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13 July 2012

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

Dear Mr Hall,

**Queensland Rail's 2012 Draft Access Undertaking (March 2012)**

QR National (QRN) welcomes the opportunity to make a submission on the Queensland Rail (QRail) 2012 Draft Access Undertaking (AU1).

QRN is the largest third party access seeker on QRail's network, and has a substantial interest in ensuring that QRail's AU1 facilitates open access on commercially-acceptable terms. This interest aligns with QRN's position as:

- Australia's largest national rail freight operator with business operations in Queensland, New South Wales, Victoria, South Australia and Western Australia;
- an operator for agricultural products, intermodal and general freight on key rail lines within Queensland; and
- a heavy haulage operator for coal and other bulk commodities on key rail lines within Queensland.

QRN currently uses QRail's network to transport a range of freight products, specifically:

- coal traffic on the West Moreton system in the south west;
- bulk minerals, predominantly on the Mount Isa line;
- intermodal and general freight traffic that traverse most of the network, with the majority of the volumes on the North Coast line;
- agricultural commodities, transported through the central and south west Queensland regions, and
- both coal and non-coal freight through the Metropolitan system.

This submission is structured as follows:

1. the first section provides an overview of QRN's response to the AU1, using some of the key issues to build a picture that is intended to rationalise our perspective;
2. the second section provides more targeted comments on individual provisions within the QRail AU1, including, where relevant, answers to the questions posed by the QCA in its Issues Paper (dated April 2012); and
3. the final section provides comments on the proposed Standard Access Agreement (SAA) in a tabular form.

Whilst QRN has completed a comprehensive review of the AU1, given the substantial changes made, it is not exhaustive. As such, QRN looks forward to working further with QRail and the Queensland Competition Authority with regard to the AU1. For any queries in relation to this submission please contact Rachel Martin on 3235 5476 or by email at [rachel.martin@qrnational.com.au](mailto:rachel.martin@qrnational.com.au).



Mr Paul Scurrah  
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# Queensland Rail's Draft Access Undertaking 1

Public Submission to the  
Queensland Competition Authority

13 July 2012

# Queensland Rail's Draft Access Undertaking 1

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# 1 Executive Summary

QRN is firmly of the view that regulation should be light-handed and proportional, and give priority where possible to commercially-negotiated outcomes in the first instance. QRN acknowledges that QRail's move towards a more 'light-handed' regulatory approach is appropriate. However, in reviewing QRail's AU1, QRN believes that QRail has acted to disadvantage freight operators relative to its own passenger operations and that significant amendment and revision of AU1 is required in order to achieve an appropriate balance.

In review of the AU1 QRN has identified the following key issues:

- *Market Complexity:* The diversity of traffic across QRail's network is a source of complexity for all stakeholders involved in the development of QRail's undertaking. QRN considers that the QRail AU1 needs to strike a balance between being general enough in application to cover all scenarios, and being sophisticated enough to recognise that the same measures will not achieve the same outcomes in all parts of the network.
- *QRail' role as a railway operator:* QRail has removed the obligations around ringfencing. This is not unreasonable given the above rail passenger operations is unlikely to be competing with other passenger operations. That being said, freight services are competing for capacity with QRail passenger operations and QRail is incentivised via their Transport Service Contract (TSC) to prioritise passenger operations over freight. It is QRN's view that QRail has sought to include in AU1 certainty for their passenger operations that is over and above the obligations in the passenger priority legislation.
- *QRail as railway manager :* QRail has sought to simplify the Standard Access Agreement (SAA). However in doing so it is QRN's view that the risk allocation between the parties has substantially changed and is weighted even further in favour of QRail. For example the indemnities and liabilities are structured in such away that it is unlikely that an Access Holder would ever have a right to make a claim against QRail even in circumstances where QRail is in breach of the agreement or are negligent.
- *Provision of information:* the intent of a negotiate/ arbitrate model is to incentivise commercial negotiations and provide a dispute resolution mechanism as a safety net for Access Seekers. To aid the commercial negotiation, information is required by Access Seekers to balance the countervailing power of the access provider. In addition information assists in addressing coordination failure – an accepted consequence of unbundling vertically integrated operations. The type of information of value to Access Seekers includes:
  - a. Technical and operating information regarding the infrastructure and the applicable standards, procedures and protocols.
  - b. Service Quality Performance Reporting
  - c. annual report on performance of the access
  - d. Financial and planning information
- *Consultation:* – Consultation with stakeholders is of paramount importance in order to maximise the efficiency of the network, by ensuring maintenance and expansion programmes are targeted and fit for purpose.

Whilst QRN has completed a comprehensive review of AU1, given the substantial changes made, it is not exhaustive. Given the number of changes QRail has proposed, QRN considers that the process for developing AU1 would benefit from further explanatory material from QRail.

## 2 Key Issues

### 2.1 Summary

The diversity of traffic across QRail's network is a source of complexity for all stakeholders involved in the development of QRail's AU1. It is the role of QRail to strike a balance that will accommodate all its various stakeholders in obtaining Access that meets their commercial requirements. The Mount Isa line, for instance, is primarily used for bulk minerals traffic, whereas the North Coast line carries agricultural products, intermodal traffic and passenger services. Where coal traffic is predominant on QRail's network, it is significantly constrained by passenger priority and preservation of path legislation. This results in the need to proactively manage the disparate commercial and operational requirements of passenger, coal, agricultural, intermodal, and bulk freight traffic. This is distinct from QR Network's network where the commercial and operational requirements are substantially homogenous.

In responding to QRail's proposed AU1, QRN is guided by three high level principles, set out below:

1. QRN is firmly of the view that regulation should be light-handed and proportional, and give priority where possible to commercially-negotiated outcomes in the first instance. QRN acknowledges that QRail's move towards a more 'light-handed' regulatory approach is appropriate. That said, the key elements of a negotiate/ arbitrate model is to ensure there is sufficient information to facilitate a meaningful negotiation and a robust dispute resolution mechanism available as a safety net for Access Seekers. QRN will comment on the extent to which QRail's proposed AU1 achieves an appropriate balance between regulatory intervention and facilitates commercial negotiation through this submission.
2. QRN views the QRail AU1 as an excellent opportunity for the economic regulation of rail infrastructure to move closer to consistency with the Council of Australian Governments (COAG) objective of an easy to understand and nationally consistent approach to interstate rail regulation<sup>1</sup>. In this respect, QRN does not consider that it is appropriate for bespoke arrangements to be developed by QRail absent a particular circumstance unique to its network. QRN considers the Australian Rail Track Corporation (ARTC) interstate access undertaking (IAU) to the Australian Competition and Consumer Commission (ACCC) to be a suitable benchmark against which QRail's AU1 can be assessed by the QCA. In this context QRN considers it is worth noting that, as regards the ARTC undertaking, the ACCC has noted that: "... it is clear that ARTC does not earn sufficient revenue to cover the full economic cost of the rail network, [t]herefore, in assessing the Undertaking, the ACCC has put less focus on provisions to prevent ARTC from earning monopoly rents and focussed more on the need to provide sufficient certainty for access seekers to confidently invest in above rail services, without undermining ARTC's ability to improve its cost recovery over time."<sup>2</sup>
3. QRN regards the QRail AU1 as an important opportunity for QRail to encourage utilisation of its network by Queensland businesses that have the option of choosing between multiple modes of transportation. In order to do this, QRail needs to give rail operators the regulatory certainty they need to market rail as not only a viable option, but in many instances, the best option for freight transportation. In this respect, it is a clear preference of both State and Federal Governments to transition a greater share of Australia's freight traffic from road to rail networks.

