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Dear Mr Wing

Coal & Allied submission on Australian Rail Track Corporation Hunter Valley Coal Network Access Undertaking

Coal & Allied Industries Limited (**C&A**) welcomes the opportunity to comment on the draft Australian Rail Track Corporation (**ARTC**) Hunter Valley Coal Network Access Undertaking (**Draft Undertaking**).

C&A holds a long term view on growing its business in the Hunter Valley. In recent years, however, as the Australian Competition and Consumer Commission (**ACCC**) is well aware, the operations of C&A and other producers have been constrained by infrastructure bottlenecks. Accordingly, C&A has a strong incentive to work with other industry participants to arrive at a long term solution for the Hunter Valley coal chain that addresses all unresolved issues.

C&A is therefore grateful for the significant investment of time and effort that ARTC has made in putting forward the Draft Undertaking as a way of addressing track capacity issues affecting the Hunter Valley coal chain. C&A believes that the Draft Undertaking is a significant step forward in terms of a vital alignment of track and port in the Hunter Valley coal chain and acknowledges that ARTC has incorporated into the Draft Undertaking a number of comments made by C&A and the Hunter Rail Access Task Force.

In addition to the model proposed by ARTC, C&A has a number of suggestions which it is putting forward in order to improve the model so as to achieve greater efficiencies and savings and improve coal chain alignment.

By way of general comment, in assessing the Draft Undertaking, C&A believes that the Draft Undertaking must provide producers with:

- increased certainty in the provision of track services to facilitate informed investment decisions in the Hunter Valley region, in particular, the track arrangements need to be aligned with the provision of port services;
- greater involvement in ARTC investment decisions;

- greater operational flexibility;
- increased cost efficiency in the provision of track services to improve cost competitiveness of Hunter Valley coal;
- a reliable supply of coal to achieve customer satisfaction and growth in the Hunter Valley coal chain;
- surety of ongoing access to existing track capacity;
- a defined process for new and expanding producers by which they can gain access to system capacity; and
- transparency – there should be sufficient information made available to enable verification of access charges and the level of access charges should reflect efficient costs and a reasonable return on realistically valued assets.

With these comments in mind, C&A provides the following responses to the ACCC's Issues Paper.

Alignment

In its final determination of the Port Waratah Coal Services (*PWCS*) and Newcastle Coal Infrastructure Group (*NCIG*) application for authorisation in respect of *PWCS* Tonnage Allocation Stage 1, the ACCC stated:

To be effective, any long term solution must extend beyond terminal capacity allocation to ensure all coal chain contracts, including above and below rail are properly aligned and reflect whole of coal chain system capacity, rather than just stand-alone capacity of individual components of the coal chain.

C&A is also strongly of the view that alignment between track and port must be achieved. Participants in the Hunter Valley need to achieve contractual alignment to:

- ensure that contractual commitments drive coal chain investment behaviours, that is, that there are no under/ over investments;
- use contractual terms to drive system efficiency, and at the same time minimise potential loss due to commercial constraints; and
- effectively manage vessel queue.

The Draft Undertaking attempts to address coal chain alignment. In particular, C&A agrees strongly with the ARTC seeking advice from the HVCCC in a number of key areas. C&A also recognises that at the time ARTC lodged the Draft Undertaking, the Implementation Memorandum (*IM*) between the Newcastle Port Corporation, *PWCS* and *NCIG* had just been signed. As a result, ARTC might not have had the opportunity to fully review and digest the key terms of the *IM* before lodging the Draft Undertaking. Consequently, the Draft Undertaking may have been drafted independently of the terminal access documents drafted by *PWCS* and, as a result, the Draft Undertaking does not align with the proposed terminal arrangements in many areas.

Since the agreement of the *IM* on 8 April 2009, C&A is aware that *PWCS* and *NCIG* have made substantial progress in developing the terminal access documents. C&A has also been advised by *PWCS* that it is working towards finalising the relevant documents by 31 August 2009.

C&A therefore urges ARTC to take this opportunity to work closely with PWCS and NCIG to align the Draft Undertaking and the Terminal Access Protocol. C&A strongly believes that the contract misalignment issues can be resolved and has listed a few areas for ARTC's consideration.

