



Australian
Competition &
Consumer
Commission

Decision

Australian Rail Track Corporation's application to vary the 2011 Hunter Valley Access Undertaking

29 June 2017

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Abbreviations and acronyms

Act	Competition and Consumer Act
ACCC	Australian Competition and Consumer Commission
ARTC	Australian Rail Track Corporation
AHA	Access Holder Agreement
Capex	Capital expenditure
FTE	Full Time Equivalent
GTK	Gross Tonne Kilometres
HRATF	Hunter Rail Access Task Force
HVAU	Hunter Valley Coal Network Access Undertaking
HVCCC	Hunter Valley Coal Chain Coordinator
IAHA	Indicative Access Holder Agreement
IAU	Interstate Access Undertaking
IPART	Independent Pricing and Regulatory Tribunal
NSWRAU	New South Wales Rail Access Undertaking
Opex	Operating expenditure
OSA	Operator Sub-Agreement
PWCS	Port Waratah Coal Services
PZ1, PZ2, PZ3	Pricing Zone 1, Pricing Zone 2, Pricing Zone 3
RAB	Regulatory Asset Base
RCG	Rail Capacity Group
RML	Remaining Mine Life
ROR	Rate of Return
TOP	Take-or-Pay
Track Km	Track Kilometres
Train Km	Train Kilometres
TUT	True-Up Test
WACC	Weighted Average Cost of Capital
WAML	Weighted Average Mine Life

Executive Summary

On 29 June 2017, the Australian Competition and Consumer Commission (**ACCC**) consented to the Australian Rail Track Corporation's (**ARTC's**) 16 June 2017 application (**Application**) to vary its 2011 Hunter Valley Coal Network Access Undertaking (**2011 HVAU**) under section 44ZZA(7) of the *Competition and Consumer Act 2010* (Cth) (**the Act**), having regard to the matters listed under section 44ZZA(3) of the Act. The current HVAU is due to expire on 30 June 2017.

This Decision to consent to the Application follows an extensive assessment process of prior iterations of a proposed HVAU throughout 2015, 2016 and 2017, and two extensions to the 2011 HVAU, incorporating extensive public consultation with stakeholders. All relevant submissions to these processes have informed the ACCC's position in this Decision. The short period between lodgement of the most recent variation and the expiry date of the current undertaking has meant that there has been limited opportunity for ACCC consultation on the Application.

June 2017 Application

The Application seeks to vary the term of the 2011 HVAU until 31 December 2021, at a real pre-tax rate of return (**ROR**) of 5.38 per cent and a nominal pre-tax ROR of 7.91 per cent, with a remaining mine life (**RML**) of 23 years from 1 July 2016. The ACCC notes that a ROR has been specified in ARTC's Application and has not been calculated on the basis of an accepted methodology.

ARTC also seeks to include a revised corporate overhead cost methodology and allocators and an obligation on ARTC to engage in good faith negotiations with stakeholders to develop a further variation to the 2011 HVAU. The future variation, to be lodged with the ACCC by 31 December 2017, is intended to deal with a limited number of the matters raised in the ACCC's 2017 HVAU Draft Decision that were yet to be addressed by ARTC when it withdrew from that regulatory process on 8 May 2017.

Regulatory certainty

Although stakeholders support the ACCC accepting ARTC's Application, this support does not reflect an agreed position between industry and ARTC on key elements as was the case when the 2011 HVAU was originally accepted on 29 June 2011. In particular, the ROR proposed by ARTC is higher than that considered appropriate by the ACCC in its 2017 HVAU Draft Decision using a standard regulatory approach for estimating a ROR. Stakeholder submissions have expressed ongoing concerns with a number of other proposed clauses and suggest that support for the acceptance of the Application does not necessarily indicate a consensus view or the outcome of commercial negotiations on these matters.

However, stakeholders have raised concerns that if the Application to vary the 2011 HVAU is not consented to by the ACCC prior to 1 July 2017, regulation would revert to the Independent Pricing and Regulatory Tribunal (**IPART**) and the New South Wales Rail Access Undertaking (**NSWRAU**). While the ACCC does not comment on the appropriateness or otherwise of that regulatory regime, stakeholders consider that this outcome would be inefficient and would result in significant regulatory and commercial uncertainty. In light of this, and the limited time that ARTC has allowed for its Application to be assessed, stakeholders consider they have no alternative but to support ARTC's proposed variation in order to ensure the continued operation of an HVAU after 30 June 2017.

The ACCC considers that stakeholders' support for the Application reflects a desire to maintain regulatory certainty from 1 July 2017. The ROR proposed by ARTC in response to the ACCC's view on the ROR (and the other elements of ARTC's Application as indicated in the 2017 HVAU Draft Decision) has been accepted by stakeholders in order to secure that certainty. The ACCC accepts stakeholders' views on the desirability for certainty of a known regulatory regime until 2021 over an unplanned and rushed transition to a regime that may give rise to uncertainties as to the commercial parameters and the operational approach to be adopted.

This is a key factor in the ACCC's decision to consent to ARTC's proposal to vary the 2011 HVAU on the terms in its Application. The reasoning for this, as well as other supporting reasons, is set out in this Decision.

The ACCC acknowledges and shares stakeholders concerns that the outcome of this process illustrates significant issues with the current regulatory framework as it applies to the Hunter Valley rail network.

Next steps

ARTC intends to commence good faith negotiations with stakeholders to develop a further variation application to incorporate matters outstanding from the ACCC's 2017 HVAU Draft Decision. Given the complexity of the issues outstanding, the ACCC expects that ARTC will commence good faith negotiations with stakeholders in a timely manner in order to meet their commitments under the Application. The ACCC also expects ARTC to engage with it as early as possible to provide the information the ACCC requires in relation to the proposed future variation.

1. Introduction

On 6 June 2017, the Australian Rail Track Corporation (**ARTC**) submitted an application to vary the 2011 Hunter Valley Access Coal Undertaking (**2011 HVAU**) pursuant to section 44ZZA(7) of the *Competition and Consumer Act 2010* (Cth) (**the Act**). ARTC subsequently submitted a revised variation application incorporating finalised access charges on 16 June 2017 (**the Application**).

The Application seeks to vary the term of the 2011 HVAU by 4.5 years to 31 December 2021 and sets out a commercial position proposed by ARTC for the key terms, including Rate of Return (**ROR**) and Remaining Mine Life (**RML**). The Application also seeks to include a revised corporate overhead cost methodology and allocators, and an obligation to engage in good faith negotiations with Access Holders to develop a further variation application to be lodged with the ACCC by 31 December 2017.

On 29 June 2017 the ACCC consented to this variation under section 44ZZA(7) of the Act, having regard to the matters listed under section 44ZZA(3) of the Act.

1.1. 2011 Hunter Valley Access Undertaking

An Inter-governmental Agreement between the State and Commonwealth Transport Ministers established ARTC to provide below-rail access to the interstate network. This was intended to improve, among other things, the efficiency and competitiveness of the rail industry by providing a single point of access for the standard gauge interstate rail network.

As a condition of ARTC's 60 year lease of the Hunter Valley rail network from the NSW Government, ARTC was required to submit an undertaking to the ACCC for its Hunter Valley rail network.

On 29 June 2011, the ACCC accepted the 2011 HVAU under Part IIIA of the Act. The Hunter Valley rail network was previously subject to the New South Wales Rail Access Undertaking (**NSWRAU**), administered by the Independent Pricing and Regulatory Tribunal (**IPART**).

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 NSW and comprises the following key features:

- preliminary sections on the operation and interpretation of the HVAU
- a process for parties to apply for access with ARTC, and a negotiate/arbitrate framework, with ACCC arbitration as a back-stop, to facilitate agreement of mutually acceptable terms and conditions of access
- a revenue cap and pricing methodologies to promote access pricing that is efficient and that reflects the cost of providing access to the network
- numerous provisions regarding network capacity management, including provisions designed to facilitate alignment of capacity management on the Hunter Valley rail network with other components of the supply chain
- a framework for governing investment in the network and creation of additional network capacity. The framework allows for endorsement of investment proposals by the Rail Capacity Group (**RCG**), and a user funding option where Access Holders can fund a project if ARTC ceases or refuses to contribute to its development
- liability and performance accountability/incentive measures with implications for both ARTC and access seekers

- operational provisions regarding the management of trains on the network.¹

1.2. 2016 HVAU and 2017 HVAU assessment

On 23 December 2015, ARTC submitted the proposed 2016 HVAU to the ACCC for assessment as a replacement to the 2011 HVAU. However on 14 June 2016, after consulting with industry, ARTC withdrew the 2016 HVAU. On 16 June 2016, ARTC submitted an application to extend and vary the terms of the 2011 HVAU to 31 December 2016—which the ACCC accepted on 22 June 2016. On 18 October 2016, ARTC submitted an additional application to extend and vary the terms of the 2011 HVAU to 30 June 2017—which the ACCC accepted on 23 November 2016.

On 9 December 2016, ARTC submitted the proposed 2017 HVAU to the ACCC for assessment. On 20 April 2017, the ACCC published a draft decision to not accept the 2017 HVAU, providing detailed recommendations as to how the various issues may be resolved by ARTC.² On 8 May 2017, prior to the end of the consultation period, ARTC withdrew the 2017 HVAU from the ACCC's consideration.

1.3. June 2017 Application

On 6 June 2017, the ACCC received an application from ARTC to vary the term and the commercial parameters of the 2011 HVAU. ARTC has specified a commercial position for ROR and RML as it submits that it is unable to accept the ACCC's position outlined in the 2017 HVAU Draft Decision.³ The ACCC notes that the ROR specified in ARTC's Application has not been calculated on the basis of an accepted methodology.

ARTC submits that the Application will provide medium term regulatory certainty to ARTC and Access Holders and reflects 'amendments that have the support of the majority of Hunter Valley Coal Producers'.⁴

ARTC acknowledged at the time of submission that its application was incomplete as it did not contain access charges for the second half of 2017 in line with the revised commercial parameters, stating it would provide that pricing to the ACCC shortly.⁵ On 16 June 2017, ARTC submitted a revised application which mirrors the 6 June application but includes the access charges that will apply from 1 July to 31 December 2017.

The ACCC understands that ARTC's Application represents a 'package' that was offered to Access Holders in the Hunter Valley during consultations in early June 2017 as one of two regulatory alternatives that could apply from 1 July 2017.

The first is where the ACCC consents to the proposed variation prior to the expiry of the 2011 HVAU. Under this option, the 2011 HVAU would continue to apply from 1 July 2017 until 31 December 2021, with altered commercial parameters, minimal immediate operational changes, and a proposal to engage with stakeholders in the development of a future variation for certain matters outstanding from the ACCC's 2017 HVAU Draft Decision within 6 months.

¹ ACCC, *Decision – in relation to Australian Rail Track Corporation's Hunter Valley Rail Network Undertaking*, 29 June 2011, p. 7.

² id., *Draft Decision – Australian Rail Track Corporation's 2017 Hunter Valley Access Undertaking*, 20 April 2017, available at: <https://www.accc.gov.au/regulated-infrastructure/rail/hunter-valley-access-undertaking-2017/draft-decision>.

³ ARTC, *Application by ARTC to vary the Hunter Valley Access Undertaking to extend term*, 6 June 2017, p. 2.

⁴ Fullerton J, *ARTC 2011 Hunter Valley Coal Network Access Undertaking – Extension Application to the ACCC*, 6 June 2017, p. 1.

⁵ ARTC, *Application by ARTC to vary the Hunter Valley Access Undertaking to extend term*, 6 June 2017, p. 3.

The counterfactual, where ARTC did not submit an application to vary the 2011 HVAU or the ACCC did not consent to ARTC's proposed variation, regulation of the Hunter Valley rail network would by default revert to the NSWRAU regulated by IPART on 1 July 2017.

Given the commercial parameters in ARTC's Application are different to those that were considered appropriate in the ACCC's 2017 HVAU Draft Decision, and ARTC has not provided additional arguments in support of the change in approach, industry support for ARTC's proposal is of key significance to the ACCC's assessment of the Application.

1.4. Timeline of current HVAU assessment process

Table 1 below provides a timeline of the key stages of the ACCC's assessment.

Table 1: Timeline of ACCC assessment

Date	Event
29 June 2011	The ACCC accepts the 2011 HVAU under Part IIIA of the Act. The original expiry date of the 2011 HVAU was 30 June 2016.
23 December 2015	ARTC submits the 2016 HVAU for ACCC assessment as a replacement to the 2011 HVAU.
8 January 2016	ACCC publishes a consultation paper on the 2016 HVAU. The consultation period closes on 22 February 2016.
20 May 2016	ARTC submits its first variation application to extend the term of the 2011 HVAU to 31 December 2016.
23 May 2016	ACCC sends a letter to stakeholders seeking comments on ARTC's application to extend the 2011 HVAU.
14 June 2016	ARTC withdraws the 2016 HVAU from ACCC consideration.
16 June 2016	ARTC submits a revised application to vary the term of the 2011 HVAU to 31 December 2016.
22 June 2016	ACCC accepts the variation application to extend the term of the 2011 HVAU to 31 December 2016.
7 July 2016	ACCC publishes a letter to stakeholders outlining its preliminary views on the 2016 HVAU.
18 October 2016	ARTC submits a second variation application to extend the term of the 2011 HVAU to 30 June 2017.
19 October 2016	ACCC sends a letter to stakeholders seeking comments on ARTC's further application to extend the 2011 HVAU.
23 November 2016	ACCC accepts the variation to extend the term of the 2011 HVAU to 30 June 2017.
9 December 2016	ARTC submits the 2017 HVAU for ACCC consideration.
15 December 2016	ACCC publishes a consultation paper on the 2017 HVAU. The consultation period closes on 3 February 2017.
20 April 2017	ACCC publishes its Draft Decision on the 2017 HVAU. The consultation period closes on 12 May 2017.
8 May 2017	ARTC withdraws the 2017 HVAU from ACCC consideration.