It is QRN's view that in order to provide a regime that will make rail freight transportation more attractive in line with the above principles, QRail should have the following objectives:

1. greater transparency of information relating to charges for rail access;
2. greater certainty as to the access product itself, particularly in relation to specification of the network infrastructure to which access may be sought;

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<sup>1</sup> Espoused by COAG in the 2006 Competition and Infrastructure Reform Agreement (CIRA)

<sup>2</sup> ACCC, Draft Determination of Australian Rail Track Corporation Interstate Access Undertaking, p8

3. a robust, timely, clear and binding statement of what QRail will provide to an Access Holder;
4. disclosure of how QRail's operation of passenger train services will impact upon the operation of non-passenger train services;
5. the management of train services under an Access Agreement, including those services that operate over both the QRail network and the QR Network rail network ('Through Running Trains');
6. an inexpensive negotiation and dispute resolution process; and
7. a framework that supports the development of new business.

## 2.2 The Market Context

The competitive environment in which QRail operates is driven not only by the type of traffic being transported but by the corridor characteristics in which it operates. For example:

- The Mt Isa line carries predominantly bulk freight exported via Townsville and is nearing capacity constrained. Bulk freight is generally high value and low volume in nature and requires dedicated rollingstock. As a result efficiencies of scale are reduced, as compared with transporting bulk coal, creating conflict between desired service levels and price. This conflict is exacerbated by the characteristics of the Mt Isa line, which includes sometimes extreme heat and high rainfall impacting rail operations and a non homogeneous supply chain. On the Mt Isa line, whilst road is competitive with rail this is not the case in all circumstances.
- Where road is most competitive with rail is in the transportation of intermodal and general freight. Compared with road, the rail industry is exposed to a higher degree of volume risk given the breakeven costs for road are significantly lower than for rail. The competitiveness of rail is driven by service levels particularly with regard to reliability, transit time and just-in-time delivery. Intermodal and general freight is predominantly carried on the North Coast line which is part of the national freight network and is, therefore, fundamental to the achievement of government policy objectives with regard to facilitating economic growth. The efficiency of intermodal traffic on rail is significantly impacted where there are divergent operating requirements of the multiple rail networks over which it operates.
- Whilst the metropolitan system in Brisbane is predominately used for passenger services, like Sydney and Melbourne it is a key link in the national freight network. In addition, the Brisbane metropolitan system is fundamental to the export of coal and grain from the south west. The importance of finding an appropriate balance between freight and passenger objectives in metropolitan rail networks was recently demonstrated when NSW amended the *Transport Administration Act 1988*. In the Second Reading to the Transport Legislation Amendment Bill, the Honourable Duncan Gay said:
 

*"The bill explicitly sets out common objectives for the public transport agencies. These objectives are putting the customer first and ensuring that the transport system is designed around the needs and expectations of the customer, and enabling the transport system to support the economic development of the State, with a particular focus on improving the coordination of freight, from paddock to port and from ship to shop."*<sup>3</sup>
- The West Moreton system (which is a subset of the Western system), is approximately two-thirds coal with the remainder being agricultural, intermodal and general freight. Coal on the West Moreton system is constrained by preservation of path legislation and the available capacity through the Metropolitan System. In addition, the rail infrastructure is at capacity in the section of track on the Toowoomba Ranges.
- The remaining track managed by QRail is underutilised and road provides competition to rail in these markets.

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<sup>3</sup> The Honourable Duncan Gay, "Transport Legislation Amendment Bill 2011, Second Reading, September 2011" [http://www.parliament.nsw.gov.au/prod/parliament/nswbills.nsf/0/d0814f07f6268d32ca2578f500245ff7/\\$FILE/Transport%20Amdt%20Bill%20-%20LC%202nd%20Reading.pdf](http://www.parliament.nsw.gov.au/prod/parliament/nswbills.nsf/0/d0814f07f6268d32ca2578f500245ff7/$FILE/Transport%20Amdt%20Bill%20-%20LC%202nd%20Reading.pdf), Downloaded: 12/7/2012

Whilst a significant part of QRail's infrastructure is supported by funding from the State Government in the form of a TSC, the Mt Isa lines and the proportion of the West Moreton system attributable to coal traffic, is excluded.

## 2.3 Availability of Information

In order for a light-handed approach to be effective it needs to provide, as per comments from the NCC, "*an appropriate balance between commercial negotiations and regulatory intervention to facilitate access negotiations*"<sup>4</sup>, as well as addressing "*information asymmetries, so that access seekers can enter into meaningful access negotiations*"<sup>5</sup>.

The types of information to assist meaningful negotiations include not only technical information for an Access Seeker to be able to design a service, but also information that will inform the Access Seeker of the reasonableness of the access charge being proposed and enable the assessment of potential changes to the access charges and service levels over time. Other information that is relevant to Access Seekers is information that assists in coordinating both the short and long term capacity and operation of the supply chain. It is the SAA that deals with the short coordination. However, it is corridor strategy and planning documents that facilitate coordination over the long term.

Under the proposed AU1 there are three avenues for information to be made available to Access Seekers:

1. The quarterly network train performance reports. This information is to be aggregated on the basis of coal and non coal freight<sup>6</sup>.
2. Annual report that gives information regarding the QRail's compliance with the negotiation framework<sup>7</sup>.
3. Information about the infrastructure can be requested by the Access Seeker and will be provided if it can be demonstrated by the Access Seeker that the information is required and it must also be ordinarily and freely available to QRail.

In QRN's view, these avenues do not adequately address the information requirements from a negotiation or long term coordination perspective and considers the information and consultation provisions under the ARTC IAU as the appropriate benchmark for QRail's network.

## 2.4 QRail as Rail Manager and Passenger Operator

In QRN's view, the QRail AU1 is being used to assert QRail's rights as a passenger operator and to limit its role as a rail network manager to the extent necessary to ensure that they do not interfere with its passenger operations. From a freight perspective, this does not provide an appropriate balance between the objectives of freight and passenger, and reveals an absence of strategic direction as regards QRail's responsibility as a rail network manager.

In QRN's view, QRail seeks to preference its own passenger operations in two ways:

1. QRail seeks to elevate the importance of the passenger priority obligations within the regulatory framework; and
2. QRail seeks to erode the existing rights of Access Seekers and Access Holders (and removing its own obligations in this regard by excusing its own operations of passenger train services from the coverage of the AU1).

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<sup>4</sup> NCC, Application for Certification of the Western Australian Rail Access Regime Draft Recommendation, 17 August 2010, p20

<sup>5</sup> NCC, Application for Certification of the Western Australian Rail Access Regime Draft Recommendation, 17 August 2010, p20

<sup>6</sup> 5.1 AU1

<sup>7</sup> 5.2 AU1

QRail's approach may provide comfort to those tasked with sourcing and providing public rail passenger services, but it fails to provide any certainty to rail freight operators, or their customers, that the QRail network is an effective link in a national rail freight network or an attractive option for Queensland businesses seeking transport options.

