of electricity to the eastern States, Macquarie Generation requires constant rail access for fuel delivery, and would seek to negotiate conditions which matched our long term coal supply agreements.'⁵⁸⁶

Macquarie Generation also submitted that '[t]o remove rail access without the ability to show cause is inequitable and may impact the Corporation's ability to generate electricity. Again, the differences between coal haulage for export compared with domestic electricity supply are not adequately considered.'⁵⁸⁷

Anglo

Anglo submitted that 'the most appropriate approach to capacity resumption is the position agreed between ARTC and coal producers and set out in clauses 11.4(a) – (e) of the 24 December IAHA.'

⁵⁸² ACCC, Draft Decision on HVAU, 5 March 2010, p. 304.

⁵⁸³ ACCC, Draft Decision on HVAU, 5 March 2010, p. 306.

⁵⁸⁴ ACCC, Draft Decision on HVAU, 5 March 2010, p. 306.

⁵⁸⁵ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, [Appendix 1], p. 39.

⁵⁸⁶ Macquarie Generation, *Australian Rail Track Corporation Limited Hunter Valley Coal Network Access Undertaking – Draft Decision 5th March 2010*, 23 March 2010, p. 2.

⁵⁸⁷ Macquarie Generation, Submission in Response to ACCC Draft Decision, 23 March 2010, p. 2.

Anglo submitted that the this position ‘as reflected in clauses 11.4(a) – (e) of the 24 December IAHA provides appropriate incentives from smaller coal producers to ‘use or lose’ capacity as well as safeguards to protect producers from fluctuations in production or market demand. It is important for smaller coal producers such as Anglo to have a quarterly allocation and to not automatically lose train paths if their quarterly allocations are not met in one period.’⁵⁸⁸

Anglo noted that it ‘understands the ACCC’s concerns in relation to efficiency’ but submits that ‘certainty of contractual position is essential for coal producers and in particular smaller producers. The level of flexibility inherent in the position agreed between ARTC and coal producers and reflected in the 24 December IAHA is especially important in circumstances where there are long term contract as the loss of train paths may have significant commercial consequences.’⁵⁸⁹

Coal & Allied

Coal & Allied submitted that ‘at the least, the test for resumption as it currently appears in the 24 December IAHA is appropriate given the practical realities of coal mine production.’⁵⁹⁰

NSWMC

The NSWMC submitted that it:

requested the changes to the capacity resumption provision that ARTC included in the 24 December draft of the HVAU to allow for potential fluctuations in the use of coal producers’ capacity entitlements relative to the uniform periodic allocations of capacity under the HVAU. These fluctuations may arise from time to time due to fluctuations in customer off-take, the timing of large coal shipments, Force Majeure, Availability Exceptions and operational reasons such as longwall equipment moves and adverse geological conditions in the mines which can curtail or stop coal production for significant periods. Examination of production and coal shipment volumes by producers indicated the changes to the capacity resumption provisions and tolerances that would be necessary.

The NSWMC also submitted that ‘without appropriate tolerances for short term underutilisation of capacity entitlements, coal producers will be at risk of resumption of part or all of their capacity entitlements due to short term throughput fluctuations which are an inherent part of their business.’⁵⁹¹

Xstrata

Xstrata noted ‘that the ACCC considers the presently proposed provisions in relation to the resumption of under-utilised capacity to be insufficient’ and raises ‘two key concerns in relation to the ACCC’s findings:’

⁵⁸⁸ Anglo Coal, *Submission to the ACCC regarding its Draft Decision on Australian Rail Track Corporation Ltd’s Hunter Valley Coal Network Access Undertaking dated 5 March 2010*, 31 March 2010, p. 5.

⁵⁸⁹ Anglo Coal, *Submission on ACCC Draft Decision*, 31 March 2010, p. 5.

⁵⁹⁰ Coal and Allied, *Submission in Response to Draft Decision on Australian Rail Track Corporation Hunter Valley Coal Network Access Undertaking*, 31 March 2010, p. 3.

⁵⁹¹ NSW Minerals Council Hunter Rail Access Task Force, *Submission to Australian Competition and Consumer Commission regarding the Draft Decision in relation to Australian Rail Track Corporation Hunter Valley Coal Network Access Undertaking*, 1 April 2010, p. 9.

(a) the ACCC appears to favour ARTC having an economic incentive to resume Path Usages which are “under utilised”. Xstrata is of the view that there is no benefit to ARTC doing so, except where there is an alternative user seeking access to those paths. The original Access Holder continues to be liable to pay a TOP Charge in relation to Path Usages, even where they are not used. Provided that other Applicants for capacity are able to access under utilised Path Usages through making an application to ARTC which then enables ARTC to trigger the resumption process, Xstrata does not understand the benefit of resuming paths where there is no alternative user to assume liability for the TOP Charges; and

(b) the use of an 80% utilisation test over a 6 month period recognises the inherent variability of the coal industry. Major force majeure and other events can seriously adversely affect mine production for prolonged periods. The additional threat of resumption of train paths, making reopening of the mine impossible or uneconomic, should only apply after a considerable period of serious under-utilisation. In addition, different Operators utilising different train sizes may require fewer Path Usages, and a short resumption period would run the risk that an Access Holder utilising an Operator with more efficient train sizes (requiring fewer Path Usages) during a short period might be permanently disadvantaged through the loss of Path Usages.⁵⁹²

Aston Resources

In its submission to the proposed 2010 HVAU, Aston Resources expressed concern that ‘the 80% threshold, coupled with the increase to a six-month period and the “show cause” right in clause 11.4(f) has unduly weakened the resumption provisions.’⁵⁹³ Aston Resources submitted that the resumption provisions ‘should be drafted to ensure that available capacity is used by new access seekers and/or competing producers’, as there is ‘no incentive for ARTC, the HVCCC or Producers to ensure that Access Holders “use” or “lose” capacity.’⁵⁹⁴ Aston also noted that ARTC is not obliged to resume pathways under the IAHA, rather that the IAHA provides that ARTC may elect to do so.⁵⁹⁵

Aston Resources submitted that, if a reasonable operational reason for under-utilisation is not provided, ‘ARTC should be required to resume the effected paths, at the very least in circumstances where there is a Capacity Shortfall.’ Alternatively where ARTC retains a residual discretion, Aston submitted that it would be appropriate ‘to require producers to “show cause” at a higher under-utilisation threshold – e.g. < 90% over a quarter.’⁵⁹⁶ Aston Resources proposed a ‘tiered’ approach to capacity resumption as a means of addressing its concerns.⁵⁹⁷

Aston also submitted that, under the Capacity Framework Arrangements at the Port of Newcastle, ‘PWCS and NCIG are required to mandatorily compress for under-utilisation in the event of a capacity shortfall’, which Aston submitted protects new access seekers when there is a delay in the construction of additional capacity.⁵⁹⁸ Aston Resources considered that it ‘is very important that the resumption provisions

⁵⁹² Xstrata, *Submission in Response to ACCC Draft Decision on ARTC Hunter Valley Coal Network Access Undertaking*, Attachment 1, 8 April 2010, p. 8.

⁵⁹³ Aston Resources, *Submission in Response to ACCC Consultation Paper*, 25 October 2010, p. 5.

⁵⁹⁴ Aston Resources, *Submission in Response to ACCC Consultation Paper*, 25 October 2010, p. 5.

⁵⁹⁵ Aston Resources, *Submission in Response to ACCC Consultation Paper*, 25 October 2010, p. 5.

⁵⁹⁶ Aston Resources, *Submission in Response to ACCC Consultation Paper*, 25 October 2010, p. 5.

⁵⁹⁷ Aston Resources, *Submission in Response to ACCC Consultation Paper*, 25 October 2010, p. 5.

⁵⁹⁸ Aston Resources, *Submission in Response to ACCC Consultation Paper*, 25 October 2010, p. 5.

in the 2010 HVAU are effective given that the resumption provisions in the Capacity Framework Arrangements are only triggered in the event of a Capacity Shortfall and not mandatorily in the case of under-utilisation. Otherwise, there is limited incentive for incumbents to trade unneeded capacity.⁵⁹⁹

10.7.4 ACCC view

‘Strength’ of the capacity resumption provision

The ACCC notes that in the 24 December IAHA, ARTC proposed a number of amendments to clause 11.4 of the IAHA providing that the resumption provisions will only be triggered where an Access Holder has not utilised their path usage 80% of the time over a six month period (or for smaller producers, two consecutive quarterly periods).

The ACCC also notes that ARTC has made further amendments to clause 11.4 of the IAHA, which includes a positive obligation on ARTC to investigate a failure of the Access Holder to utilise their path usages 80% of the time over a previous six month period (by requesting that the Access Holder provide reasons demonstrating a sustained requirement for the Path Usages not utilised in the previous six months).

The ACCC reiterates its view from the March 2010 Draft Decision that devising an appropriate and practical approach to capacity resumption is complex given the range of interests that need to be taken into account. The ACCC notes in particular that the submissions received on this issue have highlighted the difference in interests between incumbent users of the network and new entrants.

The ACCC considers that the amendments proposed by ARTC, subject to an increase of the resumption threshold to 85%, would appropriately deal with the concerns raised in the March 2010 Draft Decision in relation to strengthening the provisions on resumption of underutilised capacity. While it is noted that ARTC is not required to resume capacity in specific circumstances, the positive obligation imposed on ARTC to investigate reasons why capacity was not utilised, in addition to the increased threshold, should allow for the effective enforcement of the capacity resumption provisions in the case of genuine capacity hoarding and provide a more appropriate balance between the interests of incumbent users of the network and new entrants. ARTC will nonetheless also retain sufficient discretion to adequately take into account the genuine fluctuations in coal production that can affect a producer’s path usages.

In relation to the concerns raised with regards to the potential for capacity hoarding, the ACCC refers stakeholders to the discussion in relation to the ‘network exit capability’ requirement in the Negotiating for Access chapter which support the anti-hoarding provisions at the ports.

Other issues

The ACCC considers that ARTC has appropriately included clause 11.4 as a Tier 1 (Mandatory) provision, in line with the ACCC’s views in the Draft Decision regarding the alignment of capacity management provisions.

⁵⁹⁹ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 5.

The ACCC notes that, notwithstanding the broader objectives behind the requirement for ARTC to consult with the HVCCC in relation to capacity management more generally (as expressed in the Draft Decision), it agrees with ARTC's view, as set out in its response to the Draft Decision, that it is not necessary for ARTC to engage in a detailed consultation with the HVCCC under clause 11.4 on whether there is to be a reduction in below rail access rights under the capacity resumption provisions as where an Access Holder is not using its track Access Rights, it will also not be using its nominated allocations at the coal terminal at the ports.⁶⁰⁰ The ACCC notes ARTC's comment that it does, in practice, 'inform the HVCCC when it resumes Capacity under clause 11.4 of the IAHA in order to plan the coal schedule'.⁶⁰¹

Finally, the ACCC considers that amendments to clause 11.4(d)(ii) of the IAHA are likely to be appropriate and address the ACCC's concerns expressed in the Draft Decision regarding the use of the term 'substantially consistent.' The amendments make use of a model of '90% of the assumed gross tonnes per Service (loaded) as identified in the Train Path Schedule for that Train Path' as an alternative to the previously undefined phrase 'substantially consistent.'

10.8 Capacity Relinquishment

Under section 5.8(b) of the HVAU, which interacts with clause 11.1 of the IAHA, an Access Holder may reduce its capacity in accordance with the terms set out in the access agreement. Clause 11.1 of the IAHA is identified as a Tier 1 mandatory term in Schedule A:1 to the HVAU.

In the March 2010 Draft Decision the ACCC was of the view that it may be appropriate to include provisions relating to capacity relinquishment on the Hunter Valley rail network in the HVAU itself which can then be mirrored in access agreements, in order to ensure consistent application of capacity management protocols across access seekers on the Network.⁶⁰² ARTC has specified clause 11.1(b)(iii) as a Tier 1 (mandatory) provision, and the ACCC considers that this is appropriate recognition of the matters raised in the Draft Decision.

The ACCC notes that it is not considered necessary that all other provisions in relation to permanent variation to Train Paths in clause 11.1 of the IAHA be included as Tier 1 mandatory terms, as the remaining provisions apply equally to both parties to the IAHA and relate to the voluntary process of relinquishment rather than capacity management on the Network.

ARTC has also made a further amendment to clause 11.1(b)(i)(C) to provide that if ARTC requests that a train path be permanently varied under clause 11.1, then the notice ARTC gives to the Access Holder will state whether ARTC will relieve the Access Holder of its obligation to pay TOP Charges. ARTC submits that it introduced clause 11.1(b)(i)(C) in response to producers' requests that it inform Access Holders of its intended approach up-front.⁶⁰³ The ACCC considers that the amendments to clause 11.1(b)(i)(C) provide greater clarity to how ARTC intends the permanent variation provisions to operate and are likely to be appropriate.

⁶⁰⁰ ARTC, Response to ACCC Draft Decision, cover letter, 31 March 2010, p. 61.

⁶⁰¹ ARTC, Response to ACCC Draft Decision, cover letter, 31 March 2010, p. 61.

⁶⁰² ACCC, Draft Decision on HVAU, 5 March 2010, p. 307.

⁶⁰³ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, [Appendix 1], p. 59.

Finally, in the March 2010 Draft Decision the ACCC was of the view that the circumstances in clause 11.1(b)(iii)(C) under which access holders could not ‘withhold consent’ from ARTC for permanent variations to their train paths where required for the purposes of maximising the use and the reliability of the Network were unclear.⁶⁰⁴ The ACCC considers that the amendments ARTC has made to clause 11.1(b)(iii)(C), which includes a qualifier that ARTC can only permanently vary an Access Holder’s Train Path for the purpose of maximising the use and reliability of the Network, if the variation would not ‘materially adversely affect the Access Holder’s entitlement to the Path Usages set out in the Train Path Schedule’, deal with the concerns raised in the Draft Decision.

10.9 Provisions relating to capacity trading to be consistent

In the March 2010 Draft Decision the ACCC was of the view that it may be appropriate to include provisions relating to capacity trading in the HVAU itself which can then be mirrored in access agreements, in order to ensure consistent application of capacity management protocols across access seekers on the network.⁶⁰⁵

The ACCC notes that ARTC has specified clause 16.4, relating to ‘Temporary Trade of Path Usages,’ and clause 16.5, relating to ‘Treatment of Traded Path Usages,’ as Tier 1 (mandatory) provisions in the proposed 2010 HVAU.

Newcastle Port Corporation submitted that, while clause 16.4 was included as a Tier 1 (mandatory) provision, clause 16.3, relating to permanent trades, and clause 16.6, relating to ARTC’s consideration of whether to consent to permanent and non-safe harbour trades, are not.⁶⁰⁶ Newcastle Port Corporation submitted that it is not clear why these clauses are not included among the Tier 1 provisions, and considered that they should be.⁶⁰⁷

The ACCC considers that inclusion of clauses 16.4 and 16.5 as Tier 1 (mandatory) provisions in the proposed 2010 HVAU is likely to be appropriate, and in line with the ACCC’s views in the Draft Decision. However, the ACCC recommends that all clauses from 16.4 through to 16.8 be included as Tier 1 (mandatory) provisions, as the remaining provisions other than clauses 16.4 and 16.5 are also relevant to the operation of the temporary trading regime. More specifically, clauses 16.6, 16.7 and 16.8 all interact and are related to the temporary trading provisions. There also does not appear to be an obvious reason why those provisions relating to permanent trades (clause 16.3) are not specified as Tier 1 (mandatory) provisions.

⁶⁰⁴ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 307-308.

⁶⁰⁵ ACCC, Draft Decision on HVAU, 5 March 2010, p. 308.

⁶⁰⁶ Newcastle Port Corporation, *Re: ARTC proposed 2010 Hunter Valley Rail Network Access Undertaking*, 21 October 2010, p. 3

⁶⁰⁷ Newcastle Port Corporation, *Submission*, 21 October 2010, p. 3

10.10 Assignment or transfer of an IAHA – clauses 16.1 and 16.2

10.10.1 March 2010 Draft Decision

In relation to the assignment or novation of the IAHA by ARTC, in the March 2010 Draft Decision, the ACCC considered that it was unlikely to be appropriate for an Access Holder not to have an ability to terminate an access agreement where ARTC's lease of the Hunter Valley rail network ended, or where ARTC otherwise lost the ability to offer access to the Network.⁶⁰⁸

In relation to the 'transfer' of the IAHA by the Access Holder, in the March 2010 Draft Decision the ACCC was of the view that ARTC should be under an obligation to act reasonably in relation to requests by Access Holders for consent to assign, trade or novate their rights under the access agreement other than under clauses 16.3 and 16.4.⁶⁰⁹

10.10.2 ARTC submission

Assignment by ARTC

ARTC submitted that a right of an Access Holder to terminate the access agreement in the circumstances described is not appropriate, as ARTC has an obligation under the NSW Lease to include within all ARTC Agreements a right for the Lessor or its nominees to require the novation of the AHAs at the expiration in such circumstances.

⁶¹⁰ ARTC notes that clause 21.4 of the NSW Lease provides:

*"ARTC agrees to include within all ARTC Agreements a right for the Lessor or its nominee, if it so elects, to take an assignment or require the novation of the applicable ARTC Agreement at the expiration or earlier termination of this Deed, at no cost to the Lessor and without the need for the consent of any party to the ARTC Agreements."*⁶¹¹

ARTC submits that amendments to clause 16.1 (and to the corresponding clause in the OSA, clause 19.1) seek to ensure that it complies with this obligation.⁶¹² Clause 16.1 now reads:

16 Assignment, trading and novation

16.1 By ARTC

- (a) The Access Holder agrees that ARTC may, by prior written notice to the Access Holder, assign or novate this agreement, its interest in the subject matter of this agreement or any right under this agreement:
 - (i) to a successor of ARTC or to any body established by any person in relation to the management of the Network or any relevant or material part of it; or

⁶⁰⁸ ACCC, Draft Decision on HVAU, 5 March 2010, p. 239.

⁶⁰⁹ ACCC, Draft Decision on HVAU, 5 March 2010, p. 310.

⁶¹⁰ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, [Appendix 1], p. 45.

⁶¹¹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, [Appendix 1], p. 45.

⁶¹² ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, [Appendix 1], p. 45.

- (ii) on the expiration or earlier termination of the NSW Lease, to the lessor of the Network or a nominee of the lessor of the Network,

and the Access Holder is deemed to have given its consent to an assignment and novation of this agreement and will cooperate with ARTC and execute any instrument reasonably required by ARTC to give effect to the novation or assignment.

- (b) In all circumstances other than those referred to in clause 16.1(a), ARTC may not assign or novate this agreement, its interest in the subject matter of this agreement or any right under this agreement without the prior written consent of the Access Holder, which will not be unreasonably withheld.

Transfer by an Access Holder

In the response to the Draft Decision, ARTC initially proposed amending clause 16.2 to provide that where an Access Holder seeks to ‘license, assign, novate, sell, trade, sub-license or otherwise dispose (“transfer”) of this agreement, its interest in the subject matter of this agreement or any right under this agreement,’ ARTC would not unreasonably withhold its consent.⁶¹³

ARTC then considered that it was no longer appropriate to make this change, as:

- Clause 16.2 of the 2009 IAHA covers transfers broadly but most types of transfers will be permanent assignments, permanent trades or temporary trades. These are covered separately in clause 16.3 and 16.4 of the 2010 IAHA and under these provisions ARTC is required to consent to such transfers provided certain conditions are met.
- One transfer which may not be covered is an assignment or novation of the entire agreement and ARTC considers it should have discretion in relation to consent to such a transfer. Terms of the AHA may be negotiated with a particular applicant and may reflect the individual circumstances of the applicant - ARTC should not be required to extend these terms to an assignee of the access holder who may not be in the same circumstances as the access holder.⁶¹⁴

10.10.3 Stakeholder views

Coal & Allied

Coal & Allied note that clause 16.1(a) deems the Access Holder to have given its consent to ARTC's assignment or novation of the agreement, its interest in the subject matter of the agreement or any right under the agreement in certain circumstances.⁶¹⁵ Coal & Allied noted that in light of ARTC's obligations under clause 21.4 of the NSW Lease, the novation or assignment of the whole of an Access Holder agreement without the consent of the Access Holder would be appropriate in those circumstances covered by the NSW Lease.⁶¹⁶

However, Coal & Allied submitted that ‘unless ARTC is assigning or novating an Access Holder agreement under the requirements of the NSW Lease, ARTC should

⁶¹³ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010,[Appendix 1], p. 46.

⁶¹⁴ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010,[Appendix 1], p. 46.

⁶¹⁵ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 74.

⁶¹⁶ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 75.

be required to seek the consent of Access Holders before novating or assigning the agreement.⁶¹⁷ In particular, Coal & Allied submit that 'in clause 16.1(a) of the Proposed IAHA, ARTC has also sought the right to assign or novate "its interest in the subject matter of the agreement or any right under the agreement"'.⁶¹⁸ Coal and Allied submit that, based on the information provided by ARTC, there is no obligation on ARTC under clause 21.4 of the NSW Lease to impose a right for ARTC to assign or novate an interest or right under the agreement without the Access Holder's consent. Consequently, Coal & Allied does not consider that assignment or novation without the consent of the Access Holder in these circumstances would be appropriate.⁶¹⁹

Coal & Allied also note that they 'agree ... with the ACCC's comments in section 7.4.11.8 of its Draft Decision, that more specificity in relation to the liability of the parties in the event of assignments would add a degree of certainty to these provisions. ARTC has maintained its position that such specificity is unnecessary.'⁶²⁰ Coal & Allied argue that 'it would be in the interests of both parties to have a greater degree of certainty in relation to these provisions and, therefore, considers that the provisions are currently inappropriate.'⁶²¹

Coal & Allied therefore propose that:

- (a) clause 16.1(a) be amended to provide ARTC with the right to assign or novate the whole of the Access Holder agreement only; and
- (b) clause 16 be amended to include more specificity in relation to the liability of the parties in the event of assignments or novations. If the ACCC agrees with C&A's proposal, C&A would be pleased to draft appropriate liability provisions for public consultation.⁶²²

Coal & Allied also did not consider ARTC's explanation for its changed stance in relation to clause 16.2 to be reasonable:

- (a) while most types of transfers may be dealt with under clauses 16.3 and 16.4, those that are not should not be subject to different consent criteria without ARTC providing appropriate reasons;
- (b) the reason given by ARTC for retaining its discretion under clause 16.2 is not appropriate. C&A considers that it would be reasonable for ARTC to withhold its consent to an assignment of an AHA to an assignee that had significantly different circumstances to the existing Access Holder; and
- (c) ARTC fails to explain why an Access Holder is under an obligation not to withhold its consent unreasonably in clause 16.1, but ARTC should not be under the same obligation under

⁶¹⁷ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 75.

⁶¹⁸ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 75.

⁶¹⁹ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 75.

⁶²⁰ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 75.

⁶²¹ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 75.

⁶²² Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 75.

clause 16.2. C&A cannot see any difference in these clauses that justifies ARTC's position.⁶²³

Coal & Allied did not consider clause 16.2 appropriately balanced the interests of ARTC and Access Holders, and proposed that it be amended to mirror clause 16.1 by adding the words 'which will not be unreasonably withheld' at the end of the clause.⁶²⁴

Xstrata

Xstrata expressed concern with the amendments to clause 16.1 in relation to the assignment and novation of the IAHA.⁶²⁵ Xstrata submits that the 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.⁶²⁶

Xstrata submits 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.'⁶²⁷

Xstrata therefore submit that the following amendments be made:

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"⁶²⁸.

10.10.4 ACCC views

Assignment by ARTC

The ACCC acknowledges ARTC's obligations under the clause 21.4 of the NSW Lease, as set out above, and considers that that it is appropriate that clause 16.1 of the IAHA accurately reflects the nature of this obligation.

The ACCC considers, however, that the IAHA should be amended so that it is clear that an IAHA can only be assigned or novated by ARTC without the consent of the relevant Access Holder: (i) only in the specific circumstances referred to in the NSW Lease; and (ii) the assignment or novation involves the transfer of the whole of the access agreement.

⁶²³ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 76.

⁶²⁴ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 76.

⁶²⁵ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 24.

⁶²⁶ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 24.

⁶²⁷ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 24.

⁶²⁸ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 30.

Transfer by the Access Holder

The ACCC accepts ARTC's contention that because the terms and conditions in an AHA for different applicants are likely to reflect the individual circumstances of the applicants, ARTC should not be required to extend those same terms and conditions to an assignee of the Access Holder who may not be in the same circumstances as the Access Holder.⁶²⁹

However, it is not obvious to the ACCC how inclusion of a requirement that ARTC not unreasonably withhold its consent to a transfer – which ARTC originally proposed to include in its response to the March 2010 Draft Decision – would prevent ARTC from withholding consent in the circumstances it has described above.⁶³⁰ It does not appear unreasonable for ARTC to refuse to consent to a transfer where the terms and conditions of access provided in the IAHA would be unsuitable for the proposed assignee.

The ACCC therefore reiterates its recommendation in the March 2010 Draft Decision that clause 16.2 should include an obligation to not unreasonably withhold consent.

Liability in the event of assignments

The ACCC is of the view that the proposed amendments to clause 16.7 of the IAHA from the version in the April 2009 IAHA deal appropriately with the concerns in the March 2010 Draft Decision that more specificity was required in relation to the liability of the parties in the event of assignments as they would add a degree of certainty.⁶³¹

10.11 Permanent Assignment and trades (clause 16.3)

In the March 2010 Draft Decision the ACCC considered that revisions were required to clarify the operation of clause 16.3, regarding the assignment or novation of the Access Holder Agreement, or some or all of the Path Usages under the Agreement, for a period of 12 months or more.⁶³²

ARTC has revised clause 16.3(a)(ii) to make it clear that it is not possible that ARTC can receive a windfall gain through a transfer.⁶³³ The ACCC also accepts ARTC's clarification set out in its response to the March 2010 Draft Decision that it is not necessary to use the defined term 'Path Usages' in clause 16.3(b).⁶³⁴

10.12 Temporary trades (clause 16.4 and related clauses)

10.12.1 Introduction

Clause 16.4 of the IAHA provides for the temporary trade of Path Usages. In the March 2010 Draft Decision, the ACCC included recommendations on how the clause

⁶²⁹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 46.

⁶³⁰ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 63.

⁶³¹ ACCC, Draft Decision on HVAU, 5 March 2010, p. 248.

⁶³² ACCC, Draft Decision on HVAU, 5 March 2010, p. 310.

⁶³³ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 63.

⁶³⁴ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 64.

could be revised such that it would be more likely to be appropriate under the Act. In particular, the ACCC was of the view that the criteria and processes by which ARTC will decide to consent to a temporary trade for less than 12 months are unclear and that the proposed amendments in the December 2009 IAHA provided some additional certainty and clarity when compared to the version submitted in April 2009.⁶³⁵

The ACCC understands that the revised clauses in the proposed 2010 HVAU reflect further industry developments in relation to the trading of capacity across the Hunter Valley supply chain. The ACCC notes however that a number of interested parties have provided further comments on the clause as it appears in the revised IAHA.

10.12.2 Conditions for making a 'safe harbour' trade for less than 12 months

Clause 16.4(a) specifies a number of conditions that must be satisfied prior to ARTC granting consent to the trade of a Path Usage for a period of less than 12 months. Stakeholders have commented on these conditions, and for ease of reference the ACCC here sets out the relevant provisions:

- (i) the Former Access Holder, and New Access Holder must give ARTC at least three days notice of the Trade;
- (ii) the New Access Holder's load point for the traded Path Usage must be:
 - (A) closer to the Port of Newcastle than the Former Access Holder's load point; and
 - (B) within the same or a closer Pricing Zone as the Former Access Holder's load point;
- (iii) the destination of the traded Path Usage when utilised by the New Access Holder will be the same destination had the traded Path Usage been utilised by the Former Access Holder. To avoid doubt, a discharge point of Kooragang Coal Terminal, Carrington Coal Terminal, the Newcastle Coal Infrastructure Group Terminal at Newcastle or any other export coal terminal at Newcastle will be considered the same destination;
- (iv) the Former Access Holder and New Access Holder each warrant that the Trade will not adversely impact Coal Chain Capacity and agree that ARTC is entitled to rely, and is under no obligation to review the accuracy of, this warranty;
- (v) the New Access Holder must only use an Operator for a traded Path Usage who has an unconditional Operator Sub-Agreement with ARTC and endorsed by the New Access Holder;
- (vi) the New Access Holder's nominated Operator must comply with the Service Assumptions relating to the Train Path;
- (vii) the Former Access Holder and the New Access Holder have the same Allocation Period in the Contract Year the Trade takes place and the Trade is for an unconditional Base Path Usage of the Former Access Holder in that Contract Year; and

⁶³⁵ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 311-312.

- (viii) the New Access Holder must only use the Path Usage in the same Period the Path Usage was available for use by the Former Access Holder.

The ACCC provides views on these conditions as applicable in the following sections.

10.12.3 Two week notice period

In the March 2010 Draft Decision the ACCC noted the view of interested parties that the two week notice period for temporary trades that do not require ARTC's consent under section 16.4(a)(iii) of the IAHA was unworkable and would impose potential inefficiencies and capacity losses on the coal chain and that, as a result, a shorter period is necessary.⁶³⁶ It is the ACCC's view that the amendments to clause 16.4(a)(i), which reduce the notice period from two weeks to three days, deal with these concerns.

10.12.4 New Access Holder's load point to be closer to the Port of Newcastle

Under clause 16.4(a)(ii), one of the conditions an Access Holder must satisfy before it can trade under 16.4(a) without ARTC's consent is:

- (ii) the New Access Holder's load point for the traded Path Usage must be:
 - (A) closer to the Port of Newcastle than the Former Access Holder's load point; and
 - (B) within the same or a closer Pricing Zone as the Former Access Holder's load point;

Stakeholder views

HVCCC

The HVCCC submitted that:

it cannot be automatically assumed that transfer of contractual entitlement to a load point closer to the Port of Newcastle will not impact on Coal Chain Capacity and contractual entitlements of other Access Holders; be it contractual entitlement with ARTC, rail haulage providers or with terminals at the Port of Newcastle. Load points often share track access to the network. These branch lines, such as the Whittingham branch line in the Lower Hunter Valley, can often be congested due to timing of demand from a number of load points. A transfer of contractual entitlement to a load point that is located closer to the Port of Newcastle can adversely impact the Capacity entitlements of other Access Holders, particularly those on the same branch line.⁶³⁷

In light of this, the HVCCC submits that clause '16.4(a) of the IAHA should be amended to provide that no Trade of Path Usage can be made without ARTC consent in accordance with Clause 16.4(d) and Clause 16.6(c). This amendment could be achieved by incorporating a further requirement in 16.4(a)(iv) whereby both the Former and New Access Holders must produce evidence of HVCCC acceptance of

⁶³⁶ ACCC, Draft Decision on HVAU, 5 March 2010, p. 311.

⁶³⁷ HVCCC, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 4.

the trade as part of their warranty to ARTC. HVCCC would assess the trade in accordance with the CTS Protocols.⁶³⁸

Newcastle Port Corporation

The Newcastle Port Corporation (NPC) notes that it appears ‘from these conditions [in clause 16.4(a)(ii)] that it is envisaged that ‘safe harbour’ trades are of a nature that they will not adversely impact on coal chain capacity or contractual entitlements and therefore that the service provider’s consent to the trade, and the administrative impost this may entail, are not justified.’⁶³⁹

The NPC submits that while ‘such a [‘safe harbour’] trade in general may be less likely to have an adverse impact on the coal chain than a trade to a more distant load point NPC understands that such may not always be the case, particularly if the new load point is in an area of high congestion.’⁶⁴⁰

ACCC views

The ACCC accepts the views of the HVCCC and the Newcastle Port Corporation that it cannot be accepted in all circumstances that a trade made in accordance with proposed clause 16.4(a)(ii) will not adversely impact on Coal Chain Capacity. That is, it cannot be assumed that in all cases a trade involving a New Access Holder’s load point being closer to the Port of Newcastle is a ‘safe harbour’ trade. As a result, there is a possibility that a trade made in these circumstances without some form of oversight may not promote the efficient operation of the Hunter Valley coal chain.

The ACCC therefore considers that the HVCCC consultation process specified in clause 16.6(c) apply in relation to all trades under clause 16.4. Clause 16.6(c) requires ARTC to consider in good faith, and is entitled to rely on, the recommendations of the HVCCC as to the impact of a trade on Coal Chain Capacity, and the Capacity entitlements of other Access Holders. In practice this could mean that all trades by coal users under section 16.4(a) could initially go through the CTS Clearing House.

As currently drafted in clause 16.6(c), ARTC should continue to be able to rely on the HVCCC’s assessment, and should ‘not be taken to be unreasonably withholding its consent or terminating a Trade where the HVCCC raises material objections to the assignment, novation or trade’.⁶⁴¹ As currently proposed (and as discussed further below), ARTC should also be able to rely on the HVCCC’s assessment as a warranty that the Trade will not adversely impact Coal Chain Capacity under clause 16.4(a)(iv).

10.12.5 Trading parties must warrant that the trade will not adversely impact Coal Chain Capacity

Clause 16.4(a)(iv) provides that one condition to be satisfied before a trade can occur without ARTC’s consent is:

⁶³⁸ HVCCC, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 4.

⁶³⁹ Newcastle Port Corporation, Submission in Response to ACCC Consultation Paper, 21 October 2010, p. 3

⁶⁴⁰ Newcastle Port Corporation, Submission in Response to ACCC Consultation Paper, 21 October 2010, p. 4

⁶⁴¹ ARTC, *Access Holder Agreement for Indicative Services in the Hunter Valley*, 7 September 2010, clause 16.6(c).

- (iv) the Former Access Holder and New Access Holder each warrant that the Trade will not adversely impact Coal Chain Capacity and agree that ARTC is entitled to rely, and is under no obligation to review the accuracy of, this warranty

Stakeholder views

Coal & Allied

Coal & Allied does not consider it appropriate for Access Holders to be required to provide the warranties referred to in this clause. Coal & Allied argues that Access Holders are not in a position to provide this information and, in any case, the CTS process already determines what impact the Trade will have on Coal Chain Capacity.⁶⁴²

Coal & Allied notes that the conditions listed in clauses 16.4(a)(i) – (viii) appear aimed at ensuring that a trade will not adversely impact on Coal Chain Capacity.⁶⁴³ Consequently, if those conditions (except for clause 16.4(a)(iv)) were satisfied, the warranties required to be given under clause 16.4(a)(iv) would be unnecessary and, therefore, inappropriate.⁶⁴⁴

Coal & Allied therefore proposes that clause 16.4(a)(iv) be deleted, or if not, that clause 16.4 be amended so that ARTC has no recourse against the trading parties for the warranties provided by them.⁶⁴⁵

HVCCC

The HVCCC submits that clause ‘16.4(a) of the IAHA should be amended to provide that no Trade of Path Usage can be made without ARTC consent in accordance with Clause 16.4(d) and Clause 16.6(c). This amendment could be achieved by incorporating a further requirement in 16.4(a)(iv) whereby both the Former and New Access Holders must produce evidence of HVCCC acceptance of the trade as part of their warranty to ARTC. HVCCC would assess the trade in accordance with the CTS Protocols.’⁶⁴⁶

Newcastle Port Corporation

The NPC submits that clause 16.4(a)(iv) attempts to minimise the likelihood of an adverse impact on the coal chain occurring as a result of the trade by requiring the parties to the trade to warrant that the trade will not adversely impact coal chain capacity.⁶⁴⁷ However, it ‘is not clear how the parties could provide such a warranty in good faith without seeking the HVCCC’s assessment of the trade’s impact on the coal chain.’⁶⁴⁸

The NPC submits therefore that, as a minimum, the warranty given by the parties should be amended to provide that the parties warrant ‘that the HVCCC’s assessment

⁶⁴² Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 77.

⁶⁴³ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 77.

⁶⁴⁴ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 77.

⁶⁴⁵ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 78.

⁶⁴⁶ HVCCC, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 4.

⁶⁴⁷ Newcastle Port Corporation, Submission in Response to ACCC Consultation Paper, 21 October 2010, p. 4

⁶⁴⁸ Newcastle Port Corporation, Submission in Response to ACCC Consultation Paper, 21 October 2010, p. 4

of the trade is that it will not adversely impact on coal chain capacity or contractual entitlements.’⁶⁴⁹

The NPC also submits that the existing industry mechanism for the assessment of terminal allocation trades, the CTS, could be used for transfer approval for trades of rail network capacity.⁶⁵⁰ The NPC considers that a better alignment of the capacity transfer protocols for track and terminal would be achieved if the parties to a ‘safe harbour’ trade were required to obtain the HVCCC’s assessment of the trade utilising the CTS approval process.⁶⁵¹

The NPC acknowledges, however that while this approach would improve coal chain alignment, it would also make the ‘safe harbour’ trade mechanism in the IAHA redundant. In particular, it would ‘subvert the apparent purpose of the safe harbour trades to create a class of transfers for which ARTC consent is not required, as its practical effect would be to require the ARTC’s consent to the trade through the CTS transfer approval process.’⁶⁵² All trades would therefore be dealt with as ‘non-safe harbour’ trades as currently defined in the IAHA.⁶⁵³

ACCC views

The ACCC notes Coal & Allied’s view that in some circumstances access holders may not be in a position to provide the warranties referred to in clause 16.4(a)(iv) without input from the HVCCC. Further, the ACCC welcomes the HVCCC’s suggestion of an amendment to clause 16.4(a)(iv) whereby the Former and New Access Holders must produce evidence of HVCCC acceptance of the trade as part of their warranty to ARTC.⁶⁵⁴

As outlined above in relation to clause 16.4(a)(ii), the ACCC has recommended that ARTC should be obliged to consider in good faith, and be entitled to rely on, the recommendations of the HVCCC as to the impact of a trade on Coal Chain Capacity and the Capacity entitlements of other access holders under clause 16.6(c) in relation to all trades by coal users of the Network under clause 16.4(a).

With all trades under clause 16.4(a) having to be considered by the HVCCC, and in line with the HVCCC’s proposal set out immediately above, the ACCC also recommends that clause 16.4(a)(iv) should be amended so that ‘evidence of HVCCC acceptance of the trade’ will constitute the warranty required by ARTC that the trade will not adversely impact Coal Chain Capacity.

⁶⁴⁹ Newcastle Port Corporation, Submission in Response to ACCC Consultation Paper, 21 October 2010, p. 4

⁶⁵⁰ Newcastle Port Corporation, Submission in Response to ACCC Consultation Paper, 21 October 2010, p. 4

⁶⁵¹ Newcastle Port Corporation, Submission in Response to ACCC Consultation Paper, 21 October 2010, p. 4

⁶⁵² Newcastle Port Corporation, Submission in Response to ACCC Consultation Paper, 21 October 2010, p. 4

⁶⁵³ Newcastle Port Corporation, Submission in Response to ACCC Consultation Paper, 21 October 2010, p. 4

⁶⁵⁴ HVCCC, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 4.

10.12.6 Trade must be for an unconditional Base Path Usage in the Contract Year

ARTC has amended clause 16.4(a)(vii) to incorporate the underlined text:

- (vii) the Former Access Holder and the New Access Holder have the same Allocation Period in the Contract Year the Trade takes place and the Trade is for an unconditional Base Path Usage of the Former Access Holder in that Contract Year;

The ACCC considers that these amendments provide greater certainty and clarity to the operation of clause 16.4(a).

