

25 October 2010

Mr Anthony Wing
General Manager
Transport and General Prices Oversight
ACCC
GPO Box 520
Melbourne VIC 3001



Email: transport@accg.gov.au

Dear Mr Wing,

QR NATIONAL COAL'S SUBMISSION TO THE HUNTER VALLEY ACCESS UNDERTAKING

QR National Coal welcomes the opportunity to provide comments on ARTC's Hunter Valley Access Undertaking (HVAU). The HVAU is recognised as 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 issues of significance to QR National Coal. For the sake of brevity, we have elected not to provide a response to issues raised by the ACCC where there is no substantial concern or where we believe the issue has less direct relevance to QR National Coal as a haulage provider. Similarly, we have chosen not to reiterate our position on issues raised in our previous HVAU submissions to the ACCC (QR National Coal Response to ACCC Issues Paper, 29 June 2009 and QR National Coal Submission on the Draft Decision on the HVAU, 30 March 2010).

It should be noted that on the basis of tight timeframes between the release of the documentation by the ACCC and the closing date for submissions, QR National Coal is limiting its response in this submission only to the matters outlined below.

QRNational Coal's Position on Key Issues

Role in the Coal Supply Chain

QR National Coal welcomes ARTC's acknowledgement of its role within the coal chain.

QR National Coal has provided comment on the 18 matters that the ACCC has sought responses as a table at the back of this submission.

Access Agreements

QR National Coal, in its previous submissions, outlined some of its concerns in relation to the provisions of the draft Access Holder Agreement (AHA) and Operator Sub Agreement (OSA). We note that although ARTC has addressed some of these issues the vast majority are yet to be addressed.

QR National Coal previously noted the ACCC's preliminary view that the HVAU should specify with greater clarity that access seekers may seek to negotiate with ARTC for the provision of non-indicative services, and for terms and conditions of access other than as set out in the AHA and OSA (aside from key provisions in relation to the management of capacity). On this basis, ARTC has included Tier 1 (Mandatory) Provisions and Tier 2 (Negotiable) Provisions in Schedule A:1 of the draft HVAU.

As outlined in previous submissions, QR National Coal supports the ACCC's preliminary view that *"..... it is unlikely to be in the interests of Access Seekers for the HVAU to prescribe a comprehensive set of mandatory terms and conditions of access that must apply in all cases regardless of their suitability to the circumstances at hand"*.¹ We have reviewed the Tier 1 (Mandatory) Provisions and Tier 2 (Negotiable) Provisions in Schedule A:1 of the draft HVAU. We agree with the majority of the allocations of the provisions between Tier 1 and Tier 2 with the following exceptions:

1. Tier 1 (Mandatory) provision 13, IAHA Clause 11.6: Cancellations of services
There is currently no mechanism to notify an access holder that ARTC intends to remove Path Usages from the access holder's entitlement nor provide a process whereby ARTC's assessment and decision can be challenged. If this provision is to be mandatory, a notification and review process should be included.
2. Tier 2 (Negotiable) provision 6, "Access Holders paying a charge..... on a combination of actual usage (.....\$/gtkm)...) and on a take or pay basis:
QR National Coal believes that it is inconsistent to have charges for Coal Access rights being a negotiable provision in the undertaking given the commitment ARTC has given to pricing parity (refer Pricing Principles section below).

¹ Hunter Valley Coal Network Access Undertaking Draft Decision, 5 March 2010, pg 147

Access Agreements – Review of AHA and OSA

Please note that tables have been included at the back of this submission in relation to concerns with the AHA and OSA. Whilst in these tables we have raised issues with the draft version of the AHA and OSA, we have refrained from providing specific drafting advice as we anticipate we will address these issues through direct negotiation with ARTC and the Access Seekers.

Contract Structure and Negotiation Process

The HVAU, AHA and OSA detail a contractual 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. QR National Coal is not uncomfortable with the proposed structure, however an issue of critical importance 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.

QR National Coal reiterates its support for the ACCC's preliminary view that "the HVAU should give greater recognition to the ability of the Operator to take part in negotiation of an Operator Sub-Agreement, and to utilise the dispute resolution and arbitration provisions of the HVAU in the event of dispute".² QR National Coal is concerned that the current drafting in the HVAU still implies that the OSA is negotiated predominantly by ARTC and the Access Holder and believes that the ACCC's preliminary view must be reflected in the HVAU.

