

Hunter Valley Rail Network

ARTC Proposed Access Undertaking

RailCorp Submission in response to the ACCC Draft Decision

March 2010



Abbreviations used in this document

ACCC	Australian Competition & Consumer Commission
AHA	Access Holder Agreement
ARTC	Australian Rail Track Corporation
FCC	Fixed Cost Component
HVAU	Hunter Valley Access Undertaking
IAHA	Indicative Access Holder Agreement
MTP	Master Train Plan
NSWRAU	NSW Rail Access Undertaking
RailCorp	Rail Corporation NSW
RCG	Rail Capacity Group
TAA	Transport Administration Act
VCC	Variable Cost Component

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Executive Summary

This is the second RailCorp submission to the ACCC regarding the HVAU proposed by ARTC. It was preceded by RailCorp's response to the ACCC Issues Paper of May 2009. This submission has been developed following the release of the ACCC Draft Decision on 5 March 2010. When reviewing the Draft Decision RailCorp has concentrated its efforts on those aspects which it believed would have the greatest potential to impact on the above rail operations conducted by RailCorp on the Hunter Valley rail network. As a result not all areas of the Draft Decision have been addressed by RailCorp.

RailCorp supports many of the ACCC's preliminary views contained in the Draft Decision and acknowledge that a number of concerns raised in RailCorp's original submission appear to have been addressed, particularly in relation to non-coal access e.g. the need for an indicative access agreement for non-coal services.

However RailCorp is of the opinion that the passenger priority obligations of ARTC should be more clearly demonstrated than proposed in the Draft Decision. RailCorp believes that passenger priority is effectively a capacity management issue and therefore its impact upon capacity/network management should be clearly demonstrated in the HVAU. This would improve the transparency for all access seekers including the beneficiaries and those who may be impacted by the implementation of passenger priority. It should be noted that RailCorp may not be the only beneficiary of the implementation of passenger priority principles.

The ACCC has suggested that certain capacity aspects of the IAHA be uplifted to the actual HVAU itself and mirrored in the IAHA to assist alignment issues. The ACCC also suggests that disputes in relation to these aspects be subject to the resolution process of the HVAU itself rather than the IAHA. RailCorp see the obligation to implement passenger priority and the subsequent capacity impacts in a similar manner. That is, these matters should be uplifted into the actual HVAU, as an obligation and mirrored into the IAHA with disputes regarding these issues being dealt with by the resolution mechanism of the HVAU and not the individual AHA.

After reviewing the ARTC response to the submissions lodged with the ACCC RailCorp has also raised in the body of this submission concerns about:

- ARTC's apparent allocation of VCC
- Contributions to FCC
- The interpretation of the ability to pay: and
- The proposed guidelines regarding access charge differentiation.

RailCorp acknowledges that the ACCC has suggested a formal ceiling level be determined for non-coal access seekers however RailCorp remains convinced that indicative passenger access charges are required.

RailCorp has noted with some interest that in its Explanatory Guide, ARTC, in relation to the reservation of Non-coal paths, specifically referred to the "opportunity

to apply for access rights required to transport non-coal freight”¹. It is unclear if ARTC is suggesting a particular differentiation between non coal freight access seekers and passenger access seekers other than in relation to the implementation of passenger priority.

It is also noted that throughout the ACCC’s Draft Decision a number of preliminary views refer specifically to non-coal access seekers and at times appear to differentiate between non-coal freight and passenger access seekers.

In general the Draft Decision proposes that greater levels of transparency and certainty are proposed for non-coal access seekers which RailCorp believes should be provided to all non-coal access seekers including passenger access seekers. RailCorp would appreciate confirmation that the ACCC also believes the same level of transparency and certainty that is to be afforded to non-coal freight is also to be available to passenger access seekers. In the remaining sections of RailCorp’s submission when the term non-coal access seeker is used it is a reference to both non-coal freight and passenger access seekers unless otherwise stated.

¹ ARTC, Hunter Valley Access Undertaking 2009, Explanatory Guide, p. 60.

Preliminary Matters

Introduction

It is noted that the ACCC preliminary view is that the Introduction of the HVAU should separately acknowledge passenger and non-coal freight. RailCorp believes that restructuring the Introduction to acknowledge the 3 main network traffic types of coal, non-coal freight and passenger is appropriate. However it is suggested that the section also clearly state further references to non-coal traffic or non-coal access seekers includes non-coal freight and passenger access seekers unless specifically indicated.

