



Decision

**QR's Draft Amending Access
Undertaking**

**Amendments to the Standard Access
Agreement (Operator)**

October 2003

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1. BACKGROUND

Introduction

QR's access undertaking, approved in December 2001, outlines the negotiation processes to be followed by QR and access seekers in relation to arrangements for third party access. It includes obligations on QR and access seekers regarding: the processes to be followed; information to be provided; the range of matters to be addressed in an access agreement; and how access disputes are to be resolved. With a view to assisting the process for gaining access and to limit areas of dispute, the access undertaking committed QR to prepare a draft standard access agreement for coal-carrying train services.

QR's access undertaking provides for two separate operating scenarios. First, the access holder is the operator of a train service. Second, an end-user (eg mine) is the access holder who then sub-contracts the above-rail train services to an accredited railway operator. Given these two separate operating scenarios, two separate contracting structures, and therefore access agreements, needed to be developed for the coal-carrying train services.

QR prepared, and the Authority approved, the two separate standard access agreements for coal-carrying train services. On 31 October 2002, the Authority approved a standard access agreement for train operators ('operator agreement'). On 29 April 2003, the Authority approved a standard access agreement for an access holder ('access holder agreement').

Once approved by the Authority, the standard access agreements form part of QR's access undertaking. Consequently, an amendment to a standard access agreement constitutes an amendment to QR's access undertaking, and requires QR to submit a draft amending access undertaking.

Role of an Approved Standard Access Agreement

The standard access agreement provides greater certainty for both QR and access seekers as it provides a basis for access negotiations. QR and an access seeker may agree to terms and conditions that differ from that of the standard access agreement. However, in the event of a dispute, the standard access agreement becomes the default agreement.

QR's Proposal

On 14 August 2003, QR submitted to the Authority a draft amending access undertaking to amend its approved standard access operator agreement for coal carrying services. QR stated that the amendments sought to rectify typographical errors and minor inconsistencies between the standard operator agreement and standard access holder agreements for coal-carrying train services.

Process for Approval

On 25 August 2003, in accordance with s.146 of the *Queensland Competition Authority Act 1997* (the QCA Act), the Authority issued a notice of investigation in relation to QR's application to amend its approved access undertaking. The Authority also published a request for comments paper and invited interested persons to lodge submissions on the proposed changes by 26 September 2003.

2. PROPOSED AMENDMENTS

2.1 QR's Proposal

QR stated that its amendments to the standard access agreement (operator) sought to rectify typographical errors and minor inconsistencies between the standard operator agreement and standard access holder agreement for coal-carrying train services.

Definition of Railway Operator

QR has proposed to amend the definition of 'Railway Operator'. The term is currently defined as having the meaning given to it in the Transport Infrastructure Act. QR proposes a new definition of 'Railway Operator' as:

- any party that holds rights of access to all or any part of the infrastructure; and
- any accredited railway operator.

Definition of Year

QR has proposed to include a definition of 'Year', which is referred to in certain formulas in Schedule 3 but was not actually defined.

Cost of Inspection or Audit

QR has proposed to amend clause 12.6 (b) as follows:

The Party whose operations are inspected or audited under Clause 11(f) or Clause 12.2 shall bear the reasonable costs of conducting the inspection or audit unless it is demonstrated that the stated grounds for requiring the conduct of the inspection or audit did not exist. In circumstances where the stated grounds for such inspection or audit have not been demonstrated to exist, the Party that required the conduct of the inspection or audit shall bear the costs of conducting such inspection or audit.

Calculation of Access and Other Charges

QR has proposed to amend clause 3.2.5 (review of charges) of Schedule 3 such that, in the event of a dispute relating to matters such as new Base Access Charge elements, X Factors, or the First Escalation Date, the matter may be referred to an expert in accordance with Clause 3.3 of Schedule 3. Such matters are currently referred to an expert in accordance with Clause 17.3 of the Agreement.

Expert Review

QR has proposed to include a new clause 3.3.2 (expert review) in Schedule 3. As noted above, certain matters can be referred to an expert if the matter cannot be agreed by the Parties. The purpose of the proposed clause is to set out the process for appointing an expert, the required qualifications and experience of the expert, and limitations on the expert's role.

Review of Consumer Price Index

QR has proposed to include an additional clause 4.2 (review of consumer price index) in Schedule 3. The purpose of the clause is to take account of a situation whereby the Consumer Price Index is no longer published or is altered in a material way; and to provide a mechanism and process for an alternative to the Index to be agreed and applied.

