



Mr Anthony Wing  
General Manager  
Transport and general Prices Oversight  
Australian Competition & Consumer Commission  
GPO Box 520  
MELBOURNE VIC 3001

Dear Mr Wing

**Re: ARTC proposed 2010 Hunter Valley Rail Network Access Undertaking**

Newcastle Port Corporation ('NPC') appreciates the opportunity to make a submission on ARTC's proposed 2010 Hunter Valley Rail Network Access Undertaking ('HVAU').

NPC is concerned to ensure the successful implementation of the long term solution to the Hunter Valley coal chain capacity constraints, which was enabled by the ACCC's December 2009 authorisation of the Capacity Framework Arrangements at the Port of Newcastle.

NPC considers that the achievement of contractual alignment in the coal chain, including the alignment of protocols for the trading of coal chain capacity, is critical to the successful implementation of the long term solution.

The attached submission on the 2010 HVAU therefore focuses on the assignment and trading provisions contained in clause 16 of the Indicative Access Holder Agreement (Annexure A to the HVAU) and responds directly to the ACCC's request in its Consultation Paper for views on the appropriateness of this clause.

Please do not hesitate to contact NPC's Mr Michael Dowzer, General Manager Strategy, Efficiency & Governance on ph. (02) 4985 8205 should you have any queries regarding NPC's submission.

Yours sincerely

Gary Webb  
**Chief Executive Officer**



## Newcastle Port Corporation

### submission to the ACCC in relation to Australian Rail Track Corporation's proposed 2010 Hunter Valley Rail Network Access Undertaking

#### Overview of submission

NPC is concerned to ensure the successful implementation of the long term solution to the Hunter Valley coal chain capacity constraints, which was enabled by the ACCC's authorisation of the Capacity Framework Arrangements at the Port of Newcastle, granted in December 2009.<sup>1</sup>

NPC considers that the achievement of contractual alignment in the coal chain, including the alignment of protocols for the trading of coal chain capacity, is critical to the successful implementation of the long term solution.

NPC considers further that there is scope to improve the alignment of the proposed arrangements for transferring network capacity described in the 2010 HVAU and the current arrangements for transferring terminal allocation, represented by the CTS and managed by the HVCCC as the CTS Administrator.

This submission therefore addresses the issue of alignment between the capacity trading provisions of ARTC's 2010 HVAU and the CTS as the current industry process for the transfer of terminal allocation. In this regard NPC notes that the ACCC expressly seeks views in relation to the assignment and trading of network capacity, in particular whether clause 16 of the IAHA is appropriate and should be included as a Tier 1 (mandatory) provision.<sup>2</sup>

#### Background

The ACCC's authorisation of the Capacity Framework Arrangements at the Port of Newcastle allowed for the implementation of industry's long term solution to the capacity constraints in the Hunter Valley coal chain, which commenced on 1 January 2010 with the new PWCS 10-year take or pay terminal contracts.

In granting its authorisation the ACCC considered that 'the extent to which contractual alignment will actually be achieved, and therefore the...public benefits realised...depends on the successful implementation of contractual alignment principles across the entire Hunter Valley coal chain.' The ACCC acknowledged that the achievement of contractual alignment was 'a work in progress for industry' with matters such as ARTC's 2009 HVAU, the negotiation of track contracts between ARTC and producers and the Capacity Transfer System still outstanding.<sup>3</sup>

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<sup>1</sup> ACCC Determination, Applications for authorisation lodged by Port Waratah Coal Services Limited, Newcastle Coal Infrastructure Group and the Newcastle Port Corporation in respect of the Capacity Framework Arrangements at the Port of Newcastle, 9 December 2009, Authorisation No.A91147 and A911680 - A91169

<sup>2</sup> ACCC, Consultation Paper in relation to the Australian Rail Track Corporation's proposed Hunter Valley Rail Network Access Undertaking, September 2010 at p.14

<sup>3</sup> ACCC Determination 2009, paras 5.96-5.97 at p.59

In its Draft Decision of 5 March 2010 on ARTC's 2009 HVAU, the ACCC took supply chain alignment into account as an 'other matter' in applying the test set out in section 44ZZA(3) TPA and expressed the preliminary view that certain aspects of the 2009 HVAU should be revised to ensure that 'the objectives of alignment and the long term solution for the Hunter valley coal chain overall are not frustrated'. The ACCC further considered that system wide alignment of below rail, above rail and port terminal capacity may not be achievable if different capacity protocols apply to different access seekers and that the provisions that should be consistent including those relating to capacity assignment and trading.<sup>4</sup>

### **The Capacity Transfer System**

The Hunter Valley coal chain service providers and producers have made significant efforts to implement the long term solution for the coal chain, which have included the development of the CTS applying to the transfer of terminal allocations.

