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26 June 2009

Mr Anthony Wing
General Manager
Transport and General Prices Oversight Branch
ACCC
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Melbourne, VIC 3001
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Dear Mr Wing,

QRNational Coal's submission on the Hunter Valley Access Undertaking

QRNational Coal is the largest coal haulier in Australia, operating more than 550 train services a week throughout Queensland and New South Wales. We are a major player in the global coal economy, providing a vital link between coal mines, ports, domestic and international coal consumers.

QRNational Coal commenced operations in the New South Wales Hunter Valley in 2005. Since then, QRNational Coal has experienced rapid growth to hold a 20 per cent market share of the Hunter Valley market, delivering 19.8 million tonnes for 2007-08.

QRNational Coal welcomes the opportunity to provide comments on ARTC's Hunter Valley Access Undertaking (HVAU). The Undertaking is a critical document in defining that access to rail infrastructure is to be provided in a manner that balances the needs of ARTC, service providers, customers and the public.

Format and Content of Submission

The format of our submission is based on specific responses to the issues raised by ACCC. For the sake of brevity, we have elected not to provide a response where there is no substantial concern or where we believe the issue has less direct relevance to QRNational as a haulage provider.

Whilst we have raised general issues with the draft versions of the Access Holder Agreement (AHA) and Operator Sub-Agreement (OSA), we have refrained from providing specific drafting advice as we anticipate we will address these issues through direct negotiations with ARTC and the Access Seekers.

Summary of position on key issues

Role in the coal supply chain

QRNational Coal welcomes ARTC's acknowledgement of its role within the coal chain and supports the direct references to and proposed interfaces with the Hunter Valley Coal Chain Coordinator (HVCCC). QRNational recognises the efforts made by ARTC to ensure the HVAU aligns as much as possible with the proposed contracting terms with other parts of the supply chain, in particular that of the ports.

Proposed contract structure and negotiation process

ARTC has proposed a contract structure that enables Producers to directly contract for access rights, whilst removing the contractual obligations that specifically apply to above-rail Operators and placing these in the OSA. QRNational Coal acknowledges that there are several variations that could have been pursued by ARTC, and that the proposed relationship between the ASA and OSA is different to that being proposed by QR Network in Queensland.

On the whole, QRNational Coal is not uncomfortable with the structure proposed by ARTC, although the requirement for OSAs for each AHA will no doubt result in an increased workload for both ARTC and Operators.

An issue of critical importance to QRNational Coal is the need for a more explicit acknowledgement that as a party to the OSA, operators should be active participants in the negotiation of its development. Current drafting in the HVAU implies the OSA is negotiated predominantly by the Access Holder and ARTC.

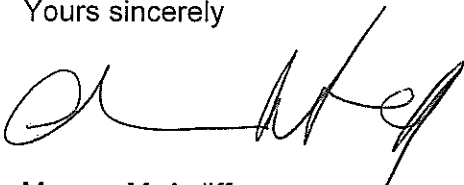
Proposed pricing

QRN Coal strongly supports ARTC's commitment to maintain pricing parity between the two services currently operating in the Hunter Valley Pricing Zones 1 and 2. Further, to enable this pricing parity, QRN Coal supports and understands from ARTC correspondence that for this pricing principle to be utilised the same gross tonne kilometre rate will be applied from commencement of the new undertaking regime for all pricing components for these services in Pricing Zones 1 and 2 at least for the first 5 years.

We would be happy to provide further detail on our position if required.

If you have any further queries or require more information please feel free to contact Michelle Yeaman, National Access Manager on telephone 07 3235 7489.

Yours sincerely



Marcus McAuliffe
Executive General Manager
QRNational Coal

Hunter Valley Access Undertaking

QRNational Coal's submission to the ACCC

26 June 2009

 **QRNational**
Coal



ARTC Undertaking ACCC Issues Paper Response

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ARTC Undertaking

ACCC Issues Paper Response

Clause 1. Preamble, Objective and Contract Structure

Issues for Comment:

1. *Are the principles enunciated in the preamble appropriate and complete? If not what should be changed?*

QRNational Coal (QRN Coal) believes it is imperative for the achievement of supply chain efficiency and a level playing field for all parties within the supply chain, that the provisions of the Undertaking be applied consistently to all access applicants and that the concepts of equity and transparency of pricing are upheld.

QRN Coal believes sufficient information is included on ARTC, its establishment, structure and responsibility as a network manager.

2. *Are the objectives appropriate and sufficiently balance the interests of ARTC, access seekers, and the public? If not what should be changed?*

QRN Coal believes the objective of the Undertaking should be to provide a fair, equitable and workable negotiation and management framework for access to rail network capacity with transparent methodologies and non-discriminatory processes that enhance the capacity of the coal supply chain. On this basis QRN Coal believes the objectives in the Undertaking sufficiently balance the interests of all parties.

