



AUSTRALIAN RAIL TRACK CORPORATION LTD

Ref No:

24 July 2009

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Australian Competition & Consumer Commission
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**PORT WARATAH COAL SERVICES (PWCS), NEWCASTLE
INFRASTRUCTURE GROUP (NCIG) AND NEWCASTLE PORT
CORPORATION (NPC)
APPLICATION FOR AUTHORISATION A91147 – A91149**

**ARTC COMMENTS ON REQUEST FOR SUBSTANTIVE
AUTHORISATION**

Australian Rail Track Corporation (ARTC) welcomes the opportunity to comment on PWCS, NCIG and NPC application for authorisation of the Capacity Framework Arrangements.

ARTC is proposing to put in place long term track access agreements with coal producers and other access seekers to commence on 1 January 2010. These agreements which will underwrite long term investment in track capacity depend on coal producers having in place long term capacity commitments with terminal operators. The negotiation and agreement of long term ship or pay contracts between terminal operators and coal producers is therefore critical to ARTC's timetable. A delay in the negotiation of such agreements will delay capacity expansion not just at the Port of Newcastle but at all levels of the Hunter Valley coal

chain. Accordingly, ARTC supported the application for interim authorisation in its previous submission.

Support for contractual alignment

ARTC recognises and supports the need for contractual alignment across the Hunter Valley coal chain which will assist in increasing certainty of access for coal users and promote efficient investment in capacity expansion. To this end, ARTC has participated, together with other service providers, in the development of Contractual Alignment Principles which form part of the PWCS/NCIG/NPC application (Schedule 5). This participation has enabled ARTC to maintain awareness of the principles of alignment being sought by the industry during finalisation of its Hunter Valley Access Undertaking (HVAU) submitted to the ACCC in April.

The submission of the HVAU followed extensive consultation with all Hunter Valley stakeholders over the preceding 9 months. A key objective was to ensure reasonable alignment with intended port principles, despite the detail not having been finalised at the time. In Attachment H of the Explanatory Guide accompanying the HVAU application, ARTC has provided detail in relation to how the HVAU addresses each of the Contractual Alignment Principles agreed by the industry.

ARTC believes it is important to recognise that achieving contractual alignment does not necessarily mean the contractual arrangements need to be uniform across agreements with different service providers. Doing so may unnecessarily constrain flexibility needed in relation to the provision of access by a service provider. In developing the detailed arrangements for capacity allocation, management and investment in the HVAU, ARTC has sought to maintain sufficient flexibility to cater for the access and capacity arrangements that may be sought by other service providers. In doing so, ARTC is seeking to enable alignment and consistent access arrangements between providers of different types of infrastructure and services, rather than uniform arrangements.

Balancing the interests

A further objective of the industry consultation was to become aware of, and address, industry concerns in relation to the HVAU and provisions of the Indicative Access Holder Agreement (AHA) and Operator Sub Agreement (OSA) forming part of the HVAU. In doing so, ARTC has sought to present a draft HVAU to the ACCC that achieves a reasonable balance of interests having regard to the needs of the coal industry to have reasonable certainty and flexibility as well as to recognise and address principles of contractual alignment.

ARTC recognises the need for certainty of access to coal chain capacity sought by coal producers. Along with this certainty of access, producers are also seeking a substantial amount of flexibility in how that access should be made available in order to meet their operational needs. Current contractual arrangements provide for a substantial amount of flexibility but, as the ACCC would be aware, access is not certain.

An increase in certainty whilst maintaining flexibility of access to the coal chain often requires increased investment in rail and coal chain capacity.

The development of the Capacity Framework Arrangements

Since submission of the HVAU to the ACCC, the industry has been in a position to continue development of the Implementation Memorandum (IM) leading to the Capacity Framework Arrangements with full knowledge of the details of ARTC's proposed approach to capacity allocation and investment incorporated in the HVAU (framework) and AHA (contract).

