

QRC

submission

Working together for a shared future

A large, stylized graphic of a leaf or branch, composed of several overlapping, curved lines. The lines are in shades of grey and green, creating a sense of movement and growth. The graphic is positioned on the left side of the page, with the main title text overlaid on it.

**Submission in response to QR Network's
proposed Alternative Access Agreements**

Queensland Competition Authority
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ABN 59 050 486 952
Level 13 133 Mary St Brisbane Queensland 4000
T 07 3295 9560 F 07 3295 9570 E info@qrc.org.au
www.qrc.org.au



Introduction

The Queensland Resources Council (**QRC**) is a non-government organisation representing companies that have an interest in exploration, mining, minerals processing, gas and energy production. It is the resource industry's key policy-making body in Queensland, working with all levels of Government, interest groups and the community.

The Council's membership is comprised of all Queensland coal producer companies, and represents a number of emerging companies that are on the cusp of commencing production with advanced coal mine developments.

The development of workable contractual frameworks that promote choice and greater flexibility are supported by QRC's coal members in the central Queensland coal region – this includes the development of contracting arrangements that provide an End User (coal producer or domestic consumer) with the genuine option to directly contract with QR Network for Access Rights without being exposed to liabilities and obligations relating to the operation of trains.

Overall, QR Network has made a good first attempt at developing the proposed framework. While this submission seeks a number of amendments, it is apparent that QR Network has approached this task with the genuine intent of developing a workable model. As such, QRC's submission seeks to build on QR Network's framework with a number of material improvements.

Background

The QCA approved QR Network's 2010 Access Undertaking (the "2010 AU") on 1 October 2010. The 2010 AU contains provisions which provide for the development, consultation and approval of:

- *End user agreement* – a proposed standard access agreement which can be entered into 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;
- *Train operations agreement* – a proposed standard access agreement which can be entered into by one or more railway operators, nominated by users who are access seekers or access holders pursuant to an end user agreement with QR Network, under which they can utilise some or all of the end user's access rights, subject to assuming liability and obligations in relation to above rail operational issues; and
- *Amendments to the 2010 undertaking* – to give effect to the proposed new standard access agreements.

In assessing QR Network's proposal QRC has reviewed QR Network's:

- Explanatory Notes for Proposed Standard Access Agreements and Consequential Amendments to the 2010 Access Undertaking ("Explanatory Note");
- Proposed End User Access Agreement (Coal) ("EUAA");
- Proposed Train Operations Agreement (Coal) ("TOA"); and
- Proposed Amendments to the 2010 AU ("2010 AU Amendments").

This submission identifies industry's issues with QR Network's framework and provides a range of proposed amendments for the QCA's consideration. The absence of direct comments by QRC regarding QR Network's proposals should not be taken to represent acceptance, as QRC intends to continue engaging in this process following the QCA's consideration of initial stakeholder submissions.



Overview

→ Importance of the approved standard access agreement

Following the approval of the proposed Standard End User Access Agreement (EUAA) and Standard Train Operations Agreement (TOA), these new standard agreements should provide greater certainty for QR Network, End Users (a coal producer or domestic customer) and Operators,

Industry's key objectives – assessment of QR Network's proposal

Key objectives for an EUAA	QR Network's Proposal
Secure Access Rights prior to securing rail haulage contracts.	Achieves objective, minor amendments proposed
Secure Access Rights beyond the date of contracted rail haulage services.	Achieves objective
Obtain Access Rights which better correlate with the development of mine projects.	Achieves objective
Secure Access Rights without accepting obligations and exposures which relate to train operations.	An End User (in certain circumstances) is effectively liable for the actions of the Operator, or unnecessarily exposed to adverse outcomes of an Operator's actions. Amendments to proposed insurances, indemnities and security are required
Retain a greater degree of flexibility in haulage contracts – including the ability to contract multiple Operators using contracted Access Rights.	Framework goes some way towards meeting objective, but amendments are suggested to improve flexibility in terms of allocation (and reallocation) of Access Rights between operators
Obtain direct control over changes to Access Rights – such as capacity transfers, relinquishment and resumption.	Achieves objective
Enable the allocation of, or the right to “call back”, Access Rights to, or from, Operators within a defined minimum notification period which reflects the scheduling environment of the system.	Ability to allocate Access Rights is overly restrictive and should reflect the notification periods of the scheduling environment



QRC's Position

→ **The framework requires a number of amendments to be fair and workable**

While QR Network has made a genuine attempt to develop a workable contractual model, QRC has identified a number of essential amendments to QR Network's framework in order to provide a workable and fair approach to contracting and managing Access Rights for an End User.

Industry Position:

QRC recommends that the QCA consider the range of proposed amendments presented within QRC's proposed EUAA and TOA as well as proposed amendments to the 2010 AU. QRC would welcome the opportunity to discuss with QR Network, and with the QCA, the rationale and benefits of the proposed amendments.



Section 1. Key concerns

This section provides an overview of QRC's views on a number of features of QR Network's proposed framework. Subsequent sections of this submission provide a detailed analysis of QRC's proposals.

→ End User potentially exposed to Operator liabilities

QR Network's proposed approach does not achieve the industry's key objectives of enabling End Users to contract Access Rights without bearing liabilities associated with above-rail operations.

The EUAA is drafted such that the End User is liability for, and releases and indemnifies QR Network for, all Claims in respect of any loss or damage to property or personal injury or death:

- due to or arising out of the TOA and caused by the wilful default or any deliberate or negligent act or omission of the End User's Staff (which, as defined, would include the Operator); or
- where such person or property is being transported on Train Services except where this is the fault of QR Network (therefore, the End User is liable in cases where the Operator is at fault or where neither QR Network or the Operator are at fault).

This is contrary to the requirements of the 2010 AU that the Alternative Agreements are to ensure that the End User does not accept liability for above rail operational issues.

QRC does not consider that the indemnities from the End User in favour of QR Network in these circumstances are necessary given QR Network will have the benefit of identical indemnities from the Operator and has the right to approve each Operator nominated by the End User.

→ Nomination of Operators by End User (and withdrawal/variation)

The process to vary Access Rights (including shifting Access Rights from one Operator to another) requires more detail than is currently provided: moreover various amendments are required for the framework to provide a workable contractual framework to effectively manage Access Rights as an End User. As currently drafted, QR Network's process to vary Access Rights between Operators only triggers an obligation to negotiate.

The EUAA should be modified to provide a more expeditious and certain process – that is, where certain conditions are met, QR Network must agree amendments. QRC considers that this approach would provide greater certainty to End Users and promote efficient administrative processes to facilitate reallocation of Access Rights by the End User between different Operators.

QR Network's proposed EUAA prohibits short-term transfers of Access Rights, as allocations of Access Rights are required to be for a period of 3 months or more. QRC considers the proposed minimum 3 month appointment of an Operator and appointment periods comprising whole months must be deleted as this adversely affects the flexibility of the EUAA. QRC considers that the proposed EUAA restrictions effectively represent unnecessary administrative barriers for End Users to manage their Access Rights.

A key industry requirement from this proposed contracting framework is control over the management of Access Rights.



Clearly the proposed periods are too long and do not provide an End User the ability to effectively manage their Access Rights. QRC considers that 48 hours prior written notice is adequate and practicable for the purposes of varying/withdrawing a nomination. QRC is interested in how the proposed development of System Rules may interact with this proposed minimum timeframe and looks forward to considering how these regulatory processes are aligned.

→ Nomination of new Operators by End User

The proposed EUAA provides that QR Network is only obliged to accept an End User's appointment of an Operator where the Operator is:

- financially sound; and
- capable of performing its obligations under the TOA.

QRC is considers that "financially sound" provides QR Network with too much discretion and that the relevant criteria/process to assess this must be clearly specified so that QR Network's expectations are understood upfront by End Users and third-party operators.

In terms of the assessment criteria/process for a new Operator, QR Network should be required to make the decision on a proposed nomination "*acting reasonably*". In addition, QR Network should be required to provide a written response to the End User concerning the proposed nomination which:

- is provided within a specific timeframe (10 business days);
- outlines QR Network's decision to accept or reject the proposed nomination of the proposed Operator. Where QR Network;
 - rejects the nomination of the Operator, the reasons for that decision must be included within the written response provided to the End User.
 - accepts the nomination, it must be required to promptly do all things required to ensure that any delay to Train Services is minimised.

The proposed amendments would limit QR Network's current broad discretion and promote a more efficient and transparent process for QR Network's assessment of the nomination of a third-party Operator. This decision making process could also be subject to the 2010 AU decision making audit and non-discrimination provisions, therefore requiring the abovementioned process would assist QR Network with its regulatory compliance obligations.

QRC considers that End Users should have the right to propose that certain Operators be pre-approved by QR Network (subject to the Operator not being in material breach of an existing TOA and being financially sound at the time of nomination). This approach would provide for greater contracting flexibility in rail haulage agreements and the appointment of new operators.

→ Interaction of the End User and Train Operator Agreements

QR Network's framework is based on an assumption of a single TOA for multiple End Users. QRC considers that this approach could unnecessarily expose a number of End Users to breaches made by an Operator made under a single TOA which are not related to the Train Services of a particular End User. QRC considers that the standard agreements should be based on a stand-alone TOA for each Operator in regard to its use of Access Rights for a specific End User – this has the clear advantage of



not unnecessarily exposing End Users to TOA breaches associated with the operation of Train Services of other End Users.

