

QRC

submission

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**QRC submission to the QCA
Proposed Standard Access Agreements
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1. Background

In September 2011 the Queensland Resources Council (**QRC**) provided a submission to the Queensland Competition Authority in response to QR Network's proposed:

- new form of End User Access Agreement (**EUAA**) and Train Operations Agreement (**TOA**) (together, the **SAAs**) and
- amendments to QR Network's 2010 Undertaking to give effect to those access agreements.

In July 2012, the QCA released its draft decision not to approve QR Network's proposed SAAs, and provided the QCA's proposed amendments to the SAAs. The QCA has invited submissions in relation to the draft decision.

The QRC generally supports the draft decision and considers that the amendments proposed by the QCA will go a long way to delivering the benefits which are intended to flow from the new 'split' SAAs, which include improved above rail competition and ability of end users to control underlying access rights. QRC considers that a number of further amendments should be considered and these are set out in this submission. The submission is structured as follows:

- Section 2 sets out QRC's response to each of the QCA's draft decisions.
- Section 3 provides comments and explanations on selected drafting changes proposed by QRC (ie. changes to the drafting contained in the QCA draft decision).
- Section 4 provides some commentary on an issue relating to the current scheduling of trains.
- Attachments 1, 2 and 3 provide proposed further amendments to the EUAA, TOA and Access Undertaking respectively. These are marked up against the QCA version included in the draft decision.

QRC confirms that this submission may be made publically available.

2. Comments on QCA Draft Decisions

The QRC notes that the system rules have a significant impact on the operation of the access agreements and utilisation of access rights. The system rules are (in some cases) yet to be developed by QR Network and (in all cases) yet to be approved. The operation of the SAAs may be affected by the system rules. The QRC may therefore seek further changes to the SAAs after reviewing the provisions of the System Rules.

The QRC also notes the QCA's view that consideration of the SAAs is not an opportunity to more broadly consider changes to the terms of the access agreement. The QRC wishes to flag that as a part of the review of UT4 it is likely to seek a number of changes to the terms of the access agreement, including the SAAs. The fact that those changes are not sought in this submission should not be taken as general support for the current terms of the access agreement.

Draft Decision 2.2: Appointing train operators and reallocating access rights

The QRC supports the QCA's draft decision. The QCA's proposed changes, including making TOA negotiations subject to the relevant parts of the negotiation framework in Part 4 of the Undertaking, would provide a degree of certainty regarding the process and timeframe in which QR Network will process an application to appoint a train operator. The QRC supports the QCA's proposals regarding



a shorter timeframe for reappointment of train operators and the elimination of minimum appointment periods.

(a) Pre-approval process

The QRC submits that the QCA should re-visit the requested process of 'in principle' pre-approval of train operators under the EUAA. This ability is important to end users in ensuring that any train operator that the end user proposes to enter into a haulage agreement with will be suitable (from QR Network's perspective) for the purposes of entering into a TOA. Given that this pre-approval is not binding and will therefore not compromise QR Network's rights to later refuse such nomination, the QRC considers that this should be acceptable to QR Network.

Further, the QRC supports the QCA's suggestion that end users may appoint those train operators which they think they might use over the life of the EUAA.

(b) Negotiation process for TOAs

In the QCA draft decision, the QCA has sought submissions on the negotiation process for TOAs which are being negotiated in parallel with a corresponding EUAA. The QRC submits that the most appropriate way to deal with such process is to:

- Allow the End User (at its election) to negotiate the TOA in conjunction with the EUAA, in which case the process under clause 4 should apply to the combined negotiation of the EUAA and TOA. In this case, the End User would take responsibility for ensuring that the operator is comfortable with the negotiated terms; and
- In regard to TOA's which are not negotiated in conjunction with an EUAA, and for the matters which must be negotiated between QRNN and the operators (such as interface risk management) include a separate expedited negotiation process or dispute resolution process under QR Network's 2010 Access Undertaking.

