



AUSTRALIAN RAIL TRACK CORPORATION LTD

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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) AUTHORISATION
A91147 – A91149 & A91168-69**

REQUEST FOR REVIEW BY ASTON RESOURCES

ARTC SUBMISSION

Australian Rail Track Corporation (ARTC) welcomes the opportunity to make comment in relation to the review sought by Aston Resources of the authorisation of the Capacity Framework Arrangements (CFA) to apply at the Port of Newcastle.

ARTC is proposing to put in place long term track access agreements with coal producers and other access seekers upon acceptance of its 2010 Hunter Valley Coal Network Access Undertaking (2010 HVAU) submitted to the ACCC in September 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. Certainty in relation to long term ship or pay contracts between terminal operators and coal producers and the Capacity Framework

Arrangements is therefore important to the development of the 2010 HVAU and ARTC's timetable for its acceptance. The importance to the ACCC of the development of the Capacity Framework Arrangements in the context of seeking alignment of contracting for port, train and track capacity has been highlighted to ARTC and the industry in both the ACCC's Draft Decision (DD) on ARTC's 2009 Hunter Valley Coal Network Access Undertaking (2009 HVAU) (March 2010), and the ACCC's Position Paper (PP) in relation to the 2010 HVAU (December 2010).

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 formed part of the PWCS/NCIG/NPC initial application (Schedule 5);
- in finalising the 2010 HVAU for submission to the ACCC in April 2009, engaged in extensive consultation with all Hunter Valley stakeholders over the preceding 18 months with a key objective being to ensure reasonable working alignment with terminal principles;
- submitted its initial 2009 HVAU to the ACCC in April 2009, at around the same time as the CFA were being finalised for submission to the ACCC, with the stated intention of giving the ACCC the opportunity to assess both the CFA and 2009 HVAU simultaneously and in the context of achieving alignment across the coal chain;
- engaged in consultation with PWCS and Hunter Valley Coal Chain Coordinator (HVCCC) in relation to assessing the extent of alignment, where applicable, in related to the more detailed provisions of the 2010 HVAU and CFA; and
- participated in a working group established to develop a framework for trading capacity.

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 2010 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 working alignment and consistent access arrangements between providers of different types of infrastructure and services, rather than uniform arrangements.

Indeed, early during industry consultation, ARTC and PWCS issued a document detailing perspectives on the areas where contractual alignment has been sought. The general conclusion by both ARTC and PWCS in the document is that there was sufficient flexibility in the arrangements proposed in the HVAU and CFA in order for working alignment to be achieved in most areas. ARTC and industry stakeholders have since sought to address the areas that still needed further refinement as part of the ACCC consultation on the 2009 and 2010 HVAU.

It is important to note however that further refinement has, by necessity, acted to reduce the flexibility originally sought by ARTC. In adjusting the 2010 HVAU to address ACCC and industry concerns, ARTC has been mindful of the need for maintaining flexibility to enable alignment.

To this end, ARTC has made a number of adjustments to certain parts of the 2010 HVAU, and specifically the proposed Indicative Access Agreement (AHA). These include key relevant revisions as follows.

- Increased recognition of coal chain principles
- Increased and more robust HVCCC consultation during access negotiation and capacity planning.
- Consistent provisions relating to coal chain alignment across agreements.

- Prescribed treatment of capital contributions (user funding of investments).
- Revised remaining mine life and rate of return proposals.
- Strengthened annual compliance assessment and information provision.
- Revised 2010 (and soon 2011) interim coal pricing.
- Stronger commitment to developing efficient train configuration and pricing in a timely manner.
- Increased pricing certainty (price caps for some coal).
- Mechanism to identify and assign capacity losses, and incorporation of elective rights for ARTC to deal with persistent breaches of Service Assumptions.
- Increased commitment and prescription around capacity development, consultation, investment and delivery, including financial incentives to deliver capacity on time.
- Involvement of the HVCCC and terminals in the monthly path allocation process with the objective of aligning terminals and track entitlements.
- Increased prescription around providing for system flexibility and ARTC performance in making capacity available.
- Stronger commitment to participation in the Capacity Transfer System Working Group and consultation with the HVCCC on Coal Chain Capacity impacts.
- Proposals for transitioning between regulatory and contractual arrangements.

ARTC has now consulted with both the coal industry and the ACCC for well in excess of 2 years, with the main focus being on alignment issues. Both the coal industry and

the ACCC have sought amendments to increase the extent of alignment with CFA and related port arrangements. It is of some concern to ARTC that addressing alignment issues have been and continues to be a key cause of protracted consultation and delay in acceptance. This is despite ARTC making available an opportunity to address alignment issues through concurrent consultation of track and port arrangements as described above.

Instead the CFA and other arrangements were approved in a relatively short time frame by late 2009 with an expectation that remaining industry alignment concerns would be addressed by amending the 2010 HVAU to suit. As stated above, this has been a key factor in the delay of acceptance of the 2010 HVAU.

ARTC recognises that the port arrangements remain uncertain, and there is specific provision for the ACCC to alter these arrangements over time if needed. It is for this reason that ARTC has endeavoured to maintain as much flexibility as possible in the 2010 HVAU. In maintaining a degree of flexibility in the arrangements in the 2010 HVAU, including providing for the opportunity to short term review of a number of the proposed operational arrangements, ARTC considers that the 2010 HVAU will be able to deal with a moderate level of change to the port arrangements.