This approach could also provide administrative efficiencies in terms of enabling better alignment of End Users and their Operators as relevant disclosure of agreements between the parties would not be subject to confidentiality issues that arise if the TOA covered multiple End Users.

→ **Proposed new amendment of QR Network Cause**

Broadly, the take or pay charges will be applied against the number of Train Services that the End User was entitled to operate in the relevant billing period, but were in fact not operated. However any Train Services, which were not able to be operated as a result of a “QR Network Cause”, are proposed to be excluded from the calculation of the take or pay charges for the EUAA.

QRC considers that definition of “QR Network Cause” should be amended to include a breach of the TOA by QR Network. QRC considers that a breach by QR Network under the TOA should provide financial relief from Take or Pay obligations, as is currently the case under the Access Agreement Coal. The current position in regard to revenue-cap arrangements should also be preserved.

→ **QR Network’s liability for Infrastructure**

QR Network’s liability under the EUAA for Claims in relation to the standard of the Infrastructure or any failure of or defect in the Infrastructure is much narrower than that set out in the Access Agreement Coal.

In the latter agreement, QR Network is liable for such Claims where it has failed to or has been negligent in performing its obligations to carry out Maintenance Work on the Network. Under the EUAA, QR Network is liable for Claims in relation to the standard of the Infrastructure or any failure of or defect in the Infrastructure, only where it has failed to perform the Maintenance Work and not where it has been negligent in performing Maintenance Work.

There is no reason why the position under the EUAA should not be the same as the Access Agreement Coal. QRC considers that QR Network should therefore be liable in these circumstances where it has negligently performed its Maintenance Work. The current position in regard to revenue-cap arrangements should also be preserved.

→ **Consequential Loss**

Under the EUAA, neither party is liable to the other for Consequential Loss. This differs from the position under the Access Agreement Coal (and the TOA), where:

- QR Network is liable for Consequential Loss incurred by the access holder (or Operator, in the case of the TOA) under the agreement as a result of a wrongful suspension of the access holder’s train services (or part thereof); and
- a party is liable for the Consequential Loss of the other arising from a wrongful inspection or audit requested by the party in specified circumstances.



QRC considers that there is no justification for the EUAA's departure from that of the current Access Agreement Coal.

→ **Provision of Security under both the TOA and EUAA**

QR Network has requested that **both** the End User under the EUAA and any Operator under a TOA provide security (ie. a bank guarantee) each for an amount effectively representing 12 weeks of Access Charges.

QRC considers that security should only be required to be provided where the End User or Operator has a credit rating below a specified agreed acceptable rating.

QRC also considers that the quantum of security under each agreement requires further consideration. QR Network has proposed an effective doubling of the total security as a result of the splitting of the capacity and operations elements of the Access Agreement Coal. QRC has considered a number of alternative arrangements, and has come to the conclusion that an increase in the total security required is a reasonable outcome of the splitting of the contracts. In the case of the TOA, QRC understands QR Network's request for 12 weeks of security in the context of the arrangement in which the Operator is solely responsible for the payment of Access Charges. However, QRC considers that security under the TOA should be reduced to a level reflecting the deductibles under the Operator's relevant insurances **if** the End User:

- elects to pay Access Charges directly to QR Network under the EUAA,

OR

- accepts liability, under the EUAA, for any unpaid Access Charges under the TOA.

QRC has proposed amendments to the EUAA and TOA to allow the End User to elect, at the time of entering into the EUAA, to pay Access Charges under the EUAA.

QRC notes that this suggestion aligns with the arrangements approved for ARTC in the Hunter Valley, in which security may be sought under the Access Holder Agreement (equivalent of the EUAA) and Operator Sub-Agreement (equivalent of the TOA) only if the contracting entity does not meet defined credit quality tests, and in this case:

- Security under the Access Holder Agreement (an agreement which includes payment obligations in regard to both Access Charges and Take or Pay) is equal to three months of Take or Pay charges.
- Security under the Operator Sub-Agreement has been set at \$2m, escalated at CPI, an amount which we understand was designed to be sufficient to cover the insurance premiums and deductibles under the relevant Operator insurance policies.

In terms of providing a reasonably acceptable form of security to QR Network before Train Services may operate, it is important that the End User is able to achieve a level of certainty over the provision of security such that the risk of delays by non-provision can be managed by the End User. There are various mechanisms by which the End User may achieve this. For example:



- a form of bank guarantee acceptable to QR Network should be annexed to the Agreement;
- the Agreement should contain a provision requiring QR Network to not unreasonably withhold or delay its approval to the security provided by the Operator under the TOA; and
- the Agreement should contain a provision requiring QR Network to notify the End User of any failure by the Operator to provide the security under the TOA and for the End User to “step-in” in these circumstances and provide the security

→ Insurances to be effected by the End User and Operator

QR Network has proposed that the insurances to be held by the End User and the Operator be the same (on the same terms, including for the same amounts).

QRC considers that careful consideration is required to assess exactly what insurances (and levels of insurances) are appropriate for each of the End User and Operator - given the relevant risks associated with each party's obligations are different.

Given the objective of these agreements is for the End User to be free of any liabilities in respect of above rail operational issues, it does not seem appropriate for the End User to be required to hold carrier liability insurance or motor vehicle insurance. Nor does it seem necessary for the End User to effect public liability insurance to the same value as the Operator.

→ Suspension of Train Services by QR Network

QRC considers that the proposed suspension provisions require substantial amendment as they do not work in their proposed form.

QR Network is entitled to suspend Train Services under a TOA for (among other things) a breach of either the Operator of specified terms of the TOA or the End User of specified terms of the EUAA. However there is no requirement in the EUAA for QR Network to provide notice of suspension to the End User. Moreover, a suspension can only be lifted by the Operator rectifying the relevant default.

Under a single TOA approach for each Operator (proposed by QR Network), a breach by an Operator of its TOA is likely to affect multiple End Users. This highlights the benefits of QRC's proposed approach of the standard agreements being based on a single TOA (per Operator) for an End User.

QRC considers that it is not acceptable to refer generally to the events giving rise to QR Network's suspension rights specified in the TOA. The End User may not be aware of the suspension rights under the TOA (for example, where these have been subsequently negotiated by QR Network and the Operator). The circumstances must be agreed between QR Network and the End User and set out in the Agreement. Therefore, QRC proposes that the EUAA should require that any notice of suspension served on the Operator under the TOA and relevant to the Access Rights of the End User, should be simultaneously served on the End User. The notice of suspension to the End User should set out the rights of the Operator and End User affected by the suspension, the reasons for the suspension and the actions the End User and/or Operator must take to have the suspension lifted.

The End User should have a right to “step-in” where possible to remedy the default of the Operator and to avoid the suspension of the Train Services.



QRC notes that under the TOA (as per the position under the Access Agreement Coal), QR Network will be liable to the Operator for loss or damage (including Consequential Loss) arising from a suspension to the Train Services where QR Network had no reasonable grounds for such suspension. QR Network should be expressly liable to the End User also for a wrongful suspension (including for Consequential Loss).

→ **Termination**

QRC considers that the right to terminate should not include failure to pay amounts that are subject to the dispute resolution provisions of the Agreement.

A failure by the End User to comply with clause 6(a) (that is, provide notice of any damage or disrepair or failure of the Nominated Network to QR Network) or clause 6(b)(ii) (that is, provide notice of any Obstruction or circumstance which may give rise to an Obstruction or Incident) should not give rise to QR Network's right to terminate. QRC notes that these failures by the End User did not give rise to QR Network's termination rights under the Access Agreement Coal.

Under the Access Agreement Coal, QR Network could not terminate the agreement unless it had first exercised its corresponding right of suspension. This provided the access holder with an opportunity to rectify the non-compliance by undertaking the actions specified by QR Network to be necessary to have the suspension lifted. Under QR Network's proposed EUAA, the End User does not have this opportunity. On this basis and subject to any amendments made to the suspension provisions, there should be provision for a cure period in respect of each default or an extension to any existing cure period.

QRC considers that QR Network should only have a right to terminate if the End User is "in default of the due performance of any other material obligation under this Agreement" and such default continues for the relevant period.

→ **Appropriate management of the TOA**

Given the substantial impact which changes to the TOA could have on the interests of the End User, the parties to the TOA should not amend or waive rights without the approval of the End User. QRC proposes that a tripartite agreement would provide a sensible approach for all parties as a means to ensure:

- the Operator and QR Network may not vary, amend or change the Train Operations Agreement without the prior written agreement of the End User;
- the Operator and QR Network may not suspend or terminate (whether in whole or in part) the Train Operations Agreement (including the provision of the Access Rights) other than in accordance with the Train Operations Agreement and then only after giving the End User a copy of the notice and a reasonable time period to remedy the cause of the suspension or termination;
- the Operator may not waive any rights under the Train Operations Agreement without the prior written agreement of the End User;



- the Operator and QR Network must give the End User a copy of any notice of dispute or force majeure at the same time providing such a notice to the other party;
- QR Network or the Operator (as the case may be) must provide the End User with any notice, correspondence or other information exchanged or developed under or in respect of the Train Operations Agreement; and
- may not assign the Train Operations Agreement without the prior written agreement of the End User.