It should also be noted that drafting of these documents is primarily on the basis of producers holding the access rights and does not adequately consider an arrangement whereby the Operator holds the access rights on behalf of producers. It is strongly recommended that further consideration be given to drafting to accommodate such an arrangement.

Further, we recommend that in light of the fact that the Operator must comply with obligations in the AHA and assist the Access Holder, where the Operator is not the Access Holder, it is necessary for them to be involved in discussions at least about operational components of the AHA.

QR National Coal reiterates its view from earlier submissions that clause 3.12(b) only allows a 3 month negotiation period to finalise an Access Agreement, unless extended by mutual agreement. Given the complexity of the Agreements, defining a longer initial negotiation period in the HVAU may be prudent.

² Hunter Valley Coal Network Access Undertaking Draft Decision, 5 March 2010, pg 15

Application for Mutually Exclusive Access Rights

QR National Coal reiterates its view from earlier submissions that a more equitable approach to resolving mutually exclusive Access Applications than is currently contemplated by clause 3.13(b) would be based on order in which applications were received rather than most favourable to ARTC (given likely comparable pricing, risk, etc).

Pricing principles

As noted in our previous submissions, QR National Coal strongly supports the maintenance of pricing parity, as committed to by ARTC, between the two services currently operating in the Hunter Valley. ARTC recognises this commitment to coal companies and above rail operators at section 1.2 of its submission dated 31 March 2010 where it states:

“The timetable for determining the efficient train configuration (the Indicative Service) needs to take into account the factors listed in section 4.16(b) of the HVAU and ARTC’s commitment to coal producers and operators to maintain pricing parity for the two key existing train types for five years from May 2009.”

Further, QR National Coal has a written commitment from ARTC (refer Attachment A) that this pricing principle will apply from the commencement of the new undertaking regime and for a period of at least five (5) years. Our understanding is that a letter containing the same commitment has been provided to all coal companies and above-rail operators in the Hunter Valley.

On this basis, QR National Coal notes that no five (5) year time period has been included in the HVAU, as per ARTC correspondence, and requests that this point be rectified in accordance with this correspondence on which QR National Coal has relied.

Further, QR National Coal is supportive of the ACCC’s draft decision which concluded that:

1. *“... the ACCC considers that the pricing proposed in the Undertaking is only likely to be appropriate subject to the ARTC having an obligation in the Undertaking to determine an efficient train configuration within a set period and an obligation to set pricing for all Services on the basis of the efficient train configuration once this has been determined.”*

2. the process to develop prices for different train configurations must reflect ARTC's commitment to producers and operators in relation to pricing parity.

*"while the ACCC acknowledges the importance of incentives to maximise the throughput of the Hunter Valley Coal Chain and for efficient track expansion, it also recognises the importance of not exposing access seekers to excessive regulatory risk and of recognising the public commitment ARTC has made about pricing. The ACCC notes that use of the proposed gtkm-based measure is in accordance with the charging methodology employed by ARTC prior to the commencement of the Undertaking. ARTC also indicated in a letter to the NSWMC dated 6 May 2009 that it was committing to not changing the basis of its [gtkm based] pricing for a period of not less than five years."*³

3. in the absence of a current determination of an efficient train configuration, that maintaining the status quo is, at least in the short term, likely to be appropriate and that *"in this respect the ACCC considers that the use of gtkms to apportion fixed costs sends no clear pricing signal to run any particular train configuration and that this is likely to be appropriate where the efficient train configuration is not yet known"*.⁴

In accordance with previous submissions, QR National Coal also notes and is supportive of the ACCC's assertion that it considers that *"it is possible that the longer heavier trains may not be the efficient train configuration for the overall Hunter Valley Coal Chain"*.⁵

Conclusion

QR National Coal believes that a material number of significant issues remain with the HVAU and its associated Agreements (AHA, OSA). Should similar issues be raised by other respondents to the ACCC's Consultation Paper, QR National Coal would be pleased to contribute to further consultation or industry reviews in order to conclude the Hunter Valley Access Undertaking.

