NSW MINERALS COUNCIL
HUNTER RAIL ACCESS TASK FORCE

RESPONSE TO

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

ISSUES PAPER

REGARDING

AUSTRALIAN RAIL TRACK CORPORATION

HUNTER VALLEY COAL NETWORK ACCESS UNDERTAKING

July 2009

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1. EXECUTIVE SUMMARY

The NSW Minerals Council ("**NSWMC**") welcomes the opportunity to respond to the Australian Competition and Consumer Commission (the "**ACCC**") Issues Paper regarding the Australian Rail Track Corporation's (the "**ARTC**") Hunter Valley Coal Network Access Undertaking (the "**HVAU**"). NSWMC is making this submission on behalf of the Hunter Rail Access Task Force, an associated group comprising all 14 Hunter coal producers using ARTC's Hunter Valley Coal Network (the "**HVCN**").

Background

The Hunter coal producers presently rail almost 100Mtpa of coal on the HVCN, worth around $8 billion pa in export earnings, and the HVCN is a key component of the "**Hunter Coal Chain**", the world's largest and most complex coal export operation.

The Hunter Coal Chain currently comprises 35 mines and 24 rail load points operated by 14 coal producers producing more than 80 different brands and grades of coal; the HVCN, operated by the ARTC, and two contiguous track networks; around 27 coal trains making 15,000 loaded trips per year of up to 350kms, operated by 2 train operators; several exit points for domestic coal consumers; 2 coal handling and ship loading port terminals, operated by PWCS, operating a complex cargo assembly process to load several thousand cargoes on around 1000 vessels per year; and the Port of Newcastle. A third port terminal, to be operated by NCIG, will begin operations in 2010.

Investment in Hunter Coal Chain mines and infrastructure by the coal producers is estimated to be in excess of $10 billion to date. Further investment of $5-10 billion is being contemplated to potentially double mine production capacity and exports over the next 5-10 years. Moreover, the additional infrastructure capacity needed will be underwritten by direct investments and service charges paid by the coal producers under long-term take-or-pay contracts, with a potential total commitment of at least $10 billion.

Aligned, efficient operation and timely, prudent expansion of the Hunter Coal Chain infrastructure, that meets the operating and commercial needs of the Hunter coal producers and the complex logistical systems of the Hunter Coal Chain, will be critical to realising the potential growth in Hunter coal exports and the consequent boost to Australia's export earnings.

The Long Term Solution for the Hunter Coal Chain

NSWMC supports the Application, submitted on 29 June 2009 and presently being considered by the ACCC, for an Authorisation for the Long Term Solution for access to, and expansion of, the port terminals at Newcastle (the "**Long Term Solution**"), which includes "proposed principles to facilitate the alignment of commercial contracts with service providers across the coal chain, including above and below rail".

The ACCC has previously recognised the need for a whole-of-coal-chain solution and for contractual alignment across the whole of the coal chain system. In this context, NSWMC submits that:

- The HVAU needs to align with the Long Term Solution, whose details are currently being developed under the Implementation Memorandum submitted to the ACCC on 6 April 2009 and accepted by it (the "**IM**")
- The ACCC should consider the HVAU in conjunction with its consideration of the Application for Authorisation of the Long Term Solution.

Under the Long Term Solution, the Hunter coal producers are collectively being asked to enter into long-term, take-or-pay contracts for both port terminal and track access with a total commitment over ten years in excess of $8 billion. Moreover, they will be basing long term export sales contracts, major investments in mine production capacity and commitments to above rail service providers on the successful operation of these port terminal and track access contracts. It remains the reasonable expectation of the coal producers that, prior to making such commitments:

- The details of how the proposed commercial agreements will operate to achieve contractual alignment must be developed and made clear by ARTC and the port terminal providers working together
- The provisions of the HVAU, governing the supply of rail track access by ARTC, the monopoly supplier, should meet the reasonable operational and commercial needs of the coal producers.

The Hunter coal producers are concerned that the rail track access arrangements set out in the HVAU are not yet contractually aligned with the port terminal contracts, thereby compromising the Long Term Solution, and are not compatible with the operating, commercial and regulatory characteristics of the Hunter Coal Chain.

NSWMC Position

Whilst NSWMC supports, in principle, ARTC's development of the HVAU as a separate access undertaking for the HVCN to address the major operational, commercial and regulatory differences from the Interstate Network (for which the ACCC accepted ARTC's Interstate Undertaking in 2008), NSWMC submits that the HVAU proposed by ARTC should be rejected (in its current form) by the ACCC for the reasons set out in sections 3 to 10 of this submission.

In particular, NSWMC considers that the HVAU, in its current form:

- Will not promote the economically efficient operation of, use of and investment in the HVCN or in the other coal and port infrastructure that forms part of the Hunter Coal Chain
- Does not adequately take into account the legitimate interests of Hunter Valley coal producers
- Will be contrary to the public interest that lies in maximising the throughput of the Hunter Coal Chain and coal export volumes
- Does not ensure that the charges payable for services covered by the HVAU will be consistent with the pricing principles set out in Part IIIA of the Trade Practices Act.

However, the coal producers are committed to implementation of the Long Term Solution from 1 January 2010 and, as stated in NSWMC's letter to the ARTC of 14 July, 2009 (Attachment 2 to this submission), are keen to work with and support ARTC and the other infrastructure service providers to ensure this commitment is met.

NSWMC therefore submits that, instead of accepting the HVAU in its current form, the ACCC should ask the ARTC to work with the other infrastructure service providers and the coal producers in a close and cooperative process to rapidly resolve the alignment issues in a manner that is consistent with the provisions of the IM, and amend other provisions of the HVAU to meet the reasonable needs of the coal producers, as set out in this submission,

with the objective of submitting, as soon as possible, an amended HVAU that can be accepted by the ACCC.

Alternatively, and to expedite the ACCC's decision-making on these issues, the ACCC might consider asking the ARTC to submit proposed amendments to the HVAU to address the ACCC's concerns as part of the ACCC's current process of deciding whether to accept or reject the HVAU. This would avoid the need for the ARTC to re-lodge the whole HVAU afresh following rejection of the HVAU (in its current form) by the ACCC or the withdrawal of the HVAU (its current form) by the ARTC.

Key Areas of Concern with the HVAU

NSWMC has four major areas of concern with the provisions of the draft HVAU:

1. The (mis)alignment between the HVAU and the port terminal arrangements contrary to the objectives and principles of the IM.

2. The failure to ensure other key certainty of capacity requirements for existing and future coal producers are met.

3. The incomplete, unclear and non-transparent access pricing arrangements and the excessive costs, rates of return and depreciation rates proposed by ARTC.

4. The content of the access holder agreements for Indicative and non-Indicative Services for coal.

Misalignment with the Port Terminal Arrangements

In relation to misalignment, NSWMC's key concerns relate to the misalignment between the provisions of the HVAU and the access holder agreements and the provisions of the port terminal arrangements being proposed by the terminal providers, PWCS and NCIG, contrary to the objectives and principles of the IM. These concerns are set out in section 6 of this submission.

In particular, it is clear that the HVAU is not adequate to ensure that ARTC adheres to the principles and requirements of the IM in that it does not contain any commitments to:

- Establish and adhere to System Assumptions that are common to both rail and port services, based on the Systems Assumptions document contemplated by the IM, and to clearly define its track system capacity

- Operate an access queue in accordance with IM Schedule 5, guiding principle 2

- Ensure that contracted access rights do not exceed the lesser of Track System Capacity or Terminal System Capacity, and that ad hoc access rights do not infringe on the contracted and aligned access rights of other producers

- Ensure the burden of any departure by a producer from their agreed System Assumptions will fall on that producer

- Establish an appropriate Contract Performance Management system

- Establish principles, criteria and processes for the initial grant of access rights that are in accordance with the Hunter Valley Coal Chain Starting Point document contemplated by the IM

- Grant equivalent rail access rights to producers who have already obtained contracted port terminal capacity, subject to pricing and service description matters being resolved in accordance with the HVAU.

In relation to the potential misalignments between the rail access operating arrangements and those being proposed by the port terminal operators, areas of concern include:

- The allocation of capacity including the allocation period, the allocation units, the flexibility and tolerances, the measurement of consumption of capacity and capacity modelling

- Changes to capacity allocations including trading terms, variation and resumption and adjustments for capacity shortfalls and under-delivery of the new capacity.

In each of these elements, there are significant differences between the proposed rail access and port terminal access terms that are likely to result in misalignment of track and port terminal capacities and volumes handled, loss of system efficiency and capacity and, consequentially, lower throughput and higher costs.

However, NSWMC believes all these alignment issues can be readily and satisfactorily resolved if the ARTC and the port terminal providers work cooperatively to implement the provisions of the IM. The Hunter coal producers stand ready to assist that process and look forward to ARTC's amendment of the HVAU to incorporate the aligned provisions.

Failure to Ensure Other Key Certainty of Capacity Requirements Are Met

As well as the concerns set out in relation to misalignment in section 6 of this submission, section 7 of this submission sets out NSWMC's concerns in relation to the failure of the HVAU to ensure other key certainty of capacity requirements for existing and future coal users are met. These concerns include:

- The requirement that the minimum term of an access holder agreement under the HVAU be 15 years whereas the minimum term of a port terminal contract under the IM will be 10 years (section 7.1)

- The intention of ARTC to classify mines with lives of less than 15 years (including existing mines reaching the end of their lives) as non-Indicative Services, which have to negotiate access arrangements with no certainty that access will be granted or the terms on which this will occur (section 7.1)

- The lack of certainty that existing mines will receive the access rights they currently receive via their rail Operators nor the access rights that match their port terminal access rights determined pursuant to the IM (section 7.2)

- The lack of transition arrangements in the HVAU to manage an orderly and smooth transition to new access agreements. In their absence, all 14 existing coal producers covering at least 35 mines have to either apply for access rights under the Access Holder Agreement or, for non Indicative Services (including those with a life of less than 15 years), have to negotiate access rights with potential disruption and delays and no certainty that their existing access rights will be maintained until rights under the new agreements are effective (section 7.2)

- Various provisions relating to the allocation and relinquishment of capacity (section 7.3)

- The lack of certainty that the ARTC will commit to the Additional Capacity requested by Access Applicants or recommended by the HVCCC within agreed timeframes or at all, even when the provisions governing the recovery of ARTC's costs on a take or pay basis are satisfied (section 7.4)
- That the ARTC is not obliged to seek the endorsement of investments for Additional Capacity by the Rail Capacity Group and that the Group needs wider coal producer representation to ensure adequate consultation (section 7.4)
- That the ARTC's obligation to supply contracted paths is conditional on subsequent commitment to, and completion of, the Additional Capacity required even though the coal producer will usually need to enter into firm commitments for export sales, mine development and above rail and port terminal capacity at the time it enters an access agreement with the ARTC (section 7.4)
- That the initial users could be required to meet the costs of the Additional Capacity over its full economic life, even if the initial user is no longer using the Additional Capacity but subsequent users are using it (section 7.5)
- The uncertainty created by the overlap and cross impact between Additional Capacity sought by individual applicants and additional capacity recommended by the HVCCC (section 7.5)
- That there are only weak requirements and no incentives for the ARTC to deliver Additional Capacity on time and on budget despite the large potential financial consequences for the new Access Holders if the Additional Capacity is not available on time and despite the higher access charges, resulting from project budget cost overruns, that coal producers will be forced to pay (section 7.6)
- The definition of "Prudent" investment is not sufficiently rigorous to ensure that ARTC does not incur inappropriate costs in relation to Additional Capacity (section 7.7)
- The failure of the HVAU to include any KPIs or sufficient detail about the principles and criteria by which they will be determined, nor to require the ARTC to rectify any non-compliance with its KPIs (section 7.8).

Section 7 sets out principles and provisions that NSWMC submits should be incorporated in an amended HVAU to address these concerns and meet the reasonable needs of the Hunter coal producers. The coal producers seek the opportunity to work cooperatively and quickly with the ARTC to help develop specific amendments for inclusion in an amended HVAU.

Access Pricing Arrangements

In relation to access pricing arrangements, NSWMC's key concerns in relation to the provisions of the HVAU are set out in section 8 of this submission and include:

- The HVAU does not fully and clearly set out the specific principles, methodology, bases and forecasts for setting and calculating access charges for coal Services so that their determination is well-defined, certain and transparent (section 8.1)
- The provisions for determination of charges for Indicative Services are far from sufficient to ensure the charges are set at economically efficient levels and are consistent with Part IIIA of the Trade Practices Act (section 8.1)

- The initial Interim Access Charges are not set out in the HVAU and the period for which Interim Access Charges will apply is not specified although ARTC's letter of 6 May 2009 (Attachment 1 to this submission) indicates that it is likely to be at least 5 years (section 8.1)

- The period for which an Indicative Service will retain that status is not specified and the effect of a Service losing Indicative status is not covered (section 8.1)

- For future annual determinations of the Indicative and non Indicative Access Charges for coal Services, the ARTC is not required to supply to Access Holders full details of the bases, forecasts and manner in which those Charges have been set and calculated and to make the information available a sufficient time before the Charges apply. The HVAU also does not allow sufficient time for the Charges to be disputed and does not allow an individual Access Holder to dispute the Indicative Access Charges (section 8.2)

- The specific principles, criteria, methodology and limits that will be used to "differentiate" Access Charges for non Indicative Services are not set out in the HVAU (section 8.3)

- The Initial Interim Indicative and non Indicative Access Charges are not included in the HVAU and have not been made available as the ARTC previously indicated to the Hunter coal producers they would be. Nor has the ARTC provided any indication of the expected level of Access Charges in 5 or 10 years time based on the its latest forecasts of volume and capital expenditure, which have changed dramatically since the previous forecasts. Current and future access holders are being asked to enter long-term take-or-pay access agreements without any indication of the Access Charges that may be determined over the life of the HVAU (section 8.4)

- There is no express provision for the ACCC to make the ARTC's annual compliance submission available to Access Holders and to consider submissions from them (section 8.5)

- The specific manner and criteria on which, and times at which, ARTC will determine the level of TOP charges are not set out in the HVAU despite the potential for the charges to be set anywhere between 0% and around 80% of the total access charge at any time during the life of the HVAU (section 8.6)

- Non-coal traffic may be cross-subsidised by coal traffic as the negotiated Access Charges for non-coal traffic only need meet Direct, not Avoidable, Costs and there is no provision for a lower priority to apply to traffic not paying full costs (section 8.7)

- The ability of access holders to reserve capacity is inconsistent with the objective of expanding capacity on the HVCN, on an industry endorsed basis, by the time Additional Capacity is need to meet contracted additional demand (section 8.8)

- The manner in which the ceiling limit is determined needs to be rectified (section 8.9)

- The provision allowing ARTC to capitalise "losses" (i.e. access revenue shortfalls versus full economic costs) is unnecessary for Pricing Zones 1 & 2 and unjustified, inequitable, economically inefficient and counter-productive for Pricing Zone 3 (section 8.10)

- The ARTC's proposed revaluation of the Dartbrook to the Gap track segments in Zone 3 from a value of nil to a DORC of $139M appears contrary to regulatory practice and quite excessive. The valuation needs to be reconsidered and the Booz and Co valuations of ARTC's investments need to be verified (section 8.10)

- ARTC is not required to incur operating and maintenance costs “prudently” and ARTC’s recoverable costs include costs and interest applicable to Additional Capacity before that Capacity is commissioned (section 8.11);

- Although the ARTC will review the Rate of Return & Remaining Mine Lives after 5 years, it is not obliged to propose revisions to the ACCC, which will allow it to do so only if those revisions would suit it (section 8.12)

- The Remaining Mine Lives for all three Pricing Zones are unrealistically low because they assume large increases in future production rates without corresponding and consistent assumptions about the increases in marketable reserves will be identified from the very large coal resource base serviced by the HVCN (section 8.13)

- The nominal vanilla (post tax) rates of return proposed by the ARTC are excessive and well above the equivalent real pre-tax rate of return currently applying to the HVCN under the NSW Rail Access Undertaking and the recent draft determination by IPART under that regime, despite the significant reduction in risk that will result from the introduction of long term take-or-pay contracts and other provisions of the HVAU and the Long Term Solution (section 8.14).

Section 8 of this submission sets out principles and provisions that NSWMC submits should be incorporated in an amended HVAU to address these concerns and meet the reasonable needs of the Hunter coal producers. As with the other concerns and solutions NSWMC has set out, the coal producers seek the opportunity to work cooperatively and quickly with the ARTC to help develop specific amendments for inclusion in an amended HVAU.

Content of Access Holder Agreements for Coal Services

In relation to the content of access holder agreements for Indicative and non-Indicative Services for coal proposed under the HVAU, NSWMC’s key concerns are set out in section 9 of this submission.

Firstly, non-Indicative Services for coal are required to negotiate all the terms of access per Schedule A of the HVAU, which does no more than identify the topics that must be covered and does not require the provisions to be the same as the equivalent provisions of the Indicative Access Holder Agreement that forms part of the HVAU.

This would result in an unnecessarily lengthy and expensive negotiation process for non-Indicative Services, and there would be no guarantee that the non-price terms and conditions contained in the non-Indicative Access Agreements would be consistent with Part IIIA of the Trade Practices Act.

