

## Attachment 1: Key ACCC recommendations & ARTC responses

Recommendation	Response (as per ARTC's Explanatory Guide) & comments on response
<p><b>1. Transitional arrangements</b></p> <p>ARTC should take steps to address the uncertainty that exists in relation to the implementation of its undertaking.</p> <p>If the non-binding approach outlined on page 186 of the Position Paper fails to achieve a satisfactory degree of certainty, the ACCC could consider whether a more prescriptive approach would be appropriate. (p186)</p>	<p>ARTC's 20 April 2011 letter to industry participants advises that the transition arrangements prescribed in ARTC's letter dated 10 December 2010 will remain in place until 1 July 2011.</p> <p><b>Comments</b></p> <p>The need to obtain greater clarity in relation to the transition arrangements has been taken up in HRATF's discussions with ARTC and is covered in HRATF's submission to the ACCC.</p>
<p><b>2. Mutually exclusive applications (section 3.13)</b></p> <p>Seen in the context of concerns regarding the practical implementation and operation of the proposed 2010 HVAU, section 3.13 contributes to the overall lack of clarity and certainty. Section 3.13 should be revised to provide much more clarity and certainty on its application, including what constitutes a 'mutually exclusive' scenario, and how such a scenario would be resolved in relation to coal access seekers, domestic coal access seekers, non-coal access seekers, incumbent users and new entrants (or any combination thereof). Consequential amendments will also be required to the Train Path Schedule. The ACCC considers that if the section cannot be expressed with sufficient clarity and certainty, and otherwise address the ACCC's concerns, an alternative approach may be necessary. (pp188-189).</p>	<p>ARTC has amended section 3.13 of the 2010 HVAU to define Mutually Exclusive Access Applications, the period during which a Mutually Exclusive Access Application can arise and to clarify the operation of section 3.13 as sought. (Item 38, p13)</p> <p><b>Comments</b></p> <p>ARTC's amendments to section 3.13 in the April 2011 HVAU do not provide materially greater clarity, particularly in relation to mutually exclusive application on similar terms.</p> <p>This issue has been taken up in HRATF's discussions with ARTC. ARTC has agreed to make certain amendments in the Revised April 2011 HVAU.</p>
<p><b>3. User funding option as a clear fallback</b></p> <p>(a) The ACCC considers that the rights and obligations of all relevant parties under the different investment mechanisms must be clearly and logically set out, including where an access seeker or group of access seekers' ability to fund an investment will be triggered, the criteria on which ARTC will base its decision on whether to consent to the investment, and the principles of equitable reconciliation that will apply to a user funded investment. (p317)</p> <p>(b) The HVAU should be amended so that it is clear when a point of commitment is reached in relation to a particular investment project and consequently when user-funding may be triggered. It appears to the ACCC that a binding decision could be made at the 'project assessment' stage of the RCG process. (pp318, 344)</p> <p>(c) The ACCC considers that a subjective discretion under section 6.3(b)(iii) (investments recommended by the HVCCC) is only likely to be appropriate where there is an effective user-funding option for investments in Additional Capacity (p350).</p> <p>(d) The only grounds on which ARTC can cease construction of Additional Capacity that is funded by a binding 'user-funding' agreement would be if it is determined that the Additional Capacity no longer meets the non-financial criteria set out in sections 6.2 and 6.3 of the HVAU (p399).</p>	<p>ARTC recognises that it is important that users have advice of ARTC funding intentions as soon as possible during project development. Accordingly, ARTC has strengthened its commitment to funding project development in the Revised Investment Framework by incorporating a requirement to indicate its intention to fund the next stage at every stage, subject to RCG endorsement of that stage, to be recovered through the RAB or expensed (see sections 9.3(c), 9.4(c), 9.5(c) and 9.6(i)(B)). (Item 75, p27)</p> <p>Regarding (d): ARTC has considered the ACCC's proposal and does not propose to make amendments to the 2010 HVAU as sought because it considers that the increased clarity around the user recovery options and the obligation to negotiate a user funding agreement should sufficiently deal with the ACCC's concerns.(Item 78, p28)</p> <p><b>Comments</b></p> <p>ARTC's approach is that it should be able to elect not to proceed with financing a Project (or to cease financing) at any stage on 'Financial Criteria' grounds. Also, ARTC may determine at any stage of the Project process – including for user-funded projects – that the "Technical Criteria" are not satisfied (which include ARTC's undefined "legitimate business interests").</p> <p>These issues has been taken up in HRATF's discussions with ARTC. ARTC has indicated that it is not willing to make any further changes to the Undertaking in relation to this issue.</p>
