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30 October 2012

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

Dear John,

### **Proposed Standard Access Agreements**

QR Network welcomes the opportunity to respond to the Queensland Competition Authority's (QCA) draft decision of 30 July 2012, on QR Network's proposed alternative standard access agreements. Following QR Network's application, the QCA extended the timeframes for lodgement of submissions in reply to that draft decision to 30 October 2012.

QR Network has considered the draft decision in accordance with the requirements of clause 5.2 of the QR Network's Access Undertaking (2010AU). In general, QR Network considers the QCA's draft decision appropriately reflects the balance of interests in most respects particularly in relation to not seeking to regulate the contractual relationship between an end user and the railway operator. However, there are circumstances where this is not the case and we have included commentary in the attached submission which identifies the relevant concerns and the basis of those concerns.

### Key Issues

QR Network considers the following matters need to be addressed in order for the alternative form of access agreements to satisfy the requirements of clause 5.2 of the 2010AU and for the QCA to be able to approve a draft amending access undertaking under 138(2):

#### 1. Exercise of Access Rights

QR Network generally accepts the QCA's draft decision enabling end users to respond to a request to appoint a new Train Operator within 10 days, and for no minimum variation term for reallocating access rights. However QR Network considers that reduction in timeframes for reallocation of access rights between rail operators to 48 hours will impact on QR Network's ability to efficiently schedule train services. As path allocation is performed on a weekly basis, any reallocation of entitlements may lead to inconsistencies in how QR Network assigns capacity. There is also the potential for the capacity of the system to be affected, as last minute variations will result in train schedule being suboptimal.



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## 2. Consequential Loss

The draft decision proposes that QR Network should be liable to both the end user and train operator for consequential loss for wrongful suspension of train services. QR Network considers that the extension of this exposure to the end user's consequential loss places increased risk on QR Network, which is not justified by the implementation of the alternative form of access. The purpose of the alternate form of access is to remove the end user from responsibilities and liabilities for operational issues. This liability is therefore better placed within the TOA.

## 3. Consequential amendments to Access Undertaking

The draft decision extends the rights of a railway operator substantially beyond those contemplated by QR Network's alternative form of access. The consequential amendment in the draft decision would allow a train operator to act as an Access Seeker, and for the TOA to be negotiated in accordance with part 4 of the Access Undertaking. QR Network considers this to be inconsistent with the intention of the alternative form of access. The premise of the access regime is that QR Network is required to negotiate with one Access Seeker for the purpose of entering into one Access Agreement to utilise Access Rights.

QR Network acknowledges that various operational matters such as the IRMP need to be agreed between QR Network and a railway operator to allow an operator to utilise access rights that have been granted to them by the end user (not by QR Network). Accordingly, QR Network considers the consequential amendments to the 2010AU can be materially simplified to effectively implement the alternative form of access.

### Submission

In addition to the key issues identified above, QR Network had suggested drafting changes to the TOA and EUAA as required. QR Network considers that these proposed amendments better reflect the requirements of clause 5.2 as understood by QR Network. QR Network request that these amendments be considered for the final decision.

QR Network has prepared a submission (attached) for your consideration in forming a Final Decision. Please also find attached proposed amendments to the End User Access Agreement (EUAA) and Train Operations Agreement (TOA).

QR Network has not proposed changes to the consequential amendments given the significant uncertainty of the role of a railway operator in the negotiation of access rights under the alternative form of access.

### Progressing Development

With consideration to the attached submission, QR Network considers the consequential amendments to the proposed SAAs reasonable, and acceptable. QR Network does however





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request further consultation on the consequential amendments to the 2010AU. Constructive engagement with the QCA and relevant stakeholders will ensure consequential amendments to the 2010AU better reflect the rights and obligations of both parties in negotiating a TOA. We look forward to working with you to achieve this outcome.

Should you have any enquiries regarding this matter, please contact David Collins on 07 3019 9353 or via email [David.Collins@qrnational.com.au](mailto:David.Collins@qrnational.com.au)

Regards,



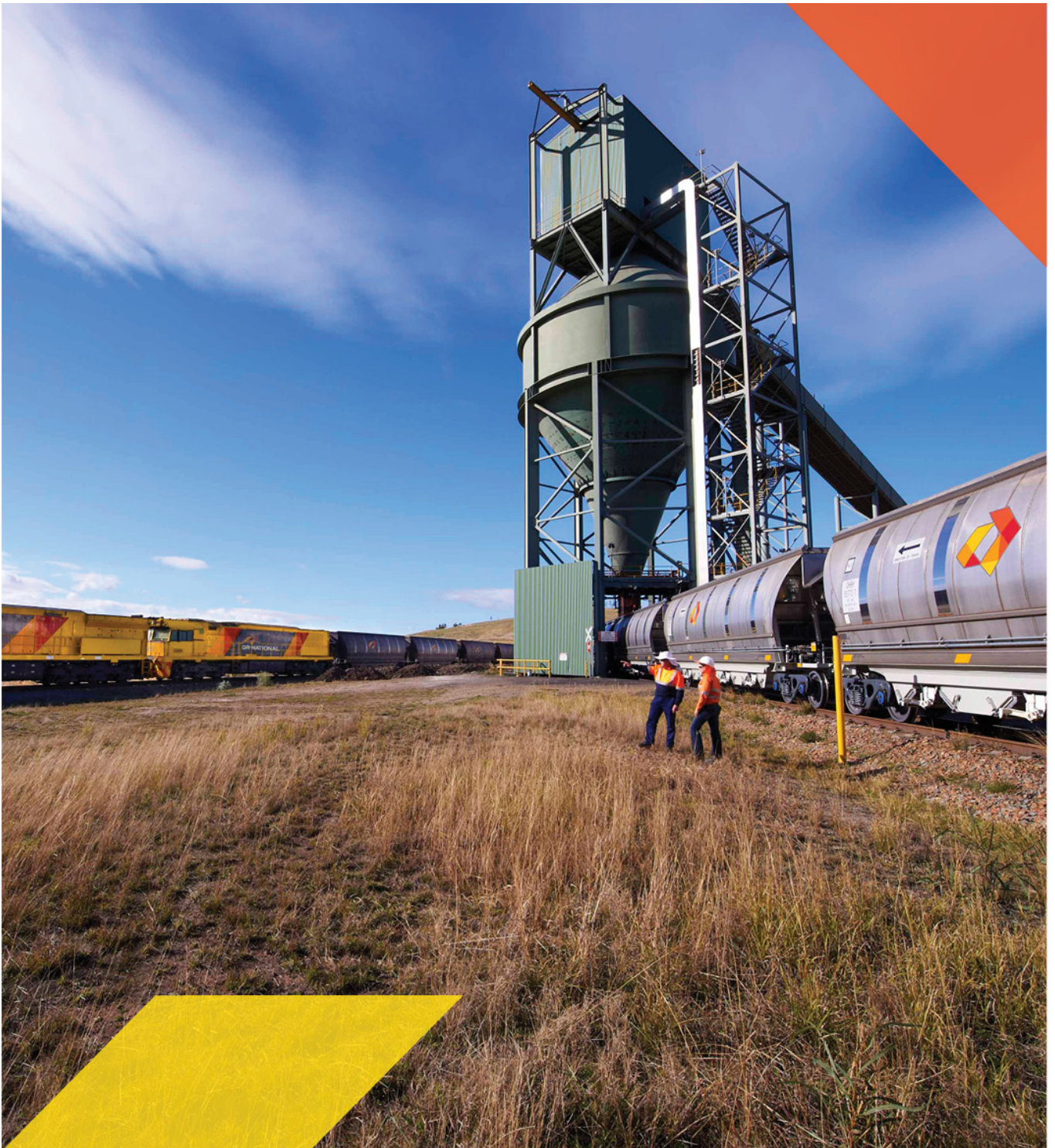
Clay McDonald  
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## QR Network