Within the new form of contracting framework, the operation of Train Services is critical to the End User therefore an End User has a legitimate interest in ensuring both the Operator and QR Network are fulfilling their relevant obligations under the TOA. QRC's proposed approach seeks to provide for a practical means of ensuring the arrangements provide for a workable framework.

→ **Obligations owed by QR Network to the End User**

A substantial amount of QR Network's obligations under the Access Agreement Coal have been stripped out of the EUAA and now appear in the TOA only. The result of this is that an End User may not directly enforce such obligations against QR Network as they are owed to the Operator, not the End User.

In some circumstances, it is sufficient for the End User to require the Operator to enforce the terms of the TOA against QR Network. However QRC considers that certain of QR Network's key obligations, which have been distributed to the TOA, should also be owed to the End User under the EUAA. For example, the following obligations of QR Network to:

- provide Train Control;
- have and maintain Accreditation to the extent required to perform its obligations; and
- comply with the QR Network Performance Levels, which are to be set out in the TOA.

→ **Interaction of Rights – the need to identify and clarify the application of terms within the 2010AU and relevant Standard Agreements**

An important process the QCA will need to undertake is assessing the extent to which defined terms contained within the 2010 AU (such as Access Holder, Customer, Operator, Access Seeker) will operate as per their initial intent and application in light of the proposed new EUAA and TOA. Given that key terms like Access Holder and Customer refer to specific undertaking provisions, it is not clear if the 2010 AU will actually operate as intended with the addition of these new agreements. QRC has commenced this review and looks forward to providing this information in the near future.

Section 2. QRC's proposed End User Access Agreement (Coal) – Key Terms and Amendments

This section provides QRC's assessment of QR Network's proposed EUAA and presents QRC's position in response to the matters identified. In addition, QRC also provides a proposed marked-up of the EUAA which addresses various concerns with QR Network's approach.

Item	Key Term (& original clause reference)	Summary	QRC Position	Amending clause in draft End User Access Agreement
1	Parties (Recitals)	<ul style="list-style-type: none"> → The parties to the Agreement are QR Network and the End User. → Any Operator appointed by the End User to provide the Train Services is not a party to the Agreement. The Operator will enter a separate TOA with QR Network upon nomination by the End User to QR Network. 	<p>The recitals refer to QR Network providing Train Control (ie. the management and monitoring of trains, including recording train running times and incident management) for the relevant Train Services on the terms and conditions of the Agreement. There is however no operative provision in the Agreement requiring QR Network to provide Train Control.</p> <p>Under the TOA, QR Network is obliged to provide Train Control (refer to clause 5 (TOA)). This obligation should be repeated in the Agreement, otherwise the End User has no right of recourse to QR Network if QR Network fails to provide Train Control.</p>	Clause 2
2	Escalation	→ References to escalation-related matters in the definitions and Schedule 3.	Escalation is not required for reference tariffs and the relevant references have been deleted.	Clause 1.1 and Schedule 3
3	Master Book of Rules	→ Defined term in clause 1.1.	This term is not used elsewhere in the agreement.	Clause 1.1
4	Noise Planning Levels	→ Defined in clause 1.1	This term is not relevant to the End User and should be deleted.	Clause 1.1
5	QR Network's Right of Way	→ Defined in clause 1.1	This term is not relevant to the End User and should be deleted.	Clause 1.1
6	Rollingstock	→ Defined in clause 1.1	The latter part of this definition appears unnecessary.	Clause 1.1
7	Appointment of Operator	→ The End User may nominate an Operator to use its Access Rights (or part thereof) to operate the Train Services for a period of not less than 3 months (and	→ As a general comment, the Agreement should clearly	Clause 1.3

Item	Key Term (& original clause reference)	Summary	QRC Position	Amending clause in draft End User Access Agreement
	(clause 2.3(b), (c) and (d))	<p>comprised only of whole months). The End User is not entitled to make such nomination where it is in material breach of the Agreement.</p> <ul style="list-style-type: none"> → The Operator must be accredited in accordance with Part 5 of the Transport (Rail Safety) Act 2010 (Qld). → The End User must give QR Network 30 days prior written notice of the nomination. → The nomination must be accompanied by (among other items) <ul style="list-style-type: none"> - a TOA executed by the Operator reflecting the allocated Access Rights; or - where the Operator is already a party to a TOA, a statement identifying the existing TOA and the Operator's consent to its nomination. → QR Network is not required to accept the nomination where: <ul style="list-style-type: none"> - the Operator is in material breach of any existing TOA; - QR Network is not satisfied that the Operator is financially sound or otherwise capable of performing its obligations under the TOA. → The End User may nominate more than one Operator. 	<p>provide that references to acts and omissions of an Operator are references to the Operator appointed by the End User in respect of the relevant Access Rights under this Agreement.</p> <ul style="list-style-type: none"> → QRC also proposes other minor amendments for clarity → The following should be deleted on the basis that they adversely affect the flexibility of the EUAA: <ul style="list-style-type: none"> - a minimum 3 month appointment of an Operator; and - appointment periods comprising whole months. <p>Flexibility in appointing Operators is a fundamental purpose of the End User Agreement.</p> <ul style="list-style-type: none"> → The Agreement should specify that QR Network must not unreasonably withhold its approval to a nomination. Where it does reject a nomination, QR Network should be required to provide detailed reasons for its decision. → End Users should have the right to propose that certain Operators be pre-approved by QR Network (subject to the Operator not being in material breach of an existing TOA and being financially sound at the time of nomination.) <p>The Agreement should specify a timeframe by which QR Network is to:</p> <ul style="list-style-type: none"> - respond to a nomination for Operator by the End User; and - execute the TOA or vary the existing TOA, as the case may be, <p>in order to minimise delays to train operations</p>	<p>For example, Clause 5.1</p> <p>Clause 3.1</p> <p>Clause 3.3(b)</p> <p>Clause 3.3(d)</p> <p>Clause 3.3(e)</p> <p>Clauses 3.3(d) and (f)</p>

Item	Key Term (& original clause reference)	Summary	QRC Position	Amending clause in draft End User Access Agreement
			<p>commencing.</p> <ul style="list-style-type: none"> → As an absolute minimum, QR Network should be required to not unreasonably delay the above. → Clause 3.3(i) should exhaustively specify the relevant clauses, rather than including a non-exhaustive list of clauses. 	
8	<p>Withdrawal or Variation to Appointment of Operator (clause 2.3(e), (f), (g) and (h)).</p>	<ul style="list-style-type: none"> → The End User may on 30 days prior written notice to QR Network withdraw an Operator's nomination or vary the extent of the Access Rights allocated to the Operator and/ or the period that the Access Rights are to be allocated to an Operator → Where the End User varies or withdraws its allocation of Access Rights to an Operator, it must pay any Adjustment Charges to QR Network that would otherwise have been payable by the Operator to QR Network. → Adjustment Charges are defined in the 2010 Undertaking. They apply where a Reference Tariff (as defined in the 2010 Undertaking) is effective from a date prior to the date of approval by the QCA. The charges represent the difference between the Access Charges (as defined in the 2010 Undertaking) paid or payable by an Access Holder (as defined in the 2010 Undertaking) for a specified period and the amount that would have been payable in that same period if calculated in accordance with the Reference Tariffs approved by QCA (together with interest on such difference). 	<ul style="list-style-type: none"> → 48 hours prior written notice is adequate and practicable for the purposes of varying/withdrawing a nomination. → For contract administration purposes, the Agreement should require QR Network to vary the TOA with the Operator to reflect any variation or withdrawal of the Operator's appointment by the End User, immediately upon expiry of the notice period (if any). While QR Network is required to notify the Operator and vary the TOA in these circumstances under the terms of the TOA, the End User is not a party to that agreement and therefore can not enforce that obligation. → The calculation of Adjustment Charges may sometimes require reimbursement by QR Network to the Operator of amounts paid by the Operator. QR Network should be obliged to pay such Access Charges to the Operator where applicable. 	<p>Clause 3.1(g)</p> <p>Clause 3.3(k)</p> <p>Clause 3.3(k)</p>
9	<p>Interaction of</p>	<ul style="list-style-type: none"> → To the extent that there is an inconsistency between the End User's rights under the Agreement or the 	<ul style="list-style-type: none"> → The End User should on an optional basis be able to nominate the correct interpretation to apply in respect of 	<p>Clause 3.5(b)(iii)</p>