It is first worth noting that QRail's role as a passenger operator is highly relevant to the QCA's assessment of the AU1, notwithstanding that it is unlikely that QRail will compete with other passenger operators over this or subsequent regulatory periods. The fact that there is not, nor is there likely to be, a competitive market for above-rail passenger transportation is not a reason for the QCA to disregard the favouring of one type of traffic over another. This is because, in terms of QRail's provision of access to its network:

1. Passenger services provided by QRail compete against other train service types for:
  - a. capacity on the QRail network (irrespective of whether passenger services need to negotiate for 'Access' in accordance with the AU1 like other traffic, they still consume available network paths); and
  - b. train management and train control services once they are on that network.
2. QRail is financially advantaged by providing passenger services in accordance with its agreement with the Queensland Government and, therefore, has an economic incentive to preference passenger traffic over other forms of traffic.
3. QRail is contracted to provide below rail services to rail operators (and other Access Holders) under Access Agreements, which, from past experience, are substantially in accordance with the SAA annexed to the Access Undertaking. The degree of discretion QRail has under its access arrangements with other rail operators is critical to the balance of power those operators have vis-a-vis QRail and its passenger services. This is because if an operator has no meaningful recourse against QRail under its access arrangement for decisions or actions taken by QRail, QRail will always be incentivised to give preferential treatment to its own passenger trains over any other trains.
4. This sort of preferential treatment is not necessarily something envisaged by the Passenger Priority provisions contained in the *Transport Infrastructure Act* (Qld) 1994 (TIA). This sort of preferential treatment could involve the establishment of maintenance windows that accommodate passenger movements and, as a result, only adversely impact freight traffic. Alternatively, preferential treatment might be given through prioritisation of maintenance to those parts of the network used predominantly by passenger services. If there is no entitlement under an access arrangement for a certain track standard to be maintained, and no absolute entitlement for a freight operator to expect to have their service run according to the sectional running times and other operational parameters of their train service entitlement, then QRail may impose speed restrictions on those parts of the network used by a freight operator, change the sectional running times of that operator's service, and ultimately fundamentally alter the service the operator believed it contracted for, all without the risk of any recourse from the operator.
5. As QRail is in a position to advantage itself over other operators on its network, the negotiation framework, and in particular, the terms and conditions of access offered to Access Seekers are vitally important to ensuring QRail is incentivised to service BOTH its obligations as rail operator of passenger services, and rail manager of its network.

The passenger focus of QRail is evident throughout the AU1 and SAA. There are numerous provisions aimed at ensuring QRail's obligations as a railway manager remain secondary to its obligations as a passenger rail operator.

The most prominent of these provisions is cl2.6.5 of the AU1, which empowers QRail to refuse to enter into an Access Agreement for non-passenger trains that will affect the safety, cause a nuisance or annoyance to, or otherwise adversely affect a passenger train service. What might constitute an 'adverse affect' is left to QRail's unfettered discretion. The example provided by QRail in the AU1 covers an occurrence that appears to be within the scope of the Interface Risk Assessment process. In other words, it is a potential hazard that should be dealt with through the joint assessment of risks and nomination of controls for all interface issues arising from the proposed operation on QRail's network, rather than through an unfettered discretion in QRail to exclude non-passenger traffic.

Through this clause, QRail is attempting to give itself a broad and unreviewable discretion to refuse to enter into an Access Agreement with non-passenger operators. It provides no explanation for giving itself the ability to veto a commercial operation based on an imprecise and subjective test. That refusing to enter into such an agreement could have major, commercial repercussions for QRail's freight customers does not appear to have been taken into account by QRail. Every freight train that runs on the same part of the network that a passenger service operates on has the ability to impact a passenger service and every freight train has the ability to impact people who live or work

near a railway line. That every existing freight train is liable to not have its pathing entitlements renewed at QRail's discretion is simply unacceptable, and cannot reasonably be accepted by the QCA.

QRN considers that any legitimate concerns of QRail in relation to these sorts of issues may be adequately dealt with through the existing process for the development of the Interface Risk Management Plan ('IRMP') and that this clause should be deleted.

A further instance of attempting to use its passenger priority obligations to excuse itself from its responsibility to provide an access product to an Access Holder is cl 5.3(e) of the SAA.<sup>8</sup> This provision not only attempts to double-up on the provisions of the Network Management Principles (NMP), which is confusing and unnecessary, but also misrepresents the effect of the passenger priority legislation. In particular, cl 5.3(e) states that QRail may treat other train services preferentially to the operator's train services for the purpose of bringing a late passenger train back to its scheduled time, minimising any delays experienced by a passenger train or avoiding a passenger train service becoming delayed.

This clearly misrepresents the position as regards the Passenger Priority provision. Section 265 of the TIA provides only that QRail must endeavour to bring a passenger service that is delayed back to its scheduled running time. It does not require QRail to take pre-emptive action to prevent a passenger train becoming late.

Further, in complying with the obligation to endeavour to bring a delayed passenger service back to schedule, s 265 of the TIA specifically provides that the matters QRail may consider relevant include '*train service entitlements for services other than passenger services*'. There is a clear intention in the TIA that QRail exercise its fair and reasonable judgment in balancing the passenger priority provision with the contractual obligations owed by QRail as a railway manager. The provision does not make the Passenger Priority provision absolute, nor does it empower QRail to alter, in every instance, existing contractual entitlements of non-passenger train services.

## 2.5 What is QRail's 'Access' offering?

Fundamental to the compact between Access Seeker and Access Provider is the ability of the Access Seeker to know, with a sufficient degree of certainty to enable it to assess the suitability and reasonableness of its bargain, what it is entitled to receive in exchange for the payment of access charges.

In QRN's view, QRail's AU1 falls short on this elementary question, across three key elements:

1. how clearly the AU1 and SAA define the rail infrastructure and services to which 'Access' may be sought, and the activities that may be undertaken on that rail infrastructure as part of 'Access';
2. how clearly the AU1 and SAA define the rights and obligations of QRail vis-à-vis an Access Seeker/Holder, particularly in regards to the quality of service it must provide and liability for its actions; and
3. how clearly the AU1 and SAA define the rights and obligations of an Access Seeker/Holder vis-à-vis QRail, particularly in regards to payment of access charges and liability for the actions of QRail and other users of the network.

### 2.5.1 The definition of the relevant access product

In QRN's view, QRail has not defined the rail infrastructure and services to which access may be sought with sufficient precision to support its commercial operations.

The 2008 QRail undertaking provided for the negotiation of access that is "*required for the operation of train services by Access Seekers*". That definition was relatively broad, being inclusive of a range of below rail services that are necessary to operate a train service. Specific examples included, in relation to rail infrastructure, mainline running,

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<sup>8</sup> The comments relating to this clause in the SAA also apply to paragraph (i)(ii)(B) in the Principles for Managing Deviations from the Daily Train Plan in the Network Management Principles (Schedule B AU1).

loading/unloading, marshalling and shunting in certain cases, and train stowage in certain cases. It also included a range of ancillary services that are likewise essential to the operation of rolling stock, including signalling services, train control, walkway and roadway access and land access.<sup>9</sup>

By way of comparison, the scope of the access service in QRail's AU1 is too restrictive.

It is first necessary to note that the separation of QRN and QRail in 2010 created allocated track ownership between the two entities (based on the management arrangements in place at the time of separation). The allocation of track ownership did not necessarily reflect the activities undertaken on the track; i.e. there may be instances where track is now owned by QRail, but where the usage of that track has historically been for an "above rail" purpose, e.g. provisioning, stowage and storage. QRN relies on continuing to be able to use this track in such a way in order to continue to operate its business.

The AU1 contributes to uncertainty in these ways:

1. It provides that Access Seekers are able to obtain an "Access" service, and that it does not apply to the negotiation of services other than "Access" (cl 1.2.1(a) and (b)).
2. "Access" is defined to encompass, solely, the "non-exclusive right to use a *specified section* of the Network" (cl 7.1) (emphasis added), with the definition of Network being aligned to the definition in the TIA.
3. It provides that an Access Seeker is responsible for procuring any services other than access outside the context of the undertaking.

By way of comparison, under QR Network's current undertaking, the term "Access" is defined, for clarity, to include a number of ancillary services, including stowage, signalling, train control, electric access, road access and land access.

While it seems to be the case that QRail intends for Access Seekers to obtain the benefit of ancillary facilities necessary for access to the track itself, the narrow drafting of this provision raises the possibility that QRail intends for at least some below-rail services to be excluded from the undertaking. At the very least, it is unclear whether the full range of below rail services needed to operate a train service, such as stowage and train control, are included. The decision of QRail to remove the line diagrams from the AU1 adds to the uncertainty. This may have limited consequence in many circumstances, provided that QRail is prepared to continue to negotiate for the continuation of QRN's current use. However, the AU1 provides an important platform for these negotiations, and it will be important that the AU1 continues to provide for this "right of use" by an Access Seeker.

