

Pacific National Submission to the QCA in Relation to Queensland Rail's Draft Access Undertaking 2

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Executive Summary

Pacific National has concerns with Queensland Rail's Draft Access Undertaking (DAU2) and the associated access agreement. The most important of these Pacific National concerns include:

- Risk Shifting - DAU2 inefficiently shifts risk to access seekers and access holders. Economic efficiency requires that a risk should be borne by the party best able to manage the risk. Consequently, shifting risk to access seekers and access holders who cannot manage the risk results in economically inefficient outcomes. Pacific National believes that changes should be made to DAU2 to ensure risk is borne by the party best able to manage the risk and that freight rail operations are not disadvantaged by carrying inappropriate risk.
- Relinquishment Fees – DAU2 requires a relinquishment fee equivalent to 80 per cent of the present value of the aggregate take or pay charges payable on a train path to the end of the contract term. This approach to relinquishment fees acts as a very strong disincentive for long term contracting and supply chain certainty and does not promote the efficient operation of freight rail.
- Possessions - DAU2 introduces a new concept of “Ad Hoc Planned Possessions” which will allow Queensland Rail to undertake a greater number of possessions outside the master train plan.
- Numerous issues with DAU2 scope and drafting, including:
 - Application of the access undertaking to connections;
 - Improved master planning;
 - Timing of Queensland Rail reporting;
 - The need to retain the Operations Requirement Manual in the access undertaking (as removing the manual from the access undertaking reduces the level of transparency and regulatory oversight applied to Queensland Rail's operational decision making);
 - The need to clarify the concepts “on-time” and “late” trains. Pacific National believes that current Queensland Rail practice should be changed to allow on-time windows to determine if a freight train is “on-time”; and
 - Security deposits.

In making this submission Pacific National seeks that the QCA not approve DAU2 until the matters raised by Pacific National in this submission are addressed.

1. Introduction

Pacific National welcomes the opportunity to respond to the QCA in relation to Queensland Rail's DAU2.

Pacific National is one of Australia's largest freight rail operators and undertakes extensive rail activities in Queensland. In particular, Pacific National holds access and operates trains on both Queensland Rail's Mt Isa Line and North Coast Line. These lines are covered by DAU2. Pacific National's operations on these lines include:

- holding access and operating intermodal trains and miscellaneous trains on the North Coast Line;
- operating bulk trains on the North Coast Line; and
- holding access and operating intermodal trains and bulk trains on the Mt Isa Line.

Given these operations Pacific National's focus is on the DAU2 and the Standard Access Agreement as it applies to the Mt Isa Line and North Coast Line. Pacific National does not operate on the West Moreton System and is not intending to comment in detail on the draft access pricing which DAU2 proposes should apply to this system.

This Pacific National submission will focus on:

- Pacific National's general position on DAU2 (section 3 of this submission);
- Pacific National's detailed comments on DAU2 and the proposed Standard Access Agreement. Pacific National recognises that Queensland Rail has made limited changes to the 2016 Access Undertaking and Standard Access Agreement. Sections 4 and 5 of this submission largely comment on changes to DAU2 (section 4) and the proposed Standard Access Agreement (section 5) but will also make comment on some current sections of the 2016 Access Undertaking and Standard Access Agreement that Pacific National believes should be improved.

In making this submission Pacific National seeks that the QCA not approve DAU2 until the matters raised by Pacific National in this submission are addressed.

This submission does not contain any confidential information and is a public submission.

2. Current Regulatory Environment and DAU2 Regulatory Process

In making this submission Pacific National recognises that the QCA is currently undertaking a review of the declaration of certain rail assets under the QCA Act, where the rail assets subject to the review include the Queensland Rail track assets. In making this submission Pacific National assumes that the Queensland Rail track assets currently subject to the QCA Act will continue to be subject to the relevant provisions of the QCA Act into the future.

Pacific National understands that the QCA is likely to release preliminary findings of this review in December 2018. Pacific National reserves the right to make a further submission on DAU2 if these preliminary findings are not consistent with the Pacific National assumption that all of the Queensland Rail track assets currently subject to the QCA Act will continue to be subject to the QCA Act beyond 2020.

On 21 September 2018 the QCA released a set of eleven topics relating to DAU2 on which the QCA was seeking comment. These eleven topics relate to specific clauses in DAU2 and the Standard Access Agreement and are largely addressed by Pacific National in sections 4 and 5 of this submission. Pacific National does not address QCA's topics 9, 10 and 11 in this submission as these topics apply to the tariff calculations and mechanisms for the West Moreton System. Pacific National does not operate on this System and consequently is not addressing these matters.

