AUSTRALIAN COMPETITION & CONSUMER COMMISSION

Consultation Paper

Australian Rail Track Corporation's proposed variation to the 2011 Hunter Valley Access Undertaking – December 2017

16 January 2018

Contents

1. Introduction

On 21 December 2017, the Australian Rail Track Corporation Limited (**ARTC**) submitted an application to the Australian Competition and Consumer Commission (**ACCC**) to vary the Hunter Valley Access Undertaking (**HVAU**) to incorporate path based pricing and an incremental cost methodology (**the Proposed Variation**). ARTC submitted the Proposed Variation in accordance with section 44ZZA(7) of the *Competition and Consumer Act 2010* (Cth) (**the Act**), which allows an access provider to vary an accepted undertaking with the consent of the ACCC.

The following sections provide background to the development of the Proposed Variation, an indication of the timeline for the ACCC's assessment and details on how interested parties can make a submission to the ACCC.

1.1. Background

The HVAU provides for the negotiation of access to the Hunter Valley rail network operated by ARTC in NSW. The ACCC accepted the initial HVAU in accordance with section 44ZZA(3) of the Act on 29 June 2011.

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.[1] On 8 May 2017, prior to the end of the consultation period, ARTC withdrew the 2017 HVAU from the ACCC's consideration.

On 6 June 2017, ARTC submitted an application to extend and vary the terms 2011 HVAU (**June 2017 variation**). As part of the June 2017 variation, ARTC included an obligation to submit a further variation to incorporate path based pricing and an incremental cost methodology. Specifically, section 2.3(d) of the HVAU states:

> *(d) ARTC will engage in good faith negotiations with Access Holders and, by no later than 31 December 2017 or such later date as agreed with the ACCC in writing, lodge a variation application with the ACCC under section 44ZZA(7) of the [Act] to vary this Undertaking to:*
>
> *(i) Incorporate path based pricing; and*
>
> *(ii) Apply an incremental costs methodology such that:*
>
> *(A) Pricing Zone 3 Access Holders contribute incremental costs for Pricing Zone 1 for the remaining term of the Undertaking;*
>
> *(B) Incremental maintenance costs are allocated on the basis of actual usage and incremental capital costs are allocated on the basis of contracted capacity;*

[1] See: ACCC, *2017 Hunter Valley Access Undertaking – Draft Decision*, 20 April 2017.

(C) *Take or pay charges include incremental capital based on contracted capacity; and*

(D) *A dual ceiling limit applies.*

In its supporting documentation to the June 2017 variation, ARTC noted that including section 2.3(d) was consistent with discussions with producers.[2] However, some stakeholders raised concerns about the scope of this further variation.[3] The ACCC accepted the June 2017 Variation on 29 June 2017.

1.2. Request for submissions

The ACCC, by publication of this Consultation Paper, is inviting submissions on the Proposed Variation.

Section 2 of this paper outlines a range of matters in the Proposed Variation to which the ACCC wishes to draw particular attention to.

In making a submission, please include detailed reasons to support the views offered. If there are aspects of the Proposed Variation that are considered to be *not* appropriate, please provide suggestions of changes that could be made to address the relevant concerns, including to the level of drafting amendments where possible.

1.2.1. Invitation to make a submission

Submissions should be addressed to:

Mr Matthew Schroder
General Manager
Infrastructure & Transport – Access & Pricing Branch
Australian Competition and Consumer Commission
GPO Box 520
Melbourne VIC 3001

Email: transport@accc.gov.au

1.2.2. Due date for submissions

Submissions to this Consultation Paper are due by 13 February 2018. It is in your interest that the submission be lodged by this date, as section 44ZZBD of the Act allows the ACCC to disregard any submission made after this date.

1.2.3. Confidentiality

The ACCC strongly encourages public submissions. Unless a submission, or part of a submission, is marked confidential, it will be published on the ACCC's website and may be made available to any person or organisation upon request. If you are providing a confidential submission the ACCC asks that you provide a full copy of the document, and a public version with the information to be excluded from the ACCC website omitted.

Sections of submissions that are claimed to be confidential should be clearly identified. The ACCC will consider each claim of confidentiality on a case by case basis. If the ACCC

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

3 ACCC, *Decision – Australian Rail Track Corporation's application to vary the 2011 Hunter Valley Access Undertaking,* 29 June 2017, p. 32.

refuses a request for confidentiality, the submitting party will be given the opportunity to withdraw the submission in whole or in part.