RailCorp also acknowledges and supports the ACCC preliminary view that it is appropriate for the HVAU to include a separate subsection recognising ARTC's obligations under the TAA 1988 (NSW) particularly in relation to passenger priority.² However it is also noted that the ACCC commented that section 1.1 provides context to the body of the HVAU and places no obligations on ARTC and that the ACCC does not believe that this is inappropriate.³ RailCorp does not necessarily agree with the ACCC for a number of reasons including the following.

The methods by which ARTC implement its passenger priority obligations will impact on network capacity management and planning and therefore upon on all access seekers, not only RailCorp as a passenger operator. This is a situation that the ACCC acknowledged at various points in the Draft Decision.⁴ It remains RailCorp's view that, for transparency reasons, all access seekers should be made aware of ARTC obligations in terms of ARTC being able to provide capacity and generally the impact upon the management of the Hunter Valley network. RailCorp submits that an acknowledgement in a descriptive clause within the Introduction of the HVAU is unlikely to draw the attention of potential access seekers.

In the event of an access dispute RailCorp, as an access seeker, believes it should be entitled to access the same dispute resolution mechanisms available to other access seekers under the HVAU. RailCorp is concerned that, under the current drafting of the HVAU or any drafting that would be consistent with the ACCC's preliminary views, the ability to access the dispute resolution mechanisms of the HVAU in the event of a dispute involving passenger priority/capacity management will be unclear and ultimately considered outside the scope of the HVAU. Certainly if the implementation of passenger priority principles are contained in the acknowledgment section of the HVAU it places no obligations on ARTC and therefore does not appear access to the dispute resolution mechanisms of the HVAU. It is understood that the lease to ARTC of the NSW Interstate and Hunter Valley rail networks provide obligations in regards to the implementation of passenger priority. However as RailCorp is not the lessor of the rail infrastructure, RailCorp's ability as an access seeker to access the dispute resolution mechanisms within the lease are unclear.

² ACCC, Hunter Valley Coal Network Access Undertaking, Draft Decision, p. 88.

³ ACCC, Hunter Valley Coal Network Access Undertaking, Draft Decision, p. 88.

⁴ ACCC, Hunter Valley Coal Network Access Undertaking, Draft Decision, p. 449.

RailCorp, as an access seeker believes that this type of discrimination against a particular type of access seeker, namely passenger is inappropriate.

In its original submission RailCorp suggested that the HVAU should not only recognise ARTC's obligations under the Transport Administration Act 1988, by specifically referencing section 88L but also suggested the HVAU nominate passenger priorities principles similar to those proposed be expressed in the IAHA, specifically being in relation to:

- Service planning for timetabling to ensure passenger services receive priority in programming;
- Train programming for daily operations to achieve passenger service priority in daily programming;
- Network Control in accordance with the Network Management Principles;
- Preservation of existing and future passenger train paths; and
- Apply Passenger Priority in undertaking any maintenance to the Network.

RailCorp remains of the view that the HVAU would be enhanced and provide greater certainty to access seekers by the uplifting of these clauses to the HVAU from the IAHA in a similar manner that the ACCC has proposed in regards to other capacity aspects.

Scope

RailCorp supports the ACCC preliminary view that the definition of the HVUA requires greater clarity with a view to minimise the likelihood that access seekers will be subject to multiple access arrangements.

RailCorp also supports the concept of Extensions being covered by the HVAU.

In its original submission, and in this submission, RailCorp indicated its view that the HVAU should clearly articulate the passenger priority obligations of ARTC as opposed to being included in individual access agreements. RailCorp acknowledges ARTC's subsequent comments that it believes it is not appropriate to "undertake" to the ACCC that it will meet its legislative obligations in regards to passenger priority. RailCorp submits that in the interest of transparency to all access seekers ARTC should clearly identify in the HVAU the conditions that apply to its management of the network

Negotiating for Access

Alignment Considerations

RailCorp is of the opinion that many of the aspects contained in the IAHA, that ACCC have identified such as capacity management protocols should be uplifted into the HVAU as suggested by the ACCC⁵

⁵ ACCC, Hunter Valley Coal Network Access Undertaking, Draft Decision, p. 150.

