



AUSTRALIAN RAIL TRACK CORPORATION LTD

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Queensland Competition Authority
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QR Network 2010 Access Undertaking Proposed Standard Access Agreements

ARTC Submission

Thank you for the opportunity to make a submission with respect to the Standard Access Agreements (SAA) proposed by QR Network. ARTC's submission is attached. The preparation of this submission follows substantial participation by ARTC with regard to Queensland Competition Authority (Authority) consultations in relation to the QR Network 2010 Access Undertaking and previous access undertakings to apply to the rail network in Queensland.

You would be aware that the Australian Competition and Consumer Commission (ACCC) accepted ARTC's 2011 Hunter Valley Coal Network Access Undertaking (2011 HVAU) on 29 June 2011. ARTC commenced operating in accordance with the 2011 HVAU on 1 July 2011.

ARTC has been working with industry stakeholders and the ACCC for over three years in order to develop the 2011 HVAU, designed to increase transparency and certainty of access and performance on the network. It will enable ARTC to provide certainty of capacity for coal producers and for greater alignment across the coal chain. For ARTC it provides a strong contractual foundation for our ongoing infrastructure investment in the Hunter Valley coal network.

The 2011 HVAU sets out the basis upon which rail track capacity will be developed and allocated to coal producers seeking to export coal internationally through the port of Newcastle, as well as for domestic movements. The Hunter Valley coal network is also used

by regional passenger and commuter services as well as for general freight and agricultural train movements. The 2011 HVAU seeks to strike a balance between these competing uses of the network.

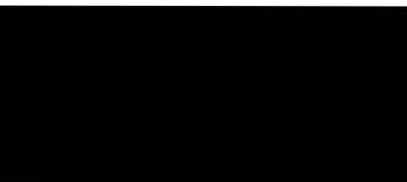
Importantly, acceptance of the 2011 HVAU paves the way for direct contracting for access to the network by coal producers who then obtain the services of a rail operator to haul coal from Hunter Valley and Gunnedah Basin mines to port.

With acceptance of the 2011 HVAU, ARTC has commenced a structured process by which coal producers will be able to nominate and secure capacity to meet requirements for the next 10 years. This process will involve the negotiation of Access Holder Agreements (AHA) and associated Operator Sub-Agreements (OSA) with producers and their rail operators over the next 6 months.

ARTC's submission will be focussed on comparing and contrasting the proposed SAA with the contractual arrangements and structure (involving the AHA and OSA incorporated in the 2011 HVAU, rather than on the detail of the agreements and the balance of interests between respective parties. This is better addressed in submissions made by those parties.

The submission contains no information considered 'commercial-in-confidence'.

For further information regarding the preparation of this submission, could you please contact myself on (08) 82174314, sormsby@artc.com.au or Mr. Glenn Edwards, (08)82174292 (Ph), gedwards@artc.com.au.



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QR Network 2010 Access Undertaking (2010 AU)

Proposed Standard Access Agreements

ARTC Submission

QR Network has submitted to the Queensland Competition Authority (Authority) proposed Standard Access Agreements, being a requirement under the 2010 AU. ARTC notes that QR Network has prepared and submitted:

- A Standard Access Agreement (End User Access Agreement) (EUAA) for users of rail haulage services by which such users gain access rights without liability for above rail operational issues; and
- A Standard Access Agreement (Train Operations Agreement) (TOA) for rail operators nominated by a user holding an EUAA, under which the rail operator can access the user's access rights subject to assuming liability and obligations in relation to above rail operational issues.

ARTC notes that the primary application of the 2010 AU would be to the networks forming part of the export coal supply chains operating in central Queensland. Over the last 3 years, ARTC has been developing, in consultation with relevant stakeholders, its Hunter Valley Coal Network Access Undertaking (2011 HVAU), with primary application to the Hunter Valley export coal supply chain. The main focus of the consultation has been around providing for greater alignment in the commercial (contractual) arrangements between coal producers and infrastructure providers, primarily in the areas of capacity development and allocation, in order to increase certainty around access to the coal supply chain.

The consultation that has occurred with stakeholders and the ACCC has resulted in substantial changes to the access undertaking originally contemplated by ARTC. Many of these changes have resulted from the pursuit by the coal industry (as well as ARTC and the ACCC) of the long term solution contemplated in the 2009 Greiner Review of the Hunter Valley coal supply chain. Fundamental to the long term solution is an increase in certainty for access to both the rail network and port facilities needed to underpin capacity investment. Areas that have undergone substantial change in this regard have been described in a previous ARTC submission¹ to the Authority.

¹ QR Network 2009 Draft Access Undertaking, ARTC Submission to the Draft Decision by the Authority.