3. *Is the contract structure appropriate and sufficiently balances the needs and interests of ARTC, operators, and producers and contributed to efficiency in the coal supply chain? If not, how should it be structured?*

QRN Coal believes the proposed contract structures (for different traffic types) sufficiently balance the needs of all parties.

Clause 2. Scope and Administration of the Undertaking

Issues for Comment:

1. *Is the scope of the Undertaking, including the defined network in Schedule B, clear and appropriate?*

QRN Coal has no concerns with the scope of the Undertaking.

2. *Does the Undertaking cover all facilities necessary for effective access?*

QRN Coal questions whether sidings and yards should be included in the definition of Associated Facilities and therefore form part of the facilities necessary for effective access. Without access to these facilities, operators would be constrained in providing the haulage services. In addition, the sidings and yards are included in the maps accompanying Schedule B, suggesting they are part of the regulated network.

In the future, should ARTC provide other services such as provisioning facilities, this may also need to be regulated through the Undertaking if the assets were to be included in the Regulated Asset Base.

ARTC Undertaking

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3. *Is the ten year undertaking term an appropriate duration?*

QRN Coal notes that although a term of 10 years is prescribed for the Undertaking, there are a number of mechanisms for ARTC to seek to vary the terms and conditions (including commercial viability, inconsistency with objectives, etc). It is also noted that a review of the Undertaking is required after the fifth year to consider any material impact to industry circumstances, government legislation, regulation etc.

4. *Are the review provisions appropriate (i.e. are they sufficiently transparent, inclusive and effective)?*

QRN Coal has no issues with the provisions for review.

5. *Is ARTC's proposed insurance liability sufficient in terms of monetary limit and coverage?*

QRN Coal has no points to raise in relation to this question.

6. *Is the information proposed to be published sufficient (i.e. extent of the information, relevance, timeliness)? Should other information be available?*

QRN Coal considers the information that is to be published sufficient for the commencement of the access application and negotiation process. It is noted that no timeframes are detailed in relation to the provision of the information, nor is there a requirement for ARTC to ensure the information is up to date and accurate.

Clause 3. Negotiating for Access

Introduction and Framework - Issues for Comment:

1. *Is the negotiation framework appropriate for facilitating access to the network? If not, what should be added or changed?*

QRN Coal notes that under the proposed Undertaking the Access Holder is responsible for negotiating with ARTC on the Access Holder Agreement and the Operator Sub-Agreement. This proposed approach is not only administratively impractical but also commercially inappropriate as the Operator Sub-Agreement places specific operational, commercial and legal obligations on the operator, who is not a party to the negotiation.

On this basis QRN Coal believes it is imperative that the operator is recognised under the Undertaking as the primary party responsible for the negotiation of the Operator Sub-Agreement.

2. *Is ARTC's proposed consultation with the Hunter Valley Coal Chain Coordinator an appropriate component of the negotiation process?*

QRN Coal supports consultation as it is a critical component of the negotiation process.

ARTC Undertaking

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Provision of Information – Issues for Comment:

1. *Is the scope of information sufficient to enable meaningful and effective access negotiations? If not, what should be changed?*

QRN Coal believes the scope of the information to be provided is sufficient to commence meaningful and effective access negotiation.

2. *Are the other aspects of the information provision clause appropriate?*

QRN Coal believes that the charging of reasonable costs incurred by ARTC in obtaining information that is not ordinarily available is acceptable in principle however, where requested ARTC should provide details of the costs incurred in obtaining the information.

It is our understanding that the purpose of the provision of information under clause 3.3 of the HVAU is to assist the Access Seeker develop a service specification in order to satisfy clause 3.7(a). As clause 3.3 makes reference to Applicant which is defined as a person seeking Access Rights under Section 3 it may be inferred that an Access Application needs to be submitted prior to ARTC providing the nominated information. QRN Coal suggests clause 3.3. be made clearer through the inclusion of 'or a person who intends to become an Applicant'.

Parties to Negotiation – Issues for Comment:

1. *Are the bases for negotiating with an access seeker appropriate? If not why not?*

QRN Coal has no concerns with the basis for negotiation with an access seeker prescribed in the Undertaking.

2. *Is the concept of "network exit capability", and the potential requirement for applicants to demonstrate sufficient port capacity allocation during rail access negotiation, appropriate? If not why not?*

QRN Coal has no concerns with concept of network exit capability as this is a key component of ensuring that there is contractual alignment throughout the Hunter Valley Coal Chain.

3. *Are the prudential requirements appropriate? If not why not?*

QRN Coal believes these prudential requirements are appropriate for the negotiation of a commercial contract.

4. *Are the bases and process for refusing to negotiate reasonable? If not why not?*

QRN Coal believes the bases and process for refusal are reasonable. It is also noted that the applicant has the ability to take the refusal to negotiate by ARTC to arbitration should they believe the cessation of negotiation is unreasonable.