The detailed mechanisms for the negotiation and allocation of access rights, and capacity management and investment, prescribed in the HVAU and AHA can therefore inform the development of the detailed Capacity Framework documents by the ports.

ARTC understands that the detailed arrangements and agreements that will underpin (give effect to) the Capacity Framework Arrangements (the conduct for which authorisation is sought) are still being drafted. The ports have indicated that authorisation for these documents is not being sought and that while they will be made available for the ACCC's information, they would not be available for public consultation.

However, industry stakeholders in some submissions to the ACCC in relation to the assessment of the HVAU that have been received to date are seeking alignment between the detailed mechanisms of the HVAU/AHA and port arrangements. Further, the New South Wales Minerals Council has recently written to ARTC seeking it to participate in negotiations with the ports and itself in relation to aligning the detail HVAU/AHA mechanisms with the port arrangements.

ARTC has recently sought to obtain greater detail in relation to these arrangements and agreements from the ports, but has been advised that due to the draft nature of the documents, they were being kept confidential.

ARTC cannot fully consider alignment until the detailed port mechanisms are developed and made available.

The lack of detail in relation to the documents (contractual arrangements) that will give effect to the Capacity Framework Arrangements also makes it difficult for ARTC to provide detailed comments to the ACCC in relation to reasonableness of the balance of interests between the interested parties as well as the consistency between port and track 'contractual' arrangements.

In the attached table, ARTC has sought to comment on some of the alignment issues of which it is aware given only the broad framework proposed in the application for authorisation.

ARTC understands, and supports, that the ACCC may consider both the HVAU and authorisation application side by side in order to ensure both proposals are considered in the context of the wider Hunter Valley coal chain, and to consider

alignment between contractual arrangements. Enabling side by side review of both the port and track arrangements was a key reason for the timing of ARTC's HVAU submission.

The Capacity Framework Arrangements developed from the IM (underlying this Application) and the subsequent documents prescribed in this Application have been or will be developed by PWCS, NCIG and NPC. Apart from involvement in the development of Schedule 5 – Contractual Alignment Principles, other service providers were not involved in the development of the arrangements and, in particular, the development of principles and protocols for the nomination and allocation of port capacity. These include timing and nature of contracting, allocation rules, under-utilisation rules and trading rules.

The HVAU: assessment under section 44ZZA

The HVAU is to be assessed under section 44ZZA of the Trade Practices Act. Section 44ZZA provides that the ACCC may accept the undertaking if it thinks appropriate to do so having regard to the following matters:

“(aa) the objects of this Part;

(ab) the pricing principles specified in section 44ZZCA;

(a) the legitimate business interests of the provider;

(b) the public interest, including the public interest in having competition in markets (whether or not in Australia);

(c) the interests of persons who might want access to the service;

(da) whether the undertaking is in accordance with an access code that applies to the service;

(e) any other matters that the Commission thinks are relevant.”

A key element of the test in section 44ZZCA is the attainment of a reasonable balance between the commercial interests of the service provider and access seekers.

The HVAU and AHA were developed through consultation with producers and other interested parties and ARTC believes that these documents, as submitted to the ACCC, represent a commercially balanced framework.

Accordingly, ARTC does not necessarily consider it appropriate at this stage for ARTC to simply accept and adopt certain principles and detailed mechanisms from the Capacity Framework Arrangements.

There are two key concerns if ARTC was to simply adopt the principles from the Capacity Framework Arrangements into the HVAU and AHA:

- The HVAU and AHA reflect the operational constraints and commercial objectives particular to the Hunter Valley rail network. The principles contained in the Capacity Framework Arrangements have been prepared with different concerns in mind and will not reflect the operational constraints of the Hunter Valley rail network. Importantly, the nature of the access rights to the rail network are, unlike the terminal access rights (tonnes), not fungible. A tonne carried from Mine A to the port using train configuration A may not be the same as a tonne carried from Mine B to the port using train configuration B where impact on coal chain is being considered.