(c) Overlapping allocations

The QCA has sought stakeholder's views on 'overlapping allocations' whereby an end user would have the ability to nominate two or more train operators in respect of the same access rights. QRC supports the inclusion of this concept in the new framework for the EUAA and TOA. In particular, the real benefit in this more flexible approach to the allocation of access rights is that an end user would be free to use any train operator for a particular train path from its pool of pre-nominated train operators.

Draft decision 2.3: Contracting structure

The QRC supports the QCA's draft decision that a separate TOA should be entered into for each EUAA. This eliminates a range of concerns which would arise from a structure in which an operator held a single TOA for all of its customers, including consequences of defaults, dispute resolution processes and ability to achieve transparency. QRC does not consider that the requirement for separate TOAs will result in any significant administrative burden, as the various TOAs held by an operator would presumably be on similar terms, varying only as necessary to reflect characteristics of each linked EUAA (which in any case would need to be separately documented if a combined TOA was adopted).

Draft decision 3.1: Billing

The QRC supports the QCA's draft decision 3.1. The QRC sees significant advantages in end users having an option to pay all access charges (rather than only the take or pay charges), given that these



are generally passed through to customers in any case. Most importantly, in the absence of this option, it will be difficult to avoid a duplication of security requirements.

Draft decision 3.2: Security

The QRC supports the QCA's draft decision which allows an end user to pay all access charges so that security required under the TOA is limited to the value of deductibles under insurances held by the operator. However, QRC suggests that the security required under the TOA in this case should be capped at an amount equal to 12 weeks of access charges, as any security beyond this amount would clearly alter risk profiles compared to those which would apply under an Operator Access Agreement Coal ("OAAC").

Also, QRC suggests that the standard agreements should provide for the following options in cases where access charges are paid under the TOA:

- Ability for the end user to guarantee QR Network for any unpaid access charges under the TOA, in which case security under the EUAA would be 12 weeks of access charges and security under the TOA would be the lesser of 12 weeks of access charges and the deductibles under the operator's insurances. We note that QR Network has indicated that it would like an approach in which security under the TOA is limited to deductibles where the end user provides such an indemnity.
- Ability for the operator (under the TOA) to guarantee QR Network for any unpaid take or pay charges, in which case security under the TOA would be 12 weeks of access charges and security under the EUAA would be the lesser of 12 weeks of access charges and the deductibles under the end user's insurances. This option is likely to be the most efficient in terms of total security required. In addition, it is likely that operators will be willing to provide such guarantee, as this arrangement places operators in the same position as they are in under an OAAC (ie. liable for access charges and take or pay). It is acknowledged that this arrangement will place the operator in a difficult position if train paths are reallocated by the end user to another operator, however, QRC considers that this is a risk which can be dealt with under haulage agreements.

Draft decision 3.3: Insurance

The QRC supports the QCA's draft decision 3.3. The QRC consider that it is appropriate to delete the requirement for an End User to hold carrier liability, motor vehicle and public liability insurances given that these insurances are only needed for operations (and are therefore only relevant to the TOA).

Draft decision 3.4.1: Liability for infrastructure

On reflection, the QRC accepts that the position which it proposed in the Initial QRC Submission went beyond the liability position provided for in the current approved standard access agreement. On that basis the QRC supports the QCA's draft decision 3.4.1, which requires clause 8.4 of the EUAA to be amended so as to accord with the current SAA.

The QRC notes however that the 'liability from infrastructure standard' provision is drafted too narrowly in the current SAAs, and QR Network should bear responsibility for a failure to maintain as a result of any breach of the agreement (and not just a breach of clause 7.2(a) of the EUAA). This is a position which the QRC will ask the QCA to consider at an appropriate time in the future.

Draft decision 3.4.2: End User liability for above rail operational issues



The QRC supports the QCA's draft decision 3.4.2 (that is, that clause 8 of the EUAA be amended to remove any requirement for the End User to indemnify QR Network for operational matters).