The proposed track access process does not align with the timing requirements of the terminal access process

The ARTC framework must be considered in the broader context of the need for the track capacity allocation process to be aligned with the port capacity allocation process, in particular the timing of the two allocation processes.

In relation to the timeframes, while the Draft Undertaking specifies a process for entering into an AHA, unlike PWCS, ARTC does not specify an annual period for that process. The PWCS Terminal Access Protocol follows a similar contracting process to the Draft Undertaking but also specifies fixed annual dates for that process. This timing mismatch will complicate the ability of ARTC to assess whether an applicant has sufficient network exit capability.

The proposed track access negotiation process undermines the binding nature of the terminal contracts and may result in gaming

C&A believes that the offer of an Indicative Access Agreement and allowance for negotiation could undermine the binding nature of the PWCS terminal nominations.

The PWCS terminal nomination process is designed such that if a producer is offered a contract for terminal capacity and timing substantially the same as their nomination, that contract will become binding without any further action by the producer. Negotiation of an offer is only permitted where the offer is outside set variation limits on key dimensions.

Under the proposed arrangements in the Draft Undertaking, the track offer is negotiable and the producer could ultimately decline the offer. Without access to track, the producer would be relieved of their port obligation hence undermining the binding nature of the terminal arrangements. The ARTC negotiation process should be limited to access offers that are significantly different to a predefined indicative contract, in a similar way to the port negotiation process, to ensure track nominations remain binding.

The mechanism to align track and terminal contracts is not effective in all circumstances

Under the Draft Undertaking there is no certainty that allocated track will align with allocated port capacity as the allocation priority rules are different and the terminal and track allocation processes currently do not provide for communication between the service providers that will create this alignment.

Additional alignment issues

There are a number of additional alignment issues:

- (a) the anti-hoarding provisions that apply to the terminal and track are different, most significantly in timing. The terminal provisions take into account usage over 18 months while the track provisions assess usage over a 3 month period;

- (b) the length and renewal rights of contracts are also different, which could result in misaligned contracts at some point during the contracting period. Therefore, the term of the Access Holder Agreement should replicate the 'evergreen' provisions contained in the port contracts;
- (c) trading mechanisms at the port and track are not aligned. C&A is aware that PWCS is still in the process of developing a 'Capacity Transfer System' that is expected to be finalised by the end of 2009. The difference in trading mechanisms has the potential to lead to misalignment of producer contract positions; and
- (d) compression rules are not aligned

An integrated process would better facilitate alignment

In order to ensure coal chain alignment is achieved, the ARTC process must be consistent in timing and allocation with the annual terminal contracting process. This is best achieved through a more closely integrated planning and contracting process which would ensure each producer is offered a matching terminal and track contract.

To facilitate discussion on this issue, C&A attaches a suggested alignment model for terminal and track contracting called a 'Stapled Process'. C&A is happy to meet with the ACCC and ARTC to discuss in detail how the Stapled Process would work.

In addition, given the extent of the alignment issues, C&A strongly suggests that the ACCC conduct a joint review of the ARTC Access Undertaking and the PWCS/NCIG/NPC Authorisation Application to enable the ACCC to assess the proposed conduct as it relates to the whole of the Hunter Valley coal chain.

Clause 1 – Preamble, objectives and contract structure

Preamble should acknowledge ARTC’s responsibility to provide infrastructure support for demand growth in the Hunter Valley

C&A submits that the following point should be added to the preamble:

Recognition of the need to provide infrastructure service to support the growing demand of export and domestic coal.

C&A understands that ARTC’s planned investments in the Hunter Valley are largely for supporting the growing demand of coal exports. C&A therefore submits that this focus on growth should be included in the preamble.

Clause 2 - scope of undertaking

The scope of the Draft Undertaking needs to be more specific in relation to extensions to the network

The scope of the Draft Undertaking needs to be clarified in relation to Extensions to the Network. C&A considers that any extension to the Network that ARTC builds within the boundaries of the lines listed in Schedule B should be included in the scope of the Draft Undertaking. For example, if ARTC builds a branch line extension on the Newcastle to Port Waratah line, this should be included within the scope of the Draft Undertaking. Extensions beyond the boundaries of these lines, if they are not built by ARTC, should not be included within the scope of the Draft Undertaking.

