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1 November 2012

**By email**

Mr John Hall  
Queensland Competition Authority  
GPO Box 2257  
Brisbane, QLD 4001

Dear Mr Hall,

**QCA draft decision in relation to QR Network's draft Standard Access Agreement**

Rio Tinto Coal Australia (**RTCA**) welcomes this opportunity to respond to the Authority's draft decision in relation to QR Network's (**QRNN's**) draft alternative Standard Access Agreement (**SAA**).

RTCA views the alternative SAA process as an extremely important step towards increased flexibility, efficiency and transparency for coal producers in the operation of the coal rail network.

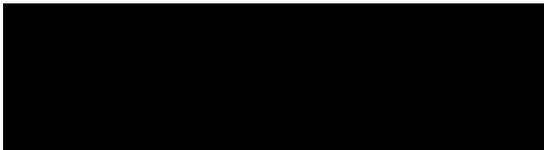
RTCA supports the Authority's draft decision to reject the alternative SAA. However, in doing so, there are a number of changes that we consider are needed in addition to those identified in the Authority's decision, set out in the attached submission. We understand that the submission and this letter may be made publicly available.

RTCA has a number of significant concerns with the wider operation of the current QRNN 2010 Undertaking (**UT3**), some of which will impact upon the terms of standard access agreements, including the alternative SAA.

As requested by the Authority, RTCA has not explored all of those issues in this process. However, RTCA looks forward to working with the Authority and industry on these issues over the coming months, including as part of the UT4 process during 2013.

Please refer any questions in relation to this submission to myself on 3625 5197.

Yours sincerely,



**Xiao Fan Zhuang**  
Manager – Infrastructure

## **Rio Tinto Coal Australia**

Submission in response to the Queensland Competition Authority's draft decision in relation to QR Network's proposed Standard Access Agreement

1 November 2012

## Executive summary

### Background

- The regulatory arrangements in Queensland governing below-rail infrastructure are contributing to higher costs at a time when its coal industry is under competitive pressure in global markets from a higher cost base.
- RTCA believes that a fundamental shift is therefore needed in the approach to below rail regulation, which focuses the regime on the requirements of coal producers and maximising their export volumes at efficient below rail tariffs.
- The alternative SAA process is an important step in this process. Properly implemented, direct contracting should deliver a more transparent, responsive and flexible access regime by giving coal producers genuine “ownership” of their access entitlements.
- RTCA therefore supports the decision of the Authority to reject the alternative SAA proposed by QRNN. Subject to the various comments made below, RTCA also generally supports the amended terms of the draft alternative SAA and Train Operator Agreement proposed by the Authority.
- However, RTCA does not support the approach taken by the Authority in relation to the proposed DAAU.

### Objectives for the Authority in the alternative SAA process

- The objectives for the alternative SAA process should be focussed singularly on ensuring that the intention of clause 5.2(n) is realised.
- However, the Authority at page 3-4 of the draft decision appears to consider that its approach in relation to the alternative SAA should instead be guided by ensuring that there is no material difference in the risk profile for QRNN, in moving from existing access agreements to the alternative SAA.
- With respect, RTCA does not accept that the Authority is constrained by the 2010 Undertaking (**UT3**), the current reference tariff, or the terms of the existing access agreement to ensure that QRNN's risk profile remains materially unchanged. This is also not required by the statutory criteria in s.138(2) of the Queensland Competition Authority Act (the **Act**) and is unworkable in the context of a fundamental restructuring of the contractual relationships of the kind contemplated by this process.
- RTCA therefore submits that the Authority should revisit the principles which it has said are guiding its approach in relation to assessing the alternative SAA.

### **RTCA does not support the proposed ‘allocating’ of Access Rights between the EU Access Holder and the TOA Access Holder under the Authority’s proposed DAAU**

- The SAA process must ensure that the nature and scope of rights that together constitute ‘Access Rights’ are clearly identified and that coal producers directly own and control those rights. If this is not achieved, then any alternative SAA structure will fail to achieve the primary objective of clause 5.2(n) of the Undertaking.

- RTCA is concerned that the amendments in the Authority's proposed DAAU allocate a different set of 'Access Rights' to End Users and Train Operators, and in doing so undermine the objective of the alternative SAA.
- Instead of creating two types of access holder (an EU Access Holder and a TOA Access Holder), the DAAU and contract structure should instead provide for **all** Access Rights to be granted to End Users, whilst identifying which of those rights are to be exercised **through** a Train Operator.
- This would ensure that the End User remains directly involved as a principal party in areas such as:
  - access negotiations;
  - disputes;
  - QRNN performance indicators and reporting; and
  - interface and environmental management plans.