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Confidentiality Issues for Comment:

1. *Are the confidentiality provisions sufficient to protect such information and do they facilitate the negotiation process? If not what should be changed?*

On the basis that the confidentiality provisions are upheld, QRN Coal has no concerns.

2. *Is the provision of confidential information to the Hunter Valley Coal Chain Coordinator and Rail Capacity Group appropriate and likely to facilitate negotiations? If not what should be changed?*

QRN Coal has no concerns with the concept of provision of information to the Hunter Valley Coal Chain Coordinator and Rail Capacity Group. However we believe that these groups should only be provided access to redated materials or prescribed schedules as are necessary to facilitate negotiation and not the full terms and conditions of contracts between producers and rail operators which are not key components of the below rail negotiation process.

Initial Review where Coal Access Rights are sought Issues for Comment:

1. *Is the initial review of capacity requirements useful and reasonable in terms of promoting access negotiations and facilitating efficient utilisation of the network? If not what should be changed?*

QRN Coal sees the utilisation of an independent third party as critical in the capacity determination process.

Application and Acknowledgment Issues for Comment:

2. *Are the information and acknowledgement requirements reasonable? If not what should be changed?*

QRN Coal has no concerns with the information and acknowledgement provisions of the Undertaking.

3. *Is the requirement for applicants to demonstrate sufficient network exit capability reasonable?*

QRN Coal has no concerns with the concept of network exit capability as this is a key component of ensuring that there is contractual alignment throughout the Hunter Valley Coal Chain.

Determination of Capacity and Indicative Access Proposal Issues for Comment:

1. *Is the process and timeframes for determining capacity reasonable? If not what should be changed?*

On the basis ARTC meets the timeframes proposed, QRN Coal has no concerns with the process for determining capacity. It is noted that the applicant may refer the matter to the arbitrator where they believe the time estimate for any extensions required by ARTC (beyond the initial 60 days) are excessive.

Indicative Access Proposal Issues for Comment:

1. *Is the process and timeframes for developing and providing an indicative access proposal reasonable?*

QRN Coal has no concerns with the process and timeframes outlined in the Undertaking.

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2. Is the information provided to the applicant sufficient?

QRN Coal notes that the Indicative Access Proposal (IAP) contains indicative arrangements only and does not oblige ARTC to provide Access Rights in accordance with specific terms and conditions (including charges). However, we note that negotiation is undertaken on the basis of the arrangements outlined in the IAP and in this regard, the information contained in the IAP needs to be accurate and able to be relied upon as a basis for negotiation.

Negotiation Issues for Comment:

1. Is the negotiation process reasonable and reflects an appropriate balance between the interests of ARTC and the access seekers?

QRN Coal believes the negotiation process is reasonable and reflects an appropriate balance between the parties.

2. Are the timeframes reasonable?

QRN Coal notes that the negotiation period is 3 months (as opposed to a 9 month negotiation period in Queensland) and questions whether this timeframe is sufficient to negotiate and execute an Access Holder Agreement and an Operator Sub-Agreement, particularly given that three parties are involved and the mechanics of the interfaces may be tailored on a case by case basis.

It is noted however, that the negotiation period can be extended with the agreement of both negotiating parties where required.

3. Are the bases on which ARTC may cease negotiations reasonable?

QRN Coal notes that negotiations may be ceased by ARTC at the expiry of the 3 month negotiation period. As per above, QRN Coal has concerns that the timeframe may be insufficient to negotiate and execute an Access Agreement. It is noted however, that the negotiation period can be extended with the agreement of both negotiating parties where required.

Application for Mutually Exclusive Access Rights Issues for Comment:

1. Is this a reasonable process for choosing between mutually exclusive access applications? If not how should it operate?

QRN Coal supports the concept of notification to each applicant where mutually exclusive Access Rights are being sought.

On the basis of standard access agreements (and therefore presumably a standardised level of risk) and a detailed pricing structure (with floor and ceiling prices and revenue limits) QRN Coal believes that access rights should not be allocated by ARTC on a most favourable basis.

A more equitable methodology for allocating access rights to coal customers would be on the basis of the order in which applications were sought and negotiations were commenced.

ARTC Undertaking

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The 'subject to demonstrated port capacity' in clause 3.13(b) of the HVAU effectively renders the port allocation process as the determinant of port capacity allocation in the System. However, the reference to clause 3.7(a)(ix) and subsequent reference to clause 3.7(b) can allow ARTC to allocate based on highest NPV. This arises because clause 3.7(b) allows the Applicant to demonstrate it is negotiating with the relevant Port Company (depending upon whether the Port negotiates with multiple parties for limited port capacity).

As the constrained section is subject to a Revenue Cap via Unders and Overs, clause 3.13(b) creates a bias in the capacity allocation decision to users of the unconstrained section.

Access Agreement Issues for Comment:

1. *Are the different forms of and bases on which the access agreements will be offered appropriate?*

QRN Coal has no concerns with the bases on which the access agreement will be offered.

