

## Appendix 2 to C&A submission: Additional Issues with the Proposed HVAU and Proposed IAHA

	Reference	Issue	Suggested change / comment
<b>Scope</b>			
1.	HVAU 1.2	The use of the word "intent" in the opening sentence is ambiguous.	The drafting needs to be clarified.
2.	HVAU 1.3	The use of the expression "ARTC has sought to recognise the importance of the following principles to coal producers" is ambiguous, particularly as these principles impact on the interpretation of clauses in the event of a dispute regarding Tier 1 mandatory provisions (see IAHA 1.5).	Rather than a recognition of the importance of certain principles, ARTC should commit to working towards these principles. HVAU s 1.3(d) – "There <del>must</del> <del>should</del> be workable alignment..." Also, these principles should be stated as an "objectives".
3.	HVAU 2.3(b)	The description and scope of the purpose of the review of the HVAU is unclear.	The drafting could be revised as follows: "The review will consider whether the Undertaking is operating effectively <del>to give effect to</del> <del>in light of</del> the objectives of the Undertaking..."
4.	HVAU 2.3(b)	ARTC is required to undertake a review of the HVAU, but it is under no obligation to report to the ACCC, consult with stakeholders, or do anything else with the information arising out of the review.	ARTC must have a positive obligation to adhere to a review process with a timetable, which includes: <ul style="list-style-type: none"> <li>• calling for and considering submissions from stakeholders;</li> <li>• reporting the outcome of the review to the ACCC; and</li> <li>• considering whether changes will need to be implemented, and if so, seeking the ACCC's consent to vary the HVAU to implement the changes.</li> </ul> If ARTC does not implement any changes after conducting

## Additional Issues and Suggested Changes – Proposed HVAU and Proposed IAHA

	Reference	Issue	Suggested change / comment
			the review, ARTC should be required to report to the industry on its reasons for not implementing changes.
5.	HVAU 3.1(b)	ARTC recognises the importance of consulting with the HVCCC, however it does not have a general obligation to consult with the HVCCC.	This clause should be revised to state that ARTC has a general obligation to consult with the HVCCC.
<b>Pricing Issues</b>			
6.	HVAU 4.1	The wording of this section implies that ARTC and an Access Holder could negotiate charges other than as provided for in the HVAU.  See also item 17 below.	The drafting could be revised as follows:  "The Charge to an Access Holder will <b>be determined</b> <del>include a price negotiated</del> in accordance with the terms of this Undertaking."
7.	HVAU 4.2(a)	The drafting in this clause is unclear as to how the concept of Access revenue relates to the "Direct Costs" imposed by an individual, ie, how (for example) are the "Direct Costs" determined and how, in any event, does this concept sit with the concept of Indicative Charges for Indicative Services?	Section 4 would benefit from an overall re-drafting which clarifies the procedures for setting prices, without relying on a general principles such as the ones stated in section 4.2(a).
8.	HVAU 4.2(b)	The difference between Direct Cost and Incremental Cost is not clear, and it is also unclear why these two separate concepts are required.	The distinction between Direct Cost and Incremental Cost should be clarified. Also, it should be specified that "Incremental Cost" does not include capital cost.
9.	HVAU 4.2(c)	"Access revenue must not exceed the Economic Cost of the Segments which are <b>required</b> on a stand alone basis..."  In this context, it is unclear what "required" means (ie, required for what?).	Section 4.2 defines the "Ceiling Limit", which is critical to the "unders and overs" test. This drafting must therefore be clarified.

## Additional Issues and Suggested Changes – Proposed HVAU and Proposed IAHA

	Reference	Issue	Suggested change / comment
10.	HVAU 4.3	There is no clear statement that capital expenditures cannot be included in the RAB without either RCG or ACCC authorisation. Section 6.4(b)(viii) is not exclusive.	The drafting needs to be clarified particularly to include calculations to adjust from a WACC to a real Rate of Return.
11.	HVAU 4.4(a)(iii) and (vi)	It is unclear why sections 4.4(a)(iii) and (vi) refer to "real pre-tax Rate of Return" when other references to Rate of Return are nominal (eg: WACC is the approved <u>nominal</u> pre tax Rate of Return (4.3(a)).  It is unclear how the <u>real</u> pre-tax Rate of Return is to be calculated/determined.	The drafting needs to be clarified.
12.	HVAU 4.4(b)	It is unclear who assesses what the "efficient basis" of operating expenditure will be. Presumably ARTC conducts this assessment.  Also, it is unclear what the "broader benefits that may arise from delivery through alliance or internally" referred to in section 4.4(b)(iv) refers to. In particular, delivery of what, through alliance with whom?	The assessment of the efficient basis of operating expenditure should be subject to audit and review.  Also, the drafting should clarify that the "assessment" also includes adjustments.
13.	HVAU 4.5(b)	The scope of this broadly worded section is unclear and should be set out in further detail. Is it appropriate (at least, in all cases) that costs should include "reasonably anticipated" future costs.	The drafting needs to be clarified.
14.	HVAU 4.6(b)(i)	As drafted, only variations must be approved by the ACCC.	All determinations of average mine life must be approved by the ACCC.

