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30 October 2012

Mr EJ Hall  
Chief Executive  
Queensland Competition Authority  
GPO Box 2257  
Brisbane QLD 4001

Dear Mr Hall,

### **Draft Decision on QR Network's proposed Alternate Standard Access Agreement**

Please find attached QR National's submission in response to the Queensland Competition Authority's (QCA) Draft Decision of July 2012 on QR Network's Alternate Standard Access Agreement (ASAA). QR National welcomes the opportunity to provide further comments on the introduction of split agreements to the Central Queensland Coal Network (CQCEN). As a heavy haul operator for coal and other bulk commodities on key national rail lines, QRN has significant experience in contracting for haulage in jurisdictions where access agreements are split between below-rail capacity agreements and train operator agreements.

The introduction of split agreements to Queensland is an important development for our customers. QRN is committed to ensuring that the regulatory framework promotes choice for our customers as well as supply chain efficiency. In this respect, QRN's overarching approach to the ASAA is to ensure that the additional, and welcome, choice given to our customers by way of the new standard contracting framework, is both effective and efficient, while also ensuring that customers that do not wish to manage their own access rights are not disadvantaged by exercising such a choice.

As noted in our earlier submission, QRN supports the suite of contracting arrangements proposed by QR Network; that is the Standard Operator Agreement, the Standard Access Holder Agreement and the ASAA. It is QRN's view that the availability of the varied access arrangements promote competition in the above rail market by facilitating the commercial negotiation of different service offerings in line with what is of commercial value to the end users. Preserving the scope within the contracting framework to allow varied and differentiated service levels in the above-rail market is fundamental to the vibrancy of competition across the CQCEN.

QRN has undertaken a detailed review of the QCA's marked-up changes to QR Network's contracting framework. Many of the changes made by the QCA are likely matters that are of more significance to QR Network than QRN. However, there are a number of important amendments to the QCA's mark-up that QRN considers are essential to ensuring that the EUAA, TOA and the draft access undertaking (DAU) operate as intended.

In this respect, QRN would encourage the QCA to reconsider some aspects of the proposed standard contracts before releasing its final decision. QRN notes that those aspects of the drafting which it considers necessary to amend do not fundamentally detract from the QCA's intent, but rather, are necessary in order to ensure that the framework is workable.

In particular, QR National is primarily requesting that the QCA amend the agreements such that:

1. The negotiation framework for split agreements is conducted under one access request, with the end-user nominating either (i) an operator to act as the end users agent (ii) an operator or operators to negotiate the operational components either directly with QR Network or jointly with the end user (iii) the end user as the access seeker with QR Network making assumptions regarding the operational components until an operator or operators are nominated (with appropriate allowance for an operator to be nominated as soon as practical and mechanisms to address any variations to the operating plan as a result of that

appointment). QR National considers that this change will significantly simplify the process of obtaining access rights.

2. If a new operator is nominated under the EUAA, the operator is given sufficient time to negotiate the operational components with QR Network, and is given appropriate recourse to dispute resolution under the undertaking.
3. For QR Network to be required to accept or reject a change in the proportional allocation of access rights between nominated operators (within the 48 hour minimum nomination period) in sufficient time to comply with the requirements of the Network Management Principles to issue a Daily Train Plan one day prior to the day of running. Further, in order to facilitate the timely management of access right variations, that end-users proposing a variation between nominated operators, provide QR Network with a statement from each operator to the effect that the variation complies with the train service description, and that a preliminary assessment has been conducted by the operator as to whether the variation is consistent with the Interface Risk Management Plan.
4. That the link between an EUAA and a TOA is not mandated by the QCA, but rather end-users and operators are given flexibility as to the appropriate contract structure. In particular, QRN expects that some customers with EUAAs will not necessarily require or expect their operator to execute a separate TOA with QR Network, but will be satisfied with the operator obtaining access to the network through a TOA for multiple EUAAs (essentially the current arrangements, whereby a single access agreement is executed between QR Network and an operator for the purpose of services being provided to multiple end-users);
5. That the arrangements allow for the commercial negotiation of risk sharing arrangements between the end-user and the operator. For example, the contractual framework should contemplate that the operator may not pass through, in whole or in part, access charges. Further, the framework should contemplate that an operator and end user will negotiate as to which party will bear the risk of non-performance to system specifications (i.e. what risk each party bears for a service failing to meet the specifications of the Train Service Entitlement).

Each of the above, together with additional issues for the QCA to consider, are substantively discussed in the body of the submission. Further, QRN would be happy to provide any further material or explanation to the QCA as may be required for the QCA to progress its Final Decision.

Should you have any questions in relation to the attached submission, please contact Rachel Martin on (07) 3019 5476 or via email at [Rachel.Martin@qrnational.com.au](mailto:Rachel.Martin@qrnational.com.au).