Date	Event
6 June 2017	ARTC submits a third application to vary the term of the 2011 HVAU. The Application seeks a longer-term extension of 4.5 years, with an expiry date of 31 December 2021.
6 June 2017	ACCC publishes a consultation letter on the June 2017 application to vary the 2011 HVAU. The consultation period closes on 20 June 2017.
16 June 2017	ARTC submits a revised application to vary the term of the 2011 HVAU on the same terms as the 6 June 2017 application but now including access charges to apply from 1 July to 31 December 2017.
29 June 2017	ACCC publishes its Decision on the June 2017 application to vary the 2011 HVAU.

1.5. ACCC assessment

Section 44ZZA(7) of the Act provides that the ACCC may consent to a variation of an undertaking if it thinks it appropriate to do so, having regard to the matters set out in section 44ZZA(3) of the Act. Those matters are set out in chapter 2 of this Decision.

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’). Section 44ZZBC(2) of 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 stops 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.

However, in the current circumstances the ACCC has recognised the need to make a decision prior to the 30 June 2017 expiry of the 2011 HVAU.

1.6. Further information

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

<https://www.accc.gov.au/regulated-infrastructure/rail/artc-hunter-valley-access-undertaking/june-2017-variation-of-the-2011-hunter-valley-access-undertaking>

Alternatively, go to the ACCC’s homepage at www.accc.gov.au and follow the links to ‘Regulated Infrastructure’ ‘Rail’, to the ‘June 2017 variation of the 2011 Hunter Valley Access Undertaking’.

Previous undertaking applications to replace the 2011 HVAU and prior extension applications are also available on the ACCC’s website at:

<https://www.accc.gov.au/regulated-infrastructure/rail/artc-hunter-valley-access-undertaking>

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2. Legislative framework

2.1. Part IIIA of Competition and Consumer Act

The legislative framework for the ACCC's consideration of the Application is set out in Part IIIA of the Act. Division 6 of Part IIIA states that a 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 that service. The Act also allows the provider of an access undertaking (in this case, ARTC) to vary that undertaking at any time after it has been accepted by the ACCC, but only with the ACCC's consent.⁶

Section 44ZZA(7) of the Act provides that the ACCC may consent to a variation of an undertaking if it thinks it appropriate to do so, having regard to the matters set out in section 44ZZA(3) of the Act. This chapter of the Decision discusses, in general, how the ACCC has had regard to these matters under section 44ZZA(3) of the Act in making its decision in relation to the Application.

2.2. Threshold for accepting an access undertaking

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
 - 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, which provide 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
 - include a return on investment commensurate with the regulatory and commercial risks involved
 - access price structures should:
 - allow multi-part pricing and price discrimination when it aids efficiency
 - 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
 - access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.
- 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)

⁶ See section 44ZZA(7) of the Act. ARTC has previously submitted a number of variations to the 2011 HVAU for the ACCC's consideration. Further information is available at: <http://www.accc.gov.au/regulated-infrastructure/rail/artc-hunter-valley-access-undertaking>.

- 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
- any other matters that the ACCC thinks are relevant.

Section 44ZZA(3AA) of the Act provides that the ACCC must not accept an undertaking if a decision of the Commonwealth Minister is in force under section 44N that a regime for access to the service is an effective access regime. The ACCC notes that there is currently no effective access regime in place that applies to the Hunter Valley rail network that is the subject of the 2011 HVAU.

Lastly, section 44ZZA(3A) provides that the ACCC must not accept an undertaking unless:

- the provider or proposed provider of the service is a corporation (or partnership, or joint venture consisting solely of corporations); or
- the undertaking provides for access only to third parties that are corporations; or
- the undertaking provides for access that is (or would be) in the course of, or for the purposes of constitutional trade or commerce.

The ACCC is satisfied that the section 44ZZA(3A) requirements have been met.

2.3. Objects of Part IIIA

The ACCC is required to have regard to the objects of Part IIIA set out 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
- provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

2.3.1. Promotion of efficiency and competition

Efficient operation of, use of and investment in the Hunter Valley rail network may promote effective competition in a range of upstream and downstream markets. While the ACCC has not conducted a market definition analysis (such as would occur under Part IV of the Act), and therefore not reached a conclusive view on what constitutes a particular upstream or downstream 'market', the ACCC notes that access to the Hunter Valley rail network may have significance to competition between above-rail operators for services to coal and non-coal users of the network, and to competition between coal producers for upstream inputs to mining (e.g. mining tenements, labour) and sales to export and domestic customers.

ARTC sets this out in the preamble to the 2011 HVAU. Specifically, section 1.1(d) states:

ARTC recognises that the operation, maintenance, and investment in the development of the Hunter Valley rail network is primarily to improve utilisation and performance of rail services and to optimise coal export throughput in the Hunter Valley.

Further, ARTC recognises that it is a 'Hunter Valley coal industry objective to ensure that Coal Chain Capacity is maintained, developed and utilised efficiently'.⁷

⁷ See section 1.1(h) of the 2017 HVAU.

ARTC proposes minor changes to the introduction and objectives provisions in its Application as a result of changing market conditions and ARTC's role as a service provider forming part of the Hunter Valley Coal Chain. ARTC submits that these changes have been made to reflect a greater focus on efficiency⁸ rather than the previous emphasis towards investment and expansion of the network.

2.3.2. A consistent approach to access regulation

The second object of Part IIIA is to provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

ARTC's rail network in NSW is currently regulated by three access undertakings:

- 2011 HVAU
- 2008 Interstate Access Undertaking (**2008 IAU**), accepted by the ACCC on 15 July 2008
- NSWRAU.

In the current context, ARTC is seeking a 4.5 year extension to the term of the 2011 HVAU and other amendments that have the support of coal producers following the ACCC's consideration of two previous iterations of access undertakings intended to replace the 2011 HVAU.

ARTC submits its approach to submitting a further extension of the 2011 HVAU, rather than submission of a further new access undertaking application, reflects several factors:

- to provide medium term regulatory and pricing certainty, and consistency to ARTC and Access Holders⁹
- the successful operation of the 2011 HVAU, which ARTC has previously submitted has worked well as a framework to provide certainty for Access Holders, access seekers and ARTC.¹⁰

The ACCC also recognises that its consideration of the Application must have regard to the particular features and circumstances of the Hunter Valley rail network – taking into account the current regulatory framework, significance of the network to the Hunter Valley Coal Chain overall, existing commercial arrangements across the Hunter Valley coal export supply chain, and the change in relevant market conditions from those during the initial development of the 2011 HVAU.

2.4. Pricing principles in section 44ZZCA

The ACCC is required to have regard to the pricing principles specified in section 44ZZCA of the Act. In the 2011 HVAU, ARTC has provisions setting out pricing principles and methodologies relevant to the calculation of charges for access to the Hunter Valley rail network. The current Application includes a commitment by ARTC to lodge a further variation within 6 months to reflect the incorporation of path based pricing, and application of an incremental costs methodology. The ACCC considers that the pricing principles will be particularly relevant to these aspects of the 2011 HVAU.

⁸ ARTC, *Application by ARTC to vary the Hunter Valley Access Undertaking to extend term*, 6 June 2017, p. 1.

⁹ *ibid.*, p. 2.

¹⁰ *id.*, *2017 Hunter Valley Coal Network Access Undertaking Explanatory Guide*, 9 December 2016, p. 7.

2.5. Legitimate business interests of the provider

Section 44ZZA(3)(a) of the Act requires the ACCC to have regard to the legitimate business interests of the provider, in this case ARTC. ARTC has made a submission in support of the Application, to which the ACCC has had regard to as part of its assessment. The ACCC references this submission as it relates to particular issues.

The ACCC notes the relationship between the legitimate business interests of ARTC and the pricing principles specified in section 44ZZCA(a), which 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
- include a return on investment commensurate with the regulatory and commercial risks involved.

The Application proposed by ARTC specifies a commercial position for ROR and RML that is accepted (albeit with qualifications) by coal producers for the purposes of the Application in the current circumstances. The ACCC has had regard to that acceptance in assessing ARTC's proposal.

The ACCC also notes that the legitimate business interests of ARTC sometimes differ from the interests of access seekers, though this does not necessarily imply the interests are always in direct conflict. As a general consideration, the ACCC is of the view that the current Application and 2011 HVAU should provide an appropriate balance between the interests of ARTC and the interests of access seekers.

2.6. The public interest

Section 44ZZA(3)(b) of the Act requires the ACCC to have regard to the public interest, including the public interest in having competition in markets (whether or not in Australia).

The Hunter Valley Coal Chain is predominantly used for the export of coal from Australia, allowing Australian-based coal producers to sell coal to overseas customers. The ACCC therefore considers that the provision of effective access to the Hunter Valley rail network via the 2011 HVAU has the potential to enhance the efficiency of Australian coal producers seeking to compete with international rivals for the sale of coal to global customers. Domestic purchasers of Hunter Valley coal may similarly benefit from the enhanced efficiency and competitiveness of coal producers.

2.7. Interests of access seekers

Section 44ZZA(3)(c) of the Act requires the ACCC to have regard to the interests of persons who might want access to the service.

To assess the interests of access seekers the ACCC has conducted a public consultation process on the Application, the two previous extension applications, and the 2016 HVAU and 2017 HVAU applications, during which the ACCC sought and received submissions from a range of interested parties. As part of this Decision the ACCC has had regard to stakeholder submissions on the 2016 HVAU and 2017 HVAU where relevant. The ACCC has also met with interested parties to further discuss submissions and keep parties updated on the assessment process. Submissions by actual and potential access seekers made during consultation are particularly relevant in having regard to section 44ZZA(3)(c).

The ACCC considers that access seekers include those persons seeking access to the Hunter Valley rail network for the purpose of hauling coal, either to the Port of Newcastle for export or to domestic customers. The preamble to the 2011 HVAU recognises that the predominant usage of the Hunter Valley rail network is for rail haulage of export coal to the Port of Newcastle. Further, the HVAU contemplates coal producers entering agreements directly with ARTC for access rights, provided those rights are exercised via an above-rail operator.

While the predominant usage of the Hunter Valley rail network is for the transport of coal, the ACCC also considers that access seekers include those parties seeking access to the network for purposes other than hauling coal.

The ACCC also considers it important to recognise above-rail operators as access seekers or potential access seekers, noting that above-rail operators may share common interests with both coal and non-coal access seekers.

The ACCC has had regard to submissions from access seekers, and potential access seekers, and references these submissions as they relate to particular issues.

2.8. In accordance with an access code

Section 44ZZAA of the Act provides that a prescribed industry body may give a written code (known as an access code) to the ACCC setting out rules for access to a service. The ACCC may accept the code, if it thinks it appropriate to do so having regard to matters set out in section 44ZZAA(3).

In having regard to this matter in the current context, the ACCC notes that there is currently no access code in place that applies to the Hunter Valley rail network.

2.9. Any other matters the ACCC thinks are relevant

Section 44ZZA(3)(e) of the Act provides that, in deciding whether to accept an undertaking, the ACCC may have regard to any other matters it thinks are relevant.

For the reasons set out below, the ACCC considers it appropriate to have regard to the need for regulatory certainty, the Hunter Valley rail network's role as part of the overall Hunter Valley Coal Chain, and the extent to which the HVAU is sufficiently clear and certain in its terms, effect, and operation.

2.9.1. Regulatory certainty

The ACCC acknowledges the second object of Part IIIA is to provide a framework and guiding principles to encourage a consistent approach to access regulation. However, an overlapping consideration is the need for regulatory certainty for the Hunter Valley rail network. The ACCC notes that this is of particular importance given the circumstances surrounding ARTC's submission of the Application.

Stakeholder submissions raise concerns that if the Application to vary the 2011 HVAU is not consented to by the ACCC prior to 1 July 2017, regulation of the Hunter Valley rail network would revert to the NSWRAU. Stakeholders generally accept that the 2011 HVAU has operated well and their overriding concern with regard to regulation of the Hunter Valley rail network is to ensure industry stability and ongoing regulatory certainty. These submissions are set out in greater detail in chapter 4 below.

While the ACCC does not comment on the appropriateness or otherwise of the NSWRAU administered by IPART, it notes stakeholders' views that a reversion to this regime would be

inefficient and would result in significant regulatory and commercial uncertainties. Given these views, and the limited time that ARTC has allowed for its Application to be assessed, the ACCC also notes that stakeholders consider they have no alternative but to support ARTC's proposed variation in order to ensure the continued operation of the 2011 HVAU after 30 June 2017.

As such, the ACCC has had regard to regulatory certainty as an 'other matter' it thinks is relevant under section 44ZZA(3)(e) of the Act. However, the ACCC also considers that regulatory certainty is in the legitimate business interests of ARTC, the interests of access seekers and promotes the economically efficient operation of, use of and investment in infrastructure (one of the objects of Part IIIA).

2.9.2. Coal supply chain alignment

The ACCC notes that the Hunter Valley rail network is an important part of the overall Hunter Valley Coal Chain, in that it links the coal mines in the Hunter Valley with the coal export terminals at the Port of Newcastle. Consequently, as per its views in the 2011 HVAU Final Decision, the ACCC continues to view the promotion of alignment between the Hunter Valley rail network and other elements of the Hunter Valley Coal Chain as a relevant matter in the assessment of the Application.¹¹

The HVAU was designed with a view to promoting the efficiency of the overall Hunter Valley Coal Chain. It is accepted by parties at all levels of the coal supply chain (mines, below-rail, above-rail, and port terminals) that standalone capacities of the different elements of the supply chain do not translate into whole system capacity. The HVAU therefore includes several mechanisms designed to facilitate coordination and cooperation between various parties of the Hunter Valley Coal Chain.

The ACCC is proposing to have regard to alignment as an 'other matter' it thinks is relevant under section 44ZZA(3)(e) of the Act. However, the ACCC also considers that coal supply chain alignment is in the interests of access seekers, in the public interest, and promotes the economically efficient operation of, use of and investment in infrastructure.