The 2011 HVAU was accepted by the ACCC on 29 June 2011 and puts in place a framework for long term take-or-pay track access agreements directly with coal producers and other access seekers. These agreements which will underwrite long term investment in track capacity (to meet forecasted export coal demand) depend on coal producers having in place long term capacity commitments with terminal operators.

ARTC recognises and supports the need for contractual alignment across the Hunter Valley coal chain which will assist in increasing certainty of access for coal users and promote efficient investment in capacity expansion. In developing the detailed arrangements for capacity allocation, management and investment in the 2011 HVAU, ARTC has sought to maintain sufficient flexibility to cater for the access and capacity arrangements that may be sought by other service providers. ARTC is seeking to enable **working** alignment and consistent access arrangements between providers of different types of infrastructure and services, rather than uniform arrangements.

Contracting approach under the 2010 HVAU

As part of the development of, and consultation on, the 2011 HVAU, ARTC developed a contractual model that sought to separate coal access rights from operations. This was consistent with outcomes of the 2009 Greiner Review.

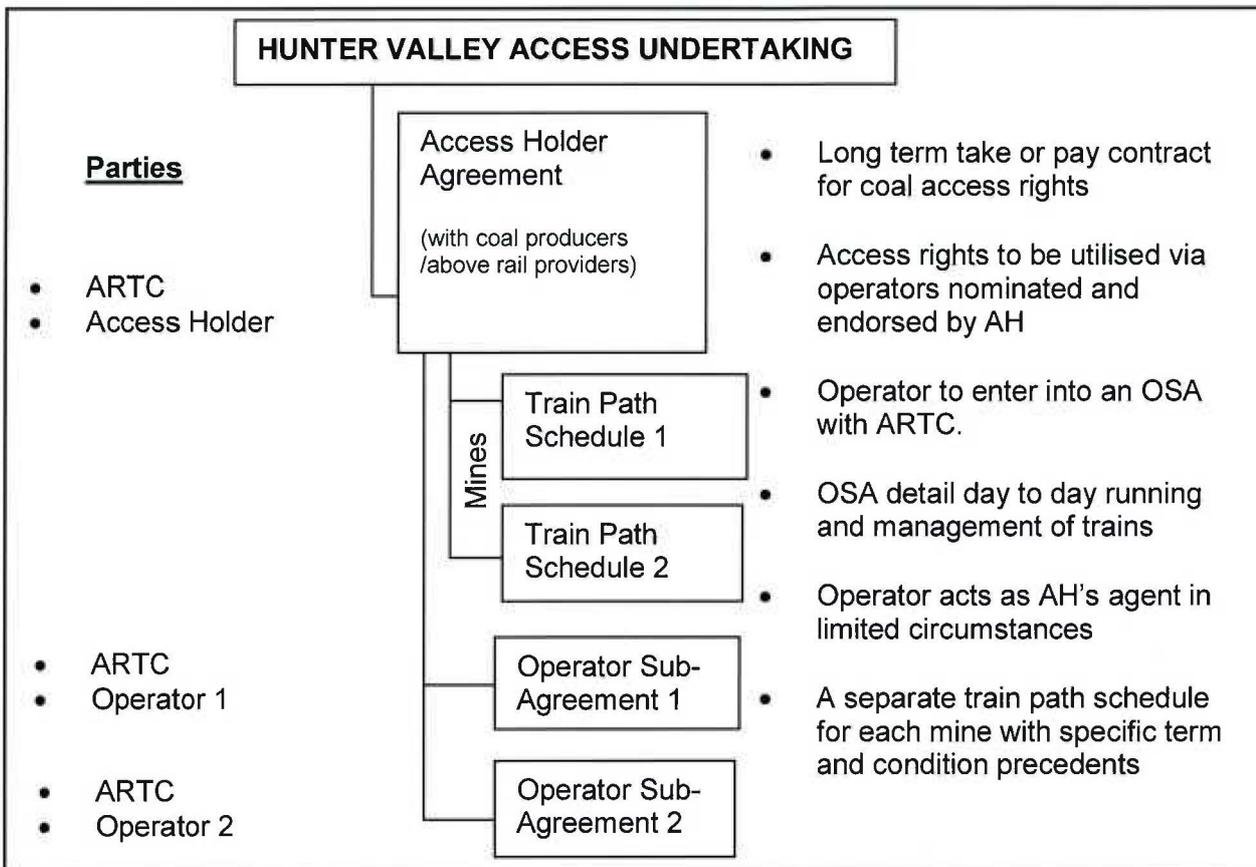
Under the model, ARTC introduced a framework whereby coal producers (as well as above rail operators) can contract directly for track access rights to the Hunter Valley coal network for the purposes of transporting coal (via an AHA). Separate agreements will be entered into by ARTC and accredited operators, nominated by the access holder, to operate trains on their behalf on the network (via an OSA).

