Consultation Paper

Australian Rail Track Corporation's proposed variation to the Hunter Valley Rail Network Access Undertaking to include the Gap to Turrawan Segments

23 July 2013

Australian Competition and Consumer Commission
23 Marcus Clarke Street, Canberra, Australian Capital Territory, 2601

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Glossary

ACCC	Australian Competition & Consumer Commission
Access Holder	Defined under clause 14 of the HVAU as an Applicant who has been granted Access Rights to the Network
the Act	*Competition and Consumer Act 2010* (Cth)
ARTC	Australian Rail Track Corporation Limited
CRIA	Country Rail Infrastructure Authority
DORC	Depreciated Optimised Replacement Cost
E&P	Evans & Peck (WorleyParsons)
Gap to Turrawan Segments	The rail infrastructure managed by ARTC from Gap to Turrawan in the Gunnedah Basin
HVAU	The Hunter Valley Access Undertaking accepted by the ACCC on 29 June 2011 and varied on 17 October 2012
Indicative Access Charge	Charge for use of train paths on the Hunter Valley rail network
Indicative Service	Coal train configuration representing most efficient utilisation of Coal Chain Capacity on the Hunter Valley Rail Network
IPART	NSW Independent Pricing and Regulatory Tribunal
kgtkm	One thousand gross tonnes multiplied by kilometres
MEERA	Modern Engineering Equivalent Replacement Asset
the Network	Hunter Valley rail network covered by the Hunter Valley Access Undertaking
NSWRAU	New South Wales Rail Access Undertaking
ORC	Optimised Replacement Cost
Proposed Variation	ARTC's proposal to vary the HVAU to extend the Hunter Valley rail network covered by the HVAU to include the Segments from Gap to Turrawan submitted on 28 June 2013
RAB	Regulatory Asset Base
Segment	Component of the Hunter Valley rail network
TOP	Take or Pay
Valuation Report	Report prepared by Evans & Peck (Worley Parsons) in June 2013 proposing a DORC valuation for the Gap to Turrawan Segments of the Hunter Valley Rail Network

1 Introduction

The Australian Rail Track Corporation Limited (**ARTC**) has requested that the Australian Competition and Consumer Commission (**ACCC**) consent to a variation (**the Proposed Variation**) of the Hunter Valley Access Undertaking (**the HVAU**) to include the Gap to Turrawan Segments of the Hunter Valley rail network.

On 28 June 2013 ARTC submitted the Proposed Variation in accordance with subsection 44ZZA(7) of the *Competition and Consumer Act 2010* (Cth) (**the Act**), which allows an access provider to vary an accepted access undertaking with the consent of the ACCC.

From 1 July 2011 the Northern railway line from Gap to Boggabilla was incorporated into ARTC's lease of the NSW Interstate and Hunter Valley rail networks. This 370km of track was previously managed by what was formerly the NSW State Government's Country Rail Infrastructure Authority (**CRIA**) – now known as Transport for NSW.[1]

The Proposed Variation has been submitted by ARTC to extend the scope of the infrastructure subject to regulation by the ACCC under the HVAU to include the Segments from Gap to Turrawan. ARTC is required under the conditions of its lease to seek coverage of this rail infrastructure under an ACCC accepted access undertaking under Part IIIA of the Act.

Details of the Proposed Variation are discussed in section 2 of this Consultation Paper.

The ACCC is conducting a public consultation as part of its assessment of the Proposed Variation, and seeks submissions from interested parties by **20 August 2013**.

1.1 Proposed effect of the application

If the ACCC accepts the Proposed Variation, ARTC will provide access to the Gap to Turrawan Segments in accordance with the provisions in the HVAU. Specifically:

- The scope of the HVAU will extend to include the Gap to Turrawan Segments - that is, the Hunter Valley rail network as defined in Schedule B of the HVAU (**the Network**) will include the Segments from Gap to Turrawan.
- ARTC's proposed asset value for the Gap to Turrawan Segments, determined using the Depreciated Optimised Replacement Cost (**DORC**) methodology, will be included in the Regulatory Asset Base (**RAB**) on which ARTC is allowed to earn a regulated rate of return.
- Forecast coal volumes and costs will inform ARTC's determination of the Indicative Access Charge for Pricing Zone 3, which will apply to the whole of Pricing Zone 3 (including the Gap to Turrawan Segments).