2.9.3. Clarity and certainty of the HVAU

The ACCC considers it relevant that the HVAU provides for sufficient certainty and clarity in its terms, effect and operations, so as to enable:

- ARTC 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. In this regard, the ACCC notes that a sufficiently clear and certain HVAU is in the interests of ARTC and access seekers
- 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 access provider
- the ACCC to quickly and effectively resolve any potential enforcement concerns that may arise regarding potential non-compliance with the HVAU by ARTC.

¹¹ ACCC, *Decision – in relation to Australian Rail Track Corporation's Hunter Valley Rail Network Undertaking*, 29 June 2011, pp. 10.

3. ARTC's application

3.1. Preamble and request for information

3.1.1. Preamble

Section 1 of the 2011 HVAU is a preamble that provides background information, context and objectives. Sections 1.1 and 1.2 of the 2011 HVAU are important to understanding the overall intent, purpose and context of the undertaking, as well as providing guidance to the interpretation of the provisions.

ARTC proposes minor changes to the introduction and objectives provisions in its Application. ARTC submits that these changes have been made to reflect a greater focus on efficiency¹² rather than the previous emphasis towards investment and expansion of the network.

The amendments to the Preamble are the same as those proposed by ARTC in the 2017 HVAU.

3.1.2. Request for information

ARTC proposes to include a provision at section 1.5 of the 2011 HVAU that allows the ACCC to require ARTC to provide information or documents that are required to enable the ACCC to exercise its powers or functions in relation to a material obligation, right or process under the 2011 HVAU. The request for information provision is the same as that proposed in the 2017 HVAU, except for a minor amendment to reflect the ACCC's views in the 2017 HVAU Draft Decision.¹³

Section 1.5(b) of the Application sets out that the ACCC's request must: be in writing; include the reasons for the request; and state how the information or documents are to be provided. ARTC proposes to require a minimum 14 days from the date of the information request in order to comply with the notice.

ARTC proposes to include a set of exceptions to the request for information provision. Specifically, that ARTC is not required to provide information or documents:

- that ARTC considers, acting reasonably, would be onerous or oppressive to provide
- not within ARTC's possession or control
- that are subject to a legitimate claim of privilege
- that are not necessary for the ACCC to exercise its powers or functions in relation to a material obligation, right or process under the 2011 HVAU.

Reflecting the ACCC's views in its 2017 HVAU Draft Decision, as part of the Application ARTC also proposes to include section 1.5(d) which requires ARTC to engage with the ACCC if ARTC considers the exceptions at section 1.5(c)(i) or section 1.5(c)(iv) apply.

3.2. Term

ARTC proposes an extension period of 4.5 years, varying the expiry date of the 2011 HVAU to 31 December 2021.¹⁴ The half year will bring the 2011 HVAU into alignment with the

¹² ARTC, *Application by ARTC to vary the Hunter Valley Access Undertaking to extend term*, 6 June 2017, p. 1.

¹³ *id.*, *Draft Decision – Australian Rail Track Corporation's 2017 Hunter Valley Access Undertaking*, 20 April 2017, pp. 27-28.

¹⁴ *id.*, *Application by ARTC to vary the Hunter Valley Access Undertaking to extend term*, 6 June 2017, p. 1.

calendar year. The extended period is shorter than the term proposed in the 2016 HVAU and 2017 HVAU, in which ARTC proposed an undertaking term of 10 years and 9.5 years, respectively.

Section 2.3 of the 2011 HVAU provides for an 'operative' commencement date for the Application of 1 July 2017.

3.3. Rate of return and remaining mine life

Sections 4.7 and 4.8 of the 2011 HVAU details depreciation and ROR, which form a key part of ARTC's financial model. Under the 2011 HVAU, average RML is a proxy for the useful economic life of ARTC's Hunter Valley rail assets, which is used to calculate annual depreciation. ARTC's financial model uses:

- nominal pre-tax ROR for the Regulatory Asset Base (**RAB**) roll forward (section 4.4(a) of the 2011 HVAU)
- average RML for the RAB Floor Limit roll forward (section 4.4(b) of the 2011 HVAU)
- real pre-tax ROR and average RML to determine the Economic Cost (section 4.5 of 2011 HVAU) and Ceiling Revenue Limits (section 4.3 of the 2011 HVAU) of a Segment.

The Application proposes from 1 July 2016 to set:

- the average RML at 23 years
- real pre-tax ROR at 5.38 per cent
- nominal pre-tax ROR at 7.91 per cent.

ARTC states these commercial parameter values were developed as 'a compromise position in negotiations with producers to provide regulatory certainty.'¹⁵ ARTC submits its Application has 'the support of the majority of Hunter Valley Coal Producers'.¹⁶

This compares to the current 2011 HVAU where the:

- average RML is set at 22 years as at 1 July 2010 (or 16 years as at 1 July 2016)
- real pre-tax ROR is set at 9.10 per cent
- nominal pre-tax ROR is set at 11.83 per cent.

As part of ARTC's 2017 HVAU application, submitted to the ACCC for assessment on 9 December 2016 and withdrawn on 8 May 2017, ARTC proposed from 1 July 2016 to set:

- the average RML at 16.5 years
- real pre-tax ROR at 6.51 per cent
- nominal pre-tax ROR at 7.86 per cent.

3.4. Access charges

Under section 4.22 of the 2011 HVAU, ARTC proposes to update the indicative access charges for the period 1 July 2017 to 31 December 2017 (**2017H2**), to reflect the proposed commercial parameters in the Application.¹⁷ ARTC similarly amends clause 5.4 of the

¹⁵ id., *Application by ARTC to vary the Hunter Valley Access Undertaking to extend term*, 6 June 2017, p. 2.

¹⁶ Fullerton J, p. 1.

¹⁷ ARTC submitted the updated access charges to the ACCC on 16 June 2017.

Indicative Access Holder Agreement (**IAHA**) to reflect this change. ARTC notes that the prices are based on the existing structure of access charges in the 2011 HVAU.¹⁸

Table 2 sets out ARTC's Take-or-Pay (**TOP**) and non-TOP access charges applicable during 2017H2 by service type. It should be noted the access charges apply for trains as they traverse each Pricing Zone. For example, when a train using Non-Indicative Service 7 travels from Pricing Zone 3 (**PZ3**) to port, it pays in total \$13.356 per thousand Gross Tonne Kilometres (**GTK**) as it traverses PZ3 and then it pays in total \$7.098 per thousand GTK when it traverses Pricing Zone 1 (**PZ1**).

Table 2: TOP and non-TOP access charges for 2017H2 by service

	PZ1		PZ2		PZ3	
	(\$ per thousand GTK)		(\$ per thousand GTK)		(\$ per thousand GTK)	
	<i>TOP</i>	<i>non-TOP</i>	<i>TOP</i>	<i>non-TOP</i>	<i>TOP</i>	<i>non-TOP</i>
Initial Indicative Service 1	3.205	4.301	5.606	0.788	10.336	2.690
Initial Indicative Service 2	3.668	4.188				
Interim Service 1	3.260	4.374	5.698	0.801	10.941	2.712
Interim Service 3	3.886	4.199				
Non Indicative Service 1	4.956	3.953				
Non Indicative Service 2	4.081	3.544				
Non Indicative Service 6	3.276	4.307	5.724	0.789		
Non Indicative Service 7	3.455	4.306			9.901	2.792

Source: Section 4.22 of the 2011 HVAU

3.5. Variation Obligation

ARTC proposes to include section 2.3(d) to the HVAU, which is an obligation for ARTC to lodge a variation application to the ACCC (**variation obligation**), which:

- incorporates path based pricing
- applies an incremental cost methodology, such that:
 - PZ3 Access Holders contribute incremental costs for PZ1 for the remaining term of the Undertaking
 - Incremental maintenance costs are allocated on the basis of contracted capacity
 - TOP charges include incremental capital based on contracted capacity
 - A dual ceiling limit applies

Section 2.3(d) states that ARTC will engage in good faith negotiations with Access Holders in relation to a limited number of matters outstanding from the 2017 HVAU Draft Decision on the 2017 HVAU. ARTC is required to submit the variation application to the ACCC by 31 December 2017, or a later date as agreed with the ACCC in writing.

¹⁸ Fullerton J, p. 1.

ARTC notes that the inclusion of this obligation is consistent with discussions with producers.¹⁹ It also considers that the 6 month timeframe between the commencement of this variation and 31 December 2017 will allow for good faith negotiations with producers after the acceptance of this Application, and enable ARTC to prepare and provide further information.²⁰

3.6. Cost allocation

ARTC proposes a new cost allocation methodology and allocators for corporate overheads. This new methodology arises from work undertaken in the context of developing the operating expenditure (**opex**) efficiency mechanism in the 2017 HVAU.²¹ ARTC engaged Deloitte to develop an efficient baseline for the overhead costs of the Hunter Valley rail network.

Section 4.6 of the 2011 HVAU states that for the purposes of determining the Economic Cost of a Segment (under section 4.5 of the 2011 HVAU), ARTC will allocate Non-Segment Specific Costs and depreciation of, and return on, Non-Segment Specific Assets in accordance with the methodology in Schedule I. The ACCC's understanding of this methodology is set out below.

Step 1: identifying and allocating costs between ARTC's businesses

ARTC initially identifies and allocates the share of its costs between the Hunter Valley rail network and its other businesses (including the interstate network).

If the cost is exclusively identifiable with the Hunter Valley rail network, ARTC will allocate it to the Hunter Valley rail network. If not exclusively identifiable with the Hunter Valley rail network, ARTC will allocate the cost categories with the corresponding allocators, set out in Table 3 below. ARTC will identify the share of a cost category attributed to the Hunter Valley rail network by calculating its share of the relevant allocator, over the total of that allocator (where the total of that allocator includes costs attributed to the Hunter Valley rail network as well as ARTC's other businesses).

¹⁹ ARTC, *Application by ARTC to vary the Hunter Valley Access Undertaking to extend term*, 6 June 2017, p. 3.

²⁰ *ibid.*

²¹ *ibid.*

Table 3: Allocation methods

Cost category	Allocation method
Executive	Direct Stay-in-Business Costs ²²
Finance	Direct Stay-in-Business Costs
Strategy & corporate development	Train Km
People	FTE
Insurance	Premium based
Safety accreditation	Track Km
Property	Track Km
Communications	Train Km
Information Technology infrastructure & systems	FTE
Management of enterprise services	Direct Stay-in-Business Costs
Environment	Train Km
Engineering services	GTK
Corporate safety	GTK
Workplace health & safety	FTE
Risk	GTK
Allowance for efficiency projects	Direct Stay-in-Business Costs

Note abbreviations: Train Kilometres (Train Km); Full Time Equivalent (FTE); Track Kilometres (Track Km).

Source: Schedule I of the 2011 HVAU

By example, ARTC identifies the share of the Hunter Valley rail network in the 'Executive' cost category by calculating the share of Direct-Stay-in-Business Costs attributed to the Hunter Valley rail network as a function of the Direct-Stay-in-Business Costs attributed to all its businesses, or:

$$Executive_{Hunter\ Valley\ rail\ network} = \frac{Direct-Stay-in-Business\ Costs_{Hunter\ Valley\ rail\ network}}{Direct-Stay-in-Business\ Costs_{All\ ARTC\ businesses}}$$

Step 2: identifying and allocating costs between coal and non-coal customers

After ARTC has identified the share of the Hunter Valley rail network (under step 1), ARTC will allocate to its coal customers in the Hunter Valley rail network as follows:

- Where it is associated with indirect maintenance and indirect operational costs, ARTC will allocate based on the proportion that the GTK for its coal customers bears to the GTK for the entire Hunter Valley rail network.
- Where it is not associated with indirect maintenance and indirect operational costs, ARTC will allocate based on the proportion that the Direct-Stay-in-Business Costs for its

²² Defined under Schedule I as costs identifiable with the function of a corridor, or part of a rail network, being the operating and maintenance expenses plus corridor capital, non-infrastructure capital incidents, but excluding indirect management labour and capital for the purpose of increasing capacity and performance.

coal customers bears to the Direct-Stay-in-Business Costs for the entire Hunter Valley rail network.

Step 3: identifying and allocating costs between Segments

After ARTC has identified the share of costs allocated to its coal customers in the Hunter Valley rail network (under step 2), ARTC will allocate to Segments as follows:

- Where it is associated with maintenance, ARTC will allocate based on the proportion that the GTK for a Segment bears to the GTK for the Network.
- Where it is not associated with maintenance, ARTC will allocate based on the proportion that the Train Km for a Segment bears to the Train Km for the Network.

The proposed cost allocators at the Segment level (step 3) are unchanged from those in the current 2011 HVAU.

3.7. Annual compliance

Section 4.10 and Schedule G of the 2011 HVAU set out the requirements for the ACCC to conduct an annual compliance assessment each year to determine whether ARTC has complied with the financial model in the 2011 HVAU.

Broadly, section 4.10 of the 2011 HVAU sets out that:

- by 30 April each year, ARTC will submit to the ACCC documentation detailing:
 - the roll-forward of the RAB and the RAB Floor Limit
 - calculations relevant to reconciliation of Access revenue with the applicable Ceiling Limit and calculation of any unders and overs amounts
- the documentation provided by ARTC will meet the information provision guidelines and timeframes set out in Schedule G
- if the ACCC reasonably considers it requires additional information other than that already provided by ARTC, then the ACCC may request this information
- the ACCC will determine whether ARTC has:
 - rolled-forward the RAB and RAB Floor Limit in accordance with the 2011 HVAU
 - correctly reconciled Access revenue with the applicable Ceiling Limit and calculated the allocation of the total unders and overs amount in accordance with the 2011 HVAU
- the ACCC will assess whether ARTC has incurred Efficient costs and Efficient opex
- the ACCC may consider stakeholder submissions for determining the roll-forward of the RAB and RAB Floor Limit; except if capital expenditure (**capex**) has been endorsed by the RCG, then the ACCC considers the capex to be prudent
- the ACCC will publish its determination on its website
- ARTC will revise the closing RAB and manage Constrained Coal Customer Accounts in accordance with the ACCC's determination.