Item	Key Term (& original clause reference)	Summary	QRC Position	Amending clause in draft End User Access Agreement
	Agreement and TOA (clause 2.5)	Undertaking and the Operator's rights under the TOA and the Undertaking, the End User's rights prevail.	"Access Holder".	
10	Payment (Clause 3)	<p>TOP Charges</p> <ul style="list-style-type: none"> → The TOP Charges are set out in Schedule 3. → The TOP Charges are calculated for each 12 month period commencing on 1 July during the Term (except for the first period which will commence on the Commitment Date and expire on the following 30 June). → No TOP Charges will be payable where: <ul style="list-style-type: none"> - the System Gtk (<i>ie. the actual gross tonne kilometres achieved by all coal carrying train services, which travel on the Individual Coal System</i>) for the year (except the first period) <u>is equal to or greater than</u> the difference between the Forecast Gtk and the QR Network Gtk (<i>ie. the System Gtk that would have been achieved solely due to coal carrying Train Services that were unable to operate in that year directly as a result of a QR Network Cause</i>) for that year; or - the difference between the Total Actual Revenue for AT₂₋₄ for the relevant Individual Coal System and the aggregate amount of Take or Pay that QR Network would be entitled to earn from all Access Agreements in relation to that Individual Coal System executed or renewed on or after 1 July 2009 <u>is equal to or greater than</u> the System Allowable Revenue for 	<p>Invoicing</p> <p>The addition of Clause 4.2(e)(iii) provides for payments determined to be made by QR Network after the Agreement has expired.</p> <p>TOP Charges</p> <p>The calculation (and review and escalation) of the take or pay charges is as per the Access Agreement Coal.</p> <p>The only difference is that the definition of "QR Network Cause" has been amended.</p> <p>The meaning of this term is where QR Network is unable to make Infrastructure available for the operation of Train Services in accordance with an access agreement as a result of: Planned Possessions; Emergency Possessions or Urgent Possessions; Force Majeure Event or any other action by QR Network having this direct effect.</p> <p>The definition of "QR Network Cause" should be amended to include a breach of the TOA by QR Network.</p>	<p>Clause 4.2(e)(iii)</p> <p>Clause 1.1</p>

Item	Key Term (& original clause reference)	Summary	QRC Position	Amending clause in draft End User Access Agreement
		AT ₂₋₄ for the relevant Year. The relevant time period for this calculation is each 12 month period commencing on 1 July.		
11	Security provided by End User (clause 3.4, 3.5 and 3.6)	<p>→ The End User must provide to QR Network either:</p> <ul style="list-style-type: none"> - an unconditional and irrevocable bank guarantee for the Security Amount in favour of QR Network; or - any other security reasonably acceptable to QR Network, - and containing such terms and conditions as are reasonably acceptable to QR Network. <p>→ The Security Amount will be the greater of:</p> <ul style="list-style-type: none"> - 12 weeks Access Charges (this is based on the Access Charges which would be payable under a TOA if all of the End User's Access Rights were allocated to and fully utilised by the Operator under that TOA); and - the deductible for any one loss under any insurance policy the End User is required to maintain under the Agreement. <p>→ The End User must provide the Security prior to the operation of Train Services and maintain the Security for the Security Amount throughout the Term of the Agreement. Within 14 days of QR Network drawing on the Security (for example where it has suffered direct loss or damage as a result of the End User's default), the End User must increase the Security to ensure the full Security Amount is held.</p> <p>→ The Security will be returned or repaid to the End User promptly after the Termination Date (subject to</p>	<p>→ QR Network has requested security for double the amount it would ordinarily receive under either of the Standard Access Agreements (ie. an amount representing 24 weeks of Access Charges, rather than 12 weeks of Access Charges).</p> <p>→ QRC considers that security under the TOA should be reduced to a level reflecting the deductibles under the Operator's relevant insurances if the End User:</p> <ul style="list-style-type: none"> - elects to pay Access Charges directly to QR Network under the EUAA, <p>OR</p> <ul style="list-style-type: none"> - accepts liability, under the EUAA, for any unpaid Access Charges under the TOA. <p>→ QRC has proposed amendments to the EUAA and TOA to allow the End User to elect, at the time of entering into the EUAA, to pay Access Charges under the EUAA. If this election is not made, the TOA will contain the Access Charge payment obligations.</p> <p>→ Security should only be required to be provided where the End User or Operator's credit rating falls below a specified agreed acceptable rating.</p> <p>→ The EUAA and TOA provide that operation of the Train Services must not commence until the security has been delivered in a form reasonably acceptable to QR Network. It is therefore critical that the End User may exercise a</p>	Clauses 4.4 and 4.7

Item	Key Term (& original clause reference)	Summary	QRC Position	Amending clause in draft End User Access Agreement
		QR Network's right of recourse to that Security).	<p>degree of control over the provision of Security. There are various mechanisms by which the End User may achieve this. For example:</p> <ul style="list-style-type: none"> - a form of bank guarantee acceptable to QR Network should be annexed to the Agreement - the Agreement should contain a provision requiring QR Network to not unreasonably withhold or delay its approval to the security provided by the Operator under the TOA; and - the Agreement should contain a provision requiring QR Network to notify the End User of any failure by the Operator to provide the security under the TOA and for the End User to "step-in" in these circumstances and provide the security. 	
12	Reduction of Access Rights (clauses 4.1 & 4.5)	<p>Resumption of Access Rights due to underutilisation (clause 4.1)</p> <ul style="list-style-type: none"> → If for any reason (other than Force Majeure or a failure by QR Network to provide the Access Rights), 85% of the Train Services entitled to be operated by the End User are not operated over any 4 consecutive Quarters, QR Network may, within 40 Business Days, serve a Resumption Notice on the End User. → The Resumption Notice will set out the proposed Date of Resumption. → QR Network may reduce the End User's Access Rights to the extent of any underutilisation where the following have occurred: <ul style="list-style-type: none"> - within 21 days of receiving the Resumption Notice, the End User has not demonstrated to 	<p>Resumption of Access Rights due to underutilisation (clause 4.1)</p> <ul style="list-style-type: none"> → As per our comments above at item 3, for contract administration purposes, the Agreement should require QR Network to vary the TOA with the Operator to reflect any resumption of Access Rights pursuant to the Agreement, immediately upon expiry of the notice period (if any). → Either Party should have the right to terminate where there are no longer any Access Rights. 	<p>Clause 5.1(g)</p> <p>Clause 5.3</p>

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		<p>QR Network's reasonable satisfaction that a sustained requirement for the Access Rights that were not utilised exists;</p> <ul style="list-style-type: none"> - QR Network can demonstrate it has a sustained alternative demand for the relevant capacity or it will receive a commercial benefit sufficiently material to justify the resumption. <p>→ The End User may dispute QR Network's decision within 28 days of receipt of the Resumption Notice, which will be determined by expert determination. The resumption will not take effect until resolution by the expert.</p> <p>→ Where Access Rights are resumed, the Agreement (including Base Access Charges) will be amended to reflect the new arrangements.</p> <p>→ The End User will not be entitled to any compensation for the resumption.</p>		
13	Forecasts (clause 4.4)	<p>→ The End User must provide to QR Network within 30 days of request, a 6 year forecast of the number and frequency of Train Services it will require its Operators to operate and also the gross tonnage to be transported each year within the 6 year period. For the first year, a monthly breakdown must be provided. QR Network must not make such a request more than once every 3 months.</p> <p>→ QR Network must provide to the End User within 60 days of request, a 6 year forecast of planned major Enhancements relating to the Nominated Network. The End User must not make such a request more</p>	<p>→ This provision is similar to the provision contained in the Access Agreement Coal, except that QR Network may now request the End User to provide its forecast once every 3 months, rather than 6 months. The forecasting obligations under the Agreement should be no more onerous than those contained in the Access Agreement Coal.</p> <p>→ Further the Operator under the TOA is also required to provide the same forecast in respect of (among other items) the number and frequency of Train Services it will require and the gross tonnage it will transport. It does not seem necessary to have both forecasts.</p>	Refer to notes in Clause 5.4

Item	Key Term (& original clause reference)	Summary	QRC Position	Amending clause in draft End User Access Agreement
		<p>than once every 6 months.</p> <p>→ Such forecasts will not be a representation or warranty as to accuracy and liability is excluded.</p>		
14	<p>Variation to Train Service Description (clause 5)</p>	<p>→ In the event that the Operator does not comply in any material respect with a Train Service Description under a TOA and has failed to demonstrate to QR Network's reasonable satisfaction, that it will comply with the Train Service Description for the remainder of the term of the TOA, QR Network may (after consultation with the End User and Operator):</p> <ul style="list-style-type: none"> - vary the Train Service Description to a level it reasonably expects to be achievable for the remainder of the Term having regard to the extent of previous compliance with the Train Service Description; and - make consequential changes to the Agreement (eg. Base Access Charges). <p>→ The End User may dispute any variation to the Train Service Description. Where the dispute relates to the Base Access Charges, the matter will be referred to the QCA. Otherwise, the dispute will be resolved by an expert.</p>	<p>→ This clause is not acceptable. A variation to the Train Service Description may significantly alter the Access Rights granted to an End User and therefore QR Network should not have a right to unilaterally make such variation in these circumstances.</p> <p>→ Further this clause contradicts the key objective of the Alternative Agreements model, which is for the End User to have control of its critical rights to access the rail network, without accepting liability for above rail operational issues.</p> <p>→ Such variation should only be made with the consent of both the End User and QR Network.</p> <p>→ As a minimum, the End User must have a right to first withdraw or vary (if appropriate) its nomination of the non-compliant Operator before QR Network commences the process of consulting with the Operator and the End User to vary the Train Service Description.</p> <p>→ A provision should be included requiring QR Network to promptly notify the End User where an Operator is not complying with a Train Service Description.</p> <p>→ Any assessment for the purposes of varying the Train Service Description should not take into account any non-compliance on account of a force majeure event.</p> <p>→ The TOA contains an identical provision regarding variations to the Train Service Description, which also requires amendment (clause 6.6(e)).</p> <p>→ Further pursuant to clause 6.6(d) of the TOA, the Operator</p>	<p>Clause 6</p>