1.2 Background

ARTC is a Commonwealth Government-owned corporation established in 1998 for the purpose of managing and providing access to its national interstate rail network. ARTC is vertically separated, providing 'below-rail' track access services and not 'above-rail' services such as haulage.

[1] ARTC, Press release – ARTC to take up full lease of Gunnedah Basin coal link, 1 July 2011, http://www.artc.com.au/Article/Detail.aspx?p=6&np=4&id=339

The HVAU provides for the negotiation of access to the Network operated by ARTC in New South Wales. ARTC leases the Hunter Valley rail network from the New South Wales government under a 60 year lease granted on 5 September 2004.

The Gap to Turrawan Segments service mines in the Gunnedah Basin. Previously the rail infrastructure from Gap to Turrawan was predominantly used for non-coal traffic, such as passenger and general freight. However, since the mid-2000s coal traffic on the track has significantly increased as coal production from the mines in the Gunnedah Basin has increased.[2]

The Gap to Turrawan Segments came under ARTC's management as of 1 July 2011 when ARTC incorporated the Northern line from Gap to Boggabilla into its Hunter Valley lease.

The Gap to Turrawan Segments are approximately 132km long in total and made up of a single track with passing loops, coal and grain sidings.[3]

Under the Proposed Variation the Gap to Turrawan Segments will become part of Pricing Zone 3 of the Network. Currently the Gap to Turrawan Segments are covered under the New South Wales Rail Access Undertaking (**NSWRAU**).

1.3 ACCC assessment

The test the ACCC applies in deciding whether to consent to a variation of an accepted access undertaking is set out in subsections 44ZZA(7) and 44ZZA(3) of the Act. Essentially, the ACCC may accept the Proposed Variation if it thinks it appropriate to do so, having regard to various matters set out in the Act. The full test is set out in section 3 of this document.

The ACCC is calling for submissions by interested parties and has not yet formed a view on the appropriateness of ARTC's Proposed Variation.

1.4 Indicative timeline for assessment

Under subsection 44ZZBC(1) of the Act, the ACCC must make a decision in relation to an access undertaking application within the period of 180 days starting at the start of the day the application was received (referred to as 'the expected period').[4]

ARTC formally lodged the Proposed Variation with the ACCC on 28 June 2013.

The Act 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 (subsection 44ZZBD(1));
- the ACCC gives a notice requesting information in relation to an application (subsection 44ZZBCA(1)); or
- the ACCC and the access provider agree in writing that certain days are to be disregarded for the purposes of calculating the expected period (subsection 44ZZBC(4)).

[2] ARTC, *Application by ARTC to vary the Hunter Valley Access Undertaking to incorporate Gap to Turrawan Segments*, Attachment B – Supporting Submission, p. 24.

[3] ARTC, *Application by ARTC to vary the Hunter Valley Access Undertaking to incorporate Gap to Turrawan Segments*, p. 2.

[4] Under paragraph (b) of the definition of "access undertaking application" under subsection 44B of the Act, a request made to the ACCC for a variation of an access undertaking is an access undertaking application.

The ACCC is requesting submissions on the Proposed Variation by **20 August 2013**.

Under subsection 44ZZBD(1), this has the effect of extending the timeframe by which the ACCC is required to make a decision on the Proposed Variation.

In the absence of the need for further 'clock-stoppers', the ACCC will be required to make a decision on the Proposed Variation by **22 January 2014**. However, the ACCC notes that a decision may be made before this date.

1.5 Consultation

The ACCC published the Proposed Variation on its website on 3 July 2013. Section 2 of the Consultation Paper highlights the main aspects of the Proposed Variation.