There would seem to be no legitimate reason why the non-price terms and conditions of non-Indicative Access Holder Agreements for coal Services should not be the same as the equivalent terms and conditions in the Indicative Access Holder Agreement.

Therefore, in section 9 NSWMC’s proposes that, in an amended HVAU, non-Indicative Services for coal to be subject to all the terms of the Indicative Access Holder Agreement, except those relating to the description of the Service and the charge for the service. Of course, this would not prevent the ARTC and access holders entering into different terms and conditions for Non-Indicative Services by mutual agreement between them.

Secondly, in an amended HVAU, relevant operational and commercial provisions of the HVAU and the Access Holder Agreement will need to be amended to incorporate provisions which are aligned with the IM and port terminal contracts when that process is completed. These provisions have not been addressed in this submission and will be the subject of a further NSWMC submission to the ACCC when that process is complete.

Other Issues

Section 10 of this submission summarises numerous other detailed concerns which NSWMC has with the terms of the HVAU, Schedule 1 (the Essential Elements of the Access Agreement), the Access Holder Agreement and the Operator Sub-Agreement.

Section 10 also sets out principles and provisions that NSWMC submits should be incorporated in an amended HVAU to address these concerns and meet the reasonable needs of the Hunter coal producers. As with the other concerns and solutions NSWMC has set out, the coal producers seek the opportunity to work cooperatively and quickly with the ARTC to help develop specific amendments for inclusion in an amended HVAU.

2. INTRODUCTION

2.1 Background

The New South Wales Minerals Council (the "**NSWMC**") welcomes the opportunity to respond to the Australian Competition and Consumer Commission (the "**ACCC**") Issues Paper regarding the Australian Rail Track Corporation's (the "**ARTC**") Hunter Valley Coal Network Access Undertaking (the "**HVAU**").

NSWMC is making this submission on behalf of the Hunter Rail Access Task Force (the "**HRATF**"), an associated group comprising all 14 Hunter region coal producers (the "**Hunter Coal Producers**") using ARTC's Hunter Valley Coal Network (the **"HVCN"**) and the contiguous rail networks: ARTC's Interstate Network; Rail Infrastructure Corporation's NSW country network; and Rail Corporation of NSW's inter-urban network.

The Coal Producers currently rail over 90 Mtpa of export coal, worth around $8 billion pa in export earnings, and about 4 Mtpa of domestic coal on the HVCN (the "**Hunter Coal Traffic**"). Rail access charges for the Hunter Coal Traffic, thought to be around $130M pa, are around 20-25% of ARTC's total revenues and are expected to grow substantially with projected large increases in Hunter coal exports over the term of the HVAU.

The HVCN is a key component of the Hunter coal mines and infrastructure which produce, handle and transport all Hunter region coal from mine to ship for export or for use in domestic power stations (the "**Hunter Coal Chain**").

The Hunter Coal Chain is the world's largest and most complex coal export operation. It currently comprises 35 mines and 24 rail load points operated by 14 coal producers producing more than 80 different brands of coal; the HVCN, operated by the ARTC, and two contiguous track networks; around 27 coal trains making 15,000 loaded trips per year of up to 350kms, operated by 2 train operators; several exit points for domestic coal consumers; 2 coal handling and ship loading port terminals, operated by PWCS, operating a complex cargo assembly process to load several thousand cargoes on around 1000 vessels per year; and the Port of Newcastle. A third port terminal, to be operated by NCIG, will begin operations in 2010.

Investment to date in the Hunter region mines and infrastructure by the Coal Producers is estimated to be in excess of $10 billion and further investment of $5-10 billion is being contemplated to potentially double mine production capacity and exports over the next 5-10 years.

Service providers for track, trains and port terminals are also planning major investments to provide the additional infrastructure capacity that will be needed. The direct investments made by the Coal Producers and the service charges they commit to pay the providers, under long term, take-or-pay contracts, estimated to be at least another $10 billion, will underwrite these investments.

The HVCN is quite different to ARTC's Interstate Network for which the ACCC accepted ARTC's Interstate Undertaking in 2008:

- All 14 Coal Producers are required under the terms of their development consents and mining leases to transport their coal by rail; there is no alternative mode of transport
- The HVCN is subject to a high traffic density and complex coal train scheduling requirements and plays a critical role in the efficient operation of the Hunter Coal Chain

- The Hunter Coal Traffic pays access charges that allow ARTC to recover full economic costs for the segments of the HVCN used by at least 95% of the traffic
- The Hunter Coal Traffic is very large in volume and dollar terms, with strong growth potential and huge future investment and take-or-pay commitments to be made by the Coal Producers, and it is economically vital to both NSW and Australia.

NSWMC therefore agrees with ARTC's recognition of the many fundamental operational, commercial and regulatory differences between the HVCN and its Interstate Network, and supports, in principle, the development of the HVAU as a separate access undertaking for the HVCN.

2.2 The Long Term Solution for the Hunter Coal Chain

Aligned, efficient operation and timely, prudent expansion of the Hunter Coal Chain infrastructure, that meets the operating and commercial needs of the Hunter coal producers and the complex logistical systems of the Hunter Coal Chain, will be critical to realising the potential growth in coal exports from the Hunter region and the consequent boost to Australia's export earnings.

NSWMC therefore supports the IM, signed by the port terminal service providers at Newcastle, Port Waratah Coal Services ("**PWCS**") and Newcastle Coal Infrastructure Group ("**NCIG**"), and by Newcastle Port Corporation ("**NPC**") on 6 April 2009 and accepted by the ACCC. The IM set out the framework for a long term solution for access to, and expansion of, coal export capacity at the Port of Newcastle (the "**Long Term Solution**").

As part of the process of implementing the Long Term Solution, it is planned to develop, by the end of August, arrangements to:

- Align the Coal Chain infrastructure delivered system capacity across terminal, track and train; and
- Align the operational parameters for the day to day movement of coal to meet the delivered system capacity.

The ACCC is presently considering the Application for an Authorisation for the Long Term Solution submitted by PWCS, NCIG and NPC on 29 June 2009. The Capacity Framework Arrangements, for which authorisation is sought include "proposed principles to facilitate the alignment of commercial contracts with service providers across the coal chain, including above and below rail" ("**Contractual Alignment**").

The ACCC has previously recognised the need for a whole-of-coal-chain solution and strongly encouraged "all the relevant parties, including producers, above and below rail providers, terminal operators and government, to continue to work together to finalise the details of a Long Term Solution as soon as possible."

The requirement for Contractual Alignment across the Hunter Coal Chain is a well understood principle, and fundamental to improving the efficiency and capacity of the Coal Chain, as recognised by the ACCC which "considers that 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 standalone capacity of individual components of the chain".

In this context, NSWMC submits that:

- The HVAU needs to align with the Long Term Solution for the Hunter Coal Chain, whose details are currently being developed, according to the objectives and principles of the IM, to apply from 1 January 2010

- The ACCC should consider the HVAU in conjunction with its consideration of the Application for Authorisation of the Long Term Solution.

2.3 NSWMC Position

Under the Long Term Solution, the Coal Producers are, collectively, being asked to enter into long-term, take-or-pay contracts for both Port Terminal and track access with a total commitment over ten years in excess of $8 billion. Moreover, they will be basing long term export sales contracts, major investments in mine production capacity, and commitments to above rail service providers on the successful operation of these port terminal and track access contracts. It remains the reasonable expectation of the Coal Producers that, prior to making such commitments:

- The details of how the proposed commercial agreements will operate to achieve contractual alignment must be developed and made clear by ARTC and the Port Terminal providers working together

- The provisions of the HVAU, governing the supply of rail track access by ARTC, the monopoly supplier, should meet the reasonable operational and commercial needs of the Coal Producers.

The Coal Producers are concerned that the rail access arrangements set out in the HVAU do not achieve Contractual Alignment, thereby compromising the Long Term Solution, and are not compatible with the operating, commercial and regulatory characteristics of the Hunter Coal Chain.

NSWMC submits that the HVAU would not promote the economically efficient operation of, use of and investment in the HVCN, and does not adequately take into account the legitimate interests of Hunter Valley coal producers. Nor does it ensure the charges payable for services covered by the Undertaking will be consistent with the objects and pricing principles set out in Part IIIA of the Act.

The Coal Producers are committed to full development and implementation of the Long Term Solution from 1 January 2010. As stated in NSWMC's letter to the ARTC of 13 July, 2009 (a copy of which is Attachment 2 of this submission), they are keen to support and work with ARTC and the other infrastructure service providers to achieve this.

NSWMC submits that the HVAU proposed by ARTC, in its current form, should be rejected by the ACCC for the reasons set out in sections 3 to 10 of this submission.

In particular, NSWMC considers that the HVAU, in its current form:

- Will not promote the economically efficient operation of, use of and investment in the HVCN and the other coal and port infrastructure that forms part of the Hunter Coal chain

- Does not adequately take into account the legitimate interests of Hunter Valley coal producers

- Will be contrary to the public interest that lies in maximising the throughput of the Hunter Coal Chain and coal export volumes

- Does not ensure that the charges payable for services covered by the HVAU will be consistent with the pricing principles set out in Part IIIA of the Trade Practices Act.

NSWMC submits that, instead, the ACCC should require the ARTC to work with the other infrastructure service providers and the Coal Producers in a close and cooperative process to rapidly resolve the alignment issues and modify other provisions of the HVAU to meet the reasonable needs of the Coal Producers which are set out in this submission.

Alternatively, and to expedite the ACCC's decision-making on these issues, the ACCC might consider asking the ARTC to submit proposed amendments to the HVAU to address the ACCC's concerns as part of the ACCC's current process of deciding whether to accept or reject the HVAU. This would avoid the need for the ARTC to re-lodge the whole HVAU afresh following rejection of the HVAU (in its current form) by the ACCC or the withdrawal of the HVAU (its current form) by the ARTC.

This submission sets out reasons why the HVAU, in its current form, should be rejected by the ACCC (in Section 3) and NSWMC's other concerns with the HVAU (in Sections 4 to10). It also puts forward specific principles or amendments to address these concerns and meet the reasonable needs of the Hunter coal producers. The coal producers seek the opportunity to work cooperatively and quickly with the ARTC to help develop specific amendments for inclusion in an amended HVAU.

3. BASIS FOR NON-ACCEPTANCE OF THE HVAU

Under Part IIIA of the Trade Practices Act (the **Act**), the ACCC may accept an undertaking if it thinks it appropriate to do so having regard to the objects of Part IIIA, the pricing principles specified in section 44ZZCA, the legitimate business interests of the ARTC, the public interest (including the public interest in having competition in markets, whether or not in Australia), the interests of access seekers, including the Hunter coal producers, and any other matters that the ACCC thinks are relevant.

The main object of Part IIIA is to promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets.

In summary, NSWMC considers that ACCC should decide not to accept the HVAU on the basis that:

(a) The HVAU in its current form will not promote allocative efficiency in the operation or use of, or investment in, the HVCN and the other coal and port infrastructure that forms part of the Hunter Coal Chain, and will therefore also be contrary to the reasonable interests of coal producers as access holders. This is because:

  (i) The misalignments between the HVAU and the port terminal arrangements developed under the IM (see section 6 of this submission) will result in available and contracted capacity on the HVCN, and at the port, not actually being utilised in practice

  (ii) The undertaking in its current form will result in the sub-optimal day to day management of the HVCN by the ARTC (see section 7.8 of this submission)

  (iii) The cross-subsidisation by coal services of non-coal services (see section 8.7 of this submission).

(b) The HVAU in its current form will not promote allocative efficiency and dynamic efficiency in the future expansion of the HVCN, and will therefore also be contrary to the reasonable interests of coal producers as access holders, as it is likely to result in:

(i) Inadequate creation of Additional Capacity of the HVCN in response to increased coal demand (see section 7.4 of this submission)

(ii) Inappropriate recovery of the costs of creating that Additional Capacity (see sections 7.5 to 7.7 of this submission).

(c) The HVAU in its current form will not promote productive efficiency in the shipment of coal from Hunter Valley Coal mines, and will thereby be contrary both to the promotion of competition in the production of coal and the supply of coal to downstream markets, and to the reasonable interests of coal producers as access holders. This is because the HVAU is likely to result in:

(i) Substantial disruption to coal shipments by Coal Producers during the process of replacing existing access rights with access rights granted pursuant to the HVAU (see section 7.1 of this submission)

(ii) Underdevelopment of Hunter region coal mines due to uncertainties about the duration of future HVCN Access Rights (see section 7.2 of this submission)

(iii) Capacity not being allocated by the ARTC in a manner which optimises the usage of the HVCN (see section 7.3 of this submission).

(d) For each of the above reasons, the HVAU would also be contrary to the public interest that lies in ensuring that:

(i) the throughput of coal production through the Hunter Coal Chain is maximised in order to protect and enhance the export competitiveness of Hunter Valley coal

(ii) additional volumes of coal exports do not have to be forgone due to limitations on capacity of the HVCN, on the flexibility of the access rights granted under the HVAU, and on the alignment of those access rights with port access rights.

(e) The provisions of the HVAU that deal with the allocation and pricing of access rights, and with the development of Additional Capacity (see sections 7.1 to 7.7, 8.1 to 8.4, and 9, of this submission) do not adequately take into account the reasonable interests of coal producers as access holders.

In particular, the very wide discretions that the HVAU gives to the ARTC as to the services that it will provide, the conditions on which it will provide those services, and the prices that it will charge for those services:

(i) Will give the ARTC undue bargaining power in negotiating access arrangements with the Coal Producers in respect of existing coal mines

(ii) Will not optimise the allocation of capacity between coal producers

(iii) Will inevitably make existing and new Coal Producers more hesitant to commit to the necessary capital investment that will be required for the future development of coal mining operations in the Hunter region.

(f) The HVAU contains significant scope for the ARTC, contrary to the pricing principles set out in section 44ZZCA of the Act, to incur inefficient costs, to over-recover its costs, and to otherwise achieve pricing outcomes that are not economically efficient, and does not give the ARTC any incentives to reduce costs or otherwise improve productivity. (see section 8 of this submission).

4. KEY FACTORS IN ASSESSING THE HVAU

NSWMC considers that there are three key factors that should govern the ACCC's assessment of the Undertaking which are quite different from the factors that were relevant to the ACCC's previous consideration of ARTC's Interstate Network undertaking:

1. The intensity of usage of the HVCN compared to the ARTC's Interstate Network

2. The position and role of rail access within the Hunter Coal Chain

3. The potential for the terms and conditions of access to the HVCN to give rise to inefficiencies in the Hunter Coal Chain as a whole.

Each of these factors leads to the conclusion that the HVAU would not promote the economically efficient operation of, use of and investment in the HVCN, and does not adequately take into account the legitimate interests of Hunter coal producers.

4.1 Intensity of Usage

It is important to keep in mind that the current and expected future usage of the HVCN is much more intensive than the current usage of the ARTC's Interstate Network.

Thus, it very important (and much more so than in the case of the ARTC's Interstate Network) that access to and usage of the HVCN be very carefully managed, with appropriate levels of input not only from the ARTC but also from the coal producers and from the port terminal operators, so as to ensure that the HVCN is used at optimal levels of efficiency.

4.2 The Position of Rail Access Within the Hunter Coal Chain

The rail access services provided by the ARTC in the Hunter Valley comprise just one part of the Hunter Coal Chain.

The Hunter Coal Chain starts at the various coal mines located in the Hunter region (i.e. the Hunter Valley and areas to the west of the Hunter Valley along the Ulan rail line and to the northwest of the Hunter Valley along and beyond the Dartbrook to Werris Creek rail line, in the Gunnedah Basin). Coal is transported from those mines, via the HVCN to the coal handling and shiploading terminals located at the Port of Newcastle, for export. The Hunter Coal Chain is also used for the supply of coal from those mines, via the HVCN and contiguous rail networks, to domestic customers in the Hunter Valley and elsewhere.

To date, the primary source of bottlenecks in the Hunter Coal Chain has been capacity constraints at the port terminals. Due to these constraints, there have been relatively few difficulties faced by coal producers in obtaining sufficient access to the HVCN to enable the coal producers to match their shipments of coal to the available port terminal capacity.

As the ACCC is aware, PWCS, NCIG and the NPC have recently signed the IM which sets out a framework for a long term solution for access to, and expansion of, coal export capacity

at the Port of Newcastle, and for aligning rail and port terminal capacity within the Hunter Coal Chain.

The IM has been accepted by the ACCC, and new port terminal access arrangement for the Port of Newcastle are currently under development pursuant to the principles set out in the IM. NSWMC is currently seeking the participation of the ARTC in a process to align the rail access terms for access to the HVCN with the port terminal access terms being developed pursuant to the IM.

In this context, NSWMC is very concerned that many of the terms and conditions set out in the HVAU are misaligned with the principles set out in the IM and (as discussed further below) are likely to be misaligned with the requirements of the proposed port terminal contacts between the Newcastle port operators and the Coal Producers. These misalignments will inevitably lead to the significant ongoing inefficiencies in the operation of the Hunter Coal Chain as a whole.