³ Hunter Valley Coal Network Access Undertaking Draft Decision, 5 March 2010, pg 611

⁴ Hunter Valley Coal Network Access Undertaking Draft Decision, 5 March 2010, pg 611

⁵ Hunter Valley Coal Network Access Undertaking Draft Decision, 5 March 2010, pg 611

We would be happy to provide further detail on our position in relation to this submission if required. Please feel free to contact Glenn Baird, National Access Manager on telephone (07) 3235 7849.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Marcus McAuliffe', written in a cursive style.

Marcus McAuliffe
Executive Vice President & Chief Executive Officer
Coal Operations
QR National

Comments in Relation to the ACCC Consultation Paper (16 September 2010) Matters

Matter #	Topic	Comment
2.1	Extensions and Connections	QR National Coal has no issues with the proposed changes to section 6.1. However, for the avoidance of doubt, the HVAU should clearly detail who “owns” the connecting infrastructure ie. ARTC or the private owner.
2.2	Alignment Measures	Refer comments above under “Access Agreements” regarding the appropriateness of the proposed provisions and in particular, the provisions to be included / excluded in each category.
2.3	Rate of Return (WACC)	QR National Coal has no comment to raise in relation to this matter at this time
2.4	Limit to Price Increases	QR National Coal has no comment to raise in relation to this matter at this time
2.5	Determination of the efficient train configuration, indicative service description and indicative access charges	<p>1. Is the process for determining the efficient train configuration appropriate</p> <ul style="list-style-type: none"> a. QR National Coal is concerned that the process for determining the efficient train configuration does not include access holders or operators b. We believe that this reduces the effectiveness and integrity of the determination of the end efficient train configuration c. Whilst there can be expected to be a consultation process completed by the ACCC following submission and requested for approval under clause 4.16(b), QR National Coal assert that earlier engagement of all Hunter Valley Coal Chain stakeholders would be a more appropriate process d. Timing: <ul style="list-style-type: none"> i. Clause 4.16(b) only obligates ARTC to submit an efficient train configuration for approval within 4 years of the commencement of the HVAU. ii. This provision is not fully aligned with the ACCC’s Draft Decision which suggested “ARTC should be required to submit an efficient train configuration to the ACCC for effective consultation with access seekers within three to four years of the

Matter #	Topic	Comment
		<p>commencement of the undertaking”⁶.</p> <p>iii. Given the critical importance of this determination to the access pricing of the Hunter Valley rail network, QR National Coal believes that requiring this submission only 1 year prior to the expiry of the current commitment to pricing parity may be insufficient to allow full consultation and agreement by all stakeholders particularly if there has been no involvement prior to this time</p> <p>iv. Further, QR National Coal believes that where Operators are not the Access Seeker they must be included in this consultation process</p> <p>2. Are the processes for determining the Indicative Access Charges and the Indicative Service description appropriate</p> <p>a. QR National Coal finds it difficult to comment on this specific matter due to a lack of detail contained in clause 4.16 on the actual determination of the Indicative Access Charges</p> <p>b. Clause 4.16(d) provides that ARTC will submit proposed characteristics to the ACCC for the efficient train configuration, and lists 4 characteristics, QR National Coal suggests that there may be additional characteristics that industry stakeholders, access holders and operators believe should be considered but ARTC is under no obligation to include</p> <p>c. Clause 4.16(d) also provides that ARTC will submit the indicative access charges and “supporting documentation.” Without knowing the content and extent of the supporting documentation, QR National Coal can not assess whether the processes are appropriate.</p> <p>3. How should the Indicative Access Charges, once determined, be implemented, including in relation to existing Access Holders</p> <p>a. QR National Coal remains supportive of the ACCC’s Draft Decision that “pricing based on the efficient train configuration must apply to all coal services in operation on the Network irrespective of when the access contracts were entered into”⁷.</p>

⁶ Hunter Valley Coal Network Access Undertaking Draft Decision, 5 March 2010, pg 612

