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2 November 2011

John Hall  
Chief Executive Officer  
Queensland Competition Authority  
GPO Box 2257  
Brisbane QLD 4001

Dear John

**Proposed Standard Access Agreements – Response to Stakeholder Submissions**


As per your request of 20 September 2011, QR Network has prepared a submission which responds to stakeholder submissions on the proposed standard access agreements (Alternative Form of Access).

The attached submission reaffirms the objectives and limitations of the proposed Alternative Form of Access. QR Network has also limited its responses to those issues raised by stakeholders which are within the scope of requirements of the 2010 Access Undertaking.

In addition, QR Network has not responded to the stakeholder suggested mark-ups. QR Network proposes to provide the Queensland Competition Authority preferred amendments to its proposal following engagement with stakeholders on the attached submission.

Should you have any queries in relation to this submission please contact Dean Gannaway, Group Manager Regulation and Policy by phone on 3235 2055 or email at [dean.gannaway@qrnational.com.au](mailto:dean.gannaway@qrnational.com.au).

Regards,



Michael Carter  
Chief Executive Officer  
QR Network Pty Ltd



# Proposed Alternative Form of Access

Response to Stakeholder Submissions

2 November 2011

# Alternative Form of Access – Response to Stakeholder Submissions

## 1.0 Introduction

The QR Network 2010 Access Undertaking (2010AU) required QR Network Pty Ltd (QRNN) to consult on and submit to the Queensland Competition Authority (QCA) within 6 months of the approval date:

- “(i) a Proposed Standard Access Agreement which can be entered by users of rail haulage services to contract directly with QR Network for Access Rights without bearing liability and obligations for above rail operational issues, subject to utilisation of those Access Rights being conditional on one or more Railway Operators nominated by the user entering an operator agreement with QR Network of the type described in Clause 5.2(n)(ii);*
- (ii) a Proposed Standard Access Agreement which can be entered into by one or more Railway Operators, nominated by such users who are Access Seekers or Access Holders pursuant to a user agreement with QR Network of the type described in Clause 5.2(n)(i), under which they can utilise some or all of the user’s Access Rights, subject to assuming liability and obligations in relation to above rail operational issues; and*
- (iii) if necessary, any consequential amendments to this Undertaking to give effect to the Proposed Standard Access Agreements submitted in accordance with Clauses 5.2(n)(i) and (ii) (including, for example, to provide flexibility for short term scheduling of Train Services) provided that any such amendments do not alter the scope and nature of this Undertaking.”*

Collectively these documents comprise an Alternate Form of Agreement (**AFoA**). QRNN refers to the Proposed Standard Access Agreement developed in accordance with:

- Clause 5.2(n)(i) of the Undertaking as an ‘End User Access Agreement’ (**EUA**); and
- Clause 5.2(n)(ii) of the Undertaking as a ‘Train Operator Agreement’ (**TOA**).

(QRNN sought an extension to the deadline for submitting the AFoA until 30 April 2011. The QCA advised QRNN of its approval of that extension in a letter dated 21 April 2011.

QRNN submitted the AFoA to the QCA on 29 April 2011. The QCA publicly released the QRNN’s proposed AFoA for comment and sought responses by 26 August 2011. The QCA received 9 submissions.

The QCA is seeking comment from QRNN on the issues raised by stakeholders in those submissions. The purpose of this submission is to address the issues raised by stakeholders and to identify where QRNN would look to amend its original proposal.

This submission does not specifically address the proposed variations to the EUA and the TOA proposed by the Queensland Resources Council (QRC). QRNN proposes to provide proposed amended Standard Access Agreements to the QCA after it has had an opportunity to consult with the QRC and QCA on the matters detailed in this submission.

## 2. Objectives of the Alternate Form of Access

QRNN notes that stakeholders have raised a number of issues which suggest that the objectives of the proposed Standard Access Agreements are uncertain or the specific nature of any restrictions are unclear. This section summarises a number of key principles which are relevant to the design of the AFoA.