ARTC believes the HVAU and AHA represent a balance between the interests of an access provider and an access seeker who operate on arm's length basis with different commercial interests. From the description in the authorisation application, it is not clear to ARTC that the principles in the Capacity Framework Arrangements, developed only by terminal stakeholders, will necessarily achieve an appropriate balance between the reasonable commercial interests of an access provider and access seeker.

Conclusion

While ARTC recognises that there are some areas of the HVAU and the Capacity Framework Arrangements which will require further work to obtain the necessary level of contractual alignment, ARTC does not consider these concerns insurmountable.

ARTC is committed to developing arrangements which provide greater certainty and are workable and efficient for all levels of the Hunter Valley coal chain. ARTC will continue to participate in the Contractual Alignment Group and work with industry to identify and resolve any remaining inconsistencies between the port and track arrangements, but cannot fully consider alignment until the detailed port mechanisms are developed and made available.

Achieving contractual alignment does not necessarily mean the contractual arrangements need to be uniform across agreements with different service providers. In developing the HVAU, ARTC has sought to maintain sufficient flexibility to cater for the access and capacity arrangements that may be sought by other service providers. In doing so, ARTC is seeking to enable alignment and consistent access arrangements between providers of different types of infrastructure and services, rather than uniform arrangements.

This submission contains no information considered 'commercial-in-confidence'.

If you have any queries regarding this submission, please do not hesitate to contact me on (08) 8217 4314, sormsby@artc.com.au or Mr. Glenn Edwards, Research and Planning Manager (08) 8217 4292, gedwards@artc.com.au .

Yours sincerely

A handwritten signature in black ink, appearing to be 'S Ormsby', written over a light blue horizontal line.

Simon Ormsby

General Manager, Commercial

Attachment 1: Potential Contractual Alignment Concerns

	Issue	Potential concern	ARTC comment
1	Misalignment between track and port expansions / Shortfall in capacity expansion	<p>Under the AHA, an Access Holder will not obtain any right to paths until the track capacity expansion project associated with the creation of those paths is complete.</p> <p>Where there is a delay in completing the project so that some, but not all, of the paths associated with that capacity expansion become available, the capacity available will be prorated amongst those access holders who have contracted for paths dependent on that capacity expansion.</p> <p>This differs to the Compression Rules set out in the Authorisation Application to apply in the event of PWCS Expansion Delay or a PWCS Expansion Shortfall. These rules provide for voluntary compression, compression to reflect unutilised allocation, and then pro rata reduction.</p>	<p>There are two scenarios which need to be considered:</p> <p><u>Shortfall in capacity expansion at the Port but no shortfall in track expansion</u></p> <p>In this scenario, track access rights will only be provided to those access holders who have sufficient allocation at the Port to enable them to utilise the access rights contracted (see the Train Path Schedule which requires "Network Exit Capability" as a condition to the grant of access rights).</p> <p><u>Shortfall in track capacity expansion but no shortfall in Port expansion</u></p> <p>ARTC has not been able to determine from the Compression Rules the impact of a shortfall in track capacity expansion on port allocation and compression.</p>
2	Removal of path usages for under-utilisation ("anti-hoarding")	<p>The AHA provides that ARTC may revoke paths where the access holder has used less than 90% of the paths during the previous three months.</p> <p>It should be noted that withdrawal under the AHA is not automatic and would depend on the circumstances having</p>	<p>It is not clear to ARTC whether this gives rises to an alignment concern.</p> <p>The description of the Capacity Framework Arrangements in the Authorisation Application does not refer to any anti-hoarding mechanism. However, ARTC</p>