### Submission to QCA: Proposed Alternative Form of Access



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# 1. Introduction

On 29 April 2011, QR Network submitted to the Queensland Competition Authority (QCA) for approval, in accordance with clause 5.2(n) of the Undertaking:

- two proposed Standard Access Agreements that together provide for an alternate form of contracting for access rights (and which are referred to in this submission as the alternate form SAAs); and
- proposed consequential amendments to the Undertaking which are necessary to give effect to the alternate form SAAs.

The QCA's Draft Decision on the proposed alternate form SAAs (referred to in this submission as the Draft Decision) was released on 30 July 2012. Submissions were sought in response to the Draft Decision by 30 October 2012. The purpose of this submission is to set out QR Network's views on the Draft Decision.

Clause 5.2(n) of the Undertaking requires QR Network to submit to the QCA:

- (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.*

QR Network refers to the proposed alternate form SAAs as follows:

- the agreement developed in accordance with Clause 5.2(n)(i) is referred to as the End User Access Agreement (EUAA); and
- the agreement developed in accordance with Clause 5.2(n)(ii) is referred to as the Train Operator Agreement (TOA).

The QCA is required to assess these proposed alternate form SAAs in accordance with the process set out in Clause 5.2 of the Undertaking. They have stated that, in making this assessment, their approach involved considering whether the new SAAs:

- are consistent with the Undertaking;
- do not alter the allocation of risk between the parties, or if it does, the change is justifiable and appropriate given the splitting of access rights and operational responsibilities;
- provide flexibility in the utilisation of access rights; and
- enable the split arrangement to operate effectively, are commercially balanced and necessary.

QR Network has considered the Draft Decision in line with this approach and in particular, whether each element of the Draft Decision reasonably reflects these objectives. To the extent that QR Network does not discuss an element of the Draft Decision in this submission, this means that it is satisfied with this decision. Where QR Network has concerns, these are addressed in the context of the objectives outlined above and, to the extent applicable, in light of the matters set out in section 138(2) of the *Queensland Competition Authority Act 1997* (the QCA Act).

For ease of reference, this submission follows the structure of the Draft Decision, as follows:

- Section 2 discusses the proposed requirements that relate to the way that end users may utilise their access rights, including appointing new operators and varying the utilisation of access rights between operators;
- Section 3 addresses those areas where the QCA considers rights and obligations have not been appropriately allocated between the end user and operator, or differ from those that currently exist;
- Section 4 deals with the proposed changes relating to the splitting of obligations between the end user and operator;
- Section 5 considers any remaining requirements for changes to the SAAs; and
- Section 6 responds to the proposed requirements of consequential amendments to the Undertaking.

Attached to this submission are marked up amendments to the EUAA and TOA to reflect the content of this submission.

In this document:

- all references to the Undertaking are to the QR Network 2010 Access Undertaking;
- all clause and subclause references are to the Undertaking, except where otherwise indicated; and
- all defined terms are with reference to the definitions in the Undertaking, except where otherwise indicated.

## 2. Exercise of Access Rights

### 2.1 Appointing Train Operators and reallocating access rights

#### *Draft Decision 2.2*

*The Authority requires QR Network to amend its proposal so that:*

- (a) it must respond to an end user's request to appoint a Train Operator within 10 days;*
- (b) an end user can reappoint a Train Operator up to 48 hours before the day of operation; and*
- (c) there is no minimum variation period for an end user to vary its Train Operator appointment or allocation of access rights.*

#### 2.1.1 Response to end user's request to appoint a Train Operator

QR Network accepts the concept that the EUAA should require QR Network to respond to a request by an end user to appoint a train operator in a timely manner. QR Network considers that the proposed timeframe of 10 days is reasonable, on the basis that the operator is in a position to meet all operational requirements for operating services for the end user (For example, it is an accredited operator, has registered rollingstock, has in place an IRMP and EIRMR that will cover these services). Any requirement for these matters to be developed and negotiated with QR Network will mean that the 10 day timeframe will be unachievable.

The approach taken by ARTC in the Hunter Valley has been developed to address this same concern. Under ARTC's standard agreements, the access holder may nominate a new accredited operator (who is not currently an approved operator) for any train path under the agreement on 10 business days' written notice to ARTC. ARTC will use best endeavours to approve or reject that nomination within 10 business days and is entitled to reject that nomination if the accredited operator does not have an unconditional operator sub-agreement with ARTC endorsed by the access holder.