**The existing flexibility allowed to train operators for pooling should made available to coal producers who hold Train Service Entitlements (TSEs) directly under the alternative SAA**

- RTCA views control over scheduling and day to day management of train path ordering as a critical component of Access Rights. In particular, the ability to pool of TSEs by a customer and between customers is an important part of increasing flexibility and efficiency within coal systems.
- The alternative SAA structure should not reduce the pooling which train operators are currently able to undertake within their portfolio of haulage customers and, instead, should ensure that an equivalent or greater degree of pooling is available to those coal producers which hold TSEs directly, under the alternative SAA structure.
- RTCA has therefore recommended a small number of amendments to the DAAU and SAA to clarify and reinforce scope for pooling of train paths under the new structure.

**RTCA strongly supports overlapping allocations by End Users to their operators**

- RTCA is strongly of the view that overlapping rights are valuable and should be introduced into the alternative SAA as part of the current process.
- The right for coal producers to nominate more than one Train Operator to operate a Train Service maximises flexibility and efficiency in the operation of the network (by enabling coal producers to respond quickly to haulage issues by reallocating tasks between operators). As the Authority notes (at page 14), a similar approach is already operating in the Hunter Valley without operational difficulty and RTCA sees no justification for not introducing the change in Queensland.

**Coal producers must be able to transition to the alternative SAA structure from existing access agreements, without cost**

- RTCA submits that the Authority clarify in its final decision that coal producers are able to transition to the new alternative SAA contract structure, without cost.

- If QRNN is not prepared to offer certainty that this will be facilitated, the Authority should amend clause 7.3.7 of the Undertaking to explicitly provide for transition from existing access agreements to the new alternative SAAs.

**Other commercial issues**

- For the purpose of this response, RTCA has focussed on what it sees as critical structural aspects of the alternative SAA framework. In doing so, we recognise that there are a range of commercial matters associated with the splitting of access rights and operational responsibility and risks (e.g. billing, insurance, security, liability etc).
- RTCA has had the benefit of reviewing the QRC submission on these issues in response to the Authority's draft decision and RTCA supports and reiterates the importance of the changes identified in those submissions.

## The importance of flexibility and the direct management by coal producers of their Access Rights

It is widely recognised that Queensland risks losing its competitive position in global coal markets because of continued pressure from a high cost base. While this is linked to a number of factors, the regulatory arrangements governing below-rail infrastructure are contributing to higher costs.

Below rail costs have steadily increased over recent years. At the same time, RTCA is concerned that inflexible scheduling practices constrain the efficiency and throughput of the DBCT and APCT linked coal systems.

A shift is therefore urgently needed in the focus of Queensland's below rail regulation to focus on the requirements of coal producers and maximising their export volumes, at efficient below rail tariffs.

RTCA sees the alternative SAA as an important step in this process. The new contract structure was intended to allow coal producers greater and more direct control over their access rights.

Rio Tinto's experience in the Pilbara demonstrates that efficiency and throughput is maximised in export-orientated supply chains where miners retain maximum flexibility and control over scheduling and management of end to end operations. While RTCA accepts that this can never be entirely replicated in a multi-user environment, where rail and port infrastructure is not operated on an integrated basis, the regulatory settings need to attempt to emulate these efficiencies, including:

- at a minimum, ensuring QRN consistently meets its contractual commitments to coal producers in terms of available system capacity and train pathing; and
- maximises coal chain throughput from mine to terminal.

Both of these objectives require the modified SAA to maximise the flexibility available to coal producers and terminal operators and the ability of coal producers, given operational constraints, to manage their own supply chains and railings/train paths.

### **What is the alternative SAA meant to deliver?**

The SAA process is part of delivering a more transparent, responsive and flexible access regime by giving customers direct control and "ownership" of their access entitlements.

RTCA agrees with the objective identified by the Authority (at page 6 of its draft decision):

*A key objective of the alternative SAAs is to provide end users with greater control and flexibility in managing their access rights. This has the potential to promote greater competition between competing rail operators with the effect of stimulating efficiency improvements in the above rail market.*

RTCA would go further and say that, properly designed, the alternative SAA would not only improve above rail competition but would facilitate more flexible and efficient operations by QRN, coal producers, rail operators and other stakeholders throughout the Queensland coal supply chains.

To achieve this objective, the SAA needs to do the following:

- clearly define the 'Access Rights' that are held by End Users and how these interact with rights granted under the related Train Operator Agreement(s);
- provide for all Access Holders to have a right to be directly involved in the day to day use and management of their rights;
- facilitate maximum flexibility in the handling and use of Access Rights, including through transferring, pooling and other commercial arrangements; and
- ensure that the 'splitting' of the contractual arrangements, and particularly responsibility for operational activities, results in an appropriate and equitable distribution of risk between Access Holders and Train Operators.