3. Pacific National's General Comments on DAU2

Risk Shifting: In the various submissions Pacific National made to the regulatory process applying to the 2016 Access Undertaking, Pacific National also consistently argued that the Access Undertaking and Standard Access Agreement inefficiently shift risk to access seekers and access holders. Pacific National believes that economic efficiency requires that a risk should be borne by the party best able to manage the risk. Consequently, shifting risk to access seekers and access holders who cannot manage the risk results in economically inefficient outcomes. The QCA should identify risk shifting when assessing DAU2 and changes should be made to ensure risk is borne by the party best able to manage the risk and that freight rail operations are not disadvantaged by carrying inappropriate risk¹.

Relinquishment Fees Under the 2016 Access Undertaking and DAU2 if an access holder seeks to permanently relinquish a train path they must pay a relinquishment fee equivalent to 80 per cent of

¹ Several examples of risk shifting are highlighted in sections 4 and 5 of this Pacific National submission.

the present value of the aggregate take or pay charges payable on the path to the end of the contract term.

Pacific National strongly believes that this approach to relinquishment fees acts as a very strong disincentive for long term contracting. If QCA and Queensland Rail wish to promote increased efficiency and increased certainty in freight operations, then the relinquishment fee should be re-assessed.

Further to this issue while some other freight rail track access providers in Australia require the payment of relinquishment fees these fees will typically result in fees which are substantially less than the approach taken by Queensland Rail in the 2016 Access Undertaking and DAU2.

Possessions and Planning: DAU2 introduces a new concept of “Ad Hoc Planned Possessions” which will allow Queensland Rail to undertake a greater number of possessions outside the master train plan to the detriment of end users and train operators. The scope for Queensland Rail to undertake possessions outside the master train plan must be curtailed.

Intermodal Renewal Rights: Pacific National recognises that the coverage of all intermodal traffics by clause 2.9.3 in the 2016 Access Undertaking may not have been intended and that both Queensland Rail and the QCA had intended for these renewal rights to only apply to coal and bulk mineral products. Pacific National notes that DAU2 clause 2.9.3 introduces a changed concept of renewal rights such that these rights only apply to bulk mineral and coal freight rather than all freight.

Pacific National has some concerns with the narrowing of the scope of these renewal rights so that they only apply to bulk mineral and coal traffics. In particular, the scope of renewals should be broadened to include non-mineral bulk products and intermodal traffics related to bulk production.

4. Pacific National’s Specific Comments on DAU2 Drafting

Pacific National’s specific comments on DAU2 are outlined in this section 4. Note that most of these comments are focused on sections of DAU2 which have been amended from the 2016 Access Undertaking but there are some comments on some unamended sections of the current 2016 Access Undertaking that Pacific National believes must be improved.

DAU2 Preamble – Pacific National recognises that the Preamble is “carved out” of the Access Undertaking for legal purposes, however Pacific National queries if the Preamble adds anything to the Access Undertaking. Pacific National believes that the preamble could be deleted.

DAU2 1.1 Duration – The term of this Access Undertaking is to June 2025. Pacific National supports an access undertaking term of at least five years.

DAU2 1.2 Scope – The Access Undertaking should explicitly apply to Queensland Rail network connections as well as Queensland Rail network access. To this end Pacific National notes that the Aurizon Network Access Undertaking explicitly applies to connections and includes a standard form connection agreement.

Pacific National believes that ideally a QCA approved Queensland Rail standard form connection agreement should be developed for Queensland Rail network connections. However, as a minimum, Pacific National believes that the new Access Undertaking should apply to Queensland Rail network connections and allow for Access Undertaking dispute resolution clauses to apply to these connection agreements.

The inclusion of connection agreements in the Queensland Rail Access Undertaking would limit the ability of Queensland Rail to use its position to shift risks and costs to access seekers and access holders through commercially negotiated connection agreements that have no recourse to regulatory dispute resolution processes.

DAU2 1.5 Master Planning and Extension Coordination – Pacific National recognises that the 2016 Access Undertaking required Queensland Rail to prepare Regional Network Master Plans within 12 months subject to industry agreement to fund these plans, however this agreement was not forthcoming. Consequently, DAU2 is proposing that a Regional Network Master Plan will be developed for a System upon a request from the relevant System users (where System users would fund the plan). Furthermore, at the current time planning and funding of the North Coast Line is undertaken by the Queensland Department of Transport and Main Roads rather than Queensland Rail and so in DAU2 the North Coast Line is excluded from this clause.

Pacific National believes that this DAU2 proposed drafting could be improved by:

- having Queensland Rail fund the Regional Network Master Plans for the Systems planned and funded by Queensland Rail; and
- including the North Coast Line in the proposed DAU2 drafting, as by 2025 the situation regarding planning and funding of the North Coast Line may have changed. Pacific National suggests that wording could be inserted which states that to the extent Queensland Rail controls the funding and planning of the North Coast Line then this clause 1.5 applies to the North Coast Line.