Schedule G sets out an indicative timeframe and the information ARTC will provide to the ACCC. For example, this information includes (but is not limited to) documentation:

- demonstrating ARTC's compliance with the roll-forward of the RAB and RAB Floor Limit, including:
 - an explanation on how components have been calculated and any assumptions used
 - a breakdown of each component into the Constrained Network and non-Constrained Network
 - a breakdown of capex values into Segments and assets
 - a table of each component and the outcomes of calculations
 - RCG endorsements of proposed capex
 - evidence of disposal values, including any RCG endorsement
- detailing ARTC's compliance with the Ceiling Limit and allocation of total unders and overs to Constrained Coal Customers
- setting out PZ3 Standard Access charges when the RAB exceeds the RAB Floor Limit for PZ3.

Section 4.9 of the 2011 HVAU sets out the unders and overs accounting process, which forms part of the annual compliance assessment for Constrained Coal Customers. This accounting process reconciles ARTC's access revenue from Constrained Coal Customers against the applicable Ceiling Limit. If revenue from Constrained Coal Customers exceeds the applicable Ceiling Limit, then ARTC has over collected and must refund the difference to Constrained Coal Customers. However, if revenue from Constrained Coal Customers is less than the applicable Ceiling Limit, then ARTC has under collected and may recoup the difference from Constrained Coal Customers.

As part of the annual compliance assessment, ARTC also submits its annual True-Up Test (**TUT**) (section 4.10(f) of the 2011 HVAU and Schedule 2 of the IAHA), which determines whether there was sufficient capacity available on the Hunter Valley rail network in a given period to meet all contracted entitlements. This takes into account reductions in capacity caused by maintenance, usage by non-coal trains and other factors. If the TUT finds that ARTC has provided insufficient capacity in a period, then ARTC is required to provide a rebate to affected users.

The Application sets out changes to the schedule of annual compliance assessments from 2016 to 2021. These changes arise from the expiry of the 2011 HVAU on 30 June 2016 and the 'backdating' period between 1 July 2016 and 30 June 2017. For this 'backdating' period, a pre-tax real ROR of 6.74 per cent and RML of 16 years (as at 1 July 2016) were previously used in determining access charges.²³ This differs from a pre-tax real ROR of 5.38 per cent and RML of 23 years (as at 1 July 2016) in the Application, resulting in ARTC over-recovering access revenue between 1 July 2016 and 30 June 2017.

For the 2016 calendar year, ARTC proposes a single annual compliance assessment but with a different ROR and RML to be applied in each half year for the calculation of capital related costs and, therefore the Ceiling Limit. Specifically, between:

- 1 January 2016 and 30 June 2016 (**2016H1**) a pre-tax real RoR of 9.10 per cent and RML of 16.5 years applies

²³ ARTC, *Application by ARTC to vary the Hunter Valley Access Undertaking to extend term*, 16 June 2016, p. 33; ARTC, *ARTC 2011 Hunter Valley Coal Network Access Undertaking Extension Application to the ACCC*, 18 October 2016, p. 34.

- 1 July 2016 and 31 December 2016 (**2016H2**) a pre-tax RoR of 5.38 per cent and RML of 23 years applies.

For 2017 and onwards, ARTC proposes annual compliance assessments for each calendar year with a pre-tax real ROR of 5.38 per cent and RML of 23 years (as at 1 July 2016).

For the 'backdating' period, the Application proposes to use the under and overs accounting process to reimburse Constrained Coal Customers for any over-recovery. For Coal Access Right holders originating from the non-Constrained Network (that is, PZ3 Access Holders), the Application proposes varying section 4.4(a)(ii) of the 2011 HVAU to 'make a one off adjustment to PZ3 Customers in respect to the backdating period'.²⁴ Specifically:

*Any one off adjustment to the revenue for Pricing Zone 3 Access Holders in respect of the backdating period 1 July 2016 to 30 June 2017 will be offset against Out-turn Revenue in the relevant calendar year for the purposes of this clause.*²⁵

The Application identifies the following two key benefits to Access Holders of its proposed changes to section 4.10 and subsequent sections of the 2011 HVAU:

- The approach brings forward access holders' rebates for 2016H2 compared with a scenario where the two halves of the year are assessed separately, in which case access holders would need to wait until the 2016H1 compliance assessment was complete for ARTC to lodge the next compliance assessment and for producers to receive a rebate.
- The approach maintains continuity of compliance assessments being on a calendar year cycle and consistency with the annual reconciliation for take or pay rebates and ad hoc charge rebates.²⁶

²⁴ id., *Application by ARTC to vary the Hunter Valley Access Undertaking to extend term*, 6 June 2017, p. 8.

²⁵ Section 4.4(a)(iii) of the 2011 HVAU.

²⁶ ARTC, *Application by ARTC to vary the Hunter Valley Access Undertaking to extend term*, 6 June 2017, p.4.

4. Stakeholder submissions

4.1. Hunter Rail Access Task Force

The Hunter Rail Access Task Force (**HRATF**)²⁷ supports the Application on the basis that it:

*...better satisfies the statutory requirements in section 44ZZA(3) than the only feasible alternative, which would be a reversion of the Hunter Valley regulatory framework to the NSWRAU from 1 July 2017.*²⁸

However HRATF specifies that its support is reluctant and should not:

*...be construed as reflecting the outcome of “commercial” negotiations. To the contrary...[HRATF’s] support is evidence of a lack of balanced commercial approach and regulatory oversight available to the industry under the current arrangements – which forces [HRATF] to accept an outcome that is materially less appropriate than the outcome of a standard, regulatory determination from the ACCC.*²⁹

HRATF states that lodging the Application extremely close to the expiry of the 2011 HVAU leaves no meaningful time to consider changes. HRATF submits that ARTC has put the Application forward on a ‘take it or leave it’ basis.³⁰

HRATF stresses the considerable regulatory and commercial uncertainty at stake if the 2011 HVAU expires and regulation returns to the NSWRAU, noting the following concerns:

- the NSWRAU has not had a requirement to evolve to reflect developments in the coal sector over the past decade
- it is unclear how the suite of access agreements (and Operator Sub-Agreements (**OSAs**)) would transition to an ex-post, bilateral negotiate/arbitrate model contemplated by the NSWRAU
- the range of industry (and Hunter Valley Coal Chain) coordinator arrangements would be lost—including the Hunter Valley Coal Chain Coordinator (**HVCCC**), the RCG and interactions with coal terminals at Newcastle
- industry would likely lose any right to recover overpayments resulting from the interim tariffs that applied during the previous two extensions of the 2011 HVAU.³¹

HRATF sets out the process to date—detailing that ARTC has twice in the last 2 years submitted and subsequently withdrawn a proposed replacement HVAU. HRATF states this process has been time consuming, costly, and frustrating for the industry.³²

HRATF considers this process demonstrates an inherent weakness in applying a voluntary regime to establish an enduring and predictable framework for the Hunter Valley rail network.³³

²⁷ The Hunter Rail Access Task Force is a group of nine coal producers who access the Hunter Valley rail network – Anglo American, Bloomfield, Coal & Allied, Glencore, Idemitsu, Hunter Valley Energy Coal, Peabody, Whitehaven, and Yancoal.

²⁸ Hunter Rail Access Task Force, *HRATF response to 2011 Hunter Valley Access Undertaking (HVAU) variation application*, 20 June 2017, p. 2.

²⁹ *ibid.*

³⁰ *ibid.*, p. 1.

³¹ *ibid.*, p. 2.

³² *ibid.*

³³ *ibid.*

HRATF states that the approach taken in the 2017 HVAU Draft Decision should be used as a starting point for any future HVAU or alternative regulatory framework. HRATF reiterates the views in its previous submissions on the 2016 HVAU and 2017 HVAU that the regulatory framework governing the Hunter Valley rail network should set out a defined and repeatable methodology for determining the key commercial parameters.³⁴

HRATF considers that a balanced and reasonable opex efficiency mechanism is unlikely to be developed commercially with ARTC on a voluntary basis, based on HRATF's experience of the development process over the last 2 years. Consequently, HRATF considers it unlikely to be of value to incur further immediate cost or distraction working with ARTC on its development.³⁵

In the absence of an opex efficiency mechanism, HRATF seeks further engagement and transparency in the ACCC's ex-post opex efficiency assessment as part of future annual compliance processes. HRATF requests that the ACCC develop a consultation framework that allows all opex documentation obtained under section 4.10 of the 2011 HVAU as part of the compliance assessment, or under section 1.5 as part of the new request for information provision, to be shared with Access Holders. This should include a process for direct engagement with industry and ARTC to test any opex claims.³⁶

HRATF supports the proposed approach to backdating tariffs to reflect the new commercial parameters.³⁷

HRATF states that the proposed overhead cost methodology and allocators are not agreed or appropriate. HRATF states that HRATF and industry have not had meaningful engagement around this process and that the draft Deloitte report was only made available to the wider HRATF producers very recently, following considerable internal review with and by ARTC. ARTC states that the proposed approach is likely to shift \$6-8 million from non-coal to coal users.³⁸

However HRATF states that ARTC has made clear that they will not accept any extension of the current HVAU without the Deloitte allocators for overheads being adopted.³⁹ On this basis HRATF supports the proposal, however requests that the ACCC undertake a rigid and thorough validation of ARTC's overhead costs as part of future compliance assessments.⁴⁰

Noting the urgency of extending the 2011 HVAU, HRATF supports the approach taken with variation obligation at section 2.3(d) of the 2011 HVAU to address outstanding issues. However, HRATF requests that ARTC consider incorporating other amendments previously raised by ARTC, HRATF and/or the ACCC, such as:

- membership and operation of the RCG
- improvements in the operation of the TUT
- various changes to the Access Holder Agreement (**AHA**) and OSA.⁴¹

HRATF notes that section 2.3(d) commits ARTC to engage in good faith negotiations with Access Holders in relation to the variation obligation. HRATF requests that in its decision,

³⁴ *ibid.*

³⁵ *ibid.*, pp. 2–3.

³⁶ *ibid.*, p. 3.

³⁷ *ibid.*, p. 4.

³⁸ *ibid.*

³⁹ *ibid.*

⁴⁰ *ibid.*

⁴¹ *ibid.*, pp. 4–5.

the ACCC set out a minimum engagement model (and timing) that it considers necessary to satisfy this condition.⁴²

4.2. AGL

AGL reiterated its concerns raised in a previous letter to the ACCC on 2 February 2017 in relation to the 2017 HVAU.

Nevertheless, AGL was pleased to note that the term defined in the latest version of the 2017 HVAU has been reduced from 9.5 years.⁴³

AGL continued to express its dissatisfaction with the lack of flexibility in the AHA to deal with variations in coal haulage quantities and long-term coal supply contracts.⁴⁴ They submit that given the significant industry uncertainty in the short term in relation to domestic coal-fired power generation AGL's Hunter Valley power stations need the flexibility to contract for shorter terms and from various locations.⁴⁵

Further, AGL submits that an AHA term of 2 years would provide sufficient certainty to ARTC for maintenance and planning purposes, and there is no obligation on ARTC to provide access where no capacity exists.⁴⁶

AGL also raises issues around the operation of the renewal notice provisions, or clauses 2.4 and 2.5 in the train path schedule, in the previously proposed 2017 AHA and the 2011 IAHA. In particular, they note:

under the terms provided, should an access holder fail to issue a renewal notice, the term of the AHA can only be extended if another access seeker applies for the paths. Accordingly, a situation may arise where an access holder wants to extend its AHA term, and the rail capacity is available, but the access holder will have to wait until another party applies for the same paths before it can apply for those paths.⁴⁷

While it accepts that an Access Holder may lose its automatic right to extend the term of the contract if it fails to issue a renewal notice, AGL submits this should not preclude the Access Holder from extending the term at a later stage, if those paths are still available, without having to wait until another party applies for those paths.⁴⁸

AGL also has concerns about transparency, suggesting the following improvements:

- greater data transparency so that the performance of AGL trains can be compared with the average performance of all trains on the relevant rail network
- inclusion of all coal Access Holders in the RCG, as this will allow more equitable and fulsome participation in decision making processes that impact rail users.⁴⁹

⁴² *ibid.*, p. 5.

⁴³ AGL, *ARTC 2017 HVAU – ACCC Consultation Paper*, 21 June 2017, p. 1.

⁴⁴ *ibid.*

⁴⁵ *ibid.*

⁴⁶ *ibid.*

⁴⁷ *ibid.*, p. 2.

⁴⁸ *ibid.*

⁴⁹ *ibid.*

4.3. Anglo American

Anglo American supports the Application on the basis of the economic parameters proposed.⁵⁰ Anglo American notes that as a member of HRATF, it:

*...shares the concerns about the process expressed in the HRATF submission, and the disappointment of HRATF that a reasonable outcome on economic parameters as proposed in the [2017 HVAU] Draft Decision will now not be given effect to.*⁵¹

However, Anglo American expresses reservations about the requirements ARTC proposed to be imposed on the subsequent variation regarding:

- incremental capital costs being allocated on the basis of contracted capacity
- TOP charges including incremental capital based on contracted capacity.⁵²

Anglo American is concerned that the proposed variation, as it relates to the incremental cost methodology, is not consistent with the criteria under section 44ZZA(3).⁵³

Anglo American noted the ACCC's views in the 2017 HVAU Draft Decision on ARTC's approach to incremental cost, and reiterated its previous submissions on ARTC's proposed approach to incremental cost in the 2017 HVAU.⁵⁴

Anglo American stated that it would prefer that sections 2.3(d)(ii)(B) and 2.3(d)(ii)(C) of the Application be removed. However, it also considers that the ACCC should make it clear that:

*...any approval of an amendment inserting that variation mechanism is not based on any determination that such an amendment is appropriate, and is simply a recognition of ARTC's ability to submit an amendment (which is subject to the ACCC's approval).*⁵⁵

However, Anglo American considers that even in the event that the ACCC made such a statement, the inclusion of the future variation provision effectively dictates what the outcome of good faith negotiations must be, thereby (on its face) precluding other outcomes.⁵⁶ To this end, Anglo American considers that it would be useful if the ACCC's Decision confirms that:

- ARTC is permitted and encouraged to consult on the appropriate approach to the matters included in the variation obligation (i.e. not being restricted to the matters currently described in the drafting)
- if consultation results in a different proposal that is considered appropriate, the ACCC would welcome the submission of a subsequent variation of a different character.⁵⁷

4.4. Aurizon

Aurizon recommends the ACCC accept the Application and states it strongly supports the regulatory certainty that would be obtained from the ACCC's acceptance of the application.⁵⁸

⁵⁰ Anglo American, *Submission to the Australian Competition and Consumer Commission - Extension of 2011 Hunter Valley Coal Network Access Undertaking*, 20 June 2017, p. 3.