Whilst important, RTCA does not agree that the last of these principles – and the general question of any rebalancing of risk – should necessarily dictate the question of whether the alternative SAA meets the requirements of the Undertaking (as reflected in Schedule E) and the statutory considerations in s.138(2) of the Act.

The Authority's objective must be to ensure that the alternative SAA enables users of haulage services to directly contract with QR Network for Access Rights without bearing liability for operational issues (clause 5.2(n)(i)), taking into account the various requirements in Schedule E and the statutory factors in s.138(2), including the public interest as well as the object of promoting the "*economically efficient operation of ...*" the rail network.

RTCA does not accept that the Authority is constrained (as suggested at page 3-4 of the draft decision) by UT3, the current reference tariff or the terms of the existing access agreement to ensure that QRN's risk profile remains materially unchanged under the terms of an alternative SAA. This is also not required by the statutory criteria in s.138(2), including the 'legitimate business interests' criterion.

Indeed, it is unrealistic to expect that a restructure of the contractual arrangements of the kind contemplated by the alternative SAA will not have a material effect on the risk profile of the parties.

**Conclusion 1. Authority's guiding priorities**

*RTCA submits that the matters set out at pages 3 and 4 of the draft decision and that the Authority says are guiding whether it accepts the alternative SAA are incomplete and do not put sufficient emphasis on the need to ensure control and transparency by End Users over their Train Services and associated Access Rights.*

*The assumption that any alternative SAA must not impact upon the 'risk profile' of the parties is also not warranted or justified by the Undertaking or the statutory criteria in s.138(2) of the Act.*

## RTCA does not support the Authority's proposed 'allocating' of Access Rights between the EU Access Holder and the TOA Access Holder under the DAAU

The most significant issue in the alternative SAA process is the nature and scope of the set of rights that together constitute 'Access Rights' and clearly identifying which party owns and controls those rights.

For the most part, and subject to some comments below, RTCA supports the amended terms of the draft alternative SAA and the Train Operator Agreement as being effective to grant "Access Rights" directly to the End User (coal producer), whilst ensuring that operational responsibility is exercised by train operators.

However, RTCA is concerned with the approach which has been adopted by the Authority in some of its own amendments to the DAAU do not provide for the End User to be the Access Holder in all cases, but instead creates two types of Access Holder (the EU Access Holder and the TOA Access Holder) and then proceeds to allocate rights between them.

In responding to this issue previously,<sup>1</sup> the Authority in its draft decision found:

*Finally, at a broader level, the Authority accepts that under the alternative SAAs, the concept of access rights is relevant to both the end user (which will hold the underlying access rights) and the operator (who will utilise the access rights and have operational access to the below-rail network). On this basis, the Authority accepts that the application of the term should be clarified. In doing so, the Authority does not consider it appropriate that the end user always be the access holder for the purposes of the undertaking or that they be given the discretion or power to nominate the correct interpretation of the term. These approaches create complications given the interaction between the 2010 undertaking and the two SAAs.*

RTCA does not agree that adopting the Authority's approach creates fewer complications than the alternative model, in terms of any interaction between UT3 and the two different forms of access agreement. To the contrary, an approach under which the End User was the only Access Holder would be easier to implement and ensure an identical set of rights are granted under both sets of agreements – avoiding any inconsistency. The only difference between the two access agreements would be that, in the case of the alternative SAA, some activities would be undertaken by the End User, *through a train operator* (or potentially another party).

With respect, this conclusion is also inconsistent with the intent of clause 5.2(n), as it requires the Authority to determine which of the bundle of rights constituting "Access Rights" under the 2010 Undertaking will be allocated between the coal producer and the train operator. Reducing the rights notionally held by End Users under the DAAU potentially reduces the ability of coal producers to then be innovative about the way they structure their operations in the future – a key objective of this process.

