

26 October 2010

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

Dear Sir

Subject: Hunter Valley Access Undertaking

RailCorp welcomes the opportunity to comment on the revised draft Hunter Valley Access Undertaking (HVAU) that was lodged on 7 September 2010.

This is the third submission that RailCorp has made in relation to the HVAU proposed by ARTC. Section 1 of this submission outlines RailCorp's broad concerns with the proposed HVAU. These concerns relating to passenger priority are in line with the concerns previously expressed by RailCorp. RailCorp does not believe that ARTC has addressed these concerns through its latest amendments. In fact proposed amendments the IAHA only heighten RailCorp's concern that the proposed HVAU does not correctly acknowledge, in a transparent manner the capacity building block nature of ARTC's passenger priority obligations.

In Section 2 of this submission RailCorp has commented, where appropriate on the specific issues that the ACCC raised in its Consultation Paper dated 16 September 2010.

Section 3 highlights further issues that RailCorp raised in previous submission that are felt to be outstanding.

RailCorp would be happy to discuss its concerns with the ACCC.

Yours sincerely



DAVID FRAME
Contracts & Regulatory Manager

Section 1

Regulatory uncertainty and areas of key concern

RailCorp is currently negotiating access arrangements with ARTC in relation to RailCorp's operations on the ARTC networks in Victoria, NSW including the Hunter Valley.

Accordingly, the rail network covered by such an access agreement as it applies to access in NSW is potentially be governed by the following three regulatory regimes:

- the Interstate Rail Access Undertaking;
- the New South Wales Rail Access Undertaking pursuant to Schedule 6AA of the Transport Administration Act 1988 (NSW)(TAA) (NSW Access Undertaking); and
- the Draft HVAU, if or when it is accepted by the ACCC.

One of RailCorp's key concerns is as to how the uncertain regulatory framework impacts on the access arrangements it is negotiating together with the manner the HVAU and the draft IAHA proposed to address passenger priority and network definition.

Passenger priority

The obligation to maintain passenger priority arises under the Transport Administration Act (TAA) and is on ARTC, as network provider. The TAA requires that, in exercising its responsibility for network control – namely in service planning and in real time control – ARTC must 'give reasonable priority to passenger services' (sections 88L and 99D TAA).

What will ultimately in RailCorp's view be appropriate is:

- a statement in all governing access undertakings that ARTC, as network provider, is obliged to accord passenger priority (general statement). The NSW Rail Access Undertaking is illustrative. Clause 7.1 of the NSW Rail Access Undertaking specifies that '[t]he Rail Infrastructure Owner must: (c) maintain reasonable priority and certainty of access for railway passengers in accordance with its obligations under the Transport Administration Act';
- specific statements in all applicable access undertakings as to how ARTC's obligation to accord passenger priority works at each operational level upon which that obligation has a clear and very real impact for all access seekers, for example, in relation to capacity management (specific statement); and
- that any indicative access agreement such as the proposed IAHA, or indeed a negotiated access agreement, entered under an ARTC access undertaking mirrors both the general and specific statements as to passenger priority.

RailCorp continues to be concerned by the ACCC commented that: "The ACCC acknowledges that while section 1.1 provides context to the body of the HVAU, it is essentially descriptive and places no obligations on ARTC."¹ If section 1.1 is in fact descriptive and therefore no obligations are created on ARTC the incremental benefits of the proposed amendments to section 1.1 remain unclear.

General and specific statements in an access undertaking

As the passenger priority obligation is imposed on ARTC in exercise of its network control, any access undertaking under which ARTC operates in NSW must include an obligation to accord reasonable priority to passenger services. Accordingly, ARTC's obligation to give reasonable priority to passenger services in exercising network control should be made explicit in the Draft HVAU.

Mere acknowledgement, however, does not regulate with sufficient clarity what needs to happen at an operational level in relation to track access to accord passenger priority. This is properly within the scope of an access undertaking. It is important to ensure proper adherence to ARTC's passenger priority obligation that the requirement at an operational level to accord passenger priority is documented in any applicable access undertaking. Certainty will be achieved only when an access seeker is aware of the areas of ARTC's operation that are affected by its statutory obligation to accord passenger priority. Not to do so would mean that an access seeker cannot properly gauge from the access undertaking itself the terms and conditions upon which it will be granted access.