As a result, QRN proposes that the definition of "Access" in the AU1 be amended to reflect that which is contained in QR Network's undertaking, in order to ensure that the full range of services needed to operate rolling stock are covered.

Similarly, the SAA does not clearly define what 'Access' covers. By way of comparison, under cl 2 of ARTC's Access Agreement (Mainline Only) 2008, ARTC very clearly sets out what it is granting to an Access Holder, and the constraints that exist on that grant. QRail's approach is cryptic and, as discussed further below, is unsatisfactory from QRN's perspective.

## 2.5.2 Clarity around the rights and obligations of parties to the agreement

It is clearly essential that the undertaking, together with agreements reached between QRail and an Access Seeker under the auspices of the undertaking, clearly and appropriately define the rights and obligations of the parties to the agreement. As set out above, it is QRN's view that QRail has fallen short of this standard across two key issues:

1. In regard to the quality of service it must provide and liability for its actions; and

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<sup>9</sup> See clause 2.1 of 2008 UT

2. In regard to payment of access charges and liability for the actions of QRail and other users of the network.

Below, QRN has considered the three fundamental entitlements that it considers an Access Holder requires in order for it to have sufficient certainty regarding the provision of 'Access' under an Access Agreement. These are:

1. a clear Train Service Entitlement that may only be varied by QRail in accordance with limited, pre-agreed and prescriptive rules (such as those that currently exist in the Network Management Principles in the 2008 UT and 2008 SAA);
2. a commitment from QRail to develop and comply with detailed operational parameters including infrastructure standards, procedures, safe-working and safety standards, which they will not vary without consulting with affected Access Holders, and agreeing to compensate those access holders if there are any material impacts from the proposed variation (such as the commitment currently applying for 'System Wide Requirements' in the 2008 SAA); and
3. a commitment from QRail to maintain the network to which access is provided to a standard that is linked to objectively measurable controls (such as the Rollingstock Interface Standards applicable under the 2008 UT) as well as the Access Holder's Train Service Entitlement, and for QRail to be liable for any failure to maintain the track to this standard.

Each of these points is addressed in turn below.

#### 2.5.2.1 Train Service Entitlement

Clause 1.2.1(a) of the AU1 states that the AU applies to negotiations in relation to "Access Rights"...and does not apply to the negotiation or provision of services other than "Access".

The relevant definitions in the AU1 provide that "Access Rights" mean an entitlement to access in accordance with a specified "Train Service Entitlement". "Access" means the non-exclusive right to use a specified section of the Network...for the purpose of operating Train Services.

"Train Service Entitlement" means an entitlement under an Access Agreement to operate a specified number and type of Train Services over the Network within a specified time period and in accordance with specified scheduling constraints for the purpose of either carrying a specified commodity or providing a specified train service. The meaning of the term "scheduling constraints" is not defined in the AU1, but use of the term in the AU1<sup>10</sup> suggests that these are operator initiated constraints.

Part 4 of the AU1 provides that QRail will perform scheduling and Train Control "...in accordance with the Network Management Principles and subject to the terms of each Access Holder's Access Agreement."

The Background section of the SAA states that the operator is "*granted non-exclusive access to the Network for the Train Services*". The SAA definition of "Train Service" is the operation of a train in accordance with clause 6.1 SAA. Clause 6.1 SAA states that the operator "*must only operate Train Services in accordance with this agreement (including the Train Service Description and any Train Control Directions) unless...*" they have obtained the prior written approval of QRail.

The SAA defines a Train Service Description as "*...the details set out in Schedule 2.*"

Train Control Directions are "*...instructions, directions and notifications ...issued by QRail for the purpose of Train Control (including preventing or minimising the effect of a material breach of this agreement).*"

Train Control is *very* broadly defined by the SAA to mean the control, management and monitoring of train and rollingstock movements on the network, and any other activities affecting or potentially affecting those movements "*...or the proper, efficient and safe operation and management of the Network.*"

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<sup>10</sup> For instance at paragraph 4(b)(ii) AU1

What an Access Holder gets, according to both the AU1 and the SAA, is the ability to operate:

1. trains, of the type and number specified in the Access Agreement (in schedule 2);
2. on those parts of the QRail network specified in the Access Agreement (in schedule 2);
3. according to the times specified in the Access Agreement (in schedule 2);
4. subject to any scheduling constraints specified in the Access Agreement; and
5. subject to any Train Control Directions issued by QRail.

The schedules to the SAA provide the vital details relevant to the first 3 elements of 'Access' listed above. Primarily an Access Holder's entitlement is defined by way of sectional running times between specified locations and a below rail transit time for the journey from origin to destination. This information is taken by QRail and used to prepare a Train Schedule in accordance with the Network Management Principles<sup>11</sup>. The development of the operator's above rail requirements (including rollingstock, locomotives, and crew) is closely inter-related with the development of their below rail train schedule. The AU1 makes this clear by providing that:

1. an Access Seeker must provide an Operating Plan to QRail during the negotiation phase, and
2. QRail will use this Operating Plan to prepare the Train Service Entitlement (amongst other things)<sup>12</sup>.

QRN has inferred (in the absence of an explicit definition) that the 'scheduling constraints' referred to in the AU1 are operator initiated and not something imposed by QRail.

If this understanding is correct, then it is the extent to which the details in schedule 2 of the SAA may be altered by QRail's 'Train Control Directions' and how clearly QRail's rights in this regard are expressed in the SAA that is of critical interest to QRN.

The reason why this issue is so important to QRN is that, as a freight operator, its commercial prospects are linked to the type of markets it services. Freight operations, indeed all operations on the QRail network are timetabled, and they largely rely upon dedicated above rail resources, rather than sharing a pool of resources that can operate on a continuous cycle. The degree to which QRail can alter the service they sell to an operator directly impacts the assumptions operators make for their business, and consequently the risk that operator takes when it contracts to provide a service to a customer. From a customer's perspective, this risk may ultimately be borne by them, notwithstanding they are least able to assert any control over the variables in play. In the contest between rail and road, this is one factor that would weigh against rail and is one reason why it is important that QRail's AU1 and SAA gives all non-passenger operators sufficient certainty regarding their access rights.

There are a number of preliminary observations that QRN would make in this regard:

1. the broader definition of 'Train Control' in the SAA suggests greater scope than currently exists for the making of directions by QRail;
2. there is no tying or linking in the SAA of QRail's 'Train Control Directions' to the Network Management Principles' notwithstanding the AU1 provides for such; and
3. the SAA focuses greater attention on confining the operator's ability to vary its train services than it does on limiting QRail's ability to impose variations upon an operator.

An Access Holder must operate in accordance with their Train Schedule unless otherwise agreed with QRail, or directed by QRail, in accordance with a Train Control Direction, or permitted by the Operating Requirements<sup>13</sup> including the Network Management Principles. The Operating Requirements are defined in the SAA as "...the practices, standards, systems, protocols, requirements, rules, policies and other information in relation to or in

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<sup>11</sup> See definition of 'Train Schedule' in SAA

<sup>12</sup> See cl 2.6.2(a)(ii)(A) of the QRail AU1

<sup>13</sup> See clause 6.3 SAA

*connection with Train Control and the access to and use of the Network by Rail Transport Operators...as published from time to time by Queensland Rail.*” Not all Operating Requirements are included in the SAA – they fall within the Operating Requirements Manual that QRail proposes to leave outside the regulatory framework. QRN considers it essential for Access Holders to be consulted and have the right to seek dispute resolution within the SAA in relation to such measures given they directly affect Access Holder’s entitlements.