For these reasons, NSWMC has been advising the ARTC and the ACCC for many months that the ARTC's submission of the HVAU has been premature. NSWMC continues to believe that this is the case.

4.3 Inefficiencies Arising from the Terms and Conditions of Access to the HVCN Itself

In light of the integrated nature of the Hunter Coal Chain, it is fundamentally important to ensure that the access arrangements that are put in place for the ARTC's Hunter Network result in the allocation of train paths and train path usages to each coal producer that are closely matched to:

- The production capabilities and production schedules of the Hunter coal mines
- The entitlements of the coal producers to access to the port terminals pursuant to contractual access arrangements between the coal producers and PWCS and NPC.

This is not merely a matter of the coal producers ensuring that they have sufficient "exit rights" at the Port of Newcastle as a pre-condition for obtaining rail access services on the HVCN.

Rather, the coal producers need to have sufficient certainty about the availability of train paths and train path usages, and about the charges that they will be required to pay for those train path usages, to be able to make long-term decisions about:

- The development of new production capacity at their respective mines
- Entering into contractual commitments with the operators of the port terminals in respect of access to coal shiploading facilities.

In this context, NSWMC is extremely concerned that the HVAU offers very little certainty to the coal producers on these issues. This will almost inevitably lead to sub-optimal utilisation both of the HVCN itself and of the Hunter Coal Chain as a whole. This is because coal producers with almost inevitably be faced with having to scale back their production levels to some extent in order to ensure that they do not commit to producing coal that cannot be shipped due to inefficiencies in the rail access services provided by the ARTC.

For these reasons, the HVAU needs to make adequate provision for the creation of Additional Capacity on the HVCN (including for appropriate recovery of the costs of creating that Additional Capacity), in accordance with the capacity requirements of the users of that

network, in order to ensure that the HVCN does not become a new bottleneck within the Hunter Coal Chain.

5. KEY AREAS OF CONCERN WITH THE HVAU

In light of these principles, NSWMC has a number of serious concerns about the acceptability of the HVAU in the following key areas which are addressed in the following sections of this submission:

- The (mis)alignment between the HVAU and the port terminal arrangements contrary to the objectives and principles of the IM (see section 6)
- The failure to ensure the other key certainty of capacity requirements for existing and future coal producers will be met (see section 7)
- The incomplete, unclear and non transparent access pricing arrangements for rail access services on the HVCN and the excessive costs, rates of return and depreciation rates proposed by ARTC (see section 8)
- The content of access holder agreements for Indicative and non-Indicative Access Services for coal (see section 9).

More detailed comments on other aspects of the HVAU, including the Access Holder Agreement (the "**AHA**") and the Operator Sub-Agreement (the "**OSA**")**,** are set out in section 10 of the submission .This submission also identifies several aspects of the HVAU, AHA and OSA where NSWMC believes further review and submissions are necessary.

6. (MIS)ALIGNMENT WITH THE IM

As part of the process of implementing the IM, the Contractual Alignment Working Group ("**CAWG**"), comprising representatives of the Coal Producers, ARTC, PWCS, NCIG, NPC and the Hunter Coal Chain Logistics Team ("**HVCCLT**"), is responsible for developing, by the end of August 2009, arrangements (see clause 12(b) of the IM) to:

- Align the Hunter Coal Chain infrastructure delivered system capacity across terminal, track and train
- Align the operational parameters for the day to day movement of coal to meet the delivered system capacity.

The need for contractual alignment across the coal chain is a well understood principle, and is fundamental to improving the efficiency and capacity of the Hunter Coal Chain. The ACCC has previously stated *[in its Interim Authorisation Decision dated 17 December 2008]* that:

> *"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 standalone capacity of individual components of the chain.*
>
> *To this end, the ACCC strongly encourages all of the relevant parties, including producers, above and below rail providers, terminal operators and government, to*

continue to work together to finalise the details of a long term solution as soon as possible."

Schedule 5 of the IM sets out a number of important Guiding Principles that ought to apply in relation to alignment between rail services and port services, including principles relating to agreed System Assumptions, track and terminal capacity, track and terminal capacity alignment, queuing management, limitations on excess access rights, and producer and service provider performance. Further, the IM also envisages the following documents being brought into existence to give effect to these principles:

*"1. **System Assumptions**: A document containing the underlying agreed System Assumptions underpinning the determination of Track and Terminal System Capacity. This could become a schedule to all Access Contracts;*

*2. **Hunter Valley Coal Chain Starting Point**: A statement as to how the initial Access Rights will be granted under the first Track and Terminal access contracts;*

*3. **Access Protocols and Process**: The process through which Access Seekers join the Access Queue and the mechanism by which Track and Terminal Access is managed until an Access Seeker becomes an Access Holder:*

*4. **Contract Performance Management**: The process and mechanism by which system capacity is managed and performance and consumption of system capacity is reported and any adjustments to contracted Access Rights are made."*

Together, these requirements are intended to ensure that:

- Rail and port capacity is not over-contracted
- Producer access to rail and port capacity can be aligned
- The grant of additional rail and port access rights is carried out in an orderly and systematic manner having regard to existing and potential future capacity constraints

… and therefore that the Hunter Coal Chain will, in the future, be able to operate in an optimally efficient manner.

Whilst NSWMC acknowledges that the ARTC is not a party to the IM, NSWMC considers that alignment between the HVAU, the IM, and the port terminal arrangements developed pursuant to the IM, is critical in order to ensure that, in practice:

- Available and contracted capacity on the HVCN does not end up not being utilised due to coal producers not being able to unload their coal at the port terminals as a result of limitations on their access rights to the port terminals
- Available and contracted capacity at the port terminals does not end up not being utilised due to coal producers not being able to deliver their coal to the port terminals as a result of limitations on their access rights to the HVCN.

Against this background, it is clear that the HVAU is not adequate to ensure that the ARTC adheres to the objectives and principles of the IM. In particular, the HVAU does not contain any commitments by the ARTC to:

(a) Establish and adhere to System Assumptions that are common to both rail and port services, based on the Systems Assumptions document contemplated by the IM (see IM Schedule 5, guiding principle 2)

(b) Clearly define its track system capacity (IM Schedule 5, guiding principle 2)

(c) Operate an access queue (IM Schedule 5, guiding principle 7) that:

   (i) Align the access queue for track access with the access queue for port services

   (ii) Operate in accordance with the proposed Access Protocols and Process document contemplated by the IM

   (iii) Give priority, when allocating available System Capacity, to delivered mine export capacity ahead of mines that may be delayed or are still under development.

(d) Ensure that contracted access rights do not exceed the lesser of the Track System Capacity or Terminal System Capacity, and that ad hoc access rights do not contribute to the creation of an excessive ship queue or infringe on the contracted and aligned access rights of other producers (IM Schedule 5, guiding principle 3)

(e) Ensure that the burden of any departure by a producer from their agreed System Assumptions which form the basis of their contracted Access Rights will fall on that producer rather than impacting on the access rights of other producers (IM Schedule 5, guiding principle 6)

(f) Establish an appropriate Contract Performance Management system and process in line with the Contract Performance Management document contemplated by the IM

(g) Establish principles, criteria and processes for the initial grant of access rights under the HVAU that are accordance with the Hunter Valley Coal Chain Starting Point document contemplated by the IM

(h) Grant equivalent rail access rights to producers who have already obtained contracted port terminal capacity, subject to pricing and service description matters being resolved in accordance with the HVAU.

It also, unacceptably, allows the ARTC to substitute another body for the independent Hunter Valley Coal Chain Co-ordinator (the "**HVCCC**") which is to be established pursuant to the IM (see the definition of "HVCCC" in clause 9 of the HVAU).

Further, a number of the coal producers are currently in negotiations with PWCS and the NCIG with a view to establishing agreed operational terms relating to matters such as allocation periods, allocation units, flexibility and tolerance, consumption measurement, capacity trades and transfers, capacity variation and resumption, adjustment for capacity shortfalls, daily planning, capacity modelling, and adjustments for under-delivery of new capacity. A comparison of the currently proposed positions of PWCS and the ARTC is provided (on a confidential basis) as the attachment to NSWMC's letter to ARTC dated 14.7.09 in Attachment 2 of this submission (entitled Analysis of Contract Alignment: Table of Issues) and similar information in respect of the NCIG will be provided shortly.

It is therefore very important that there be very close alignment on each of these issues between port terminal access rights and the rail access rights contemplated by the HVAU. To the extent that this does not occur, there will necessarily be circumstances where either:

- Contracted port terminal capacity remains unused due to these kinds of limitations on the rail access rights granted by the relevant ARTC access holder agreement
- Contracted rail capacity remains unused due to these kinds of limitations on the port terminal access rights granted by the relevant port terminal access agreement.

In these circumstances, the Hunter Coal Chain will therefore necessarily be operating at less than optimal efficiency.

In addition, it is also important to note that the IM contemplates (Schedule 5, Guiding Principle 2) that, as between the coal producers and the port terminal operators:

> "*The onus is on the producer to secure commercial arrangements to transport coal from the mine to the ship*".

In practice, it will be very difficult, if not impossible, to ensure that those arrangements do not result in inefficiencies in the operation of the Hunter Coal Chain unless the HVAU adequately addresses each of the matters outlined earlier in this section and, in addition, also contains a provision, which the HVAU does not currently contain, that commits the ARTC to grant equivalent rail access rights to coal producers who have already obtained contracted port terminal capacity, subject to access pricing and service description matters being resolved in accordance with the HVAU.

If these issues are not addressed, there will remain substantial and unacceptable scope for the ARTC to seek to impose rail access terms that are inconsistent with the IM and with the related port terminal access arrangements between the producers and the port terminal operators - that is, for the ARTC to embark on a "frolic of its own" in the manner in which it manages access to the HVCN, without regard to the impact of its decisions on the Hunter Coal Chain as a whole.

However, as stated in NSWMC's letter to ARTC of 13 July 2009 and copied to the ACCC (copy attached in Attachment 2 of this submission), NSWMC believes that all the alignment issues can be successfully addressed pursuant to the guiding principles and documents set out in the IM and that revised provisions can then be incorporated in the HVAU. In its letter, NSWMC has proposed that ARTC form a joint working party with PWCS and NCIG under the auspices of CAWG to help achieve this goal and the Coal Producers stand ready to assist this process.

7. CERTAINTY OF CAPACITY

As discussed above, it is very important that the contractual commitments by the ARTC to supply train paths be aligned, to the extent possible, with expected future production levels at the Hunter region coal mines, and with the access rights of coal producers to the port terminals.

In light of planned expansions to port terminal capacity at Newcastle, is it clear that there will be a need for significant expansions and upgrades to provide additional capacity within the HVCN in order to ensure that there continues to be sufficient capacity to carry the volume of coal that will then be able to be shipped via the port terminals.

NSWMC accepts, in principle, that the HVAU should enable the ARTC to recover the costs of that additional capacity, as long as the specific expansions and upgrades are approved by

the HVCCC and the costs incurred in undertaking them are "Prudent" (as appropriately defined in the HVAU).

However, NSWMC considers that the HVAU does not provide an adequate framework or mechanism for the establishment and negotiation of access rights in respect of the HVCN as it fails to ensure that sufficient capacity on the HVCN will be able to be obtained by coal producers to meet both their existing capacity requirements and their expected future capacity requirements.

7.1 Duration of Access Rights

NSWMC considers that the following aspects of the HVAU relating to the duration of the access rights do not provide sufficient certainty of capacity to coal producers and are therefore likely to give rise to significant inefficiencies in coal production and in the operation of the Hunter Coal Chain:

- The requirement that the minimum term of an access holder agreement under the HVAU be 15 years, including a five year notice of termination requirement, with take or pay provisions (see clause 2.3 of the AHA and clause 1 of Train Path Schedule 1 to the AHA), whereas the minimum term of a port terminal contract under the IM will be 10 years.

  NSWMC believes that the proposed minimum term of 15 years is arbitrary and inappropriate, as it bears no relation either to the life of the relevant mine or to the duration of the associated port terminal access rights.

  To ensure that the contractual commitments of ARTC to supply access paths are aligned to the duration of the associated port terminal access arrangements, NSWMC submits that the minimum term of an access holder agreement for Indicative Services should instead be the same as the minimum term of the port terminal contract under which the coal delivered by means of those Indicative Services will be shipped. It is currently expected that the minimum term for the port terminal contracts will be 10 years;

- NSWMC understands that coal mines with lives of less than 15 years (including existing mines reaching the end of their lives) will be classified by the ARTC as non-Indicative Services (see clause 4.13(c)). This means that those mines will have to enter into further negotiation of access rights with the ARTC, and will have no certainty that such access will be granted or about the terms on which this will occur.

  This is particularly unacceptable, and contrary to the legitimate interests of coal producers, in light of the fact that this alteration of the existing access rights held by coal producers is being driven by regulatory change (namely, the establishment of the HVAU) rather than arising from the expiry of the relevant access rights.

NSWMC considers that existing mines, which have known future train path requirements:

- Should be able to continue to obtain those train paths for a minimum term of 10 years, or for a minimum term that is equal to the expected remaining mine life of the relevant mine, whichever is the shorter, regardless of whether those services are Indicative Services or non-Indicative Services

- Should, by giving 3 years notice to the ARTC, be entitled to terminate that train path to take effect from any time after the minimum term. NSWMC considers that a 3 year notice period, rather than the 5 year period proposed by the ARTC (see the proposed definitions in the Train Path Schedule (Schedule 1) to the Access Holder Agreement)

will allow more than sufficient time to enable the ARTC to reallocate that capacity for subsequent use and that the HVAU should allow notice periods of less than 3 years in some circumstances (e.g. where the volume is not large and/or another user can take up the capacity).

Any subsequent shortfall in cost recovery by the ARTC as a result of a mine having a life of less than 15 years will be able to be recovered from subsequent users of the relevant portion of HVCN after the operation of that mine has ceased. In the event that there is no subsequent user, it will be recoverable from the other users as provided for in the access pricing provisions.

7.2 Preservation of Existing Access Rights

The HVAU is likely to facilitate significant change in the structure of rail access rights in the Hunter Valley - namely, a shift from those rights being held by the above rail operators to being held by the upstream coal producers themselves.

Under current regulatory arrangements, it is possible for coal producers to hold these rights, but they have not elected to do so in practice. Access rights for most if not all existing coal hauls are currently held by the coal producers' rail operators - Pacific National and QR National.

NSWMC understands that the ARTC has verbally indicated that the contracts covering these access rights will be extended only until the HVAU commences, so that new contracts under the HVAU and in the form of the AHA (for Indicative Services), Schedule A of the HVAU (for non Indicative Services) and the OSA can be put in place for all coal hauls.

However, although clause 2.5(a) of the HVAU provides that:

- It only applies to the negotiation of new access agreements and the negotiation of access rights in addition to those already the subject of an access agreement
- Nothing in the HVAU can require a party to an existing access agreement to vary a term or provision of that agreement.

There is nothing in the HVAU that would prevent the ARTC from terminating an existing access agreement in accordance with its terms even though the negotiation of new access arrangements under the HVAU have not yet been completed.

Moreover, neither the HVAU nor the proposed terms of the AHA contain any provisions to enable existing access rights to be transferred from the relevant above rail operator to the relevant Coal Producer.

This may be contrasted with clause 2.5(b) of the HVAU, under which existing train paths for non-coal traffic will be reserved, provided that a new access application is lodged by the holder of the rights to those paths within 30 days of the HVAU commencing.

This is of particular concern:

- In light of the fact that, as discussed elsewhere in this submission, the HVAU as currently drafted does not provide any meaningful parameters within which the determination of new access prices for those new access arrangements is to occur
- Given that, once the HVAU comes into effect, the process of establishing AHAs, access agreements under Schedule A of the HVAU and OSAs between the ARTC and at least

14 coal producers covering at least 35 mines is likely to take a considerable period of time with no certainty that their existing access rights will be maintained until rights under the new agreements are effective.

As a matter of commercial reality, coal producers need to be able to secure long-term certainty of rail access for existing and new hauls immediately on and from the date on which the HVAU comes into effect, in order to enter into contractual arrangements for the sale of coal to export and domestic markets and, in a number of cases, commit to major new coal mine developments. In some cases, the coal producers have already entered into long term contracts for port terminal capacity and, in other cases, they anticipate doing so.

In these circumstances, any uncertainties and delays in respect of the transfer of existing train paths and train path usages from the relevant rail operator to the relevant coal producer is likely to have a very significant adverse impact on coal export volumes and on new mine developments, as well as on the efficient use of port terminal capacity.

In some cases, the coal producers may be faced with an unacceptable choice between ensuring certainty of train path availability, and being forced to accept excessive rail access charges for access to the HVCN that are not in accordance with the objectives and principles set out in Part IIIA of the Act or in the HVAU. Moreover, the availability of a long and drawn out dispute resolution process under the HVAU is unlikely to be of practical assistance to coal producers in these circumstances.