Consistent with the approach used in the Hunter Valley, in implementing this element of the Draft Decision, QR Network has proposed amendments the EUAA to provide that it will:

- respond to an end user's request to appoint a new train operator and assign access rights to that train operator within 10 business days;
- be entitled to reject that train operator if it is not in a position to immediately sign an unconditional TOA in relation to the access rights that will be assigned to that operator, or to vary an existing TOA by including those access rights; and
- consequential amendments to ensure the Draft Decision is accurately reflected within the EUAA, so the clauses more closely reflect the approach proposed by the QCA.

A rejection of a train operator under this provision does not mean that QR Network cannot accept that appointment, merely that the train operator, following written notice by an Access Seeker or Access Holder for an EUAA, will need to negotiate the relevant operational matters with QR Network in accordance with the terms of the Undertaking, prior to being able to be appointed under the provisions of the EUAA.

#### 2.2.2 Varying allocation of access rights to Train Operators

QR Network's proposed alternate form SAAs provide that an end user must give a minimum period of notice of 30 days in order to vary its allocation of access rights between its train operators. In their initial submissions on the proposed alternate form SAAs, a number of stakeholders identified that they wanted to be able to vary the allocation of operators within a shorter timeframe. In its November 2011 response to these submissions, QR Network indicated that it would be prepared to reduce this timeframe to 14 days prior to the commencement of the relevant scheduling period (presumed to be 7 days).



In the Draft Decision, the QCA has identified that it considers that this proposal may limit the ability of end users to effectively manage their access rights, and has specified that end users should be permitted to reallocate access rights between operators with 48 hours' notice.

QR Network is concerned of the practical implications of this requirement, particularly relating to the implications for the planning and scheduling period. QR Network considers that reducing the minimum notice period to 48 hours has the potential to create disruption within the scheduling environment, which could lead to complications for allocating paths and optimising train schedules. The QCA has generally justified its requirements in relation to the appointment of operators and the reallocation of access rights as being designed to increase competition in the rail haulage market. However, it has not been demonstrated how this reduced timeframe will generate increase competition in the market for rail haulage, or that it would generate benefits which exceed the prospective coordination and contractual alignment impacts. QR Network also understands that the 48 hour timeframes have only been exercised in the Hunter Valley to address ad-hoc train paths which need to be accommodated within the capacity balancing system.

QR Network requires adequate time period to respond to a variation of access rights and proposes aligning the notice period with the relevant scheduling period as identified in the relevant System Rules. QR Network's proposed drafting amendments to the EUAA contemplate alignment with the timing requirements for train orders to be submitted (as detailed in Schedule G of the Undertaking). By aligning to this timeframe, QR Network will have sufficient time to vary the existing agreements, and also schedule train services in an efficient manner. Should no System Rules be in place, QR Network requires a minimum of 7 days notice.

#### **(a) Scheduling Considerations**

The QCA has explained its requirement for varying operator allocations with 48 hours notice with reference to the cargo assembly mode of operation that applies in the Goonyella system. They have stated that the port and rail requirements constantly change as the day of operation draws closer and having a requirement that gives QR Network 3 weeks' notice to use an alternate operator will prevent the end user from having the ability to respond to the environment in which they operate.<sup>1</sup>

While QR Network accepts that, particularly under a cargo assembly mode of operation, the rail schedules do vary as the day of operation draws closer, QR Network believes that the uncertainty that these variations create are overstated. Using the Goonyella system as an example, the cargo assembly plans for the expected ship movements are developed 21 days in advance. This is the point where all supply chain participants get clarity about what coal movements are required in order to assemble the required ship loads. Using this information, each supply chain participant will identify the resources that they require in order to achieve these coal movements. This is the key point where end users should be considering whether they need to reallocate train paths between operators to achieve these coal movements given their capacity entitlements. This cargo assembly plan will be refined over the next 10 days, to reflect the resources available in the system, as well as other changes (such as coal availability or ship arrivals).

In the Goonyella system, the train orders are then submitted 10 days prior to the day of operation, and a train schedule is developed for this scheduling period. While changes do regularly occur during the scheduling period, particularly to the scheduled times for operating services (as the schedule continues to be optimised as the day of operation draws closer), this should be viewed as a process of refinement, rather than an opportunity for major reallocations of key resources. Changing allocations of access entitlements to operators during this period will significantly complicate this process and make it increasingly difficult to develop effective schedules. Due to varying operating parameters of each train operator (e.g. depot and crew change locations), it is unlikely that where there are reallocations at a late stage in the scheduling process, that the schedule will be unaltered. This has the potential to impact on the capacity of the supply chain as a whole. However, if QR Network is aware of reallocations prior to developing the plan, the schedule can be optimised for each train operator to ensure an efficient schedule is developed.

Additionally, as proposed in QR Network's System Rules, in the event that all train orders cannot be allocated capacity within a given schedule, capacity is allocated in accordance with the Contested Train Path Decision Making Process. This process generally results in the party most behind in achieving contract being provided with scheduling priority. The process could also lead to strategic gaming by customers who could have a train order

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<sup>1</sup> QCA Draft Decision on Proposed Standard Access Agreements, July 2012, p12

submitted by an operator rejected on the basis of the application of the Contested Path Decision Making Process and then seek to change the nomination to another operator to achieve a different outcome with scheduling of the DTP.

By enabling changes up to 48hrs prior to operations, there is a risk that parties may received allocations that are misaligned to their entitlements as 48 hours prior to operation, the schedule is already confirmed. At this stage in the planning process, path allocation has already been completed; hence a longer notification period is essential. At the time of orders being submitted, QR Network requires a confirmed allocation between TOAs. This will ensure that QR Network can undertake the process of allocating paths in a fair and consistent manner to ensure each Access Holder receives their entitlement.

The QCA has referred to the ARTC framework as providing a precedent on this issue. However, QR Network is concerned that there is a reliance on this precedent without consideration as to how this timeframe relates to the overall capacity management process in the Hunter Valley. The process in the ARTC framework is strongly aligned to the capacity balancing system which has a much more significant take-or-pay and train service entitlement accountability framework. In this framework, it is critical that the contracted access rights align directly with the scheduled paths. In contrast QR Network's access management framework, as established in its Undertaking and existing SAAs, avoids the need to rigidly align access rights with scheduled train paths by relying on procedural arrangements, such as the scheduling framework, the use of the system test and capping of take-or-pay liability. In this context, it has not been adequately demonstrated how the 48 hour nomination relative to the timeframes proposed by QR Network result in a material reduction in the commercial risks to an end user.

