

Application by ARTC to vary the Hunter Valley Access Undertaking to extend term

1 Application

1.1 Application

This is an application to the ACCC for consent to vary the Hunter Valley Coal Network Access Undertaking (HVAU) under section 44ZZA(7) of the *Competition and Consumer Act 2010* (Cth) (CCA). The HVAU was accepted by the ACCC on 29 June 2011 with a Commencement Date of 1 July 2011 and an expiry date of 30 June 2016 (**Expiry Date**).

This application seeks to vary the HVAU to:

- (a) extend the term of the HVAU to 31 December 2016;
- (b) reduce the rate of return for the extended period consistent with that submitted by ARTC for the proposed 2016 HVAU; and
- (c) make consequential changes to the HVAU with respect to transitional arrangements relating to the true up test, compliance assessment and pricing for the extended period.

This application has been submitted following consultation with relevant stakeholders as well as with the ACCC as part of the 2016 HVAU application process. ARTC considers that this proposal meets the ACCC and stakeholders' requirements and is consistent with the Part IIIA criteria for variations for the following reasons:

- it provides regulatory certainty to ARTC and producers while the new HVAU is negotiated;
- it provides pricing certainty to ARTC and producers while the new HVAU is negotiated;
- it provides for a reduced rate of return during the extension period; and
- the extension does not prejudice producers as there will be a true up for the extension period for the outcomes of the new undertaking once approved.

The proposed amendments to the HVAU are detailed at Attachment A.

ARTC considers it appropriate for the ACCC to consent to ARTC's proposed variation for the reasons set out above and in the rationale in Attachment A.

1.2 Criteria for approving variation

Pursuant to section 2.3 of the HVAU and section 44ZZA(7) of Division 6 of Part IIIA of the CCA, ARTC may vary the HVAU at any time with the ACCC's consent.

The ACCC may only consent to a variation if it considers it appropriate to do so having regard to the matters set out in section 44ZZA(3) of the CCA. These matters include:

- (a) the objects of Part IIIA of the CCA;
- (b) the pricing principles specified in section 44ZZCA;
- (c) the legitimate business interests of ARTC;
- (d) the public interest, including the public interest in having competition in markets;
- (e) the interests of Access Holders and Operators; and
- (f) any other matters that the ACCC thinks are relevant.

Attachment A – Proposed variation

The table below sets out a consolidated list of amendments to ARTC’s proposed variation of the Hunter Valley Access Undertaking.

For convenience, ARTC has prepared a mark-up of the HVAU to reflect the proposed amendments set out in the table below. The mark-up is attached as **Annexure 1** and for convenience a clean version is attached as **Annexure 2**. **Annexure 4** includes an extract of the proposed changes to clause 5.4 of the Indicative Access Holder Agreement.

Section	Proposed change	Reason for proposed change
Amend section 2.2(b)	<p><u>Subject to sections 4.10(g) and 4.10(h), the Undertaking will continue until the earlier to occur of:</u></p> <p>(i) <u>31 December 2016</u>the fifth (5th) anniversary of the Commencement Date; or</p> <p>(ii) the withdrawal of this Undertaking in accordance with the CCA,</p> <p>being, the Term of the Undertaking, <u>with the period from 1 July 2016 to 31 December 2016 being the “Extension Period”</u>.</p>	<p>To extend the operation of the current Hunter Valley Access Undertaking until 31 December 2016.</p> <p>In proposing a 6 month extension of the term, ARTC is seeking to extend the term of the current HVAU to allow more time for a new HVAU to be agreed. This also has the effect of aligning the term of the HVAU with its contractual and compliance obligations that are on a calendar year basis.</p>
Amend section 4.8	<p>(a) <u>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%.</u></p> <p>(b) <u>For the Extension Period of the Undertaking, and subject to subsequent adjustment in respect of the Extension Period as contemplated in section 4.10(g), the real pre-tax Rate of Return is 6.74% and the nominal pre-tax Rate of Return is 8.50%.</u></p>	<p>Consistent with ARTC’s consultation with the ACCC, ARTC has provided a revised rate of return for the extension period (which it understands is acceptable to the ACCC in light of the proposed true up) applicable to the extended period.</p>
New 4.10(g)	<p><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, 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:</u></p> <p>(i) <u>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 (including the determination of average remaining mine lives) and Rate of Return calculated for each half year period in the 2016 calendar year, being:</u></p> <p>(A) <u>the period commencing on 1 January 2016 and ending on 30 June</u></p>	<p>The purpose of this clause is to provide for the annual compliance assessment to reflect the different rate of return and average remaining mine lives applying in each half year period for 2016.</p> <p>ARTC will submit to the ACCC in April 2017 documentation in order for the ACCC to carry out its annual review of ARTC’s RAB, RAB floor limit and reconciliation of access revenue with the applicable ceiling limit in respect of the 2016 calendar year.</p> <p>The compliance assessment will utilize a single model to</p>