Essential Elements

RailCorp agrees with the ACCC opinion that the drafting of Essential Elements permits negotiation of access agreements with non-aligning provisions, which is a scenario which is to be avoided.

In its previous submission RailCorp also raised concerns that the drafting of the Essential Elements would permit ARTC and a coal access seeker, through negotiations, to remove or vary aspects of the Essential Elements including those related to the passenger priority. RailCorp is of the opinion that the implementation of passenger priority by ARTC should be a building block integral to its capacity management practices. The potential for individual agreements to have varying passenger priority terms does not promote alignment of capacity management techniques. For this reason RailCorp believes, as indicated in previous submissions, that the passenger priority obligations should be contained in the HVAU and mirrored in the individual access agreements in the similar manner to which the ACCC has proposed with other capacity management aspects.⁶

Non Coal Access Rights

RailCorp believes the ACCC has correctly identified the significant lack of certainty in the absence of a non-coal access agreement in the HVAU. The 3 separate categories of traffic that use the Hunter Valley network (coal, non-coal freight and passenger) each have distinctive characteristics. This initially suggests that it would be appropriate that an indicative access agreement be developed for each category. While this situation may be preferable, RailCorp acknowledges it would place an additional burden on ARTC as the infrastructure owner. An alternative to 3 separate indicative access agreements while providing the appropriate level of certainty could be the development of an indicative passenger service to be used in conjunction with an indicative non-coal access agreement. Additionally any such indicative non-coal access agreement would need to be flexible enough to manage the different characteristics of the various non-coal access seekers. An example would be the need to incorporate clauses which acknowledge that a passenger access seeker is a beneficiary of the ARTC passenger priority obligations. This would differ from the IAHA which is structured in terms of the agreement holder not impeding ARTC in its performance of these obligations.

Therefore RailCorp would fully support the ACCC preliminary view that the HVAU should include an indicative access agreement for non-coal access rights particularly if an indicative passenger service is also developed.

ARTC's previous statements that access agreements for non-coal services would be based on the Indicative Access Agreement contained in the 2008 Interstate Access Undertaking are acknowledged as is the time restrictions that apply to the ACCC. However RailCorp, which has concerns with the indicative access agreement attached to the Interstate Undertaking believes the opportunity which was provided to coal

⁶ ACCC, Hunter Valley Coal Network Access Undertaking, Draft Decision, p. 150.

access seekers to review and have the IAHA subject to regulatory scrutiny should also be provided to non-coal access seekers. Therefore any indicative access agreement that ARTC proposes to be used for non-coal access seekers should be made available within the context of the HVAU for comment, scrutiny and review.

Practical Application of Negotiation Process

RailCorp notes the comment by ACCC that the practical application of the coal negotiation process is not understood and until this issue is resolved the ACCC is unable to make comment on the process of non-coal path reservation proposed by the HVAU.

Reservation of non-coal access rights

RailCorp remains of the opinion that processes in relation to the reservation of non-coal paths is unclear. RailCorp is particularly concerned in the current context as its current access agreement with ARTC, which provides for access to both the Interstate and Hunter Valley networks in accordance with the IU and the NSWRAU has expired and it is operating on a monthly extension basis. Negotiations with ARTC have only recently commenced and the lack of contractual certainty, confusion regarding the interface between the different regulatory instruments and the unclear nature of what is being proposed in relation to non-coal paths in the HVAU has created a considerable amount of uncertainty.

ACCC's preliminary view that the HVAU creates uncertainty in relation to the nature of non-coal access agreements⁷, suggesting that there is no ability to negotiate, is supported by RailCorp.

Dispute resolution and arbitration

Coverage of dispute resolution and arbitration process

RailCorp believes that any provisions that are contained in the HVAU and subsequently mirrored in the access agreements should be subject to the dispute resolution mechanism of the HVAU as opposed to the mechanisms with the access agreement. Therefore the ACCC preliminary view that disputes regarding capacity management provisions should be dealt with under the dispute resolution mechanisms of the HVAU rather than the mechanisms in the individual access agreements is supported by RailCorp.