#### **(b) Alternate arrangements available to end users**

The complexity associated with making short term changes to the access rights specified in the access agreements is the reason why short term variability in the scheduling environments is dealt with as a procedural issue, rather than through amendment of the relevant access agreements. QR Network does not believe it is practical to change this approach for the purpose of the alternate form SAAs, particularly given the difficulty in achieving rapid changes to the TOAs.

QR Network remains of the view that customers can implement arrangements in the scheduling environment to provide them the flexibility that they are seeking, rather than trying to create this flexibility in the contractual environment. To the extent that a customer wishes to vary its operators within the scheduling period, the options available to the end user remain:

- the alternate operator bringing forward the use of its allocated access rights (as discussed above); or
- the "Contested Path Decision Making Process": While QR Network acknowledges that there is no incentive on the operator losing a service to agree to another operator gaining the service, this ignores the ability of the end user to influence this process through the provisions in their rail haulage agreements. The ability of the end user to reallocate train orders and access rights between train operators (particularly in the short term) will be addressed in the rail haulage agreement; as such reallocations may have major implications for the train operators. To the extent that the end user negotiates the ability to vary its train orders at short notice, it can include in this a requirement that the operator agrees to the required reallocation of paths in the scheduling environment.

### **2.2.3 Minimum period for variation of access rights**

QR Network accepts the concept that there will be no minimum variation period for an end user to reappoint access rights between train operators. In saying this, QR Network notes that the train service entitlement is a monthly entitlement, so a transfer of a partial monthly entitlement does not confer a right to a particular scheduled train path – the transferred entitlement will be scheduled in accordance with the Network Management Principles and the System Rules.

To the extent that an end user wishes to reallocate access rights between train operators in the current month, the maximum paths that may be reallocated from a TOA will be the end user's monthly allocation to that operator, less the actual and scheduled month to date usage by that operator in accordance with this allocation. This will ensure that the process of reallocation does not inadvertently result in discrepancies between the end user's total monthly entitlement and the access rights allocated to train operators under their TOAs.

## 2.2 Contracting structure

### *Draft Decision 2.3*

*The Authority requires QR Network to amend the contracting structure of the alternative SAAs to provide for each EUAA to be linked to separate TOA(s).*

QR Network's proposed SAAs contain arrangements whereby:

- under the EUAA, an end user contracts with QR Network for access rights; and
- under the TOA, a train operator contracts with QR Network to operate train services using an end user's access rights.

QR Network's proposed TOA allows for a train operator to contract with QR Network to operate train services for some or all of the train operator's customers. This is similar to the approach adopted for the endorsed Operator Access Agreement Coal (OAAC), which can be used by the train operator either for an individual train service entitlement or to incorporate multiple train service entitlements (for different end customers), in a single agreement with QR Network.

The QCA has highlighted that there may be benefit in a separate TOA being developed for each EUAA. Some end users identified that they would prefer this structure to allow them to better manage issues such as transparency and implications for a breach of the TOA. QR Network notes the concern that the current proposal does not provide for this option with sufficient clarity and the QCA thus requires that train operators should hold a separate TOA for each EUAA under which they are assigned access rights.

However, QR Network is aware that some other parties take the alternate view that combining multiple train services in a single TOA enables greater efficiencies in contract management and administration and may reduce the risk of a breach of the TOA, where one train service entitlement leads to the suspension or termination of the TOA, affecting other train service entitlements.

In this context, QR Network believes that the decision about whether a TOA should be specific to a particular EUAA or should apply across multiple EUAA's, is best left to the end users and their respective operators. An end user who prefers that its train operator hold a specific TOA for its access rights, may include this requirement in the associated rail haulage agreement. The effectiveness of this approach is already evidenced by the OAAC style agreements – depending upon the preferences of the operator and the end user. The OAAC style agreement is used for both individual train service entitlements and combinations of train service entitlements.

QR Network recognises that the current proposal does not provide this option with sufficient clarity. As a result, QR Network is happy to propose any amendments that may be required to clarify that separate TOAs can be entered into for each EUAA.

# 3. Responsibilities not consistent with existing SAAs

## 3.1 Billing

*Draft Decision 3.1*

*The Authority requires QR Network to amend:*

..

- (b) Clause 8 of the EUAA to enable the end user and QR Network to refer disputed amounts to dispute resolution after the expiry of the EUAA; and*
- (c) Clause 15 of the General Conditions of Contract of the TOA to enable the operator and QR Network to refer disputed amounts to dispute resolution after the expiry of the TOA.*

QR Network notes the advantage that the QCA considers will be achieved, by providing parties with the ability to refer disputed amounts to the dispute resolution processes after the expiry of their agreement. However, this issue is not included in the existing OAAC or AAC. QR Network considers that the question of whether or not parties can refer disputed amounts to the dispute resolution processes after the expiry of their agreement, is not an issue that arises from the splitting of the agreements. Including this right in these agreements creates a distinction between the alternative SAAs and the current SAAs, which is not required by the splitting of responsibilities in the alternative SAAs.<sup>2</sup> As a result, QR Network believes that this issue should more appropriately be considered as part of UT4.

In the interest of finalising the alternate SAAs, QR Network will be prepared to include this provision in both the EUAA and the TOA. QR Network however believes the drafting included in clause 8.6(b) of the EUAA and clause 15.6(b) of the General Conditions of Contract of the TOA is too expansive and has included amendments which more accurately reflect Draft Decision 3.1 (b) and (c).

## 3.2 Security

*Draft Decision 3.2.2*

*The Authority requires QR Network to amend Clause 2 of the General Conditions of Contract and the Reference Schedule of the TOA and Clause 3 and the Reference Schedule of the EUAA, and other aspects of the proposed alternative SAAs where relevant, such that:*

...