	<p><u>2016 (“Initial 2016 Period”); and</u></p> <p><u>(B) the Extension Period,</u></p> <p><u>(each a “Review Period”) to take into account the different Rates of Return and average remaining mine lives 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;</u></p> <p><u>(ii) ARTC will submit to the ACCC documentation in accordance with requirements of section 4.10 and Schedule G in respect of the 2016 calendar year and each Review Period as applicable;</u></p> <p><u>(iii) the ACCC will make a determination under sections 4.10(d) and 4.10(e) in respect of the:</u></p> <p><u>(A) Initial 2016 Period – based on the Rate of Return specified in section 4.8(a); and</u></p> <p><u>(B) Extension Period – the revised Rate of Return and average remaining mine life approved by the ACCC under a new access undertaking for the Hunter Valley Rail Network commencing operation on 1 January 2017;</u></p> <p><u>(iv) for the purpose of section 4.10(f), the TUT Audit will continue to be done on a full calendar year basis for the 2016 calendar year; and</u></p> <p><u>(v) in applying section 4.9(b)(vi) in reconciling the Constrained Coal Customer Accounts, ARTC may do so on an aggregate basis for both Review Periods.</u></p>	<p>calculate the unders and overs for the constrained group of traffics and capitalised losses for Pricing Zone 3 by reference to the approved rates of return and remaining mine life. Some elements of the assessment, such as asset related costs and the underlying calculations (depreciation, return, disposals and loss on disposals) require splitting into two half years whilst revenue and non-capital expense items are unaffected by the changed parameters and do not require separation. With the two half years for asset related costs, the addition of new assets will be assessed at the mid point of each Review Period in which the commissioning occurred.</p> <p>The system wide true up test and TUT Audit will continue to apply over the full calendar year as usual except for the need to take into account the different pricing in each six month period see new clause 4.23 below.</p>
<p>New 4.10(h)</p>	<p><u>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.</u></p>	<p>Proposed new clause ensures that ARTC is required to undertake the compliance requirement and true-up test for the 2016 calendar year in accordance with the provisions of the HVAU even though it will have expired.</p>
<p>New 4.10(i)</p>	<p><u>Without limitation to section 4.10(h), ARTC will ensure that any new access undertaking for the Network which it submits to replace this Undertaking is consistent with, and gives effect to, the transitional arrangements contemplated by</u></p>	<p>Proposed new clause makes certain that a new access undertaking will give effect to the transitional</p>