In terms of QRail’s ability to vary an operator’s Train Service the SAA gives QRail a very broad entitlement under the guise of ‘Operational Constraints’<sup>14</sup> and a vague description of how it must exercise Train Control<sup>15</sup>.

As noted above, QRail’s ability to exercise Train Control is not constrained in the SAA to be in accordance with the Network Management Principles. By contrast the 2008 SAA provided that Train Control “...*must (be exercised) by the issue of... Train Control Directions...consistent with the Network Management Principles*”<sup>16</sup>. QRN considers it essential that this provision be included in the QRail SAA.

In addition, the definition of Train Control in the SAA is much broader than that in the existing 2008 SAA. In particular, it extends to the control, management and monitoring of “...*the proper, efficient and safe operation and management of the Network*”<sup>17</sup>. If QRail’s ability to exercise Train Control was required to be in accordance with the Network Management Principles, this would not be such an issue. However, without such a limitation, it creates a potential for greater weakening by QRail of an operator’s contractual access entitlement.

The impact of Operational Constraints is discussed in more detail below in relation to the obligation of QRail to maintain the network as part of the access offering. In summary, the SAA appears to entitle QRail to impose constraints, such as speed and load restrictions on the network, without operator consent, without any objective test for determining the need for such constraints and without the risk of any liability arising from such impositions. These constraints have the potential to alter an operator’s Train Service Entitlement. Whilst QRail is obliged to use “...*its reasonable endeavours to minimise disruption to Train Services...*”<sup>18</sup> if disruption does occur, and an operator does not receive their Train Service, they will still be liable to pay for it unless the cause is a “Queensland Rail Cause” as defined in the SAA.

As it stands, QRail will only take responsibility (and relieve an operator of the obligation to pay for its Train Service) where it is unable to make the network available for the operation of a scheduled train service because of:

1. a Planned Possession, Urgent Possession or Emergency Possession;
2. a Force Majeure Event affecting QRail; or
3. any other action by QRail other than QRail exercising a right or complying with an obligation in accordance with this agreement, the AU or any law;

except where QRail’s inability is in any way attributable to the Access Holder, another Rail Transport Operator or any other person<sup>19</sup>.

The intended effect of changes made to this definition need to be clarified by QRail so that it is clear when QRail will take responsibility for the non-provision of a scheduled train service and forego access charges.

On face value, the changes dramatically restrict the circumstances falling within a “Queensland Rail Cause”. Previously, the third point above simply referred to “*any other action by Queensland Rail*” which may directly result in the network not being so available. In addition, the exception at the end of the definition related only to Access Holder attribution. In other words, QRail has added ambiguity by excusing failures:

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<sup>14</sup> See clause 5.2 SAA

<sup>15</sup> See clause 5.3 SAA

<sup>16</sup> See clause 4.2 2008 SAA

<sup>17</sup> See definition of ‘Train Control’ in SAA

<sup>18</sup> See clause 5.2(b) SAA

<sup>19</sup> See definition of “QRail Cause” in clause 26 of SAA and in clause 7 of AU1

- that are caused by it exercising a right or complying with an obligation in accordance with the Access Agreement, AU or any law; and
- that can be attributed in any way to another Rail Transport Operator or any other person.

QRN considers that QRail needs to justify these changes.

Adding to QRN's concern that the QRail does not provide adequate certainty for Access Holders is the inclusion of clause 5.4 in the SAA. This provision ranks various obligations of QRail, and then states that to the extent that QRail does anything to comply with these obligations it does not breach the SAA and is not liable to the Access Holder. QRN views this provision as another example of QRail's focus on passenger priority, and in this instance, it appears to be a catch-all exclusion from its responsibility under the SAA. In QRN's consideration, to the extent that QRail has obligations under Law, including passenger priority and path preservation, these obligations should be explicitly acknowledged upfront, once, and the rest of the SAA should be left to stand. This is the approach taken by ARTC.

### 2.5.2.2 *Certainty of "System Wide" parameters*

The concept of 'System Wide Requirements' is incorporated in the 2008 SAA<sup>20</sup>. System Wide Requirements are:

- the Network Management Principles;
- the Possession Protocols;
- the Interface Coordination Plan;
- the Rollingstock Interface Standards;
- the Safeworking Procedures and Safety Standards;
- the QR Emergency Procedures; and
- the QR Investigation Procedures<sup>21</sup>.

These are sorts of controls that affect an entire system or network, not just an individual operator on a particular system or network. They are the sorts of controls that are clearly relevant to the design of an operator's above rail operating variables and for this reason, the 2008 SAA provided protection for operators against changes to these requirements during the life of an Access Agreement. These protections do not prevent a railway manager from effectively managing its network by making changes to System Wide Requirements, rather they ensure appropriate consultation occurs with affected parties, and compensation is paid where justified.

The proposed QRail SAA does not contain any provisions relating to System Wide Requirements. Worse still, QRail proposes to separate many of the documents that represent these requirements from the regulatory process by removing them from the SAA. The potential risk to an Access Holder from this move could be substantial. For instance, during the course of an Access Agreement, QRail could decide to change its possession planning process in a way that compromises an operator's existing operations, or frustrates them completely. Given QRail's passenger focus, QRN has a real concern that these sorts of changes may occur in the future without consultation or compensation.

The exclusion of the System Wide Requirements from the SAA also raises another concern for QRN. Under the 2008 SAA, there is a requirement for QRail to ensure, as far as possible, that the System Wide Requirements are applied consistently to all operators on the network. This is a valuable assurance of equity. The proposed exclusion of QRail's passenger services from the scope of the AU1 and the need to operate under an Access Agreement, in combination with the absence of contractual coverage for System Wide Requirements, removes this assurance from all non-passenger users of the QRail network.

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<sup>20</sup> See clause 5.10 2008 SAA

<sup>21</sup> See definition of "System Wide Requirements" in 2008 SAA

### 2.5.2.3 Maintenance of the Network

Under the existing SAA, QRail is obliged to maintain the Network such that both:

- the infrastructure is consistent with the Rollingstock Interface Standards; and
- the operator can operate train services in accordance with their scheduled times<sup>22</sup>.

In the proposed QRail SAA, there is no mention of any obligation to maintain the network against any objective standards such as those in the Rollingstock Interface Standards. QRail must simply maintain the network in a condition such that the operator can operate train services in accordance with their Access Agreement<sup>23</sup>. But as discussed above, given the SAA empowers QRail, without operator consent, to impose Operational Constraints<sup>24</sup> and perform Rail Infrastructure Operations<sup>25</sup> at any time, and without any liability for any disruption or damage caused as a result, this provides little comfort for Access Holders. In other words, QRN considers clause 5.1(a) to be hollow in terms of any meaningful commitment from QRail to maintain the network to an acceptable or ascertainable standard. Therefore, QRN does not consider that QRail has provided any contractual commitment at all.

Under the existing 2008 SAA, QRail is liable for any delays or cancellations of train services resulting from or caused by Operational Constraints imposed as a result of a breach by it of the Access Agreement<sup>26</sup>. QRail's proposed approach in the AU1 is very different. The Operational Constraints provisions, combined with the Indemnities and Liabilities section in the SAA, paint the picture of a very one-sided approach to responsibility under an Access Agreement.

Illustrative of this, in relation to the issue of responsibility for maintenance of the network, cl 21(a)(viii) of the SAA requires the Access Holder to 'warrant' that it has assessed the suitability of the network for its operation. In other words, QRail seems to be trying to exclude itself from responsibility for the standard of the network that it manages and sells access to. QRN does not consider it reasonable for an Access Holder to have to warrant to the railway manager the suitability of the network, particularly given the SAA fails to provide any asset condition reports that give information about the structural integrity of the rail infrastructure.