- (b) QR Network is precluded from unreasonably delaying the acceptance of the operator's security and to enable the end user to provide security in the event that QR Network decides the operator's security is unacceptable; and*
- (c) a standard bank guarantee be included in the EUAA and TOA, and if that is unsuitable to the end user or the operator, security must be on terms reasonably acceptable to QR Network.*

QR Network has no objection to an end user stepping in to provide security in the event that the operator's security is unacceptable. QR Network notes the advantage that the QCA considers will be achieved by precluding QR Network from unreasonably delaying the acceptance of the operator's security and including a standard bank guarantee in the EUAA and TOA. QR Network remains of the view that including the standard bank guarantee may not achieve the objectives of stakeholders, as any standard bank guarantee document may not align with the form to be issued by an individual financial institution. Moreover, as with issues discussed in Section 3.1 above, neither of these issues arise from the splitting of the agreements. As a result, QR Network considers that these issues should more appropriately be considered as part of UT4.

In the interests of finalising these alternate SAAs, QR Network will be prepared to:

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<sup>2</sup> The QCA has resisted creating such distinctions elsewhere, Specifically assignment by end user, p 55 of Draft Decision, but can list others.

- accept that QR Network will be precluded from unreasonably delaying the acceptance of an operator's security;
- include a standard bank guarantee document as an attachment to both the EUAA and the TOA;
- include drafting within the EUAA to clarify that where the end user provides security for an Operator, QR Network will have recourse to this security in any circumstance where it could have recourse under the relevant TOA; and
- amend the form of security to reflect that neither agreement provides for expiry and/or replacement of security and that the security will not be affected by variations to the underlying agreement

### 3.3 Liability for infrastructure

*[Draft Decision 3.4.2]*

*The Authority requires QR Network to amend Clause 8 of the EUAA to remove the requirement for then end user to provide operational indemnities or indemnities relating to the operator's conduct.*

QR Network accepts this requirement, as described in Draft Decision 3.4.2, however notes that the QCA's proposed amendment to clause 8.4 of the EUAA limits the indemnity to a greater extent than required by the Draft Decision. QR Network has included alternative drafting to that clause accordingly.

### 3.4 Consequential loss

*Draft Decision 3.4.3*

*The Authority requires QR Network to amend Clause 9 of the EUAA, and make other amendments where necessary, to provide that:*

- QR Network is liable to the end user for consequential loss for wrongful suspension, subject to the condition that the same loss or damage has not been claimed under the relevant TOA;*
- QR Network is liable to the end user for any wrongful audit or inspection under the TOA; and*
- The liabilities for consequential loss are to be subject to the same limitations which currently exist in the AAC.*

The outcome of this recommendation is that QR Network will become liable for the consequential losses of both the operator and the end user in the event of wrongful suspension, audit or inspection under a TOA. QR Network considers this to be a substantial change to its risk position, and unnecessary as a result of the change in the structure of the agreements.

While the drafting of consequential loss liability provisions in the AAC and the OAAC is very similar, in that QR Network is liable to the access holder for losses, including consequential losses, arising from wrongful suspension, audit or inspection; the risk position of QR Network under each form of agreement is quite different:

- there is a higher risk that a wrongful suspension, audit or inspection could cause loss to the access holder under the OAAC (with the operator) than under the AAC (with the end user), as the impact of such actions is most likely to be delay and additional costs in the transport of coal, rather than a complete failure to transport; but
- the potential consequential loss exposure is likely to be higher under the AAC (with the end user) than the OAAC (with the operator), as the potential size of the consequential loss for the end user (including loss of profits) resulting from a failure to transport coal is much higher than the potential consequential loss to the operator.

Therefore, the difference in risk position for QR Network under the two existing forms of agreement is that the OAAC has a higher likelihood of a consequential loss exposure occurring, but a lower exposure upon occurrence, compared to the AAC. Under the existing SAAs, QR Network has accepted that it will be subject to either of these risk positions. However, the effect of the QCA's Draft Decision is that it will now be subject to both risks, which creates a substantial change in QR Network's risk position. This is inconsistent with the QCA's stated assessment criteria, that:

*in allocating the existing responsibilities, ensure that the risk that each party bears remains unchanged or, if the risk profile does change it is justifiable and appropriate given the splitting of access rights and operational responsibilities.*<sup>3</sup>

QR Network has reviewed the reasons why this consequential loss liability was originally included in the SAAs. In the QCA's assessment of QR's first Draft Undertaking, the QCA had proposed to accept the normal commercial position on consequential loss – that neither party has any liability for consequential loss or damage or loss of profits in any circumstance.<sup>4</sup>

However, at the time, FreightCorp raised concerns that this limitation of liability may inappropriately constrain an access seeker or access holder's remedies for frustration of access or breaches of confidentiality in contravention of s104 or s125 of the QCA Act. These clauses effectively prohibit an access provider from acting in a way that prevents or hinders access by an access seeker, where the access provider is taken to have prevented or hindered access if it provides access to a related operator on more favourable terms than a competitor. The QCA accepted that there was a strong argument that an attempt to limit an aggrieved party's right to consequential damages for contravention of s104 and s125 would be inconsistent with the unlimited right to damages provided for in s153 of the QCA Act. Consequently, the QCA concluded the parties could not agree to limit the remedies provided for in the QCA Act by making them subject to the limitation of liability clause.<sup>5</sup>

In its Final Decision to approve QR's first Undertaking, the QCA implemented this objective by requiring that QR be subject to liability for consequential losses in certain circumstances.<sup>6</sup> The circumstances identified were those where QR, as an access provider, had the potential to cause significant damage to a competitor of its related operator, through breaches of the access agreement. This purpose for the original inclusion of the consequential loss liability in the SAAs indicates that, in splitting rights and obligations under the alternate form of SAAs, it is more appropriate to include this provision in the TOA – the agreement with the train operators (who may be competing with QR Network's related operator).

Moreover, suspension of rollingstock and train services, inspection and audit are fundamentally provisions relating to the operation of train services. The overriding purpose of the alternate form of SAAs is to allow the end user to contract for access rights, while being removed from responsibility and liability for operational matters. Given this purpose, QR Network considers there is insufficient reasoning as to why QR Network should remain liable to the end user for consequential losses (including loss of profits) due to these same operational matters.