### **Conclusion 2. Defining 'Access Rights' under the DAAU**

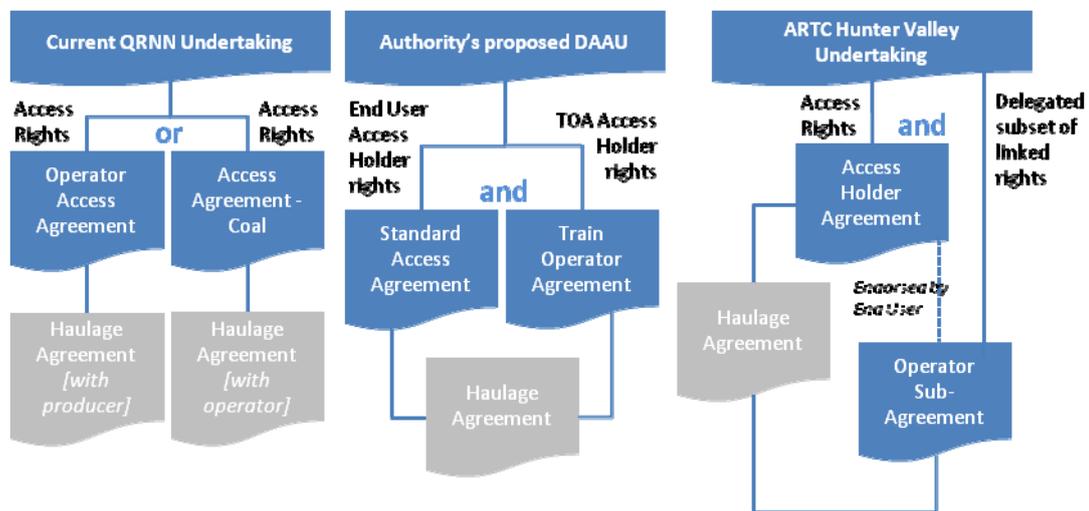
*Creating a new 'TOA Access Holder' introduces unnecessary complexity into the drafting of the DAAU and undermines the objective of ensuring that the End User retains direct control of its full set of Access Rights.*

**An alternative approach: amending the DAAU so that the End User is *always* the Access Holder with some rights exercised *through* a train operator (or with its consent)**

RTCA proposes that a simpler approach would be to recognise in the DAAU that the full set of Access Rights is held by the End User, and then provide for these to be exercised in relevant cases by train operators under a delegated agency arrangement.

This is the approach that is adopted, for example, under the ARTC Hunter Valley Undertaking. The figure below highlights the approach to how Access Rights are defined under the existing UT3, as proposed by the Authority in the DAAU amendments in the draft decision and under the ARTC Undertaking.

**Figure 1. Comparison of QRN and ARTC models for Access Rights under undertakings**



As this model indicates, RTCA supports the position adopted by the Authority in terms of providing for each EU Agreement to be linked to a separate TOA Agreement (Draft Decision 2.3).

However, this structure needs to be further reflected in the following changes to the draft DAAU (and alternative SAA/TOA Agreement) included with the Authority's draft decision:

- All references to the concept of a TOA Access Seeker/Holder should be removed from the DAAU, so that the End User (i.e. coal producer) is the *only* Access Holder/Access Seeker. This will greatly simplify the amendments.
- In its place, the Train Operator Agreement would grant Train Operators a right to operate Train Services (on the terms set out in the TO Agreement), subject to the Train Operator being nominated by the Access Holder to use those Train Services.
- The End User is responsible under the DAAU for all access negotiations – in relation to both the End User Access Agreement and linked TO Agreement(s), but may involve the train operator if it wishes to do so. At present, the Authority has proposed that the End User merely has a right to *“be present in any negotiation between QR Network and a relevant TOA Access Seeker for Access Rights relating to that EU Access Seeker’s or EU Access Holder’s proposed or existing (as applicable) EU Access Agreement”*. (clause 4.5.3 of the draft DAAU).

- The End User must have direct involvement in all disputes related to their Train Service Entitlements, rather than having a right to be notified of disputes under a related TO Access Agreement and with a right to then elect to participate as an additional party (clause 10.1.1). The End User should be the principal party to the dispute and a related Train Operator may participate with the consent of that End User.
- The End User should be able to participate directly in the development of any Interface Risk Management Plan or Environmental Investigation and Risk Management Report which will relate to its Train Services, as well as the associated Train Operator (clauses 8.1 and 8.2). These arrangements can have substantial practical and cost implications for End Users and can place constraints on the scope of their Train Service Entitlements.
- All performance indicators and reporting from QRNN should be reported to, and for the benefit of, End Users (clause 9.1), even if they are also provided to Train Operators under the TOA Agreement.
- Schedule J (Train Management Principles) and the corresponding Schedule 10 of the TOA Agreement should be amended, where relevant, to replace references to 'Access Holder' with 'train operator'. RTCA notes that in some cases the concept of Access Holder should be retained. For example, the right to place train path orders should be retained by the Access Holder (i.e. the End User), which it can then undertake itself or delegate to another party, such as a train operator or potentially a 'system coordinator'. This issue is discussed in more detail below.

This approach results in a cleaner and more effective structure, which gives the End User primacy, whilst still recognising the operational role of train operators. This is better aligned to the intent of clause 5.2(n) than the current approach of allocating Access Rights under DAAU between the EU Access Agreement and TOA Agreement and then incorporating a range of notices into each agreement so that End Users and their train operators are kept informed of relevant developments.