<p><b>4. Other conditionality and subjective criteria</b></p> <p>(a) ARTC should revise section 6.3(b)(iv)(D) so that it is clear that the interests contemplated under the 'legitimate business interests' can only be those not already addressed by the non-financial criteria at 6.3(b)(iv)(A) to (C). If ARTC is contemplating interests other than those already dealt with in this section, they should be specified.</p>	<p>Paragraph (d) of the new Definition of Technical Criteria (see section 14.1 of the HVAU) clarifies that the reference to 'legitimate business interest' does not include those interests already addressed by the Financial Criteria. ARTC does not propose to specify the interests which it will consider are as part the 'legitimate business interest' criterion as legitimate business interests is a common consideration in access regulation and need not be defined or unduly restricted. (Item 84, pp30-31)</p>
<p>(b) The Conditions Precedent to Delivery of Additional Capacity in the Train Path Schedule should be removed. ARTC should not be able to reconsider the commercial viability of a project it has already agreed to fund, and entered contracts on the basis of, at a later stage under the Train Path Schedule. This is especially the case if in the interim other parties have needed to make complementary investments (e.g. in mines or port capacity). (p326)</p>	<p>ARTC has considered the ACCC's proposal and does not propose to make amendments to the 2010 HVAU as sought because it considers that the increased clarity around the user recovery options and the obligation to negotiate a user funding agreement should sufficiently deal with the ACCC's concerns. Moreover, the Revised Investment Framework in the HVAU provides for ARTC to advise the industry of its funding intention as early as possible during project development. (Item 78, p28)</p> <p><b>Comments</b></p> <p>The "commercial viability" CP which ARTC has retained in the Train Path Schedule adds an additional layer of conditionality beyond the "Technical Criteria" ("legitimate business interests") and "Financial Criteria" conditionality in the Undertaking.</p> <p>This has been taken up in HRATF's discussions with ARTC. ARTC has indicated that it is not willing to amend the Train Path Schedule in relation to this issue.</p>
<p><b>5. Determination of 'Network Path Capability'</b></p> <p>The ACCC considers that Network Path Capability must be determined as objectively as possible to ensure the effective operation of the True-Up Test, and hence the effectiveness of the TOP rebate mechanism. Otherwise, the system TUT may never reveal an actual System Availability Shortfall, and ARTC may never be accountable under what is the primary liability</p>	<p>ARTC has proposed a package of amendments to the system wide TUT provisions to address the ACCC's concerns. In addition, ARTC has made amendments to improve the transparency and certainty in relation to the definition of System Assumptions and Track-Related Assumptions. ARTC considers that, together, these amendments sufficiently address the ACCC's concern regarding the transparency and objectivity of ARTC's determination of the Network Path Capability.</p>

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<p>mechanism for ARTC failing to make available Train Paths or Path Usages. (p230)</p> <p>Determinations of rail network capacity should take into account interactions with other components of the supply chain, and reference the System Assumptions overall, not simply the Track-Related System Assumptions. (pp230, 247)</p> <p>The determination of Network Path Capability should take into account realistic assumptions about the capacity of the Network in order to provide a more robust and objective calculation. (p230)</p>	<p>(Item 42, p15)</p> <p><b>Comments</b></p> <p>ARTC's amendments to the definition of NPC in Schedule 2 of the AHA in April 2011 HVAU did not address the ACCC's concerns. This issue has been taken up in HRATF's discussions with ARTC. ARTC has agreed to make certain amendments in the Revised April 2011 HVAU.</p>
<p><b>6. Independent audit of True-Up Test</b></p> <p>The TUT calculations should be subject to audit by an independent party (not the HVCCC). The cost of the audit should be met by ARTC, but included in the RAB as operational expenditure. The cost will be subject to the Annual Compliance Assessment process. (pp15, 28, 214, 215, 229, 232)</p>	<p>ARTC has inserted a new clause 2.8 in Schedule 2 to the IAHA to provide for an independent audit of ARTC's compliance with its obligations in relation to the system wide TUT on annual basis. Consequently, ARTC has removed the requirement to provide details relating to calculation of the TOP Rebate and Ad Hoc Charge Rebate to the ACCC as part of Annual Compliance Assessment. (section 2(e) of Schedule G of the 2010 HVAU). (Item 44, p16)</p> <p><b>Comments</b></p> <p>The TUT audit provisions in Schedule 2 of the IAHA in the April 2011 HVAU did not set out the scope of the TUT audit or, as drafted, actually oblige the carrying out of the audit. Nor did the provisions provide expressly for ARTC to make adjustments to rebate entitlements if the audit identifies issues.</p> <p>This issue has been taken up in HRATF's discussions with ARTC. ARTC has agreed to make certain amendments in the Revised April 2011 HVAU.</p>
