



Port Waratah Coal Services Limited

Submission in Relation to Australian
Rail Track Corporation's Revised
Proposed Hunter Valley Rail Network
Access Undertaking (dated April 2011)

11 May 2011

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Introduction

This submission is in response to the ACCC's Consultation Paper of 13 April 2011 in relation to the Australian Rail Track Corporation's (ARTC) revised Hunter Valley Rail Network Access Undertaking (HVAU).

In its previous submission made in October 2010, PWCS focussed on those issues with the HVAU relevant to the interface with the terminal, leaving the full range of issues to be discussed and debated by the industry more broadly.

Thus, this submission is focussed on revisiting only those issues raised by PWCS in its previous (October 2010) submission to the ACCC. For each issue, the following format is used to assess the issue in the attached exhibit (Table 1):

- What was the ACCC's response to the issue in their Position Paper? What changes were suggested?
- How did the ARTC respond to the ACCC's suggested changes, if any?
- What is the PWCS perspective on whether the issues have been addressed, especially in those instances where the ACCC suggested changes consistent with the issues identified by PWCS?

Summary Perspectives

First, PWCS would like to commend the ACCC for the particularly thorough assessment of the proposed HVAU, as outlined in its December 2010 Position Paper. The perspectives of all stakeholders were clearly considered in developing what PWCS considers to be a comprehensive slate of suggested amendments. In particular, as can be seen on the table, each issue raised by PWCS was addressed in the Position Paper and the views of PWCS were summarised and considered.

The exhibit attached (Table 1) summarises the position with regards to each of the eight issues raised in the PWCS October 2010 submission, using the framework above.

In summary, PWCS does not believe the drafting in the April 2011 revised Proposed HVAU addresses several of the critical concerns raised by PWCS, and the ACCC itself.

1. **First, the ARTC has not fully responded to the ACCC's concern regarding the lack of transitional arrangements.** PWCS understands that the ARTC has made some representations regarding transitional arrangements in supplementary documentation, but they have not been embedded within the HVAU documentation. As PWCS foreshadowed in October 2010, ten year terminal contracts have now been signed for more than 145 Mtpa at PWCS, with start dates ranging out to 2015.

2. **The investment framework for dealing with both ARTC-funded and user-funded investments is still inadequate and does not address the issues raised by PWCS and the ACCC.** In brief, the ARTC has indicated it does not plan to amend its drafting to address the ACCC's stated concerns with the definition of "legitimate business interests" and the ability for the ARTC to use this term as an "out" for committing to build user-funded expansions. Further, although there has been substantial redrafting of the investment-related sections of the HVAU, there is no less discretion as to whether the ARTC will fund particular expansions, whether there is a point at which it needs to make a firm funding commitment, and if it decides not to fund an expansion, whether the ARTC is committed to build the expansion where it is user-funded.

3. **The changes to the section on Mutually Exclusive Applications for capacity leave the arrangements uncertain, and do not address the call for "much more clarity" by the ACCC.**

Although there are other aspects highlighted on the table attached, these three areas are the most significant matters for ensuring that there is effective alignment across terminal and track in the Hunter Valley Coal Chain.

PWCS would be reluctant to support the ARTC's revised draft unless these three crucial alignment issues, at a minimum, are addressed.

* * *

Although not a party to the contractual arrangements between ARTC and users of the rail network, PWCS believes that its perspective on these issues is highly relevant, as the arrangements impact both on PWCS and its customers. For example, if producers are uncertain as to their ability to secure rail capacity following the terminal allocation process, it may constrain their willingness to nominate for additional capacity at PWCS in the first place. In the extreme, if a producer could not secure adequate rail capacity to match their terminal commitment it might result in their facing financial distress, which would have a flow-on impact on PWCS and its other customers.

Operationally, PWCS must work closely with ARTC, other service providers and producers to ensure the Contractual Alignment principles outlined in the Implementation Memorandum as reflected in the ACCC authorised Capacity Framework Arrangements are given full effect. That is, it is critical that there is a set of operating protocols across the industry that ensure that the coal chain is expanded to meet coal producers capacity requirements, operated as efficiently as possible, and that the contractual rights of all parties are upheld.