RTCA acknowledges the finding of the Authority at page 43 that it is not minded to require tripartite agreements. Implementing the above approach does not require a tripartite agreement to be put in place (see for example the 'Sub-operator Agreement' used under the ARTC Hunter Valley Undertaking, which is merely 'endorsed' by the relevant End User).

The step of ensuring that End Users are the unambiguous Access Holders under the Undertaking would also mark an important step in a necessary, longer term shift under the Queensland regulatory framework from the current preoccupation with the commercial objectives and rights of QRNN and train operators (notably its dominant related haulage business, QR National) to a regime that gives greater control and transparency to the coal industry, which funds the network and which the network is intended to service.

To assist the Authority, RTCA has set out in the Annex to this submission several of the key provisions from the ARTC Hunter Valley framework that reflect how this sub-operator approach has been implemented in that context.

### **Conclusion 3. Contract structure and Access Rights**

*The contract structure contemplated by the DAAU needs to provide for all Access Rights to be granted to End Users, which in some cases are exercised through the Train Operator. Key practical issues should involve the End User directly as the principal rights holder, including:*

- *access negotiations;*
- *disputes;*
- *QRNN performance indicators and reporting; and*
- *interface and environmental management plans.*

### **The DAAU and TOA Agreement should not result in less flexibility around pooling and the use of train paths than is currently permitted**

RTCA has a number of concerns with the lack of flexibility and transparency that currently surround the scheduling, allocation and management of train paths by QRNN. This is also an issue which we intend to progress further through System Rules processes.

Any 'direct contract' model must ensure coal producers can directly manage scheduling and train path decisions in relation to their Train Services. RTCA considers that, under the alternative SAA structure, End Users must therefore be given an expanded right to participate directly in train path allocation and scheduling activities – either themselves or through a third party (whether or not a train operator).

This is important to enable coal producers to unlock the benefits of more flexible and efficient scheduling. For example, one option that may be explored in the future is the establishment of a centralised scheduling entity which could coordinate pathing requirements and liaise directly with QRNN to lodge train path orders for a number of coal producers across a common system. This is similar to the role performed by the HVCCC in the Hunter Valley which has significantly improved efficiency and coordination across that coal chain.

RTCA understands that a degree of pooling is currently possible by train operators across their portfolio of haulage customers under the Contested Train Path Decision-making Process (Schedule G, Appendix 2, sub-paragraph (c)(ii)). Where one of its customers does not fully exploit its TSE entitlement for a given week, it can balance these 'excess' paths against over-utilisation by other customers.

To ensure that coal producer can continue to benefit from pooling, even if its Train Services are operated by more than one train operator or under more than one TOA Agreement, a small number of amendments are needed to Schedule G, Appendix 2, sub-paragraph (c)(ii) (and Schedule 1 of the TOA Agreement (Contested Train Path Decision-making Process)).

Suggested drafting for the amendment is set out below. Note that this drafting assumes that the amendment currently proposed by the Authority in Appendix 2 is removed so that the End User remains the Access Holder under the Contested Train Path Decision-making Process.

(ii) if:

*Access Holder submits, either directly or through a train operator or other person, Train Orders for less than its Nominated Weekly*

*Entitlement for one Train Service Entitlement (“First Entitlement”) and the path is not allocated in accordance with paragraph (i); and*

- *that Access Holder, train operator or other person also submits Train Orders for a different Train Service Entitlement in excess of its Nominated Weekly Entitlement (and regardless of whether the Train Service Entitlement is held by the same Access Holder as the First Entitlement),*

*then the path will be allocated to those other Train Orders in the manner requested by the Access Holder, train operator or other person and that allocation will be documented and is deemed to be performance of the First Entitlement by QR Network for the purpose of scheduling the Access Holder’s future Train Orders;*

#### **Conclusion 4. Pooling of train paths**

*Train path pooling should be controlled by coal producers and no longer be limited to a commercial right open only to train operators. This underlines the importance of Access Rights being held directly by End Users (and not in a shared manner with train operators as currently proposed in the Authority’s DAAU).*

*Amendments should be made to Appendix 2, sub-paragraph (c)(ii) of Schedule G of the DAAU and Schedule 10 of the TOA Agreement to provide for pooling by End Users of their train paths in scheduling processes (irrespective of whether Train Orders are submitted by the coal producer directly or through a train operator or third party. Related amendments are likely to also be needed in System Rules to deal with the participation of coal producers in scheduling activities (either directly or through a third party), and RTCA intends to raise this in the separate System Rules process.*

## **RTCA strongly supports the introduction of overlapping allocations**

The Authority has sought views on whether the introduction of overlapping rights would be supported by industry.