Yours sincerely,

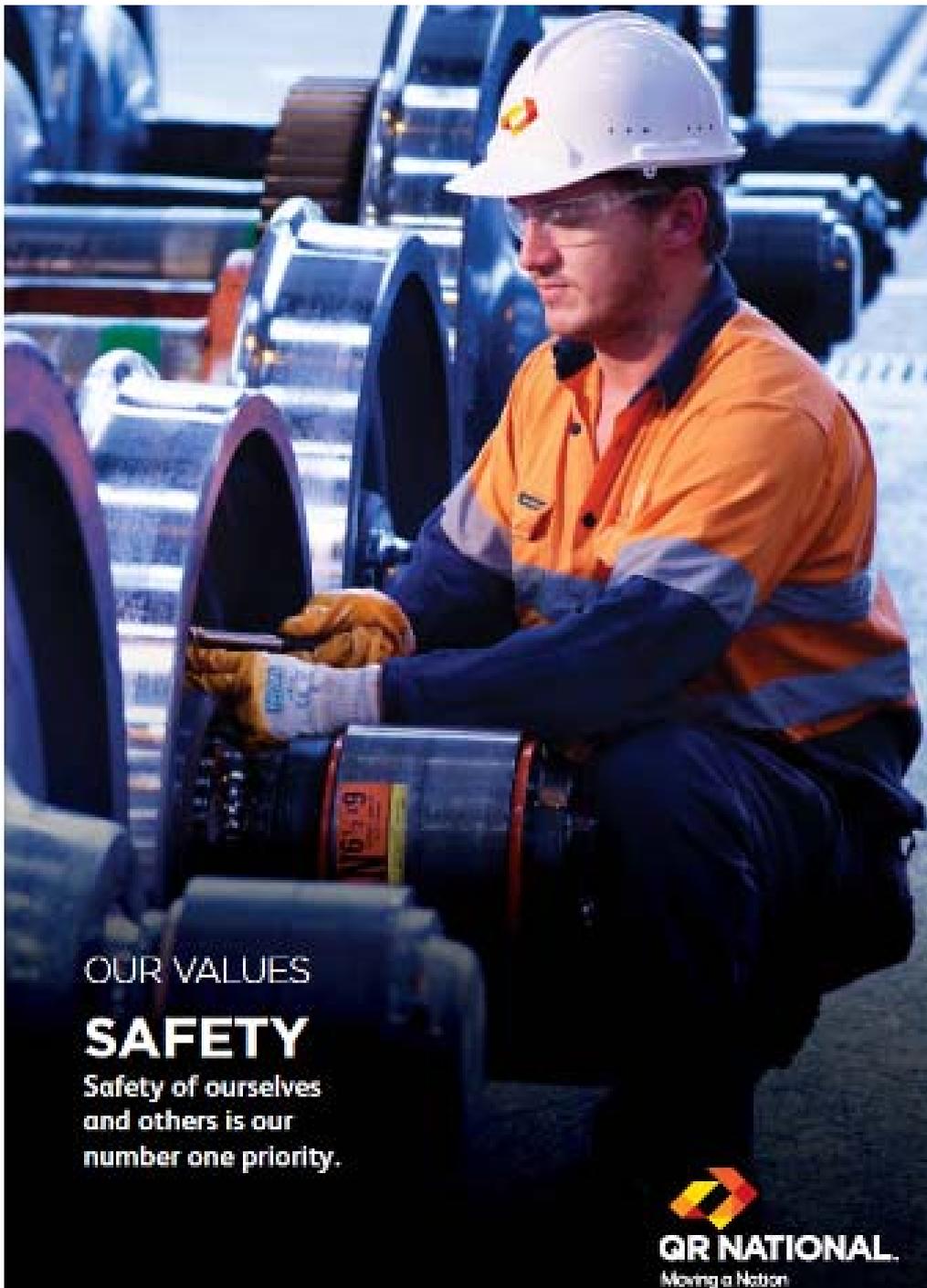


Mr Andrew MacDonald  
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Commercial & Planning



## Draft Decision on QR Network's Proposed Alternate Standard Access Agreement



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# Executive Summary

QRN supports the suite of contracting arrangements proposed by QR Network; that is the Standard Operator Agreement (SOA), the Standard Access Holder Agreement (SAHA) and the ASAA. QRN also supports the view that the ASAA should reflect the risk position in the current SOA and the SAHA except to the extent necessary to facilitate the split between the holding of access rights and the use of those access rights.

QRN understands that some of its customers see significant benefit in QR Network splitting the contract for below-rail capacity rights from the contract for train operations on the network. The alignment of below-rail capacity with upstream and downstream fixed investment in mines and ports will make considerable commercial sense for a number of customers, as will the ability of end users to more flexibly deal with operators to incentivise above-rail performance.

In this respect, greater choice for customers in obtaining haulage services that better meet their individual requirements will ensure the continued intensity of competition in the above-rail market. In this respect, QRN is committed to ensuring that the regulatory framework promotes both supply-chain efficiency and commercial flexibility to limit the potential that the greater disaggregation of the supply chain will, through increased risk of co-ordination failure, result in reduced system efficiency. The ability of end users to contract both 'long' and 'short' with operators will, in QRN's view, allow for market forces to determine the optimal allocation of risk between an end-user and operator as regards the recovery of fixed capital costs in above-rail assets.

Noting the above, QRN believes that a number of the QCA's mark-ups to the agreements require minor amendment in order for the access framework to operate efficiently. It is noted that none of those amendments, if accepted by the QCA, would fundamentally alter the nature of the agreements, but are rather intended to minimise the cost of contracting under these arrangements, while maximising flexibility for *all* customers. The following table summarises QRN's suggested amendments.