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			and QR Network may agree on variations to the Performance Levels established under that agreement and any associated variations to the Train Service Description. Given the criticality of the Train Service Description to the exercise of the End User's Access Rights, in these circumstances the parties must seek the End User's prior consent and the End User must have a right to first withdraw its nomination of the Operator.	
15	Management of infrastructure (Clause 6)	<ul style="list-style-type: none"> → The End User must not cause any Obstruction (ie. a circumstance relating to the whole or any part of the Infrastructure or private siding, including debris or other objects on the Infrastructure, which has the potential to cause a disruption to or cancellation by QR Network of Train Services or Train Movements, including any Network Incident, but not including an Operational Constraint imposed by QR Network). → The End User must also notify QR Network of any Obstruction or damage, disrepair or operational failure in relation to any part of the Nominated Network. 	<ul style="list-style-type: none"> → Clause 6 applies to the "End User's Staff", which includes the End User's contractors (e.g. the Operator). Acts and omissions of the Operator should not be picked up by this clause. → The requirement to notify should only be to the extent of material damage. 	<p>Definition of "End User's Staff".</p> <p>Clause 7(a)</p>
16	Insurance (Clause 7)	<ul style="list-style-type: none"> → The End User must ensure it holds throughout the Term insurances relating to the following (refer to Schedule 4): <ul style="list-style-type: none"> - public liability for an amount of \$350 million for any one loss (plus a deductible to be specified in the Agreement); - employee claims (covering common law and workers compensation claims for the End User's staff); - carrier liability for an amount of \$10 million for any one loss (plus a deductible to be specified in 	<ul style="list-style-type: none"> → Under the TOA, the Operator is required to hold each of the insurances required to be held by the End User under the Agreement, on the same terms, including for the same amounts. → Given the objective of the Alternative Agreements model is for the End User to be absolved of any liabilities in respect of above rail operational issues, it does not seem appropriate for the End User to be required to hold carrier liability insurance or motor vehicle insurance. Nor does it seem necessary for the End User to effect public liability 	<p>Schedule 4</p>

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		<p>the Agreement);</p> <ul style="list-style-type: none"> - motor vehicle (statutory liability); and - motor vehicle (non-Act) (third party liability for \$20 million and a Dangerous Goods extension with a maximum sum insured as required by statute). <p>→ Each policy of insurance is to note the interests of the End User and QR Network and include a cross liability clause (except for the motor vehicle (statutory liability) policy).</p> <p>→ The End User is required to disclose the insurance policies to QR Network at least 14 days prior to commencement of the Train Services (and at other specified times). Failure to do so may result in QR Network maintaining the insurances at full cost to the End User, or termination of the Agreement by QR Network.</p> <p>→ The End User must notify QR Network on an initial and ongoing basis in relation to any insurance claims under the Agreement, and must pay excesses and deductibles with respect to all claims made by it or any other insured for which it is responsible.</p>	<p>insurance to the same value as the Operator..</p>	
17	Indemnities and liabilities (Clause 8)	<p>→ The End User is solely liable for and releases and indemnifies QR Network (and directors and QR Network's Staff) against all Claims due to or arising out of the Agreement or the TOA in respect of:</p> <ul style="list-style-type: none"> - any loss or of damage to or destruction of real or personal property (including property of QR Network); or - personal injury to or death of any person, 	<p>→ The End User should not be liable for and should not indemnify QR Network against:</p> <ul style="list-style-type: none"> - all Claims due to or arising out of the TOA or for any Claims caused by the wilful default or any deliberate or negligent act or omission of the Operator (or its employees, agents or contractors); or - all damage to or loss of any property or personal injury to or death of any person being transported on 	Clause 9.1

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		<p>to the extent caused by the wilful default or any deliberate or negligent act or omission of the End User or End User's Staff.</p> <ul style="list-style-type: none"> → The definition of End User's Staff includes contractors of the End User and therefore extends to any Operators. → QR Network provides a reciprocal indemnity in favour of the End User, except that it is limited to Claims due to or arising out of the Agreement only to the extent caused by the wilful default or any deliberate or negligent act or omission of QR Network or QR Network's Staff and QR Network's liability in relation to the standard of Infrastructure is carved out from this indemnity (see below). → Notwithstanding the indemnities provided by the End User and QR Network as outlined above, the End User is solely liable for and releases and indemnifies QR Network for all damage to or loss of any property or personal injury to or death of any person being transported on Train Services (except to the extent caused by the wilful default or any deliberate or negligent act or omission of QR Network or QR Network's Staff). → Notwithstanding QR Network's indemnity, QR Network will only be liable to the End User for Claims in relation to the standard of the Infrastructure or any failure of or defect in the Infrastructure to the extent QR Network has failed to perform its obligations under the TOA to carry out Maintenance Work on the Nominated Network (ie. such that, subject to any agreed criteria and the Network Management Principles, the Infrastructure is consistent with the 	<p>Train Services being run by an Operator (except to the extent caused by the wilful default or any deliberate or negligent act or omission of QR Network or QR Network's Staff),</p> <p>The intention of clause 5.2(n) of the 2010 Undertaking is that the End User would not bear liability for above rail operational issues. Further QR Network receives an indemnity from the Operator covering such Claims under the TOA and the Operator is to provide security to guarantee the performance of such obligations.</p> <ul style="list-style-type: none"> → In the Access Agreement Coal, QR Network was liable in relation to the standard of the Infrastructure or any failure of or defect in the Infrastructure where it was negligent in performing its maintenance obligations. As a minimum, clause 8.4 of the Agreement should be amended to provide liability for QR Network's wilful default or negligence. 	<p>Clause 9.4</p>

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		<p>Rollingstock Interface Standards and the Operator can operate Train Services in accordance with their Scheduled Times.)</p> <p>→ Generally liability as between the End User and QR Network shall be determined:</p> <ul style="list-style-type: none"> - as agreed between them; or, <p>failing agreement,</p> <ul style="list-style-type: none"> - by a loss adjuster appointed by the parties; or, <p>where either party is dissatisfied with the loss adjuster's report and the Claim exceeds \$200,000.00,</p> <ul style="list-style-type: none"> - by a Court of competent jurisdiction. 		
18	<p>Limitation of Liability (Clauses 3.7 & 9)</p>	<p>Consequential Loss (clause 9.1)</p> <p>→ Neither party is liable to the other for any Consequential Loss.</p> <p>Claims against QR Network for non-provision of Access (clause 9.3)</p> <p>→ Generally, the End User cannot make a claim against QR Network regarding non-provision of access or cancellation of Train Services. Such Claims by the End User will be limited to the cases set out in the clause.</p> <p>Limitation on Liability for delays to Train Movements (clause 9.4)</p> <p>→ Claims will be limited to the cases set out in the</p>	<p>Consequential Loss</p> <p>→ The position in respect of liability for Consequential Loss differs from that under the Access Agreement Coal. Under the latter agreement:</p> <ul style="list-style-type: none"> - QR Network is liable for Consequential Loss incurred by the access holder under the agreement and arising from a suspension of the access holder's train services (or part thereof) if no reasonable grounds for suspension existed and the access holder uses reasonable endeavours to mitigate the loss or damage; and - a party is liable for the Consequential Loss of the other arising from an inspection or audit requested by the party to determine the other party's compliance with the Interface Risk Management Plan, where no reasonable grounds for calling such inspection or 	

Item	Key Term (& original clause reference)	Summary	QRC Position	Amending clause in draft End User Access Agreement
		<p>clause.</p> <p>Limitation on Liability where QR Network Train Control Direction issued (clause 9.5(b))</p> <p>Except as otherwise provided in the Agreement, QR Network is not liable for delays, cancellations of Train Services or Claims made by or brought against the End User as a result of an Operator complying with a QR Network Train Control Direction (as defined in the TOA) issued by QR Network to the Operator pursuant to the TOA, for the Operator to provide assistance with clearing any Network Incident (including varying any operation of a Train Service).</p> <p>Limitation on Liability for damage/loss of freight (clause 9.5(c))</p> <p>→ QR Network is not liable for damage to or loss of freight where QR Network takes action under Clause 8.4(d)(i) of the TOA, which provides that QR Network may take any action reasonably necessary to recommence Train Movements after an Incident.</p> <p>Limitation on Liability where audit conducted under TOA (clause 9.5(d))</p> <p>→ QR Network will not be liable for any delays or cancellation of Train Services or Claims made by or brought against the End User arising as a result of QR Network exercising its rights pursuant to clause 13 of the TOA. Clause 13 of the TOA</p>	<p>audit in fact existed and the other party uses reasonable endeavours to mitigate the loss or damage.</p> <p>→ However, under the Agreement any liability for Consequential Loss is excluded.</p> <p>→ Further, the Agreement contains an express exclusion of liability for QR Network for any Claims made by or brought against the End User as result of QR Network exercising its rights of inspection and audit. See below.</p> <p>→ The End User is likely to suffer loss or damage as a result of a suspension or interference to the Operator's Train Services in either of the circumstances outlined above. QRC does not consider there is any justification for this departure from the position under the Access Agreement Coal. QR Network should be liable to the End User in these circumstances (including for Consequential Loss).</p> <p>Claims against QR Network for non-provision of Access</p> <p>→ The reference to the parties agreeing and implementing "a performance and adjustment regime for the purposes of Clause 5 (Variation of Train Services)" in clause 9.3(d) is erroneous and should be amended.</p> <p>Limitation on Liability for delays to Train Movements</p> <p>→ QRC's comments above apply in respect of the references to the "performance and adjustment regime".</p>	<p>Clause 10.5</p> <p>Clause 10.3(d)</p>