⁵¹ *ibid.*

⁵² *ibid.*

⁵³ *ibid.*, p. 4.

⁵⁴ *ibid.*, pp. 4–5.

⁵⁵ *ibid.*, p. 6.

⁵⁶ *ibid.*

⁵⁷ *ibid.*

Aurizon notes ARTC's application requires ARTC to submit a further variation by 31 December 2017 on matters including path based pricing and the application of an incremental cost method. Aurizon states:

these matters are not subject to a consensus view among relevant stakeholders and the ACCC's draft decision on the 2017 HVAU of 20 April 2017 did not determine whether path based pricing most effectively satisfies the matters the ACCC is required to have regard to relative to a potential alternative pricing proposal.⁵⁹

However, Aurizon states it:

recognises the benefits of considering changes to the price structure through a separate and deferred regulatory process rather than as part of the consideration and approval of a new access undertaking in order to avoid unnecessary delays in its approval.⁶⁰

In relation to future reviews on price structure, Aurizon notes:

- the ACCC has not formed a view on whether path-based pricing is consistent with the legislative criteria legislative criteria under section 44ZZA(3) of the Act
- a path based price is undefined and does not necessitate the entire fixed costs of access being recovered through a path based pricing metric
- notwithstanding the proposed drafting in the variation which only requires ARTC to consult with Access Holders, Aurizon holds a reasonable expectation that ARTC will consult with all relevant stakeholders on the variation
- the ACCC's consideration of any future variation to incorporate path based pricing is subject to the relevant statutory requirements under section 44ZZA(3) of the Act and it is Aurizon's understanding the ACCC's approval of the extension, with reference to incorporating path based pricing, does not require the ACCC to accept a variation to the approved undertaking which includes a path based price.⁶¹

4.5. Centennial Coal

Centennial is in broad agreement with the Application, however notes its concerns with the proposal to incorporate path based pricing, and with the allocation of costs based on actual usage rather than contracted capacity.⁶²

Centennial notes that it is prevented from having longer trains due to restrictions in the adjoining network, and stresses that it should never be disadvantaged on account of having to travel across an adjoining network.⁶³

Centennial's chief concerns are:

...firstly the path based pricing for those shippers who are prevented from having longer trains by restrictions in the adjoining network, and secondly, changes from contracted to actual tonnes as a means of allocating costs.⁶⁴

⁵⁸ Aurizon, *Application to vary the 2011 Hunter Valley Access Undertaking*, 20 June 2017, p. 1.

⁵⁹ *ibid.*

⁶⁰ *ibid.*, p. 2.

⁶¹ *ibid.*, p. 3.

⁶² Centennial Coal, *Re: Consultation on proposed variation to the Australian Rail Track Corporation Limited 2011 Hunter Valley Coal Network Access Undertaking*, 13 June 2017, p. 1.

⁶³ *ibid.*

⁶⁴ *ibid.*

Centennial submits that ARTC has assured Centennial it will engage in a consultation process that effectively deals with its concerns starting as soon as July 2017.⁶⁵

4.6. HVCCC

The HVCCC support ARTC's Application as the most effective option available for ongoing industry stability and certainty.

The HVCCC submits that the operational and capacity framework for the Hunter Valley Coal Chain established by the 2011 HVAU has proven effective in enabling capacity, and efficiency. Any reduction, displacement, or elimination of this framework, and the role of the HVCCC in that, presents increasing risk to efficient operation across the various coal chain stakeholders.⁶⁶

The HVCCC notes the consequences if the ACCC does not consent to the Application:

...[if] regulatory control of the Hunter Valley Coal Chain reverts to...IPART operating under the regime established by the NSW Rail Access Undertaking, the adverse impact to the entire coal industry has the potential...to be severe. The commercial and operational parameters under IPART are, at best, uncertain, meaning the operational impact would be immediate and industry wide.⁶⁷

Lastly, in relation to regulatory certainty, the HVCCC strongly believes that the HVAU, and ongoing certainty of that regulatory construct, is critical to the stability and short to medium term, and indeed long term, success of the Hunter Valley Coal Chain.

The HVCCC also notes its support for certain provisions from the 2016 HVAU and 2017 HVAU which have not been included as part of the Application. In particular, the inclusion of principles from the Hunter Valley Supply Chain Alignment Protocol, and the mandatory review provisions. The HVCCC submits that these should be further considered as part of any future variation or extension of the 2011 HVAU.

4.7. Idemitsu

Idemitsu is of the view that despite the circumstances that have led to the Application and the possible alternative of reverting to the NSWRAU the ACCC should approve the Application.⁶⁸ Idemitsu submits that:

...reverting to the current NSWRAU would result in significant regulatory and commercial uncertainty, as well as being a considerable backward step in the operational efficiency and capacity framework of the Hunter Valley coal chain. The NSWRAU would require substantial amendments to accommodate access agreements, operational frameworks and industry interfaces (i.e RCG, HVCCC etc).⁶⁹

⁶⁵ ibid.

⁶⁶ Hunter Valley Coal Chain Coordinator, *Re: HVCCC submission in response to ACCC consultation on proposed variation to the Australian Rail Track Corporation Limited 2011 Hunter Valley Coal Network Access Undertaking*, 20 June 2017, p. 4

⁶⁷ ibid., p. 2.

⁶⁸ Idemitsu, *Consultation Paper – ARTC's Proposed Variation to the 2011 Hunter Valley Access Undertaking*, 20 June 2017, p. 3.

⁶⁹ ibid., p. 1.

Idemitsu argues that this is due to the process that has led to ARTC's application to vary the 2011 HVAU where through necessity rather than negotiation, ARTC has submitted the Variation to the ACCC for consideration'.⁷⁰ As a result:

*Idemitsu is disappointed that after a comprehensive two-year process involving considerable time, effort and cost (for all stakeholders) that ARTC has been unable to accept the ACCC draft determination resulting in the potential expiry of the 2011 HVAU and leading to the introduction of the NSWRAU under another regulatory regime.*⁷¹

Idemitsu submits that despite industry support:

*...the current voluntary regulatory process in the [Hunter Valley rail network] (with respect expiry and renewal) lacks regulatory and commercial certainty for Access Holders and has the potential to jeopardise the regulatory future of the [Hunter Valley rail network] and the efficient operation of the Hunter Valley coal chain.*⁷²

In addition to supporting the issues raised in the HRATF submission, Idemitsu also highlighted the following issues:

4.7.1. PZ3 Rebate

Idemitsu supports ARTC's proposal to apply backdating for the reconciliation between the previous Weighted Average Cost of Capital (**WACC**) and Weighted Average Mine Life (**WAML**) and the proposed WACC and WAML. However, Idemitsu notes there is no unders and overs process available in PZ3.⁷³

Idemitsu seeks that ARTC participate in good faith negotiations to provide the one-off rebate (backdating) to PZ3 Access Holders in a form which is no worse with respect to calculation or timing, than Constrained Coal Customers.⁷⁴

4.7.2. Future variations

Idemitsu acknowledges ARTC's proposal to prepare a submission for a variation to incorporate path based pricing and an incremental cost methodology within the nominated 6 month timeframe post approval. However Idemitsu requests ARTC not be limited to the above issues and consider other issues which enhance the efficiency and functionality of the HVAU.⁷⁵

These other issues include but are not limited to: the role and composition of the RCG; revisions to HVCCC engagement and recommendations; and performance management.

Idemitsu encourages ARTC to take a collaborative approach in developing these issues in order to contribute to the evolution of the HVAU into a more efficient undertaking in the longer term and to reduce the risk of future regulatory renewals.⁷⁶

⁷⁰ *ibid.*, p. 2.

⁷¹ *ibid.*

⁷² *ibid.*

⁷³ *ibid.*

⁷⁴ *ibid.*

⁷⁵ *ibid.*

⁷⁶ *ibid.*, p. 3.

4.8. Pacific National

Pacific National reluctantly supports the Application, stating that it is:

...effectively required to consider whether it wants the certainty of a sub-optimal but known regulatory regime for 4 years or whether it wants the potential uncertainty of a new regulatory regime.⁷⁷

Pacific National is disappointed that stakeholders have had only 2 weeks to consider a major change to the Hunter Valley rail access framework prior to the major change occurring, noting that the compressed time frames are not conducive to optimal decision making. Pacific National proposes that the regulatory process should be reviewed in order to identify improvements that limit the possibility of this occurring again.⁷⁸

Pacific National understands that ARTC has not consulted with any train operators about the Application. Pacific National considers ARTC should consult with train operators on any matter that impacts the operation and performance of the Hunter Valley rail network, including any proposed changes to access charges, and the terms and conditions of access and operations.⁷⁹

This concern also applies to the drafting of the variation obligation, which states that ARTC will engage in good faith negotiations with Access Holders. While Pacific National supports the proposed variation to incorporate path based pricing, it considers ARTC should undertake consultation with all relevant stakeholders on any change to the structure of access charges.⁸⁰

Pacific National is concerned with the proposed extension of 4.5 years, noting that it effectively continues a regulatory approach that should be reviewed within a shorter framework.⁸¹

Pacific National is concerned with the proposed cost allocation methodology and allocators, noting that the potential impact on ARTC's other corridors has not been quantified or consulted on. Pacific National is concerned that as a result, the corporate cost allocators in the IAU will be predetermined prior to any consultation. Pacific National considers that this needs to be clarified in order to ensure the allocators are cost reflective and reasonable.⁸²

4.9. Port Waratah Coal Services

Port Waratah Coal Services (**PWCS**) supports the Application since it is the most appropriate mechanism to maintain stability and certainty in the Hunter Valley rail network.⁸³ PWCS does not believe that reverting to IPART is a desirable outcome.⁸⁴

In particular, PWCS highlights that during the development of the capacity framework arrangements and the 2011 HVAU there was a focus on contractual and operational alignment. This alignment gave producers the ability to align contracted volumes with

⁷⁷ Pacific National, *Pacific National response to the ARTC application to the ACCC to extend and vary the ARTC 2011 Hunter Valley Access Undertaking*, 20 June 2017, p. 3.

⁷⁸ *ibid.*, p. 2.

⁷⁹ *ibid.*, pp. 2–3.

⁸⁰ *ibid.*, p. 3.

⁸¹ *ibid.*

⁸² *ibid.*, pp. 3–4.

⁸³ Port Waratah Coal Services, *Submission on 2011 Hunter Valley Access Undertaking Variation – Consultation Paper*, 19 June 2017, p.1.

⁸⁴ *ibid.*, p.1-2.

different service providers across the coal chain⁸⁵ and provided an environment for efficient investment in the coal chain and facilitating the efficient operation of the coal chain.⁸⁶ As a result:

Port Waratah remains firmly of the view that the most appropriate mechanism to achieve this contractual alignment between the terminals, track and trains is the continuation of the regulatory parameters established under the 2011 HVAU.⁸⁷

PWCS submits it supports aligning the timing of the variation to the broader calendar year, operational and commercial cycle in the Hunter Valley.⁸⁸ However it supports the term for future HVAUs being aligned to coal producers' TOP contracts for terminal access.

PWCS also supports transparency of pricing structures and access pricing principles, noting that this will facilitate efficient management and use of the coal chain.⁸⁹

4.10. Whitehaven

Whitehaven states that:

...although [Whitehaven] do not agree with the proposed variation of the 2011 HVAU in its current form [Whitehaven] feel compelled to request the ACCC approve the variation to avoid significant operational risk to Whitehaven.⁹⁰

Whitehaven notes the following concerns with the Application:

- Whitehaven sees no reason for industry and ARTC to move away from the WACC proposed in the 2017 HVAU Draft Decision, stating that ARTC has used the compressed timeline to exert pressure on industry to accept a significantly higher rate of return.
- Whitehaven considers an appropriate WAML is 28–29 years based on the proposed methodology and calculation in the 2017 HVAU, with a WAML of 32 years specifically for PZ3 using conservative assumptions.
- Whitehaven continues to have concerns with the current application of the TUT and notes it is not included in the 2011 HVAU under the variation obligation
- Whitehaven notes the significant change to the proposed allocation of corporate overheads, meaning an increase in costs to coal users of \$6–8 million. Whitehaven states that the consultant report was commissioned without consultation, is a redacted version and does not replicate existing cost allocations. Consequently, Whitehaven considers the report should not be used as a basis for the allocation of overhead costs in the Application.⁹¹

⁸⁵ *ibid.*, p.1.

⁸⁶ *ibid.*

⁸⁷ *ibid.*

⁸⁸ *ibid.*, p.2.

⁸⁹ *ibid.*

⁹⁰ Whitehaven, *Whitehaven Coal response to ACCC consultation paper on ARTC's proposed variation to the 2011 Hunter Valley Access Undertaking*, 20 June 2017, p.1.

⁹¹ *ibid.*, p.2.

5. ACCC views

5.1. Preamble and request for information

5.1.1. Preamble

Consistent with its views in the 2017 HVAU Draft Decision⁹², the ACCC considers that the amendments to the Preamble promote the economically efficient operation of, use of, and investment in the Hunter Valley rail network (section 44ZZA(3(aa))).