Issue	EUAA/ TOA/ Undertaking	Suggested Amendment
QR Network requirement to negotiate with multiple access seeker's	2010 Undertaking	The 2010 Undertaking be amended to reflect end user accountability for the negotiation of access rights with QR Network. The end user then may nominate an operator as an agent or include operators as a party to the negotiation with QR network to mitigate the risk of operator non compliance with the train service description and the obligations under cl.6 of the TOA. In addition, the end user can have the option for QR Network to make assumptions, as currently contemplated under cl.4.5.3 of the Undertaking, with the granting to the operator of the access rights by the end user under the EUAA, to occur as soon as practical thereafter.
Arrangements to allow for the operator to comply with obligations under cl.6 of the TOA when nominated under cl.2.3 of the EUAA.	cl.2.3 of EUAA	Clause 2.3(b) of EUAA be amended such that the end user, may give at least 30 days written notice of the nomination or such time as agreed between the end user and QR Network in order to provide sufficient time for the operator to comply with cl.6 of the TOA.
Access to the dispute provisions of the Undertaking in relation to the negotiation between the operator and QR Network for the operational components of the arrangements.	Cl.2.3 of EUAA	Include a provision that allows the operator to access the dispute resolution provisions of the Undertaking in relation to the operational components of the access agreement as outlined in cl.4.5.2 of the Undertaking
Timeframe for QR Network to accept or reject a nomination made with 48 hours notice.	cl.2.3(f) of EUAA	Change the QCA mark-up of cl.2.3(f) of the EUAA to require QR Network to comply with cl.2.3(d) subject to QR Network being required to notify its acceptance or rejection in sufficient time to comply with the requirements of cl.4(c) of the Network Management Principles, that is to issue a daily train plan at least 1 day prior to the day of running.

Issue	EUAA/ TOA/ Undertaking	Suggested Amendment
Information to be included in a variation of nomination by the end user with 48 hours notice to QR Network.	cl.2.3(f) of EUAA	Include in cl.2.3(f) a requirement for the variation of a nomination by the end user to include a statement from each relevant operator, identifying and agreeing to the changes to the nominated access rights together with a preliminary assessment of subsequent changes required to ensure the operator is able to comply with cl.6 of the TOA.
Pro rata of monthly service entitlements	cl.2.3(f) of EUAA	Where a variation of a nomination occurs mid-month, the notification should include the allocation of Train Service Entitlements that have been utilised to date and that those that are remaining for the purposes of the contested train path decision making process.
Notification of acceptance or rejection of variation to nomination.	cl.2.3(d)(ii) of EUAA	Include a notification to the relevant operators of the acceptance or rejection of the variation to the nomination.
Maintain optionality in the contract structure	2010 Undertaking cl.20.1(a)(xi) of TOA cl.20.2 of TOA	<p>The Undertaking to be amended to allow for the end user and the operator to negotiate as to whether the TOA is linked to one EUAA or multiple EUAAs.</p> <p>Amend cl.20.1(a)(xi) of the TOA to <i>“events or circumstances specified as providing QR Network with a right to suspend the End User’s Access Rights under the End User Access Agreement to which the Train Service that is proposed to be suspended relates”</i>.</p> <p>Amend cl.20.1(c) of the TOA to <i>“QR Network may suspend the operation of the Operator’s Rollingstock or Rollingstock Configuration to which the Train Service that is proposed to be suspended relates”</i></p> <p>Amend cl.20.2 of TOA where notification of the details of a suspension should be required to be given to the end user <i>“to which the Train Service that is proposed to be suspended relates”</i></p>
Provisions in relation access charges and take or pay reflect an option for the operator to not pass through, in whole or part, the access charges to the end user.	TOA EUAA Schedule F of 2010 Undertaking	<p>Amend the definition of access charge and Schedule 3 in both the TOA and EUAA to provide for the option of the operator to pay access charges and take or pay.</p> <p>Schedule F, cl.2.3.1 of the 2010 Undertaking to be amended to allow any adjustment amounts from a variation of a reference tariff with an effective date prior to the QCA’s approval of the variation to be reimbursed to (or recovered from) the relevant access holder (that is either the end user or the operator).</p> <p>Schedule F, Part B, cl.2.2.1 be amended to reflect that QR Network’s entitlement to earn take or pay revenue is permissible under either the EUAA or the TOA.</p>
Weighbridges and Overload Detectors	Draft Decision 3.8	Confirmation that the QCA’s markup of the TOA and EUAA apply.
Allow for the commercial negotiation of the risk allocation between the end user and operator to changes to train service entitlements.	cl.5(b)(i) of the EUAA	Remove cl.5(b)(i) from the EUAA
Operator flexibility in negotiating environmental risk abatement measures	cl.8.2.1(i)(ii) of 2010 Undertaking	Amend cl.8.2.1(i)(ii) of the 2010 Undertaking to provide that written consent of the end user is only required where the end user is responsible for the access charge.
Quarterly Network Performance Reports	Part 9 of Undertaking	Amend cl.9.1(a) of the 2010 Undertaking so that the quarterly network performance reports <i>“are accurate and prevent any potential for double-counting, particularly in relation to the EUAA and TOA.”</i>

# 1 Objectives of the ASAA

Generally, QRN agrees with the key objectives for the ASAA that have been proposed by both the QCA and the QRC. In assessing the ASAA and the QCA's Draft Decision, QRN has given specific consideration to:

- ensuring that the provisions do not result in inefficient constraints on the ability of above rail operators to differentiate their service offering, thereby failing to promote above rail competition;
- ensuring the provisions will maximise the efficient use of the network infrastructure, and promote efficient supply chain outcomes;
- promoting, where possible, consistency between the ASAA and the other standard access agreements; and
- ensuring that the provisions result in efficient, workable arrangements that do not impose costs on stakeholders that outweigh the benefits.