DAU 2.1.1 Access Applications – Pacific National supports the change to 2.1.1 a) which allows some flexibility in access applications. Access Applications which, for example, extend the term of an existing service or amend the timetables for existing services should not be required to go through the complete access application process as this imposes an unnecessary administrative burden on both the access holder and Queensland Rail.

Pacific National notes that new DAU2 2.1.1 wording requires that “Access Applications must be sent to the address nominated on Queensland Rail’s website”². Pacific National recognises that initial access applications should be via this address but subsequent changes to an access application typically arise due to exchanges between the access seeker and a Queensland Rail officer assigned to manage the access application. Pacific National suggests that the wording could be amended to the wording below:

Initial access applications must be sent to the address nominated on the Queensland Rail website and variations relating to the access application are via either the address nominated on Queensland Rail’s website or to the Queensland Rail officer assigned to manage the access application.

DAU2 2.2.2 Requirement for Confidentiality Agreement. – Pacific National has several concerns with the amended DAU2 drafting in clause 2.2.2 d). In particular:

- the disclosures permitted in 2.2.2 d) must be required to be made explicit in any confidentiality agreement such that the parties to the agreement are aware that such disclosures may occur. (that is the disclosures should not just be contained in the Access Undertaking). If these disclosures are a concern to the parties at the time, then they can address this via the wording of the confidentiality agreement drafted at that time; and
- the disclosure permitted in 2.2.2 d) iii) C) 2) to “other officers and employees” of the Rail Authority is too broad. This disclosure should be restricted to the board and senior executives of the Rail Authority.

DAU2 2.2.3 Ring Fencing Arrangement – Pacific National has concerns with the fact that Queensland Rail operates a network which provides freight access to third parties and passenger train services to itself.

² The 2016 Access Undertaking was silent on this matter, implying an Access Application could be sent to an undefined address at Queensland Rail.

Pacific National believes that the Access Undertaking should contain some requirements for separation between Queensland Rail functions and a high level of transparency in Queensland Rail's pathing and operational decision making. In particular:

- Pacific National supports the separate QCA regulatory process that seeks to ensure a rigorous cost allocation manual applies to Queensland Rail to minimise any cost shifting or cross-subsidisation; and
- Pacific National opposes the removal of the Operating Requirements Manual from the Access Undertaking as this reduces the level of transparency and regulatory oversight applied to Queensland Rail's operational decision making.

DAU2 2.9.3 Renewals – the 2016 Access Undertaking allows access agreements for all freight types (including intermodal freight) to be renewed provided certain conditions are met. Pacific National understands from Queensland Rail that both Queensland Rail and the QCA had intended for these renewal rights to only apply to coal and bulk mineral products. Pacific National is seeking that the QCA confirm this understanding.

Pacific National has some concerns with the narrowing of the scope of these renewal rights. In particular:

- bulk products which are not minerals should be included; and
- some intermodal traffics, notably on the Mt Isa Line are related to bulk production. These intermodal traffics should remain covered by clause 2.9.3. Thus, Pacific National seeks that intermodal traffics related to bulk and coal production remain covered by clause 2.9.3.

Pacific National recognises that these renewal provisions provide miners with improved certainty in supply chain contracts which helps underpin investments and protects miners against the stranding of mining assets.

In addition, Pacific National notes that under DAU2 drafting the term of any renewal for coal and bulk products is limited to ten years. In the context of providing improved supply chain certainty for mines and protecting mines and mining assets from stranding Pacific National seeks that the QCA confirm the acceptability of this time frame with miners and other end users.

DAU2 4.3 Operating Requirements Manual – Pacific National notes that the DAU2 section 4.3 has been amended to require Queensland Rail to consult with access holders and rolling stock operators before making any amendments to the Operating Requirements Manual (which has been removed from the access undertaking).

Pacific National does not support the removal of the Operating Requirements Manual from the access undertaking, however if the removal of the manual from the access undertaking occurs then Pacific National believes that the consultation in 2.4.3 should be strengthened by also requiring Queensland Rail to:

- consult with access holders and rolling stock operators if other Queensland Rail documents referenced in the Access Undertaking or Operating Requirements Manual are changed; and
- provide a statement to access holders and rolling stock operators when, following consultation, Queensland Rail does not adopt changes proposed by access holders and rolling stock operators. This statement should set out the reasons why Queensland Rail has not accepted the changes proposed by access holders and rolling stock operators. (In setting out these reasons Queensland Rail could use as a broad guide the drafting Queensland Rail has included in DAU2 Schedule E 1.5 which requires the QCA to set out reasons for certain decisions). Thus the 2020 Access Undertaking should include additional wording in clause 4.3 which states:

Following consultation Queensland Rail should provide a statement of reasons setting out the basis and rationale for any variations made to the Operating Requirements Manual by Queensland rail including details of assumptions made by Queensland Rail.