	section 4.10(g).	arrangements contemplated by section 4.10(h).
Insert new 4.22	<p>4.22 Extension Period Access Charges</p> <p>(a) The following Indicative Access Charges will apply for the Extension Period (and, to avoid doubt, such charges constitute charges published and determined by ARTC in accordance with the Undertaking for the purposes of clause 4(b)(i) of Schedule 3 of the Access Holder Agreements):</p> <p>[refer to Annexure 3]</p> <p>(b) ARTC will notify the Access Charges for Services which are not Indicative Services to relevant Access Holders within 10 Business Days of the approval of the variation to extend the Term of the Undertaking where such charges must be determined by ARTC in accordance with sections 4.15 and 4.16. To avoid doubt, the charges under this paragraph (b) constitute charges notified to the Access Holder and determined in accordance with the Undertaking under clause 4(b)(ii) of Schedule 3 of the Access Holder Agreements).</p>	<p>For the purposes of the extension period (1 July 2016 to 31 December 2016), ARTC agrees to recalculate its prices based on the amended rate of return.</p> <p>The varied undertaking will set out the Indicative Access charges which will reflect the revised rate of return and updated inputs relating to costs.</p> <p>The existing Access Holder Agreements will adopt the new pricing.</p>
New section 4.23	<p>4.23 Tier 1 change to system wide true up test for 2016 Calendar Year</p> <p>(a) Under clause 19.1 of each Access Holder Agreement, the parties agree that changes to a Tier 1 (Mandatory) Provision in the indicative access holder agreement included in the Undertaking will be automatically incorporated into the agreement on the date the new or varied Undertaking comes into effect.</p> <p>(b) Clause 5.4 is a Tier 1 (Mandatory) Provision.</p> <p>(c) Clause 5.4 of the Access Holder Agreements has been amended pursuant to a variation to the Undertaking approved by the ACCC in June 2016 for the purpose of calculating ad hoc rebates and applying the system wide true up test and annual reconciliation under the Access Holder Agreements where there are two sets of pricing during the 2016 calendar year.</p>	<p>The proposed amendment relates to the fact that the prices are based on a revised rate of return. For the purposes of the True up Test and annual reconciliation, the TOP and ad hoc rebates will need to be recalculated using the approved rate of return for the Extension Period.</p> <p>The changes provide for this to occur. Annexure 4 contains an extract of clause 5.4 of the AHA with the proposed changes.</p>
New section 13.1(c)	Notwithstanding termination of this Undertaking or expiry of the Term, ARTC will report on its website, performance against the Network Key Performance Indicators set out in Schedule D in respect of the 2016 calendar year.	Notwithstanding the expiry of the existing HVAU on 31 December 2016 (as proposed in the variation), ARTC is committed to reporting on its performance in relation to the KPIs in respect of the 2016 calendar year.

New definitions	The following new definitions will need to be added to section 14 (Definitions): “ Extension Period ” has the meaning given in section 2.2(b) ; “ Initial 2016 Period ” has the meaning given in section 4.10(g) ; “ Review Period ” has the meaning given in section 4.10(g) ;	Inclusion of new definitions for completeness.
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Annex 1

Mark-up of the HVAU to reflect proposed variation amendments

Annex 2

Clean version of the HVAU incorporating proposed variation amendments

Annex 3

Refer to attached.

Annex 4

Extract of proposed variations to clause 5.4 of the Indicative Access Holder Agreement

5.4 Calculation of TOP Rebate and Ad-Hoc Charge Rebate

- (a) Within 35 Business Days of the end of each calendar year in which the Access Holder has an entitlement to Path Usages in a Train Path Schedule, ARTC will:
- (i) determine if there is a Ad Hoc Charge Rebate owing to the Access Holder for Ad Hoc Charges paid for each Train Path in each Pricing Zone determined in accordance with the formulae in **clause 5.4(b)**; and
 - (ii) undertake an annual reconciliation of the TOP Rebate owing to the Access Holder for each Train Path in each Pricing Zone determined in accordance with the formulae in **clause 5.4(c)** (“**Annual Reconciliation**”).

- (b) If $APU - \text{Ad Hoc Path Usages} < ACP$, then the Access Holder is entitled to a rebate of Ad Hoc Charges paid to ARTC for Ad Hoc Path Usages on the Train Path in the Pricing Zone calculated in accordance with the following formula:

$$[ACP - (APU - \text{Ad Hoc Path Usages})] \times \text{Ad Hoc TOP}_{PU}$$

Where:

APU or Actual Path Usages means the actual path usages being, subject to **clause 16.5**, the total number of Path Usages in the Pricing Zone in respect of which the Operator actually operated a Service for the Access Holder on that Train Path in the previous Contract Year;

ACP is the unconditional Annual Contracted Path Usages for that Train Path in the Pricing Zone specified in the **Train Path Schedules** less any Path Usages not made available under **clause 3.14**, **clause 4.5** or **clause 11.6** of this agreement for the previous Contract Year;

(Ad Hoc TOP_{PU}) means the average Ad Hoc Charge associated with that Train Path in that Pricing Zone which will be calculated by dividing the total Ad Hoc Charge payable for Ad Hoc Path Usages for that Train Path in that Pricing Zone in the Previous Contract Year by the total Ad Hoc Paths Usages for that Train Path in that Pricing Zone in the previous Contract Year. [In calculating the average Ad Hoc Charge for the 2016 Contract Year for the purposes of the Extension Period \(as that term is defined in the Access Undertaking\), the Ad Hoc Charge will be calculated based on the revised rate of return and average remaining mine life approved by the ACCC under a new access undertaking for the Hunter Valley Rail Network commencing operation on 1 January 2017](#));