This model will exist alongside the current model where access rights are generally held by above rail service providers. ARTC expects that this will remain the common contractual model in the case of non-coal access rights, although the 2011 HVAU does provide that ARTC will enter into an access agreement with an applicant which is not an accredited operator provided the applicant will procure the services of an accredited operator and all the terms and conditions of the access agreement are met by the applicant or the operator.

The principal objective in directly contracting with producers is for ARTC to obtain greater producer commitment to the long term investments in capacity that will be needed to meet demand, as well as to provide coal producers with a greater degree of control over the transportation of their coal and the alignment of their contracts across the coal chain.

The following diagram provides an overview of the contract model for coal access rights.

Overview of the AHA/OSA contract model



As shown by the diagram, the key features of the proposal are as follows:

- ARTC will enter into AHA with coal producers or above rail operators, under which ARTC will grant track access rights to the Hunter Valley network.
- An access holder will be required to nominate an accredited operator(s) to use the train paths contracted under the AHA. Where the access holder is an above rail operator, the access holder and operator can be the same entity.
- An access holder may nominate more than one operator for each train path.
- The nominated operators will be required to execute an OSA which governs the running of trains for the access holder on that access holder's contracted train paths. The access holder must endorse each OSA and the OSA will be an annexure to the AHA.
- Each operator is an agent of the access holder for limited purposes. This is designed to ensure that ARTC can deal with the operator (rather than the access holder) for day to day operation of the network and the running of trains (e.g. giving of instructions and train

manifests). The access holder is not responsible for the operator's breaches of the OSA (unless directed by the access holder). For example, the access holder will not be liable to ARTC under the AHA where its operator has caused an incident on the network.

- These arrangements only apply to coal. The provision of track access rights for other commodities will continue to be contracted for in the current manner (unless an access seeker requests otherwise).

AHA/OSA model versus other models

In developing the model under which producers can directly contract for track access, ARTC considered a number of options, including the existing contract models of QR Network and the new contractual models proposed by QR Network (at the time) as part of its 2009 undertaking before adopting the model described above.

The existing QR model under which producers could directly contract for access rights required the producer to subcontract out the operation to the operator and to be entirely responsible for the actions of their operators, including accepting liability for breaches of rail safety and incidents. There was no direct relationship between the track provider and the operator. ARTC understood that producers had not taken up this option in part because of the liability issues. ARTC has deliberately developed the AHA/OSA model to overcome this issue by having a triangular relationship, including a direct agreement between ARTC and the operator. The access holder will only be liable for an operator's actions in limited circumstances.

The model proposed by ARTC in the 2011 HVAU is similar to the new model proposed by QR Network at that time. Both models separated access rights from operational matters with one contract dealing with capacity management and another contract covering operational elements. Similarly, in both models, the operator agreement would be linked to the access holder agreement. The key difference was that under QR Network's proposal, an operator could have a single agreement (Train Operations Agreement) linked to capacity contracted under a number of different agreements for access rights, while ARTC proposes a separate OSA to be endorsed and attached to each AHA.

During consultation in relation to the 2011 HVAU, above rail operators have raised concerns about the administrative burden of negotiating and managing a number of OSAs. As the counterparty, ARTC will also have this issue. Some operators proposed an alternative "driver's license" model under which the operator signs just one OSA with ARTC which would entitle them to run on the Hunter Valley coal network. Access holders are then free to use the operator services. This had some similarities to the proposed QR model above.

ARTC gave serious consideration to using a “driver’s license” model but has decided that the AHA/OSA model is preferable for the following reasons despite the potential of a larger administrative burden.

- ARTC considers that a separate OSA, to be endorsed and agreed under each AHA is important to ensure contractual alignment. If an access holder negotiates additional or amended terms regarding the use of its train paths in the Access Holder Agreement, such amendments can be reflected in the individual OSA attached to that agreement. An operator may impact on the utilisation of an access holder’s train paths and it is important that an access holder has a degree of control over how their access rights are actually used given the long term take or pay commitment to be taken on. It also ensures there is consistency between an Access Holder Agreement and its related OSAs.
- In contrast, under the driver’s license model, ARTC could not agree any changes to the Access Holder Agreement which are inconsistent with an operator’s driver’s license. ARTC believes this is inconsistent with the fundamental change being sought to be achieved. Producers through the AHA should be driving the contractual arrangements and alignment in the coal chain rather than being locked into arrangements agreed between two service providers, namely ARTC and the operators.
- The OSA also gives greater flexibility and reduces the risk of one operator obtaining an advantage over others. A driver’s license model can only work if the operators are all placed on the same terms, otherwise an operator with greater bargaining power may seek a contractual benefit under its driver’s license which allows it to capture more of the above rail market. ARTC would have to carefully consider any variation to the driver’s license to ensure this does not occur. However, ARTC does not consider it realistic to think that one set of terms can apply equally to all operators.
- In contrast, under the AHA/OSA model, the OSA is subservient to the AHA. The access holder has the ability to negotiate, or be involved in the negotiation, of all aspects of their access rights and to capture the value of its access application for the benefit of any operator it chooses.