QR Network does not accept Draft Decision 3.4.4 on the basis that:

- it will create a significant increase in risk to QR Network that has not been justified as necessary in order to implement the alternate form of SAAs;
- suspension of rollingstock and train services, inspection and audit are fundamentally provisions relating to the operation of train services – this indicates that the TOA is the appropriate place for this provision;
- the purpose of the consequential loss liability was originally to give a strong disincentive to QR Network to discriminate against third party operators who were competing with QR Network's related operator – this confirms that the TOA is the appropriate place for this provision; and
- the purpose of the alternate form SAAs is to remove the end user for responsibility and liability for operational issues – it is therefore incongruous that QR Network should remain liable to the end user for consequential losses associated with these same operational issues.

## 3.5 Rights of suspension

### *Draft Decision 3.5.1*

*The Authority requires QR Network to amend Clause 13 of the EUAA and Clause 20 of the General Conditions of Contract of the TOA such that suspension rights:*

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<sup>3</sup> QCA Draft Decision on QR Network's Proposed Standard Access Agreements, July 2012, p3-4

<sup>4</sup> QCA Final Decision on QR Draft Access Undertaking, July 2001, p293

<sup>5</sup> QCA Final Decision on QR Draft Access Undertaking, July 2001, p293

<sup>6</sup> QCA Final Decision on QR Draft Access Undertaking, December 2001, p9-12

- (a) *in the EUAA – suspend the access rights of the end user and only arise in circumstances which relate to the end user’s obligations; and*
- (b) *in the TOA – suspend the right of the relevant operator to operate train services utilising the end user’s access rights and only arise in circumstances which relate to the operator’s obligations (i.e. operational issues).*

QR Network accepts this requirement, as described in Draft Decision 3.5.1. However, QR Network believes that the proposed drafting to implement this requirement can be substantially simplified.

The proposed new Clause 13.1(a) of the EUAA lists a number of circumstances where QR Network may issue an end user with a suspension notice. QR Network agrees that these are the appropriate circumstances where it may wish to suspend an end user’s access rights. However, these circumstances all relate to the end user’s overall performance of the agreement, not to its performance in relation to a specific subset of its access rights. The appropriate response in each of these cases would be suspension of all the end user’s access rights under the EUAA.

As a result, there is no need for the EUAA to contemplate a suspension of only a portion of the end user’s access rights and the drafting changes relating to partial suspension should be removed.

## 3.6 Termination by QR Network

### *Draft Decision 3.6*

*The Authority requires QR Network to amend Clause 14 of the EUAA such that:*

- (a) *QR Network is precluded from terminating the EUAA for failure by the end user to pay amounts that are under dispute resolution;*
- (b) *The end user is provided with notice and a remedy period prior to termination; and*
- (c) *QR Network is to provide the end user with a copy of any termination notice provided to the operator.*

### 3.6.1 Failure to pay amounts under dispute resolution

QR Network notes the advantage that the QCA considers will be achieved by precluding QR Network from terminating the EUAA for failure by the end user to pay amounts that are under dispute resolution. However, this is an issue that is not included in the existing OAAC or AAC. QR Network considers that the question of whether or not QR Network is precluded from terminating the agreement in relation to non payment of disputed amounts is not an issue that arises from the splitting of the agreements. Consistent with its position on other elements of the Draft Decision of this nature, QR Network believes that this issue should more appropriately be considered as part of UT4.

However, in the interest of finalising these alternate SAAs QR Network will be prepared to include this provision in the EUAA. QR Network notes further that if this provision is to be included in respect to termination rights by QR Network, it should be consistent with termination by the end user. Clause 14(c) of the EUAA and clause 21.2© of the TOA have been updated accordingly.

### 3.6.2 Notice and remedy period prior to termination

QR Network accepts the requirement, as described in Draft Decision 3.6(b), to provide the end user with notice and a remedy period prior to termination. However, QR Network has some concerns with the drafting proposed by the QCA to implement this requirement.

The QCA’s suggested drafting proposes that termination can only occur once QR Network has exercised a right to suspend, however this may not work in practice as not all of the termination events are consistent with event giving rise to a right of suspension. QR Network has proposed drafting to address this problem in clause 14.1 of the EUAA, and clause 21.12 of the TOA.

### 3.6.3 Provision of copy of TOA termination notice to end user

QR Network accepts that it is reasonable that it notifies the end user if any termination notice is provided to the operator. However, QR Network believes that this is most appropriately implemented through including in the EUAA an obligation to notify the end user if a termination notice is provided to the operator.

A termination notice provided to an operator will set out details of the specific breach of the TOA that has occurred. QR Network believes that explaining to the end user the specific circumstances of the breach that has occurred should be the role of the operator, rather than QR Network. It would be expected that the rail haulage agreement will address this issue, as well as identifying the operator's obligations to the end user in such circumstances. Knowledge that a termination notice has been issued should be sufficient trigger for the end user to address this issue.

## 3.7 Weighbridges and overload detectors

### *Draft Decision 3.8*

*The Authority requires QR Network to amend Clause 3 of the EUAA such that:*

...

*(b) The cost of conducting such a test will be borne by the party responsible for the weighbridge or overload detector if test measurements fall within tolerances, or by the party giving notice if test measurements indicate otherwise.*

The Draft Decision requires that the cost of conducting a weighbridge test will be borne by the party responsible for the weighbridge if test measurements fall within tolerances. If the test measurements indicate that the weighbridge is not measuring within required tolerances, the party requiring the test will bear the cost.

This decision is inconsistent with the preceding discussion, with the proposed amendments to the EUAA and TOA, and with the existing SAAs, all of which require that:

- if the results of a weighbridge test indicate that it is operating within the required tolerances, the cost of conducting the test will be borne by the party requesting the test; or
- if the results of a weighbridge test indicate that it does not meet the required tolerances, the cost of conducting the test will be borne by the party responsible for the weighbridge.

Given this, QR Network assumes that the drafting of Draft Decision 3.8(b) is in error. QR Network accepts the proposed drafting of amendments to the EUAA in relation to this issue. Additionally, QR Network has made consequential amendments to the EUAA and TOA to better represent the intention being that, the party responsible for the weighbridge or overload detector being responsible for the costs of conducting tests.