10.12.7 Liability for charges where a trade has occurred

In the March 2010 Draft Decision the ACCC noted the concerns raised by interested parties that under clause 16.4 of the IAHA it was somewhat ambiguous as to which party (the former access holder or the new access holder) was liable to ARTC for which elements of the charges associated with the traded path usage.⁶⁵⁵

ARTC has revised clause 16.4(b) to provide:

- (b) For each Trade carried out in accordance with this **clause 16.4:**
 - (i) the Former Access Holder remains liable to ARTC for the TOP Charges for the traded Path Usage;
 - (ii) the New Access Holder will be liable for Non-TOP Charges relating to the traded Path Usage (but only to the extent of actual usage); and
 - (iii) to avoid doubt, the New Access Holder will not be liable for any Ad Hoc Charge when using the traded Path Usage.

It is the ACCC's view that the revised clause 16.4(b) addresses the potential ambiguity noted in the Draft Decision.

10.12.8 Non 'safe harbour' trades

Clause 16.4(d) provides for the trade of a path usage with ARTC's consent; that is, where the proposed trade does not otherwise satisfy the conditions in clause 16.4(a), and would not be characterised as a 'safe harbour' trade.

In the March 2010 Draft Decision the ACCC was of the view that the criteria and processes by which ARTC will decide to consent to a temporary trade for less than 12 months that do not satisfy the criteria for a 'safe harbour' trade were unclear and needed to be set out with greater clarity.⁶⁵⁶

ARTC has amended clause 16.4(d) to include specific commitments regarding requests by an Access Holder to carry out a non-safe-harbour trade.⁶⁵⁷ The clause now provides:

⁶⁵⁵ ACCC, Draft Decision on HVAU, 5 March 2010, p. 310.

⁶⁵⁶ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 311-312.

⁶⁵⁷ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 47.

- (d) If an Access Holder requests to Trade a Path Usage which does not meet the conditions in **clause 16.4(a)**, subject to satisfying **clause 16.4(a)(viii)**, ARTC:
 - (i) will not unreasonably refuse its consent provided ARTC is able to ascertain that the Trade will not have an impact on Coal Chain Capacity and the Capacity entitlements of other access holders;
 - (ii) will use reasonable endeavours to inform the HVCCC of its decision whether or not it approves a trade as soon as practicable;
 - (iii) in any case, must inform the HVCCC of its decision within two weeks of ARTC being notified of the Trade, or in such other period (which may not be more than two weeks) as notified by ARTC to all access holders and the HVCCC as a result of **clause 16.8** or from time to time following consultation with the HVCCC by ARTC; and
 - (iv) may impose reasonable conditions on an approval of a Trade, including the period in which the Path Usage may be used.

Stakeholder views

Coal & Allied

Coal & Allied submit that the obligation under clause 16.4(d)(iii), for ARTC to inform the HVCCC of its decision within two weeks of ARTC being notified of the Trade, specify an unreasonably long time for ARTC to consider a trade, and will reduce the efficiency of the Coal Chain from an Access Holder's perspective and result in an inappropriate level of uncertainty for Access Holders who are seeking to Trade Path Usages.⁶⁵⁸

Coal & Allied proposed instead that:

- (c) The Proposed HVAU adopts the CTS Clearing House timeframes for trades.
- (d) If the amendment to clause 16.4(d)(iii) is made, clause 16.8 be removed.
- (e) If the amendment to clause 16.4(d)(iii) is not made, clause 16.8 be amended so that ARTC is required to conduct the review by 30 June 2011.
- (f) If the amendment to clause 16.4(d)(iii) is not made, clause 16.8 be amended so that ARTC is required to publish on its website its reasons for reducing or maintaining the two week decision period.⁶⁵⁹

HVCCC

The HVCCC submitted that 'for other trades that do require ARTC to consider whether a temporary trade of a Path Usage will have an impact on Coal Chain Capacity and Capacity entitlements of other Access Holders, it is mandatory that

⁶⁵⁸ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 78.

⁶⁵⁹ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 78.

ARTC consider recommendations by HVCCC. Again HVCCC would assess these trades in accordance with the CTS Protocols.⁶⁶⁰

ACCC views

It is the ACCC's view that the amendments to clause 16.4(d) provide a greater level of certainty as to ARTC's decision making process in relation to 'non-safe-harbour' trades than what was contained in the April 2009 HVAU. The amendments therefore go a certain way towards dealing with the concerns raised in the March 2010 Draft Decision.

Two week period

The ACCC notes concerns raised by interested parties that two weeks is considered to be a long time for ARTC to consider a trade under clause 16.4(d) and may reduce the efficiency of the trading mechanism and give rise to uncertainty for users of the Network.

However as stated in the March 2010 Draft Decision, the ACCC reiterates that it is of the view that an initial 2 week period for trades requiring ARTC's consent provides an appropriate balance between the interests of access seekers, the legitimate business interests of ARTC, and promoting the efficient operation of the Hunter Valley coal chain. However, in the longer term this may not be the case.⁶⁶¹

The ACCC also reiterates the position in the March 2010 Draft Decision that in order to provide certainty to access seekers and to promote the long term efficient operation of the Hunter Valley coal chain, ARTC should set out the processes and timeframes by which it will review the two week period under clause 16.8.⁶⁶²

The ACCC understands that the timeframes for assessing trades under the CTS are for short term transfers (for the next month), two days; and for longer term transfers (for the months after the next month), five days. The ACCC understands that the assessments of trades will continue to be conducted within these timeframes.

The ACCC also notes that ARTC has made a number of amendments to the review of the two week period in clause 16.4(d) under clause 16.8. These proposed amendments are discussed in further detail below.

10.12.9 All trades under clause 16.4(d) to be considered by the HVCCC

The ACCC is of the view that ARTC should be obliged to seek and consider in good faith the recommendations of the HVCCC as to the impact of a trade on Coal Chain Capacity and the Capacity entitlements of other access holders under clause 16.6(c) in relation to all trades by coal users of the Network under clause 16.4(d). It is assumed that this may mean in practice that all trades by coal users under clause 16.4(d) could initially be required to go through the CTS Clearing House.

The ACCC is of the view that this recommendation would require an amendment to clause 16.4(d)(i) stating that the HVCCC's recommendation received under clause

⁶⁶⁰ HVCCC, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 5.

⁶⁶¹ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 311-312.

⁶⁶² ACCC, Draft Decision on HVAU, 5 March 2010, pp. 311-312.

16.6(c) could constitute sufficient evidence for ARTC ‘that the Trade will not have an impact on Coal Chain Capacity and the Capacity entitlements of other access holders’.

The ACCC notes however that ARTC cannot be held responsible for delays caused by the HVCCC in the HVCCC’s assessment of the impact of a particular trade. Therefore, the ACCC is of the view that where the HVCCC has not responded within the two week (or any future reduced period that emerges as a result of the review under clause 16.8 of the IAHA) timeframe required for trades under clause 16.4(d), ARTC should be entitled to assume that the HVCCC does not harbour any concerns as to the proposed trade’s impact on Coal Chain Capacity or the Capacity entitlements of other access holders; and ARTC can proceed with its own assessment of whether or not to approve the trade pursuant to clause 16.4(d).

10.13 Clause 16.5 IAHA - Treatment of Traded Paths

March 2010 Draft Decision

In the March 2010 Draft Decision the ACCC was of the view that it was unclear under clause 16.5 of the IAHA how ARTC intended to treat traded train path usages, which in turn would have implications for other elements of the IAHA which would likely result in significant uncertainty for access holders seeking to trade paths, and therefore may act as a disincentive more generally to the trading of paths between Access Holders.⁶⁶³

The revised IAHA

Clause 16.5 has been revised to read as follows:

- (a) For the purposes of this agreement where a path usage has been the subject of a Trade under **clause 16.4** of this agreement, the Former Access Holder will be deemed to have utilised the path usage traded to the New Access Holder in the Period in which it was available for use by the Former Access Holder, and the path usage the subject of the Trade:
 - (i) will not be counted towards the number of path usages actually used by the New Access Holder for the purposes of **clause 5.4** of this agreement and clauses 2.3 and 2.4 of **Schedule 2** of this agreement; and
 - (ii) will be treated as part of the Former Access Holder’s base path usages.
- (b) To avoid doubt, where a path usage is the subject of more than one Trade, the path usage will continue to be treated as part of the original Former Access Holder’s base path usages and will not form part of the base path usages of any New Access Holder to who receives the traded path usage.

Stakeholder views

Coal & Allied submits that there is an ‘issue with the treatment of traded Path Usages’ namely that a ‘Path Usage which has been traded is deemed to have been used by the

⁶⁶³ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 312-313.

originating Access Holder and counts towards its Base Path Usages and, conversely, the Path Usage is not recognised to have been used by the new Access Holder who actually consumes the Path Usage. However, it is possible that a Path Usage could be traded and then not used due to a Capacity Shortfall caused by ARTC.⁶⁶⁴

Coal & Allied submits that ‘[i]n this case, it should be recognised that the Path Usage was not consumed, rather than assuming a Path Usage is used once it is traded, so that the originating Access Holder is still entitled to accrue a rebate for the Path Usage not made available.’⁶⁶⁵

Coal & Allied further submits that ‘[t]he trading Access Holder can then manage any refunds for trades which lead to inequitable outcomes through the terms of its agreement.’⁶⁶⁶

Coal & Allied therefore proposes ‘that clause 16.5(a) of the ... IAHA regarding treatment of traded Path Usages be altered so that a traded Path Usage is only deemed to be utilised by the Former Access Holder once it has been physically utilised by the New Access Holder.’⁶⁶⁷

ACCC views

The ACCC considers that the amendments to clause 16.5 provide a degree of clarity to other aspects of the IAHA (for example, the treatment of a traded path in relation to the Capacity Resumption provisions and the True Up Test). It appears that these amendments go a certain way towards dealing with the concerns raised in the March 2010 Draft Decision in relation to the potential uncertainty over the operation of this provision as previously drafted.⁶⁶⁸

However, the ACCC also notes Coal & Allied’s submission that under the proposed drafting of clause 16.5, it is possible that a Path Usage could be traded and then not be used due to a System Availability Shortfall caused by ARTC, but nevertheless be deemed to have been used by the Former Access Holder under clause 16.5(a).

The ACCC is of the view that this drafting appears to result in an inappropriate balance between the interests of access seekers and ARTC and may act as a disincentive more generally to the trading of paths between Access Holders.

The ACCC therefore considers that clause 16.5(a) should 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.

10.14 CTS Administrator and the HVCCC

In the March 2010 Draft Decision the ACCC was of the view that clause 16.6 of the IAHA should be amended to include a clear and certain consultation mechanism that

⁶⁶⁴ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 54.

⁶⁶⁵ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 54.

⁶⁶⁶ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 54.

⁶⁶⁷ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 54.

⁶⁶⁸ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 312-313.

sets out the processes ARTC will follow when consulting with the HVCCC in relation to particular trades.⁶⁶⁹

Clause 16.6 of the IAHA now reads:

16.6 CTS Administrator and HVCCC

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

Stakeholder views

HVCCC

The HVCCC is of the view that the ‘principles proposed in Clause 16.6(c) of the IAHA could be tightened up to make it clear that ARTC will seek HVCCC’s assessment on the impact of the Trade on Coal Chain Capacity and Capacity entitlements of other access holders.’⁶⁷⁰

Newcastle Port Corporation

The NPC also notes that ‘the CTS is the existing industry mechanism by which the HVCCC assesses the impact of terminal allocation trades on coal chain capacity and contractual entitlements.’⁶⁷¹ Consequently, ‘it would be desirable to use the same approval process for transfers of both terminal allocation and train paths, as this is likely to facilitate the efficiency and effectiveness of the HVCCC’s assessment of the impact of such trades and therefore minimise the potential for unexpected adverse impacts of such trades.’⁶⁷²

The NPC submits that clause 16.6(c) therefore could be amended ‘not only to expressly provide that ARTC will seek the HVCCC’s recommendations regarding the

⁶⁶⁹ ACCC, Draft Decision on HVAU, 5 March 2010, p. 313-314.

⁶⁷⁰ HVCCC, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 5.

⁶⁷¹ Newcastle Port Corporation, Submission in Response to ACCC Consultation Paper, 21 October 2010, p.3

⁶⁷² Newcastle Port Corporation, Submission in Response to ACCC Consultation Paper, 21 October 2010, p.3

impact of the trade on coal chain capacity and contractual entitlements, but that ARTC will utilise, or require its Access Holders who seek the transfer to utilise the CTS transfer approval process for doing so.’⁶⁷³

Interaction of clause 16.6(c) with 16.3(a) - Permanent assignments and trades under clause 16.3(a)

The NPC notes that ‘[c]ause 16.3(a) IAHA provides that ARTC must not unreasonably withhold its consent to the permanent assignment of path usages for a train path, provided certain conditions are met.’⁶⁷⁴

The NPC further notes that when ‘read in conjunction with Clause 16.6 (c) IAHA, it appears to be intended that ARTC would seek the HVCCC’s recommendations on a permanent trade and consider such recommendations in good faith.’⁶⁷⁵

The NPC submits that ‘as a minimum, to avoid any doubt on this point, Clause 16.6(c) IAHA should be amended to expressly provide that the ARTC *will seek* and consider in good faith the HVCCC’s recommendations as to the impact of the trade on coal chain capacity and others’ contractual entitlements to coal chain capacity.’⁶⁷⁶

Interaction of clauses 16.6(c) with 16.4(a) – ‘Safe-Harbour’ Trades

The NPC note that its ‘submissions made in relation to Clause 16.6 IAHA for permanent trades also apply to safe harbour trades, that is:’

- for the avoidance of any doubt, as a minimum clause 16.6 (c) IAHA should be amended to expressly provide that the ARTC *will seek* and consider in good faith the HVCCC’s recommendations as to the impact of the trade on coal chain capacity and others’ contractual entitlements to coal chain capacity;
- it would be desirable to use the CTS transfer approval process for ‘non-safe harbour’ trades, to minimise the potential for unexpected adverse impacts of such trades. Clause 16.6(c) IAHA could be amended not only to expressly provide that ARTC will seek the HVCCC’s recommendations regarding impact of the trade on coal chain capacity and contractual entitlements, but will utilise the CTS transfer approval process for doing so;⁶⁷⁷

Interaction of clauses 16.6(c) with 16.4(d)(i) – ‘Non-Safe Harbour’ Trades

The NPC notes that ‘[c]ause 16.4(d)(i) IAHA provides that ARTC will not unreasonably refuse its consent to those temporary trades that do not meet the specified conditions for a safe harbour trade, provided that it is able to ascertain that

⁶⁷³ Newcastle Port Corporation, Submission in Response to ACCC Consultation Paper, 21 October 2010, p. 3

⁶⁷⁴ Newcastle Port Corporation, Submission in Response to ACCC Consultation Paper, 21 October 2010, p. 3

⁶⁷⁵ Newcastle Port Corporation, Submission in Response to ACCC Consultation Paper, 21 October 2010, p. 3

⁶⁷⁶ Newcastle Port Corporation, Submission in Response to ACCC Consultation Paper, 21 October 2010, p. 3

⁶⁷⁷ Newcastle Port Corporation, Submission in Response to ACCC Consultation Paper, 21 October 2010, pp. 4-5

the trade will not have an impact on coal chain capacity and the capacity entitlements of other access holders.’⁶⁷⁸

The NPC notes that it ‘supports the need for ARTC consent to these trades, given their potential to impact on coal chain capacity and contractual entitlements.’⁶⁷⁹

The NPC submits that ‘[a] reading of clause 16.4(d)(i) in conjunction with clause 16.6(c) IAHA suggests that the intention is that ARTC, in ascertaining whether a non-safe harbour trade will impact on coal chain capacity and contractual entitlements, will seek and consider in good faith the HVCCC’s recommendations on the matter. It is considered that ARTC could not otherwise appropriately ascertain the trade’s impact.’⁶⁸⁰

Xstrata

Xstrata submits that it ‘does not consider that the provisions in relation to the use of the CTS Clearing House are appropriate.’⁶⁸¹ Xstrata submits that ‘ARTC has [previously] committed to allowing the trading of rail Capacity through the CTS system’, which Xstrata views 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.’⁶⁸²

Xstrata submits that it is ‘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.’⁶⁸³

Xstrata submits however that the current drafting ‘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).’⁶⁸⁴

Xstrata submits that ‘[t]he 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’, which ‘should illustrate that the requirements of the IAHA ... can be relaxed without this having an adverse effect on ARTC’s operations.’⁶⁸⁵

Xstrata submits that clauses 16.6(a) and (b) of the IAHA should be deleted and replaced to provide that trades are made in accordance with the CTS rules. In particular, Xstrata recommends a provision that states, ‘Where a Trade is carried out

⁶⁷⁸ Newcastle Port Corporation, Submission in Response to ACCC Consultation Paper, 21 October 2010, p. 4

⁶⁷⁹ Newcastle Port Corporation, Submission in Response to ACCC Consultation Paper, 21 October 2010, p. 4

⁶⁸⁰ Newcastle Port Corporation, Submission in Response to ACCC Consultation Paper, 21 October 2010, p. 4

⁶⁸¹ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 23.

⁶⁸² Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 23.

⁶⁸³ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 23.

⁶⁸⁴ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 23.

⁶⁸⁵ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 23.

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.”⁶⁸⁶

ACCC’s view

The ACCC is of the view that the amendments to clause 16.6 of the IAHA go a certain way towards dealing with the concerns raised in the March 2010 Draft Decision by providing a greater degree of clarity to the involvement of the HVCCC in the trading process.⁶⁸⁷

As discussed above in relation to clauses 16.4(a) and 16.4(d) of the IAHA, the ACCC considers that ARTC should be obliged to seek and consider in good faith the recommendations of the HVCCC as to the impact of a trade on Coal Chain Capacity and the Capacity entitlements of other access holders in clause 16.6(c) in relation to all trades by coal users of the Network under clause 16.4. It is assumed that this may mean in practice that all trades by coal users would initially go through the CTS Clearing House.

However, regardless of whether or not ARTC amends the IAHA so that all temporary trades by coal users must go through the CTS Clearing House, the ACCC recommends that clause 16.6(c) of the IAHA be amended to clearly set out a specific obligation on ARTC to consult with the HVCCC and consider its views in good faith in relation to all trades under clause 16.3, 16.4(a) and 16.4(d) ‘as to the impact of a trade on Coal Chain Capacity and the Capacity entitlements of other access holders’. In order to preserve the ‘safe harbour’ trading stream, it is considered that this obligation would be satisfied for the purposes of clause 16.4(a), through the HVCCC assessment under clause 16.4(a)(iv) constituting sufficient evidence that the Trade will not adversely impact Coal Chain Capacity.

In making this recommendation, the ACCC also notes that ARTC cannot be held responsible for delays caused by the HVCCC in the HVCCC’s assessment of the impact of a particular trade. Therefore, the ACCC is of the view that where the HVCCC has not responded within the required timeframe required for trades under clauses 16.4(a) and 16.4(d), ARTC should be entitled to assume that the HVCCC does not harbour any concerns as to the proposed trade’s impact on Coal Chain Capacity or the Capacity entitlements of other access holders; and ARTC can proceed with its own assessment of whether or not to approve the trade pursuant to the relevant clauses.

Finally, the ACCC also notes that the reference to ‘clause 16.4(c)’ in clause 16.6(b) is incorrect and should instead refer to clause 16.4(a).

10.15 Reduction in time period for ARTC approval of trades

In the March 2010 Draft Decision the ACCC was of the preliminary view that while an initial 2 week notice period for trades requiring ARTC consent provides an appropriate balance between the interests of access seekers, the legitimate business

⁶⁸⁶ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 30.

⁶⁸⁷ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 313-314.

interests of ARTC, and promoting the efficient operation of the Hunter Valley coal chain, however, in the longer term this may not be the case.⁶⁸⁸

The ACCC also stated that in order to provide certainty to access seekers and to promote the long term efficient operation of the Hunter Valley coal chain, ARTC should set out the processes and timeframes by which it will review the two week notice period.⁶⁸⁹

Clause 16.8 of the IAHA now reads:

16.8 Reduction in time period for ARTC approval of trades

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

Stakeholder views

Coal & Allied

Coal & Allied 'acknowledges that under clause 16.8 of the Proposed IAHA, ARTC will, by 31 December 2011, conduct a review of the appropriate time for ARTC to inform the ACCC of its decision to approve or reject trades. However, C&A considers that as the Capacity Trading System (CTS) at the Port of Newcastle has been in operation since 1 January 2010, ARTC should already have all of the information it needs to conduct its review.'⁶⁹⁰

Coal & Allied therefore proposes that:

- (c) The Proposed HVAU adopts the CTS Clearing House timeframes for trades.
- (d) If the amendment to clause 16.4(d)(iii) is made, clause 16.8 be removed.
- (e) If the amendment to clause 16.4(d)(iii) is not made, clause 16.8 be amended so that ARTC is required to conduct the review by 30 June 2011.

⁶⁸⁸ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 311-312.

⁶⁸⁹ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 311-312.

⁶⁹⁰ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 78.

- (f) If the amendment to clause 16.4(d)(iii) is not made, clause 16.8 be amended so that ARTC is required to publish on its website its reasons for reducing or maintaining the two week decision period.⁶⁹¹

ACCC views

The ACCC reiterates its view from the March 2010 Draft Decision that from the perspective of maximising the efficiency of the Hunter Valley coal chain, there are sound arguments for a shorter time period to apply to the relevant trades in the longer term, as Capacity that would not otherwise be used can be traded quickly to another party who will be able to use it.⁶⁹² This is likely to promote the efficient use of the rail network and be in the interests of supply chain alignment.

It is the ACCC's view that the amendments to clause 16.8 provide a greater level of certainty in relation to ARTC's proposed review of the two week maximum notice period for 'non-safe-harbour' trades under clause 16.4(d). These amendments go a certain way towards dealing with the concerns raised in the March 2010 Draft Decision.⁶⁹³

The ACCC does not consider that there is a need for ARTC to conduct the review by 30 June 2011 as suggested by Coal & Allied. The ACCC recognises that the proposed 2010 HVAU provides for a number of reviews, and it is appropriate to allow ARTC time to manage these various processes.

The ACCC does, however, consider that it would be appropriate for ARTC to publish at the end of the review its reasons for reducing or maintaining the two week decision period. To do so would provide greater transparency for coal chain participants and contribute useful information to the ongoing development of an effectively aligned supply chain.

10.16 Reduction of capacity at port potentially causing misalignment with below rail capacity

In the March 2010 Draft Decision, the ACCC noted that there was no explicit provision in the HVAU to deal with the circumstance where a reduction in port capacity could potentially cause misalignment with below rail capacity, but that it was possible that existing provisions may be sufficient to deal with this concern (e.g. trading, network exit capability requirement).⁶⁹⁴

The ACCC notes ARTC's clarification set out in its response to the March 2010 Draft Decision that, due to the Network Exit Capability requirement in clause 3.14 of the IAHA (which is now a Tier 1 provision), ARTC may not allow an Access Holder to utilise a Path Usage where it cannot demonstrate exit capability. Further, ARTC noted that where an Access Holder does not have a sufficient allocation of port Capacity, it would have no incentive to seek to schedule a Service. Consequently, ARTC

⁶⁹¹ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 78.

⁶⁹² ACCC, Draft Decision on HVAU, 5 March 2010, p. 311.

⁶⁹³ ACCC, Draft Decision on HVAU, 5 March 2010, p. 312.

⁶⁹⁴ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 314-315.

submitted that the existing provisions are sufficient to deal with concerns about potential misalignment where port access rights are ‘compressed’ at the port.⁶⁹⁵

The ACCC therefore accepts that existing provisions of the proposed 2010 HVAU are sufficient to address the potential scenario raised in the Draft Decision.

10.17 New Clause 11.5 of the IAHA – Use of Non-Compliant Services

Clauses 11.5(a) to (d) of the IAHA set out a mechanism whereby Access Holders may request to temporarily use a ‘Non-Compliant Service’ with ARTC’s consent, and a process by which ARTC can consent to a permanent variation to Service Assumptions for a Train Path.

Clauses 11.5(e) to (k) of the IAHA set out mechanisms by which ARTC can address (through the issuance of warning notices, reviewing and adjusting the Service Assumptions, reviewing and adjusting the Annual Contracted Path Usages or adjusting the TOP Charges to be paid by the Access Holder) the situation where an Access Holder consistently uses Non-Compliant Services without the consent of ARTC.

A Non-Compliant Service is defined in the IAHA as:

- (a) a Service using a Train Path that fails to comply with the applicable Service Assumptions prescribed for that Train Path in the Train Path Schedule; and
- (b) if a Train Path Schedule nominates more than one Operator, a Service operated by an Operator in a Period which is in excess of the number of Services specified to be operated by that Operator in the Train Path Schedule, after allowing for Services operated on Ad Hoc Path Usages, traded Path Usages and Tolerance.

It is also proposed that the whole of clause 11.5 is to be included as a Tier 1 (mandatory) provision.

Clause 11.5 of the IAHA was not, in its present form, included as part of the April 2009 HVAU application.

10.17.1 ARTC’s submissions

ARTC submits that certain producers have indicated ‘that they may wish to run trains which do not accord with the Service Assumptions agreed for a Train Path at the commencement of the agreement (a Non-Compliant Service). In particular, producers ... want the flexibility to be able to change the number of services to be operated by their nominated operators part way through an agreement either temporarily or permanently’.⁶⁹⁶

ARTC notes that the ‘access holder’s right to use a service depends on their compliance with the Service Assumptions and, under the 2009 IAHA, an access holder would have needed to agree a variation to the IAHA in order to allow them to

⁶⁹⁵ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 66.

⁶⁹⁶ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 40.

run a service which does not comply with the Service Assumptions set out in the Train Path Schedule, including switching the number of services to be operated by a particular operator.’⁶⁹⁷

ARTC submits that it has ‘sought to address the potential rigidity of this approach in the 2010 IAHA by providing for temporary use of a Non-Compliant Service or a permanent change to the Service Assumptions with consent of ... ARTC.’⁶⁹⁸

ARTC submits that under the proposed approach, it ‘will not unreasonably withhold its consent to the temporary use of a Non-Compliant Service within a Period provided the access holder provides ... three day’s notice of its intention to use a Non-Compliant Service and ARTC is satisfied that the operation of the Non-Compliant Service will not have an impact on Coal Chain Capacity, capacity of the Network or the capacity entitlement of another access holder.’ Under the proposed drafting, ‘ARTC is entitled to rely on the recommendations of the HVCCC on the impact of Non-Compliant Services or the operation of Services complying with the New Service Assumptions (as applicable) on Coal Chain Capacity. ARTC may adjust TOP charges to reflect the characteristics of the non-compliant services.’⁶⁹⁹

ARTC further submits that if ‘an access holder wants to operate services which do not comply with Service Assumptions on a Train Path for more than one period, the access holder will need to seek consent again under clause 11.5(a) of the 2010 AHA’. Alternatively, they may ‘apply for a permanent variation of the Service Assumptions in the applicable Train Path Schedule.’⁷⁰⁰

ARTC notes that it ‘will not withhold its consent to a permanent variation of the Service Assumptions in the Train Path Schedule, provided the access holder provides ARTC with the requisite notice (30 days is proposed), the operation of services in accordance with the service assumptions will not have an impact on Coal Chain Capacity, the capacity of the Network or the capacity entitlement of another access holder and it does not lead to a reduction in the amount of TOP Charges otherwise payable. ARTC will amend the train path schedule to reflect the new service assumptions and new TOP charges applicable to those service assumptions.’⁷⁰¹

In addition, ARTC submits that the new subclause 11.5(c)(iii) ‘ensures that ARTC will not be financially worse off in committing to a permanent change to service assumptions.’⁷⁰²

10.17.2 Stakeholder views

Aston Resources

Aston Resources argues for a stronger requirement in clauses 11.5 and 11.6 of the IAHA. It submits that those clauses give ARTC ‘too much discretion in deciding whether to resume pathways’, as the drafting states that ARTC ‘**may** remove Path

⁶⁹⁷ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 40.

⁶⁹⁸ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 40.

⁶⁹⁹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 40.

⁷⁰⁰ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 40.

⁷⁰¹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, pp. 40-41.

⁷⁰² ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 60.

Usages from relevant access holders.’⁷⁰³ Instead, Aston submitted that ‘where the ARTC/HVCCC has reasonably formed the view that one producer’s cancellations (or non-compliance) have impacted on overall capacity or the rights of another access holder, then ARTC should be required to resume the relevant pathways.’
Alternatively, ‘[a]t the very least, the producer in question should be required to explain to ARTC the cause of the non-compliance/cancellations.’⁷⁰⁴

Aston submits that this would ‘reduce ... the likelihood that other (compliant) access holders will have their track usage unduly interfered with by third parties.’⁷⁰⁵ Further, ‘a more stringent approach to resumption may limit incentives for producers to hoard capacity that could be used by new or competing producers.’⁷⁰⁶ Aston is therefore of the view that:

‘subject to the oversight of the HVCCC, resumptions and cancellations can be an effective tool to ensure that incumbent Producers do not “game” the system. Where a resource is constrained, “use it or lose it” is an effective tool and ARTC should not be given an unfettered discretion as to whether or not to implement it.’⁷⁰⁷

Coal & Allied

Coal & Allied submits that, subject to some qualifications, the general approach of allowing the operation of Non-Compliant Services in certain circumstances under clause 11.5 of the Proposed IAHA is appropriate.⁷⁰⁸ Coal & Allied noted that clause 11.5 was included in response to concerns from some producers ‘that the 2009 IAHA did not allow them to temporarily or permanently run Trains which did not accord with the Service Assumptions agreed for a Train Path at the commencement of the relevant Access Holder agreement.’⁷⁰⁹

Coal & Allied does not consider it appropriate for ARTC to retain a residual ability to withhold its consent under clauses 11.5(a) and (c) if the Access Holder has satisfied the relevant criteria in those clauses.⁷¹⁰

Coal & Allied also does not consider that criterion in clause 11.5(c)(iii), that ‘the variation of the Service Assumptions does not lead to a reduction in TOP Charges that would otherwise be payable, to be appropriate.’⁷¹¹ Coal & Allied argues that ‘[a]s a result of this criterion, ARTC may withhold its consent in circumstances where an Access Holder wishes to use smaller Trains than previously, as under the GTK pricing methodology, the change to smaller Trains will result in a reduction in TOP Charges.’⁷¹² This therefore ‘unreasonably limits the flexibility of Access Holders to change Train sizes in response to changing circumstances.’⁷¹³

⁷⁰³ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 6.

⁷⁰⁴ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 6.

⁷⁰⁵ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 6.

⁷⁰⁶ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 6.

⁷⁰⁷ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 6.

⁷⁰⁸ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 73.

⁷⁰⁹ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 73.

⁷¹⁰ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 73.

⁷¹¹ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 74.

⁷¹² Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 74.

⁷¹³ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 74.

Instead, in relation to the provisions dealing with use of non-compliant services, Coal & Allied proposes that:

- (a) clauses 11.5(a) and (c) be amended so that ARTC is deemed to have provided its consent to the operation of a Non-Compliant Service if an Access Holder has satisfied the relevant criteria in clauses 11.5(a) and 11.5(c);
- (b) if ARTC has envisaged other circumstances in which it may reasonably withhold its consent under clauses 11.5(a) and (c), that these be listed as additional criteria for the Access Holder to satisfy; and
- (c) clause 11.5(c)(iii) be removed.⁷¹⁴

QR National Coal

QR National Coal submits that clause 11.5 ‘needs to be amended to include the requirement for the Operator to agree to be able to meet any changes to Services Assumptions prior to such change being endorsed by ARTC.’⁷¹⁵

QR National Coal submits that the ‘current wording of the provision could result in the inclusion of Service Assumptions into the Agreement which are operationally or commercially impractical or unachievable for the operator who would – without recourse – be responsible for meeting them.’⁷¹⁶

Xstrata

Xstrata submits that it is satisfied with the provisions regarding the use of Non-Compliant Services on the Network, subject to further clarification. That is, Xstrata submits that it should be:

...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.⁷¹⁷

Xstrata submits that in the IAHA, that the definition of Non-Compliant Service be amended to add at the end of paragraph (a), before the word and, inserting the following text:

“, 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”⁷¹⁸

⁷¹⁴ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 74.

⁷¹⁵ QR National Coal, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 15.

⁷¹⁶ QR National Coal, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 15.

⁷¹⁷ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 23.

⁷¹⁸ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 30.

10.17.3 ACCC views

General comments

The ACCC considers that the purposes that clause 11.5 is intended to achieve are beneficial. That is, the clause should provide flexibility for Access Holders to alter their service configuration or rail operator, temporarily or permanently, without the need to formally vary the access agreement. Further, the clause should also provide a means to address the continued use of ‘non-compliant services’ that have not been otherwise agreed to by ARTC.

The ACCC considers it appropriate that ARTC must provide consent to the use of a ‘non-compliant service,’ as this is consistent with ARTC’s position as lessee and manager of the network. Further, the two criteria common to clauses 11.5(a) and 11.5(c), that a period of notice is given to ARTC and that the Non-Compliant Service will not have a material adverse impact (on Capacity, Coal Chain Capacity or the Capacity entitlement of another access holder), are appropriate, as a practical step and in recognition of the efficient operation of the network and supply chain alignment respectively.

The ACCC considers that the current drafting of clauses 11.5(a) and (c) provides ARTC with an appropriate level of flexibility to pragmatically manage and operate the rail network in the interests of all access seekers. With regards to any residual discretion ARTC has beyond the specified criteria, clauses 11.5(a) and 11.5(c) are drafted such that ARTC ‘will not unreasonably withhold its consent.’ ARTC’s discretion must therefore be exercised with a degree of objectivity, and an Access Holder can utilise the dispute resolution provisions in the IAHA if it disagrees with ARTC’s assessment. The ACCC therefore does not consider that further criteria need be specified in the clause, nor that ARTC’s discretion be further circumscribed, as suggested in submissions. In relation to Aston Resources concern, the ACCC is of the view that the provisions of clause 11.5 (more specifically, clause 11.5(e)(ii)), allows ARTC to appropriately deal with instances where a producer’s non-compliance impacts on overall capacity or the rights of another access holder.

Further, the ACCC notes the view from QR that the proposed drafting in clause 11.5(c) may allow Service Assumptions to be permanently varied which are ‘operationally or commercially impractical or unachievable’ for the Operator who would be responsible for meeting them. The ACCC considers that it would be in the interests of an Access Holder seeking a variation to the Service Assumptions to have obtained prior confirmation from the relevant Operator that it is possible for the Operator to run that particular service. Otherwise, the Access Holder will likely expend time and resources on a course of action that is not achievable. Consequently, the ACCC considers it is unnecessary for the clause to be amended along these lines.

The ACCC does, however, see merit in Xstrata’s suggestion that the use of a different rail operator should not, of itself, constitute a non-compliant service. The ACCC considers that it is likely to promote above rail competition and efficiency in the operation of the Hunter Valley supply chain, if clause 11.5 is 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 differences in the characteristics of trains utilised by the different Operators do 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, as reasonably determined by ARTC.

Clause 11.5(c)(iii)

The ACCC considers though, that clause 11.5(c)(iii) may require revision. The ACCC considers that, as the clause may allow ARTC to withhold consent to a permanent change to Service Assumptions where the variation leads to a reduction in TOP Charges, it may disincentivise Access Holders from using some train configurations, which may perhaps be more efficient. For example, if an Access Holder sought to run shorter trains, further capacity may become available on the network that ARTC may sell as ad hoc path usages. The consequences of this clause in the context of the determination of the efficient train configuration is also unclear (see further the discussion in the **Pricing** chapter).

The ACCC notes that under the IAHA, ARTC will have contracted and priced the TOP Charges for a particular Access Holder in a Contract Year based on a particular set of Service Assumptions. Clause 4.1 of Schedule 3 to the IAHA sets out the TOP price determination process and states:

- (a) For the Contract Year in which the Commencement Date occurs, the Prices are set out in the relevant Train Path Schedule.
- (b) The Prices that apply under **Schedule 3** for each following Contract Year are:
 - (i) to the extent that ARTC is providing the Access Holder with Indicative Services under this agreement, the Prices for those services are the final Indicative Access Charges published by ARTC and determined in accordance with the Access Undertaking; and
 - (ii) to the extent that ARTC is providing the Access Holder with non-Indicative Services under this agreement, the Prices for those services are the Charges notified to the Access Holder by ARTC, and determined, in accordance with the Access Undertaking.

The ACCC considers that a preferable approach to clause 11.5(c)(iii) may be that where an Access Holder seeks to permanently vary a service, the access charges for the new service are determined annually in accordance with the process in the IAHA. Such an amendment may be necessary in particular to facilitate transition of users to the use of efficient trains once the Indicative Service has been determined.

10.18 New Clause 11.6 of the IAHA - Cancellation of Services

Clause 11.6 of the IAHA proposes a mechanism by which ARTC can require a producer, who has caused a loss in capacity due to cancellation of services, to be required to bear the loss in capacity caused by the cancellation.

This mechanism requires ARTC to request the HVCCC to inform ARTC whether the total number of cancellations assigned to a particular Access Holder has had an

impact on capacity. If the cancellations have impacted capacity, ARTC may remove Path Usages from that Access Holder's Base Path Usages in the immediately following Period, up to a maximum of two Path Usages for each single event. If ARTC does not act on the HVCCC's assessment that capacity has been impacted by the cancellations, ARTC is required to provide the HVCCC with written reasons for its decision.

It is proposed that the dispute resolution provisions in clause 14 of the IAHA will not apply to clause 11.6.

Clause 11.6 as currently drafted was not included in the April 2009 HVAU.

10.18.1 ARTC submissions

Background

ARTC notes that a previous version of the cancellation clause in the HVAU enabled it 'to remove paths from an access holder where the access holder has cancelled a number of services in previous periods and those cancellations have had an impact on Coal Chain Capacity, track capacity or the capacity entitlement of other Access Holders.'⁷¹⁹ According to ARTC, this was included 'in response to producer's concerns with the potential impact of excessive cancellations on track capacity.'⁷²⁰

However, ARTC submits that certain producers informed it that this provision was inadequate to remedy their concerns and submitted proposals aimed at capping the number of paths a producer can schedule each period and quarantining the impact of excessive cancellations to the responsible producer.⁷²¹

ARTC noted that it 'closely considered' proposals submitted by producers and 'reviewed the operation and procedures of the Live Run Superintendent Group (LRSG) which is currently responsible for the assignment of cancellations to service providers.'⁷²²

As a result of the review ARTC considers that there were significant issues with the producers' proposals, including reliance on the 'informal, immature and relatively ad hoc assignment of fault currently operating in the Hunter Valley Coal Chain via the LRSG and the creation of inappropriate incentives on operators in cancelling services and deciding whether to accept the assignment of cancellations via the LRSG.'⁷²³

Revised clause 11.6

ARTC submits that, in recognition of the producers' concerns, it has strengthened the provisions on the monitoring and treatment of excessive cancellations in clause 11.6, and has included in section 5.9 of the HVAU a proposal to 'review processes for identifying and allocating losses of Capacity caused by Access Holders and their Operators.' The review would also examine potential incentive mechanisms to minimise such losses where they have a material impact on Capacity, or Coal Chain

⁷¹⁹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 41.

⁷²⁰ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 41.

⁷²¹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 41.

⁷²² ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 41.

⁷²³ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 41.