Questions of particular interest to the ACCC relating to these issues are set out in Section 2 of this Consultation Paper. However, parties are welcome to comment on any aspect of the Proposed Variation. Parties are also encouraged to address the matters listed in subsection 44ZZA(3) of the Act.

1.6 Invitation to make a submission

The ACCC invites public submissions on the Proposed Variation, in accordance with subsection 44ZZBD of the Act.

Submissions should be addressed to:

Mr Matthew Schroder
General Manager
Fuel, Transport and Prices Oversight Branch
Australian Competition and Consumer Commission
GPO Box 520
Melbourne Vic 3001

Email: transport@accc.gov.au

1.6.1 Due date for submissions

Submissions **must** be received by **20 August 2013**. It is in your interest that the submission be lodged by this date, as section 44ZZBD of the Act allows the ACCC to disregard any submission made after this date.

1.6.2 Confidentiality

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

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

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

1.7 Further information

ARTC's Proposed Variation and other relevant material, including supporting submissions from ARTC and the currently accepted HVAU, are available on the ACCC's website at the following link:

http://www.accc.gov.au/content/index.phtml/itemId/1119891

Alternatively, go to the ACCC's homepage at www.accc.gov.au and follow the links to 'Regulated Infrastructure' and 'Rail' and 'ARTC Hunter Valley Access Undertaking 2011'.

Public submissions made in response to this consultation paper 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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2 The Proposed Variation

The Proposed Variation seeks to extend the coverage of the HVAU to include Segments from Gap to Turrawan in the Gunnedah Basin.

2.1 Addition of rail infrastructure from Gap to Turrawan to the Network

The addition of rail infrastructure from Gap to Turrawan in the scope of the HVAU is achieved by re-drafting provisions of the HVAU, specifically Schedules B and E.

Schedule B defines the Network for the purposes of the HVAU. Clause 2 of the HVAU, which outlines the Scope and Administration of the undertaking, defines the Network covered by the HVAU as the network of railway lines delineated or defined in Schedule B.

Schedule E of the HVAU lists all the Segments in the Network. A 'Segment' is defined in clause 14 of the HVAU to mean a component of the Network as defined in **Schedule E,** and is the smallest component for which the Ceiling Limit and Floor Limit applies.

2.1.1 Schedule B

ARTC seeks to vary Schedule B of the HVAU in order to incorporate the rail infrastructure acquired under the lease from the NSW Government from Gap to Turrawan in the Gunnedah Basin. ARTC also seeks to vary Annexure 1 to Schedule B to clarify that the map at Annexure 1 to Schedule B represents Hunter Valley rail network, including the Gap to Turrawan Segments.

The proposed drafting amendments are attached to ARTC's Proposed Variation at Attachment A.[5]

2.1.2 Schedule E

ARTC seeks to vary Schedule E of the HVAU in order to break down the rail infrastructure from Gap to Turrawan into four separate Segments for the purpose of applying the pricing principles contained in clause 4 of the HVAU:

- Gap to Watermark (31.1km)
- Watermark to Gunnedah (33.0km)
- Gunnedah to Boggabri (41.4km)
- Boggabri to Turrawan (27.0km)

The proposed drafting amendments to the HVAU are attached to ARTC's Proposed Variation at Attachment A.[6]

Questions for comment

- Is it appropriate to extend the scope of the HVAU to include the rail infrastructure from

5 ARTC, *Application by ARTC to vary the Hunter Valley Access Undertaking to incorporate Gap to Turrawan Segments*, pp. 5-9.

6 Ibid.

the Gap to Turrawan in the Gunnedah Basin?

- Is it appropriate for ARTC to include the Gap to Turrawan Segments in Pricing Zone 3 (rather than create an additional pricing zone which would allow ARTC to differentiate charges between the existing Pricing Zone 3 and the Gap to Turrawan Segments)?
- Is the division of the Gap to Turrawan rail infrastructure into the four proposed Segments in Schedule E appropriate?
- Are the lengths of the new Segments as set out in Schedule E representative of those Segments?