## 1.1.1 Promotion of above rail competition

QRN considers that the regulatory arrangements ought to anticipate and account for the needs of individual operators, and, where efficient to do so, provide sufficient flexibility to allow operators to create value for end users.<sup>1</sup> Promoting service differentiation in dependent markets is fundamental to maximising the scope for market forces to provide end users with an optimal outcome.

Vigorous competition exists in the CQCN between operators, niche providers of supply-chain and access management services, and the in-house provision of service by end-users. Competition occurs across a number of products, including:

- operation design;
- management of interfaces with the logistics supply chain;
- management of above rail operations;
- management of assets; and,
- financing of equipment and facilities

It is QRN's view that competition across all the products described above is in the interests of all parties. Preserving the ability of multiple entities with different interests in the supply-chain to offer these services gives end users the control to select what is of value, and to do so in conjunction with whatever other services they require.

To that end, QRN seeks to ensure the ASAA does not constrain the services provided by operators or restrict their ability to manage risk. QRN considers that the ASAA should not be prescriptive with respect to the risk allocation across the supply-chain, with this a matter that can be optimally determined by way of commercial negotiation. Further, QRN considers that the access contracting framework should give end-users choice with respect to how much, or how little, flexibility they require in the management of their access rights. This choice gives end users control over the extent to which they are prepared to pay for latent capacity in above rail resources and allows operators to calibrate what risk they are prepared to take in relation to the recovery of fixed costs.

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<sup>1</sup> QRN, *Submission on QR Network's Electric Traction DAU*, 25 September 2012, p.37

In this respect, QRN supports maintaining a suite of contracting arrangements which facilitate the end user selecting a preferred access management model, and then maintaining the scope for risk to be allocated as desired between an end user and an operator through mechanisms in the rail haulage agreement. For example, an end user that values outsourcing the management of access arrangements will generally favour a RHA/SOA model with appropriate provisions in the RHA (and amendments to the SOA if required) to address risks relevant to the end user. Where an end user is seeking a high level of control the SAHA is available<sup>2</sup>. The ASAA, quite rightly is the mid way then between a SOA and SAHA which gives the end user control of the capacity but gives the operator the ability to manage operational variability.

### 1.1.2 Maximise efficient use of network infrastructure

A significant consideration by the QCA in the assessment of the ASAA is the degree to which the ASAA provides end users with control and flexibility in managing their access rights. In the Draft Decision, the QCA noted that end users are particularly interested in controlling their underlying access rights where they are being asked to underwrite network investments<sup>3</sup>. QRN supports the ability of access holders, be they end users or operators, to manage the use of access rights to ensure the commercial value of those access rights are maximised over the life of the agreement.

QRN also supports the focus by the QCA on the competitiveness of the Queensland coal industry<sup>4</sup> in assessing the ASAA. In QRN's view, it is particularly important for the QCA to ensure that any losses in overall supply-chain efficiency that might result from further disaggregation of the constituent elements of the supply-chain, are offset by the benefit of increased above rail competition. In this respect, as with all new initiatives, QRN believes that the QCA should continue to assess the contracting framework to determine which provisions are to the overall benefit of the supply-chain, and where, on a cost-benefit view, improvements might be made.

That being said, QRN considers that it is fundamental to the regulatory arrangements that the efficient use of the network infrastructure is maximised, such that unused network capacity is made available to the system so as to maximise throughput. QRN strongly supports the existing arrangement where when a train path entitlement is unable to be utilised, it is available to be used by a party who can. In this respect, QRN considers that the ability to vary access rights of nominated operators under the ASAA is one mechanism, in a suite of provisions in the Undertaking, which facilitates this efficient use of the infrastructure.

### 1.1.3 Consistency of terms and conditions

Given the development of the ASAA is in the middle of the current regulatory period with the provisions of both the SOA and the SAHA agreed, QRN agrees it is inappropriate for the ASAA to materially diverge from the other standard agreements. Any differences in terms or risk positions should be a reflection of the arrangements necessary to effect the split agreement.

### 1.1.4 Efficient, workable arrangements

Increasing flexibility in the nomination of operators by end users, while being of potential benefit to the supply chain, is also a source of potential inefficiency and cost. Critical to the workability of these arrangements will be the smooth notification of changes to all parts of the supply chain. In this respect, QRN notes that it regarded QR Network's original proposal – namely, that operator notification occur prior to the development of the port rail plan and QR Network train path plan – as being the likely most efficient approach from a planning perspective.

While QRN does not disagree with the QCA's contraction of this period to the 48-hour window prior to the day of operations, it notes that this may result in unanticipated costs or complexities in the scheduling process. It is likely that QR Network will require additional capital expenditure in order to effectively manage the contract variations and billing associated with frequent changes to the nominated operator,

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<sup>2</sup> Whilst there have been issues identified with the SAHA model it is QRN's understanding that the model is in use with the risk-reward tradeoffs reflected in the RHA.