Additional Issues and Suggested Changes – Proposed HVAU and Proposed IAHA

	Reference	Issue	Suggested change / comment
15.	HVAU 4.8	C&A agrees with the ACCC that clause 4.8 of the HVAU is unclear. This section appears to contemplate that any TOP Rebates which are paid will be taken into account in determining each producer's proportionate allocation of any "unders" amount, but the "Ceiling Limit" revenue appears not to be reduced to take account of rebates which ARTC is required to pay – that is, it appears the "Ceiling Limit" revenue is protected even where ARTC is required to pay TOP Rebates for its failure to make paths available.  "Access revenue" is not defined – not clear what is included and what (if anything) is excluded.	<ul style="list-style-type: none"> <li>• Ceiling Limit must be adjusted for non-delivery (ie, the Ceiling Limit should be reduced by the TOP Rebate amount).</li> <li>• Access revenue should be defined to be actual revenue, rather than revenue before deductions, and the categories of revenue to be included in "Access revenue" should be clearly spelt out.</li> </ul>
16.	HVAU 4.10	The statement that Charges <b>may</b> be on the basis of a combination of actual usage and a take or pay component results in further uncertainty and suggests that ARTC could impose an alternative Charge structure, in its discretion.	"May" should be revised to "will".
17.	HVAU 4.12	Section 4.12 is a set of stand-alone pricing objectives. However, it is unclear how section 4.12 is intended to sit with the general principles in sections 4.2 and 4.3.	Insert additional sentence at the beginning of section 4.12: "For the purposes of sections 4.13 and 4.14, the following pricing objectives apply:"
18.	HVAU 4.12(b)(v)	What does it mean to "provide for an open and equitable mechanism for the application of TOP Charges"?	The drafting needs to be clarified.

## Additional Issues and Suggested Changes – Proposed HVAU and Proposed IAHA

	Reference	Issue	Suggested change / comment
19.	HVAU 4.14	The inclusiveness of the list of factors to be considered in charge differentiation essentially means that ARTC may consider anything in formulating its Charges.	"... , ARTC will have regard to <u>the following</u> <del>a range of</del> factors which impact on its business and Coal Chain Capacity <del>including:</del> "
20.	IAHA 5.4	ARTC requires all of January to calculate the TOP Rebate.	ARTC should pay interest on the amount due from 1 January until whenever the TOP Rebate is paid.
<b>Other</b>			
21.	HVAU 4.18	This section suggests that ARTC could seek proposed variations to the Access Holder's contracted coal volumes each year.	This seems at odds with the entire approach of the IAHA being a take or pay commitment.
22.	HVAU 3.5(d)	Confidentiality – There is no obligation to procure that RCG or other recipients of information have the same confidentiality obligations with respect to the information provided.	This clause should be adjusted to include an obligation that prior to any such disclosure, the party disclosing Confidential Information must ensure that the party receiving the Confidential Information is bound by obligations of confidentiality at least equivalent to those in section 3.5 applying to the Receiver in respect of that information.
23.	IAHA 3.5(d)	This clause requires the Access Holder to use reasonable endeavours to achieve an even spread of Path Usages during each Period and over the Contract Year. Within a given Period, producers railing to PWCS will “campaign rail” to fill a stockpile, once opened, in order to build a cargo as fast as possible. The intent is actually NOT necessarily to achieve an even spread over a month.	This clause is inconsistent with the mode of operation of a substantial part of the port operations at the PWCS port terminals.

## Additional Issues and Suggested Changes – Proposed HVAU and Proposed IAHA

	Reference	Issue	Suggested change / comment
24.	IAHA 11.1(b)(iii)(C)	An Access Holder cannot withhold consent to variations under this clause, but the clause does not provide sufficient certainty as to when the circumstances that would require a variation to "maximise the use and reliability of the Network" might occur.	As the ACCC suggested, ARTC should be required to specify the situations under which ARTC might use this provision.
25.	IAHA 6.4(a)	It is unclear who has "entitlements" to Additional Capacity.	This clause should be clarified and should at least be cross-referenced to the Train Path Schedule.
26.	IAHA 13.3	It is unclear why the Access Holder should have exposure to ARTC for Consequential Losses when ARTC is itself not willing to accept any exposure to Consequential Loss.	This clause should be revised as follows: <del>Other than for liability for TOP Charges under clauses 12.8 and 16.3 or the indemnities given under clauses 4.6, 4.7 and 13.5, n</del> Neither party will be liable to the other party for any Consequential Loss relating to this agreement however arising (including under this agreement, in tort including negligence, or for breach of any statutory duty).
27.	IAHA 13.5(b)	An Access Holder will have no control over claims made by an Operator against ARTC, regardless of the circumstances. Therefore it is inappropriate for the Access Holder to indemnify ARTC for liability relating to cross-claims made by an Operator against ARTC.	Clause 13.5(b) should be deleted.  To the extent that cross-claims are a concern for ARTC, ARTC should seek to restrict "contribution" or "cross claims" in its Operator Sub-Agreement with the Operator.