Further to this matter, Pacific National opposes the removal of the Operating Requirements Manual from the Access Undertaking as this reduces the level of transparency and regulatory oversight applied to Queensland Rail's operational decision making. The Operating Requirements manual should be reinstated in the Access Undertaking.

DAU2 5.1.2 Contents of Quarterly Report – Pacific National notes that clause 5.1.2 a) x) implicitly defines that a possession that commences or concludes with 30 minutes of its scheduled time is “on time” and does not need to be reported. Pacific National believes that this approach is flawed as there is currently no 30 minute “on-time” window allowed for freight train schedules. An “on-time” freight train could be delayed 10 minutes by an “on-time” possession finishing late but this freight train would then be 10 minutes behind schedule. Pacific National strongly believes that Queensland Rail should hold itself accountable to the same “on-time” windows to which it holds its freight customers. In this case the proposed changes should either be removed, or alternatively freight trains should be provided with 30 minutes “on-time” windows.

Pacific National notes that DAU2 section 5.1.2 b) has been amended to clarify that the Queensland Rail quarterly reports relate only to freight and long-distance passenger data and operations, not urban passenger data and operations. Pacific National has no fundamental concern with excluding metropolitan passenger trains and including long distance passenger trains but seeks that the QCA confirm that metropolitan passenger services were inadvertently included in the reporting requirements in the 2016 Access Undertaking.

Pacific National notes that clause 5.1.2 b) definitions of included services includes coal, bulk minerals, freight products and long-distance passenger services, however the definition does not explicitly include some freight products such as bulk agricultural product services. Pacific National believes it may be preferable to draft a clause which defines the relevant services by excluding urban passenger train services rather than draft a clause which seeks to include relevant services by identifying different freight types.

DAU2 5.2.1 Obligation to Publish Annual Report – DAU2 section 5.2.1 has been amended such that the Queensland Rail Annual Performance Report for a financial year is now to be published by 31 December rather than 31 October of the following year. Queensland Rail's rationale for this change is that the logical order for auditing the relevant documents is auditing general financial statements, then Below Rail Financial Statements (currently due 31 December) and then the Annual Performance Report (currently due 31 October), so that the Annual Performance Report can be consistent with the Below Rail Financial Statements.

Pacific National supports continuing the practice of releasing the Annual Performance Report by 31 October and believes that the Below Rail Financial Statements timing should be aligned to the Annual Performance Report timing so that both are published by 31 October.

DAU2 6.1.2 Application of Dispute and Complaint Resolution Process – Pacific National is concerned that this clause appears to require access holders to deal with access disputes under their access agreement with Queensland Rail and not under the QCA approved Access Undertaking. Under this clause the Access Undertaking applies to disputes with access seekers (but not access holders).

Pacific National believes that clause 6.1.2 must be amended. In negotiating an access agreement Queensland Rail is likely to have a stronger position than a counter party, and while a standard form access agreement may be used, there is scope to amend this agreement and there are many operational and commercial matters (for example security deposits) which are negotiated between the parties. Pacific National believes that both access seekers and access holders must have recourse to the dispute resolution clauses in the Access Undertaking to ensure that the Queensland

Rail access regime has a strong and independent dispute resolution mechanism to underpin the “negotiate and arbitrate” element of the rail access regime.

DAU2 6.1.4 Resolution by QCA – Pacific National notes that sections 6.1.4 b) and c) of the 2016 Access Undertaking required the QCA to refer any sections of a dispute which related to rail safety to the rail safety regulator. These sections have been deleted due to changes in the rail safety framework that now applies to Queensland Rail with the implementation of the Rail Safety National Law (Queensland) Act 2017.

This deletion removes obligations on the QCA to ask the rail safety regulator to decide on aspects of disputes which relate to safety matters and for any QCA decision to be consistent with this rail safety regulator decision. While the change in the rail safety framework has resulted in these DAU2 sections being deleted Pacific National continues to encourage the QCA (or any other arbitrator) to seek the advice of rail safety experts when elements of an access dispute relate to rail safety.

DAU2 Definitions and Interpretations – Pacific National has the following comments on new or amended definitions contained in clause 7 of DAU2:

- Ad Hoc Planned Possessions – this new definition relates to a new possession concept whereby Queensland Rail will be able to plan possessions outside of the Master Train Plan. These possessions will have a negative impact on train operations and end users.
- Operating Requirements Manual – this definition notes that the Operating Requirements Manual is amended from time to time by Queensland Rail. As outlined elsewhere in this submission Pacific National is concerned with the ability of Queensland Rail to unilaterally amend the Operating Requirements Manual. Pacific National’s position is that any changes to the Operating Requirements Manual must be subject to consultation with train operators and other parties as appropriate.
- Special Event – this definition of Special Event is currently too broad as it includes numerous events identified by name, “major sporting events” and “other events notified to Queensland Rail from time to time ..for which Queensland Rail is required to provide passenger services in addition to the then scheduled passenger timetable”. Pacific National believes that a Special Event could simply be “an event for which Queensland Rail is required to provide passenger services in addition to the then scheduled passenger timetable”. Pacific National’s concerns with the impact of Special Events on freight rail operations are outlined elsewhere in this submission.
- Terminating Date – this definition includes drafting which means that the Access Undertaking will terminate for any part of Queensland Rail service if that part of the service ceases to be declared. Given the 2020 Access Undertaking will not commence until the QCA review of the

declaration of certain rail assets is substantially progressed³, Pacific National believes that this current drafting is unnecessary and the drafting of DAU2 should be reviewed when there is more certainty as to the outcome of the declaration review.