2.2 DORC valuation

The HVAU implements a revenue cap based on the economic cost of providing services. This constrains the revenues ARTC may receive from access charges. Economic cost includes a return earned on assets, and therefore requires a regulatory asset value be ascribed to all relevant assets for inclusion in the RAB.

Clause 4.4(a)(ii) of the HVAU requires that those Segments that were not ascribed a regulatory asset value in accordance with NSWRAU be initially valued using the DORC methodology and approved by the ACCC. The optimised replacement cost (ORC) 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'. Depreciation is applied to the ORC to determine a DORC value.

The ACCC has previously endorsed a DORC value for the Segments from Dartbrook to Gap for inclusion in the Initial RAB under the HVAU. This DORC valuation was calculated as at 1 July 2008 and rolled forward in accordance with the NSWRAU to 1 July 2011. The value for these Segments to be included in the RAB as at 1 July 2011 was $161,141,627. These segments encompass approximately 119 kilometres of the network.[7]

The Gap to Turrawan Segments were not ascribed a regulatory asset value under the NSWRAU. Accordingly, ARTC has submitted a DORC valuation proposal to the ACCC for the Gap to Turrawan Segments prepared by Evans & Peck (Worley Parsons) (**E&P**). The valuation report prepared by E&P (the **Valuation Report**) is at Attachment C to the Proposed Variation, available on the ACCC's website.

E&P's total proposed valuation for the Gap to Turrawan Segments is $325.4 million. The proposed ORC and DORC values for each of the Segments are presented in Table 1 below.

Table 1: ORC and DORC valuations of Gap to Turrawan Segments

Segment (Length)	ORC ($m)	ORC/km ($m)	DORC ($m)	DORC/km ($m)
Gap to Watermark (31.1km)	160.8	4.69	78.5	2.28
Watermark to Gunnedah (33.0km)	174.5	4.63	94.5	2.51
Gunnedah to Boggabri (41.4km)	190.1	4.02	92.1	1.95

7 ACCC, *Determination: ARTC's compliance with pricing principles in the Hunter Valley Rail Network Access Undertaking for July – December 2011*, 5 April 2013, p. 12.

Boggabri to Turrawan (27.0km)	132.2	4.90	59.8	2.30
Network Control Centre – allocation	0.7	-	0.5	-
Total (132.5km)	**658.3**	**4.5**	**325.4**	**2.22**

Source: ARTC, *Supporting Submission*, 28 June 2013, p. 13.

The allocation of relevant Network Control Centre[8] capital assets included in the total proposed DORC value is to be allocated to each of the Gap to Turrawan Segments on the basis of train kilometres.

E&P states that it has based its DORC valuation methodology on the Australian Accounting Standards Board *'Property, Plant and Equipment'* (AASB 116) and NSW Treasury Policy and Guidelines paper *'Valuation of Physical Non-Current Assets at Fair Value'* (TPP 07) standards.[9]

E&P has undertaken the DORC valuation in accordance with the following process:

- asset valuation, involving the process of classifying the asset and undertaking a rate build-up from first principles to value the asset;
- review of the asset standards to determine the appropriate modern engineering equivalent replacement asset (**MEERA**) and its value;
- review of each asset group's practical capacity or useful life to allow the determination of an optimisation factor; and
- asset condition assessment in comparison with the useful life of the asset to determine the remaining life and the depreciation factor.[10]

The proposed valuation is based on the assets forming the Gap to Turrawan Segments as at 1 January 2013. The proposed commencement date for the variation is 1 January 2014. ARTC proposes to roll forward the DORC value as at 1 January 2013 in accordance with the NSWRAU to determine a value as at 1 January 2014.[11]

Further details and questions relating to the each of the components of the DORC valuation methodology (i.e. replacement cost, optimisation, and depreciation) are set out below.