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

1.3. ACCC assessment

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

The ACCC has not yet formed a view on the appropriateness or otherwise of the Proposed Variation, and statements in this Consultation Paper should not be taken as indicative of the ACCC's view of the appropriateness of the Proposed Variation under the Act, nor the likelihood of its acceptance.

1.4. Indicative timeline for assessment

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

The Act also provides for 'clock-stoppers', meaning that some days will not count towards the 180 days of the expected period in certain circumstances. In particular, the clock is stopped where the ACCC publishes a notice inviting public submissions in relation to an application to vary an undertaking, or where the ACCC gives a notice requesting information in relation to an application.[4]

Date	Event
21 December 2017	Lodgement of Proposed Variation
16 January 2018	Consultation process begins
13 February 2018	Closing date for submissions to Consultation Paper
March/April 2018	Draft Decision
April 2018	Consultation on Draft Decision
June 2018	Final Decision

This timetable is indicative only and may be subject to change, depending on the nature of submissions, and ARTC's and stakeholders' engagement with the assessment process.

1.5. Further information

The variation application and other relevant material, including supporting submissions from ARTC, are available on the ACCC's website at the following link:

[4] See section 3 of this paper for further information on these provisions of the Act.

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

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

The current HVAU is available on the ACCC's website at the following link:

http://registers.accc.gov.au/content/index.phtml/itemId/1203007

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

Grant Kari
Director
Infrastructure & Transport – Access & Pricing Branch
Phone: +61 3 9290 1807
Email: grant.kari@accc.gov.au

2. Key issues

The ACCC has outlined in this section various matters upon which it seeks comments. The issues raised and questions posed in this paper are not, however, designed to limit stakeholders' submissions. As noted above, the ACCC has not formed any final views on any of the matters set out in this paper and stakeholders are welcome to make comments on any aspect of the HVAU.

2.1. Effective date

Under section 2.3 of the Proposed Variation, ARTC seeks to have the:

- variation come into effect on the first day of the month which is three months after the date approved by the ACCC
- Compliance Assessment for 2018 performed as if the Proposed Variation had come into effect on 1 January 2018.

ARTC notes that the approach to the 2018 Compliance Assessment assumes the need for one compliance model to apply for the entire compliance period.[5]

Questions

1. If accepted, is it clear when the variation would come into effect?
2. Is the proposed approach to backdating the Proposed Variation for the purposes of Annual Compliance for 2018 appropriate?
3. Are there any concerns about applying the Proposed Variation for the purposes of Annual Compliance starting from the 2019 compliance period?

2.2. Incremental cost methodology

A key component of the Proposed Variation is ARTC seeking to implement an updated incremental cost methodology.

Under the current HVAU, Pricing Zone 3 Access Holders must meet the Incremental Cost they impose when traversing Pricing Zone 1 (section 4.2 of the HVAU). Incremental Cost is defined as 'all costs that could be avoided in the medium term if a Segment was removed from the Network'.[6] Prior to the 2013 Annual Compliance Final Determination, ARTC interpreted the Incremental Cost as the Direct Cost, which is defined as:

> *…maintenance expenditure, including major periodic maintenance that varies with usage of the Network, and may include other costs that vary with the usage of the Network but excluding Deprecation, assessed on an efficient basis.*[7]

As part of the 2013 Annual Compliance assessment, the ACCC engaged WIK-Consult as an independent consultant to review and assess the application of incremental cost in the HVAU. WIK-Consult noted:

---

5 ARTC, *2011 Hunter Valley Coal Network Access Undertaking Variation Explanatory Guide*, December 2017, p. 22.

6 Section 14 of the 2011 HVAU.

7 Section 14 of the 2011 HVAU.

> *…direct costs can only be an adequate approximation of short-run incremental costs. In the longer run, direct costs are only a subset of incremental costs. More costs could be avoided if a service or a segment was no longer provided. In particular, incremental costs include depreciation and costs of capital for assets if the specific assets are related to the provision of additional capacity, or are otherwise required because of network usage.*
>
> *In our understanding, the ARTC substantially underestimates incremental costs by equating them with short-run variable maintenance costs.*[8]

The 2013 Annual Compliance Final Determination adopted WIK-Consult's views on incremental cost. The Proposed Variation seeks to incorporate these views on incremental cost 'in accordance with the decision of the ACCC for the 2013 compliance assessment'.[9] One exception to this is the basis on which costs are allocated to Access Holders.

