

Mr Matthew Schroder  
General Manager  
Infrastructure & Transport - Access & Pricing Branch  
ACCC  
GPO Box 520  
MELBOURNE VIC 3001

**By email:** [transport@acc.gov.au](mailto:transport@acc.gov.au)

Copy: Sarah Sheppard  
[sarah.sheppard@acc.gov.au](mailto:sarah.sheppard@acc.gov.au)  
Grant Kari  
[grant.kari@acc.gov.au](mailto:grant.kari@acc.gov.au)

8 June 2016

Dear Mr Schroder

**ARTC proposed extension and variation of 2011 Hunter Valley Coal Network Access Undertaking (2011HVAU)**

The Hunter Rail Access Task Force (**HRATF**) welcomes this opportunity to respond to the application (**Extension Application**) by the Australian Rail Track Corporation (**ARTC**) for an extension and variation of its 2011 Hunter Valley Access Undertaking (**2011HVAU**), in order to permit additional time for approval of a replacement HVAU.

As the ACCC is aware, the HRATF operates as a user group of Hunter Valley coal producers in their collective engagement with ARTC and the ACCC in respect of the HVAU. We are currently negotiating with ARTC in respect of the draft HVAU lodged by ARTC on 23 December 2015 (**draft 2016HVAU**).

This submission is endorsed by all members of the HRATF – but this does not limit individual members from separately commenting on the Extension Application in relation to issues where they have particular or additional concerns.

**The HRATF supports the general principles proposed by ARTC in relation to the ex post adjustment of tariffs – but considers that producers should not be required to have the adjustment delayed until the 2016 annual compliance process**

The HRATF was not consulted specifically by ARTC in relation to the Extension Application. This is disappointing, in circumstances where it has been apparent for some time that an extension may be required.

Nonetheless, we remain generally supportive of its stated objectives, which we understand as being to:

- extend the term of the 2011HVAU until 31 December 2016 – so that any replacement HVAU will commence from 1 January 2017;
- implement a set of 'transitional' tariffs for the period from 1 July 2016 until 31 December 2017, based on the rate of return submitted by ARTC in relation to its draft 2016HVAU (being a real

pre-tax WACC of 6.74% and nominal pre-tax WACC of 8.5%). For the reasons set out in our submission in response to the ACCC's issues paper in relation to the draft 2016HVAU, the HRATF submits that this rate of return significantly overstates an efficient and appropriate WACC for the 2016HVAU;

- a number of consequential amendments have been proposed – which we understand are intended only to achieve the outcomes above.

We also acknowledge that this extension will align the HVAU term with a calendar year approach, which is helpful and should enable a number of transitional adjustments to be removed from the existing draft 2016HVAU.

However, HRATF does not consider that it is necessary or appropriate for any adjustment to tariffs to wait until the 2016 annual compliance process is undertaken – which is likely to result in a substantial delay in the approved tariff outcome being properly accounted for. The HRATF have discussed this issue with ARTC, which has acknowledged the risk of delay and which we understand is prepared to consider approaches to providing for a specific ex post adjustment following the commencement of the 2017HVAU.

Given the late stage at which the current Extension Application has been proposed (which unfortunately means there is no opportunity to better develop this issue), the HRATF acknowledges that ensuring regulatory certainty is important and that it is therefore desirable for minimal changes to be made to the extension and variation, in order to ensure that it can be approved and in place by 1 July 2016.

We therefore propose that the ACCC approve the amendments proposed by ARTC subject to the a number of minor drafting points which we consider would more clearly express some elements of the proposal. These amendments also contemplate that an alternative method of providing for the ex post adjustment of tariffs in respect of the Extension Period may be developed by ARTC and the HRATF (and other stakeholders) and approved by the ACCC as part of an undertaking which replaces this Undertaking.

In terms of our other proposed amendments, we consider it is important that the amendments proposed to clause 4.10(g) make it clear that the 'true up' of the tariffs as part of the annual compliance process to reflect the final outcome for the new 2017HVAU includes updating all inputs from 1 July 2016 – including new average mine lives. It should also be clear that this extension does not alter the appropriate averaging period for cost of capital inputs.

Subject to the Extension Application being modified in this way, we would support the ACCC varying the 2011HVAU to extend its term, as proposed by ARTC, and without the need for further consultation.

In particular, the HRATF shares the concern of ARTC and the ACCC to ensure that any extension (and associated transitional tariffs) is approved and in place by 1 July 2016.

### **HRATF wishes to see the transitional tariffs that are proposed**

ARTC appears to have not yet provided the ACCC or industry with its proposed set of transitional tariffs (intended to be Schedule 3 to the Application) for the Extension Period.

The amendments proposed to clause 4.22 make reference only to 'ACCC approved prices' and the explanation provides (our emphasis):

“The varied undertaking will set out the Indicative Access charges which will reflect the revised rate of return and updated inputs relating to costs.”