Therefore, any applicable access undertaking, including the Draft HVAU, must outline the operational components of the undertaking upon which passenger priority has a very real impact, such as network capacity management and planning. This will enable access seekers to fully understand the extent that ARTC is to provide access to its network under passenger priority principles during immediate, mid and long-term time horizons and the impact on ARTC's general network functions such as capacity planning. At a minimum, the Draft HVAU should state that the following specific operational areas are impacted on by ARTC's statutory obligation to accord passenger priority:

- service planning for timetabling to ensure passenger services receive priority in programming;
- train programming for daily operations to achieve passenger service priority in daily programming;
- network control in accordance with the network management principles;
- preservation of existing and future passenger train paths; and

¹ HVAU ACCC Draft Decision page 88

- the application of passenger priority in undertaking any maintenance to the Network.

The amended Draft HVAU falls short of regulating the impact of ARTC's obligation to accord passenger priority (apart from short term capacity shortfall and variation of train paths) in the operational components of the undertaking. Instead, other than in the introductory statement, matters relating to passenger priority are 'negotiable' elements of coal and non-coal access agreements (refer Schedule A1 and A2, Draft HVAU). This suggests to an access seeker that ARTC's obligation to accord passenger priority will not have a specific impact on its bilateral contract with ARTC, whereas in fact according passenger priority has consequential impact for all access seekers.

General and specific statements to be mirrored in access agreements

The IAHA provides for a contractual acknowledgement (clause 3.8) by the operator that the operator will not interfere with ARTC performing its obligations in relation to passenger priority and identifies these operational aspects. The HVAU however does not highlight these ARTC obligations/functions. It also classifies the contractual acknowledgement noted above as a Tier 2 (negotiable) aspect of an access agreement. At best this leaves an unclear message to Access Seekers of the impact that ARTC obligations may have in regards to passenger priority.

RailCorp also finds it inconsistent that within the IAHA ARTC should seek contractual protection however is not prepared to articulate its obligations, to the same level in the HVAU.

It is also noted that ARTC has removed from this clause reference to future obligations to provide passenger paths.

A bilateral contract, such as the IAHA, by which ARTC is to provide access to its track in accordance with an access undertaking must acknowledge ARTC's statutory obligations to provide passenger priority in exercise of its functions, as recognised in any applicable access undertaking. Accordingly, the IAHA should:

- include a general acknowledgement by ARTC that it, as network provider, will perform its obligations under the IAHA in accordance with its statutory obligations under the TAA to provide passenger priority; and
- mirror the specific statements in an access undertaking as to the operational areas of the relationship between ARTC and an access seeker upon which passenger priority principles have a very real impact.

To be properly enforceable, disputes on operational matters on which ARTC's statutory obligation to accord passenger priority has an impact should be dealt with under the dispute resolution mechanism of the Draft HVAU. RailCorp, as

a beneficiary of these statutory obligations, would otherwise have no recourse if they are addressed only in a bilateral contract between ARTC and another rail operator.

Section 2

Expansions and Connections

It is unclear how a dispute about an expansion or connection would be resolved given they are to be outside the definition of the Network (and hence beyond the resolution mechanisms of the proposed HVAU).

Alignment Measures

In previous submissions RailCorp also raised concerns that the drafting of the Essential Elements would permit ARTC and an access seeker, through negotiations, to remove or vary aspects including those related to passenger priority. RailCorp is of the opinion that the implementation of passenger priority by ARTC should be a building block integral to its capacity management practices. The potential for individual agreements to have varying passenger priority terms does not promote alignment of capacity management techniques. For this reason RailCorp believes, as indicated in previous submissions, that the passenger priority obligations should be contained in the HVAU and mirrored in the individual access agreements in the similar manner to which the ACCC has proposed with other capacity management aspects.²

Capacity Analysis

The amendments to clause 5.2 in which ARTC have attempted to clarify the role of the HVCCC in relation to capacity analysis has reinforced RailCorp concerns that the determination of available capacity for non coal users (including passenger services) is restricted by the HVCCC view of the impact of granting such capacity on the Coal Chain Capacity (clause 5.2 d (ii)). RailCorp believes this is contrary to ARTC's obligations in regard to passenger priority and notes that this obligation is not recognised within clause 5.2.