RailCorp reiterates its view that passenger priority principles should be subject to the dispute resolution mechanisms contained in the HVAU.

⁷ ACCC, Hunter Valley Coal Network Access Undertaking, Draft Decision, p. 153.

Capacity Management

Capacity Shortfalls

RailCorp supports the ACCC call for the rationale for the flexibility and objective to be followed be more clearly explained. However RailCorp would be concerned if the actual principles were altered as they appear to accord with ARTC obligations under passenger priority.

Capacity Resumption

RailCorp acknowledges the difficulty in developing a capacity resumption threshold in the light of coal industry output variability. However a key component of network management must include the ability of the network owner to resume unused capacity to ensure the efficient use of the network for the benefit of all stakeholders including all access seekers.

Network connections and additions

Industry Consultation Process

As indicated in RailCorp's original submission, ARTC has failed to include RailCorp in the industry consultations prior to the proposed HVAU being lodged with the ACCC. Also highlighted in its previous submission was RailCorp's belief that the process for developing the network capacity strategy was flawed in that non-coal access seekers were not accommodated. RailCorp therefore is very supportive of the ACCC suggestion that the HVAU contains a mechanism that would take into account the views of non-coal users during the development of a corridor capacity strategy. The mechanism would take the form of either membership of the RCG or a separate consultation process. A concern with any consultation process is the requirement and incentive for the process to be effectively undertaken. ARTC has demonstrated, in RailCorp's case, an apparent lack of willingness to consult with RailCorp about the HVAU. RailCorp has no wish to complicate or make RCG membership unwieldy however membership of the RCG may be preferable to a separate consultation process.

It is noted that ACCC has suggested, in relation to this mechanism, that the composition of the RCG should be discussed within industry. To RailCorp's knowledge this discussion as not taken place nor has ARTC approached RailCorp. As a result RailCorp has not yet been able to determine a position.

Network transit management

Development of a Master Train Plan and Daily Train Plan

It is acknowledged that the ACCC has recognised the non-coal user views on medium term future capacity issues are not currently addressed by the HVAU. RailCorp supports the ACCC's preliminary view that specific processes and indicative timeframes that ARTC will follow when developing the MTP should be set out in greater detail in the HVAU, and that it include a mechanism by which the interests of non-coal users are taken into account during ARTC's medium term capacity planning processes.

Network Management Principles

RailCorp notes the ACCC suggestion that, in order to avoid the potential for disputes to arise under the HVAU, that ARTC amend the HVAU to explain the nature of ARTC's obligations under the terms of the NSW Lease in relation to the NMPs. RailCorp does not manage the NSW Lease and therefore does not wish to comment on the issue of amending the Lease. However it is suggested that the ACCC rationale for HVAU to explain the ARTC inability to vary the NMP (the avoidance of potential disputes) could equally apply to the ARTC obligations to the implementation of passenger priority. That is a full and clear description of ARTC's passenger priority obligations in the HVAU has the same potential to avoid disputes.

Sections of the Indicative AHA relevant to Network Transit Management

RailCorp notes the ACCC acknowledgement in its discussion on the IHA that circumstances may arise where non-passenger services may be faced with reduced capacity as a result of ARTC's obligations.....being a consequence of the statutory obligation on ARTC to prioritise passenger services.⁸

The implementation of passenger priority obligations is not operator specific, in fact should be part of ARTC's network management principles and therefore RailCorp believes they should be contained in the HVAU itself and mirrored in the individual access agreements.

Submissions to the ACCC regarding the draft IAHA indicate a desire to limit the individual impact of this obligation and suggest there may be attempts during the IAHA negotiation phase to address these concerns. Given the building block nature of the passenger priority obligations RailCorp believes, in the interest of avoiding non alignment issues, the obligations should be contained in the actual HVAU itself. The obligations can be mirrored in the individual access agreements in a manner similar to that proposed by the ACCC for other capacity related issues.

⁸ ACCC, Hunter Valley Coal Network Access Undertaking, Draft Decision, p. 449

Consultation with the HVCCC

RailCorp would support the ACCC's preliminary view that the HVAU requires ARTC to consult with the HVCCC when ARTC is conducting its medium term capacity planning on the basis that mechanisms are developed which will require consultation with non-coal users that are clear, transparent and enforceable.