Matter #	Topic	Comment
2.6	Aspects of the Financial Model	<p>b. We have removed the words “must become effective within four to five years from the Commencement of the Undertaking and”⁸ above due to its conflict with ARTCs commitment and guarantee to pricing parity for at least 5 years as referenced in the main body of our submission and attached as Attachment A.</p> <p>c. QR National Coal asserts that this timeframe must be reflected in the provisions of the HVAU</p>
2.7	Capacity Management	QR National Coal has no comment to raise in relation to these matters (2.6.1, 2.6.2 and 2.6.3) at this time
2.8	Additional Capacity	<p>QR National Coal has no comment to raise in relation to this matter at this time</p> <p>1. Is the proposed capital expenditure framework in section 6 appropriate</p> <p>a. QR National Coal has no comment to raise in relation to this matter at this time</p> <p>2. Is the RCG process appropriate</p> <p>a. QR National Coal are supportive of the RCG process as outlined and believe it is appropriate except that it is unclear whether endorsement by the RCG is achieved by majority of voting members or if unanimous endorsement is required. We suggest that this requirement for endorsement specifically defined</p> <p>b. QR National Coal understand the rationale for non access holding operators to not have voting rights but would encourage ARTC to limit the occasions when consultations or other stakeholder interactions are restricted to voting members only to maximise industry engagement in the development of the Hunter Valley network.</p>

⁷ Hunter Valley Coal Network Access Undertaking Draft Decision, 5 March 2010, pg 612

⁸ Hunter Valley Coal Network Access Undertaking Draft Decision, 5 March 2010, pg 612

Matter #	Topic	Comment
		<p>3. Is the equitable reconciliation approach to access seeker funded capital contributions appropriate</p> <p>a. QR National Coal has no comment to raise in relation to this matter at this time</p>
2.9	Performance measurement and incentives	<p>1. Are the provisions relating to performance indicators appropriate</p> <p>a. QR National Coal has no concerns with the performance indicators specified as Schedule D</p> <p>b. We believe that the indicators in Schedule D may need supplementing, from time to time, either permanently or temporarily, to provide additional focus on system performance issues</p> <p>c. QR National Coal suggest that such additional indicators could be provided for by specifying that the RCG must approve any request for additional indicators before ARTC are obliged to report them.</p> <p>d. Clause 8.2(c) suggests that Operators will only be involved at the request of the Applicant (future access holder) or if ARTC “reasonably considers necessary.” QR National Coal reiterate our long standing view that non involvement of operators in the negotiation of AHA’s and, more particularly, OSA’s introduces significant risk if the operational provisions and performance requirements of the agreements do not have appropriate operational consideration during their negotiation.</p> <p>2. ARTC’s provision of incentive mechanisms at a later date</p> <p>a. QR National Coal has no comment to raise in relation to this matter at this time</p>
2.10	System Assumptions	QR National Coal has no comment to raise in relation to this matter at this time
2.11	HVCCC consultation	QR National Coal support the principles in Schedule F as appropriate and likely to be effective
2.12	Access rights under the IAHA	QR National Coal has no comment to raise in relation to this matter at this time
2.13	TOP rebate, true up test and	QR National Coal has no comment to raise in relation to this matter at this time

Matter #	Topic	Comment
	liability regime	
2.14	Accountability for performance measures	QR National Coal has no comment to raise in relation to this matter at this time
2.15	Assignment and trading	QR National Coal has no comment to raise in relation to this matter at this time
2.16	Changes over time	QR National Coal has no comment to raise in relation to this matter at this time
2.17	Transition and Implementation	QR National Coal has no comment to raise in relation to this matter at this time
2.18.1	Measures for non-coal Access	QR National Coal has no comment to raise in relation to this matter at this time
2.18.2	Domestic Coal	<p>The current HVAU does not include Domestic Coal within the planning framework and may therefore lead to an inefficient outcome.</p> <p>As the same rail infrastructure and rollingstock is used to perform the export and domestic tasks, QR National Coal believe that the Access Undertaking should ensure that alignment and coordination of coal haulage to domestic and export exit points on the Hunter Valley network.</p>
2.18.3	Other Comments re HVAU, IAHA and/or OSA	QR National Coal has tabulated other comments regarding the IAHA and OSA on the following pages

Comments in Relation to the Draft Access Holder Agreement

Clause #	Topic	Comment
1.1	“Associated Facilities” definition	QR National 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.
1.1	“Force Majeure” definition	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. QR National 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. Suggest including wording such as “Rollingstock failure or breakdown where such failure or breakdown could not have been prevented by good engineering practice”.
1.1	“Terminal Operator” and “Port of Newcastle” definitions	“Terminal Operator” is defined as an operator of a coal terminal at the Port of Newcastle however, Port of Newcastle is not defined. For clarity, the Port of Newcastle needs to be defined and a definition for NCIG included in Clause 1.1.
1.1	“Key Performance Indicator” definition	On the basis that KPI’s will impact on the services run by operators, it must be acknowledged that KPI’s cannot be set without negotiation and consultation with all affected parties (i.e. Access Holders and Operators).
1.1	“Network Exit Capability” definition	Definition requires clarification as it is currently ambiguous in relation to the time period and origin of haul to which it applies.