## 4. Additional provisions

### 4.1 Notice requirements for default by Operator

#### *Draft Decision 4.2*

*The Authority requires QR Network to amend:*

- (a) Clauses 12 and 19 of the EUAA and General Conditions of Contract of the TOA respectively, to impose an obligation on QR Network to issue notices to, and consult with, the end user for any extended non-performance due to force majeure;*
- (b) Clauses 13 and 14 of the EUAA to provide suspension and termination notifications under the TOA to the end user; and*
- (c) Clause 20 of the General Conditions of Contract of the TOA to require QR Network to provide suspension notifications under the TOA to the end user.*

As discussed in Section 3.6.3 in relation to Draft Decision 3.6(c), QR Network accepts that it is reasonable that it notifies the end user if any suspension and/or termination notice is provided to the operator. However, QR Network believes that this is more appropriately implemented through including in the EUAA an obligation to notify the end user if a suspension or termination notice is provided to the operator, rather than providing the end user with a copy of the notice issued to the operator. This approach still gives the end user notice that an event has occurred, while ensuring that the discussion on the performance issues that have led to the notice properly remain between the operator and the end user.

This modification would affect Draft Decision 4.2(b) and (c). While drafting amendments to the EUAA and TOA implementing Draft Decision 4.2(a) also require copies of notices issued under the TOA to be provided to the end user, these only relate to notices of force majeure events. Force majeure notices do not contain performance information of the same nature as suspension and termination notices and, as such, QR Network has no objection to copies of these notices being provided to end users.

### 4.2 Variation in Train Service Description

#### *Draft Decision 4.4*

*The Authority requires amendments to Clauses 5 and 6 of the EUAA and General Conditions of Contract of the TOA respectively, and any other aspects of the proposed alternative SAAs where relevant, such that:*

...

- (c) an end user has 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 services description;*

...

- (e) only with the consent of the end user, the operator and QR Network may agree on variations to the performance levels established under the TOA and any associated variations to the train service description. Also, the end user must have a right to first rectify any non-compliance, including by allowing the end user to withdraw its nomination of the operator.*

This element of the Draft Decision contemplates that, in the event that the operator is not complying with its train service description, QR Network will give the end user a right to rectify any non-compliance (including by allowing the end user to withdraw its nomination of the operator, before commencing the process of consulting with the operator and end user to vary the train services description). However, the alternate form of SAAs are structured to address all operational matters directly between the train operator and QR Network, with the EUAA excluding all operational issues. As a result, it is difficult to see what actions an end user can take under the EUAA to rectify the operator's non compliance with the train service description, as the end user has no operational responsibilities.

In the event that an operator is not complying with its train service description, an end user only has three options – either to require (through the rail haulage agreement) the operator to take action to comply, to change operator, or to amend the train service description to reflect the operator’s actual performance. QR Network believes that the EUAA should more clearly reflect these as being the end user’s options, and to place timeframes around this process to ensure that the matter is addressed in a timely way. Specifically, where an operator is not complying with the train service description, the EUAA should provide for:

- the end user to be notified of such non-compliance;
- QR Network to use reasonable endeavours to consult with both parties about the rectification of the non-compliance;
- within a nominated timeframe, the end user to have the opportunity to either procure its operator’s compliance or to reallocate some or all of the access rights to another operator;
- following the expiry of that timeframe, to the extent that neither of these has occurred, QR Network to consult with the end user and the operator regarding the required amendments to the train service description and to then implement the required changes to the train service description; and
- allow the end user at least 30 days to nominate an alternative operator to provide the relevant train services in accordance with its right to do so under the EUAA.

QR Network has included this drafting in clause 5 of the EUAA, and clause 6.6 of the TOA has been amended to align with that drafting.

As a separate issue, the Draft Decision 4.4(e) provides that performance levels established under the TOA should only be able to be varied with the consent of the end user. QR Network believes that this change is unnecessary as it draws the end user into matters of operational performance. Cl 6.6(g) of the TOA already provides that, to the extent that such change in performance levels impacts the train service description or the amounts payable for access, that the change is subject to and conditional upon the required amendments being made to the EUAA. This ensures that changes to performance levels that affect the matters in the EUAA can only be made with the end users’ agreement. To the extent that a change in performance levels does not affect the train service description or the access charge, this should be considered purely as an operational matter, and is most appropriately dealt with between QR Network and the operator.

## 5. Other amendments to EUAA and TOA

QR Network notes that the QCA has suggested general amendments to the EUAA and TOA. In most cases, QR Network accepts these amendments. However, in some cases, QR Network considers some amendments are not required. A summary of these is as follows:

- Variations to the definition of “Central Queensland Coal Region” within the EUAA and TOA. Changes to this definition to include all rail lines connecting any two of the abovementioned corridors would create inconsistencies with other agreements. It is recognised that in general, updates to the Undertaking are required, the requirement for these updates will be address through other processes.
- QR Network questions the reasoning behind slight wording amendments to the definition of “Infrastructure”. Inclusion of additional wording broadens the existing definition, and is not required within the EUAA.
- Amendments have been made within the definition of “Reduction Factor”. In the suggested changes, paragraph (a)(ii)(A) of this definition was amended to replace the reference to ‘was’ with ‘has. QR Network considers that as the end user gives QR Network a Notice of Intention to relinquish under clause 4.2(b) of the EUAA, that notice has been provided. The definition of TOP<sub>A</sub> has also been amended to include the words “on behalf of the end user”. QR Network considers that the drafting was effective without that amendment. If the paragraph is to be amended, it should refer to “for the end user” rather than “on behalf of the end user”, as the latter words suggest an agency relationship between the end user and the Operators (which is not the case). These changes also flow on to clauses 1.3 and 3.7 of the EUAA and clause 2.4 of the TOA. Finally, in the definition of TOP<sub>B</sub> the QCA amended the paragraph to replace the words “Take or Pay amount” with “TOP Charges”. QR Network considers the term “TOP Charges” is limited to take or pay charges payable under this Agreement. The term “Take or Pay amount” is a generic term for take or pay charges payable under any access agreement and should be included. QR Network considers the drafting was effective without these changes, and does not consider these required to effect the alternate form of access.
- The suggested the deletion of clause 2.5 (Interaction with rights), is not required under the Draft Decision. QR Network has reinstated this drafting.
- Under clause 17.1, the QCA has suggested that the end user must provide the Operator with copies of any amendments made following execution. While QR Network does not have any principle concerns around this provision, without understanding the reasoning behind these amendments provided for in the Draft Decision, QR Network considers it is likely that the obligation will be too extensive and this should be at the option of the end user.