Capacity or the Capacity entitlements of Access Holders. Subsequent to the review ARTC may seek to vary the 2010 HVAU if appropriate.⁷²⁴

ARTC submits that the key elements of the proposal it has put forward in clause 11.6 are:

- Unlike the previous drafting in clause 11.5 of the 2009 IAHA, clause 11.6(a) and (b) capture direct cancellations by an access holder and also indirect cancellations where another access holder's service was cancelled due to the fault of the first access holder.
- Clause 11.6(a) relies on the assignment of cancellations by the LRSG (made up of the current service providers in the Hunter Valley and facilitated by a representative of the HVCCC).
- ARTC will rely on the HVCCC's advice as to whether the cancellations have had an impact on track capacity, Coal Chain Capacity or the contractual entitlement of another access holder. Where this is the case, ARTC may remove paths from the access holder in the subsequent period. If ARTC is advised that this is the case, but decides not to take paths off the access holder, ARTC will be required to provide reasons to the HVCCC.
- Under the proposal in clause 11.6, the maximum number of paths that ARTC is able to remove from access holders in respect of any one event is two. This limit has been proposed at the request of producers.⁷²⁵

10.18.2 Stakeholder views

Aston Resources

Aston Resources argues for a stronger requirement in clauses 11.5 and 11.6. It submitted that those clauses give ARTC 'too much discretion in deciding whether to resume pathways', as the drafting states that ARTC '**may** remove Path Usages from relevant access holders.'⁷²⁶ Instead, Aston submits that 'where the ARTC/HVCCC has reasonably formed the view that one producer's cancellations (or non-compliance) have impacted on overall capacity or the rights of another access holder, then ARTC should be required to resume the relevant pathways.' Alternatively, '[a]t the very least, the producer in question should be required to explain to ARTC the cause of the non-compliance/cancellations.'⁷²⁷

Aston submits that this would 'reduce ... the likelihood that other (compliant) access holders will have their track usage unduly interfered with by third parties.'⁷²⁸ Further, 'a more stringent approach to resumption may limit incentives for producers to hoard capacity that could be used by new or competing producers.'⁷²⁹ Aston is therefore of the view that:

⁷²⁴ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 41.

⁷²⁵ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, pp. 44-45.

⁷²⁶ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 6.

⁷²⁷ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 6.

⁷²⁸ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 6.

⁷²⁹ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 6.

‘subject to the oversight of the HVCCC, resumptions and cancellations can be an effective tool to ensure that incumbent Producers do not “game” the system. Where a resource is constrained, “use it or lose it” is an effective tool and ARTC should not be given an unfettered discretion as to whether or not to implement it.’⁷³⁰

Aston Resources submits in relation to clause 11.6 that ‘it is unclear ... why the number of path usages that can be removed from an Access Holder as a result of a single event (under section 11.6(d)(i)) is limited to two. It seems more logical that the removal relate to the number of paths deemed by the HVCCC to have been affected by the relevant conduct.’⁷³¹

Coal & Allied

In relation to clause 11.6, Coal & Allied notes that ‘certain producers, including Coal & Allied, submits a proposal to ARTC aimed at capping the number of Path Usages an Access Holder could schedule each Month and quarantining the impact of excessive cancellations to the responsible Access Holder.’⁷³² Specifically, this approach involved:

- (a) setting a scheduling cap for each Access Holder based on their required BPU's and standard allowance for cancellations;
- (b) monitoring train cancellations and identifying the party responsible; and
- (c) allocating the cancellation to the responsible party and thereby consuming that Access Holder's overall scheduling cap if they are deemed responsible.⁷³³

Coal & Allied notes that ARTC did not accept this proposal, partly as it would be ‘administratively complex’, and Coal and Allied submits that this is not an adequate reason where the scheduling cap approach would better ensure efficient use of the Network.⁷³⁴

Coal & Allied proposes that:

as the Government-owned Corporation responsible for the management of the Hunter Valley Coal Rail Network, ARTC be required to make more effort to improve the efficiency of the Network and Coal Chain. It would, in C&A's view, be readily possible for ARTC to:

- (a) establish internal administrative procedures to oversee a scheduling cap approach, with appropriate enhancements of ARTC's internal systems and additions to ARTC's staff (and with the relevant expenses to be recovered through the charges which are to apply under the Proposed HVAU);
- (b) agree to introduce a scheduling cap approach which would have a similar intent to clause 11.6 in the Proposed HVAU, provided that robust, HVCCC-administered delay accounting procedures

⁷³⁰ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 6.

⁷³¹ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 6.

⁷³² Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 64.

⁷³³ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 64.

⁷³⁴ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, pp. 64-5.

to allocate fault appropriately exist to support a scheduling cap approach; and,

- (c) remove clause 11.6 from the Proposed HVAU as it would be superseded by the scheduling cap approach.⁷³⁵

Notwithstanding this view, Coal & Allied recognises that the amendments made to clause 11.6 'are an attempt by ARTC to include some form of accountability for the Access Holder's use of the Network.'⁷³⁶ Coal & Allied submits its support for the development and implementation of procedures to uphold performance accountability and equitably allocate Capacity Shortfalls on the Network.⁷³⁷

Coal & Allied views ARTC's revised clause 11.6 'as a step in the right direction,' but considered that the clause only be seen as an interim solution until the review contemplated under section 5.9 of the HVAU is conducted and implemented.⁷³⁸

In light of this, Coal & Allied expresses a number of concerns with the practical implementation of clause 11.6 as currently drafted, including that:

- (a) An Access Holder may potentially have Path Usages removed from it twice. That is, if the cancellation causes a Capacity Shortfall and ARTC, through the application of clause 6 of the Proposed IAHA, removes Path Usage allocation from the Access Holder in that Month, the at fault Access Holder may then have Path Usages removed again in the following Month under clause 11.6.
- (b) Similarly, if an Access Holder causes a Capacity Shortfall due to excessive cancellations and ARTC, through the application of clause 6, removes Path Usage allocation from another Access Holder, clause 11.6 would be used to remove Path Usages from the at fault Access Holder, but it does not provide for any form of reimbursement or compensation for Access Holders who have been affected by the cancellations.
- (c) Further to (b), clause 11.6 is insufficient in facilitating efficiency or alignment in the subsequent Period to the cancellation as the availability of the removed paths to affected Access Holders in the subsequent Period will not assist them unless they can secure matching port capacity. As such, clause 11.6 may be no more than a punitive measure which, by removing paths from the "at fault" Access Holder without delivering additional usable paths to other Access Holders, leads to a reduction in overall Coal Chain efficiency and throughput.
- (d) Punishing an Access Holder for excessive cancellations by removing Path Usages in the subsequent Period does not protect the capacity entitlements of other Access Holders in the Period in which the excessive cancellations occurred.
- (e) The provisions in clause 11.6 are unclear in their operation as they do not explicitly recognise section 5.9 of the Proposed HVAU and the

⁷³⁵ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 64.

⁷³⁶ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, pp. 64-65.

⁷³⁷ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 65.

⁷³⁸ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 65.

potential for the review contemplated in section 5.9 to affect the ongoing operation of clause 11.6.⁷³⁹

Coal & Allied therefore submits that clause 11.6 should be amended:

- (a) In order to increase the certainty and transparency of the operation clause 11.6, clause 11.6(e) be amended so that, in addition to providing its written reasons for not removing BPU's to the HVCCC, ARTC is also required to publish its reasons on its website, or consent to the HVCCC distributing ARTC's reasons to its members.
- (b) Clause 11.6 be amended to consider any application of clause 6 of the Proposed IAHA that may have occurred in the Period where the cancellation caused the loss in Capacity, to ensure the Access Holder deemed responsible is not penalised twice.
- (c) C&A acknowledges ARTC's comments in its Explanatory Guide that there is not necessarily a "direct linear relationship" between the number of cancellations and the number of paths available on the Network. However, in the event that ARTC removes Path Usages from an at fault Access Holder, ARTC should be required to use its best endeavours to make additional paths available to affected Access Holders to the extent possible by offering available Path Usages to industry on an ad hoc basis (thereby facilitating alignment and the efficient use of the Hunter Valley Coal Chain). Accordingly, C&A considers that clause 11.6 be amended so that affected Access Holders receive compensation in the form of first rights to ad hoc Path Usages from ARTC which may become available after removing Path Usages from the at fault Access Holder, to the extent possible.
- (d) To better facilitate Hunter Valley Coal Chain efficiency and alignment, ARTC should be required to consult with the HVCCC and other Hunter Valley Coal Chain Service Providers to assess the impact of any removed Path Usages on the other contractual arrangements of the at fault and affected Access Holders.
- (e) Clause 11.6 be amended to state that it will operate subject to outcome of the review contemplated by section 5.9 of the Proposed HVAU. If the result of that review is the introduction of a system that renders clause 11.6 redundant or results in required changes to clause 11.6, then ARTC be requested to review or accordingly amend clause 11.6 in each executed AHA.⁷⁴⁰

Coal & Allied also submits that the inter-play of the Capacity Shortfall provisions in clause 6 with clause 11.6 (or any other improved 'at fault' regime which is implemented) be made clearer. That is, clause 11.6 (or any other "fault"-based capacity allocation provisions which form part of the HVAU or IAHA ... must be applied, where applicable, before clause 6.⁷⁴¹

HVCCC

The HVCCC notes that under '[c]lause 11.6 ... if in the reasonable opinion of [the] HVCCC, cancellations assigned to the Access Holder have had an impact on Coal Chain capacity, ARTC may treat the path as a Path Usage even though the path was

⁷³⁹ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 65.

⁷⁴⁰ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 66.

⁷⁴¹ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 63.

not physically used.’⁷⁴² The HVCCC submits that this is appropriate, ‘as the path was planned for that Access Holder and as such was not available to any other Access Holder.’⁷⁴³

NSWMC

The NSWMC submits that the approach to addressing Network Capacity losses due to Train cancellations in clause 11.6 of the proposed IAHA is ‘inadequate and will not facilitate contractual alignment.’⁷⁴⁴

PWCS

PWCS submits that it would like to see ‘clear protocols for measuring and assigning accountability for performance across the coal chain.’⁷⁴⁵

PWCS submits that clause 11.6 of the IAHA ‘should be carefully reviewed to ensure there are no practical problems in its implementation.’⁷⁴⁶ Specifically:

- If the services cancelled in a given week have an impact on rail Capacity or Coal Chain Capacity in that week, and if the producer at fault for the cancellation of services is also the one that had their allocation reduced under clause 6 of the IAHA, the application of Clause 11.6 – which results in the loss of paths in the following month – should be checked to ensure that there will be no “double penalty” for the producer. It may be necessary to refine the drafting of Clauses 6 and 11.6 to ensure that Path Usages are removed once (and only once) in various circumstances.
- The mechanism for reallocating Path Usages removed from the “at fault” producer to the affected producer should be transparent, so that the affected producer has the maximum opportunity to utilise these reallocated paths in the subsequent Period.⁷⁴⁷

QR National Coal

QR National Coal submits that under clause 11.6, there is ‘currently no mechanism to notify an access holder that ARTC intends to remove Path Usages from the access holder’s entitlement nor provide a process whereby ARTC’s assessment and decision can be challenged. If this provision is to be mandatory, a notification and review provision should be included.’⁷⁴⁸

Xstrata

Xstrata submits that it would be preferable if clause 11.6 was included in the HVAU, as it does not believe that their inclusion in Access Holder Agreements will be sufficient to ensure that ARTC actually gives effect to the provision.⁷⁴⁹ Xstrata submits that the ‘benefit from the provisions results when ARTC holds an individual

⁷⁴² HVCCC, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 3.

⁷⁴³ HVCCC, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 3.

⁷⁴⁴ NSWMC, Submission in Response to ACCC Consultation Paper, p. 10.

⁷⁴⁵ PWCS, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 7.

⁷⁴⁶ PWCS, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 7.

⁷⁴⁷ PWCS, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 7.

⁷⁴⁸ QR National Coal, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 2.

⁷⁴⁹ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 8.

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).⁷⁵⁰ 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.’⁷⁵¹

Therefore, Xstrata submits that it would be preferable if the loss allocation provisions in clause 11.6 were included in the HVAU, along with the capacity shortfall provisions. Xstrata considers that this would provide 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.’⁷⁵²

Xstrata also notes reservations as to whether clause 11.6 will function as effectively as would be desirable in incentivising behaviour to minimise losses of Coal Chain Capacity.⁷⁵³ Xstrata noted that it had previously outlined to ARTC a ‘Scheduled Path Cap’ approach, which Xstrata believes would be less reliant on the exercise of ARTC discretion and therefore provide a more certain incentive for promoting desirable behaviour.⁷⁵⁴ Xstrata considered therefore that a ‘Scheduled Path’ approach would be preferable to the allocation of cancellation losses presently adopted by clause 11.6 of the IAHA.⁷⁵⁵

10.18.3 ACCC views

Clause 11.6 as an interim measure

The ACCC recognises that clause 11.6 is an attempt to incorporate into the rail access arrangements a key feature of the long term solution for the Hunter Valley coal chain. That is, that users of infrastructure are accountable for actions that cause capacity losses to the system overall, or, put another way, that the actions of some users do not adversely impact on the ability of other users to operate in the system.

The ACCC recognises also that ARTC and coal producers have engaged to some extent on the development of an appropriate mechanism, and that some difference of opinion remains as to whether a ‘scheduled cap’ approach is desirable. Coal & Allied submitted, however, that while a ‘scheduled cap’ approach should be included in the current iteration of the IAHA, such an approach ‘would have a similar intent to clause 11.6’.⁷⁵⁶ This suggests that the intent of the different models is similar, and that there is only disagreement about the mechanics of the proposal.

The ACCC is of the view that, subject to the recommendations below, the current proposal in clause 11.6 is an appropriate interim measure to monitor and deal with a producer whose cancellations have had an impact on Capacity, Coal Chain Capacity

⁷⁵⁰ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 8.

⁷⁵¹ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 8.

⁷⁵² Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 8.

⁷⁵³ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 23.

⁷⁵⁴ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 23.

⁷⁵⁵ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 23.

⁷⁵⁶ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 64.

or the Capacity entitlement of other access holders. Section 5.9 of the proposed HVAU provides for a review of clause 11.6 within 12 months, and the experience of observing the clause in operation will inform the ultimate solution. The current version of clause 11.6 of the IAHA also does not appear to ‘lock in’ an approach to dealing with capacity losses that is inconsistent with the industry proposal for a ‘scheduled cap’ approach over the longer term. The ACCC expects that the review of clause 11.6 will consider the viability of a ‘scheduled cap’ approach.

The ACCC acknowledges Coal & Allied’s submission that the clause, as currently drafted, operates essentially as a punitive mechanism and is insufficient in facilitating efficiency and alignment.⁷⁵⁷ While to some extent this is correct, it is possible that where path usages are removed from an Access Holder pursuant to the clause, this may create additional ad hoc capacity that other users may obtain. Further, in relation to clause 11.6(c), which specifies that Path Usages are to be removed for the period immediately following the period in which the relevant cancellations occurred, it may be possible to revise that provision to state that the HVCCC may recommend an alternative period in which the usages may be removed. To do so may introduce more flexibility into the provision in the short term pending the outcome of the review.

Revisions to clause 11.6

The ACCC considers that clause 11.6 should be revised to provide that ARTC will notify an Access Holder as soon as practicable where its Base Path Usages are to be removed under the clause. While it is to be expected that ARTC would inform the Access Holder in any event, in the interests of clarity and certainty, explicit recognition of this should be included in the clause.

Also in the interests of clarity and certainly, the ACCC considers it appropriate for clause 11.6 to state explicitly that it is subject to review pursuant to the process in section 5.9 of the HVAU.

The ACCC also considers that clause 11.6 should be amended to ensure that where service cancellations cause a Capacity Shortfall and ARTC through exercising its discretion under clause 6 removes Path Usage allocation from the at fault Access Holder, the Access Holder does not have its Path Usages removed again in the following period under clause 11.6. It is unlikely to be appropriate for an Access Holder to be penalised twice for the same ‘event,’ particularly as the Access Holder remains liable for TOP charges under clause 11.6(f).

The ACCC also considers that minor revisions to clause 11.6 should be made in relation to ARTC’s obligation to provide reasons when choosing not to remove path usages. Under clause 11.6(e) of the IAHA, where ARTC has been informed by the HVCCC that cancellations reported pursuant to clause 11.6 have impacted on Capacity, Coal Chain Capacity, or the Capacity entitlement of another Access Holder, and ARTC chooses not to remove Base Path Usages, ARTC must provide the HVCCC with written reasons for its decision.

The HVCCC should, in many cases, be able to pass those reasons on to Access Holders who are members of the HVCCC who request them. Where this is not possible, it may be appropriate for Access Holders to seek those reasons from ARTC

⁷⁵⁷ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 65.

directly. The ACCC therefore considers that, where ARTC has provided reasons to the HVCCC under clause 11.6(e), and an affected Access Holder who is not a member of the HVCCC requests those reasons, ARTC should be obliged to provide those reasons to that Access Holder, subject to any confidentiality requirements. In addition, there should be a specific time frame within which ARTC must provide those written reasons to the HVCCC and the affected Access Holders. The ACCC notes that while this obligation places an additional administrative requirement on ARTC, it is minor and acceptable in the interests of ensuring that Access Holders are adequately informed where their interests are affected by a decision of ARTC.

Revisions to clause 11.6 that are unnecessary at this point in time

The ACCC notes that several submissions suggest revisions to clause 11.6. The ACCC considers that a number of these revisions are unnecessary, particularly given the interim status of the clause.

The ACCC considers that clause 11.6 provides ARTC with an appropriate level of flexibility to pragmatically manage the assignment of fault on the Hunter Valley rail network, particularly pending the outcome of the review under section 5.9. The ACCC is of the view that in the short term this flexibility may be difficult to achieve if clause 11.6 contained inappropriately strict rules in relation to the removal of Path Usages prior to the review under section 5.9. The ACCC therefore does not consider it necessary to strengthen ARTC's responsibility to remove path usages at this point in time.

The ACCC also does not consider it necessary for ARTC to consult with other Hunter Valley coal chain service providers to assess the impact of any removed Path Usages on the other contractual arrangements of the at fault and affected Access Holders. Under the proposed drafting of clause 11.6, ARTC is relying on the HVCCC's advice as to whether the cancellations have had an impact on track capacity, Coal Chain Capacity or the contractual entitlement of another access holder. The ACCC expects that the HVCCC will, in providing advice to ARTC, take into account the other coal chain service providers, and it is not necessary for ARTC to also perform this step.

The ACCC also does not consider it necessary for clause 11.6 of the IAHA to be included in the HVAU for the following reason. If the ACCC accepts the proposal submitted by ARTC resulting from the section 5.9 review (of the mechanism to identify and assign Capacity losses), and approves the variation sought by ARTC to the Undertaking and the IAHA, then any amendments to clause 11.6 approved by the ACCC as part of the variation will be identified as a Tier 1 (Mandatory) Coal Provision in Schedule A:1 to the Undertaking. Pursuant to section 5.9(d) of the Undertaking,⁷⁵⁸ those amendments will be automatically incorporated into all AHAs for Coal Access Rights, on the date the new or varied Access Undertaking comes into effect.

⁷⁵⁸ See also clause 19.1(b)(i) of the IAHA

10.19 New section 5.9 of the HVAU: review of mechanisms to identify and assign capacity losses

10.19.1 Proposed 2010 HVAU

ARTC has proposed under section 5.9 of the HVAU to undertake a review of the approach to cancellations and loss allocation in the IAHA.

This review, which will commence within 12 months of the commencement of the HVAU, and will be in consultation with the HVCCC, will be of:

the policy and processes for identifying and allocating losses of Capacity caused by Access Holders and their Operators and potential incentive mechanisms to minimise such losses where they have a material impact on Capacity or Coal Chain Capacity or the Capacity entitlements of Access Holders.⁷⁵⁹

As part of the review, ARTC will invite industry participants to provide views on what actions and omissions have a material impact on capacity and to submit proposals for a suitable framework to address the adverse impacts of those actions.

ARTC will then consider those proposals in good faith, and if a proposal meets the criteria set out in section 5.9(c), ARTC will submit that proposal to the ACCC and seek a variation to the HVAU to incorporate the framework into the HVAU and the IAHA.

10.19.2 ARTC's submissions

ARTC submits that following consultation on an earlier version of the HVAU, 'industry sought a broader review that would include an assessment of policy and procedures with respect to capacity losses more generally rather than a review limited to assessing cancellation policies.'⁷⁶⁰ ARTC therefore included section 5.9 in response.⁷⁶¹

10.19.3 Stakeholder views

Coal & Allied

Coal & Allied submits that the review under section 5.9 'needs to take a coal-chain wide perspective, to ensure that gains in one area are not at the expense of losses in another part of the coal chain.'⁷⁶² Consequently, Coal & Allied submits that the review be co-ordinated by the HVCCC, not ARTC, given 'the HVCCC's existing role of planning and co-ordinating the co-operative daily operation and long term capacity alignment of the Hunter Valley Coal Chain.'⁷⁶³ Coal and Allied submit that

⁷⁵⁹ ARTC, 2010 HVAU, 7 September 2010, section 5.9(a).

⁷⁶⁰ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 27.

⁷⁶¹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, pp. 27-28.

⁷⁶² Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 10.

⁷⁶³ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 10.

under this approach, 'it will be necessary for ARTC to constructively participate in this process and be willing to adopt the HVCCC's recommendations.'⁷⁶⁴

Coal & Allied also submits that 'the nature of the proposed review falls short of what is desirable for the following reasons:'

- (a) The proposed review of "policy and process for the cancellation of scheduled Services" is too narrow and may preclude other effective whole-of-coal-chain Capacity management mechanisms from being implemented.
- (b) The proposed review of ARTC's approach to cancelled services under clause 5.9 of the HVAU is only a **review**, which ARTC could conduct and subsequently ignore if **ARTC** determines that the proposal meets the criteria set out in section 5.9(c). Accordingly, the review process provides no comfort to Access Holders that ARTC will genuinely address the critical issue of individual Access Holder performance accountability.⁷⁶⁵

Therefore, Coal & Allied submits that section 5.9 should be amended so that:

- (a) A more appropriate review would be a comprehensive review of performance accountability/capacity management across the entire Coal Chain to which all stakeholders – Access Holders and Hunter Valley Coal Chain Service Providers – can contribute and which is responsible for identifying and designing solutions to maximise the efficiency of the Coal Chain for the benefit of all stakeholders. The review should be coordinated by the HVCCC as the appropriate oversight body for the entire Coal Chain and with significant input from ARTC, other Hunter Valley Coal Chain Service Providers and Access Holders. The provisions for such a review would be outside the scope of the Proposed HVAU and would need to be implemented at an "industry" level. The HVCCC would necessarily be the appropriate body to frame the provisions of the review.⁷⁶⁶
- (b) ARTC would give effect to the review by seeking to have the HVAU varied under the TPA in accordance with any HVCCC recommendations. To the extent that ARTC (having been involved in the HVCCC review) does not agree with any of the HVCCC recommendations, it should be relieved from its obligation to apply to have the HVAU varied only if it can establish to the satisfaction of the ACCC that the recommendations do not satisfy criteria of the type set out in sections 5.9(c)(ii)(A) and (B) of the HVAU. That is, C&A considers it appropriate that the ACCC, rather than ARTC, should act as the 'umpire' in determining whether it is inappropriate for ARTC to seek to implement recommendations made by the HVCCC on this key Coal-Chain-wide issue. The ACCC would be given the power to perform this function under s44ZZA(6A) of the TPA.⁷⁶⁷

HVCCC

The HVCCC submits that 'ARTC's commitment to consult with HVCCC, within 12 months, on the process for allocating losses of Capacity caused by Access Holders

⁷⁶⁴ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 10.

⁷⁶⁵ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 67.

⁷⁶⁶ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 67.

⁷⁶⁷ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 67.

and their Operators and potential incentive mechanisms to minimise such losses where they have a material impact on Coal Chain Capacity or the Capacity entitlements of Access Holders {Clause 5.9} is appropriate.⁷⁶⁸

NSWMC

The NSWMC notes the new review provision in section 5.9, though considered that ‘a more definite and certain requirement is needed.’⁷⁶⁹ ‘ARTC should be obliged to submit a proposal, based on the HVCCC recommendations, to ACCC within 18 months.’⁷⁷⁰ Further, ‘the process should not be restricted to losses caused by Access Holders and their Operators but should reflect a whole-of-Coal-Chain approach and encompass losses caused by other service providers including ARTC and the port terminal operators. It will be important to ensure that gains in one area are not at the expense of losses in another part of the coal chain.’⁷⁷¹

The NSWMC submits that in order to ‘achieve this objective ... the review should be co-ordinated by the ... HVCCC ... not ARTC, in view of the HVCCC 's existing role of planning and co-ordinating the co-operative daily operation and long term capacity alignment of the Hunter Valley Coal Chain.’⁷⁷² It will, however, be necessary for ARTC ‘to constructively participate in this process and be willing to adopt the HVCCC’s recommendations in the proposal that it submits to the ACCC for an appropriate variation of the undertaking.’⁷⁷³

PWCS

PWCS submits that the proposed review in section 5.9, is not appropriate, arguing that it ‘should be conducted on an industry-wide basis, not led by a single service provider.’⁷⁷⁴ While PWCS supports the concept of a broad based review, it should be led by the HVCCC, which would in turn engage a wide range of stakeholders, including PWCS.⁷⁷⁵

Xstrata

Xstrata submits that it is ‘appropriate for a review of the provisions of clauses 11.5 and 11.6 of the IAHA to be provided for.’⁷⁷⁶

Xstrata submits that 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.’⁷⁷⁷

⁷⁶⁸ HVCCC, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 2.

⁷⁶⁹ NSWMC, Submission in Response to ACCC Consultation Paper, p. 10.

⁷⁷⁰ NSWMC, Submission in Response to ACCC Consultation Paper, p. 10.

⁷⁷¹ NSWMC, Submission in Response to ACCC Consultation Paper, p. 10.

⁷⁷² NSWMC, Submission in Response to ACCC Consultation Paper, p. 10.

⁷⁷³ NSWMC, Submission in Response to ACCC Consultation Paper, p. 10.

⁷⁷⁴ PWCS, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 8.

⁷⁷⁵ PWCS, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 8.

⁷⁷⁶ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 14.

⁷⁷⁷ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 14.

Xstrata therefore submits that 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’.⁷⁷⁸

10.19.4 ACCC view

The ACCC notes stakeholder’s comments that the proposed review of the loss allocation mechanism in the HVAU is too narrow and should instead take a coal-chain wide perspective to ensure that gains in one area of the supply chain (i.e. rail) are not at the expense of others. In line with this approach it has been suggested that this broader review be developed and co-ordinated by the HVCCC.

The ACCC agrees that an industry-wide review of whole of supply chain performance accountability and capacity management mechanisms is likely to assist in maximising the efficient operation of the supply chain over the longer term. The ACCC also agrees that the HVCCC is likely to be the appropriate body to conduct a review of this kind, given the HVCCC’s role in planning and co-ordinating ‘the co-operative daily operation and long term capacity alignment of the Hunter Valley Coal Chain.’⁷⁷⁹

However, the ACCC does not consider that the proposed 2010 HVAU is the appropriate mechanism by which to coordinate such a wide-ranging, HVCCC-led review. The proposed 2010 HVAU is an access undertaking proffered by ARTC as an access provider and it is likely to go beyond ARTC’s legitimate business interests for that undertaking to be used as the vehicle to coordinate such a review. This is particularly the case as ARTC is but one participant in the supply chain, and as submissions have noted, the HVCCC is better placed to perform the function. The ACCC in this regard notes Coal & Allied’s submission, which commented that the ‘provision of such a review would be outside the scope of the Proposed HVAU and would need to be implemented at an ‘industry’’ level’.⁷⁸⁰ Further, the HVAU cannot be used to impose obligations on the HVCCC.

As a participant in the Hunter Valley coal chain, the ACCC would however expect ARTC to participate in such a wide-ranging review, and to appropriately incorporate into the HVAU recommendations from the review that are appropriate and relevant to the operation of the rail network. To do so would be consistent with the ACCC’s views regarding the significance of supply chain alignment and ARTC’s legitimate business interests.

The ACCC therefore considers that if the HVCCC commences a review of supply chain performance accountability and capacity management mechanisms then ARTC should in good faith contribute to and participate in that review. If at the end of that review a proposal is developed that includes proposed amendments to the HVAU, the ACCC is of the view that any such proposal could be submitted to the ACCC under the existing mechanisms set out in section 5.9(c).

If, however, a review of this nature is not commenced by the HVCCC within the relevant 12 month period as set out in the HVAU, then ARTC should conduct the

⁷⁷⁸ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 14.

⁷⁷⁹ HVCCC, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 1.

⁷⁸⁰ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 67.

review itself as currently proposed under section 5.9 of the HVAU (subject to the additional amendments discussed below).

The ACCC considers that this approach should address any ARTC concerns about being obliged to accept and apply an industry-devised solution that it has not agreed to, while also facilitating the timely development of a whole-of supply chain approach.

Further revisions to section 5.9

The ACCC considers that additional minor revisions are also necessary to section 5.9 to ensure it provides sufficient clarity and certainty.

The ACCC notes ARTC's submission that it will consult with the HVCCC on any proposals received under section 5.9(b) of the proposed HVAU 'in accordance with the principles set out in Schedule F'.⁷⁸¹ The ACCC considers that, given the importance of the review to the development of a process that may better promote the efficient operation of the network and the supply chain, the approach to consultation in Schedule F is not appropriate in this context. Schedule F grants ARTC discretion to decide whether or not it will consult with the HVCCC and allows ARTC to decide what type of consultation may be appropriate in the circumstances.⁷⁸² Given the implications of the review of the loss allocation provisions, a more robust consultation process is required.

The ACCC therefore considers that the review of the loss allocation mechanisms in section 5.9 should be amended to set out a more robust and specific consultation mechanism, such as that included at section 5.2(d) of the proposed HVAU (subject to the recommendations set out above in relation to that consultation process).

The ACCC is of the view that this approach to consultation should provide all relevant parties with sufficient certainty and clarity as to the terms, effect and operation of the key processes by which ARTC has agreed to consult. The ACCC notes that in addition to setting out the procedural matters, a robust consultation mechanism should also provide the means by which all relevant parties are adequately informed of the outcome of the consultation process where they are either: (i) involved in the consultation process; and (ii) where their interests under that process are potentially affected.

Finally, the ACCC considers that section 5.9(a) could specify with greater clarity which particular sections of the proposed HVAU and clauses of the IAHA or OSA are likely to come within the scope of the review. The ACCC notes that certain submissions considered that the review would be limited to section 11.6 of the IAHA, whereas others indicated it would include 11.5 and 11.6. The ACCC does not consider it necessary for section 5.9 to exhaustively list the provisions likely to be reviewed, as ex ante limitation of the scope of the review may foreclose consideration of certain matters that only later become apparent. However, the ACCC considers it is likely to be appropriate for the section to include more detail on the provisions most likely to be reviewed, in the interests of providing clarity to all interested parties that aspects of the regulatory and/or contractual arrangements may be subject to change.

⁷⁸¹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, pp. 27 -28.

⁷⁸² ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, pp. 27 -28.

In particular, the ACCC considers that the scope of the review should explicitly include the sections of the HVAU and corresponding clauses of the IAHA regarding the identification and management of capacity shortfalls. Several parties have sought further revisions to these provisions, and in some cases the ACCC does not consider that such revisions are appropriate at this point in time. Instead, the ACCC considers that a review of those provisions in light of experience of their operation will inform whether the revisions are necessary. Consequently, it would be appropriate for section 5.9, which already contemplates review of similar issues, to provide for review of those relevant capacity shortfall provisions.

11 Additional Capacity & Investment

Summary

This chapter considers section 6 of the proposed 2010 HVAU, which sets out the provisions relating to the creation of additional network capacity, and network connections.

Additional capacity

The ACCC considers that the investment framework in the proposed 2010 HVAU contains fundamental elements that are likely to be appropriate, but that further revisions are required to ensure the framework operates effectively and is appropriate to accept.

At a broad level, the ACCC is of the view that a revised HVAU must clearly and logically set out the different available investment ‘mechanisms’ in their intended order of operation, that is:

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

Similarly, the ACCC considers 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
- where an access seeker or group of access seekers ability 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.

While this should be the general aim of the ‘investment framework’ in the HVAU, the ACCC has also made the following specific recommendations to facilitate achieving this outcome.

Investments identified by ARTC or recommended by the HVCCC

The ACCC recommends the following amendments:

- Under the current drafting it is unclear 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). Therefore, 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.

- The HVAU should be amended so that it is clear when a point of commitment is reached in relation to a particular investment project, and consequently when user-funding may be triggered. It appears to the ACCC that a binding decision could be made at the ‘project assessment’ stage of the RCG process.
- The HVAU should clarify that the decision by ARTC whether to consent to proceed with a user-funded investment (as opposed to ARTC’s determination of whether to fund the project itself on commercial viability grounds) is made objectively by reference to clear criteria.
- It should be set out that where the applicable access holder(s) propose to meet the costs of the investment, ARTC and the applicable access holder(s) will use their best endeavours to enter into a user funding agreement within a specific timeframe.
- ARTC and access seekers should be able to negotiate terms around delivery of additional capacity that has been committed to under the HVAU processes; hence the Conditions Precedent to Delivery of Additional Capacity in the Train Path Schedule should be removed. Any grounds for reassessing a project due to change in criteria 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.

The ACCC also considers that a number of specific amendments be made to:

- clarify how the current requirement for RCG endorsement in section 6.3(b)(i) interacts with ARTC’s broader investment framework and the RCG process set out in 6.4(d);
- clarify the timeframes within which ARTC is obliged to provide a concept assessment report to the RCG under section 6.4(d) once it has received the HVCCC’s recommendation;
- revise section 6.3(b)(iii) to clarify that ARTC’s assessment of whether the provision of additional capacity is commercially viable, relates specifically to *ARTC’s* commercial viability;
- revise section 6.3(b)(iv) to provide a reasonableness requirement in relation to the non-financial criteria by which ARTC will determine whether additional capacity should be provided;
- revise section 6.3(b)(iv)(D) so that it is clear that the interests contemplated under the ‘legitimate business interests’ can only be those not already addressed by the

non-financial criteria at 6.3(b)(iv)(A) to (C). If ARTC is contemplating interests other than those already dealt with in the section, they should be specified; and

- provide that where ARTC has decided under section 6.3(b)(iv)(D) that the recommended additional capacity does compromise ARTC's legitimate business interests, ARTC should provide written reasons for that decision to the HVCCC and (where relevant) the applicable access holder(s).

Additional Capacity sought by Applicants

The ACCC also recommends that similar and consequential amendments to those set out above in relation to section 6.3 and 6.4 be made in relation to the relevant provisions in section 6.2(a) for additional capacity requested by Applicants.

The ACCC also considers that specific amendments be made to section 6.2 to:

- specify the timeframes within which ARTC is obliged to make a decision as to whether it will consent to the provision of additional capacity under section 6.2(a) once it has received a request; and
- strengthen ARTC's obligation to consult with the HVCCC in line with the recommendations made in relation to section 5.2(d) and (e) of the HVAU in the Capacity Management chapter.

Capital Contributions

The ACCC considers that section 6.2(g) should be amended to provide greater clarity as to what it means for ARTC to be 'economically no worse off' at section 6.2(g)(i).

The ACCC does not consider it necessary for the proposed 2010 HVAU to include a pro-forma user funding deed.

RCG process at section 6.4

The ACCC notes ARTC's view that the timing of the consultation and approval process, and the delivery of capacity expansion projects, is in the hands of the RCG, and considers this to be appropriate.

However, the ACCC considers that it is not clear in the current drafting of section 6.4 that the RCG does have this ability, and that the HVAU should be amended to clearly specify that the RCG controls the timing of the various stages of industry consultation and that specific timeframes where there is an obligation on ARTC should be provided.

The ACCC also considers that:

- section 6.4(b)(ii)(C) should be amended so it is clear 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;
- any elements of the RCG Charter that are relevant to voting rights (in addition to those already set out at section 6.4) should be incorporated into the HVAU;

- section 6.4(c) should be amended to set out that ARTC is obliged to publish the Hunter Valley Corridor Capacity Strategy on its website as soon as possible after it is finalised each year under section 6.4(c)(iv)(C); and
- section 6.4(i) should be amended so that where the 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.

Network Connections

The ACCC considers that section 6.1 should be amended to clarify the general rule that applies to the ownership of connecting infrastructure under section 6.1.

11.1 Introduction

11.1.1 Section 6 of the proposed 2010 HVAU

Section 6 of the proposed 2010 HVAU sets out provisions on network connections and additions and covers situations where capacity of the Hunter Valley rail network is either expanded or connected to other networks. These provisions:

- set out the planning process – the Hunter Valley Corridor Capacity Strategy – by which ARTC will itself identify Additional Capacity needs;
- set out the criteria under which ARTC will consent to the provision of Additional Capacity recommended by the HVCCC (section 6.3(b));
- set out, where despite these processes there is not sufficient Available Capacity on the Network to provide an Applicant with the Access Rights sought, the criteria under which ARTC will consider a request for Additional Capacity (section 6.2);
- set out the stages of industry consultation that ARTC will undertake (including setting out the role of the Rail Capacity Group (RCG) and the Hunter Valley corridor capacity strategy) when Additional Capacity is sought by: an access seeker/access holder; identified by ARTC; or recommended by the HVCCC (section 6.4);
- allow for users to fund Additional Capacity (to be built by ARTC) where ARTC chooses not to fund it, and specifies the treatment of contributions where Additional Capacity is funded through Access Holder Capital Contributions (‘equitable reconciliation’) (sections 6.2(f) and (g)); and
- allow owners of tracks not part of the Network (e.g. spur lines owned by coal miners) to be able to connect to the Hunter Valley Network provided certain conditions are met (section 6.1).

11.1.2 Overview of ACCC considerations

Investment in the Hunter Valley rail network to expand capacity has been raised by a number of coal access seekers as a significant issue.

Concerns of coal producers

The ACCC understands 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 exist 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.

Recent QCA decision

The ACCC notes that the Queensland Competition Authority (QCA) recently gave extensive consideration to issues regarding investment and the provision of additional capacity in its decisions regarding Queensland Rail's 2010 access undertaking.⁷⁸³ The ACCC acknowledges the QCA's decisions and recognises that, while fundamental principles underlying the analysis are applicable to the assessment of ARTC's HVAU, there are key differences in circumstances that distinguish the assessment of the HVAU from the assessment of the QR undertakings.

In particular, whereas QR is a vertically integrated operator of below and above rail services, ARTC is a vertically separated provider of below rail services only, and hence is likely to exhibit different economic incentives to QR. That is, a vertically integrated entity with market power at one functional level, and which operates in a related competitive market, may have the incentive to leverage its market power into the competitive market to favour its related business. In contrast, a vertically separated entity with market power should not have such an incentive, but may nonetheless seek to otherwise exploit its market power. The most commonly cited exercise of market power is for a firm to withhold capacity to increase price; colloquially, to 'give less and charge more.' Failure to invest in rail capacity in response to increasing demand can be seen as a possible manifestation of this behaviour.

The ACCC notes also that the QCA's assessment of investment issues was informed by submissions from stakeholders expressing concerns that QR had failed in the past to adequately invest and provide sufficient capacity. These considerations informed the level of regulatory intervention the QCA deemed necessary pursuant to the undertaking. In the context of the assessment of the proposed 2010 HVAU, stakeholders have not raised concerns that ARTC has, in the past, failed to invest to

⁷⁸³ QCA, *Final Decision – QR Network's 2010 DAU*, September 2010.

ensure sufficient capacity on the rail network. Rather, as outlined above, concerns largely revolve around the degree of certainty that ARTC will undertake investment in additional capacity into the future.

These distinguishing features therefore inform the ACCC's view that it is unnecessary at this stage for the proposed 2010 HVAU to include the same degree of prescription on the issues of investment and additional capacity as the QCA deemed necessary for the QR access undertaking.

Proposed investment framework

It appears that the investment framework put forward by ARTC involves three avenues by which Additional Capacity may be created:

- ARTC identifies (under the Hunter Valley corridor capacity strategy), funds and constructs Additional Capacity;
- the HVCCC recommends an investment to provide Additional Capacity, and ARTC consents to providing that Capacity if certain criteria are met;
- an Applicant seeks Additional Capacity, and ARTC consents to providing it if it is commercially viable to ARTC, or if the Applicant agrees to meet the cost of the Capacity, and if other criteria are also met.

Additionally, ARTC will seek the endorsement of the Rail Capacity Group (RCG) for all capacity expansion projects, and will plan expansions of capacity in cooperation with the HVCCC.