Thus, NSWMC considers that the absence from the HVAU of transitional provisions for coal train paths and path usages gives rise to several reasons why the ACCC should not accept the HVAU:

- The fact that train paths to which access is currently obtained by the Coal Producers will not be reserved has the potential to cause substantial disruption to the efficient operation of the Hunter Coal Chain once the existing access agreements expire

- The threat of such disruption may give the ARTC greater ability to impose economically inefficient terms and conditions on the Coal Producers during the process of establishing the new access rights

- The fact that the port terminal access arrangements that are currently being negotiated with the port terminal operators are likely to make provision for existing access holders to retain the access rights that they currently have, with the result that the absence of transitional provisions in the ARTC undertaking will almost inevitably give rise to misalignments between coal access and port terminal access rights that are contrary to the IM

- The fact that, as discussed above, this alteration of the existing access rights held by coal producers is being driven by regulatory change rather than arising from normal commercial processes, and is therefore contrary to the legitimate interests of coal producers.

7.3 Allocation and Relinquishment of Capacity

NSWMC considers that the following aspects of the HVAU relating to the allocation and relinquishment of capacity are likely to give rise to significant inefficiencies in coal production and in the operation of the Hunter Coal Chai, and are contrary to the legitimate interests of coal producers:

- The fact that the ARTC would be entitled to not participate in an initial review of capacity requirements "if other Hunter Valley Coal Chain Participants do not participate reasonably and effectively in that review". This would enable additional usage of the HVCN by a coal producer to be held up, or delayed, by the actions of other industry participants.

  Given the co-ordination role that is to be played by the HVCCC in respect of capacity planning on the HVCN, NSWMC considers that this issue could be appropriately addressed by amending this clause so that ARTC is only entitled not to participate if the HVCCC itself does not adequately do so.

- A three month period for the negotiation of access rights (see clause 3.12(b)(iiii)) is unreasonably short, particularly given that this clause also gives the ARTC a range of other grounds on which it can terminate negotiations if legitimate concerns arise. NSWMC considers that 6 months would be a more appropriate period and that, in any event, the negotiation period in respect of these rights should be aligned with the relevant negotiation period for port terminal access rights.

- Where there are applications for mutually exclusive access rights (see clause 3.13), the current decision making criteria set out in clause 3.13 would allow the ARTC to make an allocation decision in manner that is inconsistent with the rules for the allocation of mutually exclusive access rights that will apply at the port terminals, and otherwise without taking into account the relative feasibility of the alternative options available to each applicant. NSWMC considers that the rules for the allocation of mutually exclusive access rights for the HVCN should be the same as those for the port terminals.

- Where there is a shortfall in existing capacity (see clause 5.3), there is no obligation on the ARTC to allocate capacity in a manner that is inconsistent with the rules for the allocation of capacity in the event of a capacity shortfall that will apply at the port terminals, and which will otherwise promote the efficient operation of the HVCN and the Hunter Coal Chain as a whole. NSWMC considers that the priority rules for the allocation of capacity in the event of a capacity shortfall on the HVCN should be the same as those for the port terminals.

- The 90% threshold for relinquishment of capacity (see clause 11.4 of the AHA) is too high, as it does not adequately take into account likely usage fluctuations arising from major operational issues at the mines such as longwall relocations, port capacity management and customer requirements.

  Further, modelling of the operation of the Hunter Coal Chain to determine the level of under-utilisation that is likely to arise in practice has not yet been undertaken, as this will only be possible once the proposed new port terminal access and rail access arrangements have been aligned.

  NSWMC therefore considers that the relinquishment provisions in the AHA ought to be aligned with those in the relevant port terminal contracts and (subject to that alignment), should adequately allow for likely usage fluctuations by, for example, extending the threshold over a longer period such as a year or reducing the threshold to a lower level such as 80% or 70%.

- As a drafting matter, clause 7.1(b) does not make it sufficiently clear that it is the ARTC (not the HVCCC) that is to be responsible for the day-to-day scheduling of trains, with the HVCCC's role being advisory only. This clause should therefore be amended to

state that "ARTC will provide the MTP to the HVCCC to assist the HVCCC in advising the ARTC in relation to the day-to-day scheduling of trains".

7.4 Additional Capacity

NSWMC believes that it is vitally important to the efficient operation of the Hunter Coal Chain as a whole that coal producers have certainty that capacity expansions and upgrades that are required from time to time in order to support new mine developments, port terminal access commitments and train contracts between the coal producers and the Hunter Valley train operators, are implemented by the ARTC in a timely and otherwise efficient manner. Otherwise, it will become very difficult in practice for the coal producers to decide to commit to such developments.

Against this background, the key deficiencies of the HVAU are as follows:

- It does not impose any obligation on the ARTC to commit to additional capacity requested by the coal producers or recommended by the HVCCC even though the provisions for the producers to meet the capital costs or pay access charges under long term take-or-pay contracts which recover the costs are satisfied (see clauses 6.2 and 6.3)
- It does not impose any obligations on the ARTC to implement any capacity expansions or upgrades and make additional capacity available to coal producers within agreed timeframes, or to pay any financial penalty for failing to do so
- It does not oblige the ARTC to seek endorsement of Additional Capacity through the Rail Capacity Group ("**RCG**") within the HVCCC and the RCG needs wider coal producer representation to ensure adequate consultation with coal producers in each Pricing Zone and each port terminal (see clause 6.4)
- It makes ARTC's obligation to supply contracted train paths and path usages conditional on any required Additional Capacity being committed and completed (see clause 6 of Train Path Schedule 1 to the AHA).

NSWMC considers that the non-inclusion of such provisions in the HVAU should make the HVAU unacceptable to the ACCC for the following reasons:

- The absence of any contractual commitment by the ARTC to supply Additional Capacity will mean that:

  (i) There is a much greater likelihood that the existing network will become capacity constrained

  (ii) The coal producers may need to seek, and to continue to obtain, a greater number of train paths and path usages on the existing network than they would need to seek if they could be more confident that the requested Additional Capacity would be delivered.

- Coal producers will be unable to make firm commitments to projects to increase production which require long lead times. They will not be able to enter agreements with contractors for mine development, with customers for export sales and with service providers for above rail and port terminal capacity at the time they enter into an access agreement with the ARTC. When ARTC does eventually commit to and complete the Additional Capacity, coal producers then may not be able to put in place the other

agreements they need to increase production nor complete them by the time the Additional Capacity is available.

- The existence of such constraints will inevitably slow down the rate of production at the relevant Hunter region coal mines and may also lead to contracted port terminal capacity sitting idle until such time as the Additional Capacity is in fact delivered. The same also applies to the trains that operate on the HVCN.

Further, NSWMC also considers that, in practice, it is likely to be the HVCCC and/or the RCG (with wider coal producer representation than currently provided in the HVAU) that will be in a far better position than the ARTC to determine the amount of additional capacity that will be required in order to meet the expected future volumes of coal produced by the Hunter region coal mines and shipped via the Port Terminals.

Thus, the provisions of the HVAU that give the ARTC a broad discretion about whether or not to agree to implement additional capacity, and to determine the amount of that additional capacity, are not appropriate, and may lead to under or over-development of that capacity (with consequent adverse impact on the efficient operation of Hunter Valley coal production and of the port terminals).

In this respect, NSWMC also notes that the HVAU expressly provides that the costs of providing additional capacity will be recovered from the applicants for that capacity (where the additional capacity is sought by applicants) or recovered by the ARTC via its generally applicable access charges (where the additional capacity is recommended by the HVCCC), and that such cost recovery will occur on a take or pay basis.

NSWMC considers that this guaranteed ability of the ARTC to recover costs is sufficient to protect the ARTC's legitimate business interests against the possibility that the amount of additional capacity that an applicant or the HVCCC seeks or recommends will be in excess of actual foreseeable requirements.

Of course, NSWMC accepts that, in some cases, there may be legitimate technical or operational reasons why particular additional capacity sought by the applicants or recommended by the HVCCC cannot be built.

However, for the reasons set out above, NSWMC considers that it is not acceptable for the ARTC to seek to deal with this issue by retaining and exercising a broad discretion over whether to build the additional capacity requested or recommended, rather than by including a provision that gives it the ability to reject particular additional capacity requests on specified grounds only. Of course, such a provision would not prevent the ARTC from entering into agreements with individual producers to build a specific piece of track, for example.

7.5 Future Recovery of Additional Capacity Costs

NSWMC accepts, in principle, that the cost of Additional Capacity should be met by the applicable users of that capacity. However, there is also a need to ensure that those costs are also borne by subsequent users of that additional capacity over its economic life, not just the initial users of that capacity.

Otherwise, the subsequent users of that additional capacity will effectively be given a free ride on investment undertaken by the initial access holder.

NSWMC is therefore concerned that clauses 6.2(b)(ii), (f) and (g) of the Undertaking have the potential to allow for an inequitable distribution of that capital contribution. For example, these clauses appear to mean that the initial holder of access rights in respect of that

Additional Capacity could be required to meet those capital costs over the full economic life of the additional capacity, even if the relevant mine is no longer using the additional capacity but other mines are now using that capacity.

Accordingly, the HVAU should not be accepted by the ACCC unless these clauses are amended:

- So that, upon use by any subsequent access holder, any capital contribution that has been initially funded by the initial access holder(s) should subsequently be reconciled by dividing the amount of that capital contribution across total past and expected future usage of that additional capacity by all users, and by then paying a corresponding refund to the initial access holder(s)

- So that this principle applies in all cases, not only where total access revenue exceeds the ceiling limit for the relevant prices (see clauses 6.2(f) and (g)).

In addition, NSWMC considers that clauses 6.2 and 6.3 should be found by the ACCC to be unacceptable on the basis that they allow for a substantial degree of overlap and cross-impact between Additional Capacity sought by individual applicants and Additional Capacity recommended by the HVCCC.

This will potentially have a very significant impact both on the planning of future upgrades and on efficient and equitable cost recovery in respect of those upgrades. For example, it would be inefficient for a "main line" upgrade (e.g. the Minimbah Bank 3rd Road) to be requested and funded by an individual applicant or, conversely, for a remote line upgrade (e.g. the Boggabri Loop Extension) to be requested by the HVCCC and included in the RAB.

7.6 Delivery of Additional Capacity on Time and Budget

Clause 6.4 of the HVAU deals with the stages of Industry Consultation in relation to the planning and delivery of Additional Capacity and the processes for determining the Capital Expenditure to be taken as prudent.

NSWMC considers that the provisions of clause 6.4 are inadequate to ensure the ARTC delivers Additional Capacity on time and budget. There are only weak requirements, and no incentives, for the ARTC to do so despite the large potential financial consequences for the new Access Holders if the Additional Capacity is not available on time and despite the higher access charges, resulting from project budget cost overruns, that coal producers will be forced to pay.

In relation to on time delivery of Additional Capacity, NSWMC submits that clause 6.4 does not clearly require the ARTC to set and meet a schedule for progressing projects to provide Additional Capacity through the stages of consultation and development set out in subclauses (d) to (g). In fact, it is not clear from clause 6.4 (f) that there is even a requirement to provide, in the project assessment report, a firm project construction schedule with a specified delivery date. Clause 6.4 (g) (iii) (v) refers to “timing tolerance margins” but it is not clear what they are or how they might relate to the project schedule.

Moreover, during the procurement stage in clause 6.4 (g) (i) and the project delivery stage in clause 6.4 (g) (iii), if a variation to the endorsed project budget arises the ARTC may cease construction to seek RCG endorsement of the variation and, where that is not obtained, review by an independent expert as to whether the variation is Prudent. Further, it is not clear from clauses 6.4 (g) (i) ((F) and (iii) (C) (v) whether the ARTC will proceed if the independent

expert decides that the extent of the variation to be taken as Prudent is less than the full variation or not Prudent at all.

NSWMC submits that these potential delays in providing Additional Capacity are unacceptable considering that:

- The right of the ARTC to cease construction while it seeks endorsement of the variation by the RCG or the review of the independent expert, and the possibility that it may not resume construction at all, may present coal producers with an unacceptable choice. They may have to endorse the variation, even if it is not merited, to ensure that the Additional Capacity is delivered on time or not endorse the variation and not get the Additional Capacity on time

- Both clause 6.4 (g) (i) (G) and clause 6.4 (g) (iii) (C) (vi) provide that any cost of delay resulting from the process will be deemed a Prudent direct cost to the project. This reduces the ARTC's incentive to estimate costs accurately in the project assessment stage and no incentive to minimize delays under this process.

  The ARTC should be required to specify a reasonable delivery date in the project assessment report and to continue with the project delivery while, if necessary, seeking RCG endorsement or the independent expert decision of the variation.

- Clause 4.4 (g) provides for interest incurred during construction of Additional Capacity to be included in the Economic Costs to be recovered from access holders and would allow this even when the project is delayed or perhaps not completed.

  This gives the ARTC no incentive to complete Additional Capacity on time. Moreover it is contrary to practice in other regimes, including the NSW Rail Access Undertaking, where interest incurred during construction is not included in the economic costs and project capital costs are not added to the regulatory asset base (the "**RAB**") until the year in which they are commissioned, in order to give the infrastructure asset owner an incentive to complete projects in a timely manner. As a general rule, the ARTC should not be allowed to include interest costs incurred during construction in the economic costs to be recovered from access holders.

  In the separate circumstance, provided for in clause 6.4 (g) (v), where a project is large and an extended delivery time frame is considered necessary, the ARTC should specify the minimum size and time fame for a project for which it may propose a staged delivery. It should also specify measures to ensure that the subsequent stages of the project are delivered on schedule, including deduction of the previously expensed financing costs from the costs of the subsequent stages that are added to the RAB if those stages are delivered late.

- As discussed in section 7.4 of this submission, clause 6 of the Train Path Schedule 1 to the AHA provides that the ARTC's obligation to supply contracted train paths and path usages is conditional on any required Additional Capacity being completed.

  As well as the huge difficulties this will cause producers wanting to expand production outlined in section 7.4, the cost to coal producers of Additional Capacity not being delivered on time, considering lost coal sales and mine and other infrastructure capacity sitting idle, will be far greater than the revenue that the ARTC will not receive for the Additional Capacity until it is completed. The ARTC obligation to supply contracted train paths should not be conditional on any required Additional Capacity being completed

and its liability for failing to do so should not be limited to the TOP Rebate under clause 5.4 of the Access Holder Agreement.

Clause 6.4 of the HVAU also does not provide strong incentives for the ARTC to deliver Additional Capacity at project budgeted cost. Under clause 6.4 (g), all variations to the endorsed project budget occurring during the procurement and project delivery stages that are endorsed by the RCG or deemed to be Prudent by the independent expert will be taken as prudent for the purpose of their inclusion in the RAB.

However, as pointed out above, the RCG may be forced to endorse a variation that is otherwise unmerited in order to ensure Additional Capacity is delivered when needed and the independent expert may be forced to deem Prudent a variation that is otherwise unmerited “having regard to the importance to the industry of the timing of completion of the project”.

In a normal commercial environment, contracts for the delivery a project would protect the parties who will use the project when it is complete from delays and cost overruns and will provide for the party delivering the project to carry those risks.

NSWMC submits that the approach taken to delivery of Additional Capacity on time and on budget in the HVAU is unacceptable and that the ARTC should accept the risk of schedule and cost overruns.

NSWMC has previously suggested to the ARTC that incentives to deliver Additional Capacity on time and on budget should also be considered and has put forward some examples of incentives that could be incorporated in the HVAU. The coal producers remain willing to consider this approach with the ARTC.

There a number of other provisions of clause 6.4 that NSWMC believes are unsatisfactory and unacceptable. They are set out in section 10 of this submission.

Finally, NSWMC submits that, given the complexities of clauses 6.2, 6.3 and 6.4, the critical importance of the delivery of Additional Capacity on time and on budget and the large capital expenditure program ARTC is planning over the next five to ten years, the application and effectiveness of these clauses of the HVAU, as amended to meet the coal producers concerns, should be reviewed by the ACCC two years after the commencement of the HVAU.

7.7 Ensuring "Prudent" Investment

NSWMC is also concerned that the definition of "Prudent" investment as set out in clause 9 of the HVAU is not sufficiently rigorous to ensure that the ARTC does not incur inappropriate costs in relation to Additional Capacity. For example:

- The ability of the ARTC to recognise "broader benefits that may arise from delivery through alliance or internally" would seem to allow the ARTC to take into account factors that have little or no connection with the HVCN or the Hunter Coal Chain
- As discussed in section 7.6 above, the provisions in clause 6.4 of the HVAU allowing the inclusion in the capital expenditure taken as prudent of the cost variations to the endorsed project budget that result from “having regard to the importance to the industry of anticipated timing for completion of projects having regard to the impact on Coal Chain Capacity and commercial arrangements” would seem to allow ARTC to fall behind schedule on the planning and delivery of projects and then claim the extra costs of catching up are Prudent. It would also seem to allow ARTC to underestimate the

engineering and construction requirements of projects and then claim the extra costs needed to deliver the project are Prudent.

NSWMC requests that the ACCC carefully consider whether the definition of "Prudent" investment in the HVAU is sufficiently rigorous and appropriate. NSWMC is also seeking expert advice on this matter and will provide further input to the ACCC.