QRN considers that the existing approach to maintenance of the network should be reinstated in the QRail SAA and the liabilities and indemnities provisions should be altered to reflect the previous position where QRail took responsibility for any delays and cancellations to train services caused as a result of its failure to maintain the network to objective and clearly measurable and reportable standards.

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<sup>22</sup> See clause 6.2(a) 2008 SAA

<sup>23</sup> See clause 5.1(a) SAA

<sup>24</sup> See clause 5.1(c) SAA

<sup>25</sup> See clause 5.1(b) SAA

<sup>26</sup> See clause 6.2(c) SAA

## 3 Draft Access Undertaking

### 3.1 Summary

This section provides discussion on the content of AU1 and provides suggested resolutions.

### 3.2 Preamble

Whilst QRN recognises that the preamble to an undertaking does not of itself create any legal obligations it does assist in the interpretation of the elements of the undertaking by providing the context and outlining the purpose or intent. It is QRN's view that the preamble to AU1 emphasises the passenger focus of QRail's business and does not adequately outline the influences on QRail as a railway manager or define key elements in the strategic approach to the delivery of access services.

Using the ARTC IAU Preamble (see Attachment 5.1) as a benchmark, QRN believes the interpretation of the AU1 would be facilitated by the defining the following matters:

1. For context:
  - a. the strategic alignment with Government objectives;
  - b. ownership arrangements of the network;
  - c. the competitive environments and diverse markets in which QRail operates;
  - d. key concepts of the Undertaking that will achieve the objectives of competition policy, acknowledging the significant influence of QRail on the rail industry ie the ability to "stimulate customer confidence, competition and market growth in the rail industry<sup>27</sup>."; and
  - e. the strategy to achieve efficient costs.
2. In relation to the intent or objectives of the Undertaking, include:
  - a. that the framework is effective and non-discriminatory, in addition to the key elements of efficiency and transparency;
  - b. define what is meant by a balanced approach. QRN considers that like ARTC, QRail has an objective of reaching an appropriate balance between the legitimate business interests of QRail, the public and those wanting access to the QRail network, to that end, replicating cl 1.2(d) of the ARTC IAU in the AU1 is appropriate;
  - c. to be consistent with the objectives and principles of the QCA Act and the Competition Principles Agreement;
  - d. clarification of the role of consultation with stakeholders to the management of access;
  - e. clarification of the key elements of a negotiate/ arbitrate model, namely:
    - to facilitate mutually beneficial agreements through commercial negotiation;
    - provide a binding dispute resolution mechanism as a safety net for Access Seekers if negotiations breakdown; and
    - address information asymmetries, so that Access Seekers can enter into meaningful negotiations.

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<sup>27</sup> See ARTC IAU, Preamble 1.1(d)

## 3.3 Application and Scope

### 3.3.1 Duration

The term of AU1 has increased to a 5 year term from 3 years. QRail have justified the longer term on the basis of providing certainty to stakeholders and used ARTC and MTM as benchmarks. Against this, as a new approach is being adopted, there is a risk that issues will emerge with the operation of the undertaking which may not be able to be addressed in a timely way. It is QRN's view that given the proposed undertaking is considerably weighted in QRail's favour, the risk of emerging issues is much higher.

QRail has also argued that the process for developing a new undertaking would need to commence within a relatively short time period after the commencement of the AU1. It is QRN's view that this is only the case in the circumstances where there are significant issues that require substantial changes to the undertaking. QRN does recognise that there is a cost of regulation. However, this needs to be balanced against the effectiveness of the regulatory regime for Access Seekers. It is QRN's view that given the substantial changes proposed under the AU1, a 3 year term should be maintained. Once the undertaking has gone through at least one regulatory period and Access Seekers have greater certainty regarding its operation it is reasonable that a longer term may be considered.

### 3.3.2 Scope

#### 3.3.2.1 *Definition of Access Rights (cl 1.2.1)*

The existing access undertaking provides for the negotiation of access 'required for the operation of train services by Access Seekers'. The definition is relatively broad, being inclusive of a range of below rail services that are necessary to operate a train service. Specific examples given include, in relation to rail infrastructure: mainline running, loading/unloading, marshalling and shunting in certain cases and train stowage in certain cases. Below rail infrastructure access includes: signalling, train control; access to walkways and land.

Under the AU1, "Access" is defined narrowly as the use of a specified section of the network, with the definition including specific reference to the definition of rail infrastructure under the TIA and excluding stations and platforms and yards and associated facilities used for passenger Train Services. Given this narrower wording it is possible that certain below rail services other than track access may be excluded. As a result of the provision in 1.2.2, services previously included in the definition of access may attract an additional charge.

It is QRN's view, for clarity, that AU1 should be amended to reflect the previous definition of access.

#### 3.3.2.2 *Line diagrams (cl. 1.2.3)*

The ability of the QCA to request a review of rail infrastructure if it considers there has been a material change has been removed. This change is reasonable in view of the separation of QRN and QRail, creating a firm allocation of rail infrastructure, and the fact that QRail commits to review and publish changes every 6 months. In line with the proposed objectives of ensuring timely, efficient and effective dispute resolution, Access Holders should be able to access the dispute resolution mechanisms if they disagree with proposed changes to the line diagrams allowing QRail to make amendments to the line diagrams without seeking QCA approval but providing a fallback for Access Holders in the event there are any disputes over the changes.

In addition, to provide clarity in relation to what is included in the scope of this Undertaking and what parties are able to gain access to, QRN believes the line diagrams should be amended to differentiate between QRail infrastructure included in the scope of the Undertaking, QRail infrastructure declared but not included in the scope of the Undertaking and private infrastructure.

## 3.4 Consistency and differentiation

It is QRN's argument that the undertaking should give Access Seekers confidence about how QRail will act in relation to like services. In particular, it should outline the circumstances in which QRail will differentiate between Access Seekers (see further discussion on Pricing Principles later in this section). The AU1 includes a reference to the QCA Act in cl 1.3(b) which obliges QRail to comply with legislative requirements to not unfairly differentiate between Access Seekers where that differentiation may have a material adverse impact on the ability of Access

Seekers to compete effectively. As such, QRN believes cl 1.3(a) should be amended to remove the requirement for AU1 to be applied consistently between Access Seekers *in the same circumstances*, to reflect that the principles included in AU1 already address the circumstances for differentiation. That is, cl 1.3(a) should state that the Undertaking will be applied in a manner that is consistent between Access Seekers.

Notwithstanding the above, there is no further detail included in AU1 to give Access Seekers confidence about how QRail will act in relation to like services. Of particular concern is the case where an end user is seeking tenders for a service – an Access Seeker wants confidence that its competitor is not able to negotiate a better deal for access. This could be achieved by providing Access Seekers with the ability to request independent confirmation that consistent arrangements have been offered and enable an independent party to confirm.

QRN acknowledges that the reference to s 100 in the QCA Act obligates the parties to negotiate in good faith. QRN believes that the Undertaking would benefit, from a transparency perspective, if the obligation was explicitly stated in the Undertaking (with or without specific reference to the legislation).

### 3.5 Extensions

The AU1 provides that QRail may, in its absolute discretion, undertake any required extensions to the network and have included criteria to be met where QRail would undertake an extension. QRN has a number of concerns regarding the proposed requirements.

But for the inclusion of this Part in the Undertaking, Access Seekers would have recourse to the legislation in the event of dispute which would enable the QCA to require the Access Provider to extend or permit the extension of a facility if the authority is satisfied that *“the extension will be technically and economically feasible and consistent with the safe and reliable operation of the facility”*<sup>28</sup>. Under the AU1 whether the extension meets this criteria or not is in QRail’s absolute discretion. In addition, the QCA, when making an access determination, *“must, in fixing the terms of access for the access seeker, take into account the costs to be paid by the parties for the extension and the benefits to the parties resulting from the extension”*<sup>29</sup>. This provision allows for the QCA to make a determination on what would be considered an equitable share in benefits. AU1 does not give consideration to the legitimate business interests of the investor in relation to a return on investment or provide certainty with regard to access rights beyond the term of an Access Agreement.