The CTS was developed in accordance with the ACCC's authorisation of the Capacity Framework Arrangements with input from coal chain producers and service providers and has been operating successfully since January 2010. It comprises a clearing house for offers of and requests for transfers of terminal allocation and a transfer approval process.

The CTS is an important mechanism for facilitating contractual alignment in the coal chain. A key feature is that the HVCCC assesses transfers, and for 'long term' transfers makes recommendations to the relevant service providers including ARTC to approve, approve with conditions or reject the transfer, based on an assessment of the extent to which the transfer may impact on their ability to meet their contractual obligations.

### **The capacity trading provisions of the 2010 HVAU**

Section 5.8(c) of the 2010 HVAU provides that a Capacity Entitlement may be assigned or traded by an Access Holder to a third party in accordance with the assignment or trading provisions of that Access Agreement.

The IAHA, which comprises Annexure A to the 2010 HVAU, provides for three types of trades of train path usage:

- permanent trades - trades of train path usages for a period of 12 months or more, under clause 16.3 IAHA;
- 'safe harbour' trades - temporary trades of train path usages (trades for a period of less than 12 months) that do not require ARTC consent provided they meet specified conditions, under clause 16.4(a) IAHA; and
- 'non-safe harbour' trades - temporary trades of train path usages (trades for a period of less than 12 months) that do not meet the specified conditions for a safe harbour trade and therefore require ARTC consent, under clause 16.4(d) IAHA.

The ARTC Explanatory Guide 2010 clarifies that the trading provisions apply to 'internal' trading between load points of the one access holder.

Trades of train paths clearly have potential to adversely impact on coal chain capacity and on others' contractual entitlements to coal chain capacity. Clause 16.6(c) IAHA appears to implicitly acknowledge the potential for such impact by providing that, in deciding whether to consent to a permanent or non-safe harbour trade, the ARTC will consider in good faith and is entitled to rely on

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<sup>4</sup> ACCC Draft Decision, Australian Rail Track Corporation Limited Hunter Valley Coal Network Access Undertaking, 5 March 2010 section 1.5.2 at p.9 and section 1.6.2 at p.11

recommendations by the HVCCC as to the impact of the trade on coal chain capacity and the capacity entitlements of other access holders.

Clauses 16.6 (a) and (b) appear to acknowledge that in practice trades of train paths and terminal allocations are likely to occur together and that the ARTC will provide the necessary information to the CTS Administrator in relation to trades of train path usage identified through the CTS.

### ***Permanent trades of train path usage***

Clause 16.3(a) IAHA provides that ARTC must not unreasonably withhold its consent to the permanent assignment of path usages for a train path, provided certain conditions are met.

When read in conjunction with Clause 16.6 (c) IAHA, it appears to be intended that ARTC would seek the HVCCC's recommendations on a permanent trade and consider such recommendations in good faith.

It is submitted that as a minimum, to avoid any doubt on this point, Clause 16.6 (c) IAHA should be amended to expressly provide that the ARTC *will seek* and consider in good faith the HVCCC's recommendations as to the impact of the trade on coal chain capacity and others' contractual entitlements to coal chain capacity.

Further, as noted earlier in this submission the CTS is the existing industry mechanism by which the HVCCC assesses the impact of terminal allocation trades on coal chain capacity and contractual entitlements.

It is submitted that it would be desirable to use the same approval process for transfers of both terminal allocation and train paths, as this is likely to facilitate the efficiency and effectiveness of the HVCCC's assessment of the impact of such trades and therefore minimise the potential for unexpected adverse impacts of such trades.

Clause 16.6(c) IAHA therefore could be amended not only to expressly provide that ARTC will seek the HVCCC's recommendations regarding impact of the trade on coal chain capacity and contractual entitlements, but that ARTC will utilise, or require its Access Holders who seek the transfer to utilise the CTS transfer approval process for doing so.

Finally, NPC notes that, while clause 16.4 IAHA on the temporary trade of path usages is included in Schedule A of the 2010 HVAU as a Tier 1 (mandatory) provision for all Access Holder Agreements for coal access rights, clause 16.3 IAHA relating to permanent trades and clause 16.6 IAHA, which is relevant to the ARTC's consideration of whether to consent to permanent and non-safe harbour trades, are not.

It is not clear why these clauses, which clearly relate to capacity assignment and trading, are not included among the Tier 1 provisions. NPC submits that the 2010 HVAU should be amended to include them among the Tier 1 (mandatory) provisions.

### ***'Safe harbour' trades***

Clause 16.4(a) IAHA provides that ARTC's consent is not required for temporary trades of path usage that meet the conditions specified in that clause ('safe harbour' trades).