While the QRC is supportive of the QCA's decision 3.4.2, the QRC considers that the drafting of clause 8.1 needs to go further. The QRC considers that the following words should be added to the end of clause 8.1: "For clarification, nothing in this clause 8.1 requires the End User to indemnify QR Network for an act or omission of an Operator". This additional language is required because the clause 8.1 indemnity is given in respect of matters "arising out of the Agreement". 'Arising out of' is a broad phrase and could be interpreted to include the entry into or performance of the Train Operations Agreement.

Draft decision 3.4.3: QR Network cause definition

The QRC supports the QCA's draft decision 3.4.3 in relation to amendments to the definition of "QR Network Cause". QRC acknowledges that further amendments requested to both QRC and QR Network are not a consequence of the split arrangements and should therefore be considered in the development of UT4.

Draft decision 3.4.4: Consequential loss

The QRC supports the QCA's draft decision 3.4.4 in relation to the allocation of risk for "Consequential Loss" for the reasons given in the initial QRC Submission.

Draft decision 3.4.5: Operational constraints

The QRC supports the QCA's draft decision 3.4.5 in relation to the allocation of risk for operational constraints. The QCA's draft decision maintains consistency of risk allocation between the new forms of access agreement and the current standard access agreement.

Draft decision 3.5: Suspension

The QRC supports the QCA's draft decision 3.5 for the reasons given in the initial QRC Submission.

Draft decision 3.6: Termination by QR Network

The QRC supports the QCA's draft decision which prevents termination of the EUAA for failure to pay an amount which is under dispute, provides a remedy period prior to termination of the EUAA and requires QR Network to provide an end user with a copy of any termination notice provided to the operator.

Draft decision 3.7: Forecasts of train services

The QRC supports the QCA's draft decision 3.7.

Draft decision 3.8: Weighbridges and overload detectors

The QRC supports the QCA's draft decision 3.8 for the reasons given by the QCA in the QCA's analysis. This amendment is also consistent with draft decision 3.1, which allows an end user to elect to pay access charges under the EUAA.

Draft decision 3.9: Definitional matters.

The QRC supports the QCA's draft decision 3.9 for the reasons given in the Initial QRC Submission. The clarification that the "end user's staff" does not include the operator is critical as this could otherwise undermine the achievement of one of the key objectives of the alternatives SAAs, which is



to allow an end user to hold access rights without becoming liable for operational matters which are the responsibility of the operators.

Draft decision 3.10: Most favoured nation clause

The QRC supports the QCA's draft decision allowing the end user to notify QR Network where it believes QR Network has entered into an access agreement with another party on more favourable terms.

Draft decision 4: Splitting responsibilities

In the Initial QRC Submission the QRC suggested that the End User, Operator and QR Network enter into a tripartite agreement. The purpose of that agreement was to provide the End User with protection that changes, disputes, suspension or termination in respect of the Train Operations Agreement did not affect the End User. The QCA has stated that it is not supportive of a tripartite agreement because it is inconsistent with the division of responsibilities intended by the new form of access agreements. QRC accepts that the outcomes which were sought through the tripartite agreement can largely be achieved through the terms of rail haulage agreements, notices provisions for issues that arise under the TOA which may impact the interests of the end user, and appropriate dispute resolution processes.

QCA has proposed that QR Network should be required to give the End User a notice of certain events – for example, the QCA is supportive of QR Network being required to notify the End User when QR Network issues a default notice under the TOA. In the QRC's view, the circumstances in which QR Network is required to copy a notice given by QR Network under the Train Operations Agreement do not go far enough.

The QRC considers that it is important that the End User receives timely provision of notices given under the TOA because the exercise of rights and obligations under the TOA will have the potential to impact on the End User. Further, unless an End User has adequate knowledge of the performance of the TOA, the End User's ability to exercise rights under the EUA may be affected. QR Network is not prejudiced by having to copy notices under the TOU to the End User.

In light of the above, the QRC considers that it would be appropriate for QR Network to copy all notices and information exchanged under the TOA to the End User. To the extent that the QCA is not willing to cast the obligation to give notices to the End User so broadly, the QRC considers that End Users should be notified of events in respect of the TOA in the following circumstances (in addition to those notices already accepted by the QCA);

- (a) Any proposal or agreement to vary a TOA;
- (b) Any notice, proposal for or consent to an assignment of the TOA;
- (c) Any waiver of a right under the TOA.