The ACCC's Consultation Paper invited submissions covering a wide range of matters related to the Proposed Access Undertaking. Once again, PWCS has chosen to focus on the subset of issues around which PWCS has a particular perspective and interest. It should be noted that PWCS lack of comments in

particular areas does not indicate that its customers might not have valid concerns with other aspects of the Proposed HVAU, or that there are other areas in which the ARTC may not have addressed the amendments suggested in the ACCC's Position Paper.

The issues on which PWCS has chosen to comment are, however, central to promoting the efficient use of, and investment in, the Hunter Valley coal chain, and the rail network in particular. Given the relatively short period between the issuance of the revised Proposed HVAU, the ACCC's Consultation Paper and the preparation of this submission, PWCS has not been able to meet with ARTC to discuss the issues raised here. PWCS is, of course, willing to meet with the ARTC or the ACCC to discuss any aspect of this submission or any other matter relating to the proposed HVAU.

A handwritten signature in black ink, appearing to read 'Graham Davidson', with a long horizontal stroke extending to the right.

**GRAHAM DAVIDSON
CHIEF EXECUTIVE OFFICER**

Table 1. Summary of PWCS position

PWCS Submission	ACCC Response	ARTC Response	PWCS Comment
1. Lack of transitional arrangements	<p>“The ARTC should take steps to address the uncertainty that exists in relation to the implementation of its undertaking”.</p> <p>“...the ACCC recognises and appreciates the efforts of C&A and PWCS in offering solutions to their concerns...” (p.185)</p>	<ul style="list-style-type: none"> • ARTC distributed ‘Transition Letter’ of 10 December 2010 • This letter now ‘out-of-date’ as subject to HVAU being accepted by 28 February 2011 • PWCS understands that ARTC has ‘refreshed’ its transitional arrangements until 1 July 2011 	<ul style="list-style-type: none"> • Preferable to have transitional arrangements provided as integral component of HVAU • The proposed transitional arrangements are non-binding • Proposed transitional arrangements did not appear to have clear priority to those with binding terminal contracts, if not all track capacity could be delivered
2. Investment framework is incomplete / uncertain in dealing with user-funded expansions	<ul style="list-style-type: none"> • “The ACCC is of the view that 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” (399) • “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” (p. 358) 	<ul style="list-style-type: none"> • “ARTC does not propose to make amendments to the 2010 HVAU as sought because it considers that the increasing clarity around the user recovery options and the obligation to negotiate a user funding agreement should sufficiently deal with ACCC’s concerns” • “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” 	<ul style="list-style-type: none"> • The unclear definition of legitimate business interests gives ARTC broad discretion to refuse to build (even if user funded) • Through new Section 11.1, ARTC can cease construction of any Project if it does not satisfy ARTC’s “legitimate business interests” even if funding guaranteed by users • ARTC can choose not to fund a project at any point during its life, with broad discretion • ARTC has not adequately responded to ACCC concerns in this critical area

Table 1. Summary of PWCS position

PWCS Submission	ACCC Response	ARTC Response	PWCS Comment
<p>3. Process for dealing with Mutually Exclusive Applications unclear</p>	<p>“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)” (p. 188)</p>	<ul style="list-style-type: none"> • ARTC has amended section 3.13 to define a Mutually Exclusive Access Application and the period during which a Mutually Exclusive Access Application can arise. • ARTC will accept the Access Application “most favourable to it” after considering NPV and all risks involved with the Access Agreement 	<ul style="list-style-type: none"> • NPV test is flawed where charges for Indicative Services are fixed • Does not give clear priority to Access Seekers holding firm terminal contracts, as users in “negotiation” for Network Exit Capability appear to be on equal standing with those holding terminal contracts • In PWCS view, ARTC changes do not fully satisfy ACCC concerns
<p>4. No obligation to continually monitor track operations to recognise shortfalls when they occur</p>	<p>“The ACCC notes the submissions that section 5.4 should set out how or when during the relevant month ARTC will actually identify that there is a shortfall in capacity. The ACCC considers however, that at this point in time it is unnecessary for the proposed 2010 HVAU to be more prescriptive in relation to the process ARTC will follow to identify a shortfall. The relevant sections of the undertaking and IAHA set out how ARTC will respond to a capacity shortfall once identified, and subject to the amendments recommended in this Position Paper, those provisions are likely to be appropriate.” (p. 257)</p>	<ul style="list-style-type: none"> • No amendments made to the HVAU 	<ul style="list-style-type: none"> • No positive obligation to continually monitor track operations • ARTC has met ACCC requirements • PWCS will continue to work with ARTC in relation to the identification and offset of track shortfalls.