NSWMC also notes that clause 6.4 of the HVAU does not allow for the possibility that the ARTC and access holders will fail to agree on the identity of any independent expert appointed to determine whether the costs of Additional Capacity are "Prudent".

NSWMC considers that it would be appropriate for the HVAU to provide that, failing such agreement, the independent expert will be nominated by the ACCC. Otherwise, the ACCC should not accept the HVAU, on the basis that it cannot be guaranteed that those costs will in fact only be incurred if they are in fact found to be "Prudent" by an independent person.

7.8 Key Performance Indicators

The ACCC has previously concluded that:

> *"as ARTC is a monopoly provider of essential infrastructure, performance indicator reporting is one means of curtailing the potential for ARTC to compromise its service quality in lieu of profits. Regular public reporting and auditing of performance indicators make network performance more transparent, assisting users of the network and the regulator to identify if service deterioration is a problem, and aiding potential access seekers in their negotiations with ARTC, by providing a means of gauging reasonable expectations of service standards, which can be weighed against proposed access charges".* (Final decision: Australian Rail Track Corporation: Access Undertaking - Interstate Rail Networks, July 2008, page 230.)

Clause 8 of the HVAU and clause 3.12 of the AHA contemplate the development of "key performance indicators" relating to various operational issues, including (in clause 3.12 of the AHA) track availability, quality and reliability, safety, and speed restrictions, as well as train reliability and availability and compliance with the daily train plan.

Neither the HVAU nor the AHA contain any details of what those KPIs will be, nor sufficient detail about the criteria and principles by which they are to be determined. Further, they do not require the ARTC to rectify any non-compliance with its KPIs or to reduce the access charges payable by access holders if such non-compliance occurs.

NSWMC believes the ARTC's proposed approach of simply leaving these matters to be the subject of further negotiation means that the HVAU should not be accepted in its current form The proposed approach will not ensure that the KPIs that are ultimately put in place will be set at levels which will provide meaningful incentives for the optimal efficient use of the Hunter Network, or that they will be enforceable against the ARTC in any meaningful way.

In addition, and notwithstanding the ARTC's stated intention to have:

> *"a consistent set of key performance indicators for all access holders which are in alignment with coal train system performance indicators",*

… the ARTC's failure to include a benchmark set of KPIs in either the HVAU or in the AHA means that it cannot be guaranteed that this objective will be achieved.

The ability of the ARTC to negotiate KPIs with individual access holders without reference to a set of benchmark indicators gives it an unacceptable degree of latitude to offer sub-optimal KPIs, or to impose more onerous sub-optimal KPIs on access holders.

8. ACCESS PRICING ARRANGEMENTS

8.1 Basis for Determining Charges for Indicative Services

Clause 4.13 of the HVAU provides that:

> "*ARTC will determine for each year indicative access charges for coal access rights with certain characteristics (Indicative Services) established in consultation with the HVCCC having regard to delivery of optimal coal chain capacity, given certain coal chain assumptions agreed with the HVCCC. Coal chain assumptions applicable to the indicative service will include the following:*
>
> - *maximum axle loads,*
> - *maximum speed,*
> - *train length, and*
> - *section run times."*

Clause 4.1(b) of the proposed AHA then provides that the applicable prices for train paths for each following contract year will be:

> "t*o the extent that ARTC is providing the access holder with Indicative Services under this agreement, the prices for those services are the final indicative access charges published by ARTC in accordance with section 4 of the access undertaking."*

NSWMC believes that it is not appropriate for the ACCC to accept the provisions of the HVAU dealing with the determination of charges for Indicative Services (clauses 4.13, 4.16 and 4.17) as those provisions currently stand. This is because those provisions are far from sufficient to ensure that the ARTC's charges for Hunter Valley rail access services are set at economically efficient levels and levels that are consistent with the objectives and principles set out in Part IIIA of the Trade Practices Act. In particular, the HVAU:

- Does not clearly and fully set out the specific principles, methodology, bases and forecasts upon which indicative access charges and interim indicative access charges will be set and calculated so that their determination by the ARTC is well-defined, certain and transparent

- Does not spell out, except in relation to Interim Indicative Services, the characteristics of each Indicative Service, nor do they guarantee that the Indicative Services or the Interim Indicative Services will remain the same from year to year, either for the life of the HVAU or for the life of each AHA.

  The ability of the ARTC to change the relevant service descriptions for "Indicative Services" and Interim Indicative Services from time to time has significant potential to impose excess costs on coal producers, and above-rail operators, if they are forced to reconfigure their existing infrastructure (such as rolling stock and train loading facilities) in order for their services to continue to be Indicative Services into the future.

- Does not set out the Interim Indicative Access Charges that will apply from 1 July 2009

- Does not specify the period for which those Interim Indicative Services and Access Charges will apply. This fails to provide sufficient certainty to coal producers and above-rail operators to enable them to enter into long term rolling stock and other infrastructure contracts on a viable and efficient basis.

NSWMC considers that the ARTC's failure to address these matters in the HVAU makes it impossible for the ACCC to be satisfied:

- That it is economically efficient for the Indicative Services to have the particular characteristics that will be determined by the ARTC, rather than other characteristics
- That the prices that the ARTC will set for those (as yet to be defined) Indicative Services will be appropriate having regard to the objects of Part IIIA and the Part IIIA pricing principles
- That even if consultation with the HVCCC occurs, the characteristics and pricing of Indicative Services will result in the delivery of optimal coal train capacity
- That the HVAU adequately takes into account the legitimate interests of coal producers. This is because, in effect, the HVAU would require the coal producers to enter into very substantial long term take or pay arrangements without having any certainty about the charges that will be payable under those arrangements.

Rather, it is appropriate that the characteristics and pricing for Indicative Services, and the relevant coal train assumptions, be documented in the HVAU itself.

Further, even if the omission of this information is acceptable to the ACCC, NSWMC considers that it would nevertheless still be appropriate, in those circumstances, that:

- Full details of the characteristics and pricing of "interim" indicative services be documented in the HVAU itself
- The ARTC should make a commitment, in the HVAU itself, to finalising the characteristics and pricing for Indicative Services within a short period of time (such as 1 year), failing which the interim indicative services and the interim prices for those services will apply for the duration of the HVAU.

NSWMC also notes that ARTC, by letter dated 6 May 2009 (copy attached in Attachment 1 of this submission), has advised further details of the interim pricing principles for Indicative Services that it intends to apply from the commencement of the HVAU.

Subject to the imposition of a deadline for the determination of final indicative services and final pricing for those services as discussed above, the principles set out in that letter ought to be expressly incorporated into the HVAU, in order to give them binding effect.

NSWMC also wishes to emphasise, however, that adopting this approach, whilst welcome, will still not resolve many of the issues identified above.

8.2 Future Access Charges for Indicative Services

Clause 4.17(c) of the HVAU requires ARTC to notify Access Holders of the ARTC's forecast actual gross tonnes for coal trains and costs for the Network in the next calendar year for each pricing zone, along with the applicable indicative access charges based on those forecasts at least 20 days before the revised indicative access charges are due to take effect, and then gives those Access Holders 20 business days to dispute those charges.

Further, that dispute notice will have no effect (and the notified indicative access charges will instead become final) if less than two thirds of the relevant access holders notify lodge such a dispute within the required time for the relevant pricing zone.

NSWMC considers that a 20 day period for deciding whether to lodge a dispute is a manifestly inadequate time frame for assessing whether the proposed indicative access charges are acceptable. This is particularly so given that clause 4.17 does not contain any obligation on the ARTC to disclose to access holders full details of:

- The manner in which those charges have been set and calculated
- The forecasts that have been used to determine those charges
- Any other relevant basis or factor that the ARTC has used or taken into account in determining those charges.

In addition, it is unacceptable that, despite the lodgement of a dispute notice by a coal producer, the ARTC's proposed indicative access charges will become final unless those charges are disputed by access holders holding two thirds or more of the contracted gtkms for Indicative Services in the relevant pricing zone for the next calendar year.

NSWMC therefore considers the HVAU should not be accepted by the ACCC unless the 2/3rds limitation on disputes is removed and the HVAU otherwise revised to include:

- A 40 day notification and response period would be much more satisfactory
- A requirement that the ARTC fully disclose the manner in which the indicative access charges have been set and calculated and details of the relevant forecasts and factual assumptions upon which those charges have been based.

This is because, in practice, any access charges for Indicative Services proposed by the ARTC will either be acceptable to the Independent Arbitrator, or not acceptable to the Independent Arbitrator (as the case may be), and will have a significant impact on all access holders who obtain such services. Accordingly, it is not appropriate that the ability of the Independent Arbitrator to make a decision on this issue should depend merely on the number and significance of those access holders who wish to lodge such a dispute.

8.3 Access Charges for Non-Indicative Services

NSWMC also has a number of serious concerns about the provisions of the HVAU that deal with access charges for non-Indicative Services.

- Whilst NSWMC accepts that the ARTC's proposed access price structure for non-Indicative Services should allow price differentiation (discrimination) where these approaches would aid efficiency, the range of differentiating factors set out in clause 4.14 of the HVAU is extremely broad, and the limitations on differentiation as set out in clause 4.15 are extremely ill-defined.
- The HVAU does not contain any defined criteria to govern how the differing service characteristics of non-Indicative Services (for example, differing axle loads) will affect the access charges payable for those services when compared to Indicative Services
- The HVAU does not include any estimate of the ARTC's proposed interim indicative and non-indicative access charges based on forecast demand and costs for the next 12 months.

There is also no provision in the HVAU which would require that the ARTC must have regard to the provisions of the Indicative Access Holder Agreement in negotiating the negotiated Access Holder Agreements.

The effect of these deficiencies is that the HVAU should be rejected, in its current form, on the basis that it:

- Fails to ensure that the access charges payable for non-Indicative Services will be economically efficient
- Fails to ensure that these access charges will only be different to the access charges payable for Indicative Services where there are legitimate efficiency-based reasons for those differences.

Amongst other things, NSWMC considers that there can be no legitimate basis for charge differentiation between coal being railed on the Hunter Network to the port terminals for export and coal being railed to domestic customers such as power stations, as all coal railings will be treated on the same basis in coal rail scheduling and be railed in the same trains.

More generally, NSWMC also considers that any Undertaking submitted by the ARTC should not be accepted by the ACCC unless it:

- Includes a much more detailed description of the principles, criteria, methodology and limits that will be applied in determining whether charge differentiation between Indicative Services and non-Indicative Services will occur or, alternatively, provides that such a description must be approved by the ACCC prior to any charge differentiation occurring
- Specifically provides that there will be no charge differentiation between coal railed to the Port of Newcastle and coal railed to domestic customers
- Provides that, when negotiating access charges for non-Indicative Services, the parties must have regard to the charges applicable for Indicative Access Services and to any differences between the costs of providing Indicative Access Services and the costs of providing non-Indicative Access Services.

8.4 Initial Interim Access Charges and Expected Future Access Charges

As noted in section 8.1 above, the table in clause 4.16 of the HVAU does not include the amounts of the Interim Indicative Access Charges for Indicative Services that will apply as at 1 July 2009 nor does the HVAU provide any indication of the Interim Access Charges to apply to non-Indicative coal services from 1 July 2009.

The ARTC's Explanatory Memorandum also does not provide any estimate or indication of what any of the interim Access Charges to apply to coal Services from 1 July 2009 might be, notwithstanding that the ARTC indicated in discussions with the Hunter Coal Producers in February and March 2009 that it would provide a schedule of access charges at the time it submitted the HVAU to the ACCC.

Moreover, the preliminary estimates of the expected Access Charges that may apply to coal Services initially and in five years time, together with information about the forecasts and assumptions used to calculate those expected Access Charges, which were provided to the Hunter Coal Producers by the ARTC in September 2008, now appear to be unrepresentative of current information.

This has become apparent since the ARTC posted on its website, on 7 July 2009, its 2009-2018 Hunter Valley Corridor Capacity Strategy Consultation Document, which was originally scheduled to be released in November 2008. The Capacity Strategy includes the ARTC's latest annual forecasts of coal volumes to be railed and capital investments required over the 10 year period.

In the near term, the forecasts of volume are significantly lower and the forecasts of capital expenditure have increased dramatically compared to the previous annual strategy (covering 2007-2012) which was released in November 2007. The forecasts of volume and capital expenditure now extend for 10 years, compared to 5 years in the previous annual strategy, which is quite pertinent in view of the long term take-or-pay access contracts that will be introduced under the HVAU.

The Hunter Coal Producers understand the uncertainties associated with these forecasts. However, under the HVAU, the access charges the coal producers will be required to pay will not be firm amounts specified in their access agreements for the term of the agreements but, instead, will be determined annually based on the actual volumes and costs each year. Moreover the Coal Producers will be required to make massive long term, take-or-pay contractual commitments under the HVAU.

In these circumstances, NSWMC submits that it is the quite reasonable expectation of the coal producers that ARTC should make available for their consideration:

- The Interim Access Charges for both Indicative and non-Indicative Services for coal that would apply from 1 July 2009 under the HVAU (in accordance with the process set out in clause 4.17 of the HVAU and recognising that all the necessary data for the I July calculation is available to ARTC)

- The forecast volumes and costs, including capital costs, that have been used to calculate these Interim Access Charges

- The forecast Indicative Access Charges in 5 and 10 years time, together with the forecasts on which they are based and the sensitivity of the forecast Access Charges to different forecasts of volumes and costs.

NSWMC also submits that the HVAU should provide for ARTC to post this information on its website and update it annually so that all existing Access Holders and Access Applicants have reasonable estimates, and a reasonable expectation, of the potential Access Charges that will be determined during the following 10 years of their access agreements with the ARTC.

As this information is essential for coal producers to be able to plan their existing operations and assess whether they wish to enter into long term access contracts with ARTC for capacity expansions and developments, NSWMC believes that the HVAU should not be accepted by the ACCC unless it provides for this information to be made available by the ARTC.

8.5 Verification of the ARTC's Annual Compliance Assessment

The HVAU does not contain any provision that would enable access holders to provide input into the ACCC's review of the ARTC's annual assessment of the ARTC's compliance with floor and ceiling prices and revenue limits (see clause 4.9).

If the HVAU does not include such a clause, it is likely to be very difficult for the ACCC to properly test the veracity and accuracy of the information contained in that assessment, and

therefore to determine whether the ARTC's pricing has in fact been determined in accordance with the objectives and principles set out in Part IIIA of the Act and in the HVAU itself.

Thus, the HVAU should not be accepted by the ACCC unless it is amended to provide that the ARTC must make that compliance assessment available to access holders at the same time as it is provided to the ACCC, and that the access holders will then have the opportunity to make submissions to the ACCC about the accuracy of that assessment.

8.6 Determination and Reconciliation of "Take or Pay" charges

In relation to the annual determination of take or pay charges, NSWMC is also concerned that the pricing objectives set out in clause 4.12 of the HVAU do not adequately articulate the manner and times, over the term of the HVAU or the access agreements, with which those charges are to be determined. In particular, clause 4.12(b)(iii) allows for the take or pay component of those charges to vary between the new capital component of costs (**NCC**), on the one hand, and on the other hand, NCC plus the fixed component of costs (**FCC**).

This potential range of take or pay components is particularly stark in light of the fact that, as at the commencement date of the Undertaking, the NCC component will be zero, whereas, over the term of the HVAU the NCC and FCC will typically be around 80% of the total access charge.

The effect of this is that the HVAU, in its current form, should be rejected by the ACCC on the basis that it fails to take into account the legitimate interests of coal producers by providing them with at least a reasonable degree of confidence about the level of access charges and the level of the take or pay component of the access charges that will be payable to ARTC under the HVAU and associated contractual arrangements.

NSWMC also considers that any HVAU submitted by the ARTC should not be accepted by the ACCC unless it specifies, in advance, the circumstances in which it will seek to recover a portion of the FCC as a take or pay component, and the proportion of the FCC that will be recovered in this way in each case;

Further, NSWMC considers that the adoption and detailed consideration of the True-Up mechanism proposed in Schedule 2 of the AHA is premature and inappropriate at the present time, as it is needs to be reviewed from the perspective of alignment with the port access arrangements once those arrangements have been further progressed.

8.7 Access Charges and Prioritisation of Non-Coal Traffic

Clause 4.12 of the HVAU appears to imply that the access charges payable for non-coal train paths may be limited to the variable component of costs (that is, Direct Costs) and may not include any contribution towards the fixed component of costs. In practice, this will allow the ARTC to cross-subsidise the costs of non-coal services from the charges payable by the coal producers for coal access rights.

Whilst NSWMC acknowledges that the ARTC is subject to certain statutory obligations regarding the prioritisation of passenger rail services, the existence of any such cross-subsidy is likely to be economically inefficient. Giving priority to traffic not paying full economic costs over coal traffic that is paying full economic costs, including the costs of Additional Capacity needed because existing capacity is being used by traffic not paying full economic costs, is also economically inefficient.

Accordingly, NSWMC believes that the HVAU should not be accepted by the ACCC unless it is amended to include provisions that explicitly state that:

- The access charges for non-Coal services will be set at levels which at least fully recover the avoidable costs of those non-Coal services
- Services which are not paying the full economic costs of providing those services must be given lower priority than services that are contributing the full amounts of those costs, except where required by legislation.