DAU2 Schedule E 1.3 Capital Expenditure Report – The capital expenditure report referenced in Schedule E 1.3 should be submitted on 31 October in order to align with dates for the Annual Performance Report and Below Rail Financial Statements as proposed by Pacific National elsewhere in this submission.

DAU2 Schedule F Network Management Principles – The DAU2 Network Management Principles introduce the concept of an “Ad Hoc Planned Possession” which is a possession which adversely affects train services that is not in the master train plan and is not an urgent, emergency or planned possession. This “Ad Hoc Planned Possession” concept is then included in the DAU2 drafting alongside references to the master train plan. Pacific National queries why “Ad Hoc Planned Possessions” cannot be included in the master train plan (such possessions could be incorporated into the Master Train Plan with three months notice). The rationale for these possessions is unclear to Pacific National, but the existence of “Ad Hoc Planned Possessions” will allow Queensland Rail to undertake non-urgent maintenance which could not be planned three months in advance. This raises concerns with Queensland Rail’s maintenance planning process.

This “Ad Hoc Planned Possession” concept will allow Queensland Rail to plan possessions outside of the Master Train Plan. These possessions will have a negative impact on train operations and end users. Pacific National believes that the references to “Ad Hoc Planned Possessions” in the Network management principles should be deleted.

DAU2 Schedule F 2.2 Daily Train Plan Principles – Clause 2.2 f) i) of the Network Management Principles has been amended to allow the daily train plan to be changed at least 48 hours out to allow for a Special Event. Clause 2.2 f) ii) of the network management principles implies that while Queensland Rail should consult with access holders in relation to some changes to the daily train plan Queensland Rail is not required to consult with access holders in relation to daily train plan changes arising from a Special Event.

Pacific National has several concerns with the introduction of the concept of Special Events into DAU2. These include:

³ The declarations expire in September 2020 and the new Queensland Rail Access Undertaking commences July 2020.

- the occurrence of Special Events is typically known with certainty well in advance of 48 hours. Special Events should be included in the master train plan when known and in any event the Network Management Principles should be amended to only allow the daily train plan to be changed at least 5 business days out⁴ to allow for Special Events;
- the current drafting of clause 2.2 f) ii) implies that Queensland Rail will not consult with rail operators, including Pacific National, in relation to Special Events. Pacific National believes that Queensland Rail should consult with rail operators on the five elements listed in the Network Management Principles clauses 2.2 f) i) A) to E); and
- Special Events can have a highly disruptive impact on freight train operations, consequently Queensland Rail should be obligated under the Network Management principles to use reasonable endeavours to find alternative train paths for freight train paths impacted by Special Events.

DAU2 Schedule F 2.4 Disputes - The 2016 Access Undertaking (clause 2.4 of the Network Management Principles) requires that if there is a dispute between Queensland Rail and an access holder in relation to a change in the master train plan then the change will not occur until the dispute is resolved under the Access Undertaking. Such a dispute could be lodged a day prior to the master train plan taking effect and the resolution of such a dispute may take several months.

Pacific National recognises that this drafting in the 2016 Access Undertaking may create problems for Queensland Rail, however Pacific National does not believe clause 2.4 of the Network Management Principles should be deleted (as proposed in DAU2). Rather Pacific National believes that the clause should be amended so that it states:

... if there is a bona fide dispute between an Access Holder and Queensland Rail in relation to any proposed change or modification to the MTP and the dispute is notified to Queensland Rail at least 30 days prior to the commencement of the MTP the proposed change will not take effect until the dispute has been resolved using the dispute resolution provisions of the undertaking.

Under clause 2.1 d) of the Network Management Principles access holders have to be notified of changes to the master train plan at least three months in advance. Pacific National believes that allowing access holders 60 days to consider the master train plan and lodge a dispute while allowing Queensland Rail 30 days to re-schedule possessions is fair to both parties.