Where QR Network is required to give the End User a notice given under the TOA, QR Network should be obliged to give the notice as soon as reasonably practicable to the End User. The current drafting in the EUA does not oblige QR Network to give the End User notice within any time period.

Draft Decision 4.3: Dispute resolution

The QRC supports the QCA's draft decision 4.3. The ability to join a relevant party to a dispute will ensure consistent outcomes and is necessary in the absence of a tripartite agreement. Requiring the End Users consent prior to amending a TOA where the amendment could have impacts on the access



rights of the End User is an important protection for End Users, while the proposed change allowing End Users and operators to exchange copies of the EUAA and TOA will improve transparency and facilitate an understanding of the links between these agreements. This approach provides a further demonstration of the benefits of a contracting structure in which the operator enters into a separate TOA for each EUAA.

Draft Decision 4.4: Train Services

QRC supports the QCA's draft decision 4.4. These amendments are necessary to ensure that the end user can ensure its ongoing ability to utilise the underlying access rights.

Draft decision 5: Responsibilities consistent with SAA

In section 5 of its draft decision the QCA has identified a number of changes proposed by stakeholders that the QCA has decided should not be made because to do so would be inconsistent with the current SAAs.

The QRC has considered the changes referred to in section 5 of the draft decision. While the QRC considers that there would be great merit in making all of the changes referred to, the QRC accepts that one of the guiding principles which the QCA should follow in considering the EUAA and TOA is the extent to which those agreements are consistent with the risk allocation provided for in the current SAAs. Accordingly, the QRC understands that the changes referred to in section 5 of the draft decision will not be made now. The QRC considers however that the QCA should consider requiring those changes to be made in the future.

3. Commentary of drafting changes

The Attachment identifies specific drafting changes to the EUAA, TOA and Access Undertaking. This section discusses some key changes to the Access Undertaking which require further explanation.

Ensuring that benefits of new SAAs are not unnecessarily delayed

In order to realise the benefits of the new split contracting structure, it is essential that customers be in a position to transfer access rights which are held under existing contracts to the split structure. If this is not possible, then customers will only benefit from the new structure upon the expiry of existing agreements, which in many cases will delay the benefits of the new SAAs for up to a decade. QRC considers that the amendments which are required to make this possible are within the scope of the current process, as:

- Part 5.2(n)(i) of the undertaking requires "a Proposed Standard Access Agreement which can be entered by users of rail haulage services to contract directly with QR Network for Access Rights". We would suggest that "users of rail haulage services" includes existing users whose access rights are currently held through an operator.
- Part 5.2(n)(iii) of the undertaking provides for consequential amendments to give effect to the new SAA's.

In proposing amendments which ensure that customers can transfer existing access rights to the new SAA's:



- QRC is not proposing a change which would alter the risk profile of QR Network. QCA in its draft decision has been careful to ensure that the new SAAs do not alter risk profiles. Therefore splitting an existing agreement into the new SAAs will not alter QR Network's risk profile.
- QRC is seeking drafting changes which clarify that existing provisions of the undertaking continue to apply in the case of the new SAA's. Under the current undertaking:
 - a customer may initiate a transfer from one access holder (of which it is a customer) to an alternative access holder (7.3.7). While we consider that clause 7.3.7 in its current form will allow a customer to initiate a transfer from an operator to the SAA structure (with the customer entering into the EUAA), QRC sees benefits in clarifying that this is the case.
 - an access holder may transfer access rights to another access holder under clause 7.3.6. This clause could again arguably be used by an access holder to transfer access rights to the new SAA structure (where, in the case of an OAAC, the original access holder would be the party to the TOA, and in the case of an Access Holder Agreement Coal, the original access holder would be the party to the EUAA), however QRC sees benefits in clarifying that this is the case.