If access holders have little appetite for tailored AHAs/OSAs, then ARTC expects that the model will work in a very similar manner to the driver’s license model. ARTC will agree an OSA with each operator and that OSA will then simply be duplicated for each of the relevant Access Holder Agreements. This is not prevented under the proposed arrangements. That is, there will only be one negotiation with each operator. Nevertheless, the model proposed in the HVAU provides a degree of flexibility in the event that in the future an access holder has particular requirements which require amendments to the OSA.

ARTC expects that there will be fundamental changes to how the Hunter Valley operates during the term of the 2011 HVAU and this flexibility should be retained.

Proposed Standard Access Agreements

ARTC notes that the broad approach adopted by QR Network in structuring the EUAA/TOA model was that of a 'layered' agreement where the end user is able to contract for the Access Rights and nominate train paths to an above rail operator for performance under a linked operator agreement. QR Network notes this is similar to the model adopted by ARTC in the 2011 HVAU.

In coming to its position, QR Network considered similar alternatives to those considered by ARTC, including the 'driver's license' model and similarly rejected these as inappropriate in the circumstances.

ARTC supports the use of a similar approach to that which ARTC has adopted in the Hunter Valley, and sees benefits for the end users (many of whom operate on both networks) in having consistent contractual models.

ARTC notes that there are some differences in the approach taken by QR Network at a more detailed (operational) level.

Billing/Payments

One notable difference is the proposed billing arrangement where, under the QR Network model, the rail operator is liable for the incremental and non-incremental access charges, whilst the end user (access holder) is liable for the take-or-pay (TOP) component of the access charge. QR Network argues that the determination of incremental charges is largely based on the operational parameters of a service which is decided by the rail operator. The non-incremental component of the access charges (non-TOP) is also charged to the rail operator for administrative simplicity.

ARTC's model has all charges being payable by the access holder. ARTC considers this appropriate as under ARTC's model, the access holder user contracts to a set of service assumptions (train characteristics) for each operator used for each haul. As the TOP component of the access charge is determined by reference to the characteristics of the train, and the consumption of capacity, under the AHA, it is the Access Holder's responsibility to ensure that the rail operator operates the train in accordance with the service assumptions. Having said this, the AHA does provide the Access Holder with some flexibility, to the extent that capacity and the rights of other access holders are not significantly impacted.

By the same token, ARTC is contractually bound to provide capacity for the Access Holder to operate trains (through the train operator) in accordance with the service assumptions, and penalties apply where such capacity is not made available.

ARTC would expect that its approach may result in an administratively simpler arrangement between the parties.

Whilst billing itself is largely administrative, the difference between the approaches to billing under the two models highlights a broader more systemic difference between the models at the operational level. That is, the QR Network model would seem to prescribe greater control over the use of capacity made available under the EUAA (end user) to the holder of the TOA (rail operator), than is the case under ARTC's model. It could be argued that whilst both models are pitched between the 'capacity deed' and 'driver's license' models (as described by QR network in the documentation), the QR Network model would seem to be closer to a driver's license model than ARTC's approach.

Train Service Entitlements

Another notable difference is that the train service entitlement that is included in the EUAA (which provides the end user with access rights to the network) is also prescribed (to the extent prescribed for a rail operator under the EUAA) in the TOA. This would seem to provide for the rail operator to also have access rights to the network.

Under ARTC's model, the OSA is subservient to the AHA and is a schedule to the AHA. The rail operator only has the right to utilize a train path held by the Access Holder.

It is not clear whether a rail operator can have a single TOA with a number of train service entitlements for one or more end users. If so, this would again seem to result in the QR Network model being more closely aligned to a driver's license model than ARTC's approach.

As stated earlier, ARTC considered the use of a driver's license model but considered it inappropriate for several reasons, one of which was that a driver's license model could only work if the operators are all placed on the same terms, otherwise a rail operator with greater bargaining power may seek a contractual benefit under its driver's license which allows it to capture more of the above rail market.

Whilst ARTC is not necessarily advocating that the QR Network approach is significantly flawed, there would appear to be elements that may enable one rail operator to gain an advantage over others. The ARTC model reduces this risk. This may be significant consideration in the circumstances of the central Queensland coal network.