Questions for comment

- Are the overall ORC and DORC valuations for the additional Segments representative of the current network configuration and projected demand for throughput?
- Does the process followed by E&P to develop the proposed ORC and DORC valuations appear to be reasonable?
- Are the standards on which E&P states that it has based its valuation methodology appropriate?

[8] The infrastructure associated with providing network control facilities to any part of ARTC.
[9] E&P, *Valuation Report,* 28 June 2013, p. 13.
[10] Ibid.
[11] ARTC, *Supporting Submission,* 28 June 2013, p. 10.

- Is it appropriate for ARTC to roll forward the DORC value as at 1 January 2013 in accordance with the NSWRAU to 1 January 2014? In particular, do you have any comments on the inclusion of capital expenditure incurred by ARTC on the Gap to Turrawan Segments during 2013?
- Is it appropriate that ARTC has included an allocation of the value of Network Control Centre capital assets based on train kilometres?

2.2.1 Replacement cost

E&P has determined asset replacement values for the Gap to Turrawan Segments on the basis of a MEERA. This assumes that the current infrastructure assets are replaced with a modern equivalent in accordance with the current codes, standards and technologies.

Fifteen different asset classifications were identified and separately valued, for example rail, bridges, sleepers and ballast. E&P has determined the MEERA value for each asset classification by calculating the overall cost to construct that asset based on four cost components:

- contractor's direct costs;
- an allowance for miscellaneous costs;
- contractor's indirect costs; and
- client costs.

The contractor's indirect costs and client costs components are calculated as a percentage mark-up on direct costs and contractor's costs respectively.[12]

E&P states that its approach is based on the principles contained in the Department of Infrastructure, Transport, Regional Development and Local Government's '*Best Practice Cost Estimation Standard for Publicly Funded Road and Rail Construction'*.[13]

Further detail on how E&P has defined these cost components and determined the benchmark unit rates and percentage mark-ups is available at pages 16 to 19 of the Valuation Report.

E&P has assumed that construction would take place in a single phase in a 'country brownfields' construction environment, and therefore additional costs associated with greenfields developments (such as land acquisition and access road construction) are not included. E&P also states that it has taken a conservative approach and assumed no additional costs associated with night work and no additional costs for lack of track access.[14]

ARTC and E&P have agreed on a number of other general assumptions and limitations relevant to the determination of replacement cost, which are set out on page 22 of the E&P Valuation Report.

Questions for comment

- Is the overall approach to determination of the replacement cost for assets in the Gap

12 E&P, *Valuation Report*, 28 June 2013, pp. 17-19.
13 Ibid., p. 16.
14 Ibid., p. 20.

to Turrawan Segments appropriate?

- Are the unit rates used to develop the direct cost components of the MEERA for each category of asset (set out at section 7 of the E&P Valuation Report) appropriate?
- Are the mark-ups that have been applied to the direct costs in respect of the combined contractor's indirect and client's costs for each asset classification (set out at page 19 of the E&P Valuation Report) appropriate?
- Are the assumptions listed on page 22 of the Valuation Report (such as the brownfields environment assumption) which underpin E&P's calculation of replacement cost appropriate?

2.2.2 Optimisation

ARTC states that throughout the Gap to Turrawan Segments there are instances where the MEERA has different capacity, quality, configuration and/or useful life compared with the actual existing asset. On this basis, E&P has determined an 'optimisation factor' to apply to the MEERA valuation for many of the assets. These optimisation factors have the effect of reducing the value of MEERA asset to reflect the age and condition profile of the existing assets.[15]

Development of the optimisation factors for the Proposed Variation were specific to each asset classification and considered the nature and capacity of the existing assets, current railway infrastructure technologies, and historical data. Key areas of MEERA optimisation were major track assets including rail and sleepers.[16]

Details of the optimisation factors applied to each asset classification are available at section 7 of the E&P Valuation Report (pages 32-47).