8.8 Capacity Reservation

Clause 5.2(b) of the HVAU would allow access holders to reserve capacity on the HVCN for use at a later date, and would allow the ARTC, when granting these access rights, to impose a capacity reservation fee of up to 75% of the relevant Indicative Access Charge.

NSWMC considers that, in principle, the ability of access holders to reserve capacity is inconsistent with the objective of expanding capacity on the HVCN, on an industry endorsed basis, by the time that the additional capacity is required in order to meet additional demand.

NSWMC also considers that, in any event, the inclusion of a fee for capacity reservation is another reason the ACCC ought not accept the HVAU. This is because, where capacity is reserved under this clause, the ARTC will still be able to make use of that capacity prior to the applicant commencing its use of that capacity.

If the ACCC forms the view that the imposition of this fee is acceptable, NSWMC considers that it would nevertheless still be appropriate for the ACCC to seek to satisfy itself as to whether 75% of the relevant Indicative Access Charge is the appropriate upper boundary, and should decide to not accept the HVAU, on the basis that this upper limit will potentially lead to an over-recovery of ARTC's costs, if this is found not to be the case.

8.9 Floor and Ceiling Prices, Revenue Limits, and Loss Capitalisation.

NSWMC considers that the manner in which the Ceiling Limit applicable to the ARTC's access pricing is to be determined (see clause 4.2(c)) has a couple of significant deficiencies that need to be rectified in order to the HVAU to be acceptable to the ACCC:

- Firstly, the phrase "group of Access Holders" is not defined. Presumably, the intention of the clause is that the Economic Cost of a Segment should be apportioned between all Access Holders who use that Segment (in accordance with the charge differentiation principles set out in clause 4.14), but this is not clear.
- More importantly, the Ceiling Limit only applies where the RAB for a Segment falls below, or equals, the RAB Floor Limit for a Segment at the end of the relevant year. NSWMC cannot see any legitimate reason why the Ceiling Limit should not also apply where the RAB Floor Limit for those segments at the end of the relevant calendar year is exceeded.

For the reasons set out in section 8.10 below and the ACIL Tasman Response, NSWMC considers that loss capitalisation of the kind proposed by the ARTC is not appropriate, and that the HVAU should be not be accepted by the ACCC unless the more conventional "building block" approach to defining revenue limits is adopted.

8.10 Regulatory Asset Base and Loss Capitalisation

Clause 4.3 of the HVAU provides for ARTC to be able to capitalise any "economic losses" and roll these into the RAB. Economic losses are defined as revenue less than the ceiling revenue.

Such an approach assumes that it is appropriate for ARTC to earn a full Rate of Return on the defined regulatory asset base, which is based on a DORC valuation rolled forward by capital expenditure and CPI.

However, in practice, prices for rail infrastructure markets are often well below the levels implied by DORC valuations, for a variety of reasons. These include the competition provided by road freight services and the fact that investments in the past may have been made for social reasons which are not justified in economic terms. In a number of jurisdictions, including for rail and water, regulators have adopted a "line-in-the-sand" approach to valuation. Under this approach, the assets are given an initial value at the start of a regulatory regime consistent with current pricing levels (ie an economic value based on continuation of existing pricing policies).

The fundamental issue raised by the loss capitalisation approach, therefore, is whether it is appropriate for ARTC to "recover" as losses prices which do not fully remunerate the DORC value of existing assets, when this has not been achieved in the past nor was expected.

The ARTC does not need the capacity to do so in Pricing Zone I and Pricing Zone 2 of the HVCN where traffic volumes are at levels that allow ARTC to fully recover Economic Costs at the present levels of Access Charges and this position will clearly prevail for the life of the HVAU.

In Pricing Zone 3, ARTC is not currently pricing at the ceiling if it were to be determined using the DORC that ARTC has proposed for the Dartbrook to the Gap line in the HVAU. However the ARTC has stated to the Hunter Coal Producers that it intends to move towards doing so in the future when major new mines in the Gunnedah Basin start production and volumes railed in Zone 3 increase substantially.

NSWMC considers that enabling the ARTC to recover current "under-pricing" in the future from future users is not equitable and would, in fact, be a significant impediment to the commencement of these new mines considering the magnitude of the "economic losses" (at ARTC's proposed DORC of $139.3M) that would accumulate by then. Nor is such a recovery required for efficiency reasons, given that the expenditure concerned is sunk, and the regulatory regime provides incentives for efficient future investment.

Moreover, NSWMC submits that the "economic losses" that would accumulate would be hugely exaggerated by the Dartbrook to the Gap DORC of $139.3M (as at 1.7.08) proposed by ARTC. NSWMC considers that this valuation would inappropriately and massively inflate the ceiling for Pricing Zone 3.

The ARTC's approach to determining the RAB for Pricing Zone 3 is not consistent with its approach for Pricing Zones 1 & 2. The ARTC is proposing to use the RAB valuations determined under the NSW Rail Access Undertaking as the starting RAB valuations for Pricing Zones 1 and 2, so as to avoid any windfall gains or losses accruing to it, which it acknowledges in its Explanatory Guide to the HVAU "is consistent with the current regulatory view". However, for Pricing Zone 3, where the Dartbrook to the Gap segment was not valued under the NSW Rail Access Undertaking, ARTC is not following this approach and plans to make a large windfall profit by means of the loss capitalisation mechanism.

NSWMC accepts that, for Pricing Zone 3, the ARTC should be able to recover the cost of its investment to enhance coal access capacity and efficiency, to date and in future. However NSWMC submits that the starting DORC proposed by the ARTC is not justified and should, instead, be determined considering the cost of the ARTC's investment and the economic value based on the continuation of existing pricing policies. Any higher value should not be accepted by the ACCC.

NSWMC considers that the ARTC should provide, for consideration by the ACCC, information on the economic value of its infrastructure in Pricing Zone 3 based on the continuation of existing pricing policies. NSWMC will need to make further comments after reviewing that information and after it obtains expert review of the Booz and Co report on the Dartbrook to the Gap DORC, which was only made available by the ARTC in mid June.

8.11 Prudency of Operational Expenditure

NSWMC also considers that the HVAU should not be accepted by the ACCC due to the fact that the HVAU does not contain any provision which would require the ARTC to ensure that its operational expenditure and maintenance costs in respect of the HVCN are incurred prudently. This gives the ARTC the ability to incur unnecessary, unreasonable or otherwise inefficient operational and maintenance costs and then pass those costs through to access holders. Whilst Clauses 4.3 (a) and (b) require Opex to be on "an industry efficient basis", this phrase is currently undefined in the HVAU.

To address this issue, NSWMC requests that the ACCC carefully consider whether this approach to defining "efficient" non-investment costs in the HVAU is sufficiently rigorous. NSWMC is seeking expert advice on this matter and will provide further input to the ACCC but considers that the HVAU should, at least, include a provision that makes it clear that the only non-investment costs that can be included in the costs recovered through Access Charges are those which are "incurred efficiently having regard to standard rail industry practice".

The HVAU should also provide for compliance with this obligation to be audited by the ACCC as part of the annual compliance assessment, and for rebates to be payable to access holders if non-compliance has occurred.

Another issue is that the Economic Costs that the ARTC will recover from access charges include interest reasonably incurred during the construction of Additional Capacity (clause 4.4(g) of the HVAU). As set out in section 7.6 of this submission, NSWMC submits that this is unacceptable, except perhaps in a relatively few, specifically defined circumstances where a project is "large and an extended delivery time frame is considered necessary".

Moreover, the HVAU provides that the ARTC may seek endorsement from the RCG of its actual and estimated costs to undertake various stages of the consultation and project preparation processes (clauses 6.4 (c) to (f)) "to be included in the RAB or expensed in the year incurred". The circumstances in which these costs would be included in the RAB and in which they would be expensed are not defined in clause 6.4. Further, if the ARTC choses not seek endorsement from the RCG, clause 4.4 (g) does not appear to prevent it from including these expenses in the RAB or expensing them in the year incurred.

In view of the major investment program planned by the ARTC over the next 5 to 10 years, these consultation and project preparation costs are likely to be substantial. NSWMC considers that, to be acceptable, the HVAU should include provisions to make it clear that only endorsed costs may be included in the RAB or expensed in the year incurred and to

define the circumstances in which they will be included in the RAB and in which they will be expensed.

8.12 Changes to Rate of Return and Estimated Remaining Mine Life

NSWMC believes that it is unacceptable that:

- The ARTC's estimates of remaining mine life (see clause 4.6(c) of the HVAU)
- The ARTC's proposed Rate of Return (see clause 4.7(c) of the HVAU)

… will only be reviewed by the ARTC five years after the commencement date, and that a revised Rate of Return and revised estimates of remaining mine life will only be proposed for ACCC approval "if necessary".

In particular, these clauses would give the ARTC an undue discretion not to propose revisions on these matters where it would not be in ARTC's interests to do so, even though the appropriate rate of return and appropriate estimates of remaining mine life have changed significantly in the intervening period.

To address this concern, a provision should be included in the HVAU which requires the ARTC, 5 years after the Commencement Date of the HVAU, to submit a revised rate of return and revised estimate of remaining mine life to the ACCC for approval.

Further, and for the reasons set out in the ACIL Tasman Report, NSWMC also submits that the market dependent parameters used in determining Rate of Return should be automatically adjusted annually.

8.13 Allowable Depreciation and Remaining Mine Life

For the purposes of calculating allowable depreciation (see clause 4.6), the methodology proposed in the HVAU for determining the useful life of a segment or group of segments (as set out in clause 4.6(b)) involves an averaging mechanism across all mines that utilise each of the three pricing zones in the HVAU of which that segment or group of segments forms part, rather than the remaining mine life of the mines that actually utilise that segment (or group of segments).

NSWMC notes that this approach:

- May lead to allowable depreciation occurring at a greater rate, or a lesser rate, than would be the case if allowable depreciation were determined by reference to actual usage of each segment or groups of segments
- Differs from the approach taken under the NSW Rail Access Undertaking where a single, system-wide RML applies to all three Pricing Zones proposed in the HVAU.

Clause 4.6 (b) also provides that the useful life for the segment or group of segments should be determined having regard to the average mine production levels anticipated during the term of the HVAU and marketable coal reserves for each mine existing at the time of the determination or expected to commence during the following 5 year period. The three RMLs proposed by ARTC and its consultant, Booz and Co, are:

Pricing Zone 1: 24.1 years
Pricing Zone 2: 21.8 years
Pricing Zone 3: 20.2 years

The approach specified in the HVAU and used by ARTC/Booz to determine these RMLs moves away from the approach used when IPART determined the single, system-wide RML under the NSW Rail Access Undertaking in 1999/2001 and in 2004. That approach was based on advice from the NSW Department of Mineral Resources that the best and simplest method for estimating RML was to divide the current marketable reserves by the current production rate. The ARTC/Booz proposal is based on ARTC's forecasts of future production and Booz's assessments of current marketable reserves of existing mines.

IPART originally determined an RML of 40 years from 1999 and, consistent with that, determined an RML of 35 years in its 2004 Review. In its recent draft report for its 2009 review, IPART was again consistent, determining an RML of 30 years. For IPART's 2009 Review, ARTC/Booz proposed a system-wide RML of 22.6 years, consistent with the three Pricing Zone RMLS it is proposing for the HVAU.

In this context, NSWMC submits that the RMLs proposed by ARTC for each of the three Pricing Zones are unrealistically low because they are:

- Based on a unjustified forecasts of production growth and a flawed assessment of reserves
- Incompatible with a basic characteristic of the Hunter coal industry i.e. that additional reserves will be proven in future from the large coal resource base serviced by the HVCN
- Inconsistent with past practice and regulatory certainty.

Firstly, the ARTC/Booz forecasts assume unprecedented increases in future production rates which are hypothetical and cannot be justified. The LECG Report prepared for IPART considered them excessive. The ARTC/Booz forecasts also substantially exceed the historical rate of growth, the committed infrastructure capacity and the forecasts of NSWMC's consultant, Wood Mackenzie, and other independent third parties such as ABARE. The Wood Mackenzie and ABARE forecasts take into account growth in aggregate market demand rather than using ARTC's more optimistic approach of just summing the growth aspirations of individual coal producers, each assuming it will capture available markets in preference to its peers.

Moreover, the ARTC/Booz forecasts, made in mid 2008, have already been superseded by significantly lower forecasts provided by all the producers to the industry logistics coordination group, the Hunter Valley Coal Chain Logistics Team, in March 2009.

A better forecast of the growth expected in production will not be available until the Hunter coal producers are able, and required, to secure track and port terminal access under long term take or pay contracts in the first few years after the Long Term Solution is implemented and the infrastructure providers start committing to expansions to meet the contracted growth in throughput. Contracted, take or pay infrastructure capacity will be the most realistic indicator of future production growth.

The ARTC/Booz assessments of marketable reserves are also flawed. As both Wood Mackenzie and LECG have pointed out, it is not valid to exclude identified potential new mine developments, such as Caroona, Watermark and Maules Creek, as ARTC/Booz have, on the

grounds that they may not be developed within the five year regulatory review period or may not be developed at all. Wood Mackenzie's forecasts include development of all three mines in the 2014-2020 timeframe.

NSWMC considers that it is completely inconsistent for ARTC/Booz to forecast growth in production beyond the five year period but exclude specific projects and resources that are expected to supply that growth and prove up further marketable reserves that will underpin that growth beyond the five year period.

Secondly, there is an even more fundamental flaw in the approach proposed by ARTC/Booz. It does not allow for an extension of the lives of existing mines and development of other new mining projects, and for the corresponding increase in marketable reserves that coal producers will prove up from the resource base to economically justify those mine extensions and new mining developments. It does not recognise that terms of mining leases are often initially limited (e.g.to 21 years) and subsequently extended. It does not take into account the practice of coal producers to use capital efficiently by only expending funds to prove up reserves on their mining tenements when those reserves are needed to extend mine lives or plan and commit new mining developments.

The ARTC/Booz approach ignores this basic characteristic of the coal industry and the very large coal resource base in the Sydney and Gunnedah geological basins from which substantial additional and new marketable reserves can be expected to be proven in future to meet growing and longer term export market demand. An increase in marketable reserves from current levels will be a source, and natural corollary, of increased production rates in the Hunter region coal industry.

NSWMC considers that it is completely inconsistent for ARTC/Booz to forecast dramatically increased production without giving corresponding weight to the potential for large increases in marketable reserves and new mining projects to be identified from the very large coal resource base serviced by the HVCN. The original approach recommended by the NSW Department of Mineral Resources provided a de facto allowance for this industry characteristic.

Thirdly, ARTC/Booz is proposing a substantial decrease in the RML from that determined by IPART and applying to the HVCN for the last 10 years. If accepted by IPART, there would be a loss of regulatory certainty and the resulting substantial increase in depreciation rates would be unjustified, inequitable and economically inefficient. It would have a significant negative financial impact on Hunter coal producers. NSWMC submits that there is no valid reason to make such a change.

In fact, NSWMC believes that any balanced assessment, with realistic estimates of potential production growth and reasonable estimates of potential reserves growth, would result in RMLs in excess of 30 years.

Moreover, review of the RMLs five years after the HVAU commences will provide an opportunity to reassess the RMLs in the light of the long term take or pay infrastructure contracts that are actually entered into under the new track and port terminal access arrangements and in the light of the changes in marketable reserves over the next 5 years.

In these circumstances, NSWMC considers that an RML of at least 30 years is appropriate for each of the three Pricing Zones and submits that the ACCC should not accept the HVAU if any of the three RMLs are less than that.

The basis for NSWMC's views on the appropriate RMLs is set out in more detail in a supporting document that will be submitted to the ACCC under separate cover.

8.14 Rate of Return

NSWMC considers that the Rates of Return ("**ROR"**) proposed by ARTC and its consultant, Synergies Economic Consulting, for the HVAU are excessive having regard to appropriate parameter values for the Weighted Average Cost of Capital ("**WACC**").

This is highlighted in the table below which compares NSWMC's proposed WACC parameters with those proposed by the ARTC/Synergies and those at the midpoint of the range in IPART's draft 2009 Determination for the ARTC's HVCN under the NSW Rail Access Undertaking

ARTC & NSWMC Proposals for WACC

		ARTC/ Synergies 2009 Proposal	Mid-point of range in IPART 2009 Draft Determination	NSWMC/ACIL Tasman 2009 Proposal
Parameter assumptions				
Nominal Risk Free Rate	Rf	4.95%	4.58%	5.37%
Inflation Rate	f			
Real Risk Free Rate	Rrf			
Cost of Debt Margin	Dm	3.36%	3.15%	2.37%
Debt Raising Costs	DRC	0.125%	0.125%	0.083%
Market Risk Premium	MRP	6.0-7.0%	6.0%	6.0%
Proportion of Franking Credits Attributed Value by Shareholders	γ	0%	40%	65%
Debt to Capital	D/V	50-55%	55%	50%
Equity to Capital	E/V	50-45%	45%	50%
Debt Beta	βd	0.0	0.0	0.0
Asset Beta	βa	0.50-0.60	0.39	0.44
Equity Beta	βe	0.99-1.32	0.7 to 1.0	0.879
Tax Rate	Te	30%		10%
Calculated WACCs				
Nominal Vanilla WACC		9.66-11.01%		7. 66%
Real Pre-tax WACC			6.9%	

The basis for NSWMC's proposed approach to determining the WACC and its proposed parameter values and the arguments against the approach and values proposed by ARTC/Synergies are set out in a detailed supporting document prepared by NSWMC's consultants, ACIL Tasman. The Table above is extracted from the ACIL Tasman document.