4. Pooling of Access Rights

Currently almost all access rights are held by train operators under a small number of access agreements. In the allocation of train paths during scheduling, certain 'pooling' of Train Service Entitlements takes place. We understand that this arises under the Contested Train Path Decision-making Process (Appendix 2, specifically item c(ii)). Unless required by a haulage agreement, such an arrangement is not formalised through consents or variations, largely because the miner is not a party to the access agreement.

The QRC is supportive of the flexibility which the current approach to train scheduling provides. The QRC is concerned to ensure that that flexibility is not lost due to the use of the EUAA/TOA form of contracting. Based on the QRC's review of Schedule G and the EUAA and TOA there should be no difference in flexibility of train scheduling between the end user access agreement and train operator access agreement (ie. the operator should be able to 'pool' the paths held directly by the operator with the paths allocated to the operator under a TOA). The QRC suggests that any System Rules developed should be tested to ensure that no disadvantage arises, in terms of flexibility, from holding Access Rights under an EUAA.

Finally, the QRC wishes to note that the train scheduling provisions in the access undertaking, access agreements and system rules require reform. For example, the language in Appendix 2 of Schedule G of the access undertaking is very broad and ambiguous. Given the importance of train scheduling, greater prescription is required. The QRC understands that reform of the train scheduling provisions is beyond the scope of the new SAAs, but considers that this issue should be considered as a part of the consideration of the system rules and UT4.

1. Proposed amendments to QR Network's 2010 Access Undertaking

The QRC has the following comments on the drafting of QR Network's 2010 Access Undertaking:

Clause	Clause details	QRC comments
3.4(e)(i) and (ii)	Management of Confidential Information	<ul style="list-style-type: none"> in paragraph (i): ... to an EU EU Access Holder information... in paragraph (ii): ...connection with the the relevant EU Access Agreement...
4.5.1(e)(iv)(B)	Negotiation Period	... <u>Negotiation Period (which in respect of any EU Access Agreement will include the TOA Access Agreement and vice versa) will...</u>
4.5.3(a)(i)	Negotiation of EU Access Agreements and TOA Access Agreements	...the right to be present <u>participate</u> in any negotiation between QR Network and a relevant TOA Access Seeker ...
4.5.3(b)(i)		...an assumed Operating Plan and <u>Interface Risk Assessment (which the EU Access Seeker...</u>
New clause 4.5.3 (ii)		The QRC submits that the new paragraph (ii) below should be included and the existing paragraph (ii) should be re-numbered to paragraph (iii): (ii) an EU Access Seeker will undertake and prepare an EIRMR in accordance with Clause 8.2.1; and
4.5.3 (c)		The QRC submits that paragraph (c) of this clause should be deleted.
6.1.2(f)(i) and (ii)	Limits on Price Differentiation	<ul style="list-style-type: none"> in paragraph (i): ...<u>or EU Access Seeker (as applicable)</u>... in paragraph (ii): ...TOA Access Seeker in a manner consistent with <u>or contemplated by the Standard Access</u>

Clause	Clause details	QRC comments
		<i>Agreements...</i>
7.3.6(a)	Capacity Relinquishment and Transfer	The QRC submits that the following words should be added to the end of the clause: <i>For clarification, an Access Holder may utilise this Clause 7.2.6 to transfer Access Rights to itself (for example, where an Access Holder under an 'access holder access agreement' wishes to transfer its Access Rights to an EU Access Agreement and TOA Access Agreement).</i>
7.3.7(a)(i)(A)	Customer Initiated Capacity Transfer	The QRC submits that the clause should be amended as follows: <i>...Access Agreement (which for clarification may be comprised of an EU Access Agreement and TOA Access Agreement) with that specified Access Seeker...</i>
7.3.7(a)(ii)		The QRC submits that the following words should be included at the end of the clause: <i>An Access Holder complies with this paragraph (ii) to the extent that one of the EU Access Agreement or TOA Access Agreement includes the terms of the Old Access Agreement relating to Take or Pay.</i>
12.1	"Access Agreement"	The QRC submits that the following sentence should be included at the end of the definition: <i>For clarification, except where expressly provided otherwise a reference to "Access Agreement" is to both the EU Access Agreement and TOA Access Agreement.</i>