Dispute Resolution and Arbitration Issues for Comment:

1. *Is the proposed dispute resolution process appropriate having regard to such matters as the timeframes for escalation, the sequence of escalation stages, the matters the ACCC must take into account when making a determination, the procedural powers of the ACCC and the responsibilities of the various parties involved in the process?*

QRN Coal has no concerns with the proposed dispute resolution process.

2. *Is the ACCC an appropriate arbitrator for disputes arising under the Undertaking?*

QRN Coal has no concerns with ACCC acting as arbitrator under the dispute provisions outlined in the Undertaking.

Clause 4. Pricing Principles

Given that the producers will take full financial responsibility under the new Access Agreement arrangements, QRN Coal has refrained from making comments against each of the questions raised in this section. QRN Coal responds to some of the key concepts as follows:

Pricing Principles

QRN Coal strongly supports ARTC's commitment to maintain pricing parity between the two services currently operating in the Hunter Valley Pricing Zones 1 and 2. Further, to enable this pricing parity, QRN Coal supports and understands from ARTC correspondence that for this pricing principle to be utilised the same gross tonne kilometre rate will be applied from commencement of the new undertaking regime for all pricing components for these services in Pricing Zones 1 and 2 at least for the first 5 years.

ARTC Undertaking

ACCC Issues Paper Response

The Floor Limit is defined as an objective only and not a true floor. The use of the term Access Holders and not an individual Access seeker means incremental costs could be met while an individual access holder (subject to price differentiation rules) is materially below marginal cost. In other words the floor limit does not constrain ARTC from pricing a particular service at less than short run marginal cost over the medium term. In the event that the loss capitalisation model is applied the associated losses would be recoverable from later users who would pay a stand-alone cost in excess of the building blocks model and breach the cross-subsidy principles.

The Economic Cost definition in clause 4.4 of the HVAU states that all costs are to be assessed on a stand alone basis. As the definition includes reference to allocated costs it is not clear whether stand-alone is referring to the stand-alone costs of operating the entire ARTC controlled network or whether stand-alone refers to allocation consistent with a stand-alone Hunter Valley Coal Network.

Capitalisation of Loss Methodology

QRN Coal does not support the capitalisation of loss methodology proposed by ARTC as it provides an option for the recovery, in future years, of any shortfalls ARTC has in recovering full costs. It is believed the proposed mechanism will create issues for current and future users of the network in relation to inter-generational equity.

QRN Coal would like ARTC to advise the circumstances in which it sees the loss and capitalisation mechanism being applied in the Hunter Valley Coal Network. Further QRN Coal believes that consideration should be given to removing this mechanism where relevant application for the Hunter Valley Coal Network is not provided.

Depreciation

QRN Coal notes that the original NSW Access Undertaking sets a mine life of 33 years for all of the Hunter Valley. ARTC's proposal under this undertaking is to set a mine life for each zone. QRN Coal believes that this will impact on the pricing of access and that current customers may bear disproportionately higher access charges relative to future users.

QRN Coal notes that the IPART draft report and draft decision of 15 May 2009 *Review of Rate of Return and Remaining Mine Life* from 1 July 2009 recommended a remaining mine life of 30 years. QRN Coal is supportive of the IPART recommendation based on the arguments put forward in the IPART report.

Price Structure for Coal and Non-coal Traffic

QRN Coal believes that ARTC is only seeking to recover the variable component of costs from non-coal traffic on the Hunter Valley Coal Network. However, it does not appear that there is any differentiation between coal and non-coal users in relation to train scheduling priorities and provision of access even where coal users are paying full costs. On this basis QRN Coal is not supportive of the distinction in pricing structure between coal and non-coal traffics.

QRN Coal would like the opportunity to better understand the impact of non-coal traffic and in this regard requests that ARTC provide further information in relation to the impact of non-coal traffic on coal capacity and access charges.

Unders and Overs Accounting

QRN Coal supports the proposed unders and overs methodology and the removal of the pre and post cusp pricing mechanism.

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Price Differentiation

The matters listed in clause 4.14(a) of the HVAU under 'commercial impacts' indirectly form the basis for capacity allocation. As mutually exclusive applications are assessed on Net Present Value (NPV), then differential pricing will also form the basis for allocation. Also, as the limits on differentiation of services in like markets (in clause 4.15 which is subject to clause 4.14(a)) are inclusive of the market value of the path (which can only be derived through one access seeker agreeing to pay more than another) then the limit on differentiation is effectively invalidated. This is particularly relevant to the constrained network where pricing involves the RAB floor limit. QRN Coal suggests that the principles be amended to exclude the market value of the Train Path as the basis of price differentiation on the constrained network.

Clause 5. Capacity Management

Capacity Analysis Issues for Comment:

1. *Is the capacity analysis appropriate?*

Capacity analysis is considered imperative in determining whether or not available capacity exists and therefore that access rights can be offered by ARTC and ultimately signed up by the applicant under an Access Agreement. This analysis is considered a sound basis for determining available capacity.

