



Level 17, 2 Lonsdale Street
Melbourne Vic 3000

GPO Box 520
Melbourne Vic 3001

tel: (03) 9290 1800

www.accc.gov.au

Our ref: 63319
Contact officer: Kristopher Morey
Contact phone: [REDACTED]

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Dr Paul Paterson, Chair
Independent Pricing and Regulatory Tribunal
Via electronic submission to IPART website

Dear Dr Patterson

NSW Rail Access Undertaking – Review of the rate of return and remaining mine life

Thank you for the opportunity to make a submission in response to IPART's Draft Report.

The attached document sets out the ACCC's support for IPART's Draft Recommendation that the NSW Government should ask IPART to undertake a review of the NSW Rail Access Undertaking. This submission does not provide comments on IPART's Draft Decisions in respect of the rate of return and remaining mine life.

The ACCC is happy for this submission to be made public on IPART's website.

If you would like to discuss this letter, please contact Kristopher Morey, Acting Director Regulated Access & Pricing on [REDACTED] or kristopher.morey@accc.gov.au.

Yours sincerely

[REDACTED]
Cristina Cifuentes
Commissioner

The ACCC has a role under Part IIIA of the *Competition and Consumer Act 2010* (CCA) to assess and administer voluntary access undertakings submitted by providers of significant infrastructure facilities with natural monopoly characteristics. Under this regime, the ACCC currently administers the Interstate Access Undertaking (IAU) and the Hunter Valley Access Undertaking (HVAU), submitted by the Australian Rail Track Corporation (ARTC).

The 2008 IAU covers the provision of access to the Interstate rail network, consisting of the mainland standard gauge track linking Kalgoorlie in Western Australia to the Queensland Border. The Interstate rail network is used to transport bulk freight, non-bulk and passenger services.

The 2011 HVAU sets the terms and conditions of access to the Hunter Valley rail network, which is used predominantly to transport coal from mines in the Hunter Valley region to the Port of Newcastle. The Hunter Valley rail network is also used to transport coal from the region's mines to domestic customers, and is used by non-coal traffic including general and bulk freight, as well as passenger services.

Prior to accepting the HVAU, the Hunter Valley rail network was regulated under the NSW Rail Access Undertaking. The ACCC accepted the current HVAU on 29 June 2011 with an original expiry date of 31 June 2016. The 2011 HVAU has been varied on several occasions, and its current expiry date is 31 December 2021.

IPART's Draft Recommendation

The ACCC strongly supports IPART's Draft Recommendation that the NSW Government should ask IPART to undertake a review of the NSW Rail Access Undertaking.

The ACCC understands that rail infrastructure owners within NSW, as defined under the *Transport Administration Act 1998* (NSW), can currently choose to submit a Part IIIA access undertaking to the ACCC, or otherwise, be regulated under the NSW Rail Access Undertaking. As was noted in IPART's Draft Report, this allows rail infrastructure owners to select regulatory regimes that optimise their interests, leaving access seekers to potentially deal with multiple regimes.¹

This can be illustrated by reference to the rate of return. In determining the relevant financial parameters, the ACCC applies a different methodology in assessing a Part IIIA access undertaking compared with IPART when making a recommendation as part of IPART's periodic review of the pricing principles in the NSW Rail Access Regime. In practice, this is likely to result in differences in the rate of return and the remaining mine life. As a consequence, rail infrastructure owners have the incentive and ability to switch and choose between Commonwealth or NSW regulation, depending on which regulatory framework is likely to provide a better outcome at a given time.

The possibility that the regulatory framework covering the service could change between the Commonwealth and NSW regimes creates significant regulatory uncertainty for industry. This affects users of the network, but also impacts on the efficient investment decisions of participants in upstream and downstream markets. Ultimately, this diminishes the efficiency and productivity of the Australian economy.

Further, the ability for a rail infrastructure owner to select the framework it operates under may form part of negotiations with industry. That is, this regulatory overlap can lead to

¹ IPART, *NSW Rail Access Undertaking – Review of the rate of return and remaining mine life: From 1 July 2019: Draft Report Rail Access*, April 2019, p. 7.

instances where industry needs to make trade-offs between regulatory certainty and the terms and conditions of access agreements or access undertakings. This provides the opportunity for a natural monopoly provider to charge a price, or earn a return, that is higher than what the regulator considers appropriate, impacting on the economically efficient operation of, use of and investment in significant infrastructure services.

The ACCC has observed the impact of this regulatory overlap during its experience administering the 2011 HVAU. In particular, if the 2011 HVAU were to expire with no replacement or varied Part IIIA access undertaking in place, the ACCC understands that regulation of the Hunter Valley rail network then would be covered by the NSW Rail Access Undertaking.² Similarly, if the 2008 IAU were to expire with no replacement or varied Part IIIA access undertaking in place, the ACCC understands that regulation of the NSW tracks that form part of the Interstate rail network then would be covered by the NSW Rail Access Undertaking.

This possibility was faced by industry in mid-2017, following lengthy negotiations to replace the 2011 HVAU. ARTC and coal miners ultimately came to a commercial agreement which was reflected in a variation to the 2011 HVAU that ARTC submitted, and the ACCC consented to on 29 June 2017. While the variation was supported by the majority of industry, submissions to the ACCC's assessment set out that industry did not consider the proposal had been effectively consulted on, and did not consider the proposed financial parameters to be appropriate. Notwithstanding, industry preferred this outcome to the alternative of allowing the HVAU to expire.³

In particular, ARTC submitted its proposed variation to the 2011 HVAU less than one month prior to its expiry date, and proposed a rate of return that was higher than what the ACCC considered efficient in its draft decision on the previously proposed 2017 HVAU. However industry expressed concern that if the 2011 HVAU expired, they would lose the provisions that had been incorporated into the 2011 HVAU since its inception in response to developments in the Hunter Valley coal industry. These include protocols that promote efficiency across the Hunter Valley coal supply chain, including processes that align operations and contracts between coal mines, below rail, above rail and port terminals.⁴ Additionally, there was uncertainty about how the access holder and above rail contractual agreements that had been established by the 2011 HVAU would transition to the NSW Rail Access Undertaking.⁵

The ACCC considers that an independent review of the NSW Rail Access Undertaking should explore the ramifications of this regulatory overlap in further detail, and consider options to remove the ability of rail infrastructure owners to choose whether to be regulated under the NSW or Commonwealth rail access regime. If IPART's Draft Recommendation is accepted, the ACCC would be interested in making a further submission to this review.

² Under section 44ZZA(2) of the CCA, a Part IIIA access undertaking must have an expiry date.

³ See for example: Hunter Rail Access Task Force, *HRATF response to 2011 Hunter Valley Access Undertaking (HVAU) variation application*, 20 June 2017; Pacific National, *Pacific National Response to the ARTC Application to the ACCC to Extend and Vary the ARTC 2011 Hunter Valley Access Undertaking*, 20 June 2017; Aurizon, *Application to vary the 2011 Hunter Valley Access Undertaking*, 20 June 2017.

⁴ See for example: Hunter Valley Coal Chain Coordinator, *Re: HVCCC Submission in response to ACCC consultation on proposed variation to the Australian Rail Track Corporation Limited 2011 Hunter Valley Coal Network Access Undertaking*, 20 June 2017; Port Waratah Coal Services, *Australian Rail Track Corporation's 2011 Hunter Valley Access Undertaking Variation – Consultation Paper*, 19 June 2017.

⁵ See for example: Hunter Rail Access Task Force, *HRATF response to 2011 Hunter Valley Access Undertaking (HVAU) variation application*, 20 June 2017.