This reference to updating “cost inputs” is unclear – in particular, whether it refers only to updating in accordance with the standard annual compliance process or whether other amendments are proposed. Provided that any updating of the tariffs for the Extension Period involves only the consequential amendments necessary to reduce the rate of return that this transitional extension process is not used to introduce or modify other inputs or costs, then the HRATF is comfortable with the approach proposed. However, we would request that the proposed tariffs be provided as soon as possible and that the ACCC confirm that this is the basis on which the tariffs are being updated.

Please do not hesitate to contact Alex Sundakov (Castalia - 02 9231 6862) or Simon Muys (Gilbert + Tobin – 03 8656 3112) if you would like to discuss this submission.

Yours faithfully

A handwritten signature in black ink, appearing to be 'AS', written in a cursive style.

**Alex Sundakov**  
HRATF Engagement Manager

## Proposed drafting changes to ARTC Extension Application

Clause	HRATF Comment	Proposed amendments
<p><b>Clause 4.8 (Rate of return)</b></p>	<p>New clause 4.8(b) states: “For the Extension Period of the Undertaking, the real pre-tax Rate of Return is 6.74% and the nominal pre-tax Rate of Return is 8.50%.</p> <p>It should be clearer that this Rate of Return only applies as a transitional measure and that the Rate of Return to apply during the Extension Period will ultimately be that which is approved by the ACCC as part of the 2016HVAU process, and which is backdated in accordance with clause 4.10(g).</p> <p>It should also be made clear that any transitional arrangements governing the Rate of Return do not modify the averaging period to be applied for relevant WACC parameters – which are to continue to be assessed on the basis that the new WACC is to be applied from 1 July 2016.</p>	<p><b>Rate of return</b></p> <p>(a) Subject to paragraph (b), for the Term of the Undertaking, the real pre-tax Rate of Return is 9.10% and the nominal pre-tax Rate of Return is 11.83%.</p> <p>(b) For the Extension Period of the Undertaking, <u>and subject to subsequent adjustment in respect of the Extension Period as contemplated in clause 4.10(g)</u>, the real pre-tax Rate of Return is 6.74% and the nominal pre-tax Rate of Return is 8.50%.</p>
<p><b>Clause 4.10(g) (FY16 annual compliance process)</b></p>	<p>As noted above, clause (g)(i) should be amended to be consistent with the principal in (g)(iii) that depreciation/mine lives will also be updated to reflect the final outcome of the 2017HVAU process.</p>	<p>(g) <u>Unless an alternative method of providing for the ex post adjustment of tariffs in respect of the Extension Period is approved by the ACCC as part of an undertaking which replaces this Undertaking</u>, for the purpose of carrying out ARTC’s annual compliance assessment for the 2016 calendar year, sections 4.9 and 4.10 and Schedule G will apply as follows:</p> <p>(i) a single annual compliance assessment will be undertaken with non-capital costs calculated on an annual basis and calculations for RAB, RAB Floor Limit, depreciation (<u>including the determination of average remaining mine lives</u>) and Rate of Return calculated for each half year period in the 2016 calendar year, being:</p> <p>(A) the period commencing on 1 January 2016 and ending on 30</p>

		<p>June 2016 (“<b>Initial 2016 Period</b>”); and</p> <p>(B) the Extension Period,</p> <p>(each a “<b>Review Period</b>”) to take into account the different Rates of Return <u>and average remaining mine lives</u> applying in each Review Period and, unless specified in this section 4.10(g) relevant references to the “previous calendar year”, “preceding calendar year”, “calendar year” and items referable to, or matters to be determined on, an annual basis in the Undertaking will be interpreted accordingly;</p> <p>....</p> <p><u>(v) for clarity, the transitional arrangements contemplated under this clause 4.10(g) are not intended to change the appropriate averaging period used for the purpose of determining any new Rate of Return to apply under any new access undertaking for the Hunter Valley Rail Network which ARTC submits to replace this Undertaking – such Rate of Return is to be determined on the basis that it applies from 1 July 2016.</u></p>
<p><b>Clause 4.10(h) (Survival of 2011HVAU provisions)</b></p>	<p>While HRATF acknowledge and support the intent of having the relevant provisions survive the expiration of the 2011HVAU, the legal effect of this mechanism is not certain.</p> <p>We suggest that, in addition to the survival clause, ARTC also warrants in the 2011HVAU that any draft HVAU which it submits in order to replace the 2011HVAU will include provisions that ensure that the intent of these transitional provisions is implemented.</p>	<p>(h) Sections 4.9 and 4.10 and Schedule G and such other sections of the Undertaking as required to give effect to section 4.10(g) survive termination of this Undertaking or expiry of the Term and to avoid doubt, include any obligations to perform any actions on a date after the expiry of this Undertaking.</p> <p><u>(i) Without limitation to clause 4.10(h), ARTC will ensure that any new access undertaking for the Hunter Valley Rail Network which it submits to replace this Undertaking is consistent with, and give effect to, the transitional arrangements contemplated by this clause 4.10(g).</u></p>