ARTC submits that the benefits to Access Holders resulting from its proposed Incremental Cost methodology are that it:

- provides price structure stability
- makes the majority of the price known by way of the magnitude of the Take-Or-Pay (**TOP**) charge in the price makeup, ahead of annual production decisions
- removes the short and medium run production decisions of competitors as a variable in the below rail cost function of other Access Holders
- provides certainty in the treatment of Incremental Capital Costs throughout the term of the HVAU.[10]

To implement the incremental cost methodology, ARTC is seeking changes to Economic Cost, Floor and Ceiling Limits and the Rail Capacity Group (**RCG**).

2.2.1. Economic cost

Under section 4.5 of the Proposed Variation, ARTC sets out the methodology to determine the Economic Cost of Segments and its allocation to Access Holders as part of the Compliance Assessment process. ARTC's proposed method encompasses four steps:

- initially allocating to specific costs, depreciation and return on assets
- allocating these costs to Variable Maintenance Costs, Incremental Capital Costs and Fixed Costs
- allocating costs to Access Holders
- excluding certain costs.

First, ARTC undertakes the initial allocation of costs into the following categories set out in section 4.5(a):

- Segment Specific Costs, which are the operating costs that ARTC can directly identify with a Segment (including losses or gains incurred on an asset's disposal)
- Depreciation of Segment Specific Assets, the value of which is determined in accordance with section 4.4.(b)

---

8 WIK-Consult, *Assessment of the Incremental Costs of Pricing Zone 3 Access Holders' Use of Pricing Zone 1 and 2 of the Australian Rail Track Corporation's Hunter Valley Rail Network*, 30 September 2015, p. 20.

9 ARTC, *2011 Hunter Valley Coal Network Access Undertaking Variation Explanatory Guide*, December 2017, p. 16.

10 Ibid., p. 7.

- a return on Segment Specific Assets, being determined by applying the real pre-tax Rate of Return (**ROR**) to (RAB Floor Limit$_{t\text{-}1\ start}$ + RAB Floor Limit$_{t\text{-}1\ end}$)*0.5, where the value of the RAB Floor Limit is determined in accordance with section 4.4(b)
- an allocation of Non-Segment Specific Costs
- an allocation of depreciation of Non-Segment Specific Assets, determined on a straight line basis, by reference to a reasonable estimate of the economic useful life of Non-Segment Specific Assets, and determined from the time the assets become serviceable
- an allocation of return on Non-Segment Specific Assets, being determined by applying a real pre-tax ROR to the value of Non-Segment Specific Assets, from the time the assets become serviceable, capitalised at that time and determined by reference to the relevant ROR.

These costs are assessed on a stand-alone and efficient basis.

Second, ARTC then defines and seeks to allocate these costs into the following three categories:

- Variable Maintenance Costs—which is defined as 'maintenance expenditure, including major periodic maintenance that varies with usage'[11]
- Incremental Capital Costs—which is limited to Pricing Zone 1 and defined as 'the capital costs that are reasonably identifiable…as avoidable in the long term'[12], but excludes capital costs incurred before 1 July 2008 and those approved by RCG as Fixed Costs
- Fixed Costs—which is defined as costs 'other than Variable Maintenance Costs and Incremental Capital Costs'.[13]

Under section 4.5(d)(i) of the Proposed Variation, Segment Specific Costs and Non-Segment Specific Costs are either Variable Maintenance Costs or Fixed Costs. ARTC proposes to allocate between these costs 'having regard to the purpose, causal factors, and cost drivers for the projects or costs as reasonably determined by an engineering assessment'.[14]

Under section 4.5(d)(ii) of the Proposed Variation, Depreciation and return on Segment Specific Assets and Non-Segment Specific Assets are either Incremental Capital Costs or Fixed Costs. Where:

- 'capital costs incurred before 1 July 2008 are taken to be Fixed Cost'[15]
- unless endorsed by the RCG, for capital costs incurred on or after 1 July 2008, ARTC proposes to allocate between these costs 'having regard to the purpose, causal factors, and cost drivers for the projects or costs as reasonably determined by an engineering assessment'.[16]

Third, section 4.5(f) of the Proposed Variation sets out ARTC's approach for allocating Incremental Capital Costs and Variable Maintenance Costs among Access Holders. Where:

- Incremental Capital Costs are allocated on the basis of either Contracted Coal GTK or Train Km

---

[11] Section 14 of the Proposed Variation.