RTCA is strongly of the view that overlapping rights are valuable and should be introduced into the alternative SAA. The ability for coal producers to nominate more than one Train Operator to operate a Train Service maximises flexibility and provides greater efficiency and control to End Users. This maximises efficiency in the operation of the network (by enabling coal producers to respond quickly to haulage issues by renominating an alternative train operator) as well as promoting competition in the above rail market.

As the Authority notes (at page 14), this approach is already operating in the Hunter Valley without operational difficulty.

As to the specific issues identified by the Authority for comments:

- *capacity reductions* – provided that the approach above is adopted (so that Access Rights and TSEs are held directly by End Users and not by train operators, there is no need to deal with reductions in ‘nominated rights’ granted to train operators.
- *QR Network’s operations* – operational issues are a matter to be negotiated with above rail haulage providers. Given that the same below rail infrastructure and arrangements are being utilised regardless of which train operator is operating a Train Service, and any such operator must be a party to a TOA Agreement, it is not clear why overlapping allocations should have any material impact on the operations of QRNN.
- *Notices and contract amendments* – arrangements for coal producers to notify their haulage providers of which one is to operate a particular TSE can be negotiated under haulage arrangements. Processes are already in place under System Rules for notices to be provided to QRNN in relation to the daily train plan and ‘real time’ operations, and these should be able to be amended under the current System Rules processes to deal with any additional notifications required to notify QRNN of which train operator is operating a TSE where overlapping nominations exist.

RTCA does not see any practical or operational reason that would prevent the immediate introduction of this right into the alternative SAA. To the contrary, this is a key part of the flexibility currently operating in the Hunter Valley coal chain and which needs to be introduced in Queensland as part of the alternative SAA process.

***Conclusion 5. Overlapping allocations of TSEs to train operators***

*RTCA strongly endorses the introduction of overlapping allocation of TSEs between train operators by an End User. There is no reasonable operational or other reason which would prevent the introduction of this right in the End User Agreement.*

**Transition to the alternative SAA from existing access agreements, without cost**

The Authority should clarify in its final decision that Customers under existing access agreements are able to transfer to an alternative SAA framework, without cost. While this may not require any amendment to the DAAU (given the transfer rights under clauses 7.3.7) – it is important that QRNN is not able to use the existing UT3 transfer process to frustrate the intention of the alternative SAA process (and clause 5.2(n) of the Undertaking) by preventing or delaying any transition to the new contract structure.

RTCA notes that it has recent experience of QRNN making the transfer process unreasonably difficult and time consuming, and this should not be allowed to occur in relation to coal producers looking to move their existing Access Rights across to the new alternative SAA structure.

If QRNN was not prepared to provide sufficient comfort to the Authority and industry that it would support these transfers, the Authority should explicitly amend clause 7.3.7 to include a new sub-clause providing for the transfer by a Customer of rights from an existing access agreement to the alternative SAA.

**Conclusion 6. Transitioning from existing access agreements to the new alternative SAAs without cost**

*The Authority should clarify that it intends for all existing coal producers to be able to transition to the new alternative SAA structure, without cost. If QRNN is not prepared to provide sufficient comfort that this will be supported, the Authority should amend clause 7.3.7 of the Undertaking to explicitly provide for transition from existing access agreements to the new alternative SAAs.*

## Other commercial issues

For the purpose of this response, RTCA has focussed on what it sees as critical 'structural' aspects of the alternative SAA framework (mostly under the DAAU) to ensure that it achieves its objective of improving the degree of control and transparency held by coal producers directly over Access Rights.

In doing so, we recognise that there are a range of commercial matters associated with the splitting of access rights and operational responsibility and risks (e.g. billing, insurance, security, liability etc). These have been well canvassed at earlier stages of this process. RTCA has had the benefit of reviewing the QRC submission on these issues in response to the Authority's draft decision and we support and reiterate the importance of the changes identified in those submissions.

Finally, the Authority's proposed DAAU includes an amendment to the definition of 'Central Queensland Coal Region' to include "all rail lines connecting any two of the abovementioned corridors". RTCA strongly endorses this amendment to clarify that the Northern Missing Link forms an integrated part of the CQCR. This conclusion is evidently also directly relevant to the approach to adopt under the current DAAU consultation in relation to GAPE reference tariffs.