DAU2 Schedule F 3 Network Control Principles - Under the Network Management Principles clause 3 g) the concepts “on-time”, “ahead” and “late” are determined by the scheduling of paths in the

⁴ This timing would still allow for sporting events which may only be finalised a week before they occur.

daily train plan. Under current Queensland Rail practice this means that if trains are not on-time to the minute they are either “ahead” or “late”, which means that under the Traffic Management Decision Making Matrix in Schedule F clause 3 h) these trains can be disadvantaged even if they are only a minute “ahead” or a minute “late”. Pacific National believes that this approach to “on-time” operations for freight trains which may travel 1700 kilometres on the Queensland Rail network applies an unrealistic standard of accuracy to freight train operations.

Pacific National notes that under DAU2 Queensland Rail, in reporting on its own performance, takes a different approach to assessing “on-time” operations. For example:

- Under clause 5.1.2 ii) A) Queensland Rail reports on the number and percentage of trains that reach their destinations within an Allotted Time Threshold, where this Allotted Time Threshold for non-coal freight is 60 minutes; and
- Under clause 5.1.2 x) Queensland Rail reports on the number and percentage of possessions that do not start or finish within 30 minutes of their scheduled time.

These examples show that Queensland Rail accepts that there is a measure of imprecision in scheduling trains and possessions and requiring freight rail operations to meet a standard of accuracy of a minute is potentially unreasonable.

A more flexible position on scheduling accuracy is taken by other freight rail network providers. Pacific National notes that other rail network providers typically use on-time windows of 15 minutes to determine if a freight train is “on-time” and scheduling and other consequences only occur if a train is outside of this 15 minute window.

Pacific National seeks that prior to approving the 2020 Access Undertaking that the QCA requires that Schedule F of the Access Undertaking provide an “on-time” window of 15 minutes to be applied to freight train scheduling. Pacific National believes that a similar “on-time” 15 minute window should be applied to Access Undertaking clauses 5.1.2 ii) A and 5.1.2 x).

DAU2 Schedule G Operating Requirements Manual (Not used) – the Operating Requirements Manual was included in the 2016 Access Undertaking; however, it has been removed from DAU2. Pacific National understands that this has been done to allow the manual to be amended without the need to amend the access undertaking.

Pacific National strongly believes that the Operating Requirements Manual should be included in the Access Undertaking as it is central to the operation of third party freight trains on the Queensland

Rail Systems. (This is evidenced by virtue of the fact that it is still referenced over 35 times in DAU2 and is a defined term).

Pacific National's primary concern is that the Queensland Rail can now unilaterally amend the Operating Requirements Manual in a manner which may have a material impact on third party train operations but there is no regulatory oversight of these unilateral amendments.

Ideally Pacific National believes that the Operating Requirements Manual should be reinstated in the Access Undertaking in order to assure access seekers, access holders and train operators that the Operating Requirements Manual is consistent with the Access Undertaking and Network Management principles and that any changes to the Operating Requirements Manual are subject to consultation and regulatory oversight.

At the very least, Pacific National seeks that the Access Undertaking binds Queensland Rail so that it cannot amend the Operating Requirements Manual without consulting with access seekers, access holders and train operators.

5. Pacific National's Specific Comments on DAU2 Standard Access Agreement Drafting

In the various submissions Pacific National made to the regulatory process applying to the 2016 Access Undertaking, Pacific National consistently argued for standard form agreements for the Mt Isa Line and North Coast Line. Pacific National welcomed the implementation of a Standard Access Agreement for these lines in the 2016 Access Undertaking and seeks that Standard Form Agreements continue to be used.

Pacific National's specific comments on the Standard Access Agreement attached to DAU2 at Schedule H are outlined in this section 5. Note that most of these comments are focused on sections of the Standard Access Agreement which have been amended from the 2016 Access Undertaking but there are some comments on some unamended sections which Pacific National believes must be improved.

Pacific National notes that Queensland Rail has retained the tripartite form of the Standard Access Agreement, with amendments to the execution mechanism for execution to ensure that an effective contract is formed where an access holder nominates more than one rail operator. Pacific National recognises that there are benefits and disadvantages to this approach. For example, the tripartite format allows all parties to see what has been included in the agreement, but the format also requires agreement from three parties which can extend agreement negotiations. Pacific National has no

fundamental concerns with the current tripartite form of access contracting for bulk and coal products⁵ and is willing to work with end users and Queensland Rail to improve the current tripartite agreement. Alternatively, if there is a strong view that the contracting model should shift to separate access holder and train operator agreements Pacific National is willing to work with end users and Queensland Rail to implement these agreements.

Schedule H General – Pacific National notes that the phrase “in good faith” has been deleted from the Standard Access Agreement⁶. Pacific National queries why this wording has been deleted and believes that the wording should be reinstated.

Pacific National also notes that at various clauses⁷ the operator or access holder is required to pay Queensland Rail’s “costs and expenses”. Pacific National is seeking that in these clauses the operator or access holder only be required to pay Queensland Rail’s reasonable costs and expenses.

In addition, there are several minor drafting errors in 8.10 b) i) – the word “to” should be inserted after the word “relation”.