<sup>3</sup> Draft Decision, p.ii

<sup>4</sup> Draft Decision, p.ii

particularly where the variation occurs part way through the month and train service entitlements will need to be allocated on a pro rata basis between operators.

## 2 Specific Issues

On review of the QCA's mark-up of the EUAA, TOA and DAU, QRN has identified a number of issues that require further clarification or amendment to ensure the provisions function as intended. This section addresses the specific issues of concern.

### 2.1.1 Exercise of Access Rights

#### 2.1.1.1 Appointing Train Operators

The QCA Mark-up of the EUAA, TOA and the 2010 Undertaking appears to provide two paths for the appointment of train operators under the EUAA. QRN believes that some clarification of the circumstances where each path applies by the QCA would be appropriate.

In the QCA mark up of the 2010 Undertaking, the negotiation framework outlines a path for both the end user (as an end user access seeker) and the operator (as a TOA access seeker) to negotiate for access rights. There are no changes to the negotiation timeframes contemplated in the DAU to account for the different type of access seeker. It follows that once the operator has notified their intent to progress an access application as a TOA access seeker, it has nine months to undertake an interface risk assessment, prepare an environment investigation risk management report and demonstrate the rollingstock and rollingstock configurations are consistent with the Rollingstock Interface Standards and therefore comply with the obligations under the TOA. Under this arrangement, QR Network is negotiating with multiple access seekers for the access rights.

In order to preserve flexibility in the negotiation for access rights (that is provide the end user with the ability to control the level of involvement in the negotiation of a split agreement relative to the expertise of the parties) and to reduce the administrative burden on QR Network, it is QRN's view that the negotiation of access rights for split agreements should be conducted as one access application. The end user then should have the ability to nominate whether:

- (i) the operator is present at negotiations with the end user;
- (ii) an operator acts as an agent of the end user in the negotiation for all or part of the access arrangements (for example the operational component of the access rights); or
- (iii) QR Network makes assumptions regarding the operational components of the access arrangements<sup>5</sup>, and when subsequently nominated, the Operator negotiates with QR Network to the extent variations to the assumptions are required (subject to the end users direction to the Operator in relation to potential variations).

Once an EUAA has been executed, the EUAA includes provisions for the end user to nominate an operator or operators. It is assumed that the nomination referred to in cl.2.3(b) to (e) is intended to be the nomination of an operator not previously nominated under the EUAA. However to give effect to this, the reference to the operator as a defined term in 2.3(b)(iv)(B) should be removed and the reference to the *existing* TOA should also be removed.

Under the EUAA<sup>6</sup> it is proposed that the end user will have the right to nominate an operator from time to time (as opposed to the varying of an existing nomination) by giving 30 days notice to QR Network. That nomination will include a TOA executed by the operator. Prior to commencing any train services under the TOA, the operator must provide<sup>7</sup>:

- a certificate of compliance, authorised by QR Network for the operators rollingstock and rollingstock;

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<sup>5</sup> As included at cl.4.5.3 of the QCA mark-up of the 2010 Undertaking

<sup>6</sup> cl.2.3, QCA mark-up of EUAA

<sup>7</sup> cl.4.1, QCA mark-up of TOA

- conducted an interface risk assessment;
- provided a copy of the operator's emergency response plan;
- provide an acceptable environmental investigation risk management report;
- demonstrated to QR Network that it has entered into agreements in respect of private facilities;
- complied with community liaison requirements; and
- plus evidence of accreditation, taken out insurance and developed a safety management system

Within ten days of receiving the notice QR Network must notify the end user whether it accepts or rejects the nomination. Within ten days of receipt of the TOA, QR Network must execute the TOA.

QR Network therefore has ten days to assess the TOA and its alignment with the EUAA, assess whether the operator is financially sound and then execute the TOA. The operator then has twenty days to negotiate with QR Network to comply with the obligations under the TOA prior to receiving a train route acceptance and commencing train services.

The timeframe required to negotiate these operational components is dependent on a number of factors, including whether the operator is a new operator to the CQCN, the specific system, or the defined origin-destination. As such, it is QRN's view that the end user must ensure that sufficient notification is provided to QR Network of the nomination so that the Operator may comply with the obligations under the train operations agreement. To acknowledge the role of the end user in mitigating this risk, it is QRN's view that cl.2.3 of the EUAA should be amended to reflect that written notice of the nomination is provided by the end user at least 30 days prior to the commencement of train services, *or such time as agreed between the EU and QR Network to provide sufficient time for the operator to comply with cl.6 of the TOA.*

Whilst the QCA has noted that the *"TOA negotiations should be subject to the relevant parts of the negotiation framework in Part 4 of the undertaking"*<sup>8</sup>, this does not appear to be reflected in the EUAA. Of some concern to QRN in relation to the pathway for a TOA access seeker under the EUAA is that the EUAA or the TOA does not provide the TOA access seeker with the Undertaking as the framework for dispute resolution in the negotiation of the operating plan, the interface risk assessment, the environmental investigation risk management report and rollingstock and rollingstock configurations. QRN is of the view that to give effect to the QCA's stated intention, cl.2.3(f) of the EUAA should include a provision that allows the operator to access the dispute resolution process of the Undertaking in relation to the operational components of the access agreement as set out in cl.4.5.2 of the QCA's markup of the Undertaking.