1. **Consistency with Terms of the Approved Standard Access Agreements.** The Proposed Standard Access Agreements are based on the commercial terms of the approved Standard Operator Access Agreement (SOAA), allocated between the EUA and TOA as appropriate. The objective of the proposed Standard Access Agreements is not to amend or depart from the scope or nature of the approved terms in the approved SOAA. We note that in this regard matters such as amending the security provisions to prescribe the requirements beyond the current approved SOAA is inconsistent with this requirement.
2. **Access is Provided to an Access Holder.** The purpose of the TOA is to ensure in relation to the performance of the Access Rights the accredited rail operator is the Access Holder. The EUA provides overarching capacity management rights with the right to assign to a railway operator as the access holder. QRNN considers this is necessary to ensure only service providers are directly involved in the integrated planning of the supply chain to meet the needs of the End Users.
3. **The Commercial Arrangements between an End User and a Rail Operator are Outside the Scope of the Access Arrangements.** The AFoA is not intended to address matters that should be managed through commercial arrangements between the End User and the Railway Operator. In this regard where the railway operator's performance under the TOA may have a commercial consequence to the End User then this should be addressed through appropriate obligations between those parties and not introduce obligations on QRNN to the End User. While the current Standard Access Holder Access Agreement (**SAHAA**) transfers liability for the operational performance of railway operator to the access holder it does not require the End User to bear those liabilities. These matters are able to be appropriately addressed in rail haulage arrangements.

## 3. Specific Issues Raised by Stakeholders

Stakeholder submissions have raised a number diverse of issues with the proposed AFoA. Subject to satisfying the objectives described above, QRNN considers a number of amendments can be made in line with those requested by stakeholders to more closely meet stakeholder preferences.

This section provides a summary response to the issues raised in stakeholder submissions.

### 3.1 Nomination of Operators by End Users

One of the more significant issues raised by stakeholders is a desire to achieve greater flexibility in the railway operator nomination process. Specifically these concerns can be classified as relating to:

- The timeframes for nomination of a railway operator;
- The requirement to have preapproved railway operators; and
- The timeframes required for variation of allocation of Access Rights to nominated railway operators.

#### 3.1.1 Timeframes for nomination of a Railway Operator

QRNN acknowledges that a requirement to do what is necessary to promptly provide for approval of a nomination is not unreasonable.

QRNN notes that submissions have proposed that a Railway Operator should have a separate TOA for each end user agreement. QRNN has not mandated that this be a requirement of entering into a EUA, however QRNN has not precluded it either. Consistent with the principles detailed in section 2 where this reflects the preference of the End User then this is an issue to be managed through negotiation of its rail haulage arrangements with a railway operator.

The process of entering into a separate TOA may lead to an increase in the timeframes necessary for QRNN to consider, approve then execute a separate TOA relative to inclusion of the train paths into an executed TOA.

### 3.1.2 Preapproval of nominated Railway Operators

Submissions suggest that at any time an End User may seek pre-approval of any third party which the End User may wish to nominate as a Railway Operator. While QRNN understands the intent of such an obligation, it is not likely to be feasible to implement. This would require QRNN to execute a TOA with any accredited rail operator the End User considers they may wish to use.

Under the terms of the Access Undertaking, a nominated Railway Operator will also be an Access Seeker and QRNN does not consider it should be required to negotiate an access agreement with a party who may at some time in the future use access rights. The purpose and intent of the access regime is to provide a framework for the negotiation of access rights the access seeker will utilise, not may utilise.

In addition, the TOA only provides the right to utilise the Access Rights where the necessary conditions of operation have been satisfied. This includes the appropriate risk assessment for completion of the interface risk management plan. Accordingly, the preapproval of a railway operator will not necessarily expedite the ability of a nominated railway operator to use the nomination access rights.

QRNN does not propose to include an obligation to pre-approve third parties as nominated Railway Operators for an EUA.

### 3.1.3 Timeframes for variation of allocation of Access Rights between nominated Railway Operators

QRNN considers that the timeframes associated for variation of Access Rights between nominated Railway Operators needs to appropriately balance the interests of flexibility with the ability of Railway Operators to undertake effective resource planning. As discussed in the explanatory notes submitted to the QCA on the proposed AFoA, it is also necessary for QRNN to understand any capacity implications of the variation of the allocation.