Schedule H 1.3 Productivity and Efficiency Variations – The proposed deletion in clause 1.3 a) of the requirement to negotiate reduces the obligation on Queensland Rail to take productivity and efficiency into account. The new drafting requires Queensland Rail to consider proposals and have regard to certain factors. Pacific National believes that the obligation to negotiate, having regard to the list of factors, should be reinstated. Thus, the clause should read:

... Queensland Rail must reasonably consider those proposed variations and negotiate in good faith having regard to factors including ...

Schedule H 6.2 Obligation to Make Payments – Under clause 6.2 a) access holders are required to make payments in 10 business days. Pacific National believe that this payment time frame is shorter than rail industry practice. Pacific National believes that the payment term should be 45 days.

Schedule H 7.3 Compliance – The proposed deletion of clause 7.3 f) removes an obligation for Queensland Rail to notify the access holder or train operator of any failure or likely failure of Queensland Rail to comply with the agreement. Pacific National believes that this obligation should

⁵ For intermodal services there are multiple end users on each train and consequently the access holder and train operator will be the same entity.

⁶ Pacific National notes that the wording “in good faith” has been deleted seven time including clauses 1.3, 6.7, 8.8. 18.2 and schedule 3.

⁷ Pacific National notes that this wording occurs at 8.4 c), 10.2 c) 10.7 a) and 11 c).

be reinstated. It is reasonable for an access holder or train operator to receive notification from Queensland Rail if Queensland Rail are unable to comply with their obligations in the agreement.

Schedule H 8.4 Compliance – Similar to the point made in relation to clause 7.3 above, the proposed deletion of clause 8.4 d) removes an obligation for Queensland Rail to notify the access holder or train operator of any failure or likely failure of Queensland Rail to comply with the agreement. Pacific National believes that this obligation should be reinstated. It is reasonable for an access holder or train operator to receive notification from Queensland Rail if Queensland Rail are unable to comply with their obligations in the agreement.

Schedule H 10.2 Obstructions - Clause 10.2 c) should be amended so that it states “Queensland Rail may do anything that it considers reasonably necessary ...”

Schedule H 10.7 Noise Mitigation – Pacific National believes that this clause should include explicit wording that the dispute resolution clauses of the access agreement and Access Undertaking apply to noise mitigation management and payments.

Schedule H 12.2 Operators Carriage Indemnity –As currently drafted the clause appears to allow Queensland Rail to be indemnified in circumstances where Queensland Rail is negligent. Pacific National believes that if this is the intention then this clause should be amended to include wording that does not protect Queensland Rail in the event that Queensland Rail is negligent. In addition, Pacific National seeks the deletion of clauses 12.2 c) and 12.2 d).

Schedule H 13.4 Liability for Network – The proposed inclusion at 13.4 a) iv) seeks to further shift risk from Queensland Rail to train operators and access holders. Under this clause, except in relation to negligence, Queensland Rail is not liable for damage arising from the condition of the network, the failure of the network, the maintenance of the network or the failure of the network to meet performance levels (where these performance levels, as set out in Schedule 5 of the agreement, are currently undefined).

Pacific National does not accept the amendment as it further reduces Queensland Rail’s liability and shifts risk to access holders and train operators. Queensland Rail should be responsible for its own performance and if it cannot meet its performance targets then it should be liable for the consequences of not meeting these targets. Queensland Rail’s customers should not be required to bear the risk of Queensland Rail being unwilling to accept the risks which may arise from its inability to meet performance targets.

Pacific National's position is that a risk should be borne by the party best able to manage the risk. In this instance Queensland Rail is best placed to manage the risk of not meeting its own performance targets and so should bear this risk. Shifting this risk to access holders who cannot manage the risk results in economically inefficient outcomes.

Schedule H 13.5 Claims in respect of delays to Train Movements – Pacific National believes that the definition of “emergency” contained in footnote 3 to clause 13.5 b) vii) should be shifted to the Definitions section of the access agreement.

Schedule H 15.2 Termination of Operator by Queensland Rail – Clause 15.2 a) should be amended to read:

“the Operator fails in any material respect to perform or comply with this agreement, other than where this Agreement excludes the Operator’s liability for that failure, or where the Operator is not otherwise liable under this Agreement for that failure”

This wording protects the Operator from termination of an agreement for failure if the Operator was not liable for that failure.

Schedule H 15.4 Termination by the Operator – Pacific National believes that a new subclause should be added to clause 15.4 which allows the operator to terminate the agreement in the event that Queensland Rail fails to comply with safety related obligations under the agreement.

Pacific National notes that Queensland Rail can terminate the agreement in the event that the operator fails to comply with safety related obligations under the agreement (clause 15.2) and, given the importance of safety, Pacific National believes that this wording should be reciprocal.