Given the QCA’s ability to make an access determination in relation to extensions is subject to what is included in an approved access undertaking<sup>30</sup>, it is QRN’s view that Access Seekers would be better served by relying on the legislation than having the conditions as proposed by QRail approved.

In line with the objective of transparency, it is in both QRail’s and the Access Seeker’s interests that corridor strategies are developed similar to ARTC’s Investment Strategies<sup>31</sup>. Corridor strategies provide valuable information for forward planning by analysing above and below rail tradeoffs, opportunities for improved operations that result in making available additional capacity, ensuring the efficiency of the investment and by outlining the cost and capacity created by specific projects. This information, providing there is significant stakeholder consultation, would facilitate productivity improvements by prioritising investment appropriately and provide Access Seekers with conceptual information to make timely project viability assessments. It is QRN’s view the provision of this information should focus on the:

- North Coast line – given its importance to the national freight task;
- Mt Isa line – given the value add to the regional economy<sup>32</sup>; and

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<sup>28</sup> S 119 (2)(c), 119(4)(b) and 119(5)(b)(i) QCA Act

<sup>29</sup> S 119(6) QCA Act

<sup>30</sup> S 119 (1)(a) and 119 (4)(a)

<sup>31</sup> See ARTC website, <http://www.artc.com.au/Content.aspx?p=154>

<sup>32</sup> The Final Report of the MITEZ 50 year Freight Infrastructure Plan estimated the region is likely to see the current \$15 billion gross regional value-added economy grow to around \$40 billion in the four decades to 2049-50 in real dollars (p11)

- West Moreton system – as an important part of the development of the reference tariffs.

In addition, it is QRN's view that the inclusion of the concepts of Prudence of Scope of Works, Prudence of Standard of Works and Prudence of Costs<sup>33</sup> in relation to extensions (and indeed all capital expenditure) would provide Access Seekers confidence that Extensions are "fit for purpose". QRN suggests the provisions with regard to capital expenditure, including the consultative framework, under the ARTC IAU, provide an appropriate model for QRail.

The final concern of QRN regarding the extensions provision is that without a queuing mechanism or RFP process, the aggregation of volumes from different sources is at QRail's discretion. The lack of transparency of demand may lead to unnecessary delays in investment or result in inequitable allocation of capacity.

## 3.6 Negotiation process

The aim of the negotiation framework in the AU1 is to establish a transparent and fair process with sufficient information available to both parties to facilitate access negotiations. Recourse to binding dispute resolution is a critical element of this framework. In a light handed regime where the focus is on commercially negotiated, rather than pre-determined regulatory outcomes, the robustness of the negotiation and dispute resolution framework is even more important.

With this objective in mind, the negotiation framework included in QRail's AU1 includes the key elements that would be expected. However, there are some threshold issues in terms of matters that potentially should be included or could be better reflected in the regime. There are also a number of issues of balance and unconstrained discretion that are of concern.

### 3.6.1 Threshold Issues

#### 3.6.1.1 Ability to depart from access undertaking (cl. 2.1.1(c))

The AU1 makes it clear that the Access Seeker must unconditionally agree to comply with the requirements of the undertaking, with failure to do so grounds for QRail to reject the access application. This is overly restrictive, and should be qualified by a materiality threshold.

#### 3.6.1.2 Removal of ringfencing requirements

QRN does not believe it is necessary to include a trigger in the Undertaking to introduce ringfencing if competitors enter the above rail passenger services, given there is not, nor is there likely to be a competitive market for above-rail passenger transportation. However, specific provisions are required to ensure QRail is incentivised to service its dual obligations as an operator of passenger services and rail manager of the network.

#### 3.6.1.3 Confidentiality provisions (cl 2.2)

The handling of Confidential Information is necessary in order to protect the legitimate business interests of both Access Providers and Access Seekers<sup>34</sup>. It is QRN's view that the definition of Confidential Information should be expanded to clarify what is considered confidential. That is, where the proposed definition sites that Confidential Information is what the parties should know is confidential and what is by its nature confidential. For example, in the ARTC IAU, Confidential Information is information that might reasonably be expected to affect the commercial affairs of the owner and would include information relating directly to the Access Seeker's future markets, the Access Seekers future market and business strategies and the strategies of ARTC or the Access Seeker's customers<sup>35</sup>.

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<sup>33</sup> See sections 2.3.2 to 2.3.4 of Schedule FB of 2008 Undertaking (page 211 – 213)

<sup>34</sup> ACCC, "Draft Decision Access Undertaking – Interstate Rail Network ARTC", April 2008, p69

<sup>35</sup> See ARTC IAU, cl 3.5

#### 3.6.1.4 *Removal of queuing framework*

Where capacity is constrained (or nearing capacity constraint such as the Mt Isa line) and there are mutually exclusive access applications, there is a requirement for QRail to establish transparent capacity allocation principles. Under the AU1, QRail has the discretion to conclude an agreement with the party which is most commercially advantageous to QRail. This principle does not address the scenario where there are mutually exclusive competing capacity requests with no material difference to QRail of either request proceeding.

Access Seekers require a capacity commitment relatively early in order to proceed with negotiations. The present obligation on QRail to inform Access Seekers if there are mutually exclusive access applications does not provide sufficient certainty. For example, under this provision, QRail could conduct a concurrent negotiation for a competing access request to service a different end user (as distinct from access requests from competing Operators for the same end user) resulting in the capacity not being available at the conclusion of the negotiation - wasting significant time and money.

Where the access rights can only be granted using capacity that will become available when an Access Agreement expires, it is QRN's view that QRail *must* notify the Access Holder rather than use reasonable endeavours.

In assessing the cost and risk to QRail of providing access rights under clause 2.7.2(a)(iv)(B), it is necessary to take into consideration the impact of Transport Service Payments received by QRail from the State Government.

#### 3.6.1.5 *Contracting available capacity or additional capacity (cl. 2.7.3)*

This provision states QRail is not obliged to enter into an Access Agreement if the network does not, in QRail's opinion, have sufficient available capacity and QRail has not agreed to provide additional capacity to meet the Access Seeker's request. While a capacity analysis (to be included in an Indicative Access Proposal) will include an assessment of additional capacity and the extensions required to meet an Access Seeker's needs (and an indicative estimate of cost and timing), the interests of Access Seekers will be better served if there is a stronger obligation on QRail to not only examine expansion options but also, at a minimum, identify the issues to be addressed in relation to the funding of expansions by Access Seekers.

The definition of Available Capacity currently excludes capacity required to comply with any Passenger Priority Obligation and in order to perform maintenance or enhancement activities. In AU1, the definition of Available Capacity has been amended to also exclude capacity:

*“(b) ....for the purposes of: ...*

*attending to and performing activities associated with safety matters or the management of safety risks; and*

*(c) Capacity that is not available as a result of:*

*an operational constraint from time to time; or*

*restrictions imposed or required from time to time in accordance with any Law”*

This addition to the definition of Available Capacity will result in capacity available to be contracted varying during a negotiation, leading to considerable uncertainty for Access Seekers as to whether they will be able to contract the required capacity right up until an Access Agreement is executed. What is Available Capacity should be both transparent and certain.

(see also comments in Extensions above)

#### 3.6.1.6 *Dispute resolution*

QRN supports the availability of dispute resolution to all matters covered by the undertaking.