Shortfall in existing Capacity

RailCorp is concerned that the amendments to clauses 5.4, 5.5 and 5.6 need further amendment to make it clear that in the event of a capacity shortfall capacity will be allocated first to passenger services and that there will be no reduction of passenger services during this period. RailCorp believes that this was the intent of the original clause.

Additional Capacity

RailCorp is concerned that the principles contained in clause 6.2 for an 'equitable form of reconciliation remain unclear particularly in the case of non coal services using Additional capacity following a capital contribution by a coal user. It indicates the applicable charges "will be equitable subject to the

² ACCC, Hunter Valley Coal Network Access Undertaking, Draft Decision, p. 150.

provisions of section 4.14 (charge differentiation) and 4.15 (differentiation on identity and end market). It is unclear if ARTC are suggesting in a coal / non coal situation, given that non coal services are likely to be only paying the VCC that there would be no reconciliation between the users.

It is suggested that clause 6.2 be amended to reflect this coal / non coal scenario.

Performance measurement and incentives

The majority of the performance measures suggested by ARTC relate to the use of the network by coal services hence the measures proposed provide Non Coal users with little benefit in assessing ARTC performance.

Measures for non-coal access

RailCorp remain concerned that contrary to the ACCC's recommendation ARTC are not proposing to provide an indicative non-coal access agreement but rather attempt to import the Interstate indicative access agreement into the HVAU without proper consideration and consultation. The unplanned/considered introduction of an access agreement that is the product of a different regulatory framework introduces uncertainty itself. RailCorp has experienced this particular issue in its current access negotiations with ARTC. A simple example of the predicament caused by the ARTC proposal to simply amend an access agreement is in the event of a dispute which framework would apply?

RailCorp believes a more considered approach is required than that which is being proposed.

RailCorp also continues to remain concerned that the mandatory elements, as described in Schedules A1 & A2 of the proposed HVAU to be included in both coal and non coal access agreements fail to demonstrate to the potential access seeker the implications of ARTC following its passenger priority obligations at a number of different operational levels.

Pricing

RailCorp remains unclear how the objective of prompting rail transport in NSW is enhanced by providing the mechanism to permit non coal services being levied with coal charges. Nor is it understood how overall efficiency is enhanced by this concept.

The amendments to clause 4.11 b, in RailCorp's opinion fail to provide any certainty to non-coal users as the amendments refer to average revenue received by ARTC in relation to coal access rights as opposed to indicative services. It is unclear how non-coal users would be aware of the revenue received by ARTC to calculate the average.

Additionally the amendments foreshadow adjustments for the difference in the capacity consumed by coal and non-coal which it is assumed is a reference to

a debate that smaller lighter non-coal trains actually consume more capacity compared to coal trains. What is not referenced by the amendment is the lower impact a lighter non-coal train has on the infrastructure compared to the heavier & larger coal trains. In such a situation the amendments are flawed.

Section 3

In addition to the issues discussed above in this submission RailCorp feels that the following significant issues raised in previous submissions remain outstanding.

Reservation of Non-Coal Rights

RailCorp does not believe that ARTC has justified the need for non-coal operators to reapply for paths that they are currently using. Further the amendments to clause 3.14 still indicate that a new access agreement will need to be negotiated despite assurances from ARTC.

Dispute Resolution

Provisions contained in the HVAU and subsequently mirrored in an access agreement should be subject to the dispute resolution mechanisms of the HVAU.

Consultation

The proposed amendments do not address RailCorp's concerns. The proposal, particularly for the development of the corridor strategy does not provide for real consultation as the completed corridor strategy would be effectively presented to Non-coal users at an earlier stage.