The RCG

Pursuant to the RCG process, coal access seekers will have the ability to endorse a particular investment proposal through various stages of development. The effect of RCG endorsement is that capital expenditure is included into the RAB, and ARTC may therefore recover on that expenditure at the regulated rate of return.

Where the RCG chooses not to endorse a particular project, subsequent expenditure incurred by ARTC on project development or delivery may only be included in the RAB (or expensed when incurred) with the approval of the ACCC. That is, the ACCC must determine that such expenditure is 'Prudent.'

If the ACCC does not consider that the proposed investment is Prudent, it will not be included in the RAB, and consequently ARTC will not earn a return. In such circumstances, ARTC is unlikely to continue with the investment.

A particular user may, however, seek to fund the investment at this stage. If this funding occurs on a non-Prudent basis, ARTC will not seek to recover the cost of the user's contribution, unless an additional user seeks to operate on that particular part of the Network. In such circumstances, Access Charges will seek to recover the capital

costs of that investment, determined by reference to the useful life of the asset, the regulated rate of return, and the proportional consumption of the asset.⁷⁸⁴

If the funding occurs on a Prudent basis, Access Charges will seek to recover the capital costs of that investment, determined by reference to the useful life of the asset, the regulated rate of return, and the proportional consumption of the asset.⁷⁸⁵

It is noted that the RCG process is new and untested. The ability of individual users to bypass the RCG and seek Additional Capacity from ARTC is one check on any residual concerns that large incumbents may – despite the safeguards built into the RCG process – use the RCG to block new entrants gaining capacity.

Appropriateness of the proposed framework

In summary, the ACCC considers that the investment framework in the proposed 2010 HVAU contains fundamental elements that are likely to be appropriate, but that the provisions are confusingly drafted and further revisions are required to ensure the framework operates effectively and is appropriate to accept.

The underlying framework is likely to be 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 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 ability for users to step in and fund additional capacity that has gone through each of these stages and otherwise been considered not prudent nonetheless allows a user to guarantee their own capacity if all else fails. The ACCC recognises that this scenario is likely to be rare.

⁷⁸⁴ ARTC, *Hunter Valley Coal Network Access Undertaking*, 7 September 2010, section 6.2(g)(iv)(A)(ad).

⁷⁸⁵ ARTC, 2010 HVAU, 7 September 2010, section 6.2(g)(iii)(A)(ab).

User-funding option

The inclusion of a user-funding option as part of the investment framework is also likely to appropriately reflect the interests of supply chain alignment and access seekers, as well as promote efficient investment in infrastructure.

While the framework contemplates user-funding in some instances, the ACCC considers that the relevant provisions require revision to operate effectively and be appropriate to accept.

Section 6.2 of the proposed 2010 HVAU provides for an access seeker to fund Additional Capacity as part of the process of negotiating an access agreement, while it is also possible for a user to fund Additional Capacity where it has otherwise been deemed not prudent (that is, the scenario described above).

While these options are appropriate, the ACCC considers that the user-funding option must in general operate as an alternative or fallback where ARTC decides not to fund capacity expansions itself. If the 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, a user-funding option that operated in this way should incentivise ARTC to make efficient and timely investment decisions. User-funding contributions to capacity expansion investment will not be included in the RAB, hence ARTC will not earn a return on those investments. ARTC 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. The user funding option should therefore promote efficient investment in infrastructure, as reflected in the objects of Part IIIA of the Act.

As discussed in this chapter, the ACCC considers that revisions are needed to ensure that the user-funding option operates in this manner. In particular, the ACCC considers that it must be clear when user-funding may occur, and that the decision by ARTC to consent to user-funding be made objectively by reference to clear criteria.

At present, the ACCC considers that it is unclear and uncertain that user-funding may be pursued as an option other than in the circumstances noted above. While the ACCC recognises that user-funding may be appropriate in these circumstances, there may be adverse consequences where user-funding is left as an option that is not well-specified. That is, access seekers are unlikely to obtain necessary certainty where ARTC has pursued an investment decision up to a particular point, and then decides it no longer wishes to proceed. If a period of months or years has transpired, the timing mismatch between the delivery of the rail capacity and the complementary capacity may create inefficient outcomes for the Hunter Valley coal chain.

To avoid these outcomes, the ACCC considers that the undertaking must specify that a user-funding option may be pursued at an appropriately timely juncture in the planning and development of Additional Capacity. The ACCC recognises that, depending on the nature of the project and the stage of its development, the point at which funding decisions are made may vary. However, the ACCC considers that the

‘project assessment’ stage (referred to in section 6.4(f) of the HVAU), appears to be the appropriate juncture at which funding decisions are made, and where commitment to delivery of the capacity occurs.

Consequences of an effective user-funding option

The ACCC also considers 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.

The ACCC notes that one of the advantages of the investment framework is that ARTC is largely in control of investment decisions, but with significant input from industry so as to ensure that investment occurs where industry judges it is prudent and there are users who are willing to pay for it. Arbitration on investment decisions serves only as a fallback where all industry processes have broken down.

Equitable reconciliation

A further consequence of user-funding is that the undertaking must include clear and certain provisions on how user contributions will be treated, and how access charges for user-funded capacity will be determined and collected.

The proposed 2010 HVAU includes provisions on these issues, and the ACCC considers them below.

Delivery of new capacity

Once a decision has been made either by ARTC to fund the recommended Additional Capacity at the ‘project assessment’ stage, or that ARTC should build it with user funding, at that point, there should be more certainty that Additional Capacity will be constructed.

The ACCC notes that where ARTC makes a decision to invest and elects to fund the Additional Capacity at the ‘project assessment stage’, there may be a period between that election and the finalisation of the relevant TOP contracts. As a result, the ACCC is of the view that it is not unreasonable for ARTC to be able to withdraw during this period if its cost of funding changes or the TOP contracts do not eventuate. However, once contracts are signed, the delivery of capacity would then be mandatory by virtue of there being mutual contracts.

What this means is that ARTC should not be able to reconsider the commercial viability of a project it has already agreed to fund, and entered contracts on the basis of, at a later stage under the Train Path Schedule. This is especially the case if in the interim other parties have needed to make complementary investments (e.g. in mines or port capacity).

However, the actual terms on which delivery of the Additional Capacity occurs, including grounds for abandoning or reassessing a project due to change in criteria that are beyond ARTC's control, would be set out in the commercial contracts between ARTC and the parties contracting for the capacity and, if relevant, any other providers of user funding. If they could not agree, the terms and conditions would be subject to ACCC arbitration, in the normal manner. In so arbitrating, the ACCC would expect to adhere to the view expressed in its March 2010 Draft Decision that ARTC is not a construction company. The ACCC is of the view that 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 contractually, but that the Project Completion Condition Precedent in the Train Path Schedule create too much uncertainty.

The ACCC also notes that ARTC should not be liable for damages for consequential economic loss. This would equally limit any monetary damages for non-performance of contracts for the delivery of Additional Capacity.

The ACCC has also taken the view that a general exclusion on all non-financial remedies is not appropriate, so that parties could seek remedies such as specific performance or declarations from a court. In deciding whether to grant such remedies, the court could take into account the specific circumstances of the matter.

The ACCC considers that leaving these matters to the normal process of commercial contracts (backed up by arbitration) and the commercial courts is preferable to attempting to specify now, perhaps years in advance of a matter arising, all circumstances in which it would be reasonable for ARTC to not proceed.

Clarity of drafting of HVAU

Finally, the ACCC considers that the degree of concern over investment and additional capacity issues has been heightened by the ambiguity of the drafting of the relevant provisions in the undertaking. Investment in additional capacity is, like many other aspects of the proposed access arrangements, highly complex, involving a balance of various considerations and the prescription of detailed processes. The ACCC considers that the HVAU as drafted does not, however, set out a clear and logical treatment of the issue.

Therefore, the ACCC is of the view that a revised HVAU must clearly and logically set out: (i) the different available investment 'mechanisms' under the HVAU – in their intended order of operation; (ii) the rights and obligations of all relevant parties under those different mechanisms including: (a) when ARTC's obligations are triggered, when ARTC will be bound by its decisions, and the criteria on which those decisions will be made; and (b) where an Access Seeker/Access Holder's right to fund an investment will be triggered, including the principles of equitable reconciliation that will apply to a user funded investment.

While the ACCC is of the view that this should be the general aim of the ‘investment framework’ in the HVAU, a range of specific recommendations have also been made in relation to the proposed provisions in the HVAU in order to assist in achieving this outcome.

An important first step in the analysis is therefore to set out the ACCC’s understanding of the investment framework as proposed in the HVAU, and in doing so also note the revisions the ACCC considers necessary in order for the framework to be appropriate to accept.

11.1.3 The proposed ‘investment framework’ in the HVAU

ARTC has usefully provided in *Appendix 4* of the Explanatory Guide, ‘a flow chart describing the pathways and options for creation of additional capacity in the Network.’⁷⁸⁶

Having regard to the sections of the proposed 2010 HVAU and expanding on ARTC’s flow charts, and prior to setting out the ACCC’s specific recommendations in relation to the investment provisions (sections 6.2, 6.3 and 6.4 of the HVAU and clauses 4.3(a)(iii) and (iv) of the Train Path Schedule), the ACCC considers it useful to set out a high level summary of how it understands ARTC’s proposed ‘investment framework’ to operate, including how the recommendations that the ACCC has proposed in the following chapter are intended to operate.

The purpose of this explanation is to set out how the ACCC views the HVAU investment process working at a broader level and to facilitate ARTC making the necessary amendments with that context in mind.

Hunter Valley corridor capacity strategy

- ARTC will develop the Hunter Valley corridor capacity strategy (HVCCS) annually.
- The HVCCS is the primary mechanism by which capacity expansion options across the Hunter Valley Network are planned. The HVCCS is developed in conjunction with the HVCCC and in consideration of the Coal Chain Master Plan developed by the HVCCC, with the aim of aligning projects to provide Additional Capacity with projects to expand capacity at the coal terminals at the Port of Newcastle.
- The HVCCS will be developed taking into account the interests of Access Holders with Non-Coal Access Rights, Access Holders with Non-Coal Access Rights and above rail operators.
- ARTC may seek endorsement of the HVCCS through the RCG. ARTC will convene, and conduct regular monthly meetings with the RCG. If the RCG does not endorse the HVCCS, then any subsequent expenditure incurred by ARTC on project development or delivery may only be included in the RAB or expensed

⁷⁸⁶ ARTC, *Hunter Valley Access Undertaking - Explanatory Guide (September 2010)*, 7 September 2010, p. 30; ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, [Appendix 4], pp. 61-65.

when incurred with the approval of the ACCC (or as otherwise allowed under the RCG process).

- The HVCCS will include a range of capacity expansion options and ARTC will identify preferred options that will proceed through the RCG process. Where ARTC decides that it does not wish to fund the particular ‘option’ at the ‘project assessment’ stage (referred to in section 6.4(f) of the HVAU), a user funding option should be available.

Additional Capacity recommended by the HVCCC

- The HVCCC may recommend an investment to provide Additional Capacity to the Network to ARTC at any time under section 6.3(b) of the HVAU.
- ARTC will prepare a concept assessment report in relation to that recommended Additional Capacity under section 6.4(d) within a specific timeframe.
- The project will go through the RCG process. ARTC will assess whether or not it will fund the project in line with the criteria set out at section 6.3(b) at the ‘project assessment’ 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.
- 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 set out in section 6.3(b)(iv).
- 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 set out in section 6.3(b)(iv).
 - 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.
- ARTC may seek endorsement of the recommended Additional Capacity through the RCG. If the RCG does not endorse the recommended Additional Capacity, then any subsequent expenditure incurred by ARTC on project development or delivery may only be included in the RAB or expensed when incurred with the approval of the ACCC (or as otherwise allowed under the RCG process).
- Where ARTC has decided to fund the recommended Additional Capacity at the ‘project assessment’ stage, there should be more certainty that Additional Capacity will be constructed.
 - The ACCC notes that where ARTC makes a decision to invest and elects to fund the Additional Capacity at the ‘project assessment stage’, there may be a period between that election and the finalisation of the relevant TOP contracts.

As a result, the ACCC is of the view that it is not unreasonable for ARTC to be able to withdraw during this period if its cost of funding changes or the TOP contracts do not eventuate. However, once contracts are signed, the delivery of capacity would then be mandatory by virtue of there being mutual contracts.

- This means that ARTC should not be able to reconsider the commercial viability of a project it has already agreed to fund at a later stage under the Train Path Schedule. This is especially the case if in the interim other parties have needed to make complementary investments (e.g. in mines or port capacity). However, the actual terms on which delivery of the Additional Capacity occurs, including grounds for abandoning or reassessing a project due to change in criteria that are beyond ARTC's control, would be set out in the commercial contracts between ARTC and the parties contracting for the capacity. If they could not agree, the terms and conditions would be subject to ACCC arbitration, in the normal manner. In so arbitrating, the ACCC would expect to adhere to the view expressed in its March 2010 Draft Decision that ARTC is not a construction company. The ACCC is of the view that 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.
- Where the requested Additional Capacity is funded by the applicable Access Holder(s) under a user funding agreement, then ARTC is bound to finalise the Additional Capacity in the time agreed. As above, the actual terms on which delivery of the Additional Capacity occurs, including timetables and grounds for abandoning or reassessing a project due to change in criteria that are beyond ARTC's control, would be set out in the commercial contracts between ARTC and the user funders and any other parties contracting for the capacity.

Requests for Additional Capacity by Applicants

- An Applicant may apply for Access Rights under section 3 of the HVAU at any time.
- As part of its assessment of the application for Access Rights, ARTC will determine whether there is sufficient Available Capacity to meet that Applicant's request.
- If ARTC considers that there is not sufficient Available Capacity on the Network to provide the Applicant with the Access Rights sought, the Applicant may request that Additional Capacity be created.
- ARTC will consider that request under section 6.2 of the HVAU.
- If ARTC accepts the project under section 6.2(a), ARTC will prepare a concept assessment report within a specific timeframe in relation to that recommended Additional Capacity under section 6.4(d).
- The project will go through the RCG process. ARTC will assess whether or not it will fund the project in line with the criteria set out at section 6.2(a)(i) at the

‘project assessment’ 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 under section 6.2(a)(i)(B).

- Where ARTC has made the assessment that it is willing to fund the investment, ARTC will also consider whether the Applicant’s request for Additional Capacity satisfies, in the reasonable opinion of ARTC, the range of objective non-financial criteria set out in section 6.2(a)(ii).
- Where an Applicant has agreed to meet the cost of the Additional Capacity under section 6.2(a)(i)(B), then ARTC will also consider whether the Applicant’s request for Additional Capacity satisfies, in the reasonable opinion of ARTC, the range of objective non-financial criteria set out in section 6.2(a)(ii).
 - Where an Applicant has agreed to meet the cost of the Additional Capacity under section 6.2(a)(i)(B), ARTC and the Applicant must enter into a user funding agreement within a specific timeframe.
- ARTC may seek endorsement of the Additional Capacity through the RCG. If the RCG does not endorse the Additional Capacity, then any subsequent expenditure incurred by ARTC on project development or delivery may only be included in the RAB or expensed when incurred with the approval of the ACCC (or as otherwise allowed under the RCG process).
- Where ARTC has decided to fund the requested Additional Capacity at the ‘project assessment’ stage, ARTC should be obliged to construct that Additional Capacity. As noted above, the ACCC is of the view that it is not unreasonable for allowances to be made for the period between the election to fund the Additional Capacity at this stage and the finalisation of the relevant TOP contracts. This means that ARTC should not be able to reconsider the commercial viability of a project it has already agreed to fund at a later stage under the Train Path Schedule. The ACCC is of the view that 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 contractually, but that the Project Completion Condition Precedent in the Train Path Schedule creates too much uncertainty.
- Where the requested Additional Capacity is funded under a user funding agreement, then ARTC is bound to finalise the Additional Capacity in the time agreed. As above, the actual terms on which delivery of the Additional Capacity occurs, including timetables and grounds for abandoning or reassessing a project due to change in criteria that are beyond ARTC’s control, would be set out in the commercial contracts between ARTC and the user funders and any other parties contracting for the capacity.

Industry consultation through the RCG process

- All expansions through the HVCCS and proposals for the construction of Additional Capacity on the Hunter Valley rail network go through the ‘concept assessment’ stage set out at 6.4(d) of the HVAU.

- The RCG controls the timing of the various stages of industry consultation set out in sections 6.4(d) through (h). Wherever there is an obligation on ARTC to do anything under the consultation process, ARTC must satisfy that obligation within a specific timeframe.
- As the RCG controls the timeframes, the RCG can move through the stages set out in section 6.4(d) through (h) as quickly as it deems necessary for any particular proposal to create Additional Capacity.
- ARTC may seek endorsement of the relevant Additional Capacity through the various stages of the RCG. If the RCG does not endorse the recommended Additional Capacity at any particular stage, then any subsequent expenditure incurred by ARTC on project development or delivery may only be included in the RAB or expensed when incurred with the approval of the ACCC (or as otherwise allowed under the RCG process).
- Alternatively, if the RCG does not endorse a project, and ARTC does not wish to fund the Additional Capacity, an Applicant or the applicable Access Holder(s) will have the option to decide whether or not to fund the project at the ‘project assessment’ stage.
- With the RCG controlling the timeframes within the consultation process, the RCG will move as quickly as industry desire in order to get to a stage of project development where an Applicant or the applicable Access Holder(s) will know what capital needs to be spent on a particular project and whether and to what extent that Additional Capacity will be recovered through a socialisation of costs, and will be able to decide whether or not they are willing to fund the construction of that Additional Capacity.

11.2 Expansions and Additional Capacity identified by ARTC or recommended by the HVCCC

11.2.1 Proposed 2010 HVAU: process for investment in Additional Capacity

Section 6.3(a) states that ARTC will cooperate with the HVCCC in relation to planning expansions of Capacity and Coal Chain Capacity.⁷⁸⁷

Section 6.4(a)(i) goes on to state that, in relation to Additional Capacity arising from the cooperative ARTC/HVCCC process, ARTC will follow certain steps. These steps are subsequently set out in sections 6.4(c) to (g).

The first step is the development of the Hunter Valley corridor capacity strategy, which ARTC is required to develop under section 6.4(c). For ease of reference, the section is set out in its entirety:

- (i) ARTC will develop a Hunter Valley corridor capacity strategy annually.

⁷⁸⁷ Section 6.3(b) goes on to discuss criteria ARTC will use to decide whether to consent to a capacity expansion.

- (ii) In developing the Hunter Valley corridor capacity strategy, ARTC will base the strategy on the rolling annual capacity forecast developed by the RCG, which will:
 - (A) be based on contracted volumes sought by existing and prospective access holders;
 - (B) be aligned with Newcastle port terminal capacity forecasts; and
 - (C) identify maximum future capacity requirement.
- (iii) The Hunter Valley corridor capacity strategy will include capacity expansion options which:
 - (A) seek to ensure sufficient Capacity to meet coal producers' combined demand forecasts;
 - (B) take into consideration preferred outcomes of the Coal Chain Master Plan, existing capability and future investment commitments in other parts of the coal supply chain, and a reasonable assessment of sunk assets and the costs and risks associated with fluctuations in coal demand and volumes;
 - (C) include a preliminary high level assessment of objectives, and an indicative cost estimate and benefits;
 - (D) include an estimate of cost to be incurred in the Concept Assessment stage; and
 - (E) recommendation of the preferred options.
- (iv) Before finalising the Hunter Valley corridor capacity strategy, ARTC will:
 - (A) convene and conduct an annual meeting with the HVCCC and relevant coal terminal operators at the Port of Newcastle. The objective of the consultation is to provide that any planned expansions to the Network in the Hunter Valley corridor capacity are aligned with expansions at the coal terminals at the Port of Newcastle;
 - (B) publish a draft Hunter Valley corridor capacity strategy on the ARTC website and will invite comments on the options set out in draft strategy from all users of the Network including Access Holders with Coal Access Rights, Access Holders with Non-Coal Access Rights, and above rail operators; and
 - (C) consider the views submitted by those stakeholders in good faith and take those views into account in finalising the Hunter Valley corridor capacity strategy.

Additional capacity identified by ARTC - industry consultation

Section 6.4(c)(v) goes on to state that:

- (v) ARTC may seek formal endorsement from the RCG of identified preferred options in the Hunter Valley corridor capacity strategy to proceed to Concept Assessment and for the estimated costs of undertaking the Concept Assessment to be included in the RAB or expensed in the year incurred.

The section therefore provides that ARTC may seek endorsement from the RCG of options identified in the Corridor Capacity Strategy.

In the March 2010 Draft Decision the ACCC was of the view that amendments needed to be made to section 6.4 of the proposed 2010 HVAU to ensure that the RCG is consulted in relation to all new rail infrastructure that ARTC is intending to add to the Hunter Valley rail network.⁷⁸⁸

It is the ACCC's view that the amendments in section 6.4(d)(i) of the proposed 2010 HVAU, which sets out that the RCG will be consulted in relation to projects identified by ARTC and by those recommended by the HVCCC, deal with the concerns raised in the March 2010 Draft Decision regarding ensuring that the RCG is consulted in relation to new rail infrastructure identified by ARTC.

Section 6.4(b)(i) provides that:

- (i) ARTC will convene, and conduct, regular monthly meetings with the RCG for the purpose of consulting with applicable industry representatives and obtaining endorsement of Additional Capacity. ARTC will prepare an agenda for meetings and provide a secretariat. ARTC may seek to consult or seek endorsement from the RCG outside of regular monthly meeting where ARTC considers this will assist project development and delivery.

Meetings of the RCG will therefore occur on a 'regular, monthly basis.'

The ACCC interprets these provisions to mean that ARTC may put forward to the RCG for endorsement a project it has identified as part of the Corridor Capacity Strategy at these regular monthly meetings.

Additional capacity recommended by HVCCC

In the alternative, the HVCCC may recommend investment in a particular project, in which case it is then necessary to refer back to section 6.3, which sets out the criteria ARTC will apply in deciding whether to consent to a recommendation from the HVCCC for investment.

Section 6.3(b) states:

- (b) Where the HVCCC recommends an investment to provide Additional Capacity to the Network, ARTC will consent to the provision of Additional Capacity if:
 - (i) the investment to provide the Additional Capacity is endorsed by the Rail Capacity Group ("the RCG") as contemplated in **section 6.4;**
 - (ii) sufficient take or pay commitments are contracted by applicable Access Holders to recover NCC associated with the Additional Capacity over the economic life of the Additional Capacity; and

⁷⁸⁸ ACCC, *Australian Rail Track Corporation Limited – Hunter Valley Coal Network Access Undertaking Draft Decision*, 5 March 2010, p. 362.

- (iii) in ARTC's opinion, the provision of the Additional Capacity is commercially viable having regard to:
 - (A) terms and conditions of the relevant Access Agreement;
 - (B) circumstances for ARTC to service and raise financing through debt and equity for Additional Capacity;
 - (C) opportunity cost to ARTC given the relative risk and returns associated with the Additional Capacity financing relative to other investment opportunities; and
 - (D) net effect on ARTC's balance sheet, gearing ratios and any other debt covenants in existence at the time; and
- (iv) the Additional Capacity of the Network is, in the opinion of ARTC:
 - (A) technically feasible and consistent with the economically efficient operation of the Network and meets ARTC's engineering and operational standards;
 - (B) consistent with the safe and reliable operation of the Network and will not impact on the safety of any user of the Network;
 - (C) does not reduce Capacity or Coal Chain Capacity; and
 - (D) does not otherwise compromise ARTC's legitimate business interests.

11.2.2 Stakeholder views

Coal & Allied

Coal & Allied submits that it 'supports the concept of Additional Capacity being recommended by the HVCCC, particularly given the importance of addressing circumstances where Additional Capacity is required to service existing Capacity Entitlements (for example, to relieve congestion or provide additional Tolerance to assist with coordination of track and port entitlements).'⁷⁸⁹

Coal & Allied also submits that 'the right for Access Seekers to fund an expansion is, ultimately, the only assurance that expansions necessary to deliver requested Additional Capacity will be built.' Coal & Allied submits that it 'recognises that ARTC might not be "forced" to invest in and expand its facilities.'⁷⁹⁰

Coal & Allied submits however that '[g]iven this, the process for Applicants funding expansions must be transparent, including the timing of key decisions'.⁷⁹¹

In line with this, Coal & Allied submits that 'if the HVCCC recommends Additional Capacity under section 6.3 of the Proposed HVAU, it is unclear how this sits with the

⁷⁸⁹ Coal and Allied, *Submission in Response to the ACCC's Consultation Paper in relation to the Australian Rail Track Corporation's Proposed Hunter Valley Rail Network Access Undertaking*, 25 October 2010, p. 23.

⁷⁹⁰ Coal and Allied, *Submission in Response to ACCC Consultation Paper*, 25 October 2010, p. 31.

⁷⁹¹ Coal and Allied, *Submission in Response to ACCC Consultation Paper*, 25 October 2010, p. 31.

'RCG' industry consultation process in section 6.4 of the Proposed HVAU, and how long the process is likely to take.'⁷⁹²

Coal & Allied also submits that '[s]imilarly, the Proposed HVAU does not include any indication of how long ARTC's assessments under section ... 6.3(b) of the Proposed HVAU may take, or how long the RCG processes (which respond to assessments and other information provided by ARTC) may take. Applicants could potentially wait for a very lengthy period of time – perhaps even years – before ARTC completes the various processes required to decide whether or not to proceed to fund a project to build Additional Capacity. However, in the meantime, Applicants will most likely have made substantial, binding investment commitments that rely on the availability of that Additional Capacity.'⁷⁹³

Coal & Allied submits that 'the following timeframes should apply to ARTC's assessments of Additional Capacity under sections 6.2(a) and 6.3(b) of the Proposed HVAU.'⁷⁹⁴

- (a) 6 months for assessments involving less than 10mtpa of Additional Capacity; and
- (b) 12 months for assessments involving more than 10mtpa of Additional Capacity.'⁷⁹⁵

Coal & Allied submits that the 'Proposed HVAU also does not specify the point at which the decision as to who will fund the construction of Additional Capacity is made. This is a critical juncture, however, given that the party that funds a project needs to know when it must arrange for financing and a range of internal approvals for a substantial investment in infrastructure. Also, if an Applicant needs to self-fund a project for Additional Capacity, it may bear a much higher charge for that Capacity than for an expansion funded by the ARTC and socialised amongst all Access Holders.'⁷⁹⁶

HVCCC

The HVCCC submits that 'ARTC's commitment to cooperate with HVCCC in planning expansions of Coal Chain Capacity and proposed process for consenting to the provision of Additional Capacity recommended by HVCCC {Clause 6.3} is appropriate.'⁷⁹⁷

11.2.3 ACCC view – process issues

The ACCC considers that three procedural issues appear to arise in relation to the above provisions:

⁷⁹² Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 31.

⁷⁹³ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 31.

⁷⁹⁴ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 31.

⁷⁹⁵ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 31; However, the ACCC notes that later in its submission at p. 40, Coal & Allied note that 'all steps [in order to finalise all stages of ARTC's assessment] should not exceed' the 6 and 12 months periods proposed.

⁷⁹⁶ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 32.

⁷⁹⁷ HVCCC, *Submission Re: ARTC 2010 Hunter Valley Access Undertaking (2010 HVAU)*, 25 October 2010, p. 2.

- the interaction between the RCG process and the HVCCC recommendation for investment in Additional Capacity;
- the point in time at which the HVCCC may recommend investment in Additional Capacity;
- the point in time at which users decisions regarding the funding of Additional Capacity are made, and the point at which a commitment is made to construct the Additional Capacity.

These issues are considered in the following sections.

Section 6.3(b)(i) – A recommendation by the HVCCC for an investment to provide Additional Capacity must be endorsed by the Rail Capacity Group ‘as contemplated in section 6.4’ for ARTC to consent to its construction

The ACCC notes the concerns of interested parties that it is unclear at what stage in the ‘investment process’ a recommendation by the HVCCC for Additional Capacity will receive RCG endorsement under section 6.3(b)(i) of the proposed 2010 HVAU.

The ACCC is of the view that the process by which a recommendation by the HVCCC for the creation of Additional Capacity will receive RCG endorsement under section 6.3(b)(i) is currently unclear.

Under the current drafting of 6.3(b), it appears that ARTC intends that the HVCCC may make a recommendation at any time with regards to an investment to provide Additional Capacity. However under section 6.3(b)(i), ARTC will only consent to the provision of the Additional Capacity if (amongst other things) the investment is endorsed by the RCG ‘as contemplated by section 6.4’.

Section 6.4(a)(i) then states that ‘[i]n relation to Additional Capacity sought under section 6.3, ARTC will undertake the stages of consultation set out in section 6.4(c) to (g)’. However, section 6.4(c) is the section which sets out the process as it relates to the development of the annual Hunter Valley corridor capacity strategy.

While the ACCC notes that the HVCCC has a role under section 6.4(c)(iv) in ARTC’s development of the Hunter Valley corridor capacity strategy, there is no clear link between: (i) a recommendation made by the HVCCC under section 6.3(b); and (ii) the development of the Hunter Valley corridor capacity strategy in section 6.4(c).

Alternatively, if ARTC intends that an investment recommended by the HVCCC under section 6.3(b) should automatically go through the process of being endorsed by the RCG under sections 6.4(d) through (i) of the HVAU, then it is also unclear at what stage of RCG endorsement would satisfy ARTC under section 6.3(b)(i). For example, would it be sufficient for the RCG to have endorsed the recommended Additional Capacity at the Concept Assessment stage?

In light of the unclear drafting, and given the ‘investment framework’ that ARTC has proposed in the 2010 HVAU in relation to Additional Capacity (as understood by the ACCC and set out above), the ACCC is of the view that it is unclear how the current requirement for RCG endorsement in section 6.3(b)(i) interacts with ARTC’s broader

investment framework and gives rise to significant uncertainties as to the intended approach to RCG endorsement of Additional Capacity that is recommended by the HVCCC.

Therefore, the ACCC is of the view that a clearer approach to seeking RCG endorsement, given ARTC's broader 'investment framework', would be for the HVAU to be amended so that it is clear that:

- The HVCCC may recommend an investment to provide Additional Capacity to the Network to ARTC at any time under section 6.3(b) of the HVAU;⁷⁹⁸
- ARTC will prepare a concept assessment report in relation to that recommended Additional Capacity under section 6.4(d) within a specific timeframe.
- The project will go through the RCG process. ARTC will assess whether or not it will fund the project in line with the criteria set out at section 6.3(b) at the 'project assessment' 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.
- 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 set out in section 6.3(b)(iv).
- 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 set out in section 6.3(b)(iv).
 - 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.
- Where ARTC has decided to fund the recommended Additional Capacity at the 'project assessment' stage, ARTC should be obliged to construct that Additional Capacity.
 - The ACCC notes that where ARTC makes a decision to invest and elects to fund the Additional Capacity at the 'project assessment stage', there may be a period between that election and the finalisation of the relevant TOP contracts. As a result, the ACCC is of the view that it is not unreasonable for ARTC to be able to withdraw during this period if its cost of funding changes or the

⁷⁹⁸ The ACCC is of the view that it is appropriate that the HVCCC be able to recommend Additional Capacity at any time (including outside of the Hunter Valley corridor capacity strategy process) given the HVCCC's role as the independent coal chain coordinator who can use the recommendation process under section 6.3(b) to, as noted by Coal & Allied, address 'circumstances where Additional Capacity is required to service existing Capacity Entitlements (for example, to relieve congestion or provide additional Tolerance to assist with coordination of track and port entitlements).'

TOP contracts do not eventuate. However, once contracts are signed, the delivery of capacity would then be mandatory by virtue of there being mutual contracts.

- This means that ARTC should not be able to reconsider the commercial viability of a project it has already agreed to fund at a later stage under the Train Path Schedule. This is especially the case if in the interim other parties have needed to make complementary investments (e.g. in mines or port capacity). However, the actual terms on which delivery of the Additional Capacity occurs, including grounds for abandoning or reassessing a project due to change in criteria that are beyond ARTC's control, would be set out in the commercial contracts between ARTC and the parties contracting for the capacity. If they could not agree, the terms and conditions would be subject to ACCC arbitration, in the normal manner. In so arbitrating, the ACCC would expect to adhere to the view expressed in its March 2010 Draft Decision that ARTC is not a construction company. The ACCC is of the view that 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.
- Where the requested Additional Capacity is funded by the applicable Access Holder(s) under a user funding agreement, then ARTC is bound to finalise the Additional Capacity in the time agreed. As above, the actual terms on which delivery of the Additional Capacity occurs, including timetables and grounds for abandoning or reassessing a project due to change in criteria that are beyond ARTC's control, would be set out in the commercial contracts between ARTC and the user funders and any other parties contracting for the capacity.

Further, the ACCC is of the view that the timeframes within which ARTC is obliged to provide a concept assessment report to the RCG under section 6.4(d) once it has received the HVCCC's recommendation, should be clearly set out in order to provide an appropriate level of clarity and certainty as to the operation of the provision.

The RCG process at section 6.4: Timeframes and endorsement of project stages – Reaching a 'point of commitment'

In the March 2010 Draft Decision the ACCC was of the view that there was a general lack of clarity regarding the timeframes within which ARTC and other parties must fulfil their obligations under section 6.4.⁷⁹⁹

The ACCC also notes concerns raised by interested parties that it is not clear where or when (either in the RCG process or in the HVAU generally) a decision will be made as to whether ARTC will decide to fund, or user(s) will have the opportunity to elect to unconditionally fund, a proposal for Additional Capacity.

ARTC submissions

ARTC submits that it has made amendments to the proposed 2010 HVAU that 'make it clear that the RCG controls the timeframes for both consultation and approval of projects and the delivery of projects' including:

⁷⁹⁹ ACCC, Draft Decision on HVAU, 5 March 2010, p. 370.

- In section 6.4(a)(iv), ARTC has made it clear that the stages of consultation set out in section 6.4(c) to (g) will be followed except where the RCG consents to a request by ARTC to adopt a modified consultation process (which would be the case where ARTC considers that the process set out in section 6.4 would unjustifiably compromise timely delivery of the project).
- The concept assessment report to be provided by ARTC to the RCG under section 6.4(d)(ii) will include indicative timeframes for the development, through delivery of the project (unless ARTC and the RCG agree otherwise). The RCG's endorsement of the concept assessment report, which will be sought if ARTC wants to proceed to the next stage, will include endorsement of the indicative timeframes under subsection (iii).⁸⁰⁰
- The project assessment report to be provided by ARTC to the RCG under section 6.4(f)(ii)(C) will incorporate a project schedule, including time tolerances and project management plan under section 6.4(f)(ii)(E)(xi) setting out, among other things, project phases, milestones, deliverables. The RCG's endorsement of the project assessment report, which will be sought if ARTC wishes to proceed to project implementation, will include endorsement of the project schedule and these project phases, milestones and time tolerance (e.g. delivery +/-20 days).⁸⁰¹

ARTC submits that the '[c]onsultation objectives in 6.4(a)(ii) have been amended to strengthen links with port capacity expansion ... to clarify that RCG controls both the timeframes for the consultation approval of projects; and the delivery of projects.'⁸⁰²

ARTC submits that the 'changes to subsection 6.4(f)(ii)(C) and the inclusion of new subsection (xi) were made in response to the ACCC's recommendation that section 6.4 include specific timeframes that clearly set out the time within which ARTC and any relevant parties are required to satisfy their obligations. This further strengthens RCG control over project delivery timing.'⁸⁰³

Stakeholder views

Coal & Allied

Coal & Allied submits that:

It is not clear when a decision is made as to who will fund a particular expansion (ARTC or the Access Holder), who has the first right to fund and who will ultimately pay for the expansion (for example, recovery through Access Charges). Moreover, it is uncertain whether these decisions will be made in time to ensure the Capacity is available when needed by the Access Holder.⁸⁰⁴

In light of this, Coal & Allied submits that 'a more appropriate arrangement would require a fundamental change to the Proposed HVAU that gives Applicants a clear right to fund Additional Capacity when the technical feasibility of that Additional

⁸⁰⁰ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 30.

⁸⁰¹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 31.

⁸⁰² ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, [Appendix 1], p. 29.

⁸⁰³ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, [Appendix 1], p. 33.

⁸⁰⁴ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 7.

Capacity has been confirmed and an estimate of the cost of that Additional Capacity has been scoped (the 'point of commitment').⁸⁰⁵

Coal & Allied submits that '[a]t the point of commitment, either ARTC makes a firm contractual commitment to fund and build that Additional Capacity, or, if ARTC declines, then the Applicant must have the right to fund that Additional Capacity.'⁸⁰⁶

Coal & Allied submits that '[a]t the point of commitment, the Applicant should know what capital needs to be spent to deliver the Additional Capacity and whether and to what extent that Additional Capacity will be recovered through a socialisation of costs across all Access Holders in that Pricing Zone.'⁸⁰⁷

Coal & Allied submits that '[o]nce a project for Additional Capacity is committed with either ARTC or Applicant funding, ARTC must be required to build the Additional Capacity unless developments arise which result in either the RCG or the ACCC determining that the Additional Capacity no longer meets the legal, environmental, safety or technical requirements of the type referred to in sections 6.2(a)(ii)(A) and (B) of the Proposed HVAU.'⁸⁰⁸

Coal & Allied therefore submits that '[a]lthough the revisions introduced by ARTC are helpful developments to the RCG process, the ultimate question of whether Access Holders can be certain that capacity will be available when the Access Holders need that Capacity, remains unresolved.'⁸⁰⁹

Coal & Allied submits that 'the right for Access Seekers to fund an expansion is, ultimately, the only assurance that expansions necessary to deliver requested Additional Capacity will be built.'⁸¹⁰ Coal & Allied submits that '[g]iven this, the process for Applicants funding expansions must be transparent, including the timing of key decisions.'⁸¹¹

Coal & Allied also submits that 'the Proposed HVAU does not include any indication of ... how long the RCG processes (which respond to assessments and other information provided by ARTC) may take. Applicants could potentially wait for a very lengthy period of time – perhaps even years – before ARTC completes the various processes required to decide whether or not to proceed to fund a project to build Additional Capacity. However, in the meantime, Applicants will most likely have made substantial, binding investment commitments that rely on the availability of that Additional Capacity.'⁸¹²

Therefore, while Coal & Allied submits that it 'does not propose that ARTC be compelled to construct Additional Capacity in the same manner as PWCS' unqualified obligation to expand, C&A considers it.'⁸¹³

⁸⁰⁵ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 22

⁸⁰⁶ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 22

⁸⁰⁷ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 22

⁸⁰⁸ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 22

⁸⁰⁹ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 31.

⁸¹⁰ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 31.

⁸¹¹ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 31.

⁸¹² Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 31.

⁸¹³ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 38.

inappropriate for ARTC to have no binding obligation to build Additional Capacity in circumstances where the RCG has already endorsed the implementation of Capacity which ARTC has assessed and proposed and which is backed by long-term take or pay contracts, or in circumstances where an Applicant has agreed to fund Additional Capacity based on an implementation plan and budget agreed with ARTC.⁸¹⁴

Coal & Allied also submits that ‘all steps should not exceed a period of:’

- (a) 6 months for assessments involving less than 10mtpa of Additional Capacity; and
- (b) 12 months for assessments involving more than 10mtpa of Additional Capacity.⁸¹⁵

PWCS

PWCS submits that ‘the Investment Framework set out in the Proposed HVAU falls short in a number of [relevant] areas:’⁸¹⁶

- Although “user funding” is an option under the Proposed HVAU for an Access Seeker to ensure Additional Capacity is funded, the investment framework is incomplete in dealing with user-funded expansions:
 - ...
 - It is not clear whether, when or how an Access Seeker considering whether to fund an expansion will know the extent to which the expansion being funded will be allowed in the RAB, and thus have some or all of its costs spread across all users.⁸¹⁷

PWCS submits that ‘to provide producers with certainty, the “right to fund” arrangements for track capacity must be strong and transparent. If an Access Seeker is uncertain as to their ability to fund (and thus ensure the construction of) track capacity, the entire intent of the new Contractual Framework is weakened.’⁸¹⁸

PWCS submits that ‘[a]t its core, the intent of the Contractual Framework was to ensure that existing and new producers could secure access to the infrastructure necessary to facilitate industry growth on a fair and transparent basis. If this is not achievable on the track, it will lessen the value of the certainty that PWCS provides to producers nominating for capacity at the terminals.’⁸¹⁹

Xstrata

⁸¹⁴ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 38.