### **2.1.1.2 Re-allocating Access Rights**

The Draft Decision highlighted concerns held by the QCA and Stakeholders that the process for varying nominations in the EUAA would *"prevent end users from flexibly managing and utilising access rights during the scheduling process."*<sup>9</sup> To address concerns the QCA has required QR Network to amend its proposal so that an end user can reappoint a train operator up to 48 hours before the day of operation with no minimum variation period.

QRN does not object to the approach taken by the QCA; plainly, QRN will compete on the merits whether under a long-term contract, or under short-term arrangements at the end-users nomination. However, for the QCA's approach to work efficiently, QRN considers that some consequential amendments are required to ensure procedures and processes are in place to ensure effective management of the supply-chain.

In this respect, there are three amendments that QRN considers should be made to the documentation.

First, QRN agrees it is appropriate for the provisions of the ASAA to be consistent with the Undertaking. As such in assessing the minimum notification period to reallocate access rights, QRN notes that the

<sup>8</sup> Draft Decision, p.11

<sup>9</sup> Draft Decision, p.12

Network Management Principles (schedule G to the Undertaking), require variations to the monthly train plan or the interim train plan when scheduling the daily train plan to be requested 48 hours prior to the day of operation providing that the change does not result in any other access holder's scheduled train services not being met or a planned possession not being met. In addition QR Network is required to schedule the daily train plan at least one day prior to the actual day of running and provide all access holders with a copy of the daily train plan within the same timeframe. QRN therefore considers that the 48 hour minimum notification period aligns with the provisions of the Undertaking. However, the requirement in cl.2.3(f) of the EUAA that QR Network must notify its acceptance or rejection of the nomination within 48 hours conflicts with the requirement to issue the daily train plan at least one day prior to the actual day of running. It is QRN's view that the acceptance or rejection of the re-allocation must be made prior to the issue of the daily train plan to access holders.

Second to facilitate the ability of QR Network to assess the nomination and comply with the obligation to ensure that any delay to train services is minimised to the extent practicable, it is QRN's view that any variation of the nominated operator should, at a minimum, include statements (similar to the requirements at 2.3(b)(iv)(B)) from each relevant operator, that is the operator(s) whose access rights are reduced and the operator(s) whose access rights are increased, that includes evidence that the operators agree to the variation, that the variation complies with the train service description and that, where relevant, the operator has conducted an initial assessment of the impact of the changes on their ability to comply with the obligations under the TOA and provided to QR Network as part of the nomination. For example in the event the varied access rights include a path with a new origin destination, that an assessment has been made by the operator of the impact of its operations on the environment and whether any additional risk abatement measures are required<sup>10</sup>. In addition, QR Network should be required to notify all relevant parties to the nomination of its acceptance or rejection. This process will assist in the timely assessment of the nomination by QR Network and the ability of QR Network to comply with the variation provisions of the TOA<sup>11</sup>.

Third, given the train service entitlements are monthly, the nomination of alternate operators during a month needs to identify the proportion of train service entitlements that have not been consumed for the purposes of the contested train path decision making process.

### 2.1.1.3 Flexible Contract Structure

The Draft Decision requires each EUAA to be linked to a separate TOA. The QCA considers that there are clear advantages in this approach, and has therefore required QR Network to amend the contracting structure making the link mandatory.<sup>12</sup> In reaching that view, the QCA has relied on its assessment of the increased administrative costs on QR Network of having a number of TOA's to manage (one TOA for each operator for each EUAA's versus one TOA per operator for multiple EUAA's) offset by the increased risk of an operator breaching the TOA that results in the suspension or termination of access rights under the TOA for end users not related to the breach. In forming this view, the QCA considered the circumstances where a breach may only apply to a train operator for a single access holder specifically (i.e. the failure to pay money owing, or a breach in relation to a rollingstock configuration authorisation).

QRN disagrees with the approach taken by the QCA, which it regards as bureaucratic and likely to prevent end-users and operators reaching commercially-negotiated arrangements. It is QRN's view that the overall contract structure should be the result of a commercial negotiation between the end user and the operator rather than a mandated approach by the QCA (or QR Network). As the end user has the power to nominate, or not, an operator (and withdraw nominations) and thereby controls the preferred contract structure in relation to the TOA, it would seem that the end user has the bargaining power necessary to ensure the desired outcome, providing the arrangements are suitably flexible.

It is QRN's view that the decision by the QCA to require QR Network to amend the contracting structure to provide for each EUAA to be linked to separate TOAs does not adequately consider all practical alternatives or take into consideration additional benefits of alternate structures. It is QRN's view that the option for either a direct relationship between TOA's and EUAA's or a TOA that includes the access rights for multiple EUAA should be available and should not mandate what is ultimately the product of a commercial negotiation between the end user and the operator.

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<sup>10</sup> QRN notes and agrees with the position in the EUAA that if the operating plan will be different from the Train Service Description included in the EUAA, the EU must vary the EUAA prior to nominating the Operator.

<sup>11</sup> cl.24.1 of QCA mark-up of TOA

<sup>12</sup> Draft Decision 2.3, p.17

Indeed, it is notable that in considering the advantages or otherwise of specific contract structures, the QCA has not taken into consideration the considerable benefits of a TOA encompassing a number of EUAAs. For example, the ability for an operator to amalgamate the obligations of a number of EUAA in one TOA reduces the administrative costs not only of QR Network, but also the operator. In addition, the amalgamation of a number of end user access rights in one TOA actually reduces the risk to the end user that the access rights will be terminated given the trigger for termination requires a **material** breach. This benefit to the end user has not been considered by the QCA.