C&A is supportive of a ten year term

C&A is supportive of a ten year term for the Draft Undertaking, provided there is a review at year five of the term, as proposed in clause 2.4 of the Draft Undertaking.

Clause 3 — negotiating for access

Alignment is a key consideration in assessing the process for negotiating access. In particular, the timing of the process for negotiating track access and the timing of the process for negotiating terminal access must be consistent in order for both capacity allocation and capital investments to be aligned in timing and volume. C&A's detailed comments in relation to alignment are contained above under the heading 'Alignment'.

Proof of Network Entry Capability should be added as an additional requirement

In addition to the Network Exit Capability requirement, the Draft Undertaking should also include a Network Entry Capability requirement which requires the Applicant to satisfy ARTC that it in fact has access to the loop (and the Network) for the same level of capacity that the producer is seeking Coal Access rights. For example, some producers may have a load point that is located on another producer's loop. These producers should not be able to contract coal chain capacity greater than their actual ability to enter coal into the system on that loop.

Like the Network Exit Capability requirement, the purpose of the Network Entry Capability requirement would be to ensure that no producer contracts for more track access than they can actually make use of. Accordingly, the risk of any producer 'gaming' track access would be further reduced.

Definition of 'Load Point'

The definition of a 'load point' should be clarified to mean 'the intersection of private loop and ARTC track'.

Determination of Monthly Base Path Usages should also consider producer planned maintenance

Clause 3.2 of the Draft Undertaking states that ARTC will determine each producer's path usage after taking into consideration ARTC's major planned network outages.

C&A has some loops in the Hunter Valley which require some major repair and upgrade work due to their age and condition. Maintenance of the loop and loadout facilities improves train cycle times and reduces system losses due to unplanned outages. This work is done annually in a 7 – 14 day period during which the loop and its train loadout facility will be completely shut down. The work is done this way as it requires the use of highly specialised maintenance equipment that is not readily available. Given this limited equipment availability, C&A (like ARTC which uses the same equipment) plans this work approximately 12 months in advance as part of a loop maintenance schedule.

By planning its loop maintenance schedule so far in advance, C&A is able to provide ARTC with very advanced notice of its planned shutdowns. In doing so, C&A believes this would benefit ARTC in the planning of its own repair and maintenance work as well as in the planning of its monthly tolerance and ad hoc path allocations.

Thus, C&A submits that in determining the Monthly Base Path Usages, ARTC should be required to take into account any planned loop outages that have been provided by a producer with a long notification time, for example, 12 months. ARTC should be required to use its best endeavours to accommodate these planned outages when determining Monthly Base Path Usages. For example, if C&A's Hunter Valley loop has a planned 14 day shutdown, which C&A has notified ARTC of 12 months in advance, ARTC should then be required to use its best endeavours to still allocate to C&A its **total annual** train paths, but do so across the remaining 50 weeks of the year.

'Reasonable participation' should be subject to review

Clause 3.6(c) of the Draft Undertaking states that:

If the other Hunter Valley Coal Chain Participants do not participate reasonably and effectively in the initial review of Capacity, ARTC will not consider itself bound to participate in the review.

Although not expressly stated, it appears that it will be ARTC's opinion that is relevant in determining whether other Participants have been participating reasonably and effectively or not. C&A submits that ARTC's decision in this regard should be subject to review by the ACCC or subject to the dispute resolution procedures.

ARTC's 'available capacity' decision should be subject to review

Under clause 3.9(d) of the Draft Undertaking, while ARTC is obliged to 'have regard to' advice provided by the HVCCC as to whether there is sufficient Available Capacity or not, ARTC retains the sole right to determine whether there is sufficient Available Capacity to grant the Access Rights sought by the Applicant.

Unlike ARTC's decision as to capacity resumption, relinquishment or transfer under clause 5.5(a) of the Draft Undertaking, ARTC's decision under clause 3.9(d) is not subject to the dispute resolution provisions in the AHA, nor is the decision reviewable in any way.

Given the importance of ARTC's decision as to Available Capacity under clause 3.9(d) of the Draft Undertaking, this decision should be subject to review and to the dispute resolution provisions in the AHA.