⁸¹⁵ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 40.

⁸¹⁶ PWCS, *Submission in Relation to Australian Rail Track Corporation’s proposed Hunter Valley Rail Network Access Undertaking*, 25 October 2010, p. 5.

⁸¹⁷ PWCS, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 6.

⁸¹⁸ PWCS, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 6.

⁸¹⁹ PWCS, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 6.

Xstrata submits that 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.’⁸²⁰

Xstrata submits that 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.’⁸²¹

ACCC view

First, the ACCC notes ARTC’s view that the timing of the consultation and approval process, and the delivery of capacity expansion projects, is in the hands of the RCG,⁸²² and considers that it is likely to be appropriate. The ACCC recognises that providing the RCG with the ability to set the timeframes for capacity expansion projects should facilitate an approach that is both aligned with other components of the supply chain and responsive to the interests of Network users.

However, the ACCC considers that it is not clear on the current drafting of section 6.4 that the RCG does in fact have this ability. Specifically:

- there are no clear timeframes within which ARTC must provide the various reports to the RCG under sections 6.4(d)(i), 6.4(e)(i), 6.4(f)(i) and 6.4(h)(i);
- there are also no clear timeframes within which ARTC:
 - must seek RCG endorsement (where ARTC has placed an obligation on itself that it ‘will seek the endorsement of the RCG’) where it is required to under sections 6.4(g)(i)(C) and 6.4(iii)(C)(i);
 - decide whether to refer a matter to an independent expert under sections 6.4(g)(i)(E) and 6.4(g)(iii)(C)(iii);
 - decide whether to conduct an open competitive tender under section 6.4(g)(i)(F);
 - finalise the ‘project management plan’ under section 6.4(g)(ii);
 - begin to ‘implement the project management plan’ under section 6.4(g)(iii)(A); and
 - decide whether to cease project implementation or to propose a variation to the RCG under section 6.4(g)(iii)(C)(vi);

⁸²⁰ Xstrata, *Xstrata Coal Pty Ltd’s response to the Australian Competition and Consumer Commission in relation to the ACCC Consultation Paper in relation to the Australian Rail Track Corporation’s proposed Hunter Valley Rail Network Access Undertaking dated 16 September 2010*, 25 October 2010, p. 18.

⁸²¹ Xstrata, *Submission in Response to ACCC Consultation Paper*, 25 October 2010, p. 18.

⁸²² ARTC, *Response to the ACCC Draft Decision on the Hunter Valley Access Undertaking*, 31 March 2010, p. 74.

- it is not clear from the proposed drafting that ARTC may cease to continue with project development at the various stages of project development (nor the timeframes within which a decision by ARTC must be made); and
- it is not clear from the proposed drafting that where ARTC has withdrawn from the construction that a relevant Applicant or applicable Access Holder(s) may elect to fund (nor the timeframes within a decision must be made).

Therefore, the ACCC considers the drafting of 6.4 should be clarified to clearly specify that the RCG controls the timing of the various stages of industry consultation set out in sections 6.4(d) through (h) and that the specific timeframes where there is an obligation on ARTC should be provided. The ACCC notes that it is appropriate that these timeframes are likely to differ in relation to the scope of the proposed Additional Capacity. If it is clear that project development is in the hands of the RCG, then it can move through the project development stages as quickly as necessary for any particular project.

It is envisaged that this will enable the RCG to get to a stage of project development on its own terms, or in the words of Coal & Allied a ‘point of commitment’ (discussed further immediately below), where an Applicant or the applicable Access Holder(s) will know what capital needs to be spent on a particular project and whether and to what extent that Additional Capacity will be recovered through a socialisation of costs, and will be able to decide whether or not they are willing to fund the construction of that Additional Capacity.

The ACCC is of the view that restricting a user funded model to these specific circumstances will reduce the ability of any particular party to dominate investment in Additional Capacity across the Hunter Valley rail network, potentially to the detriment of other users of the Network. The ACCC is of the view that the RCG process (subject to the recommended amendments) is more likely to provide the industry with a consultative and representative approach in relation to expansions of the Network, including those that are requested by Applicants or recommended by the HVCCC, particularly where the stages of project development are clearly in the hands of the RCG.

Therefore, the ACCC understands that ARTC’s consultation proposal in section 6.4 contemplates that a user or users will have the ability to fund a particular project at certain ‘trigger points’ during project development. Specifically, the ACCC understands that ARTC intends that relevant parties may step in to fund a project where:

- the RCG does not endorse a stage of project development; and
- ARTC does not wish to pursue funding of the Additional Capacity.

If, for example, the RCG refused to endorse a particular project at the ‘Project Feasibility’ stage in section 6.4(e), ARTC would have the first right to choose to continue with the delivery of that project by seeking ACCC endorsement of the prudence of that investment. However, if ARTC chose not to pursue that path, relevant users would also have the ability to elect to fund the continued development and construction of that Additional Capacity.

However, given Access Holders need for certainty in relation to the creation of Additional Capacity, the ACCC is of the view that while ARTC should have the option to agree to fund a project in a non-binding manner throughout section 6.4(d) to e), the ACCC is of the view that ARTC must make a binding election at the ‘project assessment stage’ set out at section 6.4(f) of the HVAU as to whether or not it will fund the project in line with its commercial viability considerations (taking into account the relevant criteria set out at 6.2(a)(i) and 6.3(b)(iii)).

The ACCC is of the view that once binding contracts are entered into, whether funded by ARTC or funded by users, ARTC will be required to build and finalise the expansion within the agreed timeframe.

Contracted take or pay commitments – A ‘user-funding’ model

The ACCC notes ARTC’s intention set out in its Flowchart 2 in *Appendix 4* of its Explanatory Guide accompanying the proposed 2010 HVAU, that if ARTC does not agree to fund the Additional Capacity recommended by the HVCCC, then it ‘[m]ay be funded by industry through [section] 6.2 [of the HVAU]’.⁸²³ However, it is not clear to the ACCC how a HVCCC recommendation for Additional Capacity under section 6.3(b) is intended to interact with the provisions of section 6.2 where ARTC will assess ‘as part of the negotiation process with an Applicant, any requests for Additional Capacity’ under 6.2.

Given the significant uncertainty caused by the current drafting in the HVAU in relation to ARTC 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 as set out above.

11.2.4 ACCC view – substantive issues

The ACCC considers that the following ‘substantive’ issues arise in relation to the provisions set out in relation to the ‘investment framework’:

- the criterion that sufficient TOP commitments must be contracted to allow recovery of New Capital Cost over the economic life of the Additional Capacity;
- whether, in making the decision to consent to investment in Additional Capacity recommended by the HVCCC, ARTC must exercise its discretion subjectively or objectively, including whether that discretion must be objective in relation to both commercial considerations and non-commercial considerations;
- the criteria ARTC will use in deciding whether to consent to investment in Additional Capacity recommended by the HVCCC, both generally and specifically:
 - the criterion that the Additional Capacity should be technically feasible and consistent with the economically efficient operation of the Network; and
 - the criterion relating to ARTC’s ‘legitimate business interests.’

⁸²³ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, [Appendix 4], p. 62.

These issues are discussed in the following sections.

Section 6.3(b)(ii) – ‘Sufficient take or pay commitments must be contracted by applicable Access Holders to recover NCC associated with the Additional Capacity over the economic life of the Additional Capacity’ for ARTC to consent to its provision

Stakeholder views

Coal & Allied

Coal & Allied submits that it is ‘not clear when a decision is made as to who will fund a particular expansion (ARTC or the Access Holder), who has the first right to fund and who will ultimately pay for the expansion (for example, recovery through Access Charges). Moreover, it is uncertain whether these decisions will be made in time to ensure the Capacity is available when needed by the Access Holder.’⁸²⁴

Coal & Allied therefore submits that it ‘has concerns with the following drafting in section 6.3 of the Proposed HVAU:’⁸²⁵

- (a) Section 6.3(b)(ii) of the Proposed HVAU requires that there be sufficient take or pay commitments contracted by applicable Access Holders to recover the new capital component of costs associated with the Additional Capacity over the economic life of the Additional Capacity. This criteria is unreasonable because the Proposed IAHA contemplates that Access Seekers will enter into 10 year contracts, but the economic life of most track infrastructure is longer than 10 years.⁸²⁶

...

- (c) In the event the HVCCC recommends an investment to provide Additional Capacity, but ARTC decides that the provision of the Additional Capacity is not commercially viable in accordance with the criteria listed in section 6.3(b)(iii) of the Proposed HVAU, it is important that the HVCCC-recommended investment proceed to implementation if one or more Access Holders agree to fund that track investment and the relevant project is endorsed by the RCG. In the way that the Proposed HVAU is currently drafted, this 'backstop' for ensuring HVCCC recommended Additional Capacity is built if Access Holders are willing to fund the construction of that Additional Capacity does not exist.⁸²⁷

NSWMC

The NSWMC submits that [u]nder s6.3, which deals with Capacity expansions recommended by HVCCC, ARTC will commit to the Additional Capacity only if TOP commitments cover the capital costs over its economic life and the Additional Capacity is “commercially viable” (i.e. can be financed by ARTC) and does not compromise ARTC’s “legitimate business interests” (not defined).⁸²⁸

⁸²⁴ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 7.

⁸²⁵ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 23.

⁸²⁶ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 23.

⁸²⁷ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 24.

⁸²⁸ NSWMC, *Hunter Rail Access Task Force – Submission in Response to the Australian Competition and Consumer Commission’s Consultation Paper in relation to Australian Rail Track*

The NSWMC submits that these ‘provisions could prevent HVCCC and producers, through the RCG, ensuring track capacity and capacity increases are aligned with port capacity and capacity increases.’⁸²⁹

The NSWMC therefore submits that ‘if the Additional Capacity is endorsed by the RCG and sufficient TOP commitments are contracted to cover the annual capital costs for 10 years through the access pricing provisions, ARTC should agree to the Capacity being built, subject to financing.’⁸³⁰

The NSWMC submits that ‘[a]gain, ARTC’s “legitimate business interests” need to be defined to clarify the extent of ARTC’s discretion to not construct Additional Capacity for which it has financing and TOP commitments.’⁸³¹

The NSWMC submits that there ‘appears to be no provision for financing HVCCC recommended Additional Capacity by any other party if ARTC chooses not to finance that Additional Capacity.’⁸³²

Therefore, the NSWMC submits that ‘if ARTC chooses not to finance the Additional Capacity, then Access Holders and Applicants should have the right, individually or in a group, to finance it and to equitable recovery of their capital cost contributions from other users of the Additional Capacity.’⁸³³

ACCC views

‘Over the economic life of the Additional Capacity’

The ACCC notes the concerns of interested parties that:

- it is not clear at which stage ‘applicable Access Holders’ will be required to sign up to the relevant take or pay commitments under section 6.3(b)(ii); and
- the requirement that parties sign up to take or pay commitments ‘to recover NCC associated with the Additional Capacity over the economic life of the Additional Capacity’.

The ACCC agrees with the views put forward by interested parties that there appears to be an inconsistency between the proposed term of the IAHAAs being 10 years and the economic life of the track infrastructure. The ACCC is of the view that the economic life of Additional Capacity created under section 6.3(b) will generally be significantly longer than 10 years.⁸³⁴

However, in its 21 September 2009 response to submissions, ARTC noted that concerns have been “expressed that section 6.2(b) of the HVAU [which contains the term ‘economic life’ in relation to Applicants agreeing to fund an expansion] means

Corporation’s Proposed 2010 Hunter Valley Rail Network Access Undertaking, 25 October 2010, p. 7.

⁸²⁹ NSWMC, Submission in Response to ACCC Consultation Paper, p. 7.

⁸³⁰ NSWMC, Submission in Response to ACCC Consultation Paper, p. 7.

⁸³¹ NSWMC, Submission in Response to ACCC Consultation Paper, p. 7.

⁸³² NSWMC, Submission in Response to ACCC Consultation Paper, p. 7.

⁸³³ NSWMC, Submission in Response to ACCC Consultation Paper, p. 7.

⁸³⁴ For example, see Booz & Co, *Report – Mine Life Assessment – Hunter Valley Region – Australian Rail Track Corporation*, February 2009.

that the initial holder of access rights in respect of Additional Capacity built could be required to meet those capital costs over the full economic life of the Additional Capacity, even if the relevant mine is no longer using the Additional Capacity.’⁸³⁵

However, ARTC also submitted that ‘section 6.2(f) and (g) of the HVAU have specifically been included to rectify any potential inequality’.⁸³⁶ ARTC further submitted that ‘as TOP calculations (on a gtk basis) are determined each year, TOP Charges can be spread equitably over all users and the addition of new Access Holders would result in reduced TOP for existing users.’⁸³⁷

ARTC submitted that if ‘the revenue received falls short of the ceiling, ARTC should not be obliged to rebate revenue to the initial party as that party is not paying at the ceiling (even after taking into account the capital contribution).’⁸³⁸

ARTC further submitted that:

‘[t]he application of loss capitalisation will also encourage an equitable distribution of costs as it removes any incentive to seek to obtain recovery of the entire capital costs from the initial user(s). Rather, ARTC is enabled to recover expenditure already incurred proportionately with usage (gtk) over time.’⁸³⁹

The ACCC is of the view that the concerns regarding the apparent inconsistency caused by the term ‘economic life of the Additional Capacity’ are dealt with as a result of the equitable reconciliation principles set out at sections 6.4(f) and (g) as ARTC will enter into a ‘user(s)-funding’ agreement in relation to HVCCC recommended Additional Capacity where it has decided not to fund the recommended Additional Capacity.

Section 6.3(b)(iii) - A reasonableness requirement in relation to ARTC determining whether a recommendation for Additional Capacity is ‘commercially viable’

In the March 2010 Draft Decision the ACCC was of the view that the phrase ‘in ARTC’s opinion’ in what is now section 6.3(b)(iii), where ARTC is deciding whether to fund the Additional Capacity by considering whether the provision of Additional Capacity is commercially viable, is subjective and recommended that it should include a reasonableness requirement.⁸⁴⁰

ARTC submissions

The ACCC notes ARTC’s view in its response to the March 2010 Draft Decision that because of the extra detail provided in section 6.3(b)(iii) on the criteria that ARTC will form its opinion as to the commercial viability of a recommendation for Additional Capacity, that in the circumstances, a further reasonableness criterion is not necessary.⁸⁴¹

⁸³⁵ ARTC, *Response to Submissions to the ACCC on the Hunter Valley Access Undertaking*, 21 September 2009, p. 23.

⁸³⁶ ARTC, *Response to Submissions*, 21 September 2009, p. 23.

⁸³⁷ ARTC, *Response to Submissions*, 21 September 2009, p. 23.

⁸³⁸ ARTC, *Response to Submissions*, 21 September 2009, p. 23.

⁸³⁹ ARTC, *Response to Submissions*, 21 September 2009, p. 23.

⁸⁴⁰ ACCC, *Draft Decision on HVAU*, 5 March 2010, p. 365.

⁸⁴¹ ARTC, *Response to the ACCC Draft Decision*, 31 March 2010, p. 70.

In addition, ARTC has noted it has ‘considered the ACCC’s recommendation that ARTC amend ... section 6.3(b)(iii) ... to provide that ARTC’s opinion it to be ‘ARTC’s reasonable opinion’ but considers that such an amendment is not appropriate’ as:

- The criteria set out in ... section 6.3(b)(iii) ... are objective criteria and leave little room for an *unjustified* subjective assessment.
- ARTC’s view of the [criteria ARTC will take into account in determining whether a project is commercially viable under section 6.3(b)(iii)] ... for example its view of the relative risk and returns associated with a project, may be different to the views of a coal miner, which operates under very different conditions and ARTC is concerned that its view could be trumped by an alternative view expressed by such a party.
- Assessing commercial viability is a critical task that would be carried out by ARTC. It is not appropriate that such a decision be second guessed.
- Further, should ARTC decide that the commercial viability criteria are not satisfied, the applicant always has the option of funding the Additional Capacity itself (see section 6.2(a)(ii) of the 2010 HVAU). Following consultation with HRATF, ARTC has clarified that the matters ARTC can consider in relation to a self funded project (essentially operational, technical and safety issues and legitimate business interests) do not overlap with the commercial viability factors specified above.⁸⁴²

Stakeholder views

Aston Resources

Aston Resources submits that ‘section 6.3(b)(iii) should be amended, at the very least, to provide that ARTC’s opinion is to be “ARTC’s **reasonable** opinion”.’⁸⁴³

Aston Resources submits that the ‘value of having objective criteria is obviated if ARTC is not required to form a reasonable opinion with respect to such criteria.’ Aston Resources submits that ‘[r]equiring ARTC to form a “reasonable” opinion is not unduly onerous as such opinion need only be reasonable to a person or entity in the position of ARTC.’⁸⁴⁴

Aston Resources notes that in its ‘explanatory guide, ARTC states that such an amendment is not required because the applicant always has the option of self-funding the Additional Capacity.’⁸⁴⁵

Aston Resources is of the view that this ‘provides insufficient protection to access seekers particularly where.’⁸⁴⁶

⁸⁴² ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 29-30.

⁸⁴³ Aston Resources, *Submission: ARTC proposed Hunter Valley Rail Network Access Undertaking*, 25 October 2010, p. 7.

⁸⁴⁴ Aston Resources, *Submission in Response to ACCC Consultation Paper*, 25 October 2010, p. 7.

⁸⁴⁵ Aston Resources, *Submission in Response to ACCC Consultation Paper*, 25 October 2010, p. 7.

⁸⁴⁶ Aston Resources, *Submission in Response to ACCC Consultation Paper*, 25 October 2010, p. 7.

1. ARTC can still decline to provide the additional capacity having regard to its “legitimate business interests”; and
2. if the Capital Expenditure is subsequently deemed Prudent, the contributor has no priority access to the infrastructure that it has itself funded.⁸⁴⁷

Aston Resources also submits that ‘ARTC should be required to act reasonably when taking into account the HVCCC’s comments and recommendations and should not be entitled to have regard to its legitimate business interests when an applicant has agreed to self-fund an expansion.’⁸⁴⁸

Aston Resources submits that ‘[i]f a project is fully-funded (and considered to be technically feasible, safe and not reduce coal chain capacity) no further endorsement should be necessary.’⁸⁴⁹

Aston Resources submits that ‘it is inappropriate that ARTC can decline to provide Additional Capacity when:’⁸⁵⁰

1. the HVCCC has recommended an investment;
2. the investment is endorsed by the Rail Capacity Group (**RCG**); and
3. sufficient take or pay commitments are contracted to cover capital costs (section 6.3).⁸⁵¹

Aston Resources submits the ‘value of the HVCCC and the role of the RCG is limited when ARTC retains an overriding (and essentially unfettered) discretion to refuse to provide a capacity expansion.’⁸⁵²

Aston resources submits that there is ‘no value in including detailed objective criteria in the 2010 HVAU when ARTC is not required to act reasonably, or have reasonable regard to the opinions of the HVCCC and RCG, when assessing the criteria.’⁸⁵³

ACCC view

As noted in its March 2010 Draft Decision, the ACCC is of the view that the HVAU should not set out strict rules to oblige ARTC to comply with a recommendation from the HVCCC in relation to ARTC’s decision whether or not to fund a particular investment in Additional Capacity, as the decision to fund a particular investment is ultimately a matter of significant commercial consequence for ARTC.⁸⁵⁴

Suggestions have been made that ARTC should at least exercise its discretion ‘reasonably’ when deciding whether to consent to fund an investment recommended by the HVCCC. Under the proposed approach in section 6.3(b)(iii), ARTC may exercise a subjective discretion in deciding whether to consent to an investment

⁸⁴⁷ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 7.

⁸⁴⁸ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 7.

⁸⁴⁹ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 7.

⁸⁵⁰ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 7.

⁸⁵¹ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 7.

⁸⁵² Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 7.

⁸⁵³ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 7-8.

⁸⁵⁴ ACCC, Draft Decision on HVAU, 5 March 2010, p. 365.

recommended by the HVCCC. Specifically, ARTC's opinion on whether a particular investment is commercially viable is simply 'ARTC's opinion,' not ARTC's 'reasonable' opinion. Consequently, there would be limited scope to question whether a recommendation by the HVCCC for Additional Capacity (to be funded by ARTC) is commercially viable to ARTC when ARTC has decided that it is not, as ultimately the question would simply be whether ARTC was of that opinion, not whether that opinion was reasonable.

The ACCC considers, however, that (subject to the views below), a further reasonableness requirement is not necessary under section 6.3(b)(iii). The ACCC considers that ARTC should be entitled to subjectively assess whether a particular investment project, recommended or sought by another party, is commercially viable to ARTC. Such an assessment is to some extent necessarily subjective: the ACCC notes that if a reasonableness criterion was included, where a dispute is raised in relation to a decision made under this provision, it would effectively require an arbitrator to step into the shoes of the board of ARTC and decide whether or not a future investment is 'commercially viable' to ARTC.

However, the ACCC recommends that ARTC clarify that its assessment of whether the provision of Additional Capacity is commercially viable under section 6.3(b)(iii) relates to ARTC's commercial viability. Specifically, section 6.3(b)(iii) of the HVAU should copy the wording in section 6.2(a)(i)(A) of the HVAU so that it reads: '*in ARTC's opinion, the provision of the Additional Capacity is commercially viable to ARTC having regard to:...*'.

More significantly, the ACCC considers that a subjective discretion under section 6.3(b)(iii) is only likely to be appropriate where there is an effective user-funding option for investments in Additional Capacity.⁸⁵⁵

Section 6.3(b)(iii) – The criteria by which ARTC will determine that the provision of Additional Capacity is 'commercially viable' [to ARTC]

In the March 2010 Draft Decision the ACCC was of the view that the criteria and processes by which ARTC will determine whether the provision of Additional Capacity would be commercially viable to ARTC (when ARTC is deciding whether to fund the provision of the recommended Additional Capacity itself) are unclear and would benefit from further explanation.⁸⁵⁶

ARTC submissions

In response, ARTC has amended section 6.3(b)(iii) of the proposed 2010 HVAU and set out the criteria that it will take into account in determining whether the provision of requested Additional Capacity is commercially viable, including the:

- terms and conditions of the relevant Access Agreements;
- circumstances for ARTC to service and raise financing through debt and equity for Additional Capacity;

⁸⁵⁵ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, [Appendix 4], p. 62.

⁸⁵⁶ ACCC, Draft Decision on HVAU, 5 March 2010, p. 365.

- opportunity cost to ARTC given the relative risk and returns associated with the Additional Capacity financing relative to other investment opportunities; and
- net effect on ARTC's balance sheet, gearing ratios and any other debt covenants in existence at the time

Stakeholder views

Coal & Allied

Coal & Allied submits that it 'has concerns with the following drafting in section 6.3 of the Proposed HVAU:'

- (b) Section 6.3(b)(iii)(A) of the Proposed HVAU requires that the provision of the Additional Capacity be, in ARTC's opinion, commercially viable "having regard to the terms and conditions of the relevant Access Agreement". This is conceptually inconsistent with C&A's understanding of the circumstances where the Additional Capacity is an enhancement to improve service to existing Capacity Entitlements (that is, where no new AHAs for Additional Capacity Entitlements would arise from the construction of the HVCCC recommended Additional Capacity).⁸⁵⁷

For example, if the HVCCC recommends, and the RCG endorses, a track improvement investment project, the cost of that project would be included in the RAB, and this in turn would result in an increase in relevant Access Charges. As C&A understands, the Additional Capacity would not result in the terms and conditions of any existing AHAs being changed, so the requirement in section 6.3(b)(iii)(A) of the Proposed HVAU does not appear relevant or appropriate.⁸⁵⁸

ACCC views

It appears to the ACCC that the amendments in section 6.3(b)(iii) of the proposed 2010 HVAU, which set out the criteria that ARTC will have regard to in determining whether the provision of Additional Capacity is commercially viable (subject to the amendment set out above that the reference be amended to 'commercially viable to ARTC') when ARTC is deciding whether to fund the provision of the recommended Additional Capacity, deal with the concerns raised in the March 2010 Draft Decision in relation to the lack of clarity regarding the operation of this provision.

The ACCC notes the concern raised by interested parties that ARTC having regard to the terms and conditions of the relevant Access Agreements when considering whether provision of the Additional Capacity is commercially viable to ARTC (under section 6.3(b)(iii)(A)), is 'conceptually inconsistent' with the circumstances where the Additional Capacity is an enhancement to improve service to existing Capacity Entitlements. However, the ACCC is of the view that the phrase 'terms and conditions' includes any additional Access Charges that are likely to be paid under existing AHAs as a result of any Additional Capacity that is to be funded by ARTC. As a result, the ACCC is of the view that ARTC's consideration of 'the terms and

⁸⁵⁷ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 23.

⁸⁵⁸ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 23.

conditions of the relevant Access Agreements’ under section 6.3(b)(iii)(A) is appropriate.

Section 6.3(b)(iv) – A reasonableness requirement in relation to the non-financial criteria by which ARTC will determine whether Additional Capacity should be provided (which are considered by ARTC where either ARTC has agreed to fund or where the investment is to be user funded)

The ACCC notes that ARTC, in its response to the March 2010 Draft Decision, did not specifically respond to the ACCC’s view that ‘the phrase “in the opinion of ARTC” in section 6.3(b)(ii) is subjective’ and the recommendation that a reasonableness requirement should be included in section 6.3(b)(ii) [which is now 6.3(b)(iv)] of the HVAU.⁸⁵⁹

In addition, the ACCC notes that ARTC has not specifically responded to this recommendation in its Explanatory Guide accompanying the proposed 2010 HVAU other than to note that ‘ARTC considers that it has addressed these concerns in the amendments included in sections 6.2 and 6.3 of the 2010 HVAU’.⁸⁶⁰

ARTC submissions

Therefore, the only references in the Explanatory Guide to ARTC considering the ACCC’s recommendation to include a reasonable requirement more broadly is in relation to sections 6.2(a)(i) and 6.3(b)(iii) of the HVAU where ARTC considers ‘that such an amendment is not appropriate’ as:

- The criteria set out in section 6.2(a)(i) (and section 6.3(b)(iii)) are objective criteria and leave little room for an *unjustified* subjective assessment.
- ARTC’s view of the [criteria ARTC will take into account in determining whether a project is commercially viable under section 6.2(a)(i) and section 6.3(b)(iii)] ... for example its view of the relative risk and returns associated with a project, may be different to the views of a coal miner, which operates under very different conditions and ARTC is concerned that its view could be trumped by an alternative view expressed by such a party.
- Assessing commercial viability is a critical task that would be carried out by ARTC. It is not appropriate that such a decision be second guessed.
- Further, should ARTC decide that the commercial viability criteria are not satisfied, the applicant always has the option of funding the Additional Capacity itself (see section 6.2(a)(ii) of the 2010 HVAU). Following consultation with HRATF, ARTC has clarified that the matters ARTC can consider in relation to a self funded project (essentially operational, technical and safety issues and legitimate business interests) do not overlap with the commercial viability factors specified above.⁸⁶¹

⁸⁵⁹ ACCC, Draft Decision on HVAU, 5 March 2010, p. 365.

⁸⁶⁰ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 29.

⁸⁶¹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 29-30.

Further, it is noted that ARTC did submit in its response to the March 2010 Draft Decision in relation to section 6.3(b)(i) [which is now section 6.3(b)(iii)] of the HVAU that a similar recommendation for a reasonableness requirement is not necessary as additional detail on the relevant criteria which are relevant to ARTC forming its opinion as to the commercial viability of the provision of the Additional Capacity has been provided (where ARTC is funding the Additional Capacity). As noted above, the ACCC accepted this argument in the context of ARTC's assessment under section 6.3(b)(iii), subject to a minor amendment.⁸⁶²

Stakeholder views

Aston Resources

Aston Resources notes that in its 'explanatory guide, ARTC states that ... an amendment [to include a reasonableness requirement in relation to 6.(b)(iii)] is not required because the applicant always has the option of self-funding the Additional Capacity.'⁸⁶³

However, Aston Resources is of the view that this 'provides insufficient protection to access seekers particularly where:'

1. ARTC can still decline to provide the additional capacity having regard to its "legitimate business interests"; and
2. if the Capital Expenditure is subsequently deemed Prudent, the contributor has no priority access to the infrastructure that it has itself funded.⁸⁶⁴

Aston Resources submits that 'ARTC should be required to act reasonably when taking into account the HVCCC's ... recommendations and should not be entitled to have regard to its legitimate business interests when an applicant has agreed to self-fund an expansion.'⁸⁶⁵

ARTC submits that '[i]f a project is fully-funded (and considered to be technically feasible, safe and not reduce coal chain capacity) no further endorsement should be necessary.'⁸⁶⁶

Aston Resources submits that 'it is inappropriate that ARTC can decline to provide Additional Capacity when:'

1. the HVCCC has recommended an investment;
2. the investment is endorsed by the Rail Capacity Group (RCG); and
3. sufficient take or pay commitments are contracted to cover capital costs (section 6.3).⁸⁶⁷

⁸⁶² ARTC, Response to the ACCC Draft Decision, 31 March 2010., p. 70.

⁸⁶³ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 7.

⁸⁶⁴ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 7.

⁸⁶⁵ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 7.

⁸⁶⁶ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 7.

⁸⁶⁷ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 7.

Aston Resources submits the ‘value of the HVCCC and the role of the RCG is limited when ARTC retains an overriding (and essentially unfettered) discretion to refuse to provide a capacity expansion.’⁸⁶⁸

ARTC submits that there is ‘no value in including detailed objective criteria in the 2010 HVAU when ARTC is not required to act reasonably, or have reasonable regard to the opinions of the HVCCC and RCG, when assessing the criteria.’⁸⁶⁹

ACCC views

The ACCC considers that, while it is appropriate for ARTC to exercise a subjective discretion in relation to the ‘commercially viable’ criteria in section 6.3(b)(iii) where it is determining whether or not to fund the Additional Capacity, ARTC should exercise an objective, reasonable discretion in relation to the non-financial criteria in section 6.3(b)(iv).

As discussed, the ‘commercial viability’ criteria in section 6.3(b)(iii) relate to matters that are to some extent inherently subjective. In contrast, the criteria in section 6.3(b)(iv) relate to matters that are more capable of objective assessment: technical feasibility, impact on Capacity and Coal Chain Capacity, safety, satisfaction of engineering standards etc. The ‘legitimate business interests’ criterion is discussed further below, however at this point the ACCC notes that by incorporating this phrase, ARTC has introduced a legal concept that should be capable of objective determination by an arbitrator.

Further, while the user-funding option facilitates an appropriate balance of ARTC’s interests and other considerations discussed above, there is no such ‘bypass’ option to constrain ARTC’s discretion in relation to the non-financial criteria specified in section 6.3(b)(iv). As drafted, ARTC’s proposed approach appears to allow it to exercise its discretion in a subjective manner without the possibility of the applicable Access Holder(s) being able to seek a meaningful review of the decision, as any arbitration would only determine whether or not ARTC held a particular opinion. The introduction of an objective discretion should, however, ensure that ARTC’s determination on the satisfaction of these non-financial criteria is subject to meaningful arbitration, and thereby subject to appropriate constraint.

The ACCC therefore reiterates its recommendation in the March 2010 Draft Decision that a reasonableness criterion be included in the phrase ‘in the opinion of ARTC’ in section 6.3(b)(iv) to provide a degree of certainty to the applicable Access Holder(s) that ARTC’s decisions are being made on objectively justifiable criteria and for that decision to ultimately be able to be arbitrated by the ACCC.

Section 6.3(b)(iv)(A) – The non-financial criteria by which ARTC will determine whether Additional Capacity should be provided (which are considered by ARTC where either ARTC has agreed to fund or where the investment is to be user funded) - ‘economically efficient operation of the network’

In the March 2010 Draft Decision, the ACCC was of the view that the criteria and processes by which ARTC will determine the provision of additional capacity is ‘economically feasible’ are unclear.⁸⁷⁰

⁸⁶⁸ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 7.

⁸⁶⁹ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, pp. 7-8.

ACCC view

The ACCC is of the view that the amendments in section 6.3(b)(iv)(A), which delete the reference to ‘economically feasible’ and replaces it with ‘consistent with the economically efficient operation of the Network’ – wording that is, in ARTC words, ‘consistent with the wording used in Part IIIA of the TPA’, deals with the concern raised in the March 2010 Draft Decision in relation to use of the term ‘economically feasible’ (when taken in combination with the recommendation for a ‘reasonableness requirement’ in section 6.3(b)(iv) as set out above).⁸⁷¹

Section 6.3(b)(iv)(D) – The non-financial criteria by which ARTC will determine whether Additional Capacity should be provided (which are considered by ARTC where either ARTC has agreed to fund or where the investment is to be user funded) - ‘legitimate business interests’

In the March 2010 Draft Decision the ACCC was of the view that the criteria and processes by which ARTC will determine that the provision of Additional Capacity does not compromise ARTC’s ‘legitimate business interests’ are unclear under section 6.3(b)(iv)(D).⁸⁷²

ARTC submissions

The ACCC notes that in its response to the March 2010 Draft Decision, ARTC stated that it is not necessary to further define the term ‘legitimate business interests’ as ‘its meaning is sufficiently familiar to [the] ACCC, and access seekers and providers alike’.⁸⁷³

Stakeholder views

Aston Resources

Aston Resources submits that the ‘value of having objective criteria is obviated if ARTC is not required to form a reasonable opinion with respect to such criteria.’ Aston Resources submits that ‘[r]equiring ARTC to form a “reasonable” opinion is not unduly onerous as such opinion need only be reasonable to a person or entity in the position of ARTC.’⁸⁷⁴

Aston Resources notes that in its ‘explanatory guide, ARTC states that such an amendment is not required because the applicant always has the option of self-funding the Additional Capacity.’⁸⁷⁵

Aston Resources is of the view that this ‘provides insufficient protection to access seekers particularly where:’⁸⁷⁶

1. ARTC can still decline to provide the additional capacity having regard to its “legitimate business interests”⁸⁷⁷

⁸⁷⁰ ACCC, Draft Decision on HVAU, 5 March 2010, p. 365.

⁸⁷¹ ARTC, Response to the ACCC Draft Decision, 31 March 2010., pp. 69 and 71.

⁸⁷² ACCC, Draft Decision on HVAU, 5 March 2010, p. 365.

⁸⁷³ ARTC, Response to the ACCC Draft Decision, 31 March 2010., p. 69.

⁸⁷⁴ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 7.

⁸⁷⁵ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 7.

⁸⁷⁶ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 7.

⁸⁷⁷ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 7.

Aston Resources also submits that ‘ARTC should be required to act reasonably when taking into account the HVCCC’s comments and recommendations and should not be entitled to have regard to its legitimate business interests when an applicant has agreed to self-fund an expansion.’⁸⁷⁸

Aston Resources submits that ‘[i]f a project is fully-funded (and considered to be technically feasible, safe and not reduce coal chain capacity) no further endorsement should be necessary.’⁸⁷⁹

Aston Resources submits the ‘value of the HVCCC and the role of the RCG is limited when ARTC retains an overriding (and essentially unfettered) discretion to refuse to provide a capacity expansion.’⁸⁸⁰

Aston resources submits that there is ‘no value in including detailed objective criteria in the 2010 HVAU when ARTC is not required to act reasonably, or have reasonable regard to the opinions of the HVCCC and RCG, when assessing the criteria.’⁸⁸¹

NSWMC

The NSWMC submits that ‘[u]nder s6.3, which deals with Capacity expansions recommended by HVCCC, ARTC will commit to the Additional Capacity only if TOP commitments cover the capital costs over its economic life and the Additional Capacity is “commercially viable” (i.e. can be financed by ARTC) and does not compromise ARTC’s “legitimate business interests” (not defined).’⁸⁸²

The NSWMC submits that these ‘provisions could prevent HVCCC and producers, through the RCG, ensuring track capacity and capacity increases are aligned with port capacity and capacity increases.’⁸⁸³

The NSWMC therefore submits that ‘if the Additional Capacity is endorsed by the RCG and sufficient TOP commitments are contracted to cover the annual capital costs for 10 years through the access pricing provisions, ARTC should agree to the Capacity being built, subject to financing.’⁸⁸⁴

The NSWMC submits that ‘[a]gain, ARTC’s “legitimate business interests” need to be defined to clarify the extent of ARTC’s discretion to not construct Additional Capacity for which it has financing and TOP commitments.’⁸⁸⁵

The NSWMC submits that there ‘appears to be no provision for financing HVCCC recommended Additional Capacity by any other party if ARTC chooses not to finance that Additional Capacity.’⁸⁸⁶

⁸⁷⁸ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 7.

⁸⁷⁹ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 7.

⁸⁸⁰ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 7.

⁸⁸¹ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 7-8.

⁸⁸² NSWMC, Submission in Response to ACCC Consultation Paper, p. 7.

⁸⁸³ NSWMC, Submission in Response to ACCC Consultation Paper, p. 7.

⁸⁸⁴ NSWMC, Submission in Response to ACCC Consultation Paper, p. 7.

⁸⁸⁵ NSWMC, Submission in Response to ACCC Consultation Paper, p. 7.

⁸⁸⁶ NSWMC, Submission in Response to ACCC Consultation Paper, p. 7.

Therefore, the NSWMC submits that ‘if ARTC chooses not to finance the Additional Capacity, then Access Holders and Applicants should have the right, individually or in a group, to finance it and to equitable recovery of their capital cost contributions from other users of the Additional Capacity.’⁸⁸⁷

PWCS

PWCS submits that ‘the Investment Framework set out in the Proposed HVAU falls short in a number of [relevant] areas.’⁸⁸⁸

- Although “user funding” is an option under the Proposed HVAU for an Access Seeker to ensure Additional Capacity is funded, the investment framework is incomplete in dealing with user-funded expansions:
 - The ARTC still has a great deal of discretion to choose not to build Additional Capacity, even if the project is funded by users⁸⁸⁹

PWCS therefore submits that ‘to provide producers with certainty, the “right to fund” arrangements for track capacity must be strong and transparent. If an Access Seeker is uncertain as to their ability to fund (and thus ensure the construction of) track capacity, the entire intent of the new Contractual Framework is weakened.’⁸⁹⁰

PWCS submits that ‘[a]t its core, the intent of the Contractual Framework was to ensure that existing and new producers could secure access to the infrastructure necessary to facilitate industry growth on a fair and transparent basis. If this is not achievable on the track, it will lessen the value of the certainty that PWCS provides to producers nominating for capacity at the terminals.’⁸⁹¹

ACCC view

The ACCC accepts that it is reasonable that ARTC be able to consider whether a recommendation by the HVCCC for Additional Capacity compromises its ‘legitimate business interests’ in relation to any investment decision relating to the Network, whether it is being funded by ARTC or is subject to a user-funding agreement.

The ACCC notes, ARTC’s comment that the meaning of ‘legitimate business interests’ within the context of the TPA is ‘sufficiently familiar’ to the ACCC, access seekers and access providers and does not require further definition. The ACCC considers, however, that the use of the phrase in the context of section 6.3(b)(iv)(D) of the proposed 2010 HVAU may not necessarily be identical to that contained in the Act in all circumstances and as a result, requires further definition.