QRN also notes that prospect that every TOA that it sought to enter into would require approval by the QR Network Board under s 438H of the *Transport Infrastructure Act*. This is an administrative complexity and cost that is not considered by the QCA when assessing the benefit or otherwise of the contract structure.

QRN is of the view that concerns raised by the QCA and Stakeholders in relation to the risk of suspension or termination of the access rights under a TOA that relates to multiple EUAAs can be easily addressed by QR Network without requiring a direct relationship between each TOA and EUAA and thereby provide both the required level of certainty to end users *and* the realisation of contract management efficiencies. The risk that is sought to be ameliorated is the risk that an end user will default under the EUAA, resulting in the suspension of access rights under the TOA. In circumstances where the relevant TOA is providing for multiple EUAAs, the concern is that non defaulting end users will be impacted.

QRN first notes that this is already partially addressed by the terms of cl.13.1 of the EUAA whereby QR Network may suspend **some or all** of the access rights **of the end user**. By definition it is not the TOA on whole that will be suspended but those access rights that relate to the end user. Minor amendments to cl.20.1 of the TOA will effect a risk position that prevents all access rights under the TOA from being suspended in the event one end user defaults under their EUAA. In this respect, QRN suggests that the QCA consider amending cl.20.1(a)(xi) of the TOA to provide that to “*events or circumstances specified as providing QR Network with a right to suspend the End User’s Access Rights under the End User Access Agreement to which the Train Service that is proposed to be suspended relates*” (amendments added). This comparatively simple amendment would appear to resolve much of the concern, without the complexity of entirely separate TOAs.

Concerns were raised by stakeholders that the operator may fail to pay access charges to QR Network due to a failure of another end user to pay the operator resulting in the suspension of the access rights under the TOA. QRN regards this as an unconvincing explanation for requiring the imposition of the mandatory compliance cost on *all users and all operators* of managing many TOAs. Where an operator is unable to pay an access invoice for one month of activity and is unable to remedy the situation because it has not received money from one end user would suggest the operator is or is likely to become insolvent. In QRN’s view, this risk is properly outside the scope of the regulatory framework, and can be effectively managed in a RHA. That is to say, the prospect of an operator defaulting on QR Network (or any other supplier) and therefore not being able to perform under an RHA is something that can – and is – accounted for in the RHAs themselves. From the perspective of an end user, if an operator is at risk of default, the end user is able to reallocate the train services and consequently reduce the risk of lost throughput to the end user.

A similar concern raised by stakeholders was the suspension of the operation of the operator’s rollingstock or rollingstock configuration as a result of breach. QRN notes that this prospect is specific to the authorisation provided. That is cl.20.1(c) refers specifically to the rollingstock or rollingstock configurations **involved**. Nevertheless, it is QRN’s view that minor amendments to the suspension provisions in the TOA can clarify whether a suspension relates to all access rights under a TOA or the specific access rights affected by the default or breach. Again, this would not require TOAs for every EUAA.

## 2.1.2 Responsibilities not consistent with existing SAAs

Given the development of the ASAA is in the middle of the current regulatory period with the provisions of both the SOA and the SAHA agreed, QRN agrees it is inappropriate for the ASAA to materially diverge from the other standard agreements. Any differences in terms or risk positions should be a reflection of the arrangements necessary to effect the split agreement.

### 2.1.2.1 Allocation of responsibility for access charges

QRN notes the discussion by stakeholders and QR Network in relation to the allocation of responsibility for the payment of access charges which included recommendations for:

- the end user to pay all charges;
- the end user to have some optionality to pay all access charges; or
- the end user to pay the take or pay component and the operator to pay the non take or pay elements of the access charge.

QRN agrees with the arguments supporting each of the options above, however QRN is concerned that these arguments do not account for an existing option for operators to not pass through to the end user access charges or take or pay (or may pass through only part thereof).

QRN therefore considers that the EUAA, TOA and DAU should not limit the ability of operators to commercially negotiate with its customers for the provision of this service offering. Whilst there are a number of amendments required to facilitate this option (for example the definition of access charge<sup>13</sup> and amendments to schedule 314) of particular concern is the references in the DAU where the adjustment charges<sup>15</sup> and clauses specific to take or pay<sup>16</sup> assume there is full pass through of all access charges to the end user and is not consistent with the existing operation of the commercial relationship between the operator SAA and the RHA. Flexibility should be retained in the Undertaking, EUAA and TOA in the event the end user and operator commercially agree that the TOA access holder accepts access charge risk and therefore should be considered the access holder for all access charges and related adjustments.

### 2.1.2.2 Apportioning cost of testing Weighbridges and Overload Detectors

The QCA has agreed with QRN that both the EUAA and the TOA should include obligations in relation to weighbridges and overload detectors. However whilst QRN supports the drafting in the QCA's mark-ups of the EUAA and the TOA, QRN disagrees with Draft Decision 3.8, which requires the cost of conducting any tests to ascertain the accuracy of the weighbridge or overload detector to be borne by the party responsible for the equipment if the test measurements are within tolerances. Alternatively if the test measurements are outside the tolerances the costs are to borne by the party not responsible for the equipment.<sup>17</sup> QRN considers this is an error in the Draft Decision - plainly the risk of faulty equipment should be on the party that is responsible for that equipment.