Clause #	Topic	Comment
1.1	"System Assumptions Document" definition	On the basis that HVCCC includes Terminal Operators and ARTC, we believe that Operators and other services providers should be explicitly included in the consultation on the Systems Assumption Document.
1.4	Schedule Priority	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, QR National 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.
1.6	Amendment to Consumer Price Index	Current wording requires agreement of the parties to the Access Holder Agreement to a different index for escalation where the CPI is no longer published. This is not considered appropriate on the basis that it may result in different escalation index arrangements for each Access Holder Agreement which must not occur when access rates are regulated. It is recommended that any new index for escalation should apply to all agreements and should therefore be incorporated into the HVAU and agreed through consultation with all Access Holders.
3.3	Determination of Monthly Tolerance Cap and Tolerance	It is questioned how fair allocation of tolerance to all Access Holders will be ensured when some producers will have a monthly allocation and others will have a quarterly allocation of Base Path Usages. This arrangement has not been considered in the current drafting and needs to be clarified.
3.12	Light Engine Movements	Clarity is required in relation to this clause and the definition of "Train Path" as to the difference between light engine movement and ancillary Train movement.
3.13	Key Performance Indicators	Provision for Operators to be included in any discussions on the setting and monitoring of KPI's must be included. Current drafting only includes Operator in discussions on KPI's which may be Operator KPI's, after the initial decision on KPI's has been made.

Clause #	Topic	Comment
3.14	Network Exit Capability Requirement	Refer to comments in relation to clause 1.1 definition for “Network Exit Capability” above.
4.4 (b)(iv)	Nomination of New Operator	Credit Support and the amount of such support by the Operator must be considered on a case by case basis rather than included as a blanket requirement. Further, on the basis that the Operator has no real financial obligations under the AHA or OSA, credit support should not be required.
5.4 (a)	Calculation of TOP Rebate and Ad-Hoc Charge Rebate	Query in relation to how this clause will work in practice. Current wording implies that where an Access Holder has more than one operator the rebate will be calculated separately (i.e. based on the paths operated by each Operator individually). It is questioned whether this is how the clause is intended to operate.
5.4 (h)	Quarterly True-up of TOP Charges	Under the TOP true-up provision, the Access Holders sole remedy for the failure by ARTC to make available a Path Usage or Train Path is a TOP Rebate. QR National Coal believes that additional provisions/penalties should apply if ARTC <u>consistently</u> 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.
7	Credit Support	Clauses in relation to return of security, ARTC’s right to draw down on security and the dispute resolution provisions must all survive termination or expiry of the Agreement. These provisions must be amended to allow for this arrangement.
7.2 (g)	Obligation to Grant Security – Payment Default	It is not considered acceptable for ARTC to draw down on security in the event that monies are outstanding on termination of the agreement. It would be more appropriate for invoices to be issued for any outstanding monies, particularly in the first instance.
11.1 (a) and (b)	Permanent Variation to Train Paths	There is a contradiction in the drafting in clauses 11.1 (a) and 11.1 (b). Clause (b) states for the remainder of the term or such other duration, which contradicts (a) which refers to a permanent variation of path. For the avoidance of doubt, the wording in these provisions needs to be made

Clause #	Topic	Comment
11.2 (b) (ii)	Repairs, Maintenance and Upgrading of the Network	consistent. Under the provision of this clause ARTC is to notify the Access Holder and relevant Operator of the works as soon as reasonably practicable. QR National Coal believes timeframes for notice should be included in this provision.
11.5 (c)	Use of Non-Compliant Services	This clause needs to be amended to include the requirement for the Operator to agree to be able to meet any changes to Service Assumptions prior to such change being endorsed by ARTC. The current wording of the provision could result in the inclusion of Service Assumptions into the Agreement which are operationally or commercially impractical or unachievable for the operator who would – without recourse - be responsible for meeting them.
12.3	ARTC Termination Rights	This clause should be amended to enable: (a) the Access Holder to terminate the Agreement if ARTC's lease is terminated or if ARTC loses its right to grant access to the network; and (b) ARTC's liability must not be excluded particularly if these events occur as a result of ARTC's default, negligence or wrongdoing.
15	Confidentiality	Permitted disclosure provisions must be amended to permit disclosure of confidential information to Shareholding Ministers, Directors, Board Members etc.
19.1	Change in Law - Access Undertaking	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. QR National 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