2. *Is the basis and process for conducting a more detailed analysis appropriate?*

QRN Coal has no concerns with the process for conducting a more detailed analysis.

It is noted that where capacity analysis is required in greater detail ARTC may charge a fee based on reasonable costs and agreed with the applicant. QRN Coal believes that where requested, ARTC should provide a breakdown of the cost involved in the more detailed capacity analysis.

3. *Is consultation with the Hunter Valley Coal Chain Coordinator appropriate and likely to promote efficient utilisation of the network?*

QRN Coal sees the consultation process with the Hunter Valley Coal Chain Coordinator as critical to promoting efficient utilisation of the network.

Capacity Reservation Issues for Comment:

1. *Is the basis for the capacity reservation fee appropriate?*

Conceptually QRN Coal has no major issues with a capacity reservation fee. Please refer below for our concerns with the proposed implementation of the fee.

2. *Is the possible imposition of the fee appropriate?*

It is noted that a reservation fee may be charged by ARTC where an Access Agreement covering Access Rights is executed more than 6 months prior to the utilisation of those rights. QRN Coal believes that a fee should only be applied in circumstances where another party is wishing, but unable to utilise those rights (including on an ad hoc basis) and no other available capacity exists to meet that demand.

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The principle being that if Capacity is Available for Use then there is no opportunity cost unless ARTC can identify an alternate revenue stream.

Further, QRN Coal believes that where there are mechanisms for ARTC to recover the amount through other provisions, the reservation fee should not apply.

Shortfall in Existing Capacity Issues for Comment:

1. *Does the treatment of capacity shortfalls by ARTC appropriately balance the interests of ARTC, operators and access holders?*

Please refer to comments below.

2. *Is the management of capacity shortfalls of seven days or less appropriate (i.e. is the intention of the provision and the shortfall management methodology appropriate)?*

It is noted under the provisions of the Undertaking that capacity remaining after the allocation to passenger services will be allocated to Access Holders at ARTC's discretion taking into account ARTC's contractual obligations under Access Agreements and any impact on the efficient utilisation of capacity and coal chain capacity. QRN Coal has no specific issue with the proposed methodology.

3. *Is the management of capacity shortfalls of more than 7 days appropriate (i.e. is the intention of the provision and shortfall methodology appropriate)?*

QRN Coal has no concerns with the proposed management of capacity shortfalls of more than 7 days.

4. *Is the management of additional capacity shortfalls appropriate?*

QRN Coal has no concerns with the proposed method for management of additional capacity shortfall.

5. *Are the provisions concerning 'system monthly true-up' specified at Schedule 2 of the access holder agreement appropriate, particularly in light of the operational requirements of producers, operators, and the coal chain as a whole?*

QRN Coal has no points to raise in relation to this question.

6. *Is the methodology and timeliness of the 'system monthly true-up' specified at Schedule 2 of the access holder agreement appropriate and likely to balance the legitimate interests of ARTC, producers, operators and the public?*

Whilst there is an argument that the Rebate should be calculated and applied at least quarterly as drafted in ARTC's previous draft, it is recognised that the provision for the 10% monthly tolerance requires that contracted paths can be delivered within a twelve month timeframe, with allowable variances across the year to a total of their annual contracted entitlement. As this does not align with a quarterly reconciliation, a quarterly rebate is not practical.

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Capacity Resumption, Relinquishment and Transfer Issues for Comment:

1. *Are the capacity resumption, relinquishment, and transfer provisions appropriate?*

Please refer to specific comments outlined below.

2. *Are the capacity entitlement provisions reasonable, particularly in regard to reduction of entitlement through under utilisation?*

Conceptually QRN Coal has no major issues with this provision. However, we believe that certain criteria should be considered prior to removal of train paths for under-utilisation. Firstly, an Access Holder must be given the ability to demonstrate, to ARTC's satisfaction, an on-going sustained requirement for the train paths that have been under-utilised. Secondly, ARTC must be able to demonstrate that it has (i) a sustained alternative demand for the train paths and (ii) a reasonable expectation of receiving a commercial benefit from the removal of the under-utilised train paths. Thirdly, this provision should not apply when the under-utilisation is as a result of ARTC not making paths available.

The Resumption provisions appear to be based on 90% of monthly usage paths over 3 consecutive months. The calculation of 90% is an exceptionally high threshold over a quarter and has no regard to non-provision of paths by ARTC to that Access Holder or more broadly to the System Availability Shortfall.

The Access Holder may also be exposed to a permanent reduction in path entitlements based on non-performance of another party through a temporary trade. This issue needs to be addressed.