## 2.1.3 Additional provisions for splitting responsibilities

QRN supports the position taken by the QCA that the arrangements between the end-user and the operator should be governed by the rail haulage agreement and that QR Network should not be unnecessarily drawn into those matters.<sup>18</sup>

### 2.1.3.1 Amendments to Counter Party Agreements

Under the existing standard access agreements, in the event the operator does not materially comply with the train service description, QR Network has the ability to amend the train service description and if necessary adjust the access charges to account for the impact of the change. In the EUAA, the QCA has included the right of the end user to withdraw or vary its nomination of the non-compliant operator before

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<sup>13</sup> To include the option that the operator pays access TOP charges

<sup>14</sup> To include the provisions regarding TOP in schedule 3 of the TOA

<sup>15</sup> QCA's Mark-up of QR Network's 2010 Access Undertaking (July 2012), Schedule E (note previously Schedule F), cl.2.3.1 (Any adjustment amounts from a variation of a reference tariff with an effective date prior to the QCA's approval of the variation will be reimbursed to (or recovered from) the End User AA and not the TOA).

<sup>16</sup> QCA's Mark-up of QR Network's 2010 Access Undertaking (July 2012), Schedule E (note previously Schedule F), Part B cl.2.2.1 (QR Network's entitlement to earn Take or Pay revenue is only permissible under the EU Access Agreement and not the TOA Access Agreement)

<sup>17</sup> Draft Decision, p.39

<sup>18</sup> Draft Decision, p.42

QR Network commences the process of consulting with the operator and the end user to vary the train service description<sup>19</sup>.

Under the current standard agreements, the consequences to the access holder of changes in the service level (including the train service description) is managed through the rail haulage agreement. The risk to the access holder of QR Network negligently altering the train service description is mitigated by the consultation process and access to dispute resolution. Under the proposed arrangements, the risk and consequence to the TOA access holder of changes in the service level is increased as a result of the end users right to vary the nomination of the operator prior to any consultation or ability to dispute any variation proposed by QR Network.

QRN understands the rationale for the proposed amendments but considers that the rights of the operator are not adequately protected by these arrangements. Specifically, as drafted, the provisions give rise to the prospect that an operator will need to pursue QR Network for consequential loss in the circumstances where an operator loses its nomination as a result of the operation of cl.5(b)(i) of the EUAA and it is subsequently found that QR Network did not act reasonably or that the non compliance was either not material or within the control of the operator.

Given the end user already has the right to nominate an alternate operator with 48 hours notice, this ability to vary the operator's nomination as a result of changes to the service level does not increase the end users flexibility or control of their access rights, while at the same time unnecessarily altering the risk profile of the parties. QRN is of the view that the removal of clause 5(b)(i) from the EUAA is necessary and will result in the reinstatement of the status quo; that is, that the risk and consequence of changes to the service level are maintained in the RHA. This change will, in addition, remove the requirement for consequential amendments to the TOA to appropriately manage the risk.

## 2.1.4 Consequential Amendments to the 2010 Undertaking

### 2.1.4.1 Operator flexibility in negotiating environmental risk abatement measures

The amendments to the 2010 Undertaking provide that the operator, once nominated, will be responsible for the obligations in relation to the environmental investigation and risk management report. The QCA has included an amendment to cl.8.2.1(i)(ii) the limits the ability of the TOA access seeker or TOA access holder to specify how the access charges may reflect the cost to QR Network of assuming all or some of the risk only with the written consent of the relevant EU access seeker or access holder<sup>20</sup>. The amendments as currently proposed assume a full pass through of the access charges to the end user which may not always be the case. QRN suggests the amendment to cl.8.2.1(i)(ii) should reflect the circumstances where the risk mitigation by QR Network will result in an increase to the access charge to which the end user will be liable only so as to avoid unnecessary bureaucracy in the development of the environmental investigation and risk management report.

### 2.1.4.2 Impact of the arrangements on the Quarterly Network Performance Reports

The quarterly network performance reports are intended to provide users with information to establish the cost effectiveness of the service being delivered by QR Network. The relevant changes required as a result of the splitting of responsibility between the end user and the operator is to ensure the quarterly reports aggregate the information without duplicating as a result of the split of accountabilities. Under Part 9 of the QCA's marked-up of the 2010 Undertaking, QR Network is required to publish quarterly reports that are accurate "and presented in a manner that appropriately distinguishes between and EU Access Agreement and a TOA Access Agreement, and any Train Services under such Access Agreements, including to prevent any potential for double counting."<sup>21</sup> Such wording suggests information in the quarterly reports is to be disaggregated on the basis of the type of agreement and raises some concerns that commercially confidential information will be publicly available, particularly in the short term where there are only a limited number of EU/ TOA Agreements executed. QRN suggests the following wording to replace the current amendment to clarify requirements: "*accurate and prevents any potential for double-counting, particularly in relation to EUAA and TOAs.*"

<sup>19</sup> Draft Decision 4.4 (c), cl.6.6(e) TOA and cl.5(b) EUAA

<sup>20</sup> QCA Mark-Up of QR Networks 2010 Access Undertaking, cl.8.2.1(i)(ii)

<sup>21</sup> QCA Mark-Up of QR Networks 2010 Access Undertaking, cl.9.1(a)