More information is required in the indicative access proposal

ARTC should be required to provide more information in the Indicative Access Proposal in the event that the Access Application requires the Applicant to have recourse to Additional Capacity (see clause 3.10(a)(ii) of the Draft Undertaking.) The Draft Undertaking currently provides that in these circumstances ARTC will include in the Indicative Access Proposal:

an outline of the works and an indicative estimate of the cost of such works required to provide the Additional Capacity or an outline of the requirements for an investigation into the provision of Additional Capacity for the requested Access Rights.

The Draft Undertaking does not, however, expressly state that ARTC will include in the Indicative Access Proposal:

- the estimated timing for the completion of the works required to provide the Additional Capacity;

- any timeframe under which ARTC must complete the investigation into the provision of Additional Capacity;
- an indication of train path price and whether ARTC intends to install the new capacity and:
 - recover the costs in the years immediately following the installation; or
 - achieve an economic return over a longer period of time under the loss capitalisation approach proposed in the Draft Undertaking; and
- very importantly, what will happen if there are multiple Applicants who require Additional Capacity, whether they will be placed in a queue and, if so, where they will be placed in the queue, which will depend on what basis the queue will be formed.

The process for choosing between mutually exclusive access applications is not transparent and is inconsistent with the objectives of Part IIIA of the TPA

The process for choosing between mutually exclusive access applications is not reasonable for a number of reasons. First, the two or more Applicants who have submitted an Access Application for mutually exclusive Access Rights will have no transparency over the calculations that ARTC will use to determine which Access Application will represent the highest present value of future returns to ARTC.

More importantly, in order to achieve alignment with the port and optimal coal chain throughput, the process for choosing between mutually exclusive access applications for track capacity should be determined by ARTC using a similar set of priority rules to that used by PWCS' Nomination and Allocation Principles. If ARTC does not adopt PWCS' priority rules, the differences in the rules could result in producers receiving separate, non-aligned contracts for terminal and track capacity.

Thus, ARTC's consideration of which Applicant to grant the mutually exclusive Access Rights to should not be based on an assessment of which Applicant will 'accept an Access Agreement with ARTC, which, in the opinion of ARTC, is most favourable to it'. That approach not only provides ARTC with excessive discretion (and lacks transparency), but it may also facilitate ARTC conducting an 'auction' for Access Rights, offering them to the Access Seeker yielding them the highest Net Present Value.

Clause 4 — pricing

The WACC and RAB Loss Capitalisation methodology

C&A is working closely with the Hunter Rail Access Task Force on these issues and will make its submission when this work is complete.

The pricing objectives will not promote the efficient use of, or investment in, the Network

In the Draft Undertaking and Access Holder Agreement, ARTC uses 'Path Usages' as the unit of measure for providing access to its Network, but uses gross tonnes multiplied by kilometres (*gtkm*) as the unit of measure for pricing. This inconsistency means that it is possible for exactly the same train path to be subject to different pricing. For example, a producer that runs a smaller train on a path will be charged a lower price than a producer

who runs a larger train on that path even though the larger train may be more efficient in its carriage of coal due to its larger size.

C&A also acknowledges ARTC's intention of avoiding 'overnight winners or losers' because of the introduction of the Draft Undertaking; however C&A holds the view that a gradual introduction of 'train standards' to guide pricing (referred to as 'Indicative Services' in the Draft Undertaking) will be of benefit to the whole coal chain and eventually to all producers. For example, if the train standard is 10,000 gtkm, then a producer whose train is calculated at 8,000 gtkm will be required to pay for the shortfall in the standard size. Such a standard will ensure that regardless of train size, the path usage price will be the same.

C&A submits that there is currently insufficient detail in the pricing clauses of the Draft Undertaking to understand whether ARTC will provide incentives for producers to use more efficient trains, or whether ARTC is treating the more efficient trains in the same way as the less efficient trains.