ARTC also submits that it has considered approaches to ensure consistency between the optimisation assumptions in the asset valuation and the treatment of maintenance expenditure related to those assets. Specifically, ARTC notes that maintenance expenditure included in Economic Cost should be based on consistent optimisation assumptions to those made in the asset valuation. Rather than including maintenance costs adjustments in the valuation itself, ARTC proposes to identify any necessary adjustments to actual maintenance expenditure each year as part of the annual compliance assessment conducted by the ACCC under clause 4.10 of the HVAU.[17]

E&P has also considered current network utilisation patterns and determined that while substantial parts of the existing track are required to meet current capacity and performance requirements, there are certain assets not utilised or required for coal haulage. These assets have not been included in the valuation.[18] The map at Appendix 6 of the Valuation Report highlights in red those parts of the Gap to Turrawan which are included in the valuation.

Questions for comment

- Is the overall approach to optimisation in the proposed DORC valuation appropriate?
- Is the approach to determination of 'optimisation factors' appropriate? Do you have any

[15] ARTC, *Supporting Submission*, 28 June 2013, p. 15.
[16] E&P, *Valuation Report*, 28 June 2013, p. 44.
[17] ARTC, *Supporting Submission*, 28 June 2013, p. 17.
[18] E&P, *Valuation Report,* 28 June 2013, pp. 24-5.

comment on any of the specific optimisation factors set out at section 7 of the E&P Valuation Report?

- Is the configuration optimisation of the Gap to Turrawan Segments appropriate? That is, have the appropriate sections been included in the valuation as depicted in the map at Appendix 6 of the E&P Valuation Report?

- Is it appropriate for ARTC to deal with differences in maintenance costs between the MEERA and the existing assets in the annual compliance assessment?

- To what extent does the Gap to Turrawan infrastructure existing as at 1 January 2013 reflect the modern equivalent asset?

2.2.3 Depreciation

The DORC has been calculated by applying depreciation to the ORC, determined having regard to the condition and remaining life of the assets.

The method for determining depreciation is specific to each asset classification. The basis for depreciation ranged from asset utilisation to date, survey of asset condition, or age of the asset depending on such things as historically accepted practice and availability of historical utilisation, condition and age data.

Details of the depreciation applied to each asset classification are available at sections 4.8 and 7 of the E&P Valuation Report.[19]

Questions for comment

- Is the proposed approach to determining depreciation for each asset classification appropriate?

- Do you have any comment on any of the assumed asset lives and specific depreciation factors set out at section 7 of the E&P Valuation Report?

2.3 Indicative Service and Indicative Access Charges

ARTC proposes that the rail infrastructure from Gap to Turrawan will form part of Pricing Zone 3 for the purpose of determining the Indicative Service and the associated Indicative Access Charges. ARTC considers that incorporating the Gap to Turrawan Segments into Pricing Zone 3 has a number of advantages and efficiencies such as:

- providing for a simpler pricing and performance management structure for both Access Holders[20] and ARTC;

- allowing a single application of the RAB and RAB Floor Limit roll-forward, loss capitalisation, pricing limits and unders and overs accounting in the extended Pricing Zone 3; and

[19] E&P, *Valuation Report*, 28 June 2013, pp. 20-1, 32-47.

[20] Defined under clause 14 of the HVAU as an Applicant who has been granted Access Rights to the Network.

- allowing a single application of the system wide true-up test to the extended Pricing Zone 3 under the varied 2012 HVAU.

The proposed Initial Indicative Service and Initial Indicative Access Charge for the Gap to Turrawan Segments for the 2014 calendar year is detailed in table 2 below.

Table 2: 2014 Initial Indicative Service and Access Charge

Pricing Zone 3	**Non-TOP $/kgtkm (ex GST)**	**TOP $/kgtkm (ex GST)**	**Initial Indicative Service Characteristics**
Initial Indicative Service 1	0.958	6.276	25 tonne axle load 80 kph maximum speed (loaded) 80 kph maximum speed (empty) 82 wagon length 1350 metres maximum train length Section run times as per applicable Hunter Valley standard working timetable

Source: ARTC, *Supporting Submission*, 28 June 2013, p. 21.

