

QCA Position Paper – Aurizon Network’s 2019 Draft Amending Access Undertaking

Introduction

Pacific National (PN) welcomes the opportunity to provide a submission to the QCA Position Paper (Position Paper) on Aurizon Network’s (AN) 2019 Draft Amending Access Undertaking (UT5 DAAU).

PN is pleased the revised UT5 DAAU now includes Railway Operators (Train Operators) as members of the proposed Rail Industry Group (RIG). This is because Railway Operators need to retain the opportunity to be consulted and to advocate on matters of importance and relevance to their participation in the Central Queensland Coal Network (CQCN) and to protect their legitimate business interests.

We note the QCA’s preliminary position is UT5 DAAU is appropriate to approve subject to:

- AN incorporating the QCA amendments consolidated in the ‘Revised UT5 DAAU’ at Appendix 1 of the Position Paper.
- Consideration of stakeholder views on certain unresolved impacts on non-coal traffic (freight).

As the QCA is well aware, the *Queensland Competition Act 1997* (QCA Act) requires appropriate consideration of supply chain participants (both in terms of upstream downstream markets and as access seekers) to approve a draft access undertaking (ss 68E and S. 138(2) (a), (d) and (e)). PN hauls non-coal traffic on the AN and there are interfaces with the Queensland Rail (QR) network which must be preserved.

PN submits that, subject to the QCA incorporating four new amendments into the Revised UT5 DAAU, Pacific National would not oppose the approval of the Revised UT5 DAAU.

Capacity assessments

PN has residual concerns on how UT5 DAAU defines deliverable network capacity and undertakes capacity assessments. We note they incorporate all services (including non-coal services) into these provisions which are squarely aimed at identifying the most efficient and effective way to operate coal services. PN foresees a risk that these processes could, over time, undermine the provision of non-coal services which have different objectives and priorities than coal.

We submit all non-coal obligations (including non-coal access agreements, passenger priority obligations and preserved path obligations) be treated as constraints to be recognised in these processes, rather than having obligations in non-coal access agreements being treated as levers that can be adjusted in order to better achieve the objectives of coal users.

PN Amendment 1:

Clause 7A.2 (vi) which defines AN's considerations for assessing deliverable network capacity and system capacity should be modified as follows:

~~(vi) the extent reasonable) in relation to the review of System Operating Parameters of non-coal traffic on the Rail~~

~~Infrastructure and the extent to which non-coal traffic takes priority over coal traffic including to comply with any~~

~~Passenger Priority Obligation or Preserved Train Path Obligations;~~ (vi) 'compliance with Aurizon Network's obligations to provide access to non-coal traffic under access agreements, Passenger Priority Obligation or Preserved Train Path Obligation'.

As part of its capacity assessments (both initial and annual), the independent expert (IE) must develop the system operating parameters (SOPs) for each coal system (clause 7A.4.1(b)(ii) and 7A.4.2(b)(ii)(C)). In doing so, the IE must ensure AN will not breach its undertaking or access agreement obligations; clause 7A.12 allows the access agreements to be amended (to reflect the SOPs) only with the operator/access holder's agreement.

PN's concern is the SOPs (insofar as they impact on the operation of non-coal freight) are treated as a variable to be amended in this process. This may be reasonable for coal services, as all factors are being weighed up to best meet the coal industry's objectives overall, however it is not reasonable for freight services whose objectives and priorities are substantially different, and who entirely rely on their access agreement to achieve their required outcomes.

While the operator has no obligation to vary its access agreement, its renewed access agreement will be based on the new SOP, and at that point there will be limited opportunity for freight services to negotiate around these. Accordingly, we submit clause 7A.12 should only apply to coal access agreements.

PN Amendment 2:

Clause 7A.12 should be modified to only apply to coal access agreements

7A.12 Amendment to Access Agreements

As soon as is reasonably practicable after the System Operating Parameters are published by the Independent Expert, Aurizon Network agrees to amend any **Coal** Access Agreement to effect any changes requested by the Access Holder or End User that are consistent with and reflect:

- (a) the System Operating Parameters as determined by the Independent Expert; and
- (b) this Undertaking,

provided that, the amendments to the **Coal** Access Agreement will not take effect unless and until any corresponding Train Operations Deed is also amended in a consistent manner.

Operational disruption from maintenance

Amendments to the Standard Access Agreement (SAA) mean the process in 7A.11 takes precedence over AN's obligation to minimise disruption to the operation of non-coal train services (that are otherwise operating in accordance with the agreement).

In addition, AN removed overarching reasonable endeavour obligations to minimise disruptions to non-coal train services with a more specific obligation to carry out maintenance works in a manner consistent with, among other things, the approved maintenance strategy and budget. As drafted, this will supersede AN's maintenance obligations in the TOD to the extent of any inconsistency. PN notes AN claims Clause 21.2(a) of the Train Operations Deed (TOD) does apply in respect of non-coal traffic.

Our interpretation is in certain circumstances (new clause 21.2(a) of the revised TOD)) if the RIG determines other priorities, AN does not need to accommodate Train Operator's (including PN) non-coal train services operating to its scheduled times (clause 21.2(b) of the revised TOD)) or to use reasonable endeavours to minimise disruptions (clause 21.2(d) of the revised TOD) of non-coal train services for maintenance works.

The trouble is this clause refers to AN's maintenance strategies in a broad sense and these do not expressly define how maintenance is to be used to deliver committed capacity. In other words, maintenance could be used to justify removing non-coal train prioritisation with resultant disruptions to freight services.

This is particularly problematic as freight services on QR's North Coast Line traverse the CQCN - AN and QR work together to ensure interfaces operate effectively to preserve these paths. However, with a less clarity on how operational disruption from maintenance will impact on non-coal traffic, this process could be jeopardised.

As with capacity assessments above, all non-coal obligations (including non-coal access agreements, passenger priority obligations and preserved path obligations) should be treated as constraints to be recognised in the maintenance process.

PN Amendment 3:

Clause 21.2(a) and 21.2(k) requires additional drafting:

'(a) With the exception of non-coal access agreements, passenger priority obligations and preserved path obligations, this clause 21.2 does not limit and is subject to Aurizon Network's obligations in clause 7A.11 of the Access Undertaking. To the extent of any inconsistency between the Undertaking and any of clauses 21.2(b)21.2(c) and 21.2(d), the Undertaking will prevail.'

'(k) With the exception of non-coal access agreements, passenger priority obligations and preserved path obligations, if there is any inconsistency or ambiguity between the provisions of this clause 21.2(d)(i)21.2(c)(i) and the provisions of Part 7A of the Access Undertaking or of the Network Management Principles, clause 21.2(d)(i)21.2(c)(i) will prevail to the extent of the inconsistency or ambiguity.'

Wilful breach provisions (non-coal)

We note the removal of wilful breach provisions from the UT5 DAAU is because coal users have access to the rebate mechanism. However, non-coal customers can only seek to enforce their contractual rights in relation to a failure by AN to provide train service entitlements; non-coal users appear worse off as the wilful breach provisions were originally designed to protect their entitlements. The QCA Position Paper states 'we consider the wilful breach concept in the existing UT5 Undertaking has a more specific purpose (i.e. an exclusion of certain allowable thresholds for non-provision of access) than the common law meaning of the term it appears AN is referring to'.

PN Amendment 4:

Wilful breach provisions be re-inserted into the TOD, undertaking and SAA.

Conclusion

PN recommends the QCA include the above four amendments into the Revised UT5 DAAU. We contend these amendments are required to satisfy ss 68E and S. 138(2) (a), (d) and (e) of the QCA Act.