NSWMC submits that the nominal vanilla (post tax) WACC proposed by the ARTC/Synergies cannot is not justified. It is well above the equivalent real pre-tax value currently applying to the HVCN under the NSW Rail Access Undertaking and the recent draft determination by IPART in its 2009 review of the ROR under that regime, despite the significant reduction in risk to the ARTC that will result from the long term take-or-pay contracts and other provisions of the HVAU and from the Long Term Solution for access to, and expansion of, coal export capacity at the Port of Newcastle.

NSWMC submits that:

- The proposed Rate of Return is excessive and economically inefficient
- The ARTC's proposed separation of the Regulatory Asset Base into two separate components for existing assets is not justified
- The ARTCs' proposals in respect of cost recovery do not adequately address the treatment of assets funded by third parties or built and gifted to the ARTC, nor the treatment of government contributions and grants

… and should, therefore, not be accepted by the ACCC.

NSWMC also considers that a five year period for the review of the WACC is reasonable and that annual revision of the market-based parameters (the risk free rate and the debt margin) would be appropriate. NSWMC considers that, in this instance, equity raising costs should not be included as the ARTC will not need to raise external finance. IDC is covered through the application of a WACC to the rolled forward RAB.

8.15 Unders and Overs Accounting

As a drafting matter, NSWMC also notes that the "unders and overs" accounting regime in clauses 4.8 and 4.9 of the HVAU should include a specific provision that states that the take or pay charges for unsupplied path usages (as determined in accordance with clause 5.4 of the AHA) should be deducted from the ARTC's actual access revenue for the relevant period.

9. ACCESS HOLDER AGREEMENTS FOR COAL SERVICES

Schedule 1 of the HVAU contains a list of so-called "essential elements" of any negotiated Access Holder Agreement. In most cases, however, this list does no more than identify the subject matter or topics that must be covered in that Agreement.

Further, the HVAU does not require that the relevant provisions of that agreement be the same as the equivalent provisions of the Indicative Access Holder Agreement (for Indicative Services) that forms part of the Undertaking.

NSWMC considers that the only terms and conditions applicable to non-Indicative Services for coal that ought to be different to the terms and conditions applicable to Indicative Services for coal are:

- The description of the characteristics of the relevant non-Indicative Services (that is, a description that is similar to the way in which Indicative Services are defined in the Undertaking)
- The Access Charges payable by Access Holders for the Non-Indicative Services (which, in the case of the Indicative Services, will be set out in Schedule 3 of the Indicative Access Holder Agreement).

NSWMC considers that all the other proposed terms of the Indicative Access Holder Agreement are equally suitable for inclusion in Access Holder Agreements for non-Indicative Services, or in the HVAU itself. Of course, this would not prevent the ARTC and access holders entering into different terms and conditions for Non-Indicative Services by mutual agreement between them.

In this context, NSWMC considers that Schedule 1 of the HVAU, in its current form, should not be accepted by the ACCC. This is because:

- There would seem to be no legitimate reason why the non-price terms and conditions of non-Indicative Access Holder Agreements should not be the same as the equivalent terms and conditions in the Indicative Access Holder Agreement
- Not setting out these terms and conditions in full for non-Indicative services (either as an Access Holder Agreement attached to the HVAU, or in the HVAU itself), would mean that an unnecessarily lengthy and expensive negotiation process would be required in respect of non-Indicative Services, and would mean that there would be no guarantee that the non-price terms and conditions contained in the non-Indicative Access Agreements would be consistent with the principles and objectives set out in Part IIIA of the Act.

Further, as set out in section 6 of this submission, NSWMC considers that the Access Holder Agreement attached to the HVAU should not be accepted by the ACCC in its current form because many of the operational and commercial provisions of the Access Holder Agreement will need to be amended to incorporate provisions which are aligned with the Implementation Memorandum and port terminal contracts when the alignment process is completed. These provisions have not been addressed in this submission and will be the subject of a further NSWMC submission to the ACCC when that process is complete.

10. DETAILED COMMENTS ON PROVISIONS OF THE HVAU, AHA & OSA

NSWMC's further concerns and comments on the detailed provisions of the HVAU will be submitted to the ACCC under separate cover. The following tables set out NSWMC's comments on the AHA and OSA.

NSWMC submits that the HVAU, in its current form, cannot be accepted by the ACCC and that the issues identified in these tables should be addressed in an amended HVAU, AHA and OSA.

In addition, as noted in section 9 above, many of the operational and commercial provisions of the Access Holder Agreement will need to be amended to incorporate provisions which are aligned with the Implementation Memorandum and port terminal contracts when the alignment process is completed. These provisions have not been addressed in this submission and will be the subject of a further NSWMC submission to the ACCC when that process is complete.

10.1 Access Holder Agreement

Clause	Issue
1.1	**Consequential Loss** is defined too broadly and may, in effect, prevent the Access Holder from being able to recover any damages should ARTC fail to perform its obligations. This is not a situation where the Access Holder can simply obtain track access through another source if ARTC is in breach. The Access Holder is completely reliant on ARTC delivering track access and its only real remedy for ARTC breach would be damages, which this clause effectively undermines. In these circumstances, it is unreasonable for ARTC to exclude liability for losses which are in the reasonable contemplation of the

Clause	Issue
	parties, as well as economic and other special losses.
1.1	**Force Majeure** is defined to exclude a breakdown or delay of any Trains or Rolling Stock operated by the Operator. However, it is possible that a breakdown or delay could have been caused by an event listed as a Force Majeure. The definition should be extended to include the words "unless that breakdown or delay was caused by an event within this definition" at the end of the sentence.
1.1	**HVCCC** is defined so as to allow ARTC to determine the body responsible for co-ordinating the operation and capacity development of the Hunter Valley. This is not acceptable. The definition should state "Hunter Valley Coal Chain Co-ordinator or, where that body no longer exists or has been reconstituted, renamed, replaced or whose functions have been removed or transferred to another body or agency, is a reference to the body which most closely serves the purposes or objects of the first mentioned body."
1.1, 2.3	**Initial Period**: The definition of **Initial Period** refers to a period specified in the relevant Train Path Schedule for a Train Path. As noted elsewhere in this Submission, NSWMC considers that the minimum term for an AHA of 15 years is arbitrary and inappropriate as it bears no relation either to the life of the relevant mine or to the duration of the associated port access rights. Clause 2.3 provides that neither party may terminate the Train Path Schedule within the Initial Period and, after expiry of the Initial Period, a minimum of 5 years notice is required prior to termination. In order to properly align with port terminal access arrangements, the minimum term of an AHA (both for indicative services or for non-indicative services) should be 10 years or the expected life of the mine (whichever is the shorter), and there should be a three year notice period for termination thereafter.
1.1	**Instruction**: There is no definition of Instruction contained in the AHA. The definition should be included.
1.4	Clause 1.4 provides that the imposition of additional terms in a Train Path Schedule in relation to a Train Path takes priority over the AHA. There should be a clear statement that a Train Path Schedule cannot contain provisions which would breach the Access Undertaking.
2.4, 12.5	Clause 2.4 is expressed to be subject to clause 12.5. Clause 12.5 deals with the ability of a party who might otherwise terminate the agreement to elect to suspend obligations of both parties until the cause of the right to terminate is remedied. The implication appears to be that if all Train Path Schedules expire or are terminated, the AHA will not automatically terminate or expire. This would appear to produce an unusual result as an Access Holder would be left with Train Paths but no schedules in which to use those Train Paths and could continue to have obligations to TOP Charges. In the event that all Train Path Schedules expire, ARTC should be required provide further Train Path Schedules or the obligation to continue payment of TOP Charges should

Clause	Issue
	cease.
3.2(b)(ii)	The Access Holder should have some choice as to which months of the Contract Year will receive the extra Train Paths attributable to the Maintenance Losses, rather than these being applied by ARTC in its discretion (as is currently contemplated).
3.2(c)	At present, the Access Holder has one month in which to dispute a Monthly Base Path Usage. The timeframe is too short. Access Holders will need to confirm that the proposed Monthly Base Path Usages align with production capacity at mines and port access arrangements. NSWMC considers that a 40 day notification period would be more appropriate.
3.5(a)	It should be possible for ARTC to provide reasonable notice of some Availability Exceptions or for ARTC to incorporate these matters into the Monthly Base Path Usage calculation. For example, ARTC would typically be aware in advance of its Passenger Priority obligations and Third Party Works. ARTC should also be required to use best endeavours not to reduce or remove the availability of a Train Path or a Path Usage. It should also be made clear that the availability exceptions apply only to the extent the occurrence of the relevant exception prevents ARTC from delivering the particular Train Path or Path Usage in question.
3.5(vi)	This availability exception should only apply to orders, directions or requirements of Governmental Authorities which pertain to the Network.
3.5(b)	The Access Holder undertakes not to access or attempt to access the Network in a way other than that authorised by the agreement. This fails to contemplate any separate agreements which the Access Holder may have in relation to, for example, Non-Indicative Services. NSWMC proposes that the words "except under a separate valid and binding AHA" be inserted at the end of this sentence for clarity.
3.7	This clause should clarify, for the avoidance of doubt, that the exercise of the Access Holder's rights under the Agreement will not be taken to interfere with or breach ARTC's Passenger Priority obligations.
3.9	It is unreasonable to apply this accuracy of information warranty to all information irrespective of its nature. Forward looking information, such as volume forecasts, will be subject to uncertainties and should not be covered by the warranty.
3.12	As noted elsewhere in this Submission, neither the Access Undertaking nor the AHA contain sufficient details of what the KPIs will be, other than identifying in the AHA the broad criteria to which they will relate. The AHA fails to indicate the level of compliance with key performance indicators and does not address what will happen if either party fails to comply with key performance indicators.

Clause	Issue
	The AHA also fails to address the timeframe within which it is intended that the parties will agree key performance indicators and does not provide for the parties to attend dispute resolution in the absence of agreement.
4.2(b)(i)	It is unreasonable that ARTC may reject a nomination of an Operator on the basis that it is in breach of another operator sub-agreement. The Access Holder has no control over the Operator's dealings on behalf of other access holders and should not be disadvantaged as a result of something which occurs in the context of those arrangements.
4.4(b)(ii)	It is unreasonable that ARTC may reject a nomination for an Accredited Operator by reason of the fact that ARTC has terminated an agreement with the Operator in the past. If an Operator is currently accredited and has sufficient financial capacity (or provides Credit Support), the Operator should be considered for nomination. This is particularly important given that there are only two major Hunter Valley rail operators. The ability of ARTC to reject one of the two major Operators provides the second Operator with an unreasonable level of bargaining power as compared to the coal supplier.
4.4(b)(iii)	It is unreasonable that ARTC can reject an Operator based on ARTC's reasonable view that the Operator is not of sufficient financial capacity to meet potential liabilities under the OSA. ARTC can require an Operator to provide Credit Support pursuant to the terms of the OSA. This should be sufficient to overcome any concerns regarding financial capacity.
4.6(a)	In addition to stating that the Access Holder does not incur liability for Incidents, the clause should also say that the Access Holder does not incur liability for any acts or omissions of the Operator in the course of operating a Service or for the Operator's breach of the Operator Sub-Agreement.
5.2(a)	In practical terms, access to the Network will only be obtained by the Access Holder on commencement of the Operator Sub-Agreement. Accordingly, payment of the charges should only commence once the Operator Sub-Agreement has become unconditional.
5.2(c)	It is unreasonable that an Access Holder is only entitled to dispute an invoice in cases of manifest error. If the Access Holder believes that it has not been charged in accordance with the Agreement, then it should be free to dispute the invoice.
5.3(c)	It is unreasonable that an Access Holder must pay the greater of an undisputed amount or 50% of the invoice. If ARTC has concerns about an Access Holder's solvency, it can require Credit Support to be provided. If an amount is genuinely in dispute, ARTC should not require an Access Holder to pay any of that disputed amount until the dispute has been resolved or determined.
5.4(f)	Access to the Network is fundamental to what ARTC is committing to deliver. If ARTC fails to deliver Train Paths or Path Usages, then an Access Holder's damage is likely to be far greater than the TOP Rebate. Accordingly, it is unreasonable to limit ARTC's liability to this amount.

Clause	Issue
5.7(a)(iv)	The phrase "legitimate commercial factors" is not sufficiently certain and the factors to which ARTC may have regard to should clearly specified.
7.1(b), 7.2(e)	It is unreasonable that under clauses 7.1(b) and 7.2(e) the results of a review of the amount of Security required by ARTC are not subject to the dispute resolution mechanism.
7.1(e), 7.2(f)	These clauses allow ARTC to draw down on the Security immediately prior to expiry of the Security, irrespective of whether any amounts are then owing by the Access Holder under the agreement. There should be an obligation on ARTC to repay the Security drawn once the replacement Security is provided.
7.1(f), 7.2(g)	Clauses 7.1(f) and 7.2(g) should also apply to the scenario where the agreement expires. Further, it is unusual that ARTC has the right to draw down on the Security in the event that monies are outstanding on termination of the agreement. The usual practice would be for the Access Holder to be required to make payment in accordance with all relevant Invoices (unless disputed) and for the Security to be used only where payment is not made. Where amounts are disputed, the dispute resolution provision should apply and payment made once the dispute has been resolved or determined. Clauses regarding return of the Security, ARTC's right to draw down on the Security and the dispute resolution provision should all survive termination or expiry of the agreement.
8.3	There should be an express contractual obligation on ARTC to comply with the Access Undertaking and the NSW Lease.
11.1(b)(iii), 11.1(e)	Clause 11.1(e) provides that TOP Charges must be paid by an Access Holder irrespective of the fact that an Access Holder's Train Path has been varied for the remainder of the term by reason of the fact that there is a requirement to maximise use and reliability of the network. ARTC should consider use and reliability of a network when granting a Train Path and, in the event of a permanent variation in these circumstances, should not retain the right to payment of TOP Charges.
11.2(c)	It is in ARTC's discretion to waive TOP Charges applicable to Services affected by repairs, maintenance and upgrades to the network. This is not acceptable. It is in ARTC's discretion to carry out these works, albeit with reasonable steps to minimise any disruption. If there is a disruption to an Access Holder it should not be obliged to pay TOP Charges for the relevant period.
11.3	This provision is not subject to the requirements that ARTC take reasonable steps to minimise disruption to a Train Path, notify the Access Holder and Operator and use best endeavours to provide an alternative Train Path or Path Usage. NSWMC would suggest wording similar to clause 11.2(b) be inserted as well as wording acknowledging that in some circumstances Third Party Works may not be subject to long lead times or notice periods. Clause 11.3(b) should be subject to ARTC complying with these obligations.