ARTC states that these charges are based on current expectations of volumes and costs for the 2014 calendar year for Pricing Zone 3. ARTC submits that it has also taken a number of other factors into account in determining the forecast Initial Indicative Access Charge, including ARTC's current forecast of operating expenditure for Pricing Zone 3, the existing 2013 Initial Indicative Access Charge for Pricing Zone 3 and the pricing principles in clause 4.13 of the HVAU.[21]

ARTC notes Access Holders have not yet provided or proposed variations to their 2014 volumes in accordance with clause 4.20(a) of the HVAU so the finalised Initial Indicative Access Charge may differ. Once 2014 volumes are finalised ARTC has advised it will resubmit a finalised Initial Indicative Access Charge for Pricing Zone 3 for the ACCC's approval.

Questions for comment

- Is the proposed Initial Indicative Service and Access Charge for the Gap to Turrawan Segments appropriate?
- Are the factors ARTC has had regard to in determining the proposed Initial Indicative Access Charge appropriate?
- Is the proposed access charge for Pricing Zone 3 significantly higher or lower than the current access charges faced by parties using the Gap to Turrawan Segments?

21 ARTC, *Supporting Submission*, 28 June 2013, p.20.

2.4 Drafting amendments

ARTC proposes a number of drafting amendments to the HVAU that are to apply if the ACCC approves the Proposed Variation to incorporate the additional Segments between the Gap and Turrawan.

ARTC submits that the drafting amendments to the HVAU seek to:

- incorporate the Gap to Turrawan Segments under the HVAU;
- include the four additional Segments from Gap to Turrawan in Pricing Zone 3;
- include the Gap to Turrawan Segments in relevant illustrative maps;
- clarify the Initial RAB for the Gap to Turrawan Segments as at the date they are incorporated in the HVAU, which is to be rolled forward in accordance with the principles in clause 4.4 of the HVAU;
- to prescribe the Initial Indicative Access Charges for the extended Pricing Zone 3; and
- recognise ARTC's quarterly and annual reporting obligations apply to the Gap to Turrawan Segments.

The proposed drafting amendments are attached to ARTC's variation application at Attachment A.[22]

Questions for comment

- Is the drafting of the Proposed Variation sufficiently clear?
- Is the drafting of the Proposed Variation consistent with the intention of the Proposed Variation as stated by ARTC in its variation application?

22 ARTC, *Application by ARTC to vary the Hunter Valley Access Undertaking to incorporate Gap to Turrawan Segments*, 28 June 2013, pp. 5-9.

3 Legal test for accepting an access undertaking variation

Under paragraph 44ZZA(7)(b) of the Act, an access provider may withdraw or vary an access undertaking at any time after it has been accepted by the ACCC, but only with the consent of the ACCC.

If the ACCC consents to the variation, the provider is required to offer third party access in accordance with the varied access undertaking. An access undertaking is binding on the access provider and can be enforced in the Federal Court upon application by the ACCC.

Subsection 44ZZA(7) allows the ACCC to consent to a variation of an accepted access undertaking if it thinks it appropriate to do so, having regard to the matters contained in subsection 44ZZA(3), which are:

- the objects of Part IIIA 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 or services; and
    - include a return on investment commensurate with the regulatory and commercial risks involved; and
- access price structures should:
    - allow multi-part pricing and price discrimination when it aids efficiency; and

- not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and

- access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.

3.1 Timeframes for ACCC decisions and clock-stoppers

Subsection 44ZZBC(1) of the Act 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'). A request made to the ACCC for the withdrawal or variation of an access undertaking is an access undertaking application.

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 subsection 44ZZBC(6).

The Act contains 'clock-stoppers' that mean certain time periods are not taken into account when determining the expected period (see subsection 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: subsections 44ZZBC(4) and (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;

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

3.1.1 Information requests

Subsection 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.