The access rights also assume that the Access Holder could potentially rail up to the annual contracted entitlement prior to the end of the year via the monthly base plus monthly tolerance of 10%. For example, if the annual contract entitlement is 1200, then the monthly is 120 average plus a tolerance of 12. Theoretically, an Access Holder can meet the annual contracted entitlement within 10 to 11 months, exposing the Access Holder to the risk of resumption. The resumption provisions also include no right of dispute or a demonstration of an alternate use.

3. *Are the capacity transfer provisions appropriate, particularly in regard to the daily and long term operational requirements of producers, operators and the coal chain as a whole?*

QRN Coal has no concerns with the capacity transfer provisions in regard to the daily and long term operational requirements.

4. *Are the monthly tolerance thresholds specified in the access holder agreement appropriate, particularly in regard to the determination of the tolerance and the extent of tolerance provided to access holders?*

QRN Coal believes the monthly tolerance threshold is appropriate in regard to the determination of the tolerance and the extent of tolerance provided to access holders.

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5. *Are the provisions governing permanent train path variations specified in the access holder agreement appropriate, particularly in light of the operational requirements of producers, operators, and the coal chain as whole?*

As the Access Holder cannot withhold consent for a variation based on Passenger Priority or Network Utilisation the ACCC should confirm that ARTC has the legislative right to vary an Access Holders 'existing' train paths entitlements for passenger priority or that a party would not be subject to an uncompensated loss from a variation deemed to be necessary to maximise use of the network.

6. *Are the provisions governing temporary train path usage specified in the access holder agreement appropriate, particularly in regard to the notification requirements, limitations on load point transfer, and the operational requirements of producers, operators and the coal chain as a whole?*

The Access Holder Agreement states 'subject to being given at least 2 weeks' notice, ARTC will not unreasonably refuse its consent to a request by the Access Holder to Trade a Path Usage which does not meet the conditions set out in 15.4 (a).

QRN Coal believes that in practice a shorter timeframe would be beneficial, for example something in the order of a couple of days. QRN Coal considers this reasonable on the basis that train schedules are only locked in for a 36 hour period and to really gain a benefit from the trading provisions the Access Holders will require a more reasonable level of flexibility in trading Path Usages. It is understood that the impact on system capacity would need to be assessed before ARTC provided consent, however a two week timeframe substantially limits any benefit which the Access Holder (and ARTC in terms of system utilisation) could obtain from the trading provision.

Clause 6. Network Connections and Additions

In general, QRN Coal is supportive of the robust processes for progressing capital projects for additional and enhanced capacity. Where no comments have been included in relation to the issues raised with this Clause 6 Network Connections and Additions, QRN Coal has no concerns.

Network Connections

QRN Coal has no conceptual issues with the network connection provisions. However, for the avoidance of doubt, the Undertaking should clearly detail who 'owns' the connecting infrastructure (i.e. ARTC or the private owner?).

Rail Capacity Group

QRN Coal agrees that it is critical that the operators continue to have an active role in the Rail Capacity Group. Our experience is that there is substantial value-add in providing operator input to various technical solutions, some of which may present issues of substantial concern to operators (e.g. based on safety concerns).

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Clause 7. Network Transit Management

Issues for Comment:

1. *Is this a sufficient and reasonable approach to the planning of network transit management? Should other network management planning be included?*

QRN Coal considers that the proposed Network Management Principles are not reasonable. Whilst QRN Coal understands the requirement for passenger trains to get priority over all other traffic types, given that coal services pay for the fixed costs of the system and are required to meet time slots at the port, coal trains should have an entitlement to be given priority after passenger trains. All other traffics should be prioritised after passenger and coal services.

Clause 8. Performance Indicators

Issues for Comment:

1. *Is this a sufficient commitment in relation to performance indicators?*

The provisions in the Undertaking in relation to performance indicators provide no specific obligations in relation to timeframes, details, measurement methodologies etc. The stated focus of the KPI regime is 'management of the Hunter Valley Coal Chain', however, QRN Coal believes that the stated focus should also be placed on maximising efficiency, operational performance, impact of supply chain parties on efficiency etc.

2. *Are the performance indicators outlined in the access holder agreement appropriate and likely to promote efficient use of, and investment in, the network?*

Under the provisions of the draft Access Agreements, ARTC and the Access Holder will use best endeavours to agree key performance indicators within 6 months of the Commencement Date. It is noted that the KPI's include operator KPI's and on this basis QRN Coal believes that operators should have the right to be automatically included in any KPI discussions. This is considered imperative to ensure that meaningful and achievable levels are set which enables appropriate monitoring and review.

The operator KPI's should relate only to below rail performance, e.g. % presentation on time and compliance with daily train plans and not measures such as availability and reliability.

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Clause 9. Definitions

Issues for Comment:

1. *Are the ascribed meanings of the terms in Clause 9 reasonable and provide sufficient clarity and certainty to the operation of the Undertaking?*

QRN Coal has no comments in relation to the definitions in Clause 9.