Table 1. Summary of PWCS position

PWCS Submission	ACCC Response	ARTC Response	PWCS Comment
5. Total discretion to allocate shortfalls relating to events less than 5 days	“ACCC’s view is that ARTC should amend section 5.5(a)(ii) so that when exercising its discretion to allocate capacity other than on an equitable contractual basis, it can only do so ‘if it is consistent with the objective of ensuring efficient utilisation of Capacity and Coal Chain Capacity during the Capacity Shortfall and after considering any recommendations provided by the HVCCC under section 5.4(a)(ii)’.” (p.264)	<ul style="list-style-type: none"> • ARTC has amended section 5.5(a)(ii) (which is now section 5.4(a)(ii)) of the 2010 HVAU 	<ul style="list-style-type: none"> • ARTC still has discretion to allocate shortfalls as it sees fit, as there are no effective mechanisms for scrutinising the shortfall allocation • ACCC did not ask ARTC to reduce 5 day period to 2
6. Double penalty with Clause 6 and Clause 11.6 for cancellation of services	“The interaction of clause 11.6 of the IAHA and the capacity shortfall provisions in clause 6 should be clarified to set out that an Access Holder cannot be penalised twice for the same event.” (p. 309)	<ul style="list-style-type: none"> • “ARTC does not believe an amendment is necessary because, under clause 6, the paths are not reduced on an ‘at fault’ basis. Rather, Capacity Shortfall is allocated so that path losses are borne by all affected load points on an equitable pro-rata share basis. That is, it is not a penalty and nor is fault attributed to anyone.” 	<ul style="list-style-type: none"> • An Access Holder which has caused a capacity shortfall as per Clause 11.6 could lose capacity under Clause 6 then have paths removed in the following period under Clause 11.6. • PWCS is concerned original issue still remains
7. Mechanism for transferring Path Usages from “at-fault” to affected producers is unclear	“The ACCC considers that a number of these revisions are unnecessary, particularly given the interim status of the clause” (p. 310)	<ul style="list-style-type: none"> • No amendments made to the HVAU 	<ul style="list-style-type: none"> • ACCC suggests that issue will be dealt with under the review required in Clause 5.9 • Not a solution to issue until and unless addressed in Clause 5.9

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<p>8. Review of the policy and processes for identifying and allocating losses should be conducted on an industry wide-basis</p>	<p>The ACCC considers that if the HVCCC commences a review of supply chain performance accountability and capacity management mechanisms then ARTC should in good faith contribute to and participate in that review. If at the end of that review a proposal is developed that includes proposed amendments to the HVAU, the ACCC is of the view that any such proposal could be submitted to the ACCC under the existing mechanisms set out in section 5.9(c). 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”</p>	<ul style="list-style-type: none"> • ARTC has amended the HVAU to provide for ARTC to participate in good faith in, and consider any proposals arising from, and industry wide review that may be conducted by the HVCCC • ARTC’s consultation process provides for the HVCCC to make submissions. ARTC has amended this section to explicitly recognise a submission arising from any HVCCC review 	<p>review</p> <ul style="list-style-type: none"> • While this outcome may be reasonable (since ARTC will consider HVCCC submissions on ‘good faith’), it will require HVCCC to make a submission in the first instance, which creates some uncertainty • Thus, still may result in an ARTC-led review, rather than a broad-based industry review of arrangements, driving change