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			<p>Limitation on Liability where QR Network Train Control Direction issued to Operator</p> <ul style="list-style-type: none"> → The Access Agreement Coal does not contain such an exclusion of liability. It instead states that the access holder under that Agreement (on behalf of the Operator) may recover the reasonable direct costs incurred by the Operator in complying with the QR Network Train Control Direction. → This clause should be amended to clarify that it will only apply where QR Network has complied with the relevant clause of the TOA (ie. issued a QR Network Train Control Direction where it is reasonable and practicable to do so). <p>Limitation on Liability for damage/loss of freight</p> <ul style="list-style-type: none"> → This clause should be amended to clarify that the exclusion of liability for QR Network only applies where QR Network has complied with the terms of clause 8.4(d)(i) of the TOA (ie. QR Network has used reasonable efforts to consult with the Operator and the actions taken by QR Network are reasonable). → Clause 8.4(d)(i) of the TOA provides that QR Network will not be liable for any damage to or loss of freight or Rollingstock caused by such actions, subject to clauses 8.4(d)(ii) to (iv). These clauses deal with the circumstances where QR Network has ordered the removal of Rollingstock but where such removal may cause material damage to the Rollingstock and set out a process by which the parties must agree on a course of action regarding the proposed removal. The exclusion of liability in clause 9.5(c) of the Agreement should be 	<p>Clause 10.6(b)</p> <p>Clause 10.6(c)</p>

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			<p>subject to these clauses of the TOA also.</p> <p>Limitation on Liability where audit conducted under TOA</p> <ul style="list-style-type: none"> → As discussed above in this item 13 under the heading “Consequential Loss”, this is not the position under the Access Agreement Coal. That is, a carve out from this limitation of liability should be for loss or damage (including damages for Consequential Loss) arising from the conduct of the inspection or audit under clauses 12 (f) and 13.2(a)(ii) of the TOA (ie. in relation to determining the Operator’s compliance with the Interface Risk Management Plan), where the inspection or audit was carried out without reasonable grounds. → If QR Network requires such an inspection or audit, it has the right to require the Operator’s Rollingstock be available at such locations as QR Network may reasonably required, (including not on the Nominated Network) for inspection. This may disrupt the End User’s operations. → This clause should be amended to clarify that the exclusion of liability for QR Network only applies where QR Network has complied with the terms of clause 13 of the TOA. 	<p>Clause 10.6(d)</p>
19	<p>Material change (Clause 10)</p>	<ul style="list-style-type: none"> → A Material Change is defined (among other things) as a Change in Relevant Taxes and Change in Law. → The consequences of a Material Change are dependent on whether a Reference Tariff is applicable to the Train Service under the Agreement. If a Reference Tariff is applicable, the relevant Reference Tariff Schedule will set out the consequences of a Material Change. → If there is no applicable Reference Tariff and a 	<ul style="list-style-type: none"> → A TOA may govern Access Rights granted to the relevant Operator by various End Users. The clause should be amended to ensure it only applies to a change in the financial position of QR Network under the TOA, to the extent that change is relevant to the End User’s Access Rights. → QR Network cannot give notice under both the TOA and this Agreement in respect of the Material Change. 	<p>Clause 11.2(a)</p> <p>Clause 11.2(c)</p>

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		<p>Material Change affects the financial position of QR Network or the cost to QR Network of performing its obligations under the Agreement or TOA, then</p> <ul style="list-style-type: none"> - QR Network may notify the End User of the financial effect of the Material Change on QR Network's performance or exercise of rights under the Agreement or TOA; and - the parties must then negotiate in good faith any adjustments to amounts payable under the Agreement in order to put QR Network in the position it would have been in had it not been for the Material Change. If the parties do not reach agreement within 20 days of QR Network's notice, the matter will be referred to an expert for determination. 		
20	Force Majeure (clause 12)	<ul style="list-style-type: none"> → A Force Majeure Event is an event or circumstance, which is beyond the reasonable control of the affected party and was not reasonably able to be prevented or overcome by the exercise of due diligence by the affected party. The Agreement provides various examples of Force Majeure Events (eg. malicious damage or sabotage, fire and flood). → If a party is wholly or partially unable to carry out its obligations under the Agreement (other than an obligation to make a payment) as a result of a Force Majeure Event, it must provide notice to the other party as soon as it becomes aware of the Force Majeure Event. The notice must detail (among other items) the obligations affected and the an estimate of time during which the party will not be able to carry out its obligations. → In these circumstances, a party's obligations (other 	<ul style="list-style-type: none"> → The End User should exercise some control over whether a TOA is terminated for a Force Majeure Event. The Agreement should be amended to provide: <ul style="list-style-type: none"> - QR Network must provide a copy to the End User, of any notice it serves on an Operator under the TOA pursuant to the Force Majeure provisions, where relevant to the End User's Access Rights; and - Where either the Operator or QR Network has been unable to perform its obligations under the TOA for a period of 3 consecutive months and the parties meet in an endeavour to resolve the situation, the End User must be involved in any such consultation. 	Clause 13.7

Item	Key Term (& original clause reference)	Summary	QRC Position	Amending clause in draft End User Access Agreement
		<p>than an obligation to make a payment) will be suspended to the extent that and during the period the performance of such obligations is prevented by the Force Majeure Event. Subject to the below, the suspension ends when the affected party is able to resume full performance of its obligations under the Agreement.</p> <ul style="list-style-type: none"> → A party has a duty to mitigate the effect of a Force Majeure Event. → If any part of the Nominated Network is damaged or destroyed by a Force Majeure Event and in QR Network's reasonable opinion it is not economic to repair or replace the relevant part of the Nominated Network, the End User or other Railway Operator may elect to fund the repairs or replacement. In these circumstances, QR Network must carry out the relevant works. If neither the End User nor another Railway Operator notify QR Network of their intent to do so within 60 days of notice from QR Network, QR Network may terminate the Agreement on 30 days notice. → If a Force Majeure Event prevents performance by the affected party for 3 consecutive months: <ul style="list-style-type: none"> - the parties must meet to determine an alternative means of providing Access Rights; - failing agreement on the above within 1 month, the other party may terminate the Agreement on 30 days notice. 		
21	Suspension (clause 13)	→ The End User acknowledges that under a TOA, QR Network may suspend the operation of all or part of the Operator's Train Services, upon the occurrence	<ul style="list-style-type: none"> → The provisions regarding QR Network's suspension rights require substantial amendment. → It is not acceptable to refer generally to the events giving 	Clause 14

Item	Key Term (& original clause reference)	Summary	QRC Position	Amending clause in draft End User Access Agreement
		<p>of one or more events or circumstances specified in the TOA.</p> <ul style="list-style-type: none"> → The suspension of any rights under a TOA does not affect or suspend any other obligation of the End User under the Agreement (including the obligation to pay TOP Charges). → The TOA sets out various circumstances where QR Network may suspend the right of the Operator to operate the Train Services (eg. where the Operator's Accreditation is suspended) (clause 20 of TOA). These circumstances are the same as those set out in the Access Agreement Coal. → Under the TOA, QR Network may suspend the Operator's Train Services, where the End User is in default of the Agreement or insolvent. That is, if any of the following occurs and the End User does not rectify the default within 7 days of notice from QR Network of such default: <ul style="list-style-type: none"> - the End User fails to pay an amount payable under the Agreement; - the End User fails to establish, maintain or replace the Security under the Agreement; - the End User fails to maintain relevant insurances under the Agreement; - an Insolvency Event occurs in respect of the End User; - the End User purports to assign or transfer its rights or obligations under the Agreement, other than in accordance with the Agreement. 	<p>rise to QR Network's suspension rights specified in the TOA. The End User may not be aware of the suspension rights under the TOA (eg. where these have been subsequently negotiated by QR Network and the Operator). The circumstances must be agreed between QR Network and the End User and set out in the Agreement. This could be done by way of reference to the relevant clause in the pro-forma TOA to be annexed to the Agreement.</p> <ul style="list-style-type: none"> → The Agreement should require that any notice of suspension served on the Operator under the TOA and relevant to the Access Rights of the End User, should be simultaneously served on the End User. The notice of suspension to the End User should set out the rights of the Operator and End User affected by the suspension, the reasons for the suspension and the actions the End User and/or Operator must take to have the suspension lifted. → The End User should have a right to "step-in" where possible to remedy the default of the Operator and to avoid the suspension of the Train Services. → The TOA provides QR Network with rights to suspend the Operator's Train Services where the End User is in default of specific obligations or an Insolvency Event occurs in respect of the End User, and the End User fails to remedy such circumstance within 7 days notice of the event. There is no express obligation in the Agreement for QR Network to provide such notice to the End User or for the End User to rectify the default within 7 days to avoid the suspension. QRC recommends the circumstances where the End User's actions may lead to a suspension under the TOA be expressly set out in the Agreement. 	