[12] Section 14 of the Proposed Variation.

[13] Section 14 of the Proposed Variation.

[14] Section 4.5(e)(iii) of the Proposed Variation.

[15] Section 4.5(e)(i) of the Proposed Variation.

[16] Section 4.5(e)(ii) of the Proposed Variation.

- Variable Maintenance Costs are allocated on the basis of either GTK (weighted for axle load) or Train Km.

Currently, Incremental Capital Costs are allocated on the basis of either actual GTK or Train Km. This approach was adopted following the 2013 Annual Compliance Final Determination.

In allocating costs among Variable Maintenance Costs, Incremental Capital Costs and Fixed Costs and then to Access Holders, under section 4.5(g) of the Proposed Variation, ARTC proposes that:

- 'the same incremental proportion and allocation method for Incremental Capital Costs should be consistently used for projects or capital projects of a similar nature or purpose'[17]
- once an incremental proportion or allocation method for capital or maintenance is approved by the ACCC, 'it will not be reviewed in future Compliance Assessments and will continue to apply for the life of that project or capital costs'[18]
- if the RCG endorses a request to treat a capital cost as a Fixed Cost rather than as an Incremental Capital Cost, 'then than treatment will be applied for the relevant Compliance Assessment and will continue to apply for the life of those capital costs or relevant project'.[19]

Fourth, under section 4.5(h) of the Proposed Variation, ARTC seeks to exclude the following when determining the Economic Cost of a Segment:

- Variable Maintenance Costs by Access Holders that do not hold Coal Access Rights
- Variable Maintenance Costs by Access Holders holding Coal Access Rights and who are not Constrained Coal Customers
- for Segments in Pricing Zone 1, the Incremental Capital Costs imposed by Pricing Zone 3 Access Holders.

[17] Section 4.5(g)(i) of the Proposed Variation.

[18] Section 4.5(g)(ii) and (iii) of the Proposed Variation.

[19] Section 4.5(g)(iv) of the Proposed Variation.

Questions

4. Are the definitions of Variable Maintenance Costs, Incremental Capital Costs and Fixed Costs clear?
5. Is the approach for allocating costs to Variable Maintenance Costs, Incremental Capital Costs and Fixed Costs appropriate?
6. Is it clear how Fixed Costs will be allocated to Access Holders?
7. Is the use of Contracted Coal GTK or Train Km rather than actual GTK or Train Km commitments appropriate as the method of allocating Incremental Capital Costs to Access Holders?
8. Given section 4.5(h) of the Proposed Variation, is it appropriate these costs are excluded from the Economic Cost of a Segment?
9. In addition to that set out in section 4.5(h) of the Proposed Variation, should any other costs be excluded from the Economic Cost of a Segment?

2.2.2. Floor contribution

Under section 4.2 of the Proposed Variation, ARTC sets out the Floor Contribution of revenue Access Holders must meet. In the current HVAU, the equivalent mechanism is the Floor Limit.

For Access Holders who are Constrained Coal Customers from Pricing Zone 1 or 2, the Floor Contribution is equal to the Variable Maintenance Costs they impose traversing Pricing Zone 1 and 2 and Incremental Capital Costs they impose traversing Pricing Zone 1.

For Pricing Zone 3 Access Holders, the Floor Contribution is equal to the Variable Maintenance Costs they impose traversing Pricing Zone 1 and 3 plus the Incremental Capital Costs they impose traversing Pricing Zone 1.

Questions

10. Is the definition of the Floor Contribution clear?
11. Is it appropriate that the Floor Contribution for Pricing Zone 3 producers traversing Pricing Zone 3 is equal to the Variable Maintenance Cost of those segments?
12. Is it appropriate that Pricing Zone 3 Access Holders traversing Pricing Zone 1 meet their Variable Maintenance Costs and Incremental Capital Costs?