The inclusion of section 1.1(h) of the 2011 HVAU, which sets out that ARTC will undertake to work cooperatively with coal producers, the HVCCC, and other parties to ensure Coal Chain Capacity is maintained, developed, and utilised efficiently, is appropriate as it also supports the promotion of coal supply chain alignment (section 44ZZA(3)(e)).

5.1.2. Request for information

The ACCC considers that the request for information provision is appropriate. The ACCC considers the provision is necessary to increase the ACCC's ability to obtain relevant information in a timely manner and to enable it to properly discharge the functions and powers provided to the ACCC under the 2011 HVAU.

Under the Act, if an access undertaking provides for the ACCC to perform functions or exercise powers in relation to the undertaking, the ACCC may perform those functions and exercise those powers. If the ACCC decides to do so, it must do so in accordance with the undertaking.⁹³

ARTC's proposed request for information power in the Application also reflects the ACCC's views in the 2017 HVAU Draft Decision.⁹⁴ The Application introduces new a section 1.5(d) of the 2011 HVAU which requires ARTC to engage with the ACCC if it receives a request for information or documents:

- it considers, acting reasonably, would be onerous or oppressive to provide
- that is not necessary for the ACCC to exercise its power or functions in relation to a material obligation, right, or process under the undertaking.

The proposed approach provides an appropriate balance between enabling the ACCC to properly exercise its functions and powers, assisting ARTC in managing its responses to the ACCC in a timely and efficient manner, and is also in the interests of access seekers as it will enable the ACCC to effectively assess ARTC's compliance with its obligations under the 2011 HVAU (sections 44ZZA(3)(a) and (c)).

5.2. Term

The ACCC considers it appropriate to accept the proposed 4.5 year extension of the 2011 HVAU. In addition, the half year will align the 2011 HVAU to the operational and commercial cycle in the Hunter Valley. While the Application is an extension of the 2011 HVAU it effectively sets the arrangements for the Hunter Valley rail network for a new regulatory period.

⁹² ACCC, *Draft Decision – Australian Rail Track Corporation's 2017 Hunter Valley Access Undertaking*, 20 April 2017, p. 19.

⁹³ Section 44ZZA(6A) of the Act.

⁹⁴ ACCC, *Draft Decision – Australian Rail Track Corporation's 2017 Hunter Valley Access Undertaking*, 20 April 2017, pp. 27–28.

The Application proposes an extension period that is shorter than the 9.5 years proposed in the 2017 HVAU (and 10 years in the 2016 HVAU). However, stakeholders note that the continued operation of the HVAU is critical to the stability of the Hunter Valley Coal Chain. Consequently, the ACCC is of the view that the 4.5 year extended term will provide medium term regulatory and commercial certainty in the interests of ARTC and access seekers relative to the alternative of the expiration of the 2011 HVAU on 30 June 2017 (sections 44ZZA(3)(a) and (c)).

5.3. Rate of return and remaining mine life

The ACCC accepts the Application to set from 1 July 2016 the following commercial parameters:

- average RML of 23 years
- real pre-tax ROR of 5.38 per cent
- nominal pre-tax ROR of 7.91 per cent.

However, the ACCC considers the ROR specified in the Application has not been calculated on the basis of an accepted methodology. The ACCC's acceptance of these commercial parameters is in order to balance the legitimate business interests of ARTC and the interests of access seekers with the need for regulatory certainty for the Hunter Valley rail network and broader Hunter Valley Coal Chain (sections 44ZZA(3)(a), (c) and (e)).

In coming to this decision, the ACCC considered the support of Access Holders in submissions and statements from stakeholders regarding the need for regulatory certainty for the Hunter Valley Coal Chain. In particular, the ACCC considered Access Holder acceptance (albeit qualified) of these commercial parameter values as a key component of approving the broader variation application.

Access Holders have indicated support for these commercial parameters but have done so with reservations. In particular, HRATF states that it supports the Application but notes that it 'does not consider the commercial parameters and allocation principles set out in the Variation [are] consistent with regulatory practice'.⁹⁵ Access Holders forming HRATF represent the majority of access revenues earned by ARTC. Given this acceptance, the ACCC considers these commercial parameter values, as part of the broader package included in the Application, are in the interest of access seekers (section 44ZZA(3)(c)).

However, stakeholders support the commercial parameters proposed by ARTC in the interests of regulatory certainty. That is, if the ACCC does not consent to the Application and the 2011 HVAU expires on 30 June 2017, then regulation for the Hunter Valley rail network transfers to the NSWRAU.

The 2011 HVAU is a key component in the efficient operation of the overall Hunter Valley Coal Chain. The ACCC considers regulatory certainty for the Hunter Valley rail network and broader Hunter Valley Coal Chain to be essential. Particularly, given the counterfactual of regulation of the Hunter Valley rail network transferring from the 2011 HVAU to the NSWRAU and the significant regulatory uncertainty stakeholders submit this would result in. Therefore, the ACCC views the acceptance by Access Holders of the commercial parameters as being in the interests of access seekers (section 44ZZA3(c)) in order to ensure the desired regulatory certainty (section 44ZZA3(e)).

⁹⁵ Hunter Rail Access Task Force, p. 1.

5.3.1. Comparison to original 2011 HVAU process

The ACCC's acceptance of the commercial parameters for this Application is not the same as the approach taken in approving the original 2011 HVAU on 29 June 2011.

The circumstances in which Access Holders supported the commercial parameters for the original 2011 HVAU compared to this Application are different. In particular, in relation to the timeframe for assessment and the counterfactual regulatory framework were the ACCC not to consent.

First, for the original 2011 HVAU, Access Holders received details on the real pre-tax ROR of 9.10 per cent on 13 April 2011 as part of additional documents supporting a revised 2010 HVAU application.⁹⁶ After receiving these additional documents, the ACCC issued a consultation paper on 13 April 2011. Following stakeholder submissions and ongoing negotiations between ARTC and Access Holders (facilitated by the NSW Minerals Council), ARTC withdrew the 2010 HVAU from the ACCC's consideration on 23 June 2011. On 23 June 2011, ARTC then submitted the 2011 HVAU for the ACCC's assessment, which incorporated the agreed real pre-tax ROR of 9.10 per cent. On 29 June 2011, the ACCC approved the 2011 HVAU. Overall, 72 days elapsed between ARTC publishing its ROR and withdrawing the 2010 HVAU.

Compared to the current process, HRATF submits that Access Holders received details of the real pre-tax ROR of 5.38 per cent in a meeting with ARTC on 1 June 2017 (30 days prior to the expiry of the 2011 HVAU).⁹⁷

Second, the counterfactual regulatory framework if the ACCC did not consent to the original 2011 HVAU was the Hunter Valley rail network continuing to be regulated under the NSWRAU as was the case at the time. This compares to the current Application, where after 6 years of reforms to improve alignment across the Hunter Valley Coal Chain, the counterfactual regulatory framework is a return to regulation under the NSWRAU with regulatory uncertainty widely identified as being the likely result.

5.3.2. Comparison to 2017 HVAU Draft Decision

In the 2017 HVAU Draft Decision, the ACCC considered appropriate:

- an average RML of between 20 and 32 years and proposed point estimate of 23 years (based on available information)
- a real pre-tax ROR of 4.60 per cent
- a nominal pre-tax ROR of 7.11 per cent.

The ACCC recognises ARTC's Application adopts the 2017 HVAU Draft Decision's proposed point estimate on average RML. However, for the real pre-tax ROR, ARTC's Application is 0.78 per cent higher than what the ACCC considered appropriate in the 2017 HVAU Draft Decision. The ACCC understands that the pre-tax real ROR has been accepted by stakeholders in order to maintain regulatory certainty from 1 July 2017.

In addition, the ACCC notes as part of ARTC's Application, the difference between a real pre-tax ROR of 5.38 per cent and nominal 7.91 per cent is an inflation rate of 2.4 per cent. This inflation rate is the same as what the ACCC recommended in its 2017 HVAU Draft Decision.

⁹⁶ See ARTC, *Hunter Valley Access Undertaking – Rate of Return*, 13 April 2011.

⁹⁷ Hunter Rail Access Task Force, p. 1

While the ACCC has accepted the commercial parameters of the Application on the basis of Access Holders' support (albeit qualified), the ACCC does not consider an agreement on commercial parameters by an access provider and a group of access seekers would be appropriate in all circumstances. For example, an agreed ROR may not necessarily promote the efficiency and competition objectives of Part IIIA, the public interest, or the interests of all access seekers.

5.4. Access charges

The ACCC considers that the certainty provided by setting out the access charges for the period 2017H2 is in the interests of persons who might want access to the Hunter Valley rail network (section 44ZZA(3)(c)) and the legitimate business interests of ARTC (section 44ZZA(3)(a)). This is likely to promote the efficient operation, use of and investment in, the Hunter Valley rail network (section 44ZZA(3)(aa)).

5.5. Variation obligation

The ACCC considers ARTC's inclusion of section 2.3(d), which sets out a limited number of matters that it intends to submit a variation for, and a timeline for submitting that variation, to be appropriate.

Under section 44ZZA(7) of the Act, ARTC may, with the consent of the ACCC, vary the 2011 HVAU at any time. Therefore, the ACCC considers that the variation obligation is not necessary for the submission of a variation application on these matters. However, a number of submissions support the proposal to include a future variation application. For example, Aurizon submits that it:

...recognises the benefits of considering changes to the price structure through a separate and deferred regulatory process rather than as part of the consideration and approval of a new access undertaking in order to avoid unnecessary delays in its approval.⁹⁸

Similarly, HRATF and Idemitsu separately submit that given the amount of time before the 2011 HVAU expires, they agreed with ARTC's approach to defer the drafting of path based pricing and incremental cost provisions for a subsequent variation.^{99,100}

However, the ACCC acknowledges Anglo American's concerns about including section 2.3(d). In particular, Anglo American submits that it has reservations about how the drafting of section 2.3(d) precludes other outcomes.¹⁰¹ The ACCC considers that ARTC's intention to submit a variation application does not mean that the application will be automatically accepted. As part of any variation to the HVAU submitted under section 44ZZA(7) of the Act, the ACCC would consult as per its usual regulatory process. In considering whether or not a variation to an undertaking is appropriate to accept, the ACCC must have regard to all of the relevant legislative criteria under section 44ZZA(3) of the Act. These criteria are set out in further detail in chapter 2 of this Decision.

On balance, the ACCC considers that ARTC's proposal to set out obligations for a future variation is in the interests of access seekers and provides regulatory certainty to stakeholders about potential future changes to the 2011 HVAU (sections 44ZZA(3)(a) and (e)).

⁹⁸ Aurizon, p. 2.

⁹⁹ Hunter Rail Access Task Force, p. 4.

¹⁰⁰ Idemitsu, p. 2.

¹⁰¹ Anglo American, p. 6.

Although submissions expressed broad acceptance of ARTC's proposed variation obligation, a number of stakeholders raised a number of concerns regarding the matters to be considered in the variation obligation, and engagement during the development of the variation application. These are discussed in further detail below.

5.5.1. Matters included in the variation obligation

The variation obligation includes matters that were outstanding from the ACCC's 2017 HVAU Draft Decision. The ACCC acknowledges that a number of submissions raised concerns about ARTC's previous proposals for path based pricing and an incremental cost methodology. However, as the Application does not currently include a proposal for path based pricing, the ACCC is not currently assessing these matters. The ACCC will therefore not provide views on these particular concerns in this Decision, but will consider them once the variation obligation has been submitted for assessment.

The ACCC provided views on ARTC's path based pricing and incremental cost proposals in the 2017 HVAU Draft Decision. In summary, the ACCC required further information from ARTC regarding each of these issues (set out in further detail in Appendix A). The ACCC would still require the requested information from ARTC if it were to propose the same or substantially similar proposals in its application submitted under the variation obligation.

A number of stakeholders considered that ARTC should consider matters outside of those specified in section 2.3(d). These matters included those proposed in the 2016 HVAU and 2017 HVAU. Examples include:

- The HVCCC considers that the HVCCC Consultation Principles, submitted as part of the Schedule G in the 2016 HVAU and 2017 HVAU, should be included within the Application or addressed as a specific item in section 2.3(d).¹⁰² The HVCCC also considers that the Application should include a mechanism to force ARTC to undertake a review, consistent with the Mandatory Review (set out in section 2.3 the 2017 HVAU), and replace the 2011 HVAU on its expiry. In the absence of such a mechanism, the HVCCC considers the Mandatory Review provisions should be reinstated.¹⁰³
- HRATF submits that the membership and operation of the RCG, operation of the TUT and changes to the IAHA and OSA proposed in the 2017 HVAU should be incorporated into the assessment of the variation obligation.¹⁰⁴
- Idemitsu submits that ARTC should consider matters such as the role and composition of the RCG, revisions to HVCCC engagement, and Net Key Result Areas.¹⁰⁵
- Whitehaven requests that the ACCC take into consideration its concerns in the application of the TUT.¹⁰⁶ The ACCC understands these concerns were raised as part of HRATF's submission to the 2017 HVAU.¹⁰⁷

Although not raised in the context of the variation obligation, AGL reiterated its support of the proposed approach to RCG membership in the 2017 HVAU.¹⁰⁸ ARTC does not retain this proposal in the Application, but AGL's support is consistent with submissions from other stakeholders in this process. Additionally, AGL raised a number of issues in its submission

¹⁰² Hunter Valley Coal Chain Coordinator, pp. 3-4.

¹⁰³ *ibid.*, p.3.

¹⁰⁴ Hunter Rail Access Task Force, pp.4-5.

¹⁰⁵ Idemitsu, p. 3.

¹⁰⁶ Whitehaven, p. 2.

¹⁰⁷ HRATF, *ARTC 2017 Hunter Valley Access Undertaking – Hunter Rail Task Force submission to the ACCC*, 6 February 2017, p. 34.

¹⁰⁸ AGL, p. 2.

relating to the IAHA and the provision of data that the ACCC considers could be considered as part of the variation obligation.