C&A also wishes to make some additional observations here:

- Larger trains are usually (but not always, subject to other operational parameters) more efficient than smaller trains and the Draft Undertaking should therefore contain pricing incentives for producers to nominate larger and more efficient trains as part of their Application.
- It is possible that a producer may nominate a small train in order to secure as many paths as possible, but then game the system by actually using larger trains on its paths.
- The use of gtkm as the unit of measure for pricing will introduce an additional degree of complexity to the train path transfer process. For example, if producer A and producer B both use the same train path, but producer A uses larger trains than producer B (and therefore gets charged a higher amount per usage under a gtkm calculation), what will happen to the pricing for a path usage on that path if producer A transfers a usage to producer B?
- In subsequent discussions that C&A has had with ARTC, ARTC has indicated that it intends for the current train standards to have effect at least until the five year review of the Draft Undertaking takes place. C&A considers that this is too long a period for producers to wait for this very important issues to be addressed.

In conclusion, C&A believes ARTC should offer multi-part or differential pricing as an incentive for producers to use more efficient trains. This move to multi-part or differential pricing should also be completed as soon as practicable (for example, in 12 months' time) in order to assist producers in their own planning and budgetary approvals processes. In addition, a great deal more information is needed about how the pricing objectives will be translated into a detailed pricing mechanism in order to be able to comment on the extent to which the pricing objectives support efficient investment in the network.

Finally, the pricing objectives in clause 4.12 of the Draft Undertaking should include an additional objective: 'to promote the efficient use of, and investment in, the coal chain'.

The Draft Undertaking does not provide sufficient detail on the methodology for calculating the access charge

There is a lack of transparency in the methodology to be used in determining the access charge. In general, there should be sufficient disclosure of information to producers around asset values, capital and operating budgets, volume forecasts by zone and any other relevant assumptions, such that the drivers of access charges each year in each zone are visible.

In particular, the Draft Undertaking does not provide sufficient information about the indicative access charge for Coal Access Rights that do not fall within the definition of 'Indicative Services'. Clause 4.14 of the Draft Undertaking suggests that charging can be differentiated based on a wide range of factors, including the potential for growth of the business, the opportunity costs to ARTC and the market value of the Train Path sought. This final criterion alone would appear to provide very broad scope for ARTC to price train paths in a discriminatory manner. This is certainly not consistent with the intent of this type of pricing regime or with the pricing approach taken by other infrastructure providers, for example, the terminal operators.

Thus, pricing for coal services that do not operate with the characteristics of Indicative Services will be determined having regard to a range of factors. The relative weighting of these factors, and how they will be applied to determine an access charge needs to be clarified. Important considerations will be the impact of the access rights sought on ARTC's cost, network capacity and coal chain capacity. Non-indicative usage will often result in increased capacity consumption and an efficient charging regime needs to reflect this.

Finally, ARTC should provide each producer with an estimate of track charges for all of those producers' load points.

Clause 5 — capacity management

The treatment of capacity shortfalls by ARTC does not appropriately balance the interests of ARTC, operators and producers

As the shortfall and compression provisions in the Draft Undertaking and PWCS Terminal Access Protocol are not aligned, the treatment of capacity shortfalls by ARTC does not appropriately balance the interests of the various producers and ARTC. The proposed arrangements mean that producers will be subject to two different sets of provisions which may prove problematic in practice.

Producers do not have certainty of capacity

Clause 6(a)(ii) of Train Path Schedule 1 of the Access Holder Agreement states that:

- (a) ARTC's obligation to make available the Path Usages in row 2 in clause 3 of this Schedule, is conditional on:...
- (ii) completion of the following projects ("listed projects")...

The Draft Undertaking and Access Holder Agreement do not provide sufficient obligations or consequences for ARTC to complete the listed projects and deliver additional capacity in a timely manner. For example, while producers are still liable to pay take or pay charges in the event of any delay on their part, no similar obligation exists for ARTC in

the event that any of the listed projects is delayed. Accordingly, ARTC may not have the incentive to complete any capacity expansions as quickly as it can.

ARTC's obligation to make the relevant Path Usages available should therefore be unconditional and not subject to ARTC completing the listed projects.

Capacity Shortfall clauses should only apply to the 'affected' Access Holder

Clause 5.3(b)(ii) should be clarified by making clear that the clause will only apply to each 'affected Access Holder's unconditional and unused Capacity applying immediately before the shortfall arose'.

An appropriate definition for an 'affected Access Holder' would be:

An Access Holder whose train path operation is affected by a track capacity shortfall as determined and advised by HVCCC

The impact of this proposed change would be to make it more clear which producers' capacity is affected by a Capacity Shortfall.