The proposed EUA includes a requirement for the End User to:

- provide a minimum period of notice of the variation of 30 days; and
- nominate variation for contract period of no less than 3 months.

A key driver of the proposed 3 month period is to ensure a Railway Operator maintained a sufficient period of commercial certainty to be able to borrow and lend access rights over a period of time to manage demand variability under the contracting framework. However, consistent with the principle that these practices are intended to be managed directly between the Railway Operator and the End User this should be managed within the rail haulage agreement. Therefore, QRNN considers that it is reasonable to provide a greater degree of flexibility to varying allocations of Access Rights to align with the scheduling and planning environment. Given these factors, QRNN proposes to amend the variation of allocation of Access Rights to require the End User to:

- Provide a minimum period of notice of variation of 14 days prior to the commencement of the relevant 7 day planning period; and
- Nominate variation in minimum increments of 7 days.

The submissions also have made reference to the requirement to vary allocations over a shorter time period in order to address circumstances where the nominated Railway Operator is unable to utilise the Access Rights. The proposed amendments do not prevent the utilisation of those Access Rights. The alternate Railway Operator can utilise the Access Rights through:

- an adhoc train service;
- nomination of entitlements under clause (c) of the Contested Train Path Decision-making Process; or
- obtaining agreement between the parties to schedule the train service as permitted under clause (b) of the Contested Train Path Decision-Making Process.

Where the service has been scheduled and operated by the alternate railway operator the End User can make subsequent variations to the allocations to rebalance the nominations should it elect to do so. In addition, the take or pay will be determined on the aggregate train paths operated under the relevant TOAs.

Accordingly, the proposed amendments to the allocation variation procedures provide an appropriate balance of interests and do not impede the flexibility being sought by the End User where it also has the appropriate commercial arrangements in place with its nominated Railway Operators.

### 3.2 Payment of Access Charges

Stakeholders have expressed a preference for access charges to be payable through the EUA without clear explanation as to purpose or as to why QRNN's proposals and reasons for access charges to be payable under the TOA is not appropriate. QRNN notes that the primary purpose of the TOA is to manage the normal commercial arrangements associated with the performance of access rights.

As access charges are dependent on the performance by the Railway Operator under the TOA then the liability for the payment of access charges should rest with the Railway Operator. QRNN is seeking to avoid involvement in billing disputes which relate not to the derivation of the access charges but whether the railway operator's performance aligned to the service expectations of the End User. These matters are currently dealt with under the commercial interface between the Railway Operator and the End User and should continue as such.

Matters which could give rise to an access charge variation could include:

- loading performance;
- train length;
- scheduled train performance and capacity multiplier; or
- operational decisions regarding use of diesel or electric trains.

QRNN maintains its proposal to invoice access charges through the TOA.

### 3.3 Security

QRNN has reviewed that alternate proposals for security and notes that stakeholders have put forward arrangements which are consistent with option 2 included in the explanatory notes. QRNN considers that it is reasonable to reduce the security under the TOA to a level reflecting the deductibles under the railway operator's insurance policy if the End User accepts liability under the EUA for unpaid access charges or other payments which are due and payable under the TOA.

QRNN notes that the inclusion of a form of bank guarantee as annexure to the agreement may not achieve the objectives of stakeholders, as this may not align with the form to be issued by their preferred financial institution. QRNN considers it would be preferable to specify only the list of minimum requirements for the bank guarantee.

QRNN would prefer not to include a requirement in the EUA to not unreasonably withhold or delay its approval of the security provided by the railway operator under the TOA. This would also appear unnecessary if the EUA included an ability to call on the End User for any default in payment under the TOA.

### 3.4 Insurances

QRNN accepts that the End User should not be required to maintain carrier liability insurance as a commercial obligation in the EUA. QRNN considers that the End User should be required to maintain motor vehicle insurance as it's conceivable that the end user may have their vehicles entering our premises, in which event they should be adequately insured where they cause personal injury and/or property damage.