QR Network has also reviewed the draft agreements, and has made minor changes to the drafting to enable the EUAA and TOA agreements to work effectively. A summary of these changes and the reason for such changes is below:

- Changes have been made to definitions within the EUAA and TOA, where ‘Train Services’ was referenced. As the definition of ‘Train Services’ references services operating under that specific agreement, amendments have been made to reference all trains utilising access rights under an access agreement or train operations agreement. This amendment has been made within the definition of “Common Corridor”, “Obstruction”, “QR Network Cause”, and “Reduction Factor”.
- QR Network has included minor amendments to the definition of “Weighbridge” noting that the Trade Measurement Act has been repealed.
- QR Network has removed drafting from clause 4.1 (b) (Reduction of Access Rights) as it considers this drafting is not required, given the operation of clause 2.3 (h). Where an end user’s Access Rights are reduced, under 2.3(h), this reduction will automatically flow through to the relevant TOA.
- Amendments have been made to clause 8.6 of the EUAA and clause 15.6 of the TOA (Continuation of Indemnities and Liability). QR Network considers the QCA’s amendments were more expansive than that required by the Draft Decision, and has amended the clause to better reflect this Draft Decision.
- Minor amendments have been made to clause 9.3 and 9.4 of the EUAA to align it with the corresponding clause (clause 16.3 and 16.4 respectively) of the TOA.
- Minor amendments have been made to the form of security contained in Schedule 9 of the EUAA to reflect that the security may be given by the end user on behalf of the operator.

## 6. Consequential amendments to Undertaking

QR Network recognises that there consequential amendments to the Undertaking that are required to enable the alternate form SAAs. QR Network originally suggested transitional provisions to the Undertaking to enable this, from which the QCA has made consequential amendments throughout the Undertaking. Upon review of the implications of these changes, QR Network considers that there are inconsistencies with the original intention in terms of the administration of the alternate form SAAs. It has been suggested that a railway operator can be classified as an access seeker for the purpose of entering into a TOA. The consequence of these amendments is to materially increase the complexity of QR Network's voluntary commitment to implement the alternative form SAAs while retaining the existing contractual framework.

The intention of the contracting and negotiating framework proposed by QR Network is that where an end user wishes to negotiate access rights under an EUAA, then it is the access seeker for all material aspects of the access rights, including the relevant operating plan. Accordingly, access rights are not granted by QR Network to a railway operator under a TOA, they are granted by the end user who in turn nominates these to a rail operator under the executed pro-forma TOA. As a pro-forma agreement, the TOA is not negotiated, it is simply executed. This is consistent with the ARTC model where the railway operator does not have negotiation provisions for access rights under the Undertaking.

This approach is consistent with the premise of the access regime that the service provider is only required to negotiate with one access seeker for the purpose of entering into one access agreement to utilise access rights. Where a customer is the access seeker, they must nominate whether they are negotiating access for the purpose of an EUAA. Upon such confirmation, QR Network should be entitled to cease negotiation with any other party who has submitted an access application for those same access rights. As currently drafted in marked up Undertaking, QR Network may be subject to conflict and inconsistency in the necessary infrastructure enhancements if a railway operator, as an access seeker, sought to operate train services in a way which differed from the operating preferences of the end user and the obligation should not be on QR Network to resolve such conflict. In the event that an end user seeks to nominate access rights to a railway operator who is not able to perform in accordance with the relevant operating assumptions negotiated with the end user, then the end user would be required to become an access seeker to negotiate variations to existing access rights or for new access rights. Variations should not be negotiated with a railway operator under the TOA as they are not the primary access holder and have only been granted access rights from an end user in order to operate train services.

It is the responsibility of the end user in negotiating the access rights to address any relevant matters relating to train operations, whilst consulting and seeking guidance from the relevant train operator. QR Network has no concerns with the involvement of a railway operator as an advisor in that process, subject to the discretion of the end user. In the event that an operator cannot conform to that operating plan, then the end user assumes the capacity risks associated with its decision to not actively consult a railway operator(s) during the negotiation process. Accordingly, any matters relating to confidentiality between a railway operator, an end user and QR Network in the Undertaking are unnecessary as these obligations are managed through the terms of the EUAA and the TOA. Similarly notices are issued under the EUAA and the TOA and therefore issues of confidentiality should be addressed in the rail haulage agreement, rather than the Undertaking.

However, QR Network does acknowledge that there are interface risk management issues which may need to be addressed with a Railway Operator where Access Rights are to be granted under EUAA. The TOA and EUAA as submitted by QR Network did not address dispute resolution with respect to these matters. The primary purpose of the transitional provisions included in the consequential amendments proposed by QR Network was intended to deal with only these circumstances. It was not QR Network's intention that a railway operator could be an access seeker.

In terms of other proposed changes to the Undertaking, QR Network notes the QCA's proposed amendments to Part 9 in relation to reporting. QR Network considers the purpose of this drafting to be unclear and there is a lack of supporting reasoning for the basis of these changes. QR Network does not consider amendments to be necessary as the quarterly performance report measures are operational metrics and QR Network are not required to separate any element of its annual reporting according to type of access agreement. To the extent the QCA seeks to expand reporting requirements beyond that already required, we consider it necessary that such a decision is supported by an assessment against the requirements of the s.138(2).

As noted in relation to the EUAA and TOA, the consequential amendments in the Draft Decision also include changes which have no relevance to the alternative form of SAAs, eg the change to the definition of Central Queensland Coal Region. Consistent with its response on similar matters for the EUAA and TOA, QR Network does not support these changes being made to the Undertaking through this process.

QR Network therefore cannot support the QCA's proposed drafting of the Undertaking. QR Network would like to discuss proposed the changes to the Undertaking in more detail directly with the QCA prior to the release of the Final Decision, to ensure drafting reflects the intent of the alternative form SAAs.

We also suggest that further amendments will be required to enable finalisation of the EUAA and TOA once all stakeholder comments have been taken into consideration. A constructive engagement on resulting drafting issues will expedite a Final Decision, which satisfactorily addresses QR Network's intent while ensuring any matters the QCA considers need to be the subject of negotiation and dispute resolution for the purpose of allowing operations under an executed TOA can be effectively addressed.