Further, when assessing an access undertaking under section 44ZZA(3)(c) of the Act, the ACCC has an obligation to consider the ‘interests of persons who might want access to the service’. This includes access seekers of varying sizes and legal resources. As a result, it is imperative that the decision making process that ARTC

⁸⁸⁷ NSWMC, Submission in Response to ACCC Consultation Paper, p. 7.

⁸⁸⁸ PWCS, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 5.

⁸⁸⁹ PWCS, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 5.

⁸⁹⁰ PWCS, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 6.

⁸⁹¹ PWCS, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 6.

goes through in deciding whether to consent to the provision of Additional Capacity is clear and certain in its terms, effect and operation in order to enable ARTC, access seekers and any other parties relevant to the Hunter Valley supply chain to be clear about their respective rights and obligations. It is the ACCC's view that this should allow relevant parties to be clear as to ARTC's decision making process which should facilitate contractual alignment between the ports and below rail through the provision of Additional Capacity.

The ACCC notes however that ARTC has not made any amendments to section 6.3(b)(iv)(D) to clarify the criteria and processes by which ARTC will determine:

- where ARTC has decided the provision of Additional Capacity is commercially viable to ARTC under 6.3(b)(iii) and will fund the Additional Capacity, and is assessing whether the Additional Capacity will 'otherwise compromise ARTC's legitimate business interests'; or
- where the applicable Access Holder(s) have agreed to meet the costs of the Additional Capacity (in line with the ACCC's recommendations that a 'user(s)-funding' option in relation to HVCCC recommended Additional Capacity be clearly set out) and ARTC is assessing whether the request to self-fund the recommended Additional Capacity will 'otherwise compromise ARTC's legitimate business interests'.

The ACCC notes, however, that section 6.3(b)(iii) sets out a number of 'commercial viability' criteria ARTC must be satisfied of prior to consenting to funding HVCCC-recommended Additional Capacity when deciding whether to fund the Additional Capacity itself. As outlined above, the ACCC considers it appropriate that ARTC exercise a subjective discretion in deciding whether these criteria are satisfied. Section 6.3(b)(iv)(A) to (C) go on to specify non-financial criteria ARTC will consider when making the objective decision to consent to the capacity construction. Cumulatively, these criteria provide that, in deciding whether to consent to provide Additional Capacity recommended by the HVCCC, ARTC has regard to:

- a range of commercial viability considerations;
- technical feasibility;
- the economically efficient operation of the Network;
- satisfaction of engineering and operational standards;
- safe operation of the network and safety of users of the network; and
- impact on Network and Coal Chain Capacity.

The ACCC considers that these factors substantially cover the field of likely 'legitimate business interests' that ought to be recognised pursuant to the section. The ACCC therefore considers that interests contemplated by section 6.3(b)(iv)(D) could only be those not already addressed by the preceding sections. Consequently, if ARTC is contemplating interests other than those already dealt with in the section, they should be specified.

In addition, the ACCC considers that section 6.3(b)(iv)(D) should be amended so that where ARTC has decided that the HVCCC's recommended Additional Capacity does compromise ARTC's legitimate business interests, where the Applicant has agreed to fund the Additional Capacity, ARTC should provide written reasons to the HVCCC and the applicable Access Holder(s) as soon as practicable as to why ARTC has reached that decision. This obligation could be covered using an appropriately amended version of section 6.2(e) of the HVAU, subject to an amendment for the written reasons for the decision to be provided as soon as practicable.

The ACCC is of the view that these amendments, alongside the inclusion of a reasonableness criterion in section 6.3(b)(iv), will provide certainty that ARTC's decisions are being made on objectively justifiable criteria. The ACCC also notes that ultimately, such a decision could be arbitrated by the ACCC where relevant.

11.3 Additional Capacity Sought by Applicants and user-funding

11.3.1 Proposed 2010 HVAU

Section 6.2(a) sets out that ARTC will consider, as part of the negotiation process with an Applicant, requests for the provision of Additional Capacity, and will consent to the provision of that capacity if certain conditions are satisfied.

As provided in **sections 3.9** and **5.2**, ARTC will consider, as part of the negotiation process with an Applicant, any requests for Additional Capacity. ARTC will consent to the provision of Additional Capacity if:

- (i) either:
 - (A) in ARTC's opinion, such provision is commercially viable to ARTC having regard to the:
 - (aa) terms and conditions of the relevant Access Agreement;
 - (ab) circumstances for ARTC to service and raise financing through debt and equity for Additional Capacity;
 - (ac) opportunity cost to ARTC given the relative risk and returns associated with the Additional Capacity financing relative to other investment opportunities; and
 - (ad) net effect on ARTC's balance sheet, gearing ratios and any other debt covenants in existence at the time; or
 - (B) the Applicant agrees to meet the cost of the Additional Capacity; and
- (ii) the Additional Capacity of the Network is, in the opinion of ARTC:
 - (A) technically feasible and consistent with the economically efficient operation of the Network and meets ARTC's engineering and operational standards;
 - (B) consistent with the safe and reliable operation of the Network and will not impact on the safety of any user of the Network;

- (C) does not reduce Capacity or Coal Chain Capacity (in assessing Coal Chain Capacity, ARTC will consult the HVCCC, and take into account HVCCC's comments on any reduction of Coal Chain Capacity in accordance with the steps set out in **section 5.2(d)**, as applicable); and
- (D) does not otherwise compromise ARTC's legitimate business interests except that if the Applicant agrees to meet the cost of the Additional Capacity as contemplated in **section 6.2(b)(i)**, this does not include consideration of the commercial viability factors referred to in **section 6.2(a)(i)(A)**.

11.3.2 Overview of ACCC assessment of user-funding option

Section 6.2(a) provides the basis for the 'user-funding' option for investment in Additional Capacity. The ACCC considers that the following issues arise for consideration in relation to the section:

- the operation and timing of the 'user-funding option';
- issues with the criteria ARTC uses to decide whether to consent to investment in capacity funded by users;
- the treatment of the capital contributions by users for RAB purposes; and
- the 'equitable reconciliation' between users where the user-funding option has been pursued.

11.3.3 Operation and timing of the user funding option

Suggestions for an unconditional obligation on ARTC to construct Additional Capacity where user-funded

The ACCC notes the concern raised by interested parties that where Applicants are willing to fund the construction of Additional Capacity, ARTC should be unconditionally required to construct that Additional Capacity.

Stakeholders

Coal & Allied

Coal & Allied notes that it 'welcomes the inclusion of the ability for Applicants to fund the construction of Additional Capacity in the absence of ARTC's willingness to do so.'⁸⁹² However, Coal & Allied also submits that 'since such funding is the only effective means that Applicants have of ensuring that Additional Capacity becomes available, this mechanism must be robust and practical.'⁸⁹³

Coal & Allied therefore submits that '[i]n circumstances where Applicants are willing to fund an expansion ... ARTC should be unconditionally required to construct that Additional Capacity.'⁸⁹⁴

⁸⁹² Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 20.

⁸⁹³ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 20.

⁸⁹⁴ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 21.

Coal & Allied notes that in ‘response to submissions previously made by coal producers, ARTC rejected a proposal that as an option of last resort, Applicants should be permitted to fund and "step in" in order to build Additional Capacity on ARTC's Network if ARTC refuses to fund or build that Additional Capacity.’⁸⁹⁵

Coal & Allied submits that ‘ARTC's refusal to build Additional Capacity could result in underutilised mine, above-rail and port assets, where ARTC is not willing to fund Additional Capacity, it is vital that Applicants have a clear right to provide that funding and certainty that the Additional Capacity will be built.’⁸⁹⁶

Coal & Allied therefore submits that it is ‘not seeking that in the Hunter Valley Applicants have a right to build, but if ARTC wishes to reserve to itself the sole right to construct Additional Capacity, it must unconditionally agree to construct Additional Capacity when funded by an Applicant.’⁸⁹⁷

ACCC view

The ACCC is of the view that once an Applicant has agreed to fund the Additional Capacity under 6.2(a)(i)(B) and ARTC has consented to the provision of that Additional Capacity under 6.2(a), the RCG process in section 6.4 will continue to apply in relation to finalising the construction of that Additional Capacity.

More specifically, subject to the recommended amendments to section 6.4 of the proposed 2010 HVAU and the Train Path Schedule – in light of ARTC’s noted intention for the RCG to ‘control the timeframes for both consultation and approval of projects and the delivery of projects’ – any user-funded Additional Capacity that is endorsed by the RCG should be constructed in a timely manner, subject only to the efficient operation by industry participants in the RCG process, as ARTC’s obligations under that process are to be set out with clarity and certainty.⁸⁹⁸

Assuming that these amendments are made, the ACCC is of the view that this approach provides Applicants who are willing to fund an expansion with sufficient certainty that any required Additional Capacity will be constructed in line with producer demand and in line with complementary expansion along the Hunter Valley supply chain.

The ACCC notes that if ARTC were to be required to unconditionally build any Additional Capacity that an Access Seeker has agreed to fund, one potential consequence is that larger coal producers may come to dominate construction of Additional Capacity across the Hunter Valley Network, potentially to the detriment of other users of the Network. The ACCC is of the view that the RCG process (subject to the recommended amendments) is more likely to provide the industry with a consultative and representative approach in relation to expansions of the Network that are requested by Applicants, particularly where the timing and finalisation of the construction of Additional Capacity is clearly in the hands of the RCG.

⁸⁹⁵ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 21.

⁸⁹⁶ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 22

⁸⁹⁷ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 22

⁸⁹⁸ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 30.

Section 6.2(a) – Timeframes within which a decision will be made by ARTC as to whether or not the Additional Capacity will be consented to once a request for Additional Capacity is made under section 6.2(a)

The ACCC notes the concerns raised by interested parties that it is unclear in what timeframes ARTC will determine whether or not a request for Additional Capacity will be consented to once a request for Additional Capacity is made by an Applicant under section 6.2(a) of the proposed 2010 HVAU.

Stakeholder views

Coal & Allied

Coal & Allied submits that ‘the Proposed HVAU does not include any indication of how long ARTC’s assessments under sections 6.2(a) and 6.3(b) of the Proposed HVAU may take ... Applicants could potentially wait for a very lengthy period of time ... before ARTC completes the various processes required to decide whether or not to proceed to fund a project to build Additional Capacity. However, in the meantime, Applicants will most likely have made substantial, binding investment commitments that rely on the availability of that Additional Capacity.’⁸⁹⁹

Coal & Allied submits that ‘the following timeframes should apply to ARTC’s assessments of Additional Capacity under sections 6.2(a) and 6.3(b) of the Proposed HVAU.’⁹⁰⁰

- (a) 6 months for assessments involving less than 10mtpa of Additional Capacity; and
- (b) 12 months for assessments involving more than 10mtpa of Additional Capacity.⁹⁰¹

Coal & Allied submits that the ‘Proposed HVAU also does not specify the point at which the decision as to who will fund the construction of Additional Capacity is made. This is a critical juncture, however, given that the party that funds a project needs to know when it must arrange for financing and a range of internal approvals for a substantial investment in infrastructure. Also, if an Applicant needs to self-fund a project for Additional Capacity, it may bear a much higher charge for that Capacity than for an expansion funded by the ARTC and socialised amongst all Access Holders.’⁹⁰²

PWCS

PWCS submits that ‘the Investment Framework set out in the Proposed HVAU falls short in a number of [relevant] areas.’⁹⁰³

⁸⁹⁹ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 31.

⁹⁰⁰ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 31.

⁹⁰¹ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 31; However, the ACCC notes that later in its submission at p. 40, Coal & Allied note that ‘all steps [in order to finalise all stages of ARTC’s assessment] should not exceed’ the 6 and 12 months periods proposed.

⁹⁰² Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 32.

⁹⁰³ PWCS, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 5.

- Although “user funding” is an option under the Proposed HVAU for an Access Seeker to ensure Additional Capacity is funded, the investment framework is incomplete in dealing with user-funded expansions:

...

- The time frame in which the ARTC has to make a decision on whether or not to fund Additional Capacity is unclear; there is a concern that the ARTC can delay a fund/build decision until it might be too late for the Access Seeker to fund/build in time to meet its capacity requirements;⁹⁰⁴

PWCS also submits that ‘to provide producers with certainty, the “right to fund” arrangements for track capacity must be strong and transparent. If an Access Seeker is uncertain as to their ability to fund (and thus ensure the construction of) track capacity, the entire intent of the new Contractual Framework is weakened.’⁹⁰⁵

PWCS submits that ‘[a]t its core, the intent of the Contractual Framework was to ensure that existing and new producers could secure access to the infrastructure necessary to facilitate industry growth on a fair and transparent basis. If this is not achievable on the track, it will lessen the value of the certainty that PWCS provides to producers nominating for capacity at the terminals.’⁹⁰⁶

Xstrata

Xstrata submits 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’.⁹⁰⁷

ACCC view

The ACCC notes that under section 3.9(a) of the proposed 2010 HVAU ARTC is obliged to use reasonable efforts to provide an Indicative Access proposal within 60 business days (which may already incorporate ARTC’s consideration of a request for Additional Capacity under section 6.2(a)). However, the ACCC is of the view that the specific timeframes within which ARTC is obliged to arrive at a decision as to whether it will consent to the provision of Additional Capacity under section 6.2(a) are unclear and would benefit from greater explanation.

Further, while the ACCC notes ARTC’s intent for the RCG to ‘control the timeframes for both consultation and approval of projects and the delivery of projects’, without further clarification as to the applicable timeframes under section 6.2(a), this assessment by ARTC could lead to delays in the creation of Additional Capacity.⁹⁰⁸

Therefore, the ACCC is of the view that the timeframes within which ARTC is obliged to make a decision as to whether it will consent to the provision of Additional Capacity under section 6.2(a), once it has received a request for Additional Capacity (via the mechanism set out in section 3.9(d) of the proposed 2010 HVAU), should be

⁹⁰⁴ PWCS, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 5.

⁹⁰⁵ PWCS, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 6.

⁹⁰⁶ PWCS, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 6.

⁹⁰⁷ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 16.

⁹⁰⁸ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 30.

clearly set out in order to provide an appropriate level of clarity and certainty as to the operation of the provision.

11.3.4 Criteria ARTC will use to decide to consent to capacity sought by Applicants

The ACCC considers it important that the decision making process that ARTC goes through in deciding whether to consent to the provision of Additional Capacity and the consultation process with the HVCCC in relation to that Additional Capacity under the HVAU is clear and certain in its terms, effect and operation in order to enable ARTC, access seekers and any other parties relevant to the Hunter Valley supply chain to be clear about their respective rights and obligations.

It is the ACCC's view that this should allow relevant parties to be clear as to ARTC's decision making process which should facilitate contractual alignment between the ports and below rail through the provision of Additional Capacity in a timely manner in line with expansion along the supply chain.

Section 6.2(a)(i)(A) – A reasonableness requirement in relation to determining whether a request for Additional Capacity that is to be funded by ARTC is 'commercially viable to ARTC' when ARTC is determining whether to fund the Additional Capacity

In the March 2010 Draft Decision the ACCC was of the view that the phrase 'in ARTC's opinion' in what is now section 6.2(a)(i)(A) is subjective and recommended that it should include a reasonableness requirement.⁹⁰⁹

ACCC views

The ACCC notes that the submissions and analysis in relation to 6.2(a)(i)(A) are discussed above in relation to section 6.3(b)(iii)(A) and are, for that reason, not extracted here again except where they are specific differences.

Please refer above for the ACCC's views on this matter.

Section 6.2(a)(i)(A) – The criteria by which ARTC will determine that the provision of Additional Capacity is 'commercially viable to ARTC' when ARTC is determining whether to fund the Additional Capacity

In the March 2010 Draft Decision the ACCC was of the view that the criteria and processes by which ARTC will determine whether the provision of Additional Capacity would be commercially viable to ARTC (when ARTC is deciding whether to fund the provision of the requested Additional Capacity itself) are unclear and would benefit from further explanation.⁹¹⁰

ACCC views

The ACCC notes that the submissions and analysis in relation to 6.2(a)(i)(A) are discussed above in relation to section 6.3(b)(iii)(A) and are, for that reason, not extracted here again except where they are specific differences.

Please refer above for the ACCC's views on this matter.

⁹⁰⁹ ACCC, Draft Decision on HVAU, 5 March 2010, p. 360.

⁹¹⁰ ACCC, Draft Decision on HVAU, 5 March 2010, p. 360.

Section 6.2(a)(ii) - A reasonableness requirement in relation to the non-financial criteria by which ARTC will determine whether Additional Capacity should be provided (which are considered by ARTC where either ARTC has agreed to fund or where the investment is to be user funded)

The ACCC notes that ARTC, in its response to the March 2010 Draft Decision, did not specifically respond to the ACCC's view that 'the phrase "in the opinion of ARTC" in section 6.2(a)(iii) is subjective' and the recommendation that a reasonableness requirement should be included in section 6.2(a)(iii) [which is now 6.2(a)(ii)] of the HVAU.⁹¹¹

In addition, the ACCC notes that ARTC has not specifically responded to this recommendation in its Explanatory Guide accompanying the proposed 2010 HVAU other than to note that 'ARTC considers that it has addressed these concerns in the amendments included in sections 6.2 and 6.3 of the 2010 HVAU'.⁹¹²

ACCC views

The ACCC notes that the submissions and analysis in relation to 6.2(a)(ii) are discussed above in relation to section 6.3(b)(iv) and are, for that reason, not extracted here again except where they are specific differences.

Please refer above for the ACCC's views on this matter.

Section 6.2(a)(ii)(A) – The non-financial criteria by which ARTC will determine whether Additional Capacity should be provided (which are considered by ARTC where either ARTC has agreed to fund or where the investment is to be user funded) - 'economically efficient operation of the Network'

In the March 2010 Draft Decision, the ACCC was of the view that the criteria and processes by which ARTC will determine whether the provision of Additional Capacity is 'economically feasible' are unclear.⁹¹³

ACCC views

The ACCC notes that the submissions and analysis in relation to 6.2(a)(ii)(A) are discussed above in relation to section 6.3(b)(iv) and are, for that reason, not extracted here again except where they are specific differences.

Please refer above for the ACCC's views on this matter.

The ACCC notes submissions by interested parties that ARTC's assessment as to whether or not the requested Additional Capacity is 'technically feasible' under section 6.2(a)(ii)(A) should be reviewable.

The ACCC is of the view that the inclusion of a reasonableness criterion in section 6.2(a)(ii) will deal with this concern by providing certainty to applicants that ARTC's decisions are being made on objectively justifiable criteria and that the decision can ultimately be arbitrated by the ACCC where relevant.

⁹¹¹ ACCC, Draft Decision on HVAU, 5 March 2010, p. 361.

⁹¹² ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 29.

⁹¹³ ACCC, Draft Decision on HVAU, 5 March 2010, p. 361.

Section 6.2(a)(ii)(C) – The non-financial criteria by which ARTC will determine whether Additional Capacity should be provided (which are considered by ARTC where either ARTC has agreed to fund or where the investment is to be user funded) - consultation with the HVCCC

In the March 2010 Draft Decision the ACCC was of the view that there should be greater detail and clarity around ARTC's obligation to consult with the HVCCC in section 6.2(a)(ii)(C).⁹¹⁴

Stakeholder views

Aston Resources

Aston Resources submits that 'ARTC should be required to act reasonably when taking into account the HVCCC's comments and recommendations [under section 6.2(a)(ii)(C)]'.⁹¹⁵

Aston Resources also submits the 'value of the HVCCC and the role of the RCG is limited when ARTC retains an overriding (and essentially unfettered) discretion to refuse to provide a capacity expansion.'⁹¹⁶

Aston resources submits that there is 'no value in including detailed objective criteria in the 2010 HVAU when ARTC is not required to act reasonably, or have reasonable regard to the opinions of the HVCCC and RCG, when assessing the criteria.'⁹¹⁷

HVCCC

The HVCCC submits that 'ARTC's commitment to consult with HVCCC, and take in to account HVCCC comments in accordance with **section 5.2(d)**, in assessing any impact of ... requests for Additional Capacity ... is appropriate.'⁹¹⁸

ACCC views

As set out above, the proposed 2010 HVAU has two 'streams' of HVCCC consultation, a more prescriptive approach as set out in section 5.2(d) and an optional approach set out in Schedule F.

It is the ACCC's view that the amendments in section 6.2(a)(ii)(C), which set out that ARTC is obliged to consult with the HVCCC on whether a request for Additional Capacity by an Applicant will reduce Coal Chain Capacity – in accordance with the specific procedures set out in section 5.2(d) of the HVAU (as applicable) – go a certain way to dealing with the concerns raised in the March 2010 Draft Decision in relation to providing greater certainty and detail around the HVCCC consultation process in this context.⁹¹⁹

However, the ACCC is also of the view that aspects of ARTC's obligation to consult with the HVCCC need to be strengthened. The ACCC considers the detailed

⁹¹⁴ ACCC, Draft Decision on HVAU, 5 March 2010, p. 361.

⁹¹⁵ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 7.

⁹¹⁶ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 7.

⁹¹⁷ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, pp. 7-8.

⁹¹⁸ HVCCC, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 2.

⁹¹⁹ ACCC, Draft Decision on HVAU, 5 March 2010, p. 361.

recommendations set out in relation to sections 5.2(d) and (e) of the HVAU in the Capacity Management chapter to be relevant.

Section 6.2(a)(ii)(D) – The non-financial criteria by which ARTC will determine whether Additional Capacity should be provided (which are considered by ARTC where either ARTC has agreed to fund or where the investment is to be user funded) - ‘legitimate business interests’

In the March 2010 Draft Decision the ACCC was of the view that the criteria and processes by which ARTC will determine that the provision of Additional Capacity does not compromise ARTC’s ‘legitimate business interests’ under section 6.2(a)(ii)(D) are unclear.⁹²⁰

ACCC views

The ACCC notes that the submissions and analysis in relation to 6.2(a)(ii)(D) are discussed above in relation to section 6.3(b)(iv) and are, for that reason, not extracted here again except where they are specific differences that impact on the above analysis.

Please refer above for the ACCC’s views on this matter.

11.3.5 Treatment of Capital Contributions and equitable reconciliation

Section 6.2(b) to (e) provides that:

- (b) In the event ARTC agrees to the creation of Additional Capacity, ARTC’s costs of Additional Capacity will be met:
 - (i) by the Applicant reimbursing the relevant costs as and when they are incurred by ARTC;
 - (ii) through increased Charges, or making other periodic payments, reimbursing ARTC for recurring costs, plus an annuity in advance calculated by application of the relevant Rate of Return to ARTC’s capital outlay; or
 - (iii) by such other way that ARTC and the Applicant agree, including take or pay arrangements requiring financial commitment by the Applicant to the Additional Capacity over the economic life of that Additional Capacity.
- (c) The option of increasing Charges or making periodic payments including an annuity as set out in **sub-section (b)(ii)**, or some other arrangement as agreed under **sub-section (b)(iii)** is only available to an Applicant if arrangements are made which satisfy ARTC that the risk of the Applicant failing to make such payments is commercially acceptable and is at ARTC’s discretion.
- (d) Any Additional Capacity, once created, will be owned and managed by ARTC.
- (e) Where requested to do so by an Applicant, ARTC will provide the Applicant written reasons for the basis of decisions made by it in relation to Additional Capacity.

⁹²⁰ ACCC, Draft Decision on HVAU, 5 March 2010, p. 361.

Consequently, section 6.2 provides that ARTC will own and manage any Additional Capacity created through Access Holder capital contributions, and provides flexibility for ARTC and the Access Holder to determine mutually acceptable funding arrangements.

ACCC view

The ACCC notes that section 6.2(b) to (e) allows for considerable flexibility for Access Holders and ARTC to reach mutually acceptable funding arrangements in relation to Capital Contributions.

The ACCC considers that it is likely to be appropriate for section 6.2 to provide this flexibility in relation to the funding arrangements, as it is likely to allow for a suitable balancing of the interests of persons wanting access and ARTC's legitimate business interests.

11.3.6 Sections 6.2(f) and (g) – Treatment of contributions where Additional Capacity is funded through Access Holder Capital Contributions ('equitable reconciliation')

In the March 2010 Draft Decision, the ACCC expressed concerns with ARTC including capital contributions from access holders into the RAB and allowing ARTC to earn a return on capital and recover depreciation on those contributions. In particular, the ACCC was concerned that this would result in ARTC unjustly recovering a windfall gain where ARTC did not bear the initial capital outlay.⁹²¹

The ACCC also expressed concerns with ARTC's proposed *processes* regarding Additional Capacity being funded through access holder contributions, specifically how subsequent access holders would pay for the use of the access holder funded capacity.⁹²² A number of stakeholders also raised concerns with how the operation of section 6.2(b) will ensure 'equitable distribution' of the capital contribution.

Principles in section 6.2(g)

The proposed 2010 HVAU

In response to the concerns expressed by the ACCC and stakeholders, ARTC has made amendments to the 2010 HVAU.

ARTC has revised the definition of Net Capex in Section 4.3(a) of the 2010 HVAU to exclude capital contributions made by access holders.

ARTC has also made amendments to section 6.2, which it submits provides greater clarity and certainty as to how Capital Contributions will be treated.⁹²³ In particular, 6.2(f) now refers to specific principles in section 6.2(g) which ARTC states will ensure an 'equitable form of reconciliation'. Under the principles in section 6.2(g) ARTC states that:

- (i) ARTC will be economically no worse off.

⁹²¹ ACCC, Draft Decision on HVAU, 5 March 2010, p. 496.

⁹²² ACCC, Draft Decision on HVAU, 5 March 2010, p. 496.

⁹²³ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 14.

- (ii) In determining Charges for the relevant Pricing Zone, ARTC will have regard to:
 - (A) achieving full recovery of VCC from all Access Holders on the basis of actual usage;
 - (B) the Charges applicable to the Contributor and other Access Holders will be equitable subject to the relevant provisions of section 4.14 and section 4.15 of this Undertaking; and
 - (C) the Contributor will not achieve recovery of capital cost associated with assets funded by a Capital Contribution (“Contributed Assets”) that exceeds the Rate of Return.

Further, ARTC makes a distinction between whether Additional Capacity that is funded by an Access Holder is ‘prudent’ or ‘non-prudent’ based on the principles in section 6.4 and then applies different charging approaches according to this classification to recover the value of the contribution.

For Additional Capacity that is deemed to be prudent, ARTC will charge in the following way – section 6.2(g)(iii):

- (A) ARTC will have regard to the following objectives in determining Charges for the relevant Pricing Zone:
 - (aa) Maximising recovery of (or contribution to) applicable FCC and NCC, in proportion to relative consumption of assets funded by ARTC or a Capital Contribution (“Combined Assets”).
 - (ab) Maximising recovery of (or contribution to) the capital cost associated with Contributed Assets, determined with reference to the useful life of the Contributed Assets and Rate of Return approved under this Undertaking, in proportion to relative consumption of the Combined Assets.
- (B) Subject to section 6.2(g)(i) and section 6.2(g)(ii)(C), recovery of capital cost associated with Contributed Assets by the Contributor will be based on an allocation of revenue obtained through the Charges between ARTC and the Contributor such that ARTC and the Contributor achieve an equitable rate of capital cost recovery from assets funded by ARTC (“ARTC Assets”) and Contributed Assets respectively.
- (C) The Contributor will not receive any priority in the allocation of Additional Capacity made available through Contributed Assets.

For Additional capacity that is deemed *not* to be prudent, ARTC will charge in the following way – section 6.2(g) (iv):

- (A) ARTC will have regard to the following objectives in determining Charges for relevant Pricing Zone:
 - (aa) Maximising recovery of (or contribution to) the non-capital component (operating expenditure) of applicable FCC and NCC, in proportion to relative consumption of Combined Assets.

- (ab) Maximising recovery of (or contribution to) the capital component (depreciation and return) of applicable FCC and NCC, in proportion to relative consumption of ARTC Assets.
 - (ac) Subject to subsection 6.2(iv)(ad), no there will be no recovery of (or contribution to) the capital cost associated with Contributed Assets.
 - (ad) Where another Access Holder elects to utilise the Additional Capacity made available through Contributed Assets, maximising recovery from that access holder of (or contribution to) the capital cost associated with Contributed Assets, determined with reference to the useful life of the contributed assets and Rate of Return approved under the Undertaking, in proportion to relative consumption of Contributed Assets.
- (B) The Contributor will not recover the capital cost associated with Contributed Assets except where another access holder elects to utilise the capacity made available through the Contributed Assets, in which case the recovery of capital cost associated with Contributed Assets will be based on an allocation of revenue obtained through the Charges between ARTC and the Contributor such that ARTC and the Contributor achieve an equitable rate of capital cost recovery from ARTC Assets and Contributed Assets respectively.
- (C) The Contributor will receive priority in the allocation of Additional Capacity made available through Contributed Assets.

Section 6.2(h) also allows ARTC and the funding Access Holder to depart from the principles set out in section 6.2(g) that apply to the equitable form of reconciliation, other than the principles at sections 6.2(g)(i)-(ii) and section 6.2(g)(iv)(A)(ac).

ARTC submissions

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

In relation to the differential treatment of Additional Capacity that is not deemed prudent, ARTC submits that ‘only Capital Expenditure that is Prudent will be included in the RAB for pricing purposes and shared equitably among users in the relevant Pricing Zone.’⁹²⁴

ARTC considers that the changes and additions have been made to address concerns raised by producers around uncertainties surrounding recovery of Capital Contributions made and how other users of capacity made available by a Capital Contribution would be treated.⁹²⁵

Stakeholder views

NSWMC

In its response to the May 2009 Issues Paper, the NSWMC submitted that the cost of Additional Capacity should be met by all the applicable users of the Additional

⁹²⁴ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 15.

⁹²⁵ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 14.

Capacity over its economic life, otherwise, the subsequent users of that additional capacity will effectively be given a free ride on investment undertaken by the initial access holder.⁹²⁶

Subsequently in its submission on the proposed 2010 HVAU, the NSWMC notes that if:

‘ARTC does not consider the Additional Capacity commercially viable, the Applicant can agree to meet the total cost by up-front Capital Contribution, access charges, periodic payments reimbursing ARTC’s capital outlay, or some other agreed way.’⁹²⁷

The NSWMC submits that these ‘provisions could prevent Applicants obtaining access unless they contribute the total capital cost of the Additional Capacity.’⁹²⁸ In particular, the NSWMC also submits that:

‘[a]s well as any spur line used only by the Applicant, the requirement could include an expansion of the multi-user track section that the Applicant has to use, whereas the current capital costs of Additional Capacity on multi-user track segments are best recovered from all the users of the section (as provided for in the access pricing provisions).’⁹²⁹

Further, the NSWMC submits that section ‘6.2(g) is a further inhibitor of the provision of Additional Capacity.’ The NSWMC submits that it ‘provides, where Additional Capacity is provided by a Capital Contributions by an Applicant, for an “equitable form of reconciliation between the Contributor, ARTC and another user sharing the Additional Capacity” according to a complex set of principles.’⁹³⁰

The NSWMC submits that section 6.3 ‘remains too uncertain, is overly complex and needs to be simplified to make the equitable form of reconciliation clearer.’⁹³¹

PWCS

PWCS submits that ‘the Investment Framework set out in the Proposed HVAU falls short in a number of [relevant] areas’

...Although “user funding” is an option under the Proposed HVAU for an Access Seeker to ensure Additional Capacity is funded, the investment framework is incomplete in dealing with user-funded expansions:

- The ARTC still has a great deal of discretion to choose not to build Additional Capacity, even if the project is funded by users;
- ...
- It is not clear whether, when or how an Access Seeker considering whether to fund an expansion will know the extent to which the

⁹²⁶ NSWMC (and HRATF), *Response to ACCC Issues Paper regarding ARTC Hunter Valley Coal Network Access Undertaking*, July 2009, p .27.

⁹²⁷ NSWMC, Submission in Response to ACCC Consultation Paper, p. 6.

⁹²⁸ NSWMC, Submission in Response to ACCC Consultation Paper, p. 7.

⁹²⁹ NSWMC, Submission in Response to ACCC Consultation Paper, p. 7.

⁹³⁰ NSWMC, Submission in Response to ACCC Consultation Paper, p. 7.

⁹³¹ NSWMC, Submission in Response to ACCC Consultation Paper, p. 7.

expansion being funded will be allowed in the RAB, and thus have some or all of its costs spread across all users.⁹³²

RailCorp

RailCorp submit that it:

is concerned that the principles contained in clause 6.2 for an equitable form of reconciliation remain unclear particularly in the case of non coal services using Additional capacity following a capital contribution by a coal user, as it 'indicates the applicable charges "will be equitable subject to the provisions of section 4.14 (charge differentiation) and 4.15 (differentiation on identity and end market). It is unclear if ARTC are suggesting in a coal / non coal situation, given that non coal services are likely to be only paying the VCC that there would be no reconciliation between the users.⁹³³

RailCorp therefore submit that 'clause 6.2 be amended to reflect this coal / non coal scenario.⁹³⁴

Xstrata

Xstrata's key issues with 'user funding' are outlined as follows:

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,⁹³⁵

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;⁹³⁶ and

Access seekers to have the right to user fund at any point in project development, including where ARTC is unreasonably delaying a project.⁹³⁷

ACCC views

The ACCC considers that the provisions relating to equitable reconciliation are a significant element of the proposed investment framework and important to ensuring that the user-funding option is effective.

Capital Contributions and the RAB

In the **Financial Model** chapter, the ACCC considers that ARTC's amendments to the definition of Net Capex in section 4.3 appear to be appropriate, as they explicitly exclude capital contributions from Access Holders from being included in the RAB. ARTC therefore will not earn a return on such contributions.

⁹³² PWCS, Submission in Response to ACCC Consultation Paper, 25 October 2010, pp . 5-6.

⁹³³ RailCorp, *Subject: Hunter Valley Access Undertaking*, 26 October 2010, pp. 5-6.

⁹³⁴ RailCorp, Submission in Response to ACCC Consultation Paper, p. 6.

⁹³⁵ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 16.

⁹³⁶ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 18.

⁹³⁷ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 18.

In the Explanatory Guide, however, ARTC contemplates including capital contributions into the RAB in order to calculate and levy access charges; specifically, such that the contributed cost may be socialised amongst users in the relevant pricing zones, where the investment is Prudent.⁹³⁸

While the ACCC recognises that there is a conceptual challenge in excluding such contributions from the RAB for some purposes but including them for others, inclusion for the purposes of determining access charges for contributed capacity is a practical step and likely to be appropriate provided ARTC does not earn a return on the contributed assets (as is currently provided).

Principles for equitable form of reconciliation – prudence of contribution

The ACCC's view is that it is appropriate for ARTC to apply different charges to 'Prudent' and 'non-Prudent' Access Holder capital contributions.

The ACCC notes that where Additional Capacity funded by an access seeker contribution is not considered Prudent, recovery of the contribution only occurs where a subsequent Access Holder elects to utilise the Additional Capacity created by the contribution. The ACCC considers this likely to be appropriate, as otherwise the contributing Access Holder could be rewarded for making an inefficient capital investment.

In contrast, where the capital expenditure is considered Prudent, section 6.2(g)(iii) provides for recovery of the capital contribution to be socialised amongst users (that is, including that the contributor does not receive any priority in the allocation of the Additional Capacity). The ACCC considers that if the expenditure has been deemed Prudent, Access Holders have endorsed it as 'efficient' investment and it should be recovered accordingly.

The ACCC also notes that the different approaches to recovery of Prudent and non-Prudent contributions should mitigate concerns that a small number of Access Holders may dominate the investment process and force inefficient investments on other parties.

In response to RailCorp's concerns that it is unclear how charges will be applied to coal and non-coal access seekers, the ACCC considers that reference to section 4.14 in section 6.2(g)(ii)(B) provides sufficient certainty as to how access charges will be determined for Additional Capacity.

The ACCC also disagrees with Xstrata's submission that the funding Access Holder should not pay any access charges in order to protect itself from the risk of ARTC mismanaging the Additional Capacity. The ACCC notes that the intention of 'equitable reconciliation' is for the funding Access Holder to receive just compensation for their investment. If the contributing Access Holder did not pay access charges in relation to the contributed assets, subsequent users may pay the full capital costs of the contributed assets without any recognition of the beneficial use enjoyed by the contributing Access Holder. The ACCC therefore considers that it is likely to be appropriate for the contributing Access Holder to pay access charges

⁹³⁸ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 15.

determined according to the same principles as those paid by other users, as the resulting equitable reconciliation should appropriately balance the interests of persons who may want access to the service by accounting for the beneficial use enjoyed by contributing Access Holder.

Further, the ACCC notes that ARTC has provided in the ‘unders and overs’ mechanism in section 4.8 for allocation of any unders or overs amount to recognise equitable allocations consistently with sections 6.2(f) and (g). The ‘unders and overs’ mechanism in section 4.8 is considered further in the **Financial Model** chapter.

ARTC to be economically no worse off

The ACCC considers however, that clarification is required on ARTC’s objective for it to ‘be economically no worse off’ as a result of equitable reconciliation. The ACCC is concerned that the objective may operate to limit the usefulness of the user-funding option, as ARTC will not be able to earn a return on user capital contributions, hence may in one sense always be ‘worse off.’

The ACCC understands however that ARTC’s intent with the provision is that ARTC’s return on existing assets should not be reduced as a result of capital contributions from an Access Holder. If this is the case, the ACCC considers that the provision be revised to more accurately reflect this intent.

Proposals for a ‘User-funding Deed’

The ACCC notes recommendations by interested parties that ARTC should include a pro-forma ‘User Funding Deed’ in the HVAU to fully document the user-funding arrangements.

Stakeholder views

Coal & Allied

Coal & Allied welcomes the inclusion in section 6.2(g) principles for an equitable form of reconciliation where Additional Capacity is initially funded by a Capital Contribution, however it:⁹³⁹

considers that these principles should be clearly embodied in a pro forma Capital Contribution Deed between ARTC and the Applicant. This Deed would include all necessary commercial terms for the making of the Capital Contribution by the Applicant.

C&A considers that ARTC should be required to submit a draft Capital Contribution Deed to the ACCC for acceptance as part of an amended HVAU except if ARTC were to commit to funding or constructing any Additional Capacity required to meet any initial allocations, in which case, ARTC should be required to submit the deed within six months of the ACCC’s acceptance of an HVAU.⁹⁴⁰

Xstrata

⁹³⁹ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 7.

⁹⁴⁰ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 7.

Xstrata submits that it ‘has continuing concerns as to how the user funding process will work where an Access Seeker is funding Capital Contributions.’⁹⁴¹

Xstrata submits 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.’⁹⁴²

Xstrata submits that 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.’⁹⁴³

Xstrata submits 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’.⁹⁴⁴

Xstrata submit therefore that 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.’⁹⁴⁵

Xstrata submits that 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.⁹⁴⁶

ACCC views

As outlined in the introductory sections of this chapter, the ACCC does not consider it necessary for the proposed 2010 HVAU to provide the same level of prescription as

⁹⁴¹ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 16.

⁹⁴² Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 16.

⁹⁴³ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 16.

⁹⁴⁴ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 16.

⁹⁴⁵ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 16.

⁹⁴⁶ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 16.

considered necessary by the QCA in relation to QR Networks. The QCA stated in its *Final Decision – QR Network’s 2010 Draft Access Undertaking* that:

It is also now a matter of the public record that the counterparties to those access negotiations are significantly dissatisfied with how some of the negotiations [in relation to required expansions of the QR network] have progressed in the past and that the undertaking has been deficient in assisting them to address their concerns. These coal and train companies are particularly concerned about how negotiations may progress in the future without significant protections being added to the 2010 access undertaking.⁹⁴⁷

These considerations – that is, the past behaviour of the below-rail provider – have not been raised in submissions in relation to ARTC.