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		regard to the reason for under-utilisation and the demand for the capacity by others.	<p>notes that:</p> <ul style="list-style-type: none"> • Access Holders are obliged to transfer any allocations which are unlikely to be used; • the Compression Rules take into account unutilised allocation and will apply greater compression to producers with unutilised allocation
3	Capacity Transfer	<p>The AHA provides for temporary trades:</p> <ul style="list-style-type: none"> • without the consent of ARTC provided certain conditions are met. The AHA provides for two weeks notice to ARTC but ARTC has made it clear that this timetable may be shortened • with the consent of ARTC (up to 2 weeks notice to ARTC) <p>ARTC understands that the terminal operators' Capacity Transfer System is yet to be determined. However the Authorisation Application indicates that an Access Holder will have an obligation to trade but the Capacity Transfer System will not be the exclusive means of transferring capacity.</p>	<p>The AHA does not preclude the development of trading principles allowing for trades to take place on a shorter timeframe. The content of the Capacity Transfer System will need to be known before the track trading principles can be further developed.</p> <p>ARTC is able to consider a more flexible approach to trading but will not do so without assessing impact in coal chain capacity and ARTC's ability to deliver contractual entitlements.</p>
4	Negotiation timing	Unlike the Port arrangements, the HVAU does not provide an	The absence of a prescribed annual process to negotiate

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		annual process to negotiate track access rights/capacity expansions.	<p>track access rights may not be problematic. Nothing in the HVAU prevents access seekers from aligning the timing of port and track negotiations.</p> <p>Under the HVAU, ARTC will not necessarily require proof of Network Exit Capability before entering into an AHA if the applicant is able to establish that it is negotiating for terminal capacity (Section 3.7(b)). This possibility is likely to be sufficiently flexible to accommodate the Port timetable in allowing an access agreement to be entered into prior to formal confirmation of the terminal contract.</p>
<p>The following potential alignment concerns have been raised by producers.</p> <p>ARTC has not been provided with a copy of the Terminal Access Protocols or Port Supply Handling Agreement and is unable to comment on these issues</p>			
5	Nature of access rights	<p>Access Rights in the AHA are expressed in terms of train paths.</p> <p>Commitment to port capacity is based on tonnes.</p>	<p>The industry has for some time grappled with the use of a measure of coal chain capacity being a 'reference tonne', but ARTC is not aware of any commitment to the application of such an approach.</p> <p>The access rights under the AHA (train path) is specified in relation to a range of service assumption including journey and train configuration. Conversion from volume commitment (annual tonnage) in port contractual arrangements to a train path commitment in the AHA</p>

	Issue	Potential concern	ARTC comment
			should be relatively straightforward. The HVAU also provides for the access seeker to obtain the advice of the HVCCC and service providers in determining access requirements and facilitating contractual alignment.
6	Allocation period	<p>The AHA provides that an access holder will be provided with Annual Contracted Path Usages which will be split into Monthly Base Path Usages.</p> <p>ARTC has been informed by the NSW Minerals Council that PWCS is proposing a monthly model for large producers and a quarterly model for small producers.</p>	ARTC will need to review the documentation prepared by PWCS in order to comment on this allocation.
7	Tolerance (Flex)	<p>The AHA provides for a monthly tolerance the greater of 10% of monthly average path usages or 13 path usages, whichever is the greater. This tolerance is subject to the Monthly Tolerance Cap and also runs out once the Access Holder has used its annual contracted commitment for the year.</p> <p>While the size of the port flex has not yet been determined, ARTC understands from the NSW Minerals Council that the flex proposed by PWCS would not count towards consumption of capacity at the Ports.</p>	The contract documentation would need to be reviewed once available.
8	Investment decision making	Where an applicant for access rights is seeking additional	ARTC's policy is for timely investment in track capacity to

	Issue	Potential concern	ARTC comment
		<p>capacity, ARTC will provide the capacity if one of the three conditions in section 6.2 of the HVAU is met.</p> <p>ARTC understands that PWCS will invest in new capacity where required under the NPC/PWCS lease - i.e. where aggregated contracted allocations (for greater than 10 years) exceed aggregate available capacity.</p>	<p>ensure there is sufficient track access rights to enable full utilisation of terminal capacity once requirements for system maintenance are met. The HVCCC will be involved through the development of the Hunter Valley Coal Chain Master Plan.</p>