The concerns raised by Aston underscores the need to retain provisions in the 2010 HVAU that are as flexible as possible.

ARTC considers it would be counter productive if any changes to the CFA that may arise from this consultation could introduce new alignment issues that the ACCC and industry will seek ARTC to resolve prior to acceptance of the 2010 HVAU. This may result in further delay, increased uncertainty, and possibly greater risks (possibly not fully recognised through adequate compensation through the rate of return). ARTC has no control as to introduction of changes, little opportunity to influence, may not support changes, and may be forced or pressured (to get acceptance) into further change to the 2010 HVAU to align with port arrangements.

ARTC seeks the ACCC to have regard for ARTC's concerns in this regard in coming to a decision on Aston's request for review.

ARTC makes the following comments in relation to Aston's specific concerns.

Balancing the interests of Incumbents and New Entrants

Firstly, ARTC recognises that arrangements put in place by Hunter Valley coal chain service providers need to strike a balance between the certainty needed by existing coal chain participants in order to invest with confidence in the expansion of coal chain capacity, the need to facilitate entry to the coal chain by new participants (where the wider benefits of increased competition and innovation can be realised), and the incentive for incumbents to hoard capacity. Indeed, ARTC believes that the ACCC is also acutely aware of the need to strike an appropriate balance in this regard, particularly where the nature of the industry is such that regulatory consultation and process can be swamped by the views of a few major incumbent participants.

Whilst ARTC, consistent with its charter, has been, and will continue to be, supportive of the competitive and innovation outcomes arising from new entrants into markets, ARTC is not an economic regulator. To this end, ARTC believes that it is the role of an economic regulator to ensure that access arrangements strike an appropriate balance between the interests of incumbents and new entrants.

ARTC has sought adjustments to the 2010 HVAU in order to achieve what is considers to be an improved balance. For example, Aston has raised the under-utilisation threshold provisions of the CFA as an issue. ARTC originally proposed a threshold of 90% over 3 months in the 2009 HVAU, which was subsequently relaxed following consultation with the industry to 80% over 6 months. The ACCC has now sought to tighten the threshold to 85% over 6 months in the PP following concerns raised by some participants (including Aston). During consultation, the ACCC has also sought and obtained adjustments to the 2010 HVAU that strengthen ARTC obligations to resume under-utilised capacity, including 'show cause' provisions sought by Aston.

Given the ACCC's role, and the extended period of consultation and review of the 2010 HVAU, it is ARTC's view that the ACCC (and ARTC) have achieved a reasonable balance between the interests of incumbents and new entrants in many aspects of the 2010 HVAU. In some cases, achieving this balance has resulted in an increase in the risks to which ARTC is now being exposed, where in order to increase certainty for new entrants and smaller developing incumbents, such things as price caps in developing parts of the network have now been introduced.

To this end, ARTC would be reluctant to further adjust the balance now achieved in the 2010 HVAU in order to align to new arrangements that might arise at the port. The existing balance achieved in the 2010 HVAU has arisen from a thorough consideration of all submissions made during consultation (including Aston's), which will clearly not meet the needs of each and every participant. Given this, ARTC requests the ACCC to have regard, in its consideration of Aston's concerns, to the balance now achieved in the 2010 HVAU, and the need to achieve workable alignment between port and track arrangements.

Certainty of delivery of New Capacity

Throughout consultation on the 2009/2010 HVAU, both the coal industry and the ACCC have sought changes to provisions dealing with delivery of capacity in order to increase the certainty and timeliness of the delivery of new capacity. Whilst ARTC recognises the importance of certainty in delivery of new capacity for producers investing in the coal chain and has made a number of adjustments to the 2010 HVAU in order to align ARTC's incentives to those of the coal chain in this regard, it must be recognised that an infrastructure manager or access provider is not a construction company, nor are the permitted regulatory returns aligned to that of a construction company. ARTC welcomes the support of the ACCC in this view, and also understands that the coal industry accepts this position.

As such, whilst ARTC has no objection to the use of financial or other incentives in order to align the objectives of the access provider in relation to delivery of new capacity to those of users (as long as any risk exposure is adequately compensated), ARTC does not believe that the access provider should take on all of the financial

and operational risks associated with the delivery of new capacity, unless its returns match those of a company facing such risks. ARTC is not permitted to earn such higher returns, and would not expect PWCS and NCIG to earn such higher returns.

To this end, introducing or strengthening appropriate incentives for on time delivery of new capacity in the CFA, as has occurred in the 2010 HVAU may be a more appropriate approach to dealing with Aston's concerns. If Aston seeks greater certainty around delivery of new capacity, then it is not unreasonable to expect that Aston should adequately compensate PWCS or NCIG for its additional exposure in providing that certainty.

The 2010 HVAU contains a comprehensive process, involving industry stakeholders, for the identification, development and delivery of new capacity. The process is flexible and transparent to stakeholders, and consists of a number of stages of project identification, development and implementation that involves obtaining stakeholder consultation and endorsement at each stage. As such, stakeholders have a substantial degree of control over the timing and cost of delivery of new capacity. This provides greater certainty around the delivery and cost recovery of new capacity for both stakeholders and ARTC. The adoption of a similar approach to developing and delivering new port capacity, involving greater stakeholder consultation and responsibility, may also present as a means of dealing with Aston's concerns.

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



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