2.2.3. Ceiling Limit

Under section 4.3 of the Proposed Variation, ARTC sets out the Ceiling Limit or maximum revenue that can be recouped from Train Paths operated on behalf of Access Holders. The Ceiling Limit is the Economic Cost of Segments as determined under section 4.5 of the Proposed Variation (set out in section 2.2.1 of this Consultation Paper).

ARTC proposes two reconciliations where Access Revenue must not exceed the Ceiling Limit. These are for Train Paths traversing:

- Pricing Zone 1 and 2, and where these Train Paths operated on behalf of Access Holders who are Constrained Coal Customers for the Pricing Zone 1 and 2 Constrained Network
- Pricing Zone 3, and where these Train Paths operated on behalf of Access Holders who are Constrained Coal Customers for the Pricing Zone 3 Constrained Network.

Currently, Pricing Zone 3 is not a Constrained Network and a Ceiling Limit does not apply. However, the Proposed Variation states the Pricing Zone 3 Ceiling Limit applies when the Regulated Asset Base (**RAB**) for Pricing Zone 3 is equal to or less than the RAB Floor Limit for Pricing Zone 3.[20]

ARTC states:

> *…it is intended once the capitalised loss balance has been fully recovered, Pricing Zone 3 will be a separate Constrained Network with its own overs and unders accounting process distinct from the Constrained Network that comprises segments in Pricing Zone 1 and 2.*[21]

ARTC notes that 'a capitalised loss balance will remain at the end of the term of the HVAU as currently extended'.[22]

Under section 4.8A of the Proposed Variation, ARTC sets out how it will reconcile revenue from Constrained Coal Customers in the event Pricing Zone 3 is a Constrained Network and there are two Ceiling Limits. ARTC also states this section has been included 'to make clear that there is a reconciliation between Access revenue and Economic Cost in the Compliance Assessment'.[23]

First, under section 4.8A(b), ARTC proposes the Floor Contribution of Pricing Zone 3 Access Holders traversing Pricing Zone 1 and 2 is removed from the Economic Cost of Pricing Zone 1 and 2. This Floor Contribution is not added to the Economic Cost of Pricing Zone 3.

Second, under section 4.8A(c), in allocating and reconciling Access Revenue from a Pricing Zone 3 Access Holder, ARTC proposes it must:

- *first allocate and recover an amount of Access revenue equal to the Floor Contribution for each Segment traversed by that Pricing Zone 3 Access Holder and, for Segments in Pricing Zone 1, such Access revenue is to be allocated and recovered outside any Ceiling Limit and is not further taken into account for the purpose of reconciling Access revenue against the Ceiling Limit for either the PZ1/2 Constrained Network or the PZ3 Constrained Network;*
- *not allocate Access revenue to a Segment in Pricing Zone 1 in excess of the Floor Contribution for that Segment for that Pricing Zone 3 Access Holder; and*
- *allocate remaining Access revenue to Segments in Pricing Zone 3 for the purpose of determining compliance with any Ceiling Limit for those Segments in Pricing Zone 3.*

---

[20] Section 4.3(c) of the Proposed Variation

[21] ARTC, *2011 Hunter Valley Coal Network Access Undertaking Variation Explanatory Guide*, December 2017, p. 19.

[22] Ibid.

[23] Ibid., p. 65.

Questions

13. Is the introduction of two Constrained Networks appropriate?
14. Is the rationale and purpose for creating two Ceiling Limits for two Constrained Networks clear?
15. Is it clear how the two Ceiling Limits will practically operate?
16. Is it appropriate to determine the Ceiling Limits on a Train Path basis?

2.2.4. Rail Capacity Group

ARTC seeks to include RCG in the assessment of capital cost as Fixed Costs or Incremental Capital Costs, affecting the Ceiling Limits and Floor Contributions.

Under section 9.2(a) of the Proposed Variation, ARTC proposes it will convene RCG for the purpose of:

- *at the appropriate stage of the consultation process, informing the RCG on the proportions and allocation methods for Project costs or other Capital Expenditure on the Network that are Incremental Capital Costs in accordance with section 4.5, including providing details of new engineering assessment (if required), but ARTC is not required to obtain RCG endorsement of such proportion and allocation methods; and*
- *if requested by ARTC (at its discretion) at a stage in the consultation process, consulting with the RCG and obtaining endorsement of the RCG of capital costs being treated as Fixed Costs rather than Incremental Capital Costs.*

Questions

17. Are there any concerns relating to RCG endorsement of a capital cost where RCG approves of the capital cost but does not agree with ARTC's proportions and allocation methods for Incremental Capital Costs?
18. Is the distinction between section 9.2(a)(ii) and section 9.2(a)(iii) on proportions and allocation methods for Incremental Capital Costs and Fixed Costs and the role of ARTC and RCG clear?
19. Is the role of the ACCC for assessing decisions relating to the proportion and allocation methods for Project costs or other Capital Expenditure clear?

2.3. Path based pricing

ARTC's path based pricing proposal comprises of two elements; the structure of Charges for Coal Access Rights, and the Services Envelope. In addition, ARTC's path based pricing proposal includes changes to RCG membership and voting.

ARTC submits that it seeks to achieve the following two objectives through the implementation of path based pricing:

- *to ensure that pricing provides an incentive for efficient consumption of network capacity in the context of the supply chain that it operates within; and*
- *to ensure that the same pricing incentives encourage efficient long-term investment in the below rail network infrastructure, as well as in downstream above rail infrastructure.*[24]

ARTC considers that path based pricing is more simple and transparent than the Initial Indicative Services used in the current HVAU. ARTC also considers that path based pricing provides an incentive to design and operate train configurations that maximise the capacity of the network.[25] ARTC notes that path based pricing does affect customers that originate from, or complete their journey on, an adjoining network. ARTC submits that this effect is mitigated by moving to a three-part tariff, where part of the TOP charge is levied on a GTK basis. ARTC also submits that the removal of differentiation factors has a positive effect on pricing for customers who have axle load constraints affecting train sizes.[26]

The proposed changes are outlined below.

2.3.1. Structure of Charges for Coal Access Rights

Under section 4.11(a) of the Proposed Variation, ARTC seeks to set Charges for Coal Access Rights on the basis of a combination of:

- a non-TOP component based on actual usage ($/GTK) for the recovery of Variable Maintenance Costs for each Pricing Zone.
- a TOP component comprising of:
    - $/Contracted Coal GTK for the recovery of Incremental Capital Costs incurred in the Pricing Zone 1 and 2 Constrained Network; and
    - $/Train Km for each Pricing Zone for the recovery of Fixed Costs.

In the pricing objectives set out section 4.13(a) of the Proposed Variation, ARTC will will have regard to the following when determining Charges:

- *achieving the full recovery of Variable Maintenance Costs from all Access Holders on the basis of the actual GTK usage weighted for the axle load*
- *through the application of the TOP component of Charges, achieving the maximum permitted recovery of Incremental Capital Costs and Fixed Costs; and*
- *the proportion of Fixed Costs and Incremental Capital Costs recovered through a TOP component to be consistently applied to all Access Holders holding Coal Access Rights within a Pricing Zone*

In addition, section 4.13(b) states that in determining Charges, ARTC will have regard to the objective of providing for an open and equitable mechanism for the application of TOP Charges.

---

[24] Ibid., p. 10.

[25] Ibid., p. 5.

[26] Ibid., p. 15.

Questions

20. Is the proposed basis for TOP and non-TOP Charges appropriate?
21. Does the proposed structure of charges provide sufficient incentive for the efficient use of the Network?
22. Does Train Km reflect how Fixed Costs are incurred?
23. Does GTK reflect how Incremental Maintenance Costs and Incremental Capital Costs are incurred?
24. Is it clear which activities are considered to be:
    a. Incremental Capital Costs?
    b. Variable Maintenance Costs?
    c. Fixed Costs?

2.3.2. Services Envelope

Under section 4.14 of the Proposed Variation, ARTC proposes to use a Services Envelope for each Pricing Zone to determine the annual Standard Access Charge. The Services Envelope is a single set of maximum train characteristics for each Pricing zone, with Standard Access Charges applying to all coal services whose configuration sits within that range.

Section 4.15 includes provisions for formulating Access Charges for coal customers whose train configuration falls outside the Services Envelope.

Questions

25. Are the proposed configurations in the Services Envelope appropriate?
26. Is the introduction of the Services Envelope dependent on a portion of TOP Charges being levied on a Train Km basis?
27. Is the proposed approach to determining Access Charges for coal customers whose train configuration falls outside of the Services Envelope appropriate?

2.3.3. Rail Capacity Group

Under section 9.2 of the Proposed Variation, ARTC has proposed changing the basis for determining Access Holder and Operator membership to the RCG, and associated voting entitlements, from contracted coal GTK to Contracted Coal Km. That is, membership and voting entitlements will be based on distance traversed, and not take into account the gross tonnage hauled.

ARTC has also proposed changes to the basis for the RCG endorsement threshold, under section 9.8(a) and (b) of the Proposed Variation, from contracted coal GTK to Contracted Coal Km. Specifically:

- *Where:*
    - *Additional capacity is provided; or*
    - *ARTC requests that capital costs be treated as Fixed Costs rather than Incremental Capital Costs under section 9.2(a)(iii)*

  In relation to a particular Pricing Zone, the endorsement of coal producers that hold Coal Access Rights under an Access Holder Agreement and any coal Train KM included under section 9.2(g), with at least 50 per cent of Contracted Coal KM in that Pricing Zone will constitute endorsement by the RCG.

- *Where Additional Capacity (delivered by way of a single project of series of projects) is provided in relation to a particular Pricing Zone, and that Additional Capacity results in an increase in the Standard Access Charge for that Pricing Zone by more than 10 per cent, the endorsement of Coal Customers that hold Coal Access Rights under an Access Holder Agreement and any coal Train KM included under section 9.2(g) with at least 70 per cent of Contracted Coal KM in that Pricing Zone and any coal Train KM included under section 9.2(g) will constitute endorsement by the RCG of that stage of project development.*

Questions

28. Are the proposed changes to the basis for determining RCG membership and voting entitlements appropriate?

29. What would be the effect of changing the basis of determining RCG membership and voting entitlements from contracted GTK to Contracted Coal KM?

30. Is the proposed change to the basis for RCG endorsement thresholds appropriate?

31. What would be the effect of changing the basis for RCG endorsement thresholds from contracted GTK to Contracted Coal KM?

2.4. Other issues

ARTC has proposed to remove a number of clauses considered to be redundant, such as those related to Interim and Indicative Services, and the development of the Final Indicative Service.[27] ARTC has also proposed a number of minor wording changes, including those to reflect the proposed introduction of Path Based Pricing and an Incremental Cost Methodology.

[27] Ibid., p. 16.

Questions

32. Are there any concerns with any other changes in the Proposed Variation that have not been addressed in this consultation paper?

33. Are there any other issues in the HVAU that have not been addressed in the Proposed Variation?

3. Legal framework for accepting a variation to an access undertaking

In assessing an access undertaking under Part IIIA of the Act, the ACCC must apply the test set out in subsection 44ZZA(3), which provides that the ACCC may accept the undertaking if it thinks it appropriate to do so, having regard to the following matters:

- the objects of Part IIIA of the Act, which are to:
  - promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
  - provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry;
- the pricing principles specified in section 44ZZCA of the Act (see further below);
- the legitimate business interests of the provider of the service;
- the public interest, including the public interest in having competition in markets (whether or not in Australia);
- the interests of persons who might want access to the service;
- whether the undertaking is in accordance with an access code that applies to the service; and
- any other matters that the ACCC thinks are relevant;

In relation to the pricing principles, section 44ZZCA of the Act provides that:

- that regulated access prices should:
  - be set so as to generate revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and
  - include a return on investment commensurate with the regulatory and commercial risks involved;
- that the access price structures should:
  - allow multi-part pricing and price discrimination when it aids efficiency; and
  - not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and
- access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.

3.1. Timeframes for ACCC decisions and clock-stoppers

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

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

- make a decision to not accept the application; and
- published its decision under section 44ZZBE and its reasons for that decision.[28]

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

- by written agreement between the ACCC and the access provider (in this case, ARTC), and such agreement must be published: subsections 44ZZBC(4) and (5);
- if the ACCC gives a notice under subsection 44ZZBCA(1) requesting information in relation to the application;
- if a notice is published under subsection 44ZZBD(1) inviting public submission in relation to the application;
- if a decision is published under subsection 44ZZCB(4) deferring consideration of whether to accept the access undertaking, in whole or in part, while the ACCC arbitrates an access dispute.

3.1.1. Information requests

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

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

[28] See subsection 44ZZBC(6) of the Act.