The EUA provides QRNN the ability hold the End User liable for incidents which are not related to train performance but may arise due to the actions (e.g. loading practices) of the End User. QRNN notes that these actions may give rise to an incident on the mainline which has the potential to result in a maximum exposure consistent with an incident which was associated with the actions of the railway operator. Accordingly, QRNN maintains that the level of insurance requirements should be consistent between the EUA and the TOA (but notes that insurance requirements will be the subject of commercial negotiation on a case by case basis).

### 3.5 Obligations owed by QRNN to the End User

Stakeholder submissions have expressed concern that QRNN has removed obligations from the EUA which were included in the current SOAA and only retained in the TOA.

QRNN has 'split' the obligations and responsibilities in the SOAA between the EUA and TOA to reflect the intended commercial relationship of the respective agreements and to ensure a contractual obligation is not duplicated. Where obligations have not been included in the EUA it is because that agreement does not provide the Access Holder with any rights to operate a train service. It provides the right to allocation access rights to a railway operator who is able to operate the respective train service under the TOA. For example, there is no contractual requirement to provide train control to an End User in the EUA as the agreement does not provide for the operation of a train which requires those services.

QRNN does not support inclusion of obligations in the EUA which relate to operation of train services.

### 3.6 Management of the TOA

Submissions have suggested that QRNN should be required to enter into a tri-partite arrangement with the End User and the railway operator. QRNN accepts that the End User's interests could be affected if the railway operator waived or varied its rights under the TOA without the approval of the End User.

Consistent with the principle that the AFoA is not intended to provide a framework for management of the commercial relationship between the railway operator and the End User, QRNN does not support proposals to enter into a tri-partite contractual obligation to address issues that are able to be and should be properly reflected in the rail haulage arrangements.

### 3.7 Suspension and Termination

Stakeholders have raised a number of concerns regarding the rights of the End User associated with suspension or termination of the TOA. It is worth emphasising that the End User is also able to address suspension through allocation of train paths to another nominated railway operator and that termination of TOA does not terminate the End Users access rights.

QRNN acknowledges the concerns that where multiple EUA's are linked to a single TOA may give rise to issues of suspension and termination of the TOA. However, QRNN notes that under certain circumstances even where the multiple and separate TOAs are entered into a suspension of use for a Railway Operator will apply to all its agreements (this may be particularly relevant where the suspension is safety related or related to a material non-compliance with the railway operator's interface risk management plan).

#### 3.7.1 Suspension

Stakeholders have requested that QRNN provide to the End User a notice of suspension where it intends to suspend train services under a TOA. QRNN notes that where the End User has accepted the security arrangements proposed above they would receive any relevant notification of suspension of use through non-payment directly when QRNN calls on the End User to satisfy the relevant financial obligations. Notwithstanding these proposed arrangements QRNN considers it reasonable to include a requirement to inform the End User of any suspension notices issued under the TOA.

As discussed, an End User's potential remedy would be to allocate access rights to an alternate nominated Railway Operator. Accordingly, it is not feasible or necessary for the End User to be able to 'step-in' where suspension relates to operational matters.

#### 3.7.2 Termination

Stakeholders have queried whether the termination provisions relating to clause 6(a) or 6(b)(ii) should give rise to a right to terminate and this appears to be inconsistent with the SOAA. Upon review of the current standard access arrangements, these provisions do not give rise to a right to terminate and amendments are necessary to the proposed EUA to ensure a consistent approach between the standard access agreements.

Similarly, QRNN acknowledges that the EUA should also include the relevant notice and remedy period in the approved SOAA prior to QRNN exercising its rights to terminate.

QRNN notes that the inclusion of 'material obligation' in the termination provisions is variation from the approved SOAA and should not be included in the EUA.

## 3.8 Liabilities

In preparing the drafting for the proposed EUA and TOA, QRNN has applied the following principles:

1. there should be no overlap in liability across agreements which would give rise to both the Railway Operator and End User the right to claim on QRNN for the same matter; and
2. there should be no increase in QRNN's risk arising from entering into the two agreements relative to the current SOAA.