Clause 10. Schedules

Schedule F Issues for Comment:

1. *Are the proposed terms of the parent guarantee and indemnity appropriate? If not, why not and why changes are necessary?*

QRN Coal believes the requirement for parent company guarantee should be negotiated on an individual basis, between ARTC and the Access Seeker.

Annexure A. Indicative Access Holder Agreement

ARTC has proposed a contract structure that enables producers to directly contract for access rights, whilst removing the contractual obligations that specifically apply to above-rail operators and placing these in the Operator Sub-Agreement (OSA). QRN Coal acknowledges that there are several variations that could have been pursued by ARTC, and that the proposed relationship between the Access Holder Agreement (AHA) and OSA is different to that being proposed by QR Network in Queensland.

On the whole, QRN Coal is not uncomfortable with the structure proposed by ARTC, although the requirement for OSA's for each AHA will no doubt result in an increased workload for both ARTC and Operators.

An issue of critical importance to QRN Coal is the need for a more explicit acknowledgement that as a party to the OSA, operators should be active participants in the negotiation of its development. Current drafting in the HVAU implies the OSA is negotiated predominantly by the Access Holder and ARTC.

QRN Coal has refrained from providing specific drafting advice as we believe there are key issues requiring resolution prior to more detailed drafting of the document.

Issues for Comment:

1. *Are the proposed terms of the indicative access holder agreement appropriate? If not, why not and what changes do you think are necessary?*

QRN Coal raises the following concerns (and suggested amendments) with the proposed terms of the indicative access holder agreement:

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Force Majeure definition (Clause 1.1)

It is noted that “the breakdown or delay of any Trains or Rollingstock operated by the Operator” is excluded from the definition of a Force Majeure event. QRN Coal strongly suggests that a blanket exclusion of all Train or Rollingstock breakdown or delays is neither reasonable nor appropriate.

Certainly the breakdown or delay of a single train could not reasonably be considered a force majeure event, however a circumstance where an operator’s entire rollingstock fleet was effected (e.g. the grounding of the fleet for manufacturer defect etc) must reasonably be included as an FM event. QRN Coal suggests a rewording of the definition to include rollingstock events that could be FM.

Schedule Priority (Clause 1.4)

It is noted that where a Train Path Schedule imposes additional terms, those terms will take priority over the terms of the Access Agreement to the extent that any inconsistencies arise between them.

As the wording currently stands it is impossible to assess the impact of this provision. On this basis, QRN Coal would like to see some examples of where this may occur so as the impact of these on other terms in the Access Agreement may be assessed.

Key Performance Indicators (Clause 3.12)

Please refer to comments in Clause 8 Performance Indicators above.

Calculation of ToP Rebate (Clause 5.4(f))

Under the ToP true-up provision, the Access Holders sole remedy for the failure by ARTC to make available a Path Usage or Train Paths is a ToP Rebate.

QRN Coal believes that additional provisions/penalties should apply if ARTC consistently fails to make a Path Usage or Train Path available, especially in circumstances where the Access Holder is ready, willing and available to utilise a Path Usage.

Repairs, Maintenance and Upgrading of the Network (Clause 11.2(b)(ii))

Under the provision of this clause ARTC is to notify the Access Holder and relevant operator of the works as soon as reasonably practicable. QRN Coal believes timeframes for notice should be included in this provision.

Repairs, Maintenance and Upgrading of the Network (Clause 11.2(c))

It is noted that “ARTC may at its discretion waive the ToP Charges applicable to any Services affected by the provisions of the repairs, maintenance and upgrading of the network clause”. QRN Coal believes that in circumstances where the Access Holder is ready, willing and available to utilise the train path and is prevented from doing so by repairs, maintenance or upgrades to the network, the ToP Charges should automatically be waived.

ARTC could introduce a clause that gives Access Holders the ability to agree, e.g. through RCG process to continue ToP during upgrades.

Removal of Path Usage for Under-utilisation (Clause 11.4)

Please refer to comments in Clause 5 Capacity Management above.

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Early Termination and ToP Charges (Clause 12.7(b))

Under the provisions of this clause, where within 12 months of ARTC terminating an Access Holder Agreement, they enter into or vary an Access Holder Agreement with another party (with the same or substantially similar train paths) they may rebate an amount paid which ARTC reasonably considers to be the difference between ToP Charges it would have received but for early termination and the expected take or pay charges it receives under the new or varied agreement.

QRN Coal believes that the provisions of this clause should place a positive obligation on ARTC to rebate the amount of money it receives from the new or varies agreement as a result of utilising the paths from the terminated agreement. Failure to do so would result in a double dipping on the train paths.

Temporary Trade of Path Usages (Clause 16.4)

Please refer to comments in Clause 5 Capacity Management above.

Change in Law – Access Undertaking (Clause 19.1)

On the basis that Above Rail Agreements are executed between the Mine and the Operator (outlining terms and conditions for the transport of coal from origin to destination) and may include access conditions as agreed in an Access Agreement it is neither practical nor commercial for variations in Access Undertaking terms to be retrospectively applied to existing Access Agreements.