It would appear from these conditions that it is envisaged that 'safe harbour' trades are of a nature that they will not adversely impact on coal chain capacity or contractual entitlements and therefore that the service provider's consent to the trade, and the administrative impost this may entail, are not justified.

NPC notes in this regard that a condition for a 'safe harbour' trade is that the new load point for the traded path is closer to the Port of Newcastle and within the same or closer pricing zone than the original load point (clause 16.4(a)(ii)). While it is acknowledged that such a trade in general may be less likely to have an adverse impact on the coal chain than a trade to a more distant load point NPC understands that such may not always be the case, particularly if the new load point is in an area of high congestion.

A 'safe harbour' trade therefore has potential to adversely impact on the coal chain. Clause 16.4(a)(iv) apparently attempts to minimise the likelihood of realising such an impact by requiring the parties to the trade to warrant that the trade will not adversely impact on coal chain capacity.

It is not clear how the parties could provide such a warranty in good faith without seeking the HVCCC's assessment of the trade's impact on the coal chain.

NPC submits that, as a minimum, the warranty given by the parties to the trade under clause 16.4(a)(iv) should be amended to provide that the parties warrant that the HVCCC's assessment of the trade is that it will not adversely impact on coal chain capacity or contractual entitlements.

Further, as submitted above in relation to permanent trades, the CTS is the existing industry mechanism for the assessment of terminal allocation trades, and it is desirable that the same transfer approval process be used for trades of rail network capacity.

NPC submits that a better alignment of the capacity transfer protocols for track and terminal would be achieved if the parties to a 'safe harbour' trade were required to obtain the HVCCC's assessment of the trade utilising the CTS approval process.

While this approach would improve coal chain alignment, it would also make the 'safe harbour' trade mechanism redundant. It would subvert the apparent purpose of the safe harbour trades to create a class of transfers for which ARTC consent is not required, as its practical effect would be to require the ARTC's consent to the trade through the CTS transfer approval process.

Under this approach, all temporary trades would need to be dealt with as 'non-safe harbour' trades as currently defined in the IAHA. Submissions in relation to 'non-safe harbour' trades follow.

### ***'Non-safe harbour' trades***

Clause 16.4(d)(i) IAHA provides that ARTC will not unreasonably refuse its consent to those temporary trades that do not meet the specified conditions for a safe harbour trade, provided that it is able to ascertain that the trade will not have an impact on coal chain capacity and the capacity entitlements of other access holders.

NPC supports the need for ARTC consent to these trades, given their potential to impact on coal chain capacity and contractual entitlements.

A reading of clause 16.4(d)(i) in conjunction with clause 16.6 (c) IAHA suggests that the intention is that ARTC, in ascertaining whether a non-safe harbour trade will impact on coal chain capacity and contractual entitlements, will seek and consider in good faith the HVCCC's recommendations on the matter. It is considered that ARTC could not otherwise appropriately ascertain the trade's impact.

NPC's submissions made in relation to Clause 16.6 IAHA for permanent trades also apply to safe harbour trades, that is:

- for the avoidance of any doubt, as a minimum clause 16.6 (c) IAHA should be amended to expressly provide that the ARTC *will seek* and consider in good faith the HVCCC's recommendations as to the impact of the trade on coal chain capacity and others' contractual entitlements to coal chain capacity;

- it would be desirable to use the CTS transfer approval process for 'non-safe harbour' trades, to minimise the potential for unexpected adverse impacts of such trades. Clause 16.6(c) IAHA could be amended not only to expressly provide that ARTC will seek the HVCCC's recommendations regarding impact of the trade on coal chain capacity and contractual entitlements, but will utilise the CTS transfer approval process for doing so; and
- clause 16.6 IAHA is relevant to the capacity trading process and therefore should be included in the Tier 1 (mandatory) provisions.

It is noted that if the submissions that all temporary trades should be required to use the CTS transfer approval process to seek the HVCCC's recommendations are accepted, amendments to Clause 16.4 would be required to provide that all temporary trades are dealt with as 'non-safe harbour' trades as currently defined.

## Glossary

2009 HVAU	Australian Rail Track Corporation's proposed Hunter Valley Coal Network Access Undertaking, April 2009
2010 HVAU	Australian Rail Track Corporation's proposed Hunter Valley Coal Network Access Undertaking, September 2010
ACCC	Australian Competition and Consumer Commission
ARTC	Australian Rail Track Corporation
CTS	Capacity Transfer System
HVCCC	Hunter Valley Coal Chain Coordinator Limited
IAHA	Annexure A to the 2010 HVAU- Access Holder Agreement for Indicative Servicers in the Hunter Valley
NPC	Newcastle Port Corporation
PWCS	Port Waratah Coal Services
TPA	Trade Practices Act 1975 (Cth)