## ANNEX

An overview of key structural clauses under the ARTC Hunter Valley framework and implications for defining direct contracting of access rights

Document	Provision	Implication for access rights
<b>ARTC Undertaking</b>	<p><b>Definition of ‘Coal Access Rights’</b></p> <p>means the availability of the Train Paths specified in an Access Holder Agreement, and the right to utilise those Train Paths, through an Operator with Coal Trains, on the Network.</p>	<ul style="list-style-type: none"> <li>• Links access rights explicitly to a right to train path availability</li> <li>• Grants rights to the coal producer</li> <li>• Rights are utilised <i>‘through an Operator’</i></li> </ul>
	<p><b>Clause 1.4 (Contract Structure)</b></p> <p>(a) in recognition of interests pertaining to coal traffic ... ARTC will, on request, enter into a direct agreement with a Coal Customer for Coal Access Rights to the Network (an Access Holder Agreement) subject to the following terms:</p> <p>(i) the Coal Customer may only utilise those Access Rights through an Accredited Operator who has been nominated by the Access Holder for that purpose; and</p> <p>(ii) that Operator must have an Operator Sub-Agreement with ARTC which has been endorsed by the Access Holder.</p>	<ul style="list-style-type: none"> <li>• Explicitly recognises the direct grant of access rights to the coal producer</li> <li>• Staples the Access Holder Agreement to an Operator Agreement</li> </ul>
	<p><b>Clause 3.4 (Parties to negotiation of Access Rights)</b></p> <p>... ARTC will negotiate the terms of the Operator Sub-Agreement forming part of the Access Holder Agreement with the Access Holder or the relevant Operator where it has been appointed as the Access Holder’s agent for that purpose.</p>	<ul style="list-style-type: none"> <li>• Gives the coal producer a right to negotiate operational issues under the operator agreement itself or delegate this role to a train operator</li> <li>• Recognises the operational capability of</li> </ul>

Document	Provision	Implication for access rights
	<p><b>Clause 3.15 (Dispute resolution)</b></p> <p>(b) An operator who has been appointed agent for the Access Holder as contemplated in section 3.4(b) may, with that Access Holder's prior written consent, participate in a dispute ...</p>	<p>producers</p> <ul style="list-style-type: none"> <li>• Gives the coal producer/access holder control over disputes involving their Coal Access Rights</li> </ul>
<p><b>Access Holder Agreement</b></p>	<p><b>Recitals</b></p> <p>...</p> <p>B. ARTC agrees to grant the Access Holder rights to access the Network for the purposes of transporting coal on the terms and conditions set out in this agreement.</p> <p>C. The Access Holder may only access the Network through a nominated Operator.</p> <p>D. Each Operator nominated by the Access Holder to use the Network on behalf of the Access Holder must have an unconditional Operator Sub-Agreement with ARTC which has been endorsed by the Access Holder ...</p> <p>E. Each Operator Sub-Agreement governs the nominated Operator's use of the Access Holder's access rights. ARTC will deal directly with the Operators in relation to the day to day operations of the Network.</p> <p>F. The Access Holder Agreement and the Operator Sub-Agreements together comprise the basis on which ARTC grants the Access Holder access to the Network and the use of those access rights by nominated Operators.</p>	<ul style="list-style-type: none"> <li>• Access rights are granted explicitly to the Access Holder – the Operator is to use the Network on behalf of the Access Holder</li> <li>• The Access Holder Agreement and the Operator Sub-Agreement form the basis for the grant of rights to the Access Holder – those Agreements confer to the Operator an ability to use the Access Holder's access rights for limited purposes</li> </ul>

Document	Provision	Implication for access rights
	<p><b>Definition of “Operator Sub-Agreement”</b> means an agreement between ARTC and each nominated Operator and which has been endorsed by the Access Holder.</p>	<ul style="list-style-type: none"> <li>• Recognises that the terms and conditions under which the Operator is to conduct activities are subject to the endorsement of the Access Holder</li> </ul>
	<p><b>Clause 3.1. (Grant of Access Rights – grant of Path Usages for transport of coal)</b> (a) <b>(base entitlement)</b> ARTC grants to the Access Holder, for the purpose of transporting coal, the availability of, and the right to use the Base Path Usages for each Train Path, upon the terms and conditions set out in this agreement, subject to:</p> <p>(i) the Operator being nominated by the Access Holder to provide a Service using a Path Usage on a Train Path for the purposes of the Daily Train Plan; and</p> <p>(ii) the terms of access granted to the Access Holder under the Access Holder Agreement.</p>	<ul style="list-style-type: none"> <li>• Access rights are defined explicitly as a right to Train Paths</li> <li>• Access Rights are clearly granted to the Access Holder</li> </ul>
	<p><b>Clause 4.1 (Only Operators may run Services)</b> The Access Holder agrees it is only entitled to utilise a Train Path through an Operator and that it is the Operator who will operate Services on the Train Path. To avoid doubt, the Access Holder can be the Operator provided it has an unconditional Operator Sub-Agreement and complies with this clause 4.</p>	<ul style="list-style-type: none"> <li>• Recognises that Access Holders’ rights to utilise a Train Path are facilitated by the Operator operating the Services – this confirms the agency function of the Operator</li> </ul>
	<p><b>Clause 4.6 (Limited agency)</b> (a) If the Access Holder is not also the Operator for a Path Usage, the Access Holder appoints each nominated Operator, as its agent for the following purposes:</p> <p>(i) providing inputs and agreeing to the final Daily Train Plan and the scheduling of Trains or changes to that plan or schedule for the Path Usages for which it is nominated by the</p>	<ul style="list-style-type: none"> <li>• The Operator is to use the Network on behalf of the Access Holder and only in its capacity as a limited agent for the Access Holder</li> </ul>