Clause	Issue
11.4(d)(ii)	The use of the phrase "substantially consistent with" is not sufficiently clear. An objective test such as a percentage by which the load and capacity vary should be inserted.
11.4(f)	It is not acceptable that ARTC only be required to take into account the occurrence of a Force Majeure event. If a Force Majeure event has occurred, the right of ARTC to remove a Train Path for under-utilisation should not apply. Similarly, ARTC should not be entitled to remove a Train Path if the under-utilisation is attributable to the Availability Exceptions in clause 3.5(a). In addition, the clause needs to address an Access Holders' inability to utilise Train Paths as a result of suspensions to production / railing of coal whilst the Access Holder (or a related body corporate) is undertaking longwall relocations at an underground longwall mine. ARTC should not be entitled to delete Path Usages from the relevant Train Path Schedule to the extent a Train Path is not utilised by reason of this circumstance. An alternative would be to adjust the Monthly Base Path Usage downwards by agreement with the Access Holder. In the alternative, ARTC should acknowledge that an Access Provider who is temporarily unable to use a Train Path as a result of a longwall move is entitled to trade its Train Path with other access providers holding an Access Holder Agreement with ARTC. The whole of clause 11.4(a) should be subject to clause 11.4(f) (as well as subject to clause 11.4(b) as is currently drafted).
12.1(b)(ii)	This clause should only apply to the extent that clause 12.1(a)(iii) is applicable.
12.1(b)(iii)	The Rectification Response should be required to be "reasonably" satisfactory, rather than simply "satisfactory" in order that the assessment is objective.
12.1(d)	This clause says that nothing in clause 12.1(b) derogates from various of ARTC's rights and powers, including ARTC's rights or powers under the agreement. This is inconsistent with the Access Holder's right in clause 12.1(b) to suspend ARTC's rights under the agreement if ARTC is in default.
12.2(b)	The phrase "the other party ceases to carry on business" is too vague and should be deleted.
12.2(c)	This clause should be subject to a rider that the relevant default has continued for a period of 14 days.
12.3(a)(ii)	The Access Holder should be allowed to terminate the agreement if the NSW Lease is terminated or if ARTC loses its right to grant the Access Holder access to the Network.
12.3(b)	It is unreasonable to exclude the liability of ARTC if the agreement terminates as a result of ARTC losing its right to grant access to the Network or if the NSW Lease terminates, particularly if those events occur as a result of ARTC's default, negligence, wrong doing etc

Clause	Issue
12.6(a)	The words "(but in the case of a suspension, only for the term of the suspension)" should be inserted at the end of this sentence for clarity.
12.7	The take or pay charges continue to apply where ARTC terminates a Train Path Schedule (other than by reason of the conditions precedent not being met) for the remainder of the Initial Period and any Schedule Notice Period. Further, if ARTC enters into an arrangement with another party with a minimum term of 5 years for the same or substantially the same train paths as one or more of the Train Paths, there is no express obligation on ARTC to rebate the amounts paid for TOP Charges. The words "may rebate" are not reasonable. ARTC should be obligated to rebate the amount paid under clause 12.7(a) and the amount rebated should be the actual difference between TOP Charges that would have been received from the Access Holder during the Initial Term and the Schedule Notice Period but for the early termination and the amount for which ARTC has contracted under the new AHA. Further, there should be an obligation on ARTC to use best endeavours to enter into an AHA with another party and any amounts received prior to execution of the new AHA should be included in the rebate calculation.
13.1(a)	Clause (vi) is unreasonable and should be deleted. If ARTC breaches the agreement is should be liable to the Access Holder for breach of contract (subject to the remaining limitations). Similarly, the release should only apply to the events in clauses (i), (ii) and (iii) to the extent those events are not attributable to ARTC's breach of the agreement or Operator Sub-Agreement or ARTC's negligence.
13.1(b)	The words "however arising (including under this agreement, in tort including negligence, or for breach of any statutory duty)" should be added before the words "relating to Incidents". This reflects the position in clause 13.1(a).
13.3	It is unreasonable that ARTC has capped its liability to the value of the TOP Charges. This amount represents a gross under estimation of the potential loss which could be suffered by the Access Holder should ARTC not comply with the Agreement (e.g. if fails to deliver Train Paths and Path Usages, as committed).
13.4(b)	This clause should be deleted. It is unreasonable for ARTC to claim contribution for cross-claims made by the Operator (which is not controlled by the Access Holder).
15.1	The definition of Confidential Information is too narrow. This definition should be extended to all information provided by either party.
15.3(c)	The Members' Agreement for HVCCC will regulate (in great detail) the basis on which ARTC (as a member of HVCCC) can disclose to HVCCC the confidential information of the Access Holder. This clause is inconsistent with those arrangements and should be deleted.
16.1(b)	This clause should clarify that the ARTC remains responsible for the acts /

Clause	Issue
	omissions of its subcontractors and agents.
16.2	There is no obligation on ARTC to act reasonably in granting or withholding its consent unless such consent specifically falls within clauses 16.3 or 16.4. This does not seem reasonable given that the reciprocal provision requires the Access Holder to act reasonably whenever ARTC requests consent to an assignment or novation.
16.3(b)	The requirement that the Access Holder must agree to an amendment of the Train Path Schedule where permanently assigned should also apply to ARTC.
16.4(a)(iii)	The proposal that ARTC be given 2 weeks notice of a temporary trade is unworkable and would impose potential inefficiencies and capacity losses onto the coal chain. The industry requires the ability to trade and swap (subject to reasonable System Assumptions and physical constraints) on a short notice basis (for example, less than 1 day).
16.6	ARTC should be required to have regard to and rely on recommendations of the HVCCC.
19.2(b), 5.6	The parties are required to negotiate in good faith in order to retain the commercial and economic position of both parties where there is a change in law that cannot be contracted out of. However, clause 5.6 provides that the net effect of taxes should be passed on automatically. Clause 19.2 requires a carve out for clause 5.6.
21.2	The drafting of this provision is too broad. The Access Holder should only be liable for stamp duty payable on the execution of the agreement and the performance of obligations under the agreement.
Train Path Schedule 1	Clause 5 appears to envisage that the Access Holder has contracted port terminal capacity. This view is supported by clause 3.7(a)(ix)(A) of the Access Undertaking. However, there is no obligation on ARTC to grant access rights for Access Holders who have contracted port terminal capacity. This is not acceptable. The coal producers require certainty that they can transport their coal from the mine to the port in the same quantities and at the same times for which they have port access rights and shipping arrangements. There is also no right for existing mines to preserve their current capacities in applying for access under the Access Undertaking. This is unreasonable given the long-term nature of many coal supply contracts and planning for coal extraction.
Train Path Schedule 1	Clause 6 provides that ARTC's obligation to make available certain Path Usages is conditional on completion of certain projects. There does not seem to be a reciprocal obligation on ARTC to achieve completion of these projects. This is problematic for coal producers, who require commitment in order to commit to mine development, coal sale, port terminal and train haulage contracts.

11.2 Operator Sub-Agreement

Clause	Issue
1.1	**Consequential Loss** uses the term "Liability". That term is not defined. An appropriate definition should be inserted. The definition is also too broad. It is unreasonable for ARTC to exclude liability for losses which are in the reasonable contemplation of the parties, as well as economic and other special losses, particularly given that if ARTC does not deliver track access in accordance with the terms of the Operator Sub-Agreement, the Operator's only real remedy is damages.
1.1	**HVCCC** is defined so as to allow ARTC to determine the body responsible for co-ordinating the operation and capacity development of the Hunter Valley. This is not acceptable. The definition should state "Hunter Valley Coal Chain Co-ordinator or, where that body no longer exists or has been reconstituted, renamed, replaced or whose functions have been removed or transferred to another body or agency, is a reference to the body which most closely serves the purposes or objects of the first mentioned body."
1.1, 8.2(b)	**Network Control Directions**: Network Control Directions are required to be complied with by an Operator "immediately". This is unreasonable. Depending on the form of the direction, it may not be possible to comply immediately. The Operator should be required to comply "as soon as is reasonably practicable and immediately with respect to a direction relating to safety".
1.1	**Solvent**: It should not be relevant that a matter has occurred previously. It should only be relevant that the Operator is currently solvent. Further, the word "proposed" should be replaced with "formally submitted a proposal to its creditors" to ensure certainty as to when a matter is "proposed".
2.2(a)	There is no certainty in subclause (i)(B) as to what ARTC considers a "material default" and this will vary from contract to contract. ARTC should be required to act reasonably in making this determination. Also, the reference in subclause (a) to the application of clause 3.9 prior to the satisfaction of the conditions appears to be wrong.
2.2(c)	The Operator may not be able to obtain the Access Holder's endorsement within one month. A longer period should be provided for satisfaction of the conditions precedent. Further, the OSA does not address what occurs if the AHA has not reached its Effective Date when the conditions under the OSA are satisfied. The commencement of an AHA should be included as a CP.
3.1(b)	ARTC should be able to provide reasonable notice of some Availability Exceptions. It should also be made clear that the availability exceptions apply only to the extent the occurrence of the relevant exception prevents ARTC

Clause	Issue
	from delivering the particular Train Path or Path Usage in question. The availability exception in clause 3.1(b)(vii) should only apply to orders, directions or requirements of Governmental Authorities which pertain to the Network.
3.1(c)	The Operator may have more than one OSA (for example, it may service multiple Access Holders). It is proposed that the words "or pursuant to a separate, valid and binding Operator Sub-Agreement which is properly endorsed by an Access Holder holding a separate, valid and binding Access Holder Agreement" be inserted at the end of the clause.
3.4	This clause should clarify, for the avoidance of doubt, that the exercise of the Access Holder's rights under the Agreement will not be taken to interfere with or breach ARTC's Passenger Priority obligations.
3.6(b)	The reference to clause 3.1(b) appears to be erroneous. The reference should be to clause 3.6(a).
3.7	It is unreasonable to apply this accuracy of information warranty to all information irrespective of its nature. Forward looking information, such as volume forecasts, will be subject to uncertainties and should not be covered by the warranty.
3.10	There is no timeframe for the negotiation, agreement and review of key performance indicators. Further, there is no statement as to the application of the dispute resolution procedure in the absence of agreement. Relevant provisions should be included.
4.1(a)	ARTC should be required to act reasonably in determining whether the Operator can demonstrate financial capacity.
4.2(d)	This clause allows ARTC to draw down on the Security immediately prior to expiry of the Security, irrespective of whether any amounts are then owing by the Access Holder under the agreement. There should be an obligation on ARTC to repay the Security drawn once the replacement Security is provided.
4.3(b)	The amount of the Security to be provided should be subject to the dispute resolution provision. The basis on which ARTC determines whether the Operator can demonstrate financial capacity is not sufficiently transparent or detailed and the Operator should have the opportunity to dispute any amount of Security which it considers to be unreasonable.
4.2(e)	This clause should also apply to the scenario where the agreement expires. Further, it is unusual that ARTC has the right to draw down on the Security in the event that monies are outstanding on termination of the agreement. The usual practice would be for the Operator to be required to make payment in accordance with all relevant Invoices (unless disputed) and for the Security to be used only where payment is not made. Where amounts are disputed, the dispute resolution provision should apply and payment made once the dispute has been resolved or determined. Clauses regarding return of the Security,

Clause	Issue
	ARTC's right to draw down on the Security and the dispute resolution provision should all survive termination or expiry of the agreement.
5.2	There should be an express contractual obligation on ARTC to comply with the Access Undertaking and the NSW Lease.
5.4(j)	The Operator has no oversight or input into decisions by ARTC to change communications equipment. If it is to be required to replace or upgrade the system, the Operator should be permitted to have input into ARTC's decision-making process. This will also allow the Operator and ARTC to explore the most appropriate system to be put into place having regard to the needs of both parties and the expected cost of implementation. Further, ARTC should be required to ensure that, to the extent information is shared with any Communications or TMS Provider, the Communications or TMS Provider is subject to obligations of confidentiality no less onerous than those contained in the OSA.
5.5(c)	If ARTC or its servants, agents, employees, contractors or volunteers negligently cause injury loss or damage to the Operator, this should be carved out of the indemnity and ARTC should indemnify the Operator in this respect. It is not reasonable if, for example, ARTC has directed its agents to move a broken down Train that ARTC should have no liability for negligence.
8.1(b)(iv)	If the Operator complies with an Instruction and, as a result, operates outside of its Service Assumptions, it should also gain priority. It should only lose priority to the extent that the delay is caused by the fault of the Operator/Access Holder.
9.1, 9.5	The cost of a variation to the Operator's right to use a Train Path or Path Usage should be borne by ARTC to the extent that the cost results from an Instruction of ARTC that arises out of a matter that is unrelated to the Operator's acts or omissions (for example, material damage to ARTC's property, the Network or the Associated Facilities). This scenario is not dealt with in clause 9.5. Note also that clause 9.5 uses the term "Charges" which is not defined.
9.4	This provision is not subject to the requirements that ARTC take reasonable steps to minimise disruption to a Train Path, notify the Operator and use best endeavours to provide an alternative Train Path or Path Usage. NSWMC would suggest wording similar to clause 9.3(b) be inserted as well as wording acknowledging that in some circumstances Third Party Works may not be subject to long lead times or notice periods. Clause 9.3(b) should be subject to ARTC complying with these obligations.
10.1	It is not clear who will pay for the costs of an audit. If ARTC wishes to audit the Operator, NSWMC considers this should be at ARTC's cost.
10.2	The frequency of audits is not sufficiently limited by the words "as are reasonably necessary in all the circumstances". The frequency should be

Clause	Issue
	limited to four times per year.
11.5	The Operator should not be required to produce a report which was commissioned under legal professional privilege.
13.5	It is not clear at whose cost any actions under clause 13.5 must be taken. NSWMC considers that the Operator should only be responsible for the cost of compliance where the remediation requirement results directly from the activities of the Operator and then only to the extent it contributed to the issue requiring remediation. Where multiple Operators contribute to a remediation requirement, the cost should be borne by all relevant operators. If the Operator is not responsible, ARTC (or another operator) should bear the cost.
14.1(a)(ii)	The timeframe is unreasonably short. Unless there is an emergency situation, the time granted should be reasonable in the circumstances.
14.1(b)(i)	A defaulting party should be required to rectify a default within the time stated in the Rectification Notice, rather than within a "reasonable time", which is unspecified.
14.1(b)(iii)	The Rectification Response should be required to be "reasonably" satisfactory, rather than simply "satisfactory" in order that the assessment is objective.
14.1(b)(vi)	The time frame for notice for a non-safety related default is too short. The Operator will potentially need to relocate infrastructure. The timeframe for termination on notice should be extended to 1 month.
14.1(b)	If the Operator has defaulted with respect to a specific Train Path or Path Usage, the suspension should be limited to that specific Train Path or Path Usage.
14.1(e)	This clause says that nothing in clause 14.1(b) derogates from various of ARTC's rights and powers, including ARTC's rights or powers under the agreement. This is inconsistent with the Access Holder's right in clause 14.1(b) to suspend ARTC's rights under the agreement if ARTC is in default.
14.2(b),(c)	These provisions should be subject to a particular action continuing for a period of more than 14 days.
14.2(d)	This provision is unreasonable and should be deleted.
15.1-15.3	Clause 15.1(b) indicates that the general principle is to release the other party from liability for Claims arising out of an Incident, except to the extent the other party was negligent. However, the indemnities in clause 15.3 deal with liability for mere breach of the agreement. Mere breach would not necessarily constitute negligence.
15.4, 15.11	These clauses appear to cover broadly the same ground, with clause 15.11 covering a wider area of ground but clause 15.4 containing an undertaking not to make a claim for Consequential Loss. These provisions could be

Clause	Issue
	combined.
15.9	The obligation to pay should be subject to the right of the Responsible Party to dispute the amount of the claim and its liability.
16	This provision should address the possibility that a party may self insure for some risks. Further, a benchmark should be set as to what constitutes an acceptable insurer (for example, by way of S&P or Moodys rating). This would allow large corporate groups who insure group-wide to ensure they can comply, as policies are often negotiated year-by-year and using multiple insurers. There may not be scope for ARTC to approve or reject the insurer. ARTC should not need copies of extracts of insurance policies. A certificate of currency should be sufficient.
18.1	The definition of Confidential Information is too narrow. This definition should be extended to all information provided by either party.
18.3(c)	The Members' Agreement for HVCCC will regulate (in great detail) the basis on which ARTC (as a member of HVCCC) can disclose to HVCCC the confidential information of the Access Holder. This clause is inconsistent with those arrangements and should be deleted.
19.1(b)	This clause should clarify that the ARTC remains responsible for the acts / omissions of its subcontractors and agents.
20.3	**Force Majeure** is defined to exclude a breakdown or delay of any Trains or Rolling Stock operated by the Operator. However, it is possible that a breakdown or delay could have been caused by an event listed as a Force Majeure. The definition should be extended to include the words "unless that breakdown or delay was caused by an event within this definition" at the end of the sentence
22	The change in law provision should include scope for an automatic pass-through of the net effect of changes in tax laws, similar to that contained in clause 5.6 of the AHA.
24.2	The drafting of this provision is too broad. The Access Holder should only be liable for stamp duty payable on the execution of the agreement and the performance of obligations under the agreement.

11.3 Schedule A – Essential Elements of the Access Agreement

Most elements in the EEAA in relation to coal have been incorporated into the AHA or the OSA, as relevant. However, the following are additional issues which have not been adequately addressed in the AHA or the OSA:

AHA related elements:

(a) element 13: there is no express obligation on ARTC to conduct Network Control, issue Instructions, maintain and operate the Network in a non-discriminatory manner;

(b) element 14: ARTC has the ability to vary Capacity Entitlements, however, the term "appropriate circumstances" is not defined in the EEAA and is potentially very broad;

OSA related elements:

(c) element 28(j): The Operator warrants that it is properly accredited in relation to the Rolling Stock. However, it is not clear if the warranty should have extended to include a warranty as to fitness-for-purpose;

(d) element 28(k): there is no express obligation on ARTC to conduct Network Control, issue Instructions, maintain and operate the Network in a non-discriminatory manner; and

(e) element 28(t): there is no express right for ARTC to make changes to Operator Rights due to changes in the AHA or the Access Holder's nominations, except where the AHA terminates (in which case the OSA will also terminate). This requires adjustment to the definition of Train Paths in the OSA:

  (i) to indicate that the nomination has not been revoked or amended; and

  (ii) for clarity, to expressly provide that where the Train Path is amended in an AHA, the relevant amendment also applies to the definition of Train Path under the OSA.

11.4 Other Appropriate Provisions

We would suggest the inclusion of provisions dealing with the proposed Carbon Pollution Reduction Scheme (**CPRS**). Whilst it will be difficult to formulate a binding clause, a statement regarding the parties' intention as to who will take responsibility for managing emissions at particular sites and during transport could be included.

ATTACHMENTS

1. NSWMC LETTER TO ARTC DATED 13 JULY 2009 (CONFIDENTIAL)

2. ARTC LETTER TO NSWMC DATED 6 MAY

3. NSWMC SUBMISSION ON REMAINING MINE LIFE