Item	Key Term (& original clause reference)	Summary	QRC Position	Amending clause in draft End User Access Agreement
			<ul style="list-style-type: none"> → The TOA provides that the suspension will only be lifted where the Operator has remedied the relevant default. This is a drafting point, however the TOA should also provide that where the suspension is as result of the End User's default, the suspension will be lifted where the End User has remedied its default. → Under the TOA (as per the position under the Access Agreement Coal), QR Network will be liable to the Operator for loss or damage (including Consequential Loss) arising from a suspension to the Train Services where QR Network had no reasonable grounds for such suspension. QR Network should be expressly liable to the End User also for a wrongful suspension (including for Consequential Loss). 	
22	Termination (clause 14)	<p>Termination by QR Network</p> <ul style="list-style-type: none"> → QR Network may by written notice to the End User, immediately terminate the Agreement where: <ul style="list-style-type: none"> - the End User fails to pay amounts payable under the Agreement (with a cure period of 30 days from notice by QR Network of such default); - the End User fails to comply in any material respect with its obligations under clause 6 (Infrastructure Management) (with a cure period of 30 days); - an Insolvency Event occurs in relation to the End User (with a cure period of 60 days); - the End User fails to effect or maintain the necessary insurances (with a cure period of 30 	<p>Termination by QR Network</p> <ul style="list-style-type: none"> → The right to terminate should not include failure to pay amounts that are subject to the dispute resolution provisions of the Agreement. → A failure by the End User to comply with clause 6(a) (ie. provide notice of any damage or disrepair or failure of the Nominated Network to QR Network) or clause 6(b)(ii) (ie. provide notice of any Obstruction or circumstance which may give rise to an Obstruction or Incident) should not give rise to QR Network's right to terminate. Such failures by the End User did not give rise to QR Network's termination rights under the Access Agreement Coal. → Under the Access Agreement Coal, QR Network could not terminate the agreement unless it had first exercised its corresponding right of suspension. This provided the access holder with an opportunity to rectify the non- 	Clause 15.1

Item	Key Term (& original clause reference)	Summary	QRC Position	Amending clause in draft End User Access Agreement
		<p>days);</p> <ul style="list-style-type: none"> - the End User fails to establish, maintain or replace the necessary Security (with a cure period of 30 days); - the End User purports to assign its rights or interests other than as permitted by the Agreement; or - the End User is in default of any other obligation (with a cure period of 60 days). 	<p>compliance by undertaking the actions specified by QR Network to be necessary to have the suspension lifted. Under this Agreement, the End User does not have this opportunity. On this basis and subject to any amendments made to the suspension provisions, there should be provision for a cure period in respect of each default or an extension to any existing cure period.</p> <p>→ QRC considers that QR Network should only have a right to terminate if the End User is “in default of the due performance of any other material obligation under this Agreement” and such default continues for the relevant period.</p>	
23	Assignment (Clause 15)	<p>Assignment by QR Network</p> <p>→ QR Network may assign the whole or part of its rights and obligations under the Agreement without the prior consent of the End User.</p> <p>Assignment by End User</p> <p>→ The End User may assign the whole or part of its rights and obligations under the Agreement with the prior consent of QR Network (not to unreasonably withheld).</p>	<p>→ The End User’s interests under the TOA should not be prejudiced by any assignment of the Agreement.</p>	Clause 16.1
24	Relationship with TOA (Clause 16)	<p>Disputes</p> <p>→ Either party may join an Operator to a dispute by notice to the other party, prior to referral of the dispute to a loss adjuster, expert, arbitrator or the QCA in accordance with clause 8.7 or 11 of the</p>	<p>Disputes</p> <p>→ Clause 16.1(c) should be amended to clarify that the End User is only required to comply with the dispute resolution provisions of the TOA and be bound by a decision of an Adjudicator under the TOA to the extent such referral and</p>	Clause 17.1(c)

Item	Key Term (& original clause reference)	Summary	QRC Position	Amending clause in draft End User Access Agreement
		<p>Agreement. The relevant dispute provisions will apply to the Operator as if the Operator was a party to the Agreement, and any dispute involving the Operator and the TOA will be simultaneously determined.</p> <p>→ If the End User is notified of a dispute to be referred to an Adjudicator in accordance with a TOA, the End User must comply with the relevant dispute resolution provisions of the TOA. These are identical to those contained in the Agreement. The decision of an Adjudicator under the TOA will be final and binding upon the End User (clause 16.1(c)).</p> <p>Amendments to the TOA (clause 16.2)</p> <p>→ If any of the following occur under a TOA:</p> <ul style="list-style-type: none"> - authorisation of modified or additional Rollingstock or Rollingstock Configurations are authorised; - variation to: <ul style="list-style-type: none"> ▪ the Performance Levels; ▪ the Train Service Description; ▪ the Access Charges; or ▪ Base Access Charges <p>preparation, amendment, review or audit of an Interface Risk Management Plan or Environmental Investigation and Risk Management Report; or</p> <ul style="list-style-type: none"> - the TOA is otherwise amended as a result of any of the above, 	<p>decision do not prejudice the End User's rights under this Agreement.</p> <p>Amendments to the TOA</p> <p>→ In its current form, this clause is not acceptable. The End User's Access Rights should not be modified other than with its approval.</p>	<p>Clause 17.2</p>

Item	Key Term (& original clause reference)	Summary	QRC Position	Amending clause in draft End User Access Agreement
		<p>then:</p> <p>the Parties must amend the Agreement (including a variation to the Base Access Charges, Train Service Levels or Train Service Description) as reasonably necessary to reflect the change or variation to the TOA.</p> <p>→ Where QR Network and the End User cannot agree on the amendments to the Agreement, the matter will be referred to an expert or to the QCA, depending on whether the variations relate to the Base Access Charges or other matters.</p> <p>→ Any amendments or variations are not to result in any increase to the total capacity allocated to the End User under this Agreement.</p>		
25	Most Favoured Nation Status	Proposed new clause.	The TOA includes a most favoured nation in relation to access charges. That clause should also be included in the End User Agreement.	Clause 18.23
26	Tripartite Agreement	Proposed new clause.	Given the substantial impact of significant changes to the TOA on the interests of the End User, the parties to the TOA should not amend or waive rights without the approval of the End User.	Clause 19

Section 3. QRC’s proposed Train Operations Agreement (Coal) – Key Terms and Amendments

This section provides QRC’s assessment of QR Network’s proposed TOA and presents QRC’s position in response to the matters identified. In addition, QRC also provides a proposed marked-up of the TOA which addresses various concerns with QR Network’s approach.

Item	Key Term (& original clause reference)	Summary	QRC Comments	Amending clause in draft Train Operations Agreement
1	General	→ It is noted that QR Network intends to enter into an agreement with an Operator who may be the operator appointed by multiple End Users with the effect that a single TOA may apply to the interests of these multiple End Users.	→ QRC is of the view that a separate TOA should be entered in respect of that Operator’s access rights relative to only a single End User.	
2	Clause 7(c)(i) – Interaction of Rights	→ This clause makes provision for the interaction between this Agreement and the End User Access Agreement (“EUAA”), and to the extent of any inconsistency, the EUAA prevails.	→ The clause should be amended to provide that where inconsistency exists the parties should amend the TOA to ensure consistency with EUAA.	Clause 7(c)(i)
3	Clause 7(c)(iii) – “Access Holder”	→ Ambiguity regarding references to “Access Holder” under Access Undertaking.	→ The End User should have the right to determine the reference to “Access Holder”.	Clause 7(c)(iii)
4	Clause 2.4 – Obligation to provide Security	→ Security is required under both the TOA and the EUAA. The amount is the greater of 12 weeks Access Charges or the insurance deductible.	→ Security should only be required if the Operator’s credit rating falls below the acceptable level (as defined). → The amount of Security is amended to the amount of the insurance deductible for public liability insurance IF the EUAA addresses risks relating to the payment to Access Charges .	Reference Schedule Clause 1.1 Clause 2.4
5	Clause 4.2 - Forecasts	→ The provision requires the Operator to provide its best estimate for the next 6 year period of the number of train services, tonnage, rollingstock requirements, etc to allow QR Network to plan for Infrastructure needs.	→ The provision is substantially replicated in the EUAA and it does not seem necessary to have both parties providing forecasts and unnecessarily replicating the information.	Clause 4.2
6	Clause 6.6 – Performance	→ Both the Operator and QR Network are subject to achieving certain agreed performance levels	→ Given that the level of performance under this agreement is relevant to the interests of the End User in exercising its	Clause 6.6(d)