Capacity Shortfall in creation of Additional Capacity should apply to Access Holders based on a set of priority rules

Similarly to the comments made above regarding mutually exclusive access rights under Clause 3, C&A proposes that in order to achieve alignment with the port, the process for 'compression' of additional track capacity should be determined by ARTC using a similar set of priority rules to that used in PWCS' Nomination and Allocation Principles. If ARTC does not adopt PWCS' priority rules, the differences in the rules could result in producers receiving separate, non-aligned contracts for terminal and track capacity.

C&A has a number of concerns with the monthly true-up test

C&A makes the following points in relation to the monthly true-up test:

- The test is essentially a comparison of the monthly system-wide train path availability with the monthly system-wide train path demand. C&A does not consider that this test provides a sufficient basis to measure ARTC's performance. C&A is of the view that a more representative measure would be the available paths at the junction where the producer's load point gains entry to the Network compared to the producer's track capacity allocation, that is, the true-up test should be separated into load points.
- The month long period is too long a time in which to conduct the test. As part of the Contractual Alignment process minimum and peak performance standards are intended to be increased for larger load points to reduce train cycle times in proportion to their impact on coal chain capacity. This will in turn reduce cargo build times at the terminals but will also encourage producers to develop load point stockpile capacity to increase the ability to manage the required intervals between campaign railing. Very short term measures are being applied to load points, trains and terminals to drive short stockpile build times and higher stock turnover rates, which is expected to increase coal chain capacity. The monthly basis for the true-up test allows large fluctuations on a short term basis to be absorbed over four weeks and is at odds with the processes applying at other

elements of the coal chain. Accordingly C&A submits that a weekly true-up test by load point would be more appropriate than the proposed test.

- Other performance measures like train speed limits should also be incorporated. Train speed restrictions are imposed by ARTC and occur frequently. They are imposed as a result of problems occurring with the relevant track, for example, inadequate drainage. The restrictions can remain in place for a number of weeks and affect train cycle time and capacity utilisation as a result. C&A submits that ARTC needs to define in a more transparent manner the way in which speed restrictions will be included in the true-up test. Incorporating speed restrictions in this manner will provide an incentive for ARTC to limit the occasions on which speed restrictions arise, and to make investments in the network to avoid situations where speed restrictions are required.

The resumption, relinquishment, and transfer provisions are not appropriate, particular when considering maintenance planning

In addition to its submission above as to how the determination of Monthly Base Path Usages should also consider producer planned maintenance, C&A similarly proposes that the capacity resumption, relinquishment and transfer provisions should be made more flexible so as to accommodate situations where a producer gives twelve months' notice to ARTC of capital works or new projects that it proposes to undertake in order to upgrade its infrastructure in order to improve its standards or expand its own capacity. These works will result in a more efficient and safer operation, as well as an increase in the amount of coal exported by the producer.

An example of the type of flexibility that ARTC should offer in these circumstances would be exempting the producer from the capacity resumption, relinquishment and transfer provisions when it has provided substantial notice in advance of undertaking such work.

With appropriate notification by producers and appropriate planning by ARTC, this level of flexibility can be achieved without ARTC needing to build more track capacity and recover the costs of doing so from producers.

The capacity entitlement provisions are not reasonable, particularly in regard to reduction of entitlement through under utilisation

Based on its historical mine performance data, C&A considers that the three month period used for the removal of path usages for under-utilisation provisions in clause 11.4(a) of the AHA is too short and so is unreasonable. By comparison, QR's undertaking in Queensland provides for a 12 month period in which to test utilisation. Importantly, QR's undertaking originally contained a three month period, but the period was extended to 12 months, as this was found to be unworkable given how often the utilisation rates were not being met. C&A considers that a 12 month period should also be adopted in the Draft Undertaking in order to take into account:

- the usual operational variability which extends beyond any three month period; and
- major capital projects during which time paths are not used, but through which load points are upgraded and enlarged.

ARTC has informed C&A that it would rather lower the utilisation rate requirement of 90%, than increase the period over which the utilisation test is applied to beyond three months. C&A considers that such a change would be inappropriate as it is the time period that most accurately accounts for usual operational variability and major capital projects rather than the utilisation percentage requirement. However, if there was to be a lowering of the utilisation rate requirement, C&A considers that an utilisation rate of 70% over three months would be appropriate.

