Level 17, 2 Lonsdale Street
Melbourne Vic 3000

GPO Box 520
Melbourne Vic 3001

tel: (03) 9290 1800

www.accc.gov.au

Our ref: 63320
Contact officer: Grant Kari
Contact phone: (03) 9290 1807

1 October 2018

Dear Stakeholder

Re: Consultation on proposed variation to the Australian Rail Track Corporation Limited 2011 Hunter Valley Coal Network Access Undertaking

On 28 September 2018, the Australian Rail Track Corporation (ARTC) submitted an application to the ACCC to vary its 2011 Hunter Valley Coal Access Undertaking (the 2011 HVAU) (September 2018 Variation). The ACCC is seeking submissions on the September 2018 Variation. The September 2018 Variation is a revised version of the application first submitted by ARTC on 21 December 2017.

The September 2018 Variation, together with supporting materials from ARTC, is available on the ACCC's website at:

https://www.accc.gov.au/regulated-infrastructure/rail/artc-hunter-valley-access-undertaking/september-2018-variation-of-the-2011-hunter-valley-access-undertaking/variation-application

Alternatively, you may go to the ACCC's homepage, www.accc.gov.au, and follow the links to 'Regulated Infrastructure', 'Rail', 'September 2018 variation of the 2011 Hunter Valley Access Undertaking'.

Background

In June 2011, the ACCC accepted the 2011 HVAU under Part IIIA of the *Competition and Consumer Act 2010* (Cth) (the Act). The 2011 HVAU sets out the terms and conditions of access for parties seeking to run trains on ARTC's Hunter Valley rail network in New South Wales. The 2011 HVAU also sets out the details of the financial model governing ARTC's revenues. The expiry date of the 2011 HVAU is 31 December 2021.

On 21 December 2017, ARTC submitted an application to vary the 2011 HVAU to incorporate a number of provisions into the undertaking, including an incremental cost methodology and path based pricing (December 2017 Variation).[1]

On 28 June 2018, the ACCC issued a Draft Decision to consent to ARTC's December 2017 Variation, subject to ARTC making amendments for clarity and certainty.[2] This was considered in light of support by a majority of stakeholders who had submitted that the 'package' of proposed amendments were preferable to the status quo–being the current 2011 HVAU continuing unchanged until its expiry on 31 December 2021.

---

[1] See ARTC December 2017 Variation at https://www.accc.gov.au/regulated-infrastructure/rail/december-2017-variation-of-the-2011-hunter-valley-access-undertaking/variation-application.

[2] See ACCC Draft Decision at https://www.accc.gov.au/regulated-infrastructure/rail/december-2017-variation-of-the-2011-hunter-valley-access-undertaking/draft-decision.

On 27 July 2018, ARTC withdrew the December 2017 Variation from the ACCC's consideration.

Proposed effect of the variation

The September 2018 Variation is a revised version of the December 2017 Variation, with amendments to improve clarity and certainty, as identified in the ACCC's Draft Decision on the December 2017 Variation. As such, the September 2018 Variation carries over the same changes proposed in the December 2017 Variation–the introduction of an incremental cost methodology and path based pricing.

The major amendments to improve clarity and certainty in the September 2018 Variation relate to the process for RCG endorsing capital allocation decisions, including recourse to resolution by the ACCC in the event of a dispute.

ARTC additionally seeks the following changes:

- amending the Variation Effective Date, at section 2.3(b)
- introducing a new provision that requires ARTC to undertake a review of the pricing framework after Loss Capitalisation ends, at section 2.3(d)
- reinstating clause 11.5(d) of the indicative Access Holder Agreement (IAHA)
- removing redundant provisions
- correcting minor drafting errors.

For further information on the amendments in the September 2018 Variation, see Attachment 1.

Submissions

The ACCC, by publication of this letter, is inviting submissions from interested parties. Submissions are due by **15 October 2018**. It is in stakeholders' interests that submissions are lodged by this date, as section 44ZZBD(3) of the Act allows the ACCC to disregard any submission made after this date.

In deciding whether to consent to a variation of an access undertaking under section 44ZZA(7) of the Act, the ACCC must have regard to the matters set out under subsection 44ZZA(3) of the Act. In making a submission, parties are encouraged to address the matters listed under subsection 44ZZA(3) of the Act.

Submissions should be addressed to:

Matthew Schroder
General Manager
Infrastructure & Transport – Access & Pricing Branch
ACCC
GPO Box 520
MELBOURNE VIC 3001
Email: transport@accc.gov.au

If you have any questions about this consultation letter, please contact Grant Kari on (03) 9290 1807 or at grant.kari@accc.gov.au.

Yours sincerely

Matthew Schroder

Matthew Schroder
General Manager
Infrastructure & Transport - Access & Pricing

Attachment 1

Endorsement of Capital Allocation at RCG

ARTC proposes amendments and new provisions at sections 4.5, 9.1, 9.2, 9.4, 9.8, 9.9 and 14, providing for different treatment of capital expenditure (capex) endorsement at RCG.

Under section 14, ARTC introduces the following definitions:

- Expansion Capital, meaning capex in relation to a Project that provides Additional Capacity.
- Sustaining Capital, meaning capex that is not Expansion Capital.
- Capital Allocation, meaning the proportion of capex that is allocated as Incremental Capital Costs rather than Fixed Costs and the method for allocating those Incremental Capital Costs to Access Holders in accordance with section 4.5.