## 3.6.2 Matters of balance

### 3.6.2.1 Preliminary information (cl. 2.1.3)

One of the key elements of a negotiate/ arbitrate regime is the provision of sufficient information to facilitate a commercial negotiation by addressing asymmetry of information issues and preventing the likelihood that negotiations may be unnecessarily delayed by the Access Provider withholding information that the Access Seeker reasonably requires. As such, there should be a stronger obligation on QRail to provide preliminary information for Access Seekers, with the type of information to be included specified upfront and published on the QRail website. This is in line with other jurisdictions and is more likely to facilitate negotiations than the proposed approach whereby the Access Seeker must demonstrate a need for the information, with QRail only obliged to provide it if its '*ordinarily and freely available*'. It is QRN's view that Schedule D of the current undertaking should be reinstated with the information provided at no charge. In addition to the Schedule D information, QRN is also of the view that, for transparency, the documents referred to in the definition of the Operating Requirements, that is the standards, systems, procedures, protocols, should also be publicly available on the QRail website.

In addition, whilst information regarding reference tariffs is provided in Schedule D there is no applicable pricing information available to Access Seekers for services that do not have a reference tariff. In like jurisdictions (ARTC IAU and WARAR), Access Providers are required to publish floor and ceiling prices and include the applicable asset valuation for the segments to which access may be sought. QRN acknowledges that requiring this information for the entire QRail Network would impose a regulatory cost that is not offset by a corresponding benefit, particularly in relation to the government supported networks. That being said, the provision of similar information for the North Coast and Mt Isa lines would be of value to Access Seekers. This is discussed further under the heading Pricing Principles later in this section.

### 3.6.2.2 Timing of provision of IAP (cl. 2.4.1)

QRN considers there should be a greater commitment by QRail to provide an IAP within the nominated 20 day timeframe. The option to take longer than 20 days should only be under exceptional circumstances. In addition, compliance reporting should include the number of IAPs provided outside the 20 day timeframe.

### 3.6.2.3 Inclusions in Indicative Access Proposal (cl. 2.4.2)

Given the relationship between price and terms and conditions, in order to assess an IAP, Access Seekers require an understanding of the terms and conditions that would apply. QRN believes, for clarity and transparency, cl 2.4.2 should identify the material divergences from the Standard Access Agreement (SAA). This is relevant for both coal and non coal freight given that the SAA is directly related to coal services and is a precedent for non coal services.

### 3.6.2.4 Cessation of Negotiation Period (cl 2.6.1)

There should be a greater obligation for QRail to continue negotiations where the parties agree to extend the Negotiation Period, rather than the current provision that QRail has no obligation to continue the negotiations beyond the Negotiation Period.

### 3.6.2.5 Issues to be addressed in negotiations (cl. 2.6.2)

There should be additional flexibility in this process to facilitate negotiations. For example, there should be the ability for an Access Seekers to revise its application (to some extent) as well as stronger obligations on QRail to provide additional information as required by an Access Seeker during the negotiation process. In addition, at this stage of the negotiation, QRail should have stronger obligations in terms of providing an indicative access charge and more detailed capacity analysis. In particular, there should be a clearer obligation on QRail to investigate capacity expansions, where required, to accommodate the Access Seeker.

### 3.6.2.6 Recovery of QRail's costs (cl. 2.6.3(c))

This provision is too broad, with QRail having the ability to recover all reasonable costs in the event it gives a negotiation cessation notice on any grounds. The provisions in the current undertaking are considered reasonable where costs are recoverable only in the event the Access Seeker has no genuine intention of obtaining or using the access sought.

### 3.6.2.7 *Frivolous Access Requests (cl 2.6.3(a)(ii)(D) and cl 2.6.4)*

QRail are able to reject an access application or cease negotiations if they determine the request is frivolous in nature. The references to Frivolous Access Requests should be removed as:

- It is QRN's view that it would be difficult for QRail to assess whether an Access Request is frivolous or not prior to the Negotiation Period;
- The ability for QRail to cease negotiations in the event an Access Seeker does not comply with material aspects of the Undertaking, protects QRail from frivolous access requests<sup>36</sup>;
- QRail has the ability to differentially price access requests on the basis of cost and risk;
- QRail has the ability to cease negotiations where the Access Seeker has no genuine interest<sup>37</sup>; and
- The provision of publicly available pricing and capacity information will remove the need for "tyre-kickers" to approach QRail for indicative pricing.

### 3.6.2.8 *Rail safety and other consideration for passenger services (cl. 2.6.5)*

This provision gives QRail a very wide and unconstrained discretion to refuse to enter into an Access Agreement. It is questionable whether this provision is necessary as the matters raised would presumably be addressed as part of access negotiations – for example, any safety issues should be addressed as part of the interface risk assessment process. Also, whether access will cause ‘...any undesirable nuisance or annoyance to or otherwise adversely affect any persons using or intending to use a passenger service.’ is a very open-ended basis for refusing to negotiate and, again, any risks identified in this regard should be dealt with as part of risk assessment processes (both interface risk assessment and environmental investigation and risk management assessment).

### 3.6.2.9 *Prudential requirements (cl. 2.9)*

AU1 includes fairly stringent obligations on Access Seekers to demonstrate prudential requirements. However, these are generally not inconsistent with those included other jurisdictions with three notable exceptions.

QRail have sought to include Material Default of the AU1 or the 2008 Undertaking. QRN would like further clarity on the circumstances where an Access Seeker is in default of the Undertaking(s) (as opposed the terms and conditions of an executed Access Agreement) that would require the inclusion of this provision in the prudential requirements. On the face of it, a “material default” under the Undertaking, from an Access Seeker's perspective, would result requiring the default to be remedied in order to progress negotiations and not represent a risk of default under an Access Agreement – which should be the intent of the prudential requirements.

In relation to the Prudential Requirements, QRail have not provided Access Seekers with the right to an explanation of the grounds for the refusal to negotiate. This hinders the ability of the Access Seeker to redress the non-compliance and continue negotiations or access the dispute resolution provisions. QRN considers the approach in the ARTC IAU where ARTC is required to provide this written notice within 10 Business Days of the decision to refuse to negotiate<sup>38</sup> as reasonable.

QRail have introduced that the Access Seeker must demonstrate they comply with the Prudential Requirements within a reasonable time period of no more than 10 Business Days. As it is in the interests of the Access Seeker to demonstrate compliance in a timely manner, as a matter of balance it should be at the discretion of the Access Seeker to determine a reasonable time.

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<sup>36</sup> ACCC, “Draft Decision Access Undertaking – Interstate Rail Network ARTC”, April 2008, p67

<sup>36</sup> See ARTC IAU, cl 3.5

<sup>37</sup> 2.6.3(a)(ii)(B)

<sup>38</sup> See cl 3.4 (e) ARTC IAU

In addition to the above, the ability to cease negotiations under cl 2.6.3(a)(ii)(C) if the Access Seeker is not reputable or of good financial standing should be deleted to reflect QRail's ability under cl 2.9.3 to either refuse to commence negotiations or cease negotiations if the prudential requirements cannot be met.

## 3.7 Pricing principles

Consistent with a light handed approach and reflecting the nature of traffics on the network, the AU1 only provides for regulator-approved reference tariffs on the Western System. This approach appears reasonable in the circumstances, provided that for non-reference tariff services:

- sufficient protections are available for Access Seekers in the pricing principles to ensure that negotiated/arbitrated access prices reflect a fair and reasonable outcome;
- cost/price information is available to facilitate the commercial negotiations; and
- there is recourse to binding dispute resolution.

### 3.7.1 Prioritisation of pricing principles

The AU1 no longer includes the prioritisation of the pricing principles. QRN understands that the inclusion of the prioritisation of pricing principles was to ensure that the Access Provider could not preferentially price between Access Seekers. For example, where capacity is constrained, charge new Access Seekers higher access prices under the Rail Infrastructure Utilisation principle with existing Access Holders charges remaining at a lower rate. In a light handed regime, the objective of the prioