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Mr Anthony Wing
General Manager
Transport and General Prices Oversight
ACCC
GPO Box 520
MELBOURNE VIC 3001

Email: transport@acc.gov.au

Submission: ARTC proposed Hunter Valley Rail Network Access Undertaking

Aston Resources Limited (**Aston Resources**) is an ASX-listed company focused on the development of its wholly-owned Maules Creek coal development project (the **Project**), a major undeveloped coal deposit in New South Wales. As a new entrant into the Hunter Valley Coal Chain, Aston Resources welcomes this opportunity to make a submission on the Australian Rail Track Corporation Limited (**ARTC**) proposed access undertaking for provision of access to the Hunter Valley Rail Network (**2010 HVAU**).

Aston Resources acknowledges that both the Australian Competition and Consumer Commission (**ACCC**) and the ARTC have undertaken a significant amount of work to bring the HVAU to its current form. Aston Resources agrees that it is important for producers to be able to enter into long-term access agreements to underpin future mine planning and investment in the region. However, Aston Resources considers that certain aspects of the 2010 HVAU disadvantage access seekers, in particular new entrants that require Additional Capacity (as defined in the 2010 HVAU).

This submission provides a brief overview of Aston Resources and then outlines the company's key concerns with respect to the 2010 HVAU. As a new entrant and a current access seeker, Aston Resources has particular concerns that the 2010 HVAU fails to ensure that:

1. incumbent Producers are adequately required and/or incentivised to transfer unused capacity;
2. Additional Capacity will be delivered (on time) to meet growing demand in the Hunter Valley; and
3. new entrants are given sufficient access to existing and/or Additional Capacity.

Aston Resources' concerns are amplified by the way in which it sees the 2010 HVAU interacting with the existing Capacity Framework Arrangements at the Port of Newcastle. Aston Resources is of the opinion that the cumulative impact of the HVAU and the Capacity Framework Arrangement (in particular, the fact that capacity is rarely resumed or "cancelled") is that incumbent producers will be able to "hoard" capacity to the exclusion of new entrants. This concern is explained in more detail below (with reference to specific section of the 2010 HVAU). Aston Resources' key concerns are essentially as follows:

1. If the "network exit capability" requirement is too strictly interpreted:
 - a. the benefits of the capacity transfer system at the port may be limited; and
 - b. the construction of Additional Capacity on the rail network may be unduly delayed in circumstances where additional capacity at the port is required to be built.
2. Access seekers have no rights of recourse against ARTC until after designed projects are completed, meaning that there is not considered to be any Capacity Shortfall if projects are unduly delayed (or indeed abandoned). Access seekers should have rights against ARTC in these circumstances and ARTC should be required to mandatorily compress incumbent Producers that are not using their base paths. Overall the compression and relinquishment provisions have been unduly weakened in the 2010 HVAU

3. The role of the HVCCC and RCG as oversight bodies have been limited by the significant overriding discretion retained by ARTC with respect to the construction of Additional Capacity. This is the case both with respect to the original decision to deliver Additional Capacity and to the timeline and budget for the eventual delivery.

When the Capacity Framework Arrangements replaced the “common user” provision in the PWCS lease, mechanisms that enshrined a ‘use it or lose it’ approach to capacity were eliminated and protections for new entrants into the coal chain were undoubtedly reduced. Aston Resources is concerned that, coupled with the 2010 HVAU, there is a significant risk that new entrants will be unable to obtain necessary access to the Hunter Valley Coal Chain on a fair and timely basis. Whilst Aston Resources acknowledges the importance of contractual certainty for producers and infrastructure providers to facilitate capacity growth, it is important for the ACCC to assist new entrants to obtain access to infrastructure that is by its nature essential and incapable of being replicated.

For completeness, Aston Resources also notes that the prospect of full coal chain alignment is hindered by the fact that the Gunnedah rail system (which connects the Hunter Valley Rail Network at Werris Creek) is not covered by any prescribed access regime.

Company overview

On 18 February 2010, Aston Resources completed the acquisition of the Project from Namoi Valley Coal Pty Ltd, a subsidiary of ASX-listed Coal & Allied Industries Limited (which in turn is a subsidiary of the Rio Tinto Group). The Project is an undeveloped coal project located in the Gunnedah Basin in New South Wales.

Aston Resources currently holds two mining tenements (CL375 and A346) over approximately 5,816 hectares in the Gunnedah Basin. A 610Mt JORC Resource and JORC Coal Reserves of 356Mt have been identified within these tenements. The Project’s current JORC Resource is expected to support a large open-cut mining operation for in excess of 30 years at an average saleable coal production rate of 10.8Mtpa. Subject to the timely delivery of necessary governmental approvals, Aston expects that the Project will be commissioned and first coal production will commence in the second half of 2012, with saleable production exceeding 10Mtpa from 2014. Importantly, it is expected that the Project will produce a majority of high value metallurgical coal, as well as premium, high energy, thermal coal.

Aston Resources nominated for port capacity this year and is seeking, in parallel, to negotiate requisite rail access on the Gunnedah and Hunter Valley Rail Networks.

SECTION ONE – PREAMBLE

Section 1 of the 2010 HVAU has been amended by ARTC to refer more explicitly to the “long term solution” and the importance of coal chain alignment. Despite these amendments, section 1 of the 2010 HVAU nowhere recognises capacity growth or the availability of access as key priorities. Aston Resources considers that section 1.2 (Objectives) should expressly highlight ARTC’s responsibility to, subject to its legitimate business interests, provide infrastructure to support growing demand in the region. This is important in circumstances where, as noted above, the Hunter Valley Coal Chain is critical infrastructure that new entrants cannot readily replicate. It is further heightened by the fact that inadequate incentives exist to ensure that incumbent Producers do not (and that ARTC ensures that such Producers do not) hoard capacity.

SECTION THREE – NEGOTIATING FOR ACCESS

Aston Resources is of the opinion that clause 3 of the HVAU 2010 should provide a more prescriptive process for ARTC to follow in negotiating for access. Clause 3.1(b) recognises the importance of consultation with the HVCCC and Hunter Valley Coal Chain Service Providers but does not set out a framework for such consultation. Although regard should be had to the principles in Schedule F, these principles do not set out mandatory timeframes. Further, ARTC is only obliged to follow the steps “to the extent practicable”. ARTC should be expressly required, as part of assessing an application for access, to

seek and have reasonable regard to the views of the HVCCC and the Hunter Valley Coal Chain Services Providers.

Section 3.6(c), which provides that ARTC would be entitled to not participate in an initial review of capacity requirements “if **other Hunter Valley Coal Chain Participants** do not participate reasonably and effectively in that review,” could enable a single coal producer to derail a new entrant’s negotiations for access. There is also no requirement for ARTC to **reasonably** form the view that participation has been ineffective. It is an unacceptable risk for access seekers that ARTC can avoid an initial capacity review simply by claiming that other participants (who may or may not be directly relevant to the access sought) have not been involved in the review process. HVCCC should be able to control a decision on this point and/or it should be sufficient for ARTC that the HVCCC itself is engaging in the review.

Network Exit Capability (section 3.7(b))

The 2010 HVAU provides that ARTC will only negotiate track access rights with an applicant seeking to transport coal to the Port of Newcastle where that applicant already has a contract to offload the anticipated coal or is in negotiations with the port company to obtain this capability. Whilst Aston Resources recognises that the 2010 HVAU provides ARTC with some discretion where the applicant is negotiating such rights, Aston Resources considers that this can be expanded upon.

Aston Resources is concerned that the ‘network exit capability’ requirement, if too strictly interpreted, could decrease the value of the capacity assignment/trading mechanisms at the port. It is possible that, although an access seeker does not receive their full port capacity allocation upfront, they will increase their capacity allocation through voluntary trading or compression of other producers’ allocations.

If access seekers are precluded from nominating for rail capacity of, for example, 10Mtpa, because they hold only port capacity of 8Mtpa, they will be unable to take advantage of the capacity trading system that has been established for the port. Voluntary transfers are a key means of procuring port access – for example, NCIG shareholders are able to make their capacity available to third parties by notice for a period of up to twelve months (subject to renewal) (clause 10 of the Ship-or-Pay Agreement). It is important that access seekers, particularly new entrants, are not prevented from taking advantage of this key way of obtaining capacity.

Aston Resources recommends that ARTC (or the HVCCC) be given clearer discretion to consider allocating such track capacity to access seekers who are using bona fide attempts to obtain or increase port capacity by any means (and who are willing to commit to a long term take or pay agreement).

There are a variety of problems that could arise as a consequence of a strict application of “network exit capability” requirement. For example, if Aston Resources is not allocated port capacity in 2010, under the current draft of the 2010 HVAU, it will be unable to negotiate for rail capacity. Whilst this might seem prima facie logical, it is possible that, because of voluntary compressions or capacity subsequently becoming available it will be allocated capacity from 2014 onwards. The problem then arises that ARTC would not contract with Aston Resources until 2014 and would not have to start working on/considering any capacity expansions (such as the Liverpool Ranges duplication) until 2014. This could mean that rail capacity would not be available until 2017 or later (depending upon the time taken for expansion works) despite port capacity being available in 2014. There is a particular likelihood of such an outcome because, as discussed below, although PWCS is essentially required to construct additional capacity, ARTC is not.

The preferable model for access seekers would be for the track capacity allocation process to be aligned with the port capacity allocation process, in particular the timing of the two processes (for both nominations and grants of capacity). This would avoid the risk, which currently exists, that an access-seeker will obtain one or other of port and rail allocation but not both. Currently, there is a clear risk that an access seeker will obtain port capacity under the annual nomination process and then be unable to negotiate commensurate rail access (particularly if Additional Capacity is required). This is inefficient for both access seekers and access providers because an access provider could become contractually bound to provide additional infrastructure in circumstances where it is no longer required. As an example, an access seeker could receive its full port allocation and T4 could be mandatorily triggered under the Capacity Framework

Arrangements – notwithstanding this, ARTC could later form the view that Additional Capacity on the rail network is not consistent with its legitimate business interests. This is inefficient for all involved. A more closely integrated, or even directly stapled allocation process would be more effective.

Application for mutually exclusive Access Rights (section 3.13)

Section 3.13 provides that, where two or more Applicants have submitted mutually exclusive applications, ARTC will allocate Access Rights to the Applicant who accepts the Access Agreement most favourable to ARTC. As currently drafted, there is no transparency with respect to the calculations that ARTC will use to determine which application will represent the highest present value of future returns to ARTC. It would be preferable for mutually exclusive access applications for track capacity to be differentiated using a similar set of priority rules to that used by PWCS under the Capacity Framework Arrangements. This focuses on the viability of the access seeker, rather than the prospective value to ARTC. Currently, the HVAU in no way considers the feasibility of respective claims for access. Whilst ARTC considers this unnecessary because feasibility has already been assessed at the Port, there are different levels of priority considered under the Capacity Framework Arrangements. Two projects that have received an allocation are not necessarily equally viable and a project with a higher priority classification (for example because it is in production or because it has a development consent as well as a mining lease) should be allocated access in preference to a project with lower priority (for example a project with a mining lease only). Aston Resources is of the opinion that this is a fairer criterion than the net present value of the two access agreements to ARTC.

SECTION 5 – CAPACITY MANAGEMENT

Capacity Analysis (section 5.2(b))

Aston Resources is of the opinion that where the ARTC disagrees with the HVCCC's comments on the availability of Coal Chain Capacity, it should be **required** to provide reasons why it disagrees with the assessment **both** to the HVCCC **and to the access seeker**. Given the HVCCC's central role in modeling and coordinating coal chain capacity, ARTC should not have discretion as to whether it provides reasons to the HVCCC and the access seeker should be given an opportunity to review and consider those reasons.

Capacity Shortfall (section 5.4(b))

Section 5.4(b) states that the Capacity entitlement held by an Access Holder will be considered an unconditional Capacity entitlement if all conditions precedent to the conferral of that Capacity entitlement, **"including the completion of designated projects"** have been satisfied or waived by ARTC. Under the 2010 HVAU, there is no right to capacity, and therefore no capacity shortfall, until projects required for that capacity are completed by the HVAU. An access seeker has no right to capacity, and therefore no recourse against ARTC, until necessary projects have been completed (irrespective of whether such projects have been unduly delayed).

This can be directly contrasted to the position under the Capacity Framework Arrangements where an access seeker's load point allocation becomes effective from the date that a project is due to be delivered (subject to delays approved by NPC or an independent expert). If a project is not delivered on time, there is deemed to be a capacity shortfall at that point, and the access seeker can take advantage of voluntary reductions and mandatory compression of contracted allocations. Essentially, an access seeker has rights from the time a project is due to be delivered (subject always to an independent arbiter's oversight of when that project could reasonably be expected to be delivered).

Aston Resources submits that a similar approach could be adopted in the 2010 HVAU. Whilst rail pathways are not fungible in the same way as port allocations, a system should be able to be devised whereby capacity that is not being utilised by existing Access Holders can be made available to access seekers disadvantaged by a capacity shortfall. This is consistent with the proposed review under section 5.9. New entrants should have rights, and a Capacity Shortfall should be deemed to exist, when the Additional Capacity is **due** to be delivered. It is not acceptable that an access seeker has no rights until a project is in fact delivered (even if such project is unduly or indefinitely delayed). Taking the current model to the extreme, an access seeker could have no rights for an essentially indefinite period of time. Whilst Aston

Resources appreciates that ARTC is not a construction company and needs to have regard to its legitimate business interests, it does get a return on its investment and access seekers should have commensurate protection.

Capacity resumption and relinquishment (section 5.8 and section 11.4 IAHA)

Pursuant to section 5.8 of the 2010 HVAU and section 11.4 of the Indicative Access Holder Agreement (IAHA), ARTC is given the right (but not the obligation) to reduce the Capacity Entitlement of an Access Holder under its IAHA if it is not fully utilised. Under the 2010 IAHA, the under-utilisation threshold is <80% over a six-month period. Although some producers specifically sought a lower threshold in their submissions, Aston Resources is concerned that the 80% threshold, coupled with the increase to a six-month period and the “show cause” right in clause 11.4(f) has unduly weakened the resumption provisions.

As currently drafted, the 2010 HVAU and IAHA provide insufficient incentives for the ARTC to resume capacity for under-utilisation, even where this is in the best interests of access seekers and the efficient operation of the Hunter Valley supply chain. The resumption provisions should be drafted to ensure that available capacity is used by new access seekers and/or competing producers, potentially allowing for an increase in actual (rather than nominal) capacity. There is no incentive for ARTC, the HVCCC or Producers to ensure that Access Holders “use” or “lose” capacity.

It is important to note that, as currently drafted, ARTC is never **obligated** to resume pathways under the IAHA. The IAHA simply provides that ARTC **may** elect to resume paths. Aston Resources submits that, if a reasonable operational reason for the under-utilisation is not provided, ARTC should be required to resume the effected paths, at the very least in circumstances where there is a Capacity Shortfall. In the alternative, Aston Resources submits that, where ARTC retains a residual discretion, it would appropriate to require producers to “show cause” at a higher under-utilisation threshold – e.g. < 90% over a quarter.

Under the Capacity Framework Arrangements, PWCS and NCIG are required to mandatorily compress for under-utilisation in the event of a capacity shortfall. As noted above, this provision protects new access seekers when there is a delay in the construction of additional capacity. It is very important that the resumption provisions in the 2010 HVAU are effective given that the resumption provisions in the Capacity Framework Arrangements are only triggered in the event of a Capacity Shortfall and not mandatorily in the case of under-utilisation. Otherwise, there is limited incentive for incumbents to trade unneeded capacity.

In addition, section 11.4(b) also provides that ARTC will **never** exercise its resumption rights where the System Availability Shortfall (**SAS**) for the Relevant Pricing Zone is greater than zero. This is too strict a rule as the under-utilisation could be of far greater magnitude than the overall SAS.

Aston Resources submits that the most appropriate approach is likely to be a tiered system. As an example only:

- In the event of a Capacity Shortfall, ARTC should be **obligated** to resume pathways for under-utilisation (at the higher threshold of <95% over 6 months) subject to force majeure. Those affected by the Capacity Shortfall should then be notified and, to the extent practicable, be given access to the pathways.
- Where there is no Capacity Shortfall, there should simply be a mandatory “show cause” for under-utilisation (at the slightly lower threshold of <90% over a quarter). ARTC would retain its discretion to resume pathways and could consider all legitimate operational reasons.
- Where a Producer has had to “show cause” twice in a 12 month period and the cause has not been outside of the Producer’s control, ARTC should be **obligated to resume pathways**.
- For repeated under-utilisation, the under-utilisation threshold could be increased over time or ARTC could announce an intention to resume in the event that usage does not increase within a specified period.
- If there is a lower under-utilisation threshold, such as the suggested <80% over six months, then resumption should be mandatory (subject only to force majeure).

Aston Resources is also of the opinion that increased transparency in relation to resumption and relinquishment would be of benefit. Reporting to the chain at large on proposed and actual resumptions would:

1. incentivise producers to trade unused capacity; and
2. inform new entrants and competitors of new capacity becoming available.

Over time, this should increase actual usage of the coal chain.

Capacity cancellation and Capacity losses (section 5.9 and sections 11.5 and 11.6 IAHA)

Similarly, in relation to sections 11.5 and 11.6 of the IAHA, Aston Resources is concerned that ARTC is given too much discretion in deciding whether to resume pathways. Under sections 11.5 and 11.6, ARTC **may** remove Path Usages from relevant access holders. Aston Resources is of the opinion that, where the ARTC/HVCCC has reasonably formed the view that one producer's cancellations (or non-compliance) have impacted on overall capacity or the rights of another access holder, then ARTC should be required to resume the relevant pathways. At the very least, the producer in question should be required to explain to ARTC the cause of the non-compliance/cancellations. This reduces the likelihood that other (compliant) access holders will have their track usage unduly interfered with by third parties (particularly given that the only remedy for their loss of path usage is a rebate on TOP charges). In addition, a more stringent approach to resumption may limit incentives for producers to hoard capacity that could be used by new or competing producers.

Once again, the importance of this concern is heightened by the fact that there is limited potential for capacity cancellations under the Capacity Framework Arrangements. Aston Resources is firmly of the view that, subject to the oversight of the HVCCC, resumptions and cancellations can be an effective tool to ensure that incumbent Producers do not "game" the system. Where a resource is constrained, "use it or lose it" is an effective tool and ARTC should not be given an unfettered discretion as to whether or not to implement it.

Finally, in relation to section 11.6, it is unclear to Aston Resources why the number of path usages that can be removed from an Access Holder as a result of a single event (under section 11.6(d)(i)) is limited to two. It seems more logical that the removal relate to the number of paths deemed by the HVCCC to have been affected by the relevant conduct.

SECTION 6 – NETWORK CONNECTIONS AND ADDITIONS

Network connections – Section 6.1

In its explanatory guide, ARTC states that that the obligation to consent to connections in section 6.1 of the 2010 HVAU ensures that ARTC cannot extract monopoly rents through withholding access to ARTC controlled land. Aston Resources fails to see how the amendments to section 6.1 ensure that the ARTC cannot extract monopoly rents or frustrate access to the Network. It is stated only that access seekers will be required to "agree reasonable terms for the construction, maintenance and operation of the connection **as determined by ACCC**." No further information is provided regarding how these terms are to be negotiated, whether there is any cap on charges that can be levied or whether disagreement is subject to ACCC review (given that "connections" do not form part of the "Network").

Additional Capacity – Commercial viability test (sections 6.2 to 6.4)

In its draft decision dated 5 March 2010, the ACCC acknowledged the importance to the effectiveness of the Hunter Valley coal chain of ensuring that the overall capacity on the rail network expands in alignment with the capacity of the port terminals, such that infrastructure across the chain is utilised effectively (section 1.6.3, page 12). Aston Resources is concerned that the 2010 HVAU fails to adequately ensure that capacity across the Hunter Valley Rail Network will expand to meet capacity growth at the port.

Aston Resources acknowledges that the ACCC has formed the preliminary view that the HVAU should not set out strict rules which oblige ARTC to comply with the recommendations of the HVCCC regarding the

creation of Additional Capacity, as the decision to consent to the provision of Additional Capacity is ultimately a decision for ARTC involving consideration of its legitimate business interests. Nonetheless, Aston Resources remains concerned that the ARTC is given too much discretion regarding when additional capacity will be created or finalised. This relates to both the ARTC's initial consent to create further capacity and to its continuing discretion not to complete the building of additional capacity within a certain timeframe, after having agreed to provide that capacity.

Access seekers need to be assured of timeliness and certainty in the provision of additional capacity, given that they may need to make significant capital investments in reliance on ARTC's undertaking to deliver capacity. The 2010 HVAU can be contrasted with arrangements at the Newcastle Port where, subject to certain economic and design feasibility criteria, PWCS is obliged to expand its terminal to respond to growth in demand for capacity.

Under section 6.2 of the 2010 HVAU, ARTC will consent to the provision of Additional Capacity if:

- **either:**
 - in ARTC's (unqualified) opinion such provision is "commercially viable" to the ARTC (having regard to certain listed factors); or
 - the Applicant agrees to meet the cost of the Additional Capacity; **and**
- the Additional Capacity is, in the (again unqualified) opinion of ARTC:
 - technically feasible and consistent with the economically efficient operation of the Network;
 - consistent with the safe and reliable operation of the Network;
 - does not reduce coal chain capacity (taking into account HVCCC's comments); and
 - does not "otherwise compromise ARTC's legitimate business interests".

It is Aston Resources' firm view that section 6.2(a)(i) (and similarly section 6.3(b)(iii)) should be amended, at the very least, to provide that ARTC's opinion is to be 'ARTC's **reasonable** opinion'. The value of having objective criteria is obviated if ARTC is not required to form a reasonable opinion with respect to such criteria. Requiring ARTC to form a "reasonable" opinion is not unduly onerous as such opinion need only be reasonable to a person or entity in the position of ARTC. In the explanatory guide, ARTC states that such an amendment is not required because the applicant always has the option of self-funding the Additional Capacity. This provides insufficient protection to access seekers particularly where:

1. ARTC can still decline to provide the additional capacity having regard to its "legitimate business interests"; and
2. if the Capital Expenditure is subsequently deemed Prudent, the contributor has no priority access to the infrastructure that it has itself funded.

It is also submitted that ARTC should be required to act reasonably when taking into account the HVCCC's comments and recommendations and should not be entitled to have regard to its legitimate business interests when an applicant has agreed to self-fund an expansion. If a project is fully-funded (and considered to be technically feasible, safe and not reduce coal chain capacity) no further endorsement should be necessary.

Aston Resources submits that it is inappropriate that ARTC can decline to provide Additional Capacity when:

1. the HVCCC has recommended an investment;
2. the investment is endorsed by the Rail Capacity Group (**RCG**); and
3. sufficient take or pay commitments are contracted to cover capital costs (section 6.3).

The value of the HVCCC and the role of the RCG is limited when ARTC retains an overriding (and essentially unfettered) discretion to refuse to provide a capacity expansion. As noted above, there is no

value in including detailed objective criteria in the 2010 HVAU when ARTC is not required to act reasonably, or have reasonable regard to the opinions of the HVCCC and RCG, when assessing the criteria.

Aston Resources has similar concerns with respect to section 6.4 and the discretion vested in ARTC to discontinue development projects. The right of the ARTC to cease construction on an endorsed project while it seeks approval of a variation by the RCG or the review of the independent expert, may present coal producers with an unacceptable choice of having to endorse the variation, even if it is not merited, to ensure that the Additional Capacity is delivered on time. Alternatively, if the RCG or independent expert is firmly of the view that a variation requested by ARTC is not merited (e.g. because the project could have been delivered on time or in budget), the ARTC can simply decline to complete the capacity expansion.

Aston Resources notes that the ACCC also raised this issue in its draft decision on the 2009 undertaking. The ACCC noted that the wording of section 6.4(g)(iii)(C) may: (i) lead to the practical effect of the RCG endorsing the entire variation (even if it is not merited), in order to get the Additional Capacity delivered on time; or (ii) if the RCG refuses to endorse the variation, the independent expert could review the decision and the independent expert may deem as 'Prudent' a variation that is otherwise unmerited.

Aston Resources acknowledges that ARTC is a below rail provider and not a construction company, and that a requirement that ARTC be held to an unduly strict timetable for delivery may not be appropriate. Notwithstanding this, an approach similar to that in the Capacity Framework Arrangements could be adopted. For example, ARTC could be required to undertake capacity expansions where (in the opinion of the ACCC or HVCCC acting as an independent arbiter):

- the project is commercially feasible;
- adequate funding can be obtained;
- the expansion will not compromise the safety or reliability of the rail network; and
- there are no engineering or planning limitations.

Where ARTC fails to meet a project deadline, the HVCCC or ACCC could be required to review whether the deadline should be extended. If the final deadline, as extended, is not met by ARTC, then there would be deemed to be a Capacity Shortfall and the access seeker would have rights under its individual IAHA.

Aston Resources is strongly of the opinion that there are certain circumstances where the opinion of the HVCCC and/or the ACCC (and independent arbiter) should be binding on the ARTC in the same way as the opinion of the ACCC can be binding on PWCS and NCIG under the Capacity Framework Arrangements. In the alternative, there are simply insufficient protections for access seekers (in particular new access seekers).

RCG – Section 6.4(b)

Aston Resources is of the opinion that, consistent with ARTC's explanatory guide, this section should be amended to expressly require that a member of the RCG representing access holders holding less than 7% contracted coal GTK (section 6.4(b)(ii)(C)) must split its vote according to the percentage of contracted coal GTK held by each represented access holder. It is important that **all** access holders have representation on the RCG and it is possible that two access holders will have interests that are not aligned.

Aston Resources supports the discretion given to ARTC under section 6.4(b)(vi) to include access seekers in determining RCG voting entitlements. Aston Resources considers that it is absolutely fundamental that new entrants have representation on the body that decides whether or not to endorse capital expansions.

Ensuring that new access seekers have adequate representation is particularly important in light of section 6.4(i)(ii). Section 6.4(i)(ii) requires 70% of existing access holders to approve a capacity expansion if the expansion would result in greater than 10% increase to the Indicative Access Charge for a Pricing Zone. The clause is of concern to Aston Resources. No such veto right is included in the Capacity Framework Agreements and there is a serious risk under the 2010 HVAU that producers already in possession of sufficient capacity could object to an expansion on purely competitive grounds. Aston Resources recommends that either:

- the HVCCC or ACCC be given an overriding discretion to approve the price increase; or
- the access seeker requiring the Additional Capacity be given the opportunity to fund the difference (to ensure that needed capacity is provided).

INDICATIVE ACCESS HOLDER AGREEMENT

Clause 5.4 – Rebate

The sole remedy of an Access Holder for the failure by ARTC to make available a path use **for any reason** is the TOP rebate under clause 5.4(c). Aston Resources is of the opinion that the TOP cost for paths foregone is not sufficient recompense in circumstances where, for example, ARTC's non-provision of a path is grossly negligent or willful.

Clause 16 – Trading

Aston Resources considers that, consistent with the requirement under the Capacity Framework Arrangements (and the associated take or pay contracts), the IAHA should expressly require access holders to use reasonable endeavours to transfer excess capacity. Whilst individual circumstances would have to be assessed in light of restrictions on trading and the fact that train paths are not “fully fungible”, the inclusion of an express obligation would create an incentive to avoid capacity hoarding. Failure to comply with this obligation could in turn lead to paths being mandatorily resumed.

In addition, Aston Resources considers that it would be of benefit if there were greater publicity surrounding the trading system (for both port and rail) and the availability of capacity for trading at any given point in time.

True-up Test (TUT) (Schedule 2)

As currently formulated, an access holder may accrue a rebate under the TUT regardless of whether or not it actually sought to use all of its Base Path Usages (**BPU**s). Aston Resources is of the opinion that this is an unfair advantage in circumstances where a producer has, because of cancellations or otherwise, failed to use its access rights. Access holders should be incentivised to use or trade their BPUs (to avoiding “gaming” or the hoarding of capacity). Access holders should not be effectively “rewarded” (in the form of a rebate) in circumstances where they cannot provide a reasonable explanation for the non-use of a path. Aston Resources is of the opinion that the real purpose of the rebate is to provide compensation where the non-use of a path is due to an act or omission of ARTC or a network failure.

Train Path Schedule 1

Aston Resources acknowledges that access holders have an “evergreen” rolling right of renewal. Clause 2.5 of the Train Path Schedule, however, provides access holders that have **failed to renew** their entitlements with priority in the event that another access holder applies for mutually exclusive path usages within 3 years of the following the expiry of the access holder's 10 year term. Aston Resources submits that an access holder that has failed to exercise its annual right of renewal should not be given automatic priority over a new entrant.

Clause 4 of the Train Path Schedule 1 to the AHA provides that the ARTC's obligation to supply contracted train paths and path usages is conditional on any required Additional Capacity being completed. As noted above, this means that access seekers have no recourse against ARTC for a failure to provide path usages until after expansion projects are completed (even if ARTC has delayed or abandoned such a project). As noted above, this provides inadequate protection to access seekers that may have committed significant capital expenditure in reliance on an expansion project being undertaken by ARTC. Access seekers may also suffer lost coal sales and the cost of mine infrastructure sitting idle. The ARTC obligation to supply contracted train paths should not be conditional on any required Additional Capacity being completed.

Todd Hannigan | CEO



Level 10, AMP Place
10 Eagle Street
Brisbane QLD 4000
Phone: +61 7 3235 6600 | Fax: +61 7 3235 6699 | Mobile: +61 428 445 550
www.astonresources.com