Miscellaneous

Key Performance Indicators

RailCorp believes the inclusion of Key Performance Indicators in the HVAU would aid transparency for all access seekers.

Pricing Principles

Structure of Charges – Non-Coal Access Rights

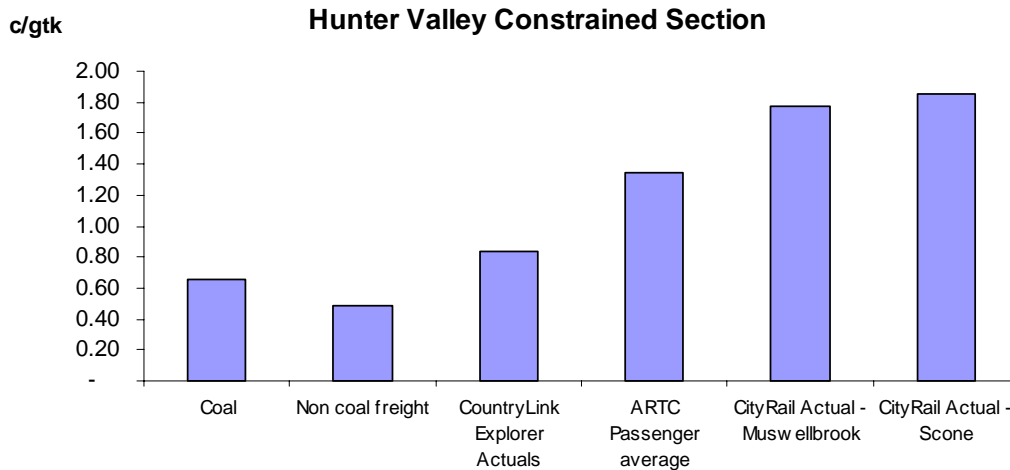
After reviewing the ARTC response to the submissions lodged with the ARTC and the subsequent Draft Decision RailCorp has concerns about:

- ARTC's apparent allocation of VCC
- Contributions to FCC;
- Interpretation of the ability to pay together with the guidelines regarding access charge differentiation

RailCorp acknowledges that the ACCC has recognised the current lack of price certainty for non-coal access seekers and has suggested a formal ceiling level be determined for non-coal access seekers. RailCorp appreciates that providing such a mechanism for non-coal access seekers would improve, to some extent, the degree of certainty. However RailCorp remains convinced that indicative passenger access charges are required.

ARTC has provided that the current per unit charges of access (c/gtk) of the various commodities using the HV constrained section of the network.⁹ These rates are demonstrated in the following graph.

⁹ ARTC, Response to Submissions to the ACCC on the Hunter Valley Access Undertaking , 2009, p. 34.



RailCorp added through its own analysis the standard CountryLink Explorer & CityRail Muswellbrook and Scone services using ARTC suggested prices currently available on the ARTC website.

All three services use the constrained section of the Hunter Valley network. The CityRail services operate between Islington Junction and Muswellbrook and Scone respectively. Both these CityRail services also operate between Islington Junction and Maitland on the Interstate network. From Maitland to Muswellbrook/Scone the services would operate on the Hunter Valley network as defined by the proposed HVAU. The services that terminate at Muswellbrook operate solely on the constrained component of the Hunter Valley network as it is understood by RailCorp.¹⁰

The CountryLink services operate from Islington Junction to Maitland along the Interstate Network. However, at times these CountryLink services can also operate between Islington Junction and Maitland on the proposed Hunter Valley network. From Maitland CountryLink services operate on the constrained component of the Hunter Valley network until Muswellbrook. The services then proceed to Scone (a non constrained component of the Hunter Valley network) and beyond.

The unit revenue demonstrated in the graph relates the proposed Hunter Valley network and not the Islington Junction to Maitland section of the Interstate network.