Document	Provision	Implication for access rights
	<p>Access Holder;</p> <p>(ii) the use of a Path Usage for which the Operator is nominated and scheduled to use under the Daily Train Plan including giving and receiving notices and instructions in relation to availability of Path Usages and the Services using those Path Usages in accordance with the Operator Sub-Agreement;</p> <p>(iii) agreeing to temporary changes to Train Paths, Path Usages or the Services in accordance with clauses 3.2(a) and 9 of the Operator Sub-Agreement; and</p> <p>(iv) the day to day operation of the Network for the Path Usages for which it has been nominated by the Access Holder as the Operator in accordance with clause 4 of this agreement and the Train Path Schedule....</p> <p>but the actual operation of Services on any Path Usage remains the responsibility of the Operator.</p>	
	<p><b>Clause 5.1 (Charges)</b></p> <p>The Access Holder must pay the Charges for each Train Path and each Path Usage...</p>	<ul style="list-style-type: none"> <li>• The Access Holder is to pay for the Access Rights and therefore they are the exclusive beneficiary of those Access Rights</li> </ul>
	<p><b>Clause 8.2 (Warranty of entitlement to grant access)</b></p> <p>ARTC warrants that it is entitled to grant to the Access Holder all of the Access Holder's rights of access to the Network described in this agreement ...</p>	<ul style="list-style-type: none"> <li>• Explicitly recognises the 'direct' grant of access rights to the coal producer</li> </ul>
	<p><b>Clause 9.1 (ARTC to repair and maintain the Network)</b></p> <p>...ARTC agrees at all times during the Term to maintain the Network (but only insofar as the Network is relevant to the Access Holder's Train Paths) in a condition which is fit for use by an Operator to provide a Service which meets the Service Assumptions.</p>	<ul style="list-style-type: none"> <li>• Recognises that the Access Holder is to be provided the Services by the Operator - the function of the Operator is limited to the delivery of those Services</li> </ul>

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	<p><b>Definition of “Service”</b></p> <p>means a Train run by the Operator using the Network to meet the transport needs of the Access Holder</p>	
<p><b>Operator Sub-Agreement</b></p>	<p><b>Clause 3.1 (Derivative right to use Train Paths for the transport of coal)</b></p> <p>(a) ARTC agrees that the Operator may, during the Term, for the purpose of transporting coal, operate a Service on a Train Path, upon the terms and conditions set out in this agreement, subject to:</p> <p>(i) the Operator being nominated by the Access Holder to provide a Service using a Path Usage on a Train Path for the purposes of the Daily Train Plan; and</p> <p>(ii) the terms of access granted to the Access Holder under the Access Holder Agreement.</p> <p>....</p> <p>(c) The Operator agrees at all times during the Term not to access or attempt to access the Network on behalf of the Access Holder in any way other than is authorised by this agreement and the Access Holder Agreement, or as authorised under a separate valid and binding agreement.</p>	<ul style="list-style-type: none"> <li>• The Operator’s use of the Train Paths is subject to the Operator being nominated by the Access Holder to provide the Services to the Access Holder</li> <li>• The Operator’s access to the Network must be authorised by the Agreements and therefore subject to the Access Holder’s rights</li> </ul>
	<p><b>Clause 3.2 (Limited agency)</b></p> <p>(a) The Operator agrees that, unless otherwise notified by ARTC in accordance with a request received by ARTC from the Access Holder, it is the agent of the Access Holder ...</p>	<ul style="list-style-type: none"> <li>• The Operator is to use the Network on behalf of the Access Holder and only in its capacity as a limited agent for the Access Holder</li> </ul> <p><i>[N.B. This clause is expressed in similar terms of clause 4.6 of the Access Holder Agreement]</i></p>

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	<p><b>Clause 19.2 (Assignment or novation by the Operator)</b></p> <p>The Operator may not license, assign or novate this agreement, its interest in the subject matter of this agreement or any right under this agreement without the prior written consent of:</p> <p>(a) the Access Holder; and</p> <p>(b) ARTC, such consent not to be unreasonably withheld.</p>	<ul style="list-style-type: none"> <li>Provides the Access Holder control over the Operator's ability to alter its interest in the Operator Sub-Agreement in conjunction with ARTC</li> </ul>