Further, while C&A recognises that the removal of path usages is not an automatic consequence of under-utilisation, but is instead at ARTC's discretion, C&A suggest that the ARTC should not be entitled to exercise this right until affording the relevant producer the opportunity to lodge a submission with ARTC setting out its reasons why ARTC should not remove path usages in the circumstances. ARTC should then be expressly required to consider this submission before exercising its discretion and, if it does so, it should be expressly required to make its reasons known to the producer.

The capacity transfer provisions are not flexible enough to encourage efficient use of the network, while also ensuring alignment with port terminal contracts

In addition to C&A's comments above regarding the alignment of access right transfers, the Draft Undertaking and Access Holder Agreement, in particular the capacity entitlement provisions need to expressly include provisions providing incentives for producers to trade path usages. For example under the Draft Undertaking:

- the incentive to trade is also reduced by clause 16.4(a)(i) of the AHA providing that despite the Trade, the Former Access Holder remains liable to ARTC for the TOP Charges for the traded Path Usage; and
- while C&A has been informed by ARTC that a trade by one producer will be counted as a use for the purposes of calculating that producer's capacity entitlement under clause 11.4(a) of the AHA, this is not expressly reflected in that clause.

Instead, C&A considers that ARTC should expressly state its support for trading while at the same time making producers aware that trades may not be on a 1:1 basis given the different locations and distances to port of the relevant producers.

Importantly, the trading of path usages must also be aligned with the trading of port capacity. For example, if a producer acquires 1 tonne of port capacity through a trade but can only secure the equivalent of half a tonne in track capacity, then the port trade will not be worthwhile. Accordingly, trading at the port and track must be aligned in order to ensure the export of as much coal as possible through the efficient operation of the coal chain.

In this regard, clause 16.4(a)(v) of the Draft Undertaking states that:

the Former Access Holder and New Access Holder each warrant that the Trade will not adversely impact Coal Chain Capacity and agree that ARTC is entitled to rely, and is under no obligation to review the accuracy of, this warranty.

Further, clause 16.6 of the AHA provides that ARTC may have regard to the recommendations of the HVCCC in deciding whether to consent to a trade.

Given the importance of alignment between the port and track, the HVCCC should be given the responsibility of acting as a capacity trading house, at least for short term trading, including verifying that a proposed trade will not adversely impact on Coal Chain Capacity. While this may be what ARTC had envisaged (see ARTC's comments about the role of the HVCCC on page 55 of its Explanatory Guide), this is not made clear in the Draft Undertaking or AHA.

In addition, the capacity transfer provisions are inappropriate as they do not provide what factors or conditions must be met in the case of a proposed trade that **does** require ARTC's consent. Currently clause 16.4 of the draft Undertaking only provides for what conditions must be met for a trade to occur without ARTC's consent, but does not provide any transparency as to what factors will be taken into account by ARTC when its consent to a trade is required.

Clause 6 — Network connections and additions

The consultation provisions concerning the provision of additional capacity are not appropriate

The 'Concept Assessment' provisions in clause 6.4(d)(iii) are insufficient as they do not place any firm obligation on ARTC to seek endorsement from the Rail Capacity Group (RCG) to proceed to project feasibility. Instead, the clause currently states that ARTC 'may' seek RCG's endorsement. The same also applies to clauses 6.4(e)(iii) and clause 6.4(f)(iii).

Summary and recommendations

C&A requests the ACCC to consider a joint review of the ARTC Access Undertaking and the PWCS/NCIG/NPC Authorisation Application to enable the ACCC to assess the proposed conduct as it relates to the whole of the Hunter Valley coal chain. The industry has come a long way towards an aligned, industry-wide solution to the provision of infrastructure in the Hunter Valley. The current confluence of events, with the ARTC submitting a new Draft Undertaking and the terminal operators proposing a new set of conduct for authorisation presents a 'once only' opportunity to set the foundation for industry growth. Taking a piecemeal approach at this time may result in the industry arrangements remaining misaligned for a long time into the future.

To this end, C&A is committed to work closely with the ACCC, ARTC, HRATF, ports, rail operators and other industry players to formulate a better industry solution.

Yours sincerely



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