However, the ACCC does note that under the current drafting of section 6.2, where an Applicant has agreed to meet the costs of Additional Capacity under section 6.2(a)(i)(B), and ARTC has agreed to the creation of that Additional Capacity, it is implicit that the parties will come to a binding formal agreement to govern those arrangements.

The ACCC considers that this implicitly contemplated agreement should be explicitly referred to in the proposed 2010 HVAU. That is, the undertaking should state that ARTC and the relevant user funders will enter an agreement governing the user-funding arrangements, which is to be consistent with the principles specified in section 6.2(g). This will provide additional clarity and certainty to the operation of the investment framework, and the agreement ultimately reached may, if necessary, form the basis for a pro-forma user-funding contract. The timing of development and execution of this agreement will depend on the particular circumstances, however the ACCC considers that explicit recognition that negotiation of the agreement is subject to ACCC arbitration may incentivise parties to reach agreement in a timely fashion. Such an agreement may, at an appropriate juncture, provide the basis for a pro-forma deed, if such a deed is considered necessary.

Agreements outside of the HVAU governing Additional Capacity

In the March 2010 Draft Decision the ACCC was of the view that the intended effect of section 6.2(h), which allowed additional capacity to be governed by agreements outside of the IAHA, was uncertain.⁹⁴⁸

The ACCC notes ARTC’s clarification set out in its response to the March 2010 Draft Decision that it did not intend section 6.2(h) in the 2009 HVAU to allow for circumvention of the HVAU and has deleted the relevant wording from the provision in the proposed 2010 HVAU.⁹⁴⁹

It is the ACCC’s view that deletion of the relevant wording from section 6.2(h) of the proposed 2010 HVAU deals with the concerns raised in the March 2010 Draft Decision in relation to this uncertainty.

⁹⁴⁷ QCA, *Final Decision – QR Network’s 2010 DAU*, September 2010, p. 25.

⁹⁴⁸ ACCC, *Draft Decision on HVAU*, 5 March 2010, p. 361.

⁹⁴⁹ ARTC, *Response to the ACCC Draft Decision*, 31 March 2010, p. 69.

11.4 Industry Consultation Process

Section 6.4 of the HVAU sets out the stages of industry consultation that ARTC will undertake (including setting out the role of the Rail Capacity Group (RCG) and the Hunter Valley corridor capacity strategy) when Additional Capacity is sought by: an access seeker/access holder; identified by ARTC; or recommended by the HVCCC.

The ACCC notes that under the proposed drafting of the HVAU, all expansions of the Hunter Valley rail network will go through the industry consultation process set out at section 6.4.

Under section 6.4(d) through (h), ARTC will go through the following stages of industry consultation with the RCG in relation to any expansion of the Hunter Valley network:

- As a preliminary issue, at each relevant stage of the RCG process ARTC may seek RCG endorsement. If the RCG does not endorse the project at a particular stage, ARTC may elect to continue without RCG endorsement. However, where this occurs, any subsequent expenditure incurred by ARTC on project development or delivery may only be included in the RAB or expense when incurred with the approval of the ACCC;
- When ARTC seeks the ACCC's approval in this context, the ACCC will conduct a form of mini-arbitration and will assess whether or not the subsequent expenditure is 'Prudent'. Whether expenditure is Prudent is to be assessed against the following criteria (unless otherwise specifically defined):

“**Prudent**” means in relation to Capital Expenditure, capital and renewals projects identified, and expenditure incurred, that is:

...

(b) otherwise, prudent having regard to:

- (i) need to meet market demand for Capacity and performance of the Network, or the need to extend the economic life of the Network;
- (ii) whether the scope of works is consistent with that identified in the Hunter Valley corridor capacity strategy, where applicable, current as at the Commencement Date or as varied from time to time;
- (iii) what is considered to represent an efficient means to achieve that demand or extend that economic life;
- (iv) what is consistent with existing standard and configuration of adjacent and/or existing infrastructure with similar utilisation and market requirements, or its modern engineering equivalent;
- (v) expenditure incurred efficiently in implementing the project, where efficient costs will reflect the costs incurred by a prudent service provider, acting efficiently, in accordance with accepted good rail infrastructure practice, to achieve lowest sustainable cost of delivering rail infrastructure services, in the context of:

- (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;
 - (C) ARTC's obligations arising under the law, applicable legislation (including regulations) or the NSW Lease; and (D) broader benefits that may arise from delivery through alliance or internally;
- (vi) adjustments in relation to the timing of commencement and/or commissioning of projects;
 - (vii) the importance to the industry of anticipated timing for completion of projects having regard to the impact on Coal Chain Capacity and commercial arrangements; and
 - (viii) where applicable, support by the relevant industry participants;
- ARTC will first provide the RCG with a concept assessment report under section 6.4(d). This will include (unless otherwise agreed with the RCG): an assessment of the project objectives; a cost estimate and outline of the benefits of the project; a preliminary financial analysis and risk assessment; and indicative timeframes for the development, consultation and delivery of the project;
 - ARTC will then provide a project feasibility report to the RCG under section 6.4(e). This will include (unless otherwise agreed with the RCG): confirmation of project objectives and will provide functional specifications; will outline the scope of the project; will estimate the project costs (+/-20% margin); an outline of the potential benefits, including capacity, maintenance and operating benefits; an updated risk assessment; preliminary project assessment plan; a report on the details of variations to budgeted costs to undertake the project feasibility report; and an outline of Project Assessment stage including an estimate of budget;
 - ARTC will provide a project assessment report to the RCG under section 6.4(f). This will include (unless otherwise agreed with the RCG): a project objectives report (providing functional specifications); a scope of work report; a project schedule including time tolerances and project budget with narrower margins (+/- 10%) where appropriate; an estimate of contingencies; a estimate of the impact on access pricing; a more developed project development plan; a project risk assessment report; and a 'Regulators notification';
 - ARTC will then commence project implementation under section 6.4(g). For projects endorsed at the project assessment stage, ARTC will undertake detailed confirmation of the project scope and cost by way of 'tender process, alliance or internal evaluation';
 - Where the cost is outside the proposed contingency and there is a material variation from the project schedule, ARTC will seek RCG endorsement;

- Where the cost, scope and project timing is confirmed by ARTC, RCG may at its cost seek review of that decision. Where RCG endorses less than the confirmed variable, ARTC can refer the matter to an agreed independent expert. A process is set out to clarify that where parties cannot agree on an appropriate expert, the President of the Institute of Arbitrators and Mediators Australia will act as the expert.
- Where the independent expert determines that the cost is Prudent, ARTC will proceed with project implementation. Where the cost determined by the independent expert is different from that confirmed by ARTC, ARTC will continue construction but may seek to put the cost of the construction in dispute out to competitive tender. ARTC will continue construction at the cost agreed as a result of the competitive tender.
- ARTC will then finalise the project management plan (including a contract management plan and operational readiness plan), and will implement the project management plan under sections 6.4(g)(ii) and (iii). ARTC will provide progress report throughout the implementation process in a manner agreed to with the RCG.
- Where a variation to the endorsed project budget or project schedule (including contingency) is identified or a variation arises from a review by an independent expert, ARTC will submit a revised project schedule and/or costing to the RCG for endorsement. ARTC will continue with construction during this process.
- Where RCG does not endorse the variation, ARTC can refer the matter to an independent expert for its determination as to prudence or the reasonableness regarding the project schedule. Where the independent expert considers the variation to not be Prudent or to be unreasonable, ARTC may cease project implementation or having regard to the findings, can propose a variation to the budget or project schedule to the RCG.
- ARTC will then commission the project into operation on completion of project delivery (which may be delivered in a staged manner where the RCG agrees) under section 6.4(g)(v). Where the project is commissioned after the delivery date in an endorsed project schedule (which is not in dispute), any interest incurred in respect of construction after that date will not be deemed Prudent.
- On completion of project implementation, ARTC will provide a project close out report to the RCG under section 6.4(h), which will finalise the RCG consultation process for that particular project.

11.4.1 Section 6.4(a)(iv) HVAU – The circumstances in which a modified consultation process will apply

In the March 2010 Draft Decision the ACCC was of the view that while certain projects may justify a truncated consultation process in order to reduce any unnecessary delay, the original wording in section 6.4(a)(iv) left it to ARTC's complete discretion as to the nature of the consultation that would take place, giving

ARTC scope to avoid the majority of the industry consultation process set out in section 6.4.⁹⁵⁰

ARTC submissions

ARTC submits that it amended section 6.4(a)(iv)(A) to make 'it clear that ARTC will only be able to follow a modified consultation process with the consent of the RCG.'⁹⁵¹

ARTC also submits that it has 'provided further clarification in section 6.4(a)(iv)(A) of what projects would be considered minor in scope and if a project does not relate to an ongoing annual programme for asset replacement, then ARTC may only consult on it as part of a group of minor projects if the RCG agrees that ARTC is able to adopt this approach.'⁹⁵²

ACCC views

It is the ACCC's view that the amendments to section 6.4(a)(iv) of the proposed 2010 HVAU, which sets out that the RCG's consent is required for a modified consultation process to apply and also clarifies when a project will be considered minor in scope or cost, deal with the concerns raised in the March 2010 Draft Decision in relation to the circumstances in which a different consultation process to that in the section 6.4 of the HVAU may apply.

11.4.2 Section 6.4(b) HVAU – The RCG voting process and membership of the RCG

In the March 2010 Draft Decision the ACCC was of the view that the RCG should be an appropriately representative body in relation to its functions and purposes.⁹⁵³

The ACCC notes that ARTC has made amendments to section 6.4(b) of the proposed 2010 HVAU regarding the proposed composition and voting rights of RCG members in light of disagreement as to what constitutes an appropriately representative body for the RCG's functions and purposes.

The proposed 2010 HVAU

In section 6.4(b), ARTC has proposed a capital expenditure process that allows industry representatives to vote to approve capital expenditure as prudent. The voting process is undertaken through the RCG.

The HVAU specifies that:

- ARTC will convene, and conduct, regular monthly meetings with the RCG for the purpose of consulting with applicable industry representatives and obtaining endorsement of Additional Capacity;⁹⁵⁴

⁹⁵⁰ ACCC, Draft Decision on HVAU, 5 March 2010, p. 370.

⁹⁵¹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, [Appendix 1] , p. 29.

⁹⁵² ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, [Appendix 1] ,p p. 29-30.

⁹⁵³ ACCC, Draft Decision on HVAU, 5 March 2010, p. 368.

⁹⁵⁴ ARTC, 2010 HVAU, 7 September 2010, section 6.4(b)(i).

- The RCG will be involved at each stage of project development and will have the opportunity to endorse each stage before ARTC proceed to the next stage;⁹⁵⁵
- ARTC may elect to continue to the next stage of project development without RCG endorsement. Where this occurs, any subsequent expenditure incurred by ARTC on project development or delivery may only be included in the RAB or expensed when incurred with the approval of the ACCC;⁹⁵⁶
- At the commencement of this Undertaking, the RCG will comprise the following membership, as selected by the relevant industry participants. One representative of:
 - (A) each Access Holder who holds the largest volume of contracted coal GTK in each Pricing Zone;
 - (B) any other Access Holder with more than 7% of contracted coal GTK on the Network who is not already eligible to appoint a representative under **sub-section (A)**;
 - (C) all Access Holders with less than 7% of contracted coal GTK on the Network;
 - (D) each Operator, in its capacity as an Operator, with more than 10% of contracted coal GTK on the Network who is not an Access Holder with more than 10% of contracted coal GTK on the Network (in a non-voting capacity);.
 - (E) the HVCCC (in a non-voting capacity).
- The composition of the RCG may change if agreed by ARTC and the current RCG members;⁹⁵⁷
- RCG member voting will be weighted on the basis of contracted coal GTK over each of the next 10 years; and⁹⁵⁸
- At its own discretion, ARTC in determining the voting entitlements may include any coal GTK which it will reasonably expect to become coal GTK for each of the next 10 years. In exercising this discretion ARTC may determine that a prospective Access holder who is not a member of the RCG has a voting entitlement.⁹⁵⁹

ARTC submissions

ARTC submits that in ‘section 6.4(b)(ii) of the 2010 HVAU, ARTC has set out changes to the membership of the RCG aimed at ensuring the RCG membership will include a representative from each of the Pricing Zones.’⁹⁶⁰

⁹⁵⁵ ARTC, 2010 HVAU, 7 September 2010, section 6.4(b)(vii)

⁹⁵⁶ ARTC, 2010 HVAU, 7 September 2010, section 6.4(b)(viii)

⁹⁵⁷ ARTC, 2010 HVAU, 7 September 2010, section 6.4(b)(iii)

⁹⁵⁸ ARTC, 2010 HVAU, 7 September 2010, section 6.4(b)(v)

⁹⁵⁹ ARTC, 2010 HVAU, 7 September 2010, section 6.4(b)(vi)

⁹⁶⁰ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 31.

ARTC submits that it is ‘important to note that access holders having less than 7% of contracted coal GTK on the Network will still have their interests represented and their views taken into account in votes of the RCG, including votes as to whether to endorse ARTC expenditure as Prudent. The member of the RCG representing access holders holding less than 7% of contracted coal GTK on the Network (who are not otherwise entitled to membership under section 6.4(b)(ii)(A)) is entitled to split its vote according to the percentage of contracted coal GTK held by each represented access holder and is expected to do so.’⁹⁶¹

ARTC gives the example of:

if the representative member represented eight access holders (including itself) who between them held 40% of contracted coal GTK in Pricing Zone 1 with each access holder holding approximately 5% of contracted coal GTK, each access holder could instruct the representative member whether its interest should be counted as a vote in favour of, or against, a proposition. So if seven of the access holders instructed the representative to vote in favour of the proposition but the eighth represented access holder was against the proposition, the representative’s member’s vote would count as 35% in favour of the proposition and 5% against the proposition (for the purpose of determining endorsement under section 6.4(b)(i) and (ii) of the 2010 HVAU).⁹⁶²

ARTC also submits that it has ‘proposed amendments to section 6.4(b)(v) and introduced a new section 6.4(b)(vi) to clarify how it will determine voting entitlement in the RCG.’⁹⁶³

- In assessing contracted coal GTK, ARTC will take into account all coal volumes contracted by access holders for the current calendar year and the next nine calendar years. This aligns with the commitment made by access holders in the 2010 IAHA (see clause 2.3(c) of the 2010 IAHA and clause 2.1 of the Train Path Schedule).
- ARTC has reserved a discretion under section 6.4(b)(vi) for ARTC to take into account anticipated coal GTK which ARTC reasonably expects will become contracted coal GTK (for any of the next ten years) immediately following the completion of the project which is the subject of the endorsement vote. This is necessary to ensure that the interests of a new entrant or of an existing access holder seeking to expand their contractual commitment and obtain Additional Capacity are properly reflected.⁹⁶⁴

ARTC submits that ‘[w]hile an applicant may be prepared to sign an access holder agreement to contract for access rights to Additional Capacity prior to that Additional Capacity being endorsed by RCG, ARTC expects that this will not invariably be the case and considers it important for ARTC to retain this discretion to take into account the anticipated volumes of a new entrant.’⁹⁶⁵

⁹⁶¹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 31.

⁹⁶² ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 31.

⁹⁶³ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 32.

⁹⁶⁴ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 32.

⁹⁶⁵ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 32.

ARTC submits that this ‘discretion will help ensure that existing coal producers in the Hunter Valley are unable to hold up new projects aimed at providing capacity to new entrants.’⁹⁶⁶

ARTC also submits that ‘[t]here may be concerns that permitting potential new or expanding players to participate in RCG voting may give rise to a situation that a new investment may be endorsed on the back of a potential new or expanding players vote and then the potential volumes do not eventuate, leaving existing participants exposed. Even where a project is endorsed in this way, ARTC is not required to commence a project, and is unlikely to do so, until such time as sufficient volume to underpin the project are committed.’⁹⁶⁷

Stakeholder views

Aston Resources

Aston Resources submits that ‘consistent with ARTC’s explanatory guide, this section [6.4(b)(ii)(C)] should be amended to expressly require that a member of the RCG representing access holders holding less than 7% contracted coal GTK ... must split its vote according to the percentage of contracted coal GTK held by each represented access holder.’⁹⁶⁸

Aston Resources submits that it ‘is important that **all** access holders have representation on the RCG and it is possible that two access holders will have interests that are not aligned.’⁹⁶⁹

Aston Resources notes that it ‘supports the discretion given to ARTC under section 6.4(b)(vi) to include access seekers in determining RCG voting entitlements.’⁹⁷⁰

Aston Resources submits that it ‘is absolutely fundamental that new entrants have representation on the body that decides whether or not to endorse capital expansions.’⁹⁷¹

HVCCC

The HVCCC submits that ‘ARTC’s commitment that HVCCC would be a non-voting member of the RCG ... is appropriate.’⁹⁷²

QR National Coal

QR National Coal submits that it is ‘supportive of the RCG process as outlined and believe it is appropriate except that it is unclear whether endorsement by the RCG is achieved by majority of voting members or if unanimous endorsement is required. We suggest that this required for endorsement specifically defined.’⁹⁷³

⁹⁶⁶ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 32.

⁹⁶⁷ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 32.

⁹⁶⁸ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 8.

⁹⁶⁹ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 8.

⁹⁷⁰ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 8.

⁹⁷¹ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 8.

⁹⁷² HVCCC, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 2.

⁹⁷³ QR National Coal, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 9.

QR National Coal submits that it ‘understands the rationale for non access holding operators to not have voting rights but would encourage ARTC to limit the occasions when consultations or other stakeholder interactions are restricted to voting members only to maximise industry engagement in the development of the Hunter Valley network.’⁹⁷⁴

Xstrata

Xstrata notes that 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.’⁹⁷⁵

Xstrata notes that 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.’⁹⁷⁶

Xstrata submits that ‘it would be more equitable to limit this to an assessment of the contracted Capacity in the current year.’⁹⁷⁷

Xstrata submits that ‘[b]y 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.’⁹⁷⁸

Xstrata submits that 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.’⁹⁷⁹

Xstrata submits that ‘[t]he 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.’⁹⁸⁰

Xstrata submits therefore that 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.’⁹⁸¹

ACCC view

The ACCC considers that if implemented appropriately, the industry voting process in the HVAU should facilitate efficient and prudent capital expenditure investment by ARTC in the Hunter Valley rail network, as ARTC should invest in response to user demand. If ARTC cannot establish a certain and transparent voting mechanism for capital expenditure, it may be appropriate to implement a process that provides the

⁹⁷⁴ QR National Coal, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 9.

⁹⁷⁵ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 15.

⁹⁷⁶ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 15.

⁹⁷⁷ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 15.

⁹⁷⁸ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 15.

⁹⁷⁹ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 15.

⁹⁸⁰ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 15.

⁹⁸¹ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 15.

ACCC a role in approving and disallowing capital expenditure, similar to the process that ARTC follows under IPART's NSW Access Undertaking.

Composition of the RCG

The ACCC accepts the view of ARTC that the amendments to the membership of the RCG in section 6.4(b)(ii) attempt to ensure that RCG membership includes a representative from each of the relevant Pricing Zones.

However, the ACCC also notes ARTC's explanation that:

access holders having less than 7% of contracted coal GTK on the Network will still have their interests represented and their views taken into account in votes of the RCG, including votes as to whether to endorse ARTC expenditure as Prudent. The member of the RCG representing access holders holding less than 7% of contracted coal GTK on the Network (who are not otherwise entitled to membership under section 6.4(b)(ii)(A)) is entitled to split its vote according to the percentage of contracted coal GTK held by each represented access holder and is expected to do so.⁹⁸²

The ACCC considers that section 6.4(b)(ii)(C) should be amended to reflect this intention, that is, so that it is clear in the drafting that the party who is representing those Access Holders with less than 7% 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.

The ACCC also considers that any elements of the RCG Charter that are relevant to voting rights (in addition to those already set out in section 6.4) in the RCG should be incorporated into the HVAU to ensure greater clarity and certainty for Access Holders. As the RCG Charter is not incorporated into the HVAU, these elements of the RCG Charter are not binding and may be subject to change. This may be of concern if elements of the Charter were amended with the effect of undermining the investment process set out in the undertaking.

Anticipated contracted coal GTK

ARTC submits that it has reserved a discretion under section 6.4(b)(vi) to take into account anticipated coal GTK because it is necessary to ensure that the interests of a new entrant or an existing access holder seeking additional capacity are properly reflected.⁹⁸³

The ACCC notes the concern of interested parties that voting entitlements under the RCG should only be given to those who have currently contracted Capacity as parties who do not and may never have contracted capacity should not be making decisions that will be reflected in changes to the Access Charges paid by those who possess currently contracted Capacity.

The ACCC considers that proposed sections 6.4(b)(v) and (vi) provide for an appropriate balance between the interests of potential access seekers and existing Access Holders. It is unlikely to be appropriate for the proposed 2010 HVAU to operate in a way that prevents or hinders new parties entering the Hunter Valley coal chain to compete.

⁹⁸² ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 31.

⁹⁸³ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 32.

11.4.3 Section 6.4(c)(iv) – Consultation with non-coal users in development of the Hunter valley corridor capacity strategy

In the March 2010 Draft Decision, the ACCC was of the view that the HVAU should contain a mechanism that provides for the development of a corridor capacity strategy that takes into account the views of non-coal users of the network.⁹⁸⁴

ARTC submissions

In response, ARTC has clarified section 6.4(c)(iv) to provide that:

- (iv) Before finalising the Hunter Valley corridor capacity strategy, ARTC will:
 - (A) convene and conduct an annual meeting with the HVCCC and relevant coal terminal operators at the Port of Newcastle. The objective of the consultation is to provide that any planned expansions to the Network in the Hunter Valley corridor capacity are aligned with expansions at the coal terminals at the Port of Newcastle;
 - (B) publish a draft Hunter Valley corridor capacity strategy on the ARTC website and will invite comments on the options set out in draft strategy from all users of the Network including Access Holders with Coal Access Rights, Access Holders with Non-Coal Access Rights, and above rail operators; and
 - (C) consider the views submitted by those stakeholders in good faith and take those views into account in finalising the Hunter Valley corridor capacity strategy.

Stakeholder views

RailCorp

RailCorp submits that the ‘proposed amendments ... for the development of the corridor strategy does not provide for real consultation as the completed corridor strategy would be effectively presented to Non-coal users at an earlier stage.’⁹⁸⁵

ACCC views

The ACCC considers that the amendments in section 6.4(c)(iv) deal with the concerns raised in the March 2010 Draft Decision.

The ACCC notes RailCorp’s concern that the proposed drafting would effectively mean that non-coal users are merely presented with the finalised corridor capacity strategy at an earlier stage. The ACCC disagrees with this interpretation, as ARTC is clearly obliged under section 6.4(c)(iv)C) to ‘consider the views submitted by ... stakeholders in good faith and take those views into account in finalising the Hunter Valley corridor capacity strategy’.

⁹⁸⁴ ACCC, Draft Decision on HVAU, 5 March 2010, p. 368-369.

⁹⁸⁵ RailCorp, Submission in Response to ACCC Consultation Paper, p. 8.

11.4.4 Section 6.4(c)(iv)(C) HVAU – Publishing the corridor capacity strategy

In the March 2010 Draft Decision the ACCC was of the view that section 6.4(c) of the HVAU should be amended to require ARTC to publish the corridor capacity strategy on an annual basis.⁹⁸⁶

In response ARTC submitted that it was necessary to prescribe that the Hunter Valley corridor capacity strategy must be published at a specific time each year.⁹⁸⁷ The ACCC notes, however that ARTC has committed to publish a draft strategy on its website as part of its consultation with all users of the Network under section 6.4(c)(iv)(B).

In light of this, the ACCC recommends that ARTC amend section 6.4(c) of the proposed 2010 HVAU to set out that ARTC is obliged to publish the Hunter Valley corridor capacity strategy on its website as soon as possible after it is finalised each year under section 6.4(c)(iv)(C).

11.4.5 Sections 6.4(d) to (h) – RCG consultation process - Content of reports and plans provided under the consultation process

In the March 2010 Draft Decision the ACCC was of the view that various provisions within sections 6.4(d) through (h) of the 2009 HVAU provided ARTC with an inappropriate level of discretion, given that those provisions specified that relevant reports or plans that were to be provided by ARTC to the RCG ‘*may include*’ certain information.⁹⁸⁸

ARTC submissions

ARTC submits that ‘[s]ection 6.4(d)(i) has been amended to clarify that ARTC will provide a Concept Assessment Report to the RCG for each project identified by ARTC which ARTC seeks to be included in the RAB (unless ARTC and the RCG agree otherwise).’⁹⁸⁹

ARTC submits that it ‘has amended section 6.4(d)(ii) in response to a recommendation by the ACCC that in order for the reports and plans to be provided to the RCG under section 6.4 to be of real value, a mechanism should be included in the 2010 HVAU such that the RCG should have the discretion to waive the provision of the report as a whole or a particular element. Accordingly, ARTC is obliged to include the listed information in the report unless the RCG agrees otherwise.’⁹⁹⁰

ARTC submits that the ‘same amendment is made in section 6.4(e), (f) and (g).’⁹⁹¹

⁹⁸⁶ ACCC, Draft Decision on HVAU, 5 March 2010, p. 370.

⁹⁸⁷ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 75.

⁹⁸⁸ ACCC, Draft Decision on HVAU, 5 March 2010, p. 370-371.

⁹⁸⁹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, [Appendix 1], p. 31.

⁹⁹⁰ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, [Appendix 1], p. 31-32.

⁹⁹¹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, [Appendix 1], p. 32.

ACCC views

The ACCC considers that the noted amendments to sections 6.4(d), (e), (f) and (g) addresses the concerns raised in the March 2010 Draft Decision.

11.4.6 Sections 6.4(d) to (h) HVAU – RCG consultation process - agreeing on an Independent Expert

In the March 2010 Draft Decision the ACCC was of the view that section 6.4 required amendment to include a clear and certain process for the appointment of an independent expert.⁹⁹²

ARTC submissions

ARTC submits that '[s]ection 6.4(g)(i)(E) [and 6.4(g)(iii)(C)(iii)] has been amended in response to the ACCC's recommendation that the 2010 HVAU should contain a clear and certain process for appointing a default independent expert when the parties cannot agree.'⁹⁹³

ARTC submits that it 'has also recognised the need to seek RCG endorsement or Independent Expert determination in relation to a variation to the project schedule (and delivery).'⁹⁹⁴

ACCC views

It is the ACCC's view that the amendments to sections 6.4(g)(i)(E) and 6.4(g)(iii)(C)(iii) of the proposed 2010 HVAU, which set out the process by which a person appointed by the President of the Institute of Arbitrators and Mediators Australia will act as expert, deals with the concerns raised in the March 2010 Draft Decision in relation to the lack of a clear and certain process for appointment of a default independent expert where the parties cannot agree on an appropriate expert.

11.4.7 Section 6.4(g) – Variations to endorsed plan

In the March 2010 Draft Decision, the ACCC was of the view that the while ARTC should not be obliged to continue construction in all instances where the associated costs have not been endorsed in full as 'Prudent', the HVAU should clearly set out what ARTC's obligations are in respect of the continuation of construction where:

- the RCG has endorsed the full variation;
- the RCG has endorsed less than (including none of) the full variation;
- the independent expert has endorsed the full variation; and
- the independent expert has endorsed less than (including non of) the full variation;⁹⁹⁵

⁹⁹² ACCC, Draft Decision on HVAU, 5 March 2010, p. 371.

⁹⁹³ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010,[Appendix X.] , p. 33.

⁹⁹⁴ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010,[Appendix X.] , p. 34.

⁹⁹⁵ ACCC, Draft Decision on HVAU, 5 March 2010, p. 369.

ARTC submissions

ARTC submits that it has ‘made amendments to section 6.4(g)(iii) of the 2010 HVAU to clarify the obligations on ARTC to proceed with a project when there has been a variation to the project budget or project schedule which had been endorsed by the RCG.’⁹⁹⁶

- where a variation to a project budget or project schedule has been identified under section 6.4(g)(iii)(C), ARTC will submit a revised costing to the RCG but will continue with implementation of the project while a decision from the RCG is pending (section 6.4(g)(iii)(C)(i));⁹⁹⁷
- where the RCG endorses less than the full variation to the budget and project schedule put forward by ARTC, ARTC may refer the matter to an independent expert and will continue with the project implementation while a determination of the independent expert is pending;⁹⁹⁸
- if the independent expert decides the full extent of the variation to be taken is Prudent or the variation to the project schedule is reasonable, ARTC will continue with project implementation (section 6.4(g)(iii)(C)(v)); and⁹⁹⁹
- if the independent expert determines less than the full variation to the budget put forward by ARTC or that the variation to the project schedule is unreasonable, ARTC may cease project implementation (or, having regard to the independent expert’s decision, may submit a revised variation to the RCG under section 6.4(g)(iii)(C)(i)) (see section 6.4(g)(iii)(C)(vi)).¹⁰⁰⁰

ARTC also submits that it has ‘made clear that any expenditure incurred by ARTC in continuing a project pending endorsement by the RCG or an independent expert will be deemed a Prudent direct cost to the project (section 6.4(g)(iii)(C)(vii)).’¹⁰⁰¹

ARTC submits that ‘[a]s set out in its response to the Draft Decision, if there was a risk that ARTC’s expenditure in continuing a project while waiting for a decision would not be deemed Prudent, ARTC would not be prepared to continue construction.’¹⁰⁰²

ARTC submits that ‘[i]n order to provide further incentive for ARTC to deliver a project on time, at 6.4(g)(v)(C), ARTC has provided that any financing costs associated with the period between the actual delivery date and the delivery date endorsed by the RCG or the independent expert, as applicable, will not be able to be included in the RAB and recovered by ARTC. This ensures ARTC is not penalised for delays beyond its control or which could not have been reasonably foreseen. Effectively the penalty faced by ARTC could be 10% of the actual project cost where the relevant delay is one year.’¹⁰⁰³

⁹⁹⁶ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 34.

⁹⁹⁷ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 34.

⁹⁹⁸ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 34.

⁹⁹⁹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 34.

¹⁰⁰⁰ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 34.

¹⁰⁰¹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 34.

¹⁰⁰² ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 34.

¹⁰⁰³ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 34.

Stakeholder views

Aston Resources

Aston Resources submits that it ‘has similar concerns with respect to section 6.4 and the discretion vested in ARTC to discontinue development projects.’¹⁰⁰⁴

Aston Resources submits that the ‘right of the ARTC to cease construction on an endorsed project while it seeks approval of a variation by the RCG or the review of the independent expert, may present coal producers with an unacceptable choice of having to endorse the variation, even if it is not merited, to ensure that the Additional Capacity is delivered on time.’ Aston Resources also submits that ‘[a]lternatively, if the RCG or independent expert is firmly of the view that a variation requested by ARTC is not merited (e.g. because the project could have been delivered on time or in budget), the ARTC can simply decline to complete the capacity expansion.’¹⁰⁰⁵

Aston Resources notes that the ‘ACCC also raised this issue in its draft decision on the 2009 undertaking’ noting that the ‘wording of section 6.4(g)(iii)(C) may: (i) lead to the practical effect of the RCG endorsing the entire variation (even if it is not merited), in order to get the Additional Capacity delivered on time; or (ii) if the RCG refuses to endorse the variation, the independent expert could review the decision and the independent expert may deem as ‘Prudent’ a variation that is otherwise unmerited.’¹⁰⁰⁶

Aston Resources ‘acknowledges that ARTC is a below rail provider and not a construction company, and that a requirement that ARTC be held to an unduly strict timetable for delivery may not be appropriate.’ However, Aston Resources also submits that ‘[n]otwithstanding this, an approach similar to that in the Capacity Framework Arrangements could be adopted.’¹⁰⁰⁷

Aston Resources submits that ‘[w]here ARTC fails to meet a project deadline, the HVCCC or ACCC could be required to review whether the deadline should be extended. If the final deadline, as extended, is not met by ARTC, then there would be deemed to be a Capacity Shortfall and the access seeker would have rights under its individual IAHA.’¹⁰⁰⁸

Aston Resources submits that ‘there are certain circumstances where the opinion of the HVCCC and/or the ACCC (and independent arbiter) should be binding on the ARTC in the same way as the opinion of the ACCC can be binding on PWCS and NCIG under the Capacity Framework Arrangements.’ Aston Resources submits that ‘[i]n the alternative, there are simply insufficient protections for access seekers (in particular new access seekers).’¹⁰⁰⁹

ACCC view

It is the ACCC’s view that the amendments to section 6.4(g) of the proposed 2010 HVAU, which sets out what will occur where there has been a variation to the

¹⁰⁰⁴ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 8.

¹⁰⁰⁵ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 8.

¹⁰⁰⁶ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 8.

¹⁰⁰⁷ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 8.

¹⁰⁰⁸ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 8.

¹⁰⁰⁹ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 8.

endorsed project budget and either some or all of the variation is endorsed by the RCG or an independent expert, deals with the concerns raised in the March 2010 Draft Decision in relation to uncertainty over what ARTC's obligations are in respect of continuing construction in certain circumstances.

While the ACCC notes the concerns that there may be circumstances where ARTC's actions present coal producers with the choice of having to endorse a variation, even if it is not merited, or failing to ensure timely delivery of Additional Capacity, this will be one consideration that may be taken into account in deciding to pursue a user-funded path.

11.4.8 Section 6.4(g)(iii)(B)(v) HVAU - Meaning of planned 'timing tolerance margins'

In the March 2010 Draft Decision the ACCC was of the view that ARTC should clearly set out the meaning of the term 'timing tolerance margins' in section 6.4(g)(iii)(B)(v).¹⁰¹⁰

ARTC submissions

ARTC submits that it 'has amended section 6.4(g)(iii)(B)(v) to clarify the meaning of planned 'timing tolerance margins''.¹⁰¹¹ The section now reads:

- (v) exceptions, where ARTC would advise the RCG that the project will deviate outside of its planned cost margins, as set out in the project budget, or outside of the planned timing tolerance margins, as set out in the project schedule, both included with the project assessment report to be provided under **section 6.4(f)(ii)**.

ARTC also submits that it has 'recognised the need to seek RCG endorsement or Independent Expert determination in relation to a variation to the project schedule (and delivery timing).'¹⁰¹²

ACCC views

The ACCC considers that the amendments to section 6.4(g)(iii)(B)(v), which clarify that planned timing tolerance margins are those set out in the project schedule under section 6.4(f)(ii), deal with the concerns raised in the March 2010 Draft Decision.

11.4.9 Section 6.4(g)(v)(B) HVAU – Staged delivery of a project

In the March 2010 Draft Decision the ACCC was of the view that the criteria and processes ARTC will apply in determining (under section 6.4(g)(v)(B) of the proposed 2010 HVAU) whether or not to implement a staged delivery should be set out with greater clarity.¹⁰¹³

ARTC submissions

ARTC has amended section 6.4(g)(v) to provide that the decision as to whether a project is staged lies with the industry (through the RCG).¹⁰¹⁴ ARTC submits that it

¹⁰¹⁰ ACCC, Draft Decision on HVAU, 5 March 2010, p. 371.

¹⁰¹¹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, [Appendix 1], p. 34.

¹⁰¹² ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, [Appendix 1], p. 34-35.

¹⁰¹³ ACCC, Draft Decision on HVAU, 5 March 2010, p. 371.

¹⁰¹⁴ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, [Appendix 1], p. 35-36.

‘has also made it clear in section 6.4(g)(v) that any interest incurred during a delay in the completion of a project beyond the latest completion date endorsed by the RCG or an independent expert will not be deemed Prudent. This creates a further incentive for ARTC to deliver projects on time’.¹⁰¹⁵

ACCC views

The ACCC considers that amendments to section 6.4(g)(v)(B) of the proposed 2010 HVAU, which set out the conditions under which ARTC (with the consent of the RCG) may propose an extended delivery timeframe, deals with the concerns raised in the March 2010 Draft Decision.

11.4.10 Section 6.4(i) HVAU - Stronger endorsement where costs increase by over 10 percent

In the March 2010 Draft Decision the ACCC was of the view that a stronger endorsement provision should apply to all stages of RCG endorsement where the Additional Capacity sought will result in an increase in the indicative access charge for that pricing zone by more than 10 percent, rather than just Project Close Out.¹⁰¹⁶

ARTC submissions

ARTC submits that ‘it intended that voting rules set out in ... (i) and (ii) of the 2010 HVAU would apply to all stages of project development and has made this clear in the 2010 HVAU. This has now been clarified.’¹⁰¹⁷

Stakeholder views

Aston Resources

Aston Resources submits that ‘[e]nsuring that new access seekers have adequate representation is particularly important in light of section 6.4(i)(ii)’ which ‘requires 70% of existing access holders to approve a capacity expansion if the expansion would result in greater than 10% increase to the Indicative Access Charge for a Pricing Zone.’¹⁰¹⁸

Aston Resources submits that this ‘clause is of concern’ as ‘[n]o such veto right is included in the Capacity Framework Agreements and there is a serious risk under the 2010 HVAU that producers already in possession of sufficient capacity could object to an expansion on purely competitive grounds.’¹⁰¹⁹

Aston Resources submits that either:

the HVCCC or ACCC be given an overriding discretion to approve the price increase; or

the access seeker requiring the Additional Capacity be given the opportunity to fund the difference (to ensure that needed capacity is provided).¹⁰²⁰

¹⁰¹⁵ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, [Appendix 1] , p. 36.

¹⁰¹⁶ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 367-368.

¹⁰¹⁷ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, [Appendix 1] , p. 36.

¹⁰¹⁸ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 8.

¹⁰¹⁹ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 8.

¹⁰²⁰ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 9.

Coal & Allied

Coal & Allied notes that ‘[u]nder the RCG decision making process contemplated by section 6.4 of the Proposed HVAU, ARTC is not required to proceed with a project where the cost of Additional Capacity will lead to an increase in charges by more than 10% and that Capacity is not endorsed by a 70% RCG vote (or approved by the ACCC as per section 6.4(b)(viii) of the Proposed HVAU).’¹⁰²¹

Coal & Allied submits that ‘an inability to secure a 70% RCG endorsement should not veto the construction of the Additional Capacity if the Applicant is willing the fund the project on a “non-RAB” basis to the extent required to keep charge increases at 10%, that is, the Applicant would be willing to fund any increase above the 10% threshold without earning a Rate of Return on the amount funded in excess of the approved price increase level.’¹⁰²²

Coal & Allied submits that ‘the Applicant should know prior to committing to funding the amount it will be required to fund (the Capital Contribution) and whether it will earn a Rate of Return on that Capital Contribution.’¹⁰²³

ACCC view

The ACCC notes the amendments in section 6.4(i) of the proposed 2010 HVAU, which sets out that the endorsement requirement in that provision where any Additional Capacity will result in an increase in the indicative access charge for that pricing zone by more than 10 percent, applies to all stages of project development. The ACCC is of the view that these amendments go a certain way to dealing with the concerns raised in the March 2010 Draft Decision in relation to this point.

However, the ACCC accepts the view of interested parties that where an Applicant or the applicable Access Holder(s) are willing to fund a project on a ‘non-RAB’ basis to the extent require to keep charge increases at 10%, then RCG endorsement should not veto the construction of that Additional Capacity and recommends that section 6.4(i) – and any consequential amendments to the HVAU that would be required as a result – be amended accordingly.

11.4.11 Ex post ACCC review of Prudency

Xstrata suggests that the ACCC should be able to conduct a post-completion review of the Prudency of any investment in Additional Capacity, notwithstanding that RCG approval has been obtained.’¹⁰²⁴ This would be triggered either by the RCG or a relevant user funder appealing to the ACCC to determine whether ARTC’s expenditure on a project was Prudent.’¹⁰²⁵

The rationale for this proposal is that:

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

¹⁰²¹ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 23.

¹⁰²² Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 23.

¹⁰²³ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 23.

¹⁰²⁴ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 15.

¹⁰²⁵ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 15.