Schedule H 16.9 Claims – Pacific National believes that the wording in this clause is incorrect. The clause implies that claims are paid in respect to damage to the network; however Pacific National believes that its responsibility is to insure for third party liability (which may include damage) that Pacific National may cause to others (including Queensland Rail). As such any claim paid is for Pacific National's legal liability to Queensland Rail, not for damage to the network per se.

Pacific National believes that this clause should be redrafted.

Schedule H Clause 17 and Schedule 1 Item 11 Security - In Schedule 1 Item 11 the requirement for a security amount has been raised to be equal to six months access charges. If this is to be applied to all access seekers and access holders then this is unacceptable.

Pacific National believes that clause 17 should be redrafted so that as a first step Queensland Rail considers the creditworthiness of an access seeker or an access holder on a case by case basis. To this end objective measures such as credit ratings should be used to assess creditworthiness. Following this review of security an access seeker or an access holder may then be required to provide security.

In any event the new requirement to provide security to cover six months of access charges is excessive. The wording should be reverted to the current wording.

Schedule H Clause 18.2 Adjustment for Material Change – This clause allows Queensland Rail to force increased Queensland Rail costs on to access holders in the event of a change in taxes, a change in law or a change in credit (including a change in funding).

Pacific National recognises that changes in taxes, laws and credit. are beyond Queensland Rail's control, however passing these costs through to access holders and operators (who almost certainly cannot fully pass these costs through to their customers) is a further example of Queensland Rail attempting to shift risk on to its customers, who are no better placed to manage this risk than Queensland Rail.

Schedule H Clause 21.1 Reduction and Relinquishment of Access Rights – As outlined elsewhere in this submission Pacific National strongly opposes the Queensland Rail approach to relinquishing access rights, and in particular the relinquishment fee that applies (where this fee is equivalent to 80 per cent of the present value of the aggregate take or pay charges payable on the path to the end of the contract term).

This relinquishment fee acts as a very strong disincentive for long term contracting for some freight operations. If QCA and Queensland Rail wish to promote increased efficiency and certainty in freight operations, then the relinquishment fee for freight must be re-assessed. The current Queensland Rail approach to relinquishment fees does not promote the most efficient utilisation of the rail network; rather it exists solely to protect Queensland rail's financial position.

Pacific National believes that clause 21 must be substantially amended so it better reflects operational realities (including for example, the increased uncertainty in intermodal supply chain contracting resulting from changes to DAU2 clause 2.9.3).

As a first step Pacific National believes that the relinquishment fee should not be linked to the present value of the aggregate take or pay charges payable on the path to the end of the contract term but

instead should be determined by a simpler approach such as the take or pay charges payable for a much shorter period of time for the path being relinquished.

Further to the issue of Queensland Rail take or pay charging, Pacific National strongly believes that the Standard Access Agreement should be amended to require Queensland Rail to reimburse train operators for any take or pay charges incurred by the train operator on the Aurizon Network sections of North Coast Line track between Parana and Rocklands and between Kaili and Durroburra, where these Aurizon Network take or pay charges are directly attributable to a Queensland Rail cause. This matter goes to the principle that a risk should be borne by the party best able to manage the risk, and in this instance the risk should be borne by Queensland Rail.

Further to this matter Pacific National notes that when Aurizon Network and Queensland Rail were a single entity this was not an issue and it is only an issue due to the separation of these network.

Schedule H Clause 28.1 Definitions and Schedule 3 – The definition of “Access Charge Input” includes a reference to clause 0 and there are seven further references to clause 0 in Schedule 3. Pacific National believes that this may be a cross-referencing error and seeks that Queensland Rail and the QCA confirm that this cross-referencing is correct.

6. Conclusion

Pacific National has concerns with Queensland Rail’s Draft Access Undertaking (DAU2). and the associated access agreement. The most important of these Pacific National concerns, as outlined in this submission are:

- Risk Shifting - Pacific National believes that changes should be made to DAU2 to ensure risk is borne by the party best able to manage the risk and that freight rail operations are not disadvantaged by carrying inappropriate risk.
- Relinquishment Fees – Pacific National believes that the DAU2 approach to relinquishment fees must be reviewed as it acts as a very strong disincentive for long term contracting and supply chain certainty.
- Possessions – The new DAU2 concept of “Ad Hoc Planned Possessions” will allow Queensland Rail to undertake a greater number of possessions outside the master train plan to the detriment of train operators and end users.
- Numerous issues with DAU2 scope and drafting, including:
 - The need to retain the Operations Requirement Manual in the access undertaking. Removing the manual from the access undertaking reduces the level of transparency and regulatory oversight applied to Queensland Rail’s operational decision making;

- The need to clarify the concepts “Pacific National believes that current Queensland Rail practice in relation to “on-time” and “late” trains. should be changed to allow on-time windows; and
- Security deposits.

In making this submission Pacific National seeks that the QCA not approve DAU2 until the matters raised by Pacific National in this submission are addressed.