The ACCC considers that the issues proposed for the variation obligation does not limit the scope of issues that could be considered in a variation application. As noted previously, the ACCC would consult with stakeholders as part of any variation application. Accordingly, stakeholders will be afforded the opportunity to inform the ACCC of their views on any aspect of the HVAU's operation. Similarly, the ACCC considers that the inclusion of section 2.3(d) in the Application does not preclude ARTC from engaging with stakeholders in development of, or including other issues in the variation obligation for assessment by the ACCC.

In addition, there are other proposals in the Application that relate to matters subject to the variation obligation. For example, in determining access charges in accordance with the pricing objectives set out in section 4.13(b) of the 2011 HVAU, ARTC will have regard to achieving:

- full recovery of the variable component of costs from all Access Holders on the basis of actual network usage
- maximum recovery of (or contribution to) the fixed component of costs and new capital component of costs from all users

Based on this, the ACCC considers that the cost allocators for corporate overheads, set out in Schedule I, are a subset of activities that are intended to be recovered through access charges. Therefore, the ACCC considers that the appropriateness of these cost allocators may be a relevant consideration in assessing a variation application to incorporate path based pricing. The ACCC's views on ARTC's proposed cost allocators for corporate overheads is set out in further detail in chapter 5.6 of this Decision.

5.5.2. Stakeholder engagement

Section 2.3(d) of the 2011 HVAU states that ARTC will engage in good faith negotiations with Access Holders, and will lodge a variation application to the ACCC by no later than 31 December 2017, or a later date as agreed with the ACCC in writing. ARTC states in its Application that it considers the 6 month time frame will allow good faith negotiations with producers, and to prepare and provide further information in relation to the variation obligation.¹⁰⁹

A number of submissions considered that ARTC should engage with a wider group than Access Holders. In relation to the path based pricing component of the variation obligation, Aurizon submits that it:

*...looks forward to working constructively with all relevant stakeholders in the development of any alternative price structures to be applied to coal rail transport services in the Hunter Valley coal network over the coming months.*¹¹⁰

Pacific National considers that ARTC should also engage in good faith negotiations with other relevant stakeholders such as train operators.¹¹¹ The HVCCC considers that it would be desirable if ARTC was also required to consult with wider stakeholders, including the HVCCC in respect of further variations which might be required.¹¹² The ACCC expects

¹⁰⁹ ARTC, *Application by ARTC to vary the Hunter Valley Access Undertaking to extend term*, 6 June 2017, p. 3.

¹¹⁰ Aurizon, p. 2.

¹¹¹ Pacific National, p. 3.

¹¹² Hunter Valley Coal Chain Coordinator, p. 2.

ARTC to engage with all relevant stakeholders for matters related to the variation obligation, as the variation could have implications for stakeholders that are not Access Holders.

Centennial's submission indicates that ARTC will engage in a consultation process to address Centennial's concerns starting as soon as July 2017.¹¹³ The ACCC expects ARTC to commence good faith engagement with all relevant stakeholders soon after the acceptance of the Application in order to submit the variation obligation that takes into account Access Holders' views. The ACCC also expects ARTC to engage with the ACCC soon after the acceptance of the Application. This is in order to ensure ARTC addresses the ACCC's information requirements (outlined in the 2017 HVAU Draft Decision and Appendix A of this Decision) in time for the submission of the variation obligation.

5.6. Cost allocation

HRATF, Pacific National, and Whitehaven raised significant concerns with ARTC's proposed overhead cost allocation methodology and allocators. However, all stakeholders submit that the ACCC accept the Application to avoid the significant regulatory and commercial uncertainty of regulation returning to the NSWRAU. On this basis, the ACCC accepts ARTC's proposed cost allocation methodology and allocators (sections 44ZZA(3)(a), (c) and (e)).

In the 2017 HVAU Draft Decision, the ACCC highlighted the need for a transparent costing manual which clearly sets out the evidence for ARTC's decisions regarding cost allocation. As noted by ARTC, the proposed cost allocation methodology and allocators in the Application is informed by work undertaken by a consultant (Deloitte) in the development of the opex efficiency mechanism, intended to form part of the 2017 HVAU.¹¹⁴ Due to the limited time that ARTC has allowed for its Application to be assessed prior to the expiry of the 2011 HVAU, the ACCC has not had the opportunity to engage an independent consultant to review the methodology and test the appropriateness of the proposed allocators.

Additionally the ACCC understands that producers outside the customer working group established to consult with ARTC on the development of the opex efficiency mechanism have only been privy to the consultant's report detailing the proposed methodology and allocators for a limited time:

- HRATF stated that the draft Deloitte report was only made available to the wider HRATF producers very recently, following 'considerable internal review with and by ARTC'.¹¹⁵
- Whitehaven stated that the Deloitte report was 'commissioned without consultation, is a redacted version and does not replicate existing cost allocations'. Consequently, Whitehaven states the report should not be used as a basis for the allocation of overheads in the Application.¹¹⁶

Pacific National is concerned that the proposed allocators may predetermine the allocators in the IAU, without any consultation with stakeholders and without any quantification of the impact.¹¹⁷ In assessing a varied or replacement IAU, the ACCC will assess any proposal regarding cost allocation on its own merit, having regard to the statutory criteria under section 44ZZA(3) of the Act.¹¹⁸

¹¹³ Centennial Coal, p. 1

¹¹⁴ ARTC, *Application by ARTC to vary the Hunter Valley Access Undertaking to extend term*, 6 June 2017, p. 3.

¹¹⁵ Hunter Rail Access Task Force, p. 4.

¹¹⁶ Whitehaven, p. 2.

¹¹⁷ Pacific National, pp. 3–4.

¹¹⁸ The expiry date of the current 2008 IAU is 30 June 2018.

As noted in chapter 5.5 of this Decision, any proposal to change the structure of access charges, such as the variation obligation to incorporate path based pricing, could affect the cost allocation methodology and allocators, as corporate overheads make up one of the activities recovered by access charges. As part of any future variation process, including the variation obligation, the ACCC will consider the views of stakeholders prior to making a decision.

For comparison, the proposed methodology and allocators in the Application differ from those used by ARTC in previous compliance assessments. For example, in its previous Annual Compliance submissions, ARTC stated that it allocated corporate overhead costs between its Hunter Valley rail network and interstate network primarily by Train Km, with GTK used only for a select range of costs such as:

- Communications
- Engineering Services
- Property
- Rail Grinding Contract Management
- Wayside Systems
- Track Monitoring Services.

ARTC stated it allocated corporate overhead costs of the Hunter Valley rail network based on the proportion of total Train Km attributable to each Pricing Zone.¹¹⁹

5.7. Annual compliance

The ACCC accepts the proposed amendments to vary section 4.10 and subsequent sections of the 2011 HVAU as part of the Application. This is for three reasons.

First, in the interests of clarity and certainty, the ACCC considers it essential that all stakeholders understand the timing and relevant input parameters for future annual compliance assessments under the 2011 HVAU (section 44ZZA(3)(e)). The ACCC considers this is in the interests of both ARTC and access seekers (sections 44ZZA(3)(a) and (c)).

Second, the ACCC considers that a robust annual compliance assessment is essential for promoting the efficient operation of, use of and investment in ARTC's infrastructure (section 44ZZA(3)(aa)), and therefore is in the interests of Access Holders (section 44ZZA(3)(c)). This is because annual compliance assessments ensure that:

- ARTC is incurring prudent capex, efficient opex and is complying with its revenue cap so that ARTC is not extracting economic rents from Access Holders
- Access Holders are not paying less than the incremental cost they impose on the Hunter Valley rail network.

Third, ARTC's proposed schedule of annual compliance assessments and approach for reimbursing over-recovered access revenue has received support from Access Holders. HRATF states it is comfortable with the approach by having repayment of over-recovered access revenue accommodated through the unders and overs accounting process for PZ1 and PZ2 Access Holders and a rebate arrangement for PZ3 Access Holders.¹²⁰

¹¹⁹ ACCC, *Final determination: Australian Rail Track Corporation's compliance with the Hunter Valley Coal Network Access Undertaking financial model for the 2014 calendar year*, 31 March 2017, p. 52.

¹²⁰ Hunter Rail Access Task Force, p. 4.

Further, Idemitsu, as a PZ3 Access Holder, submits that it seeks that:

*ARTC participate in good faith negotiations to provide the one-off rebate (backdating) to Unconstrained Access Holders in a form which is no worse with respect to calculation or timing, than the Constrained Access Holders.*¹²¹

The ACCC encourages ARTC to engage with PZ3 Access Holders on this issue.

In this context, the ACCC considers the proposed schedule of annual compliance assessments and reimbursement approach is appropriate as it is in the interest of access seekers (section 44ZZA(3)(c)).

5.7.1. Previous experience in Annual Compliance assessments

Since the commencement of the 2011 HVAU, the ACCC has performed four annual compliance assessments. As part of these assessments, the ACCC ensured that ARTC correctly rolled-forward the RAB and RAB Floor Limit and reconciled access revenue to the Ceiling Limit and unders and overs amounts. In a number of these assessments, the ACCC (and in some cases ARTC through its own further review) identified errors in calculations that resulted in amendments to the end result. The ACCC's assessments have also examined ARTC's opex to ensure that it has been efficiently incurred and appropriately allocated across the Hunter Valley rail network.

The 2017 HVAU Draft Decision provided several recommendations for changes to the annual compliance assessment process.¹²² Namely, it recommended the following information requirements be added to Schedule G of the 2011 HVAU:

- actual and contracted Train Km and GTK for the Hunter Valley rail network (broken down into coal traffic by Pricing Zone and non-coal traffic) and for the interstate rail network
- all endorsements (that is, for all project stages) by the RCG of capex
- detailed explanations for minor and major projects where capex exceeds RCG endorsed values
- detailed explanations of ARTC's processes and procedures relating to disposal values.

This information has formed part of additional information that the ACCC has routinely sought from ARTC in its annual compliance assessments under the 2011 HVAU, and most recently for the 2014 Annual Compliance assessment. ARTC providing this information up-front in its initial submissions will expedite the annual compliance assessment process. As such, the ACCC recommends these additions should form part of a future variation to the 2011 HVAU.

In addition, the ACCC expects ARTC to consider to what extent this information could be made available to stakeholders to provide greater transparency and also enable a more informed consultation process by the ACCC as part of the annual compliance assessment process.

¹²¹ Idemitsu, p. 2.

¹²² ACCC, *Draft Decision on Australian Rail Track Corporation's 2017 Hunter Valley Access Undertaking*, 20 April 2017, p. 79.

5.7.2. Efficiency of operating expenditure

ARTC has not included an opex efficiency mechanism in its application to vary the 2011 HVAU. The opex efficiency mechanism was expected to form a key component of the final 2017 HVAU. As previously noted, the ACCC considers:

*...performance incentives are intended to encourage ARTC, through financial reward, to improve operating, maintenance and capital expenditure efficiency. The ACCC considers that, once in place, these performance incentives will assist in ensuring the ongoing efficiency of ARTC's operating expenditure.*¹²³

The 2017 HVAU Draft Decision stated that if an opex efficiency mechanism was not implemented, then the ACCC would need to reconsider the appropriateness of the content of section 4.10 and Schedule G of the 2011 HVAU.¹²⁴

HRATF states it welcomes:

*...the ACCC providing greater engagement with the RCG and transparency around the ACCC's ex post opex prudence assessment as part of future annual compliance processes.*¹²⁵

Further, HRATF states it:

*...would encourage the ACCC to flag that it will develop a more comprehensive approach to the annual compliance process, in consultation with ARTC and the industry, once the current Variation is in place.*¹²⁶

In light of this, the ACCC will need to reconsider whether its current approach to assessing the efficiency of ARTC's opex as part of the annual compliance process remains appropriate.

5.8. Future regulatory certainty

5.8.1. Providing regulatory certainty

The ACCC acknowledges stakeholder views that the 2011 HVAU has generally operated well, and the operational framework provided by the HVAU has been effective in enabling the efficient operation of the Hunter Valley rail network as part of the wider Hunter Valley Coal Chain.

While stakeholders ultimately support the ACCC accepting the Application to vary the expiry date of the 2011 HVAU to 31 December 2021, this support does not reflect an agreed position on the terms of the application between industry and ARTC, as was the case when the 2011 HVAU was originally accepted on 29 June 2011.¹²⁷ HRATF submits that the Application was put forward to it on a 'take it or leave it basis', with no meaningful time for the ACCC or stakeholders to consider changes.¹²⁸

¹²³ ACCC, *Determination on Australian Rail Track Corporation's compliance with the financial model and pricing principles in the Hunter Valley Coal Network Access Undertaking for January – December 2012*, 24 March 2014, p.19.

¹²⁴ id., *Draft Decision on Australian Rail Track Corporation's 2017 Hunter Valley Access Undertaking*, 20 April 2017, p. 80.

¹²⁵ Hunter Rail Access Task Force, p. 3.

¹²⁶ ibid., pp. 3-4.

¹²⁷ ACCC, *Decision – in relation to Australian Rail Track Corporation's Hunter Valley Rail Network Undertaking*, 29 June 2011, p. 47.

¹²⁸ Hunter Rail Access Task Force, p. 1.

Alongside these procedural issues, stakeholders also raised the concern that if the Application is not consented to by the ACCC prior to 1 July 2017 that regulation would revert to the NSWRAU.

While the ACCC does not comment on the appropriateness or otherwise of the NSWRAU, it notes that stakeholders consider this outcome would result in significant regulatory and commercial uncertainty to industry. In light of this, and given the limited time that ARTC has provided for its Application to be assessed, stakeholders are of the view they have no alternative but to support ARTC's Application in order to ensure the continued operation of an HVAU after 30 June 2017. Submissions in relation to these specific points are set out below in Table 4.