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.¹⁰²⁶

Consequently ARTC may:

...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.¹⁰²⁷

Xstrata submits that an ex post review of prudence 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.’¹⁰²⁸ A benefit of such a review 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.’¹⁰²⁹

ACCC view

The ACCC does not consider it necessary for the proposed 2010 HVAU to provide for an ex-post review of the prudence of capital expenditure. Such a mechanism would likely result in ARTC seeking ACCC approval for all investments on an ex ante basis and could therefore delay and stifle the investment process.

As noted above, the ACCC considers that the proposed 2010 HVAU clarify the circumstances in which the user-funding option may be pursued. The ACCC considers that, if the user-funding option is more readily available, ARTC will be incentivised to invest efficiently, or risk forgoing a return on new investment. The ACCC considers that this approach should operate to mitigate the concerns expressed by Xstrata.

11.5 Train Path Schedule - Conditions precedent to delivery of Additional Capacity

The ACCC notes that under the proposed Train Path Schedule (TPS) attached to the 2010 IAHA there are two ‘streams’ of contracted Path Usages.

- Under clause 3.2 of the TPS, Path Usages contained in Tranche 1 relate to existing Capacity. This capacity relates to Available Capacity that has been contractually allocated to the Applicant. Once the IAHA is signed, ARTC is bound to provide those Path Usages in accordance with the IAHA and the TPS.
- Under clause 3.3 of the TPS, Path Usages contained in Tranche 2 relate to Capacity that is yet to come into existence.

¹⁰²⁶ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 15.

¹⁰²⁷ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 15.

¹⁰²⁸ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 15.

¹⁰²⁹ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 16.

- Under the proposed ‘investment framework’ in the HVAU, this would represent capacity identified by ARTC as one of the preferred options under the corridor capacity strategy which then go through the RCG process under section 6.4(d) of the HVAU, Additional Capacity recommended by the HVCCC under section 6.3(b) or Additional Capacity sought by an individual Applicant under section 6.2(a). As a result of the ACCC’s recommendations, any of these options can be funded by either ARTC, or can be ‘user-funded’ where ARTC does not wish to fund.
- The Path Usages listed in Tranche 2 are subject to a ‘Project Completion Condition Precedent’ in clause 4.3 of the TPS. Unless the conditions set out in clause 4.3 are satisfied (including that the project has been completed), ARTC is not obliged to provide access to those Path Usages.

The ACCC also notes that clauses 4.3(a)(iii) and (iv) of the TPS provides that if ARTC considers that a listed or new project (that has previously been consented to under the HVAU and is being funded by ARTC) is 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 will:

- 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 will 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 this provision is designed to deal with the situation where there is a time lapse between when the Additional Capacity has been agreed to under the terms of the HVAU (to be funded by ARTC) 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.

ARTC submissions

ARTC submits that ‘[c]lause 4.3 of the Train Path Schedule includes a project completion condition precedent which is to be included whenever a tranche of capacity is conditional upon the completion of a project creating additional capacity in the Network.’¹⁰³⁰

ARTC submits that ‘[a]s provided in clause 4.3(b) of the Train Path Schedule, ARTC is not committed to complete a listed or new project if that new project is no longer commercially viable to ARTC.’¹⁰³¹

ARTC submits that it ‘recognises that its obligation to commit to new capacity under section 6 of the 2010 HVAU is subject to a commercial viability test and once it commits to the construction of this new capacity and enters into an access holder

¹⁰³⁰ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 56.

¹⁰³¹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 56.

agreement on this basis, that it will typically be bound to construct the listed capacity.’¹⁰³²

ARTC submits however that ‘there may be occasions where it is inappropriate that ARTC be bound to construct this new capacity. For example, if there is a significant difference between the cost to ARTC of obtaining capital to construct the project and the regulated rate of return which ARTC is able to recover under the 2010 HVAU.’¹⁰³³

ARTC submits that in ‘such a scenario, ARTC should not be obliged to construct the listed or new project at a loss.’¹⁰³⁴

ARCT submits that it has ‘amended clause 4.3(b) of the Train Path Schedule to provide that if a project is not commercially viable, then ARTC will be required to offer the access holder the opportunity to self fund the project (i.e. make a capital contribution). The test for “commercially viable” in clause 4.3(a)(iii) of the Train Path Schedule, has been amended to align with the commercially viable test as set out at section 6.2(a)(i) and section 6.3(b)(iii) of the 2010 HVAU.’¹⁰³⁵

ARTC submits that ‘[i]f the access holder does decide to make a capital contribution, then the principles set out in the 2010 HVAU regarding the equitable treatment of capital contribution in relation to a ‘contributor’ access holder and other subsequent users of additional capacity funded by a capital contribution will apply’.¹⁰³⁶

ARTC also submits that ‘[t]he access holder will, however, have a choice and will not be required to provide a capital contribution to fund the project. If the access holder does not want to self fund the project, then ARTC will enter into good faith negotiations with the access holder with the aim of securing alternative funding arrangements.’¹⁰³⁷

Stakeholder views

Coal & Allied

Coal & Allied submits that:

The Project Completion Conditions Precedent in the Train Path Schedule of the Proposed IAHA appear to give ARTC the opportunity to decline to fund a specific expansion required to deliver Base Path Usages (*BPU*s), even after the AHA is signed, raising a significant question about the real nature of ARTC’s contractual commitment under the Proposed IAHA.¹⁰³⁸

Coal & Allied submits that although it ‘appreciates that ARTC must retain some discretion in the process for determining whether, when and how Additional Capacity

¹⁰³² ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 56.

¹⁰³³ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 56.

¹⁰³⁴ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 56.

¹⁰³⁵ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 57.

¹⁰³⁶ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 57.

¹⁰³⁷ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 57.

¹⁰³⁸ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 8.

is to be built, there must be some point at which ARTC is required to commit to building Additional Capacity that is the subject of a signed AHA.’¹⁰³⁹

Coal & Allied submits that ‘[i]n the Proposed HVAU, there is no point at which ARTC is required to complete the projects that are necessary to provide the Capacity that an Access Holder has contracted for under the AHA.’ However, Coal & Allied submits that ‘Access Holders are committed, from the point of signing an AHA, to pay for Additional Capacity on a take or pay basis once that Capacity becomes available.’¹⁰⁴⁰

Coal & Allied submits therefore that ‘**in practical terms, when an Applicant and ARTC enter an AHA, the AHA is only binding on the Applicant and not ARTC**’ [emphasis in original].¹⁰⁴¹

Coal & Allied submits that ‘[f]rom the Access Holder's perspective, the key purpose of contracting future Capacity with ARTC under long-term access agreements is to provide security and certainty over that track Capacity. That will in turn, assist Access Holders to make investments at their mining operations and enter into take or pay commitments with other Hunter Valley Coal Chain Service Providers.’¹⁰⁴² Instead, Coal & Allied considers that current drafting of the Train Path Schedule allows ARTC ‘to renege on its obligation to provide Path Usages where it decides, after signing an AHA, that the expansion is no longer commercially viable.’¹⁰⁴³ Coal & Allied submits that ‘[i]nclusion of this condition in the Train Path Schedule, therefore, does not provide Access Holders with sufficient certainty to make investments or other take or pay commitments.’¹⁰⁴⁴

Coal & Allied submits therefore that ‘ARTC could form the view under section 6.2(a)(i)(A) of the Proposed HVAU that the provision of Additional Capacity is commercially viable and enter into AHAs on that basis. However, it could subsequently form a view that the relevant Capacity is not commercially viable and therefore choose not to proceed with its construction. In those circumstances, the Access Holder has no recourse against ARTC.’¹⁰⁴⁵

NSWMC

The NSWMC submits that ‘the Project Completion Conditions Precedent in the Train Path Schedule of the proposed IAHA appear to give ARTC the opportunity to decline to fund a specific expansion required to deliver Base Path Usages, even after an Access Holder Agreement is signed, removing the certainty that ARTC will provide capacity even if it has entered into an Access Holder Agreement.’¹⁰⁴⁶

¹⁰³⁹ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 29.

¹⁰⁴⁰ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 29.

¹⁰⁴¹ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 29.

¹⁰⁴² Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 30.

¹⁰⁴³ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 30.

¹⁰⁴⁴ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 30.

¹⁰⁴⁵ Coal and Allied, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 30.

¹⁰⁴⁶ NSWMC, Submission in Response to ACCC Consultation Paper, p. 7.

The NSWMC submits that ‘at the time of signing an Access Holder Agreement, ARTC should commit to provide the Additional Capacity need to fulfil the Agreement.’¹⁰⁴⁷

Xstrata

Xstrata submit that ‘[o]nce 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.’¹⁰⁴⁸ Xstrata submits that ‘[a]t 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.’¹⁰⁴⁹

Xstrata submits that 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.’¹⁰⁵⁰ Xstrata submits that a ‘condition precedent which merely refers to the completion of the relevant project is sufficient to address ARTC’s legitimate concerns.’¹⁰⁵¹

ACCC views

Train Path Schedule – Clause 4.3(a)(iii) and (iv) – Certainty that Additional Capacity will be finalised within a certain timeframe

The ACCC is of the view that the amendments to clause 4.3(a)(iv) of the Train Path Schedule, which oblige ARTC to offer an Access Holder the opportunity to make a capital contribution to the project or to enter into good faith negotiations with the Access Holder with the aim of securing alternative funding to deliver the project where a project is no longer commercially viable to ARTC, do not provide sufficient certainty to Access Holders that the Additional Capacity that ARTC has agreed to fund will be completed within a certain timeframe.

The ACCC is of the view that where ARTC has decided to fund the recommended Additional Capacity at the ‘project assessment’ stage of the RCG process in section 6.4(f) and has, by making that decision, prevented users seeking to fund that Additional Capacity themselves, there should be more certainty that Additional Capacity will be constructed.

As set out above, the ACCC notes that where ARTC makes a decision to invest and elects to fund the Additional Capacity at the ‘project assessment stage’, there may be a period between that election and the finalisation of the relevant TOP contracts. As a result, the ACCC is of the view that it is not unreasonable for ARTC to be able to withdraw during this period if its cost of funding changes or the TOP contracts do not eventuate. However, once contracts are signed, the delivery of capacity would then be mandatory by virtue of there being mutual contracts.

¹⁰⁴⁷ NSWMC, Submission in Response to ACCC Consultation Paper, p. 7.

¹⁰⁴⁸ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 18.

¹⁰⁴⁹ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 18.

¹⁰⁵⁰ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 18.

¹⁰⁵¹ Xstrata, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 18.

This means that ARTC should not be able to reconsider the commercial viability of a project it has already agreed to fund at a later stage under the Train Path Schedule. This is especially the case if in the interim other parties have needed to make complementary investments (e.g. in mines or port capacity). However, the actual terms on which delivery of the Additional Capacity occurs, including grounds for abandoning or reassessing a project due to change in criteria that are beyond ARTC's control, would be set out in the commercial contracts between ARTC and the parties contracting for the capacity. If they could not agree, the terms and conditions would be subject to ACCC arbitration, in the normal manner. In so arbitrating, the ACCC would expect to adhere to the view expressed in its March 2010 Draft Decision that ARTC is not a construction company. The ACCC is of the view that 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 contractually, but that the Project Completion Condition Precedent in the Train Path Schedule creates too much uncertainty.

Obviously, the ACCC accepts that this approach may raise issues for any projects that are currently under development. Therefore the ACCC accepts that for any existing projects, there would need to be a sensible transition process in place. However, after a certain point in time as set out in the transition period, any party who has agreed to fund the project must fulfil its contractual obligations. The ACCC is of the view that there would be an inappropriate balance of the rights of access seekers and the legitimate business interests of ARTC if this was not the case.

Clauses 4.3(a)(iii) and (iv) of the Train Path Schedule and user-funding

The ACCC is also of the view that clauses 4.3(a)(iii) and (iv) of the Train Path Schedule should only apply to Additional Capacity that is funded by ARTC.

As set out above in relation to sections 6.2 and 6.3 of the HVAU, the 'commercial viability' factors are not relevant to ARTC's assessment where an Applicant has entered into a binding 'user-funding' agreement to cover the cost of the Additional Capacity. If the opposite was the case, the Applicant would be bound by the terms of that 'user-funding' agreement but ARTC would not be. The ACCC is of the view that this would be an inappropriate balance of the rights of access seekers and the legitimate business interests of ARTC.

The ACCC is of the view that the only grounds on which ARTC can cease construction of Additional Capacity that is funded by a binding 'user-funding' agreement would be if it is determined that the Additional Capacity no longer meets the non-financial criteria set out in sections 6.2 and 6.3 of the HVAU.

11.6 Network Connections

Section 6.1 of the proposed 2010 HVAU reads:

6.1 Network connections

- (a) In the event that other owners of track not part of the Network wish to connect such track to the Network, ARTC will consent to such a connection provided:

- (i) all relevant approvals from all relevant Government Authorities have been obtained;
 - (ii) the configuration of the connection to the Network is such that the connection will not, by virtue of its existence, reduce Capacity or Coal Chain Capacity (in assessing Coal Chain Capacity, ARTC will consult the HVCCC, and take into account HVCCC's comments on any reduction of Coal Chain Capacity in accordance with the steps set out in section 5.2(d), as applicable);
 - (iii) procedural and physical interface arrangements comply with ARTC's existing interface arrangements and there is no impact on safety;
 - (iv) the owners of track not part of the Network ensure that all users of such track comply with the directions of ARTC's Network controllers regarding entry to and exit from the Network;
 - (v) the connection meets ARTC's engineering and operational standards;
 - (vi) the owners of track not part of the Network meet the initial and continued costs associated with constructing and maintaining the connection and agree to reasonable terms associated with the construction, maintenance and operation of the connection as determined by ARTC; and
 - (vii) the connection is not inconsistent with the terms of any lease, licence or other arrangement to which ARTC is a party in respect of the land on which the connection is to be built. Subject to any confidentiality restrictions or obligations, ARTC will make available extracts of the relevant terms on request.
- (b) For the purposes of section 6.1(a), connection includes the Turnout and, if the construction of railway track on land owned or controlled by ARTC forming part of the Hunter Valley Network corridor is necessary to connect the Turnout to the owner's track, the portion of railway track on ARTC owned or controlled land forming part of the Hunter Valley Network corridor necessary to connect the Turnout to the other owner's track.
- (c) If ARTC has refused consent under section 6.1(a)(ii), ARTC will, if requested to do so by the applicant, notify the applicant in writing of the reasons why the connection would, in its view or the view of the HVCCC, reduce Capacity or Coal Chain Capacity.

11.6.1 Consultation with the HVCCC

In the March 2010 Draft Decision the ACCC was of the view that there should be greater detail and clarity around ARTC's obligation to consult with the HVCCC in section 6.1(a)(ii).¹⁰⁵²

The proposed 2010 HVAU

Clause 6.1 of the HVAU states that ARTC will allow owners of tracks not part of the Network to be able to connect to the Hunter Valley rail network provided certain

¹⁰⁵² ACCC, Draft Decision on HVAU, 5 March 2010, pp. 356-357.

conditions are met. Clause 6.1(b) also provides that the right to connect to the Hunter Valley rail network includes a right to have access to the land owned or controlled by ARTC if that is necessary to connect the other owner's track.

The ACCC notes that the proposed 2010 HVAU has included two 'streams' of consultation.

The first approach is set out in section 5.2(d) of the proposed 2010 HVAU and imposes an obligation on ARTC to seek the HVCCC's views, consider the views of the HVCCC in good faith when provided within a particular timeframe and provide reasons (either orally or in writing) why it disagrees with the HVCCC's assessment (if ARTC reasonably considers there to be sufficient time to do so given the particular circumstances of the Access Application).

The second approach is set out in Schedule F of the proposed 2010 HVAU and is a catchall provision that applies where a specific process is not referred to in the provision itself. The wording in Schedule F grants ARTC the discretion to decide whether or not it will consult with the HVCCC in relation to an aspect of the HVAU or the IAHA, and what type of consultation may be appropriate in the circumstances.

Neither stream of consultation requires ARTC to accept the HVCCC's views, simply to consider the view put forward in good faith.

Stakeholders

HVCCC

The HVCCC submits that 'ARTC's commitment to consult with HVCCC, and take in to account HVCCC comments in accordance with **section 5.2(d)**, in assessing any impact of proposed Network Connections or requests for Additional Capacity {Clauses 6.1 and 6.2} is appropriate.'¹⁰⁵³

ACCC views

It is the ACCC's view that the amendments in clause 6.1(a)(ii) of the HVAU, which set out that ARTC is obliged to consult with the HVCCC in accordance with the specific procedures set out in section 5.2(d) of the HVAU, go a certain way to dealing with the concerns raised in the March 2010 Draft Decision in relation to providing greater certainty and detail around the HVCCC consultation process in this context.¹⁰⁵⁴

However, the ACCC is also of the view that certain aspects of ARTC's obligation to consult with the HVCCC need to be strengthened. The ACCC considers the detailed recommendations set out in relation to sections 5.2(d) and (e) of the HVAU in the Capacity Management chapter to be relevant.

11.6.2 Additional conditions on ARTC granting consent to a connection whether or not it is on ARTC controlled land

The ACCC notes that clause 6.1(a)(vi) of the proposed 2010 HVAU has been amended so that a new condition of ARTC consenting to a connection is that the

¹⁰⁵³ HVCCC, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 2.

¹⁰⁵⁴ ACCC, Draft Decision on HVAU, 5 March 2010, p. 356-357.

owner of track not part of the Network must enter into a separate connection agreement and agree to ‘reasonable terms associated with the construction, maintenance and operation of the connection as determined by ARTC.’

Further, clause 6.1(a)(vii) also sets out that ARTC will not consent to a connection if it is inconsistent with the terms of any lease, licence or other arrangement to which ARTC is a party in respect of the land on which the connection is to be built.

Finally, clause 6.1(b) now sets out that a connection ‘includes the Turnout’ and also provides that the right to connect to the Hunter Valley Network includes a right to access the land owned or controlled by ARTC if that is necessary to connect the other owner’s track to the Network.

Turnout is defined in section 9.1 of the HVAU as:

the points, signal and de-rail device connecting, or for operating the connection or, a connecting track with the Network.

ARTC submissions

ARTC notes that in the March 2010 Draft Decision, ‘the ACCC expressed concern with the perceived ability of ARTC to refuse to build an Extension (where it is to be built on ARTC land) unless the access seeker agreed to pay charges determined by ARTC thereby giving ARTC the ability to extract monopoly rents or frustrate access to the Network.’¹⁰⁵⁵

In ARTC’s view, section 6.1 of the 2009 HVAU ensured ‘that ARTC cannot extract monopoly rents through withholding access to ARTC controlled land’.¹⁰⁵⁶

ARTC is also of the view that ‘the ACCC’s concerns are divorced from the practical reality of connections of spur lines (also known as private siding lines) to ARTC track’ and has submitted that:

- To the extent a spur line requires the construction of track on ARTC’s corridor, this will be a very small section of track.
- ARTC offers all parties seeking to connect to ARTC’s network a standard connection agreement. Under the terms of this contract, the access seeker will typically construct the turnout (points, signal and de-rail device) and the line connecting the turnout to the access seeker’s site. On completion of construction and certification, ownership of the turnout will vest in ARTC and ownership of all or part of the line may vest in ARTC or the access seeker. In the vast majority of cases, the line will be owned by the access seeker (including the portion which is on ARTC’s land).¹⁰⁵⁷

ARTC submits that ‘[i]n order to provide further clarity ... ARTC has amended section 6.1 to address the concerns of the ACCC.’¹⁰⁵⁸

ARTC submits that the effect of the amendments to sections 6.1(a)(vi) and (vii):

¹⁰⁵⁵ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 28.

¹⁰⁵⁶ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 28.

¹⁰⁵⁷ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 28.

¹⁰⁵⁸ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 28.

is that a party seeking to build an extension (such as a spur line) that must connect to the ARTC network, will have a choice in either accepting ARTC terms and conditions for building and gaining access to that extension, or building the extension itself and gaining access to ARTC land to build a Connection to ARTC's Network on reasonable terms and conditions. This will mitigate any ability for ARTC to extract monopoly rents or frustrate access.¹⁰⁵⁹

In addition, ARTC notes it has taken the 'opportunity to make it clear in section 6.1(a)(vii) ... that [it] ... will only consent to a connection where it is able to do so under the terms of the NSW Lease or any other arrangement ARTC is party to in respect of the relevant land'.¹⁰⁶⁰

In relation to section 6.1(b), ARTC submits that 'the obligation on ARTC to consent to a request for a connection in section 6.1(a) [also] covers consent to the construction of the Turnout ... and consent to the construction of track on ARTC's Hunter Valley corridor to the extent that this is necessary to connect the Turnout to the owner's track, and provided the applicant agrees to reasonable terms.'¹⁰⁶¹

ARTC submits however that this 'obligation does not commit ARTC to construct the track on behalf of the applicant and leaves open the possibility that either the applicant or ARTC will be responsible for the construction of the track.'¹⁰⁶²

Stakeholder views

Aston Resources

Aston Resources notes that in its 'explanatory guide, ARTC states that the obligation to consent to connections in section 6.1 of the 2010 HVAU ensures that ARTC cannot extract monopoly rents through withholding access to ARTC controlled land.'¹⁰⁶³

Aston Resources submits that it 'fails to see how the amendments to section 6.1 ensure that the ARTC cannot extract monopoly rents or frustrate access to the Network. It is stated only that access seekers will be required to "agree reasonable terms for the construction, maintenance and operation of the connection as **determined by [ARTC]**"' [emphasis in original].¹⁰⁶⁴

Aston Resources also submits that '[n]o further information is provided regarding how these terms are to be negotiated, whether there is any cap on charges that can be levied or whether disagreement is subject to ACCC review (given that "connections" do not form part of the "Network").'¹⁰⁶⁵

¹⁰⁵⁹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 29.

¹⁰⁶⁰ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010; ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 29.

¹⁰⁶¹ ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 28.

¹⁰⁶² ARTC, 2010 HVAU Explanatory Guide, 7 September 2010, p. 28.

¹⁰⁶³ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 6.

¹⁰⁶⁴ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 6.

¹⁰⁶⁵ Aston Resources, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 6.

RailCorp

RailCorp submits that it is 'unclear how a dispute about a expansion or connection how it would resolved given they are to be outside the definition of the Network (and hence beyond the resolution mechanisms of the proposed HVAU).'¹⁰⁶⁶

ACCC views

It is the ACCC's view that the additional conditions set out in sections 6.1(a)(vi) and (vii) in relation to connecting new track to the Hunter Valley rail network are largely uncontroversial as they continue to clearly specify the conditions under which an owner of track not part of the Network can connect to the Hunter Valley rail network (and sit alongside the conditions noted as largely uncontroversial in the March Draft Decision).¹⁰⁶⁷

More specifically, the ACCC is of the view that although the terms and conditions relating to the 'construction, maintenance and operation of the connection' are to be 'determined by ARTC',¹⁰⁶⁸ these terms and conditions must be agreed by the owner of the track and are required to be 'reasonable'. As a result, if a party is refused connection or considers the terms and conditions determined by ARTC to be unreasonable, they will be able to exercise the dispute resolution provisions in the proposed 2010 HVAU. In light of this, ARTC's decision under this provision could ultimately be arbitrated by the ACCC.

Similarly, if ARTC considered that a connection was 'inconsistent with the terms of any lease, licence or other arrangement to which ARTC is a party in respect of the land on which the connection it to be built', and this decision was disputed by the party refused connection, this decision could also be arbitrated by the ACCC.

The ACCC notes that interested parties have raised concerns as to whether or not a dispute about a connection can be arbitrated by the ACCC under the dispute resolution provisions set out in section 3.15 of the HVAU. While the ACCC is of the view that the wording in section 3.15, which states that '[i]f any dispute arises under this Undertaking', clearly covers the connection provisions in section 6.1, for the avoidance of doubt the ACCC recommends that section 6.1 be amended to clarify that the dispute resolution provisions in the HVAU apply to disputes under section 6.1 of the HVAU.

The ACCC also notes that the amendments to section 6.1(b), in combination with the reasonableness requirement in section 6.1(a)(vi), which grants an owner of track not part of the Network the explicit right to construct track on ARTC controlled land, even where (as noted in ARTC's Explanatory Guide) 'the construction ... on ARTC's corridor' is 'a very small section of track', appears to deal with concerns about ARTC 'extract[ing] monopoly rents through withholding access to ARTC controlled land' in relation to network connections.

It appears to the ACCC that the amendments to section 6.1 have been included by

¹⁰⁶⁶ RailCorp, Submission in Response to ACCC Consultation Paper, p. 5.

¹⁰⁶⁷ ACCC, Draft Decision on HVAU, 5 March 2010, p. 356.

¹⁰⁶⁸ ARTC, 2010 HVAU, 7 September 2010, section 6.1(a)(vi)

ARTC in an attempt to deal with the concerns raised in the March 2010 Draft Decision in relation to the ‘exclusion of extensions’.¹⁰⁶⁹ This concern is discussed further in the Preliminary Matters chapter.

11.6.3 Clarity and certainty in section 6.1 of the HVAU

The ACCC considers it important that the HVAU provides for sufficient certainty and clarity in its terms, effect and operation in order to enable ARTC, access seekers and any other parties relevant to the Hunter Valley supply chain (for example, operators of above rail services, non-coal users of the Hunter Valley rail network, the HVCCC etc) to be clear about their respective rights and obligations. The following issues were raised in the March 2010 Draft Decision in relation to these provisions:

Section 6.1(c) – Use of the defined term ‘Applicant’

The ACCC accepts ARTC’s amendments to clause 6.1(c) which align with the ACCC’s recommendations in the March 2010 Draft Decision in relation to clause 6.1(b) of the 2009 HVAU on the inappropriate use of the defined term ‘Applicant’.

Ownership of connecting infrastructure

The ACCC notes ARTC’s clarification set out in its response to the March 2010 Draft Decision that it ‘can confirm that ARTC, as a general rule, leases assets relating to the Connection where they form part of the mainline infrastructure as the mainline has to be controlled by ARTC’.¹⁰⁷⁰

The ACCC notes QR National Coal’s submission to the proposed 2010 HVAU that it ‘has no issues with the proposed changes to section 6.1. However, for the avoidance of doubt, the HVAU should clearly detail who “owns” the connecting infrastructure i.e. ARTC or the private owner.’¹⁰⁷¹

In light of ARTC’s clarification and the relevant submissions, it is not obvious to the ACCC why the provisions in the HVAU could not be amended to set out a clarification regarding the ownership of the connecting infrastructure along these lines.

For this reason, the ACCC reiterates its recommendation in the March 2010 Draft Decision that clause 6.1 of the HVAU itself be amended to clarify the general rule that applies to the ownership of connecting infrastructure.

¹⁰⁶⁹ ACCC, Draft Decision on HVAU, 5 March 2010, pp. 92-94.

¹⁰⁷⁰ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 67.

¹⁰⁷¹ QR National Coal, Submission in Response to ACCC Consultation Paper, 25 October 2010, p. 7.

12 Network Transit Management

Summary

Section 7 of the HVAU refers to the development of Master and Daily Train Plans, and the operation of the Network in accordance with Network Management Principles (the Principles themselves are in Schedule C).

The ACCC raised concerns with these aspects of the HVAU in the March 2010 Draft Decision, and considers that, in light of amendments and clarification from ARTC, these concerns have now been addressed.

12.1 Introduction

Section 7 of the proposed 2010 HVAU provides for ARTC to develop a Master Train Plan and a Daily Train Plan, and to manage transit on the Hunter Valley network in accordance with the Network Management Principles. These aspects of the proposed access arrangements are discussed in this chapter.

In the March 2010 Draft Decision, the ACCC also provided views on a number of provisions in the Indicative Access Holder Agreement (IAHA) and Operator Sub-Agreement (OSA) as being related to 'network transit management.' Please refer to the **Agreements** chapter in relation to these matters.

12.2 Medium Term Capacity Management

March 2010 Draft Decision

In the March 2010 Draft Decision, the ACCC considered that it was unclear what the intended purpose and content of the Master Train Plan would be, as provided for in section 7.1(a) of the April 2009 HVAU. The ACCC recommended that the specific processes and indicative timeframes that ARTC will follow when developing the Master Train Plan be set out in greater detail, to provide greater certainty and clarity.¹⁰⁷²

The ACCC also recommended that the HVAU include a mechanism by which the interests of non-coal users, including future capacity needs, would be taken into account during ARTC's medium term capacity planning processes.¹⁰⁷³

Proposed 2010 HVAU

ARTC noted in its response to the Draft Decision that the Master Train Plan 'is the underpinning timetable for traffic on the Hunter Valley Network and sets out the paths available for all users', and which does not in practice take into account the

¹⁰⁷² ACCC, *Australian Rail Track Corporation Limited – Hunter Valley Coal Network Access Undertaking Draft Decision*, 5 March 2010, p. 441-442.

¹⁰⁷³ ACCC, *Draft Decision on HVAU*, 5 March 2010, p. 441-442.

Hunter Valley Corridor Capacity Strategy (which was indicated in section 7.1(a)(iii) of the April 2009 HVAU).¹⁰⁷⁴

In the proposed 2010 HVAU, the reference to the Hunter Valley Corridor Capacity Strategy has been removed from section 7.1. In addition, ARTC has clarified in section 7.1(a) that it will have regard to existing Coal and Non-Coal Access Rights when undertaking medium term capacity planning and development of the Master Train Plan.

Section 7.1(b) has also been amended to clarify that ARTC will provide the Master Train Plan to the HVCCC to assist the HVCCC in advising ARTC in relation to the day-to-day scheduling of trains.

ACCC view

The ACCC considers that the amendments in the proposed 2010 HVAU, in addition to the explanation in ARTC's response to the March Draft Decision as set out above, clarify what is meant by 'medium term capacity management' and 'medium term capacity planning' referred to in section 7.1. That is, those concepts do not refer to planning anticipated volumes and future expansion of the network for coal and non-coal users (which is covered under section 6 of the proposed 2010 HVAU), but rather to the scheduling of existing capacity entitlements.

As a result, the recommendations in the March 2010 Draft Decision regarding setting out the intended purpose and content of the Master Train Plan, including the future capacity needs of non-coal users, do not appear to be relevant. The amendments instead make it clear that the planning process is intended by ARTC to refer solely to the development of the Master Train Plan as an input into the daily scheduling process. Consequently, the amendments to section 7.1 deal with the concerns raised in the March 2010 Draft Decision in relation to this provision.

12.3 Short Term Capacity Management

March 2010 Draft Decision

In the March 2010 Draft Decision, the ACCC was of the view that the processes and timeframes that ARTC is obliged to follow in relation to short term capacity management were unclear, and recommended that section 7.2 of the April 2009 HVAU be amended to set out the specific processes and timeframes ARTC must comply with under this provision.¹⁰⁷⁵

Proposed 2010 HVAU

ARTC submitted in its response to the March 2010 Draft Decision that 'it is the HVCCC that carries out the coal train planning function [based on the Master Train Plan] ... but it is ARTC that is ultimately responsible for preparing the Daily Train Plan, which take into account possessions and Non-Coal trains.'¹⁰⁷⁶

¹⁰⁷⁴ ARTC, *Response to the ACCC Draft Decision on the Hunter Valley Access Undertaking*, 31 March 2010, p. 78.

¹⁰⁷⁵ ACCC, *Draft Decision on HVAU*, 5 March 2010, p. 443.

¹⁰⁷⁶ ARTC, *Response to the ACCC Draft Decision*, 31 March 2010, p. 78.

Section 7.2 of the proposed 2010 HVAU provides that:

ARTC will undertake short term capacity planning, including the development of the Daily Train Plan (“**DTP**”), having regard to:

- (a) the MTP and the remaining Capacity Entitlements of Access Holders under Access Holder Agreements and other Access Agreements;
- (b) any relevant input provided by the HVCCC; and
- (c) the Network Management Principles (“**NMP**”s)

ACCC view

The ACCC considers that the amendments in section 7.2, which set out that in undertaking short term capacity planning and the development of the Daily Train Plan, ARTC will have regard to the MTP and the remaining capacity entitlements under access agreements, and ARTC’s explanation set out above, clarify what is meant by ‘short term capacity management’ and ‘short term capacity planning’ in section 7.2. That is, those concepts do not refer to planning around the anticipated volumes and future expansion of the network (which is covered under section 6 of the proposed 2010 HVAU), but rather the scheduling of existing capacity entitlements.

As a result, the recommendations in the March 2010 Draft Decision that ARTC set out the processes and indicative timeframes it will follow when conducting short term capacity planning, do not appear to be relevant. It appears that the planning process is intended by ARTC to refer solely to the development of the daily scheduling process, and the ACCC therefore considers that the amendments to section 7.2 deal with the concerns raised in the March 2010 Draft Decision.

12.4 The role of the HVCCC

In the March 2010 Draft Decision the ACCC was of the view that it would be appropriate for the HVAU to include a mechanism that requires ARTC to consult with the HVCCC when undertaking medium term capacity management in order to maximise the efficiency of the Hunter Valley supply chain.¹⁰⁷⁷

The ACCC was also of the view that the role of the HVCCC in short term capacity management (development of the Daily Train Plan) was unclear, and recommended that the specific nature of ARTC’s obligations to consult with the HVCCC, including timeframes should be included in section 7.2(b) of the Undertaking.¹⁰⁷⁸

ARTC noted in its response to the March 2010 Draft Decision that the Master Train Plan is ‘the starting point’ for the development of the Daily Train Plan whereby ‘ARTC adds in track possessions, including long term major possessions and short term possessions and those slots allocated to Non-Coal’, which is then provided to the HVCCC.¹⁰⁷⁹ According to ARTC, the Master Train Plan:

shows the paths available for coal users and the HVCCC develops a daily template that optimises the coal throughput of the Hunter Valley using those

¹⁰⁷⁷ ACCC, Draft Decision on HVAU, 5 March 2010, p.442.

¹⁰⁷⁸ ACCC, Draft Decision on HVAU, 5 March 2010, p. 442.

¹⁰⁷⁹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 78.

slots ... [and the] HVCCC's template/schedule (Coal Train Plan) in effect overlays the slots available under the MTP for coal trains.¹⁰⁸⁰

Further ARTC noted that 'it is the HVCCC that carries out the coal train planning function ... but it is ARTC that is ultimately responsible for preparing the Daily Train Plan, which take into account possessions and Non-Coal trains.'¹⁰⁸¹

ARTC has amended section 7.1(b) in the proposed 2010 HVAU to state that:

ARTC will provide the MTP to the HVCCC to assist the HVCCC in advising ARTC in relation to the day-to-day scheduling of Trains.

The ACCC considers that this amendment, and ARTC's explanation set out above, clarify the nature of the involvement of the HVCCC in relation to the Master and Daily Train Plans.

As a result, the recommendations in the March 2010 Draft Decision that ARTC set out the specifics of the consultation process with the HVCCC in development of the MTP and DTP no longer appear to be relevant. Therefore, the amendment to section 7.1(b) deals with the concerns raised in the March 2010 Draft Decision.

12.5 Network Management Principles

Section 7.3 of the proposed 2010 HVAU requires ARTC to manage transit on the Network in accordance with the Network Management Principles (NMPs). The NMPs describe different objectives for coal and non-coal trains and are contained in Schedule C to the HVAU.

March 2010 Draft Decision

In response to the April 2009 HVAU, Asciano expressed concerns that the NMPs were based on the main line interstate network, and did not reflect the different objectives of the two types of train.¹⁰⁸²

In the March 2010 Draft Decision, the ACCC acknowledged that the NMPs were based on ARTC's lease of the Hunter Valley Network from the NSW Government, and that ARTC consequently did not have discretion to alter the NMPs. The ACCC recommended that recognising this constraint in a revised HVAU would provide clarification and avoid the potential for disputes on the issue.¹⁰⁸³

Proposed 2010 HVAU

ARTC has amended Schedule C to include a clarification that the NMPs are those contained in the NSW Lease. Schedule C also now states that:

In recognition of the particular objectives of Coal Trains but within the constraints of the NSW Lease, ARTC has supplemented these rules with an additional set of guidelines to be applied when Coal Trains run out of course.

¹⁰⁸⁰ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 78.

¹⁰⁸¹ ARTC, Response to the ACCC Draft Decision, 31 March 2010, p. 78.

¹⁰⁸² Asciano, *Submission to the ACCC - ARTC 2009 Draft Hunter Valley Access Undertaking - Response to the ACCC Draft Decision*, Public Version, 31 March 2010, p. 20-21.

¹⁰⁸³ ACCC, Draft Decision on HVAU, 5 March 2010, p. 444.

The ACCC notes that the ‘guidelines’ referred to in Schedule C have not been included in the proposed 2010 HVAU.

Asciano reiterated concerns raised in respect of the April 2009 HVAU, that is, the NMPs are drafted for scheduled trains, whereas this is not the proposal for the Hunter Valley. Asciano further submitted that, notwithstanding the constraints of the lease, ‘there is scope for the provision of more suitable Network Management Principles than is being proposed by ARTC, and which can cater for the unique characteristics of export coal trains operating on the same network as other freight and passenger trains’.¹⁰⁸⁴ Asciano also sought clarification on the nature and status of ARTC’s additional set of guidelines to be applied when Coal Trains run out of course.¹⁰⁸⁵

Asciano submitted that any conflict in the NMPs relating to passenger service priorities may be resolved through amendment of the lease.

ACCC view

The ACCC notes the amendments made to Schedule C of the proposed 2010 HVAU, which clarify that the Train Priority and Decision Matrices, as well as the rules, in Schedule C of the HVAU reflect the rules that are contained in the NSW Lease. The ACCC therefore reiterates its view in the March 2010 Draft Decision that the scope for amending the NMPs themselves to take into account stakeholder concerns is limited within the context of the current HVAU process.

The ACCC notes, however ARTC’s acknowledgement of the particular objectives of coal trains by providing for an ‘additional set of guidelines to be applied when coal trains run out of course.’ The ACCC is unclear as to the status of these guidelines and considers that it may be beneficial if they were included or specifically identified in Schedule C as part of the HVAU.

The ACCC also notes the amendments proposed by ARTC to the OSA to address Asciano’s concerns regarding the focus on the running of early and late trains, in particular clauses 3.6(c)(iii) and 3.8(b):

3.6 Early and late Services

...

(c) Both parties will, subject to this agreement, use their best endeavours to:

(i) ensure that such Services which are running or presented late recover the lost time;

(ii) ensure that such Services which are presented more than 15 minutes early depart the Network no later than the scheduled time; and

(iii) in the case where the Service is a loaded or empty coal train, seek to implement the course of action determined by ARTC through liaison with the HVCCC and live run operations group as contemplated in the Network Management Principles, including, where appropriate, actions other than provided for in **paragraphs (i) and (ii) above**.

¹⁰⁸⁴ Asciano, *Submission to the ACCC - ARTC 2010 Draft Hunter Valley Access Undertaking*, 25 October 2010, p. 13.

¹⁰⁸⁵ Asciano, *Submission to September 2010 HVAU*, 25 October 2010, p. 13.

...

3.8 Manner of control of the Network by ARTC

ARTC agrees at all times during the Term to control the Network in a manner which facilitates:

...

(b) the use by the Operator of the Path Usages, and in so doing to ensure (subject to the matters in **clauses 3.1(b)** and **3.6(c)(iii)**) that a Operator's Train which enters the Network on schedule or is early will exit the Network no later than the scheduled time.

The ACCC recognises ARTC's intent to address the issues raised by Asciano within the confines of the NSW Lease, and considers that these revisions are likely to be appropriate.

The ACCC also notes Asciano's comment that a revision of the NMPs may provide more scope for clauses in the IAHA and OSA to be amended.¹⁰⁸⁶ While this may be the case, any proposed revision of the NMPs as included in the NSW Lease will ultimately be a matter for the ARTC and the lessor.

¹⁰⁸⁶ Asciano, Submission in Response to ACCC Consultation Paper, 26 October 2010, p. 14.