- (c) If $APU < ACP$, then the Access Holder is entitled to a TOP Rebate equal to the lesser of the rebate applicable for the annual deficiency in contracted Path Usages for that Train Path in the Pricing Zone and the sum of the accrued system rebates under **Schedule 2** in respect of that Train Path in the Pricing Zone, as determined in accordance with the following formulae:
- (i) if $(ACP - APU) \times \text{TOP}_{PU} \leq \sum (SPR_1 \dots SPR_N)$,
 $(ACP - APU) \times \text{TOP}_{PU}$
 - (ii) if $(ACP - APU) \times \text{TOP}_{PU} > \sum (SPR_1 \dots SPR_N)$,

$$\sum (SPR_1 \dots SPR_N)$$

Where:

TOP_{PU} is the average Train Path TOP Charge associated with a Path Usage for that Train Path in that Pricing Zone which will be calculated by dividing the monthly Aggregate Train Path TOP Charge by the Aggregate Average Path Usages;

Aggregate Train Path TOP Charge is, for the first Contract Year, the sum of the amounts for that Pricing Zone set out in column 10 for each applicable tranche of Path Usages in the tables in clause 3 of all the **Train Path Schedules**, and for each following Contract Year, the sum of the Train Path TOP Charges for that Pricing Zone calculated using the relevant TOP Prices as re-determined in accordance with **Schedule 3** and any changes agreed to the relevant Input Information in the **Train Path Schedules** for that Contract Year. [In calculating the Aggregate Train Path TOP Charges for the 2016 Contract Year, for the purposes of the Extension Period \(as that term is defined in the Access Undertaking\), the Train Path TOP Charges will be calculated based on the revised rate of return and average remaining mine life approved by the ACCC under a new access undertaking for the Hunter Valley Rail Network commencing operation on 1 January 2017;](#)

Aggregate Average Path Usages is, for the first Contract Year, the sum of the figures for that Pricing Zone set out in column 4 for each applicable tranche of Path Usages in the tables in clause 3 of all the **Train Path Schedules**, and for each following Contract Year, the sum of the Average Path Usages for that Pricing Zone using any changes agreed to the relevant Input Information in the **Train Path Schedules** for that Contract Year;

To avoid doubt, the calculation of the Aggregate Train Path TOP Charge and the Aggregate Average Path Usages will include all tranches of Path Usages in that Pricing Zone which have a Start Date before the end of the Contract Year and does not include tranches of Path Usages having a Start Date after the end of the Contract Year;

$\sum (SPR_1 \dots SPR_N)$ is the sum of the system rebates accrued by the Access Holder for that Train Path in that Pricing Zone in the previous Contract Year, calculated in accordance with **Schedule 2** of this agreement; and

APU and ACP have the meaning set out in **clause 5.4(b)**.

- (d) Within 20 Business Days of performing the Annual Reconciliation ARTC will make a payment to the Access Holder of the TOP Rebate determined under **clause 5.4(c)** and the Ad Hoc Charge Rebate determined under **clause 5.4(b)**.
- (e) Except as required under **clause 5.7**, ARTC is not required to pay any interest in relation to the TOP Rebate or the Ad Hoc Charge Rebate.
- (f) If the Access Holder disputes the amount of the TOP Rebate or the amount of the Ad Hoc Charge Rebate, it must notify ARTC of that dispute under **clause 14** within one month of the date of the issue of the Annual Reconciliation and the dispute will be determined by expert determination in accordance with **clause 14.4**. If the Access Holder does not notify ARTC of a dispute within this time, it is deemed to have accepted the TOP Rebate and the Ad Hoc Charge Rebate as accurate and waives any right to make a Claim in respect of the TOP Rebate, Ad Hoc Charge Rebate, TOP Charges or the Ad Hoc Charges payable in the previous Contract Year.
- (g) Any revenue rebated by ARTC under this clause will be deemed to be revenue received by ARTC and included for the purposes of annual compliance with the pricing principles in the Access Undertaking.
- (h) The sole remedy of the Access Holder for the failure by ARTC to make available a Path Usage or a Train Path for any reason is a TOP Rebate under **clause 5.4(c)** and any such failure does not constitute a default under this agreement.