Clause #	Topic	Comment
21.1	General -Variations	<p>an Access Undertaking or Access Agreement should require either party to an Existing Access Agreement to vary a term or provision of that agreement.</p> <p>The current drafting of this provision (particularly in light of Clause 2.16 under which the AHA and OSA form one agreement) would enable the Access Holder and ARTC to vary the agreement. The implication of this provision is that any such variations could have a significant impact on the Operator, without needing the Operator's agreement or prior written consent. This clause needs to be amended to include the Operator in any discussions to vary the agreement which impact on the Operator.</p>
Other	Changes to train schedule and implications for pricing	If an Operator introduces new rollingstock or an Access Holder changes Operator, ARTC may need a prompt for rate and path entitlement review.

Comments in Relation to the Draft Operator Sub-Agreement

Clause #	Topic	Comment
1.1	"Consequential Loss" definition	QR National Coal queries the reasoning behind the varying definition for this defined term between the draft Access Holder Agreement and this draft Operator Sub Agreement.
1.1	"Path Usage" definition	QR National Coal queries the reasoning behind the varying definition for this defined term between the draft Access Holder Agreement and this draft Operator Sub Agreement.
1.1	"Service" definition	QR National Coal queries the reasoning behind the varying definition for this defined term between the draft Access Holder Agreement and this draft Operator Sub Agreement.
1.1	"Service Assumptions" definition	QR National Coal queries the reasoning behind the varying definition for this defined term between the draft Access Holder Agreement and this draft Operator Sub Agreement.
1.1	Additional definitions required	QR National Coal notes that definitions are required for "TPA" and "Train Path Schedule".
1.4	Amendment to Consumer Price Index	Refer to comment in relation to Clause 1.6 in the table for the Access Holder Agreement above.
3.6 (b)	Early and Late Service	QR National Coal notes that the clause reference in this clause refers to "notwithstanding clause 3.1 (b)". This clause reference should refer to "notwithstanding clause 3.6 (a)".
3.8	Manner of Control of the Network by ARTC	QR National Coal queries the reason behind the varying terms and conditions on this provision between the draft Access Holder Agreement and the draft Operator Sub Agreement.
3.9	Light Engine Movements (and definition of "Service")	<p>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.</p> <p>QR National 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.</p> <p>QR National Coal also believe that, in order to provide the above rail haulage services to access holders, there is a level of non revenue (coal hauling) rollingstock movement which operators must</p>

Clause #	Topic	Comment
		<p>conduct on the network to facilitate service delivery. Given that principle, QR National Coal assert that ARTC's intention to contract separately with operators, and charge separately at non-coal rates, compelling operators to then devise processes to estimate, reconcile and recover these costs from their customers (producers), will be both inappropriate and administratively burdensome for operators and producers alike.</p>
3.10	Key Performance Indicators	<p>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.</p> <p>It is noted that the KPI's are likely to include operator KPI's and on this basis QR National 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.</p> <p>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.</p>
4.1	Obligation to Grant Credit Support	<p>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.</p> <p>On this basis QR National Coal believes the requirements on the Operator under clause 4 should be removed.</p>
5.5 (c)	Removal of Rollingstock from Network	<p>Under the provisions of this clause the Operator is to indemnify ARTC for removal of rollingstock from the network, including where such injury, loss and damage is caused by the <u>negligence of ARTC or its servant, agent, employee, contractor or volunteer.</u></p>