Sundry

The remaining proposed amendments are of a sundry nature and include, for example, changing ‘Environmental Protection Authority’ to ‘Environmental Protection Agency’ (clause 8.8(c)).

2.2 Stakeholder Comments

There were no comments, although an Australian Rail Track Corporation submission on a separate matter made passing reference to QR’s proposed amendments to the operator agreement.

2.3 Authority’s Analysis

In assessing the alternate versions of the standard access agreement, the Authority was of the view that any differences between the holder and operator agreements should only reflect the difference in contracting structure. In particular, the Authority’s key objective was to ensure that the nature of the access obligations and rights between the two agreements were consistent.

The operator agreement and access holder agreement were submitted and approved sequentially. During the Authority’s assessment of the access holder agreement, a number of new issues emerged that had not been recognised in the earlier assessment but were considered equally an issue for the operator agreement. Consequently, when it approved the access holder agreement, the Authority anticipated that a number of consequential amendments would also need to be made to the operator agreement. These amendments were largely definitional in nature and do not alter the balance of the access rights and obligations of QR or an access holder.

The most significant of the changes relate to the definition of ‘Railway Operator’. The term ‘Railway Operator’ is used throughout QR’s access undertaking, operator agreement and access holder agreement. During the assessment of the access holder agreement, QR advised that the definition of ‘Railway Operator’ failed to cover access holders who are not operators. In particular, there was concern that, in certain clauses in the access holder agreement where the term was used, the term should cover not just persons who operate rolling stock on a railway, but also access holders that are not accredited railway operators.

To address this concern, QR and the Authority agreed to a revised definition of ‘Railway Operator’ that encompassed the intended meaning of the term throughout the undertaking, access holder and operator agreement. There were also some consequential amendments made to the following clauses to ensure that they were consistent with the new definition: ‘Common Corridor’ and ‘Reduction factor’; clauses 3.3 (relinquishment and transfer of access rights); clause 5.6(e)(iii) (performance levels); clause 12.4(e) (conduct of inspection or audit); clause 15.3 (claims in respect of non-provision of access); and clause 15.4 (claims in respect of delays to train movements).

The inclusion of the definition of ‘Year’ corrects an oversight in the operator agreement, in which ‘Year’, capitalised in certain formulas in Schedule 3, was not defined.

The amendment to clause 12.6(b), relating to the costs of inspections and audits, corrects an oversight in the operator agreement. The amended clause clarifies the fact that this clause applies to both inspections and audits.

The amendment to clause 3.2.5 of Schedule 3 (review of charges) corrects the fact that dispute resolution under this clause is in accordance with expert resolution processes prescribed in Schedule 3, and not in accordance with the dispute resolution processes prescribed in the body of the agreement (clause 17.3). Additional provisions have been included which govern the expert review for a dispute identified under clause 3.2 of Schedule 3. These are broadly similar to the expert review provisions in the body of the agreement (clause 17.3).

The proposed inclusion of clause 3.2 in Schedule 3 corrects the fact that the current operator agreement does not deal with the situation where a consumer price index no longer exists.

The Authority has examined the additional sundry amendments, and is satisfied that the purpose and effect of these amendments is to ensure consistency between the standard access holder agreement and standard access operator, and that the amendments do not materially affect the operation of the agreement.

3. AUTHORITY'S DECISION

Section 138(3) of the QCA Act states that the Authority may approve a draft access undertaking only if:

- it is satisfied the undertaking is consistent with any access code for the service;
- it has published the undertaking and invited persons to make submissions on it to the authority within the time stated by the authority; and
- it has considered any submissions received by it within the time.

There is no access code for the service. Submissions were invited but no submissions on this matter were received by the Authority.

Section 143 of the QCA Act states that the Authority may approve a draft amending access undertaking only if it considers it appropriate to do so having regard to:

- the legitimate business interests of the owner of the service;
- the public interest, including the public interest in having competition in markets (whether or not in Australia);
- the interests of persons who may seek access to the service, including whether adequate provision has been made for compensation if the rights of users of the service are adversely affected; and
- any other issues the Authority considers relevant.

Based on public consultation, and its own analysis, the Authority accepts the merits of the proposed amendments. Therefore, in accordance with Section 143 of the QCA Act, the Authority approves QR's proposed amendments. The approved amendments are highlighted in the attached standard access operator agreement.

QR's amended access undertaking takes effect from 9 October 2003, the date the amendments were approved.

Part B

4. MARK-UP OF STANDARD ACCESS AGREEMENT (OPERATOR)

A marked-up copy of the standard access agreement (operator) showing amendments approved by the Authority as of 9 October 2003 is attached.