Table 4: Stakeholder submissions in support of regulatory certainty

Stakeholder	Submissions on regulatory certainty
HRATF	<ul style="list-style-type: none"> • Any reversion of the current regulatory arrangement to the NSWRAU would be inefficient and result in considerable regulatory and commercial uncertainty, because: <ul style="list-style-type: none"> ○ the NSWRAU has not had the requirement to evolve over the last decade to reflect developments in the coal sector, which would take the industry substantially backward to a less sophisticated and targeted framework ○ the suite of access arrangements (and OSAs) now used in the Hunter Valley has been developed under, and forms part of the HVAU – it is not clear how these would transition to the ex-post, bilateral 'negotiate/arbitrate' model contemplated under the NSWRAU ○ a range of industry (and Hunter Valley Coal Chain) coordination arrangements (such as the HVCCC, RCG and interactions with coal terminals at Newcastle) are explicitly addressed in the HVAU. These are important to the efficient operation of the industry (and Hunter Valley Coal Chain) and would be lost as part of any reversion to the state regime. ○ industry would likely lose the right to recover the substantially higher tariffs being paid over the last 12 months if the HVAU expires without being replaced.¹²⁹ • No practical alternative but to support the Application in order to ensure the continued operation of the 2011 HVAU beyond its currently scheduled expiry on 30 June 2017. • Supports the Application on the basis that it better satisfies the statutory requirements in section 44ZZA(3) than the only feasible alternative, which would be a reversion of the Hunter Valley regulatory framework to the NSWRAU from 1 July 2017.¹³⁰
Whitehaven	<ul style="list-style-type: none"> • The HVAU is essential to the continued stability of the Hunter Valley Coal Chain and therefore must be preserved to ensure the reliable transportation of coal to the Port of Newcastle. • To avoid significant operational risk, Whitehaven requests that the ACCC accept this variation.¹³¹

¹²⁹ *ibid.*, p. 2.

¹³⁰ *ibid.*

¹³¹ Whitehaven, p. 1.

Stakeholder	Submissions on regulatory certainty
Idemitsu	<ul style="list-style-type: none"> • Reverting to the current NSWRAU would result in significant regulatory and commercial uncertainty, as well as being a considerable backwards step in the operational efficiency and capacity framework of the Hunter Valley coal chain. • The NSWRAU would require substantial amendments to accommodate access agreements, operational frameworks and industry interfaces (i.e. RCG, HVCCC etc.). To implement such amendments would take considerable time, cost, and effort, whilst access holders experienced regulatory and commercial uncertainty.¹³²
HVCCC	<ul style="list-style-type: none"> • The Hunter Valley Coal Chain construct operating within the regulatory parameters established by the 2011 HVAU has proven effectiveness in enabling capacity, and efficiency. These constructs have supported the long-term solutions to systematic challenges experienced by the industry. Any reduction, displacement, or elimination of this construct, and the role of the HVCCC in that, presents increasing risk to efficient operation across the various coal chain stakeholders.¹³³ • In the event the ACCC refuses the Application, and consequently regulatory control of the Hunter Valley Coal Chain reverts to the regime established by the NSWRAU, the adverse impact to the entire coal industry has the potential, in the opinion of the HVCCC, to be severe. The commercial and operational parameters under IPART are, at best, uncertain, meaning the operational impact would be immediate and industry wide. • The HVAU, and ongoing certainty of that regulatory construct, is critical to the stability and short to medium term, and indeed long term, success of the Hunter Valley Coal Chain.
PWCS	<ul style="list-style-type: none"> • ARTC's arrangements directly impact PWCS operations as most coal shipped through its terminals is delivered by rail. • Remains firmly of the view that the most appropriate mechanism to achieve contractual alignment between the terminals, track and trains is the continuation of the regulatory parameters established under the 2011 HVAU. The HVAU provides a necessary framework for access, operation and pricing of the track network and associated infrastructure. • If the variation to the 2011 HVAU is not accepted by the ACCC regulatory control will revert to IPART. PWCS does not believe this is a desirable outcome given the high level of uncertainty and complexity that it would bring to the operation of the Hunter Valley Coal Chain. • Strongly supports ARTC's application to vary its 2011 HVAU as being the most appropriate mechanism available to maintain stability and certainty within the Hunter Valley coal rail network.
Aurizon	<ul style="list-style-type: none"> • Strongly supports the regulatory certainty that would be obtained from the ACCC's approval of the application to extend the term of the 2011 HVAU. In this regard Aurizon submits that the objects in section 44AA of the CCA are best satisfied through the extension of the 2011 HVAU relative to the alternative of the expiration of the 2011 HVAU.¹³⁴

¹³² Idemitsu, p. 1.

¹³³ Hunter Valley Coal Chain Coordinator, p. 1.

¹³⁴ Aurizon, p. 1.

Stakeholder	Submissions on regulatory certainty
Pacific National	<ul style="list-style-type: none"> In considering whether to support the proposed extension, Pacific National is effectively required to consider whether it wants the certainty of a sub-optimal but known regime for 4 years or whether it wants the potential uncertainty of a new regulatory regime. Given this choice, Pacific National reluctantly supports the proposed extension to the 2011 HVAU as ultimately Pacific National supports regulatory certainty for the Hunter Valley coal network.¹³⁵

The ACCC considers that stakeholders' support for the Application reflects a desire to maintain regulatory certainty from 1 July 2017. The ROR proposed by ARTC in response to the ACCC's view on the ROR (as indicated in the 2017 HVAU Draft Decision), and the other elements of ARTC's Application as set out above, has been accepted by stakeholders in order to secure that certainty. The ACCC accepts stakeholders' views on the desirability for certainty of a known regulatory regime until 2021 over an unplanned and rushed transition to a regime that may give rise to uncertainties as to the commercial parameters and the operational approach to be adopted.

This is a key factor in the ACCC's decision to consent to ARTC's proposal to vary the 2011 HVAU on the terms in its Application.

5.8.2. Concerns with the current regulatory framework

This Decision is the culmination of an extensive assessment process of prior iterations of a HVAU throughout 2015, 2016 and 2017, and two extensions to the 2011 HVAU, incorporating extensive public consultation with ARTC and stakeholders.

While the new expiry date of the 2011 HVAU is 31 December 2021, in the context of the time taken to finalise the regulatory arrangements to apply from 1 July 2016, this timeframe is relatively short and a replacement undertaking will likely be under assessment before long.

HRATF submits that the process involved in reaching this point has proven time consuming, costly, and frustrating for the industry, which highlights the inherent weakness associated with a voluntary undertaking being used to seek to establish an enduring and predictable regulatory framework for the Hunter Valley rail network.¹³⁶ HRATF submits its:

*...support for the Variation should not be construed as reflecting the outcome of "commercial" negotiations. To the contrary ... [HRATF's] support is evidence of a lack of balanced commercial approach and regulatory oversight available to the industry under the current arrangements – which forces us to accept an outcome that is materially less appropriate than the outcome of a standard, regulatory determination from the ACCC.*¹³⁷

Aurizon also submits that following the conclusion of the current process, the regulatory process should be reviewed in order to identify improvements that could be made to limit the possibility of the current situation occurring into the future.¹³⁸

¹³⁵ Pacific National, p. 3.

¹³⁶ Hunter Rail Access Task Force, p. 2.

¹³⁷ *ibid.*

¹³⁸ Aurizon, p. 2.

Idemitsu considers that:

Despite industry support it is evident the current voluntary regulatory process in the [Hunter Valley rail network] (with respect to expiry and renewal) lacks regulatory and commercial certainty for Access Holders and has the potential to jeopardise the regulatory future of the [Hunter Valley rail network] and the efficient operation of the Hunter Valley Coal Chain.¹³⁹

Noting the concerns relating to the role the HVAU plays in providing regulatory certainty the HVCCC submits that possible expiry of the HVAU in 2021 without an obligation for a replacement HVAU poses a significant risk.

The ACCC acknowledges and shares stakeholder concerns that the outcome of this process illustrates significant issues with the current regulatory framework as it applies to the Hunter Valley rail network. The ACCC does not consider that the regulatory regime was envisaged to operate in this manner.

¹³⁹ Idemitsu, p. 2.

6. ACCC decision to consent to ARTC's variation application

For the reasons set out above, the ACCC consents to ARTC's 16 June 2017 application to vary its 2011 HVAU pursuant to section 44ZZA(7) of the Act having had regard to the matters set out in section 44ZZA(3).

The ROR proposed by ARTC is higher than that considered appropriate by the ACCC in its 2017 HVAU Draft Decision using a standard regulatory approach for estimating a ROR. However, in consenting to the Application the ACCC has recognised access seekers overriding concerns for regulatory certainty in relation to the Hunter Valley rail network and broader Hunter Valley Coal Chain.

The ACCC notes that under the varied 2011 HVAU, ARTC is now obliged to commence good faith negotiations with stakeholders to develop a further variation application to incorporate certain matters outstanding from the ACCC's 2017 HVAU Draft Decision.

Given the complexity of the issues outstanding, the ACCC expects that ARTC will commence good faith negotiations with stakeholders in a timely manner in order to meet their commitments under the varied 2011 HVAU. Further, the ACCC expects that ARTC will engage with the ACCC as early as possible after 1 July 2017 as to the information the ACCC requires (as set out in Appendix A) as part of this process.

Appendix A: Further information required on ARTC's path based pricing, economic cost and dual ceiling limits proposals in 2017 HVAU

Path based pricing

The ACCC's views in the 2017 HVAU Draft Decision on ARTC's path based pricing proposal were separated into the following matters:

- Pricing Unit for TOP Charges
- Pricing Unit for non-TOP Charges
- Services Envelope

The ACCC had not formed a view on ARTC's proposal to use Train Km as the basis for TOP component of access charges, because it did not have sufficient information to determine whether it encouraged the efficient use of the network.¹⁴⁰ In particular, the ACCC considered that ARTC had not provided enough evidence of the cost drivers for activities intended to be recovered through TOP charges.¹⁴¹

The ACCC considered that the use of GTK for the basis of non-TOP charges was appropriate, subject to ARTC providing further information on the cost drivers recovered by non-TOP component of access charges.¹⁴²

The 2017 HVAU Draft Decision set out examples of the information on cost drivers for activities recovered through TOP and non-TOP charges that the ACCC required in order to make a decision on ARTC's proposal.¹⁴³

The ACCC considered that ARTC's proposal to use a Services Envelope was appropriate, subject to ARTC providing guidelines for consultation between ARTC and stakeholders on changes to section run times.¹⁴⁴

Allocation of incremental costs

In the 2017 HVAU, ARTC proposed to allocate incremental maintenance costs on the basis of Access Holders' actual usage, and incremental capital costs on the basis of Access Holders' contracted commitments.¹⁴⁵ This was in contrast to the methodology used by WIK in the 2013 Annual Compliance Final Determination, which allocated the incremental costs of PZ3 Access Holders' use of PZ1 on the basis of actual usage.

The ACCC had not formed a view on ARTC's proposed approach to allocating incremental costs in the 2017 HVAU. Instead, the ACCC set out its understanding of the effects of allocating incremental capital costs on the basis of actual usage, and sought submissions on this understanding.¹⁴⁶

¹⁴⁰ ACCC, *Draft Decision – Australian Rail Track Corporation's 2017 Hunter Valley Access Undertaking*, 20 April 2017, p. 172.

¹⁴¹ *ibid.*

¹⁴² *ibid.*

¹⁴³ See ACCC, *Draft Decision – Australian Rail Track Corporation's 2017 Hunter Valley Access Undertaking*, 20 April 2017, pp. 186-187.

¹⁴⁴ ACCC, *Draft Decision – Australian Rail Track Corporation's 2017 Hunter Valley Access Undertaking*, 20 April 2017, p. 172.

¹⁴⁵ See section 4.5(d) of the 2017 HVAU

¹⁴⁶ ACCC, *Draft Decision – Australian Rail Track Corporation's 2017 Hunter Valley Access Undertaking*, 20 April 2017, p. 43.

The ACCC required ARTC to provide worked examples of the relationship between setting TOP Charges and reconciliation with the ceiling revenue tests through the annual compliance process.¹⁴⁷ The ACCC considered that these examples would provide clarity and certainty to Access Holders regarding this relationship.¹⁴⁸

Ceiling revenue limit

In the 2017 HVAU, ARTC proposed amendments to the ceiling revenue limit that had the effect of defining two separate constrained networks; one representing PZ1 and PZ2 and one representing PZ3.¹⁴⁹ This, in turn, would create separate revenue ceiling limits applicable to each constrained network.

ARTC stated that the intention of its approach to floor and ceiling revenue limits in the 2017 HVAU was to:

- enshrine the incremental cost principles outlined in the decision of the ACCC for the 2013 annual compliance assessment
- provide certainty to PZ1 producers that a defined amount of revenue from PZ3 producers is allocated towards meeting incremental costs (not only variable or Direct Costs) when PZ3 producers traverse PZ1
- provide certainty to PZ3 producers that their contribution to PZ1 cannot exceed incremental costs (with remainders of revenue from PZ3 producers allocated to meeting costs of PZ3)
- provide certainty to ARTC that PZ3 producers' incremental costs in PZ1 (no longer recovered from PZ1 producers) are recoverable as TOP Chargers from PZ3.¹⁵⁰

The ACCC considered that ARTC's proposed approach to floor and ceiling revenue limits were not appropriate, and required further clarification from ARTC:

- on the rationale for a dual ceiling revenue limit, in the context of the 2013 Annual Compliance Final Determination
- regarding the practical operation of the dual ceiling revenue limit, and associated redrafting of the 2017 HVAU for clarity.¹⁵¹

¹⁴⁷ *ibid.*, p. 43.

¹⁴⁸ *ibid.*, p. 58.

¹⁴⁹ See section 4.3 of the 2017 HVAU.

¹⁵⁰ ARTC, *2017 Hunter Valley Coal Network Access Undertaking Explanatory Guide*, 9 December 2016, p. 13.

¹⁵¹ ACCC, *Draft Decision – Australian Rail Track Corporation's 2017 Hunter Valley Access Undertaking*, 20 April 2017, p. 31.