Expansion Capital

Under section 4.5(e), for Expansion Capital (incurred on or after 1 July 2018), ARTC must seek endorsement from the RCG about whether capex will be treated as Fixed Costs or Incremental Capital Costs.

Under section 4.5(i), ARTC must maintain a Historical Capital Allocation List, which will contain all the projects or capex which the RCG has endorsed, or the ACCC has approved. This list will include the applicable Capital Allocation, a summary of any relevant engineering assessment, and the purpose, causal factors and cost drivers identified by ARTC as relevant for the choice of Capital Allocation.

Section 9.9 outlines how Capital Allocation decisions for Expansion Capital in Pricing Zone 1 will be made. This process is as follows:

- At the project feasibility stage, ARTC will propose the Capital Allocation for the capex, along with an independent engineering report in support of its Capital Allocation proposal. Section 9.9(b) notes that ARTC will provide this information to the RCG at least 28 days before seeking endorsement.
- Under sections 9.9(c) and (d), a RCG member can raise an objection to ARTC's proposed Capital Allocation prior to or at the relevant RCG meeting. If ARTC reasonably considers the RCG would otherwise endorse the Project, it will seek to resolve the objection at the relevant RCG meeting. Under section 9.9(e), a RCG member can raise an objection up to 10 Business Days after the relevant RCG meeting.
- Under section 9.9(f), if ARTC cannot resolve the objection at the relevant RCG meeting, or ARTC receives an objection after the relevant RCG meeting, ARTC must refer the decision about Capital Allocation to the ACCC for resolution, within 20 Business Days of the relevant RCG meeting.
- If a dispute is referred to the ACCC, under section 9.9(g) ARTC must provide the ACCC with the project feasibility report, the independent engineering assessment, details of the RCG member's objection, the latest Historical Capital Allocation List, and any other relevant information. ARTC must additionally notify the RCG of the referral.
- Under section 9.9(h), the ACCC will use reasonable endeavours to make a decision within 4 weeks of the referral and publish its decision on its website, subject to confidentiality restrictions. Sections 9.9(j), (k) and (l) describe how any costs associated with the ACCC's resolution of a dispute may be allocated to ARTC and / or Access Holders.
- Section 9.9(i) states that following the ACCC's resolution of a dispute, ARTC may seek endorsement from the RCG of the Capital Allocation approved by the ACCC. If the RCG

endorses that decision, it will be taken to be compliant for the purposes of Compliance Assessments.

Sustaining Capital

Section 9.8 outlines how Capital Allocation decisions for Sustaining Capital in Pricing Zone 1 will be made. Unlike Expansion Capital, ARTC does not need to get endorsement from RCG on the Capital Allocation of Sustaining Capital.

Under section 9.8(b), at the appropriate stage of the project consultation process, ARTC must inform the RCG of the Capital Allocation proposed for the capex. Under sections 9.8(c) and (d), if ARTC considers that the ACCC has previously approved a Capital Allocation for projects or Sustaining Capital of a similar nature or purpose to the project, ARTC will apply that same Capital Allocation. If not, ARTC must provide an independent engineering assessment to the RCG, in support of its Capital Allocation decision.

1. Is the distinction between Expansion Capital and Sustaining Capital clear?
2. Are there any concerns with the proposed process for endorsing capex at RCG?

Other amendments

In addition to the changes to the RCG, ARTC seeks the following changes to address issues raised in the ACCC's Draft Decision on the December 2017 Variation:

- ARTC seeks to amend section 2.3(b) so that the Variation Effective Date is 21 days after the ACCC publishes its decision to accept the Varied Undertaking, which is consistent with the statutory timeframe under section 44ZZBA(4) of the Act. Under section 2.3(b), all provisions in the Varied Undertaking are taken to commence on 1 January 2019, with the exception of provisions necessary for ARTC to determine Charges to apply on and from 1 January 2019.
- ARTC seeks to introduce section 4.10(h) which clarifies that the Compliance Assessments for 2016, 2017 and 2018 will be undertaken on the basis of the financial framework in the current HVAU (which is the 2011 HVAU varied on 29 June 2017). Whereas for the 2019 Compliance Assessment and onwards, compliance will be undertaken on the basis of the financial framework in the September 2018 Variation.
- As flagged in a submission to the ACCC[3], ARTC seeks to introduce a new provision at section 2.3(d), which states that ARTC will undertake a review of the pricing framework to apply once Loss Capitalisation ends in Pricing Zone 3.
- ARTC seeks to reinstate clause 11.5(d) of the Indicative Access Holder Agreement, which provides for ARTC to grant relief of Take or Pay Charges to Access Holders that make a permanent shift to a more efficient service.
- ARTC seeks to remove redundant provisions at sections 4.22, 4.23, 13.3, 13.4 and 13.5 of the HVAU.
- ARTC seeks to correct minor drafting errors in the HVAU and IAHA.

3. Are there any concerns with the drafting of the new provision at section 2.3(d)?
4. Are there any other concerns with the proposed drafting?

---

[3] ARTC, *Re: December 2017 HVAU Variation*, 23 May 2018, p. 1, <https://www.accc.gov.au/regulated-infrastructure/rail/december-2017-variation-of-the-2011-hunter-valley-access-undertaking/variation-application>.