Clause #	Topic	Comment
		<p>QR National 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. QR National Coal believes the second part of the sentence, from “ including where such loss” should be removed.</p>
9.3 (c)	Repairs, Maintenance and Upgrading of the Network	<p>It is noted under the provisions of this clause that ARTC will consult with the operator a reasonable time before taking possession of the network. QR National Coal believes that a positive obligation should be placed on ARTC to not only consult with the operator on the possession itself, but also consult over the long term network maintenance possession plan.</p>
10.1 (b)	Audit Obligations	<p>QR National Coal notes the inclusion in this provision that ARTC is responsible for the costs of any audits undertaken by it under the provisions of this clause. A positive obligation must also be placed on ARTC under this provision for it to accept any risk associated with audits undertaken by it under the provisions of this clause.</p>
11.5	Operator's Reports	<p>QR National Coal notes that a reciprocal clause (as per this clause 11.5) should be included into this agreement requiring ARTC to provide a report to the Operator for incidents affecting the Operator which involve ARTC.</p>
14.1 (a) (i)	Termination for Breach	<p>QR National Coal also notes the requirement to amend this clause such that the operator is not required to provide reports which have been commissioned by it under legal professional privilege.</p> <p>Under the provisions of this clause there is a requirement for the operator to pay monies (including interest) for overdue payments. On this basis and for the avoidance of doubt, QR National Coal requests the inclusion of provisions relating to the calculation of interest (similar to clause 5.7 in the draft Access Holder Agreement).</p>
18.1	Acknowledgement of Confidentiality	<p>QR National Coal requests that any information provided to the Access Holder under the provisions of this clause must only be provided to the Access Holder by the relevant Operator at its discretion</p>

Clause #	Topic	Comment
		or with its prior written consent.
18.3	Permitted Disclosure	<p>Refer to comment in relation to Clause 15 Confidentiality in the table for the Access Holder Agreement above.</p> <p>QR National Coal requests the amendment of subclause 18.3 (c) such that the provision of information to the HVCCC is “subject to the confidentiality obligations given by the HVCCC and its members”.</p>
19.2	Assignment or Novation by the Operator	<p>It is noted that under the provisions of this clause, the Operator may not licence, assign or novate this agreement without the prior written consent of both the Access Holder and ARTC. It is further noted that ARTC’s consent must not be unreasonably withheld. QR National Coal asserts that “such consent must not be unreasonably withheld”, must also be added to the provision in relation to the Access Holders consent.</p>
20.3	Force Majeure	<p>Refer to comment in relation to Clause 1.1 “Force Majeure” definition in the table for the Access Holder Agreement above.</p>
22.1	Change in Law – New and Varied Access Undertaking	<p>Refer to comment in relation to Clause 19.1 Change in Access Undertaking in the table for the Access Holder Agreement above.</p>
24.7	General – Other Agreements	<p>QR National Coal notes that under the provisions of this clause, the “whole agreement” includes an agreement which covers ancillary train movements. It is noted that QR National has not yet been provided with a draft copy of this agreement and it is therefore considered inappropriate for this document to be automatically included as part of this agreement.</p>

ARTC

AUSTRALIAN RAIL TRACK CORPORATION LTD

5 May 2009

Warren Gould
Executive Manager NSW Coal
QR Coal
PO Box 21
Merewether NSW 2291

Email: warren.gould@qr.com.au

Dear Warren

Since the lodgement of ARTC's Hunter Valley Access Undertaking [HVAU] with the ACCC a number of queries in relation to pricing have been raised by industry participants.

As such, and in order to assist in the process of decision making relating to a number of investments the following clarification is being provided.

ARTC's intention is for access pricing, from commencement of the HVAU, to be consistent between the two primary types of services currently operating in the Hunter Valley Pricing Zones 1 and 2. These services being a 91 wagon train and a 74 wagon train, both configured to operate to applicable section run times and utilising at least 30 tonne axle loads.

To enable this to occur the same gross tonne kilometre rate will be applied from commencement for all pricing components for these services in Pricing Zones 1 and 2. This will provide parity in the access charges for operators of these service types.

ARTC will further commit to maintain parity in pricing between these services for a period of not less than five years, subject to normal annual pricing reviews.

Beyond this period any re-configuration of pricing structures for these services will be undertaken in accordance with the HVAU requirements and with extensive industry consultation and ACCC oversight. It is envisaged in the HVAU that access pricing will ultimately be referenced to a service or services that will provide for delivery of optimum utilisation of coal capacity.

I trust that this provides some clarification to the principles and process provided for in ARTC's HVAU.

Yours sincerely



Simon Ormsby

Cc: Denise McMillan – General Manager Hunter Valley