Item	Key Term (& original clause reference)	Summary	QRC Comments	Amending clause in draft Train Operations Agreement
	levels	<p>throughout the term of the agreement. A failure to meet these levels will incur a pecuniary penalty for the Operator and QR Network as the case may be.</p> <ul style="list-style-type: none"> → Subclause (d) provides that the parties may meet to review and thereafter amend the performance levels if they are no longer appropriate. → The clause also provides that QR Network may vary the Train Service Description unilaterally after consulting with the Operator and the End User in circumstances where the Operator fails to comply in any material respect with a Train Service Description. 	<p>access rights, subclause (d) should be amended to provide that any variation of the performance levels may only be made with the End User's agreement.</p> <ul style="list-style-type: none"> → QR Network should be obliged to comply with the proposed amended provisions of the EUAA regarding providing the End User with an opportunity to rectify non compliance and also to meet with the End User to agree any variation to the Train Service Description. → Any disputes in relation to the variation of Train Services Description should be dealt with under the relevant dispute process under the EUAA. 	<p>Clause 6.6 (e)</p> <p>Clause 6.6(g)</p>
7	Clause 19 – Force Majeure	<ul style="list-style-type: none"> → The parties to the agreement are required to give each other notice of a force majeure event along with relevant details. → If force majeure continues for an extended period the parties are to meet to consider alternatives for the provision of the access rights. If there are no agreed alternatives either party may terminate the agreement. 	<ul style="list-style-type: none"> → Notice should also be given to the End User. → The End User should be invited to any meeting regarding alternatives for the provision of access rights. 	<p>Clause 19.1</p> <p>Clause 19.6</p>
8	Clause 20 - Suspension	<ul style="list-style-type: none"> → The clause gives QR Network the right to suspend the right of the Operator to operate the Train Services upon the occurrence of the matters listed in the clause, which include failure to pay money by Operator and End User, or End User fails to provide security, insurance, or is insolvent etc. 	<ul style="list-style-type: none"> → The clause should provide that any suspension shall be lifted when the End User remedies any failure which led to suspension. → The End User should also be notified of suspension and QR Network should comply with the relevant provisions under the EUAA to the extent the suspension relates to the End User's access rights. 	<p>Clause 20.1</p> <p>Clause 20.2</p>
9	Clause 22 - Assignment	<ul style="list-style-type: none"> → QR Network may assign its rights and obligations under the agreement without the Operator's consent provided QR Network procures the assignee's 	<ul style="list-style-type: none"> → The End User's interests under the TOA should not be prejudiced by any assignment of the Agreement. 	<p>Clause 22.1</p>

Item	Key Term (& original clause reference)	Summary	QRC Comments	Amending clause in draft Train Operations Agreement
		<p>agreement to be bound by those same rights and obligations.</p> <p>→ Any change in shareholding of the Operator is deemed to be an assignment except where the company is listed on the ASX.</p>	<p>→ The provisions restricting the Operator's ability to deal with its share ownership and deeming such to be an assignment are unnecessarily restrictive and should be deleted.</p>	<p>Clause 22.2</p>
10	Schedule 7 - Insurance	<p>→ Paragraph (f) includes requirements that the Operator's insurance must insure QR Network and include a cross liability clause.</p>	<p>→ These provisions are not generally accepted by insurers.</p>	<p>Deletion of (f)</p>
11	Schedule 13 – Pro-forma security		<p>→ An acceptable form of bank guarantee has been provided.</p>	

Section 4. QRC's assessment of proposed consequential amendments to the 2010 AU

This section provides an overview of QRC's assessment of QR Network's proposed amendments to the 2010 AU necessary to implement this new form of contracting framework.

Item	Key Term (& original clause reference)	Summary of Proposed Amendment	QRC Position
1	12.5(a)	When making an Access Application, the Access Seeker must notify QR Network in writing as to whether the Access Seeker is seeking Access under the terms of either: (i) a Standard Agreement; or (ii) an EUAA and associated TOA(s).	QRC supports this proposed amendment.
2	12.5(e)(i)	Notwithstanding clause 3.4 of the 2010 Undertaking, QR Network may disclose to an End User or to a Train Operator information and notices arising from or in connection with: A. for an End User, a relevant Train Operator's TOA and the Access Rights under that TOA; or B. for a Train Operator, a relevant End User's EUAA and the Access Rights under that EUAA, to the extent that such a disclosure is: C. reasonably necessary for the performance of obligations or the exercise rights under either the EUAA or TOA; or D. in connection with the safe operation of the Rail Infrastructure.	This clause is an exception to the restriction placed on the disclosure of confidential information under clause 3.4 of the 2010 Undertaking. QRC considers that sub-paragraph (D) be amended to provide that disclosure of confidential information is permitted to the extent it is " <i>reasonably necessary in connection with the safe operation of the Rail Infrastructure</i> "
3	12.5(e)(iv)	Where a Train Operator has been formally nominated to QR Network by an End User as a Train Operator for that End User, that Train Operator will be treated as an Access Seeker for the purposes of clauses 4.5 and 4.6 of the 2010 Undertaking in respect of the rights of Access to be negotiated and utilised by the Train Operator for the purpose of the nomination by the End User. However: A. the Train Operator will cease to be treated as an Access	Clauses 4.5 and 4.6 of the 2010 Undertaking set out the process for negotiating the Access Agreement. For example, the period for negotiation and the various tasks to be undertaken by QR Network and the Access Seeker to facilitate negotiation (eg. QR Network is to provide an Access Charge and the Access Seeker is to demonstrate that the relevant Rollingstock is consistent with the Rollingstock Interface Standards). These clauses also set out circumstances where QR Network may terminate the negotiations (eg. the Access Seeker is insolvent or fails to materially

Item	Key Term (& original clause reference)	Summary of Proposed Amendment	QRC Position
		<p>Seeker and QR Network may terminate negotiations with the Train Operator if, for any reason, the End User ceases to be an Access Seeker in respect of Access Rights that relate to that Train Operator's nomination;</p> <p>B. the Access Rights negotiated with the Train Operator cannot be inconsistent with the Access Rights granted to the End User for which the Train Operator has been nominated; and</p> <p>C. the End User shall have the right, at its election, to be present in any negotiation between QR Network and the nominated Train Operator for Access Rights relevant to the nomination, and shall have the right to have the Train Operator present at negotiations with QR Network over Access Rights to be granted to the End User.</p>	<p>comply with the 2010 Undertaking).</p> <p>QRC requests that the QCA amend this provision to provide the End User with sufficient ability to manage the negotiations for its Access Rights, albeit with the ability to involve the Train Operator in its negotiations where relevant (see clause 12.5(e)(vii) below).</p>
4	12.5(e)(vii)	<p>In respect of Part 4, where QR Network is negotiating an End User Access Agreement with an Access Seeker:</p> <p>A. QR Network and that Access Seeker will seek to agree an assumed Operating Plan and QR Network will make reasonable assumptions about the Rollingstock and Rollingstock Configurations for that Access Seeker's Train Services;</p> <p>B. an Access Seeker is not obliged to prepare or participate in an Interface Risk Assessment, IRMP or EIRMR;</p> <p>C. QR Network may make any other assumptions as are reasonably necessary; and</p> <p>D. the End User may involve the Train Operator(s) in the development of a proposed Operating Plan, for the purposes of Part 4 (including for the purposes of determining a Train Service Entitlement during those negotiations).</p>	<p>This clause clarifies the manner in which certain matters in respect of the EUAA will be negotiated with the prospective End User. The clause allows the End User to negotiate the Operating Plan with or without the involvement of a Train Operator.</p> <p>This clause is acceptable.</p>
5	12.5(e)(ix)	<p>For the purposes of clause 10.1, if a Dispute arises between QR Network and an End User or between QR Network and a Train Operator and clause 10.1 applies, then:</p>	<p>This clause provides for joint dispute resolution and arbitration.</p>

Item	Key Term (& original clause reference)	Summary of Proposed Amendment	QRC Position
		<p>A. either party to the Dispute may notify the relevant End User or Train Operator (as applicable) (Additional Dispute) of that Dispute; and</p> <p>B. if such a notice is given to the Additional Dispute, then clause 10.1 will apply to that Additional Dispute as though it was a party to the Dispute.</p>	
6	12.5(f)	<p>Where an End User seeks to vary nominated Access Rights between Train Operators, the varied rights will be treated as Transferred Access Rights within the meaning of clause 7.3.7 and Schedule F, Section 2.3 (Adjustment Charges) and the process in clause 7.3.7 will apply.</p>	<p>The intention of clause 12.5(f) is unclear. It seems to treat changes of an Operator as a transfer of Access Rights. This is not consistent with the intention of the End User arrangements (where Access Rights are held by the End User and the End User is the Access Holder).</p> <p>If the process set out in clause 7.3.7 of the 2010 Undertaking is to apply to a change of Operator, the End User's ability to change Train Operators will only occur where (among other things):</p> <ul style="list-style-type: none"> • the transferee agrees to pay all Adjustment Charges (clause 7.3.7(b)(iv)(B)); • the End User provides an undertaking (including security, if required by QR Network) indemnifying QR Network for all costs incurred in connection with the transfer (including any failure by the transferee to pay all Adjustment Charges) (clause 7.3.7(b)(v)); and • the End User has paid the Relinquishment Fee (clause 7.3.7(b)(vi)). <p>This amendment to the 2010 Undertaking therefore imposes further conditions to changes of Operators, which do not appear in the EUAA. The provision undermines the flexibility under and purpose of the EUAA. Nor is the provision consistent with the fact that the End User is the Access Holder and that Access Rights are held by the End User.</p> <p>For the reasons given above, the QRC propose to delete clause 12.5(f).</p>