QRNN notes that there is currently inconsistency in relation to liabilities and indemnities between the SOAA and the SAHAA. As the decisions and discussion of liabilities and indemnities in the approval of the 2010AU related to matters in the SOAA, any references to these issues should be with reference to that agreement.

### 3.8.1 Consequential Loss

QRNN notes that the references made by stakeholders to consequential loss refer to the provisions in the SAHAA. Under that agreement QRNN is liable to the Access Holder for Consequential Loss (as defined) only in relation to wrongful inspection or audit (in the circumstances specified in clause 12.8) or for 'wrongful' suspension (in the circumstances specified in clause 19.3(b)).

Under the current SOAA and the TOA submitted, QRNN is liable to the Railway Operator in the same terms, but the Access Interface Deed excludes liability for Consequential Loss (as defined) as between the End User and the Railway Operator.

Accordingly QRNN maintains the proposed EUA and TOA appropriately deals with consequential loss in a manner which is consistent with the current SOAA.

### 3.8.2 QR Network Cause

QRNN notes that 'QR Network Cause' in the TOA is only used in the Contested Train Path Decision Making Process. It is only in the EUA, as the definition of QR Network Cause is relevant to the calculation of take or pay.

Amendments are not required for consistency with the existing standard access agreements as the provisions are consistent with the EUA. The definition of QR Network Cause in the EUA already includes "any other action by QR Network which directly resulted in the Infrastructure not being so available". Any variation to the QR Network Cause definition in the EUA potentially broadens that to include circumstances where access is not provided for reasons other than unavailability of infrastructure which may change the scope and nature of the approved 2010AU.

### 3.8.3 Liability for Infrastructure

Stakeholders have expressed concern that the QRNN's liability for infrastructure standard in the EUA differs from the approved SOAA. Upon review QRNN has confirmed this departure from the approved terms. Accordingly, the drafting in the EUA should be consistent with the SOAA. However, it should not be amended or expanded to include the words "caused or contributed to".

## 3.9 Transitioning to Alternate Form of Agreement

Stakeholders have raised the issue of transferring access rights from current access agreements to an EUA. QRNN has no material objections were the relevant parties are able to reach appropriate agreement to achieve that outcome. It should be noted that an Access Undertaking can only require QRNN to or agree to matters which may affect existing access holder. This is consistent with the requirements of s 168 of the QCA Act which requires that a term in an Access Agreement is not void for inconsistency with an approved Access Undertaking.



QRNN notes there are two processes which may be considered for transferring existing Access Rights from an access agreement. These include:

- Relinquishing the access rights and contracting for the available capacity as an Access Seeker. It is not envisaged that a relinquishment fee would be payable due to the consistency of the train service description in both the agreement and access request. Similarly, there should be no concerns in relation to allocation of that capacity as the access seeker is the only party able to utilise those access rights. QRNN considers minor amendments to the capacity allocation provisions could be made to improve certainty. This also requires the Access Seeker to accept the terms and conditions in the approved EUA; or
- The customer initiated transfer provisions in the Access Agreement. QRNN makes no opinion as to whether these clauses can be relied upon by an End User to transfer to Access Rights to an EUA. Relevant parties will need to form their own legal opinion as to the operation of these provisions.

### 3.10 Variations to Train Service Description

Stakeholders have raised concerns regarding QRNN's variation of access rights arising from the Railway Operators non performance with the Train Service Description. QRNN considers it reasonable that the EUA only include an obligation to provide notices to the End User where QRNN has issues similar notices under the TOA. This provides the End User and opportunity to address the matter directly with the Railway Operator. This is a reasonable requirement as the train paths may potentially be reduced in the TOA while the End User retains the take or pay liability on the total aggregate train paths in the EUA. The End-user may seek to encourage the operator to perform in accordance with the Train Service Description or change operators. However for as long as the non-performance continues under the TOA, the variations should stand

QRNN notes that any dispute arising under a TOA in this regard is a dispute between QRNN and the Railway Operator. It is not a dispute between QRNN and the End User. The specification of accountabilities of the Railway Operator to the End User for variation from the Train Service Description should be within commercial arrangements between the railway operator and End User.