<p><b>7. Section 5.9 'review'</b></p> <p>The proposed 2010 HVAU is not the appropriate mechanism by which to coordinate such a wide-ranging, HVCCC-led review. The ACCC would expect ARTC to participate in such a wide-ranging review, and to appropriately incorporate into the HVAU recommendations from the review that are appropriate and relevant to the operation of the rail network. Any such recommendations could be submitted to the ACCC under the existing mechanisms set out in section 5.9(c). (p314)</p> <p>If, however, a review of this nature is not commenced by the HVCCC within the relevant 12 month period as set out in the HVAU, then ARTC should conduct the review itself as currently proposed under section 5.9 of the HVAU. (pp314-315)</p> <p>Schedule F grants ARTC discretion to decide whether or not it will consult with the HVCCC and allows ARTC to decide what type of consultation may be appropriate in the circumstances. Given the implications of the review of the loss allocation provisions, a more robust consultation process is required. (p315)</p> <p>The scope of the review of the AHA and OSA should explicitly include the sections of the HVAU and corresponding clauses of the IAHA regarding the identification and management of capacity shortfalls. (p316)</p>	<p>ARTC has:</p> <p>(a) amended section 5.8(b)(ii) (formerly section 5.9(b)(ii)) of the HVAU to increase the 'robustness' of the consultation process for the 'industry wide review'. (Item 71, p25)</p> <p>(b) amended section 5.8(c) (formerly section 5.9(c)) of the HVAU to increase the robustness of the consultation process as sought. (Item 71, p25)</p> <p>(c) inserted a new section (section 5.8(e)) into the HVAU to provide for the publishing of any report arising from the review as sought. (Item 71, p25)</p> <p><b>Comments</b></p> <p>Section 5.8 does not oblige ARTC to apply to vary the HVAU to give effect to any recommendations made by the HVCCC in any review it undertakes.</p> <p>Clause 5.8(c) as worded provides ARTC with latitude in relation to applying to the ACCC to amend the HVAU to give effect to proposals arising out of the review processes. ARTC must be satisfied that "particular acts or omissions of Access Holders or their Operations have a material impact on Capacity" - there is no mention of acts/omissions of ARTC.</p> <p>ARTC has not amended the consultation provisions in Schedule F of the HVAU in this respect.</p>
<p><b>8. Efficient consumption of network capacity</b></p> <p>The determination and implementation of the efficient train configuration is a key component of the HVAU. However, the fundamental concern is to ensure efficient consumption of network capacity, and the provision of pricing signals that enable this outcome. (p133-134)</p> <p>ARTC's proposed approach to charges is likely to be appropriate subject to the following revisions:</p> <p>(a) in determining the efficient train configuration, ARTC should seek to determine the approach that ensures efficient consumption of Network capacity and that sends price signals to facilitate the same. Consequently, the review should consider whether GTKm is the appropriate pricing unit.</p>	<p>ARTC has amended section 4.16 (which is now section 4.17) of the 2010 HVAU to provide for ARTC to consult with industry on the use of gtk as a basis of charging, submit an alternative approach to the ACCC and seek to vary the 2010 HVAU to incorporate the new approach (if any). (Item 18, p7)</p> <p><b>Comments</b></p> <p>As noted below, new section 4.17 has been taken up in HRATF's discussions with ARTC. The drafting in the Revised April 2011 HVAU requires ARTC to consider if gtkm is "not an appropriate pricing unit", and does not require ARTC to determine/submit the "most appropriate" pricing basis.</p> <p>If ARTC's variation application does propose a new pricing unit but the ACCC does not accept that aspect of the application, ARTC is not obliged to resubmit.</p>
<p>(b) ARTC should submit to the ACCC a proposed variation to the HVAU regarding the efficient train configuration and appropriate pricing approach, within six months of receiving the relevant information from the HVCCC and in any event within twelve months of the commencement of the undertaking. (p136).</p>	<p>The timing of the efficient train configuration is to be determined. (Explanatory Guide, item 19)</p> <p><b>Comments</b></p> <p>This issue has been taken up in HRATF's discussions with ARTC. ARTC has agreed to make certain amendments in the Revised April 2011 HVAU.</p>
<p>(c) The ACCC considers that the charge differentiation factors do not provide sufficient clarity for non-Indicative coal users about how their charges will be calculated. For the HVAU to be appropriate, the factors for charge differentiation should use the Indicative Service as a reference point to then differentiate the costs of providing the non-Indicative Service. The price differentials for service characteristic variations would need to be specified. It would be appropriate for the proposed service characteristic variations and price differentials for non-Indicative coal services to be developed and implemented using the same processes that will be used to develop the Indicative Service and access charges (p143).</p>	<p>ARTC understands that the issue for the ACCC is the perceived absence of a reference point for differentiating non-Indicative Services from Indicative Services. The reference point is the Indicative Access Charges for Indicative Services as prescribed at new section 4.15(a)(i) (old section 4.14(a)(i)) of the 2010 HVAU. Accordingly, ARTC considers that no further amendments are required. (Item 25, p8)</p> <p><b>Comments</b></p> <p>This issue has been taken up in HRATF's discussions with ARTC. ARTC has agreed to make certain amendments in the Revised April 2011 HVAU, by including a test in section 4.15(a)(i) which focuses on the "impact on ARTC's business" of relative capacity consumption/reduction.</p>