The current charge offered is a two part tariff with a flagfall and a variable component. The highest effective rate on a c/gtk basis that RailCorp would pay is 1.85c/gtk. It is assumed that the variable use component of the current charge being 0.38c/gtk would equate to the VCC (Direct Cost). This would indicate that RailCorp is making a contribution to the FCC of up to 1.47c/gtk. If the ARTC average passenger figure of 1.35c/gtk, which RailCorp would query, is used the result is still a significant contribution to the FCC. A comparison between the effective rates paid by non-coal freight and CityRail services is also of interest. It is understood from ARTC various submissions during the HVAU that non-coal freight access charges are effectively meeting the VCC with a small, if any contribution to FCC. This

¹⁰ ARTC, 2008-09 Submission to IPART in respect of Hunter Valley Regulatory Network, p. 14.

comparison is further evidence that RailCorp services, CityRail services in particular are making significant contributions to the FCC on a unit basis.

If, as RailCorp assumes, the rates paid by these CityRail services represent the VCC and a considerable FCC contribution on a unit basis it is unclear how this FCC contribution is allocated outside the constrained part of the Hunter Valley network. The journey between Islington Junction and Maitland takes place on the Interstate network and therefore RailCorp would believe that revenue generated by infrastructure covered under a regulatory framework (the HVAU) can not be allocated to infrastructure covered by a separate regulatory instrument (the Interstate).

Additionally, ARTC has commented that non-coal traffic access revenue will be at least be sufficient to at least recover the VCC associated with the whole journey of that traffic over the network, but only access revenue sufficient to recover the VCC will be applied to the constrained network. Remaining revenue for the journey will be applied to the parts of the journey that lie outside of the constrained network.¹¹ Given this statement by ARTC it is unclear how the substantial contribution to FCC, in unit terms by CityRail services, particularly those only operating on the constrained component of the Hunter Valley network, are allocated.

Ability to Pay

RailCorp obviously does not compete in the same end markets as coal and non-coal freight access seekers. As a result, some of the pricing assumptions made by ARTC should be questioned in relation to RailCorp as a passenger access seeker.

ARTC on a number of occasions have indicated that non-coal access seekers will most likely be charged the VCC and a small, if any contribution to the FCC. ARTC suggests that this is likely because of a combination of non-coal access seekers are subject to competitive forces which subsequently limit the ability to pay of these access seekers.

RailCorp, as indicated above operates in a different end user market. It is also a government authority currently required by government to provide above rail services in the Hunter Valley irrespective of the above rail commercial aspects of the service supply. In this regard RailCorp lacks the ability / flexibility to easily take measures such as reducing services or transfer to more commercially effective modal alternatives that the end users of non-coal freight access seekers can implement.

ARTC through the HVAU proposes that it will not, when formulating its charges, have regard to whether or not the applicant is a Government Authority. RailCorp would be concerned if ARTC considers RailCorp's identity and its captive obligation to obtain access on the Hunter Valley network to run passenger rail services is an indication of a greater ability to pay than non-coal freight access seekers.

This concern coupled with the unclear nature (and in some instances unavailability) of the components of the access charge (VCC and FCC) and subsequent network

¹¹ ARTC, ARTC HVAU – Request for Pricing Information, 2009, p.6 & 8.

allocation of revenue suggest to RailCorp that scrutinised indicative prices for passenger services are required in addition to an indicative access agreement for non-coal access seekers.

Mutually exclusive Access Applications

In its original submission RailCorp raised concerns that the implementation of the highest present value rule particularly as to its application regarding ARTC passenger priority obligations. While the ACCC has expressed a view that ARTC must make the operation of this provision clear and transparent no specific view was expressed regarding the operation of passenger priority principles.

It was also noted that the ACCC expressed a preliminary view that considers the use of the present value of Access Rights as an appropriate way to allocate mutually exclusive Trans Paths.¹² In reaching this view ACCC indicated that it considered that to the extent that non-coal access seekers are unwilling to pay equivalent access charges to coal traffic, allocation of scarce track capacity to coal users is likely to be efficient. The ACCC also suggested that non-coal traffic is likely to have a greater ability to utilise other methods of transportation than rail access.¹³ As RailCorp has previously submitted, its operational drivers mean it has significantly less ability to utilise alternative methods of transportation than rail access compared with other non-coal access seekers.

RailCorp believes that neither the HVAU nor ACCC have appropriately considered the impact of this rule upon RailCorp.

¹² ACCC, Hunter Valley Coal Network Access Undertaking Draft Decision, p. 659

¹³ ACCC, Hunter Valley Coal Network Access Undertaking, Draft Decision, p. 658.