QRN Coal believes that any variations/amendments to the Access Undertaking or Access Agreements must only apply to the negotiation of new Access Agreements or the negotiation of access rights (paths) in addition to those already the subject of an Access Agreement. Nothing in an Access Undertaking or Access Agreement should require either party to an existing Access Agreement to vary a term or provision of that agreement.

2. *Are the proposed terms of the operator sub-agreement appropriate? If not, why not and what changes do you think are necessary?*

QRN Coal raises the following concerns (and suggested amendments) with the proposed terms of the indicative operator sub-agreement:

Light Engine Movements (Clause 3.9) and definition of “Service”

It is noted from the drafting comment in the definition of “Service” and the provisions of clause 3.9 that ARTC intends to execute a separate agreement with operators for ancillary train movements.

QRN Coal is yet to see a draft of this document and notes that for day to day train operations on the network such a document would need to be executed simultaneously with the Operator Sub-Agreement. On the basis that this document has not at this point been provided to operators, QRN Coal believes that the ability to carry out light engine movements must be included in the provisions of the operator sub-agreement.

Key Performance Indicators (Clause 3.10)

Under the provisions of this clause the operator agrees, where requested by ARTC or the Access Holder, to participate in the negotiations to agree or review KPI's.

It is noted that the KPI's include operator KPI's and on this basis QRN Coal believes that operators should have the right to be automatically included in any KPI discussions. This is considered imperative to ensure that meaningful and achievable levels are set which enables appropriate monitoring and review.

The operator KPI's should relate only to below rail performance, e.g. % presentation on time (within 15 minutes) and compliance with daily train plans and not measures such as availability and reliability.

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Obligation to grant Credit Support (Clause 4.1)

On the basis that the operator has no real financial obligations under this agreement (obligations are in relation to providing and maintaining insurance and indemnification) the requirement to grant credit support is not considered to be required or relevant.

On this basis QRN Coal believes the requirements on the operator under this clause should be removed.

Removal of Rollingstock from Network (Clause 5.5(c))

Under the provisions of this clause the operator is to indemnify ARTC for the removal of rollingstock from the network, including without limitation where such injury, loss and damage is caused by the negligence of ARTC or its servant, agent, employee, contractor or volunteer.

QRN Coal accepts the concept of indemnification of ARTC for removal of rollingstock from the network; however this should not apply in circumstances where ARTC or its servant, agent, employee, contractor or volunteers are negligent. QRN Coal believes the second part of the sentence, from “..... including without limitation” should be removed.

Immediate Termination (Clause 14.2(d))

Under the provisions of this clause immediate termination applies in a number of circumstances including “if the Operator has had any of its other operator sub-agreements (with other access holders) terminated by ARTC in accordance with Clause 14.1”.

QRN Coal believes that as these are completely separate sub-operator agreements the termination of one should not automatically be grounds for the termination of an operator sub-agreement which is linked to a completely separate Access Holder Agreement and may have no impact or effect on the termination due to breach under another agreement. On this basis subclause 14.2 (d) should be removed from the clause.

Force Majeure (Clause 20.3)

It is noted that “the breakdown or delay of any Trains or Rollingstock operated by the Operator” is excluded from the definition of a Force Majeure event. QRN Coal strongly suggests that a blanket exclusion of all Train or Rollingstock breakdown or delays is neither reasonable nor appropriate.

Certainly the breakdown or delay of a single train could not reasonably be considered a force majeure event, however a circumstance where an operator’s entire rollingstock fleet was effected (e.g. the grounding of the fleet for manufacturer defect etc) must reasonably be included as an FM event. QRN Coal suggests a rewording of the definition to include rollingstock events that could be FM.

Change in Law – Access Undertaking (Clause 22.1)

On the basis that Above Rail Agreements are executed between the Mine and the Operator (outlining terms and conditions for the transport of coal from origin to destination) and may include access conditions as agreed in an Access Agreement it is neither practical nor commercial for variations in Access Undertaking terms to be retrospectively applied to existing Access Agreements.

QRN Coal believes that any variations/amendments to the Access Undertaking or Access Agreements must only apply to the negotiation of new Access Agreements or the negation of access rights (paths) in addition to those already the subject of an Access Agreement. Nothing in an Access Undertaking or Access Agreement should require either party to an existing Access Agreement to vary a term or provision of that agreement.

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3. *Are there any conceptual or operational problems or limitations that arise from the need for both an access holder agreement and an operator sub agreement?*

The way the Access Holder and Operator Sub Agreement have been designed understandably reflects the premise that the Access Holder agreement will generally be held by the Producer. QRN Coal is unsure that the structure proposed will enable the provisions to work seamlessly in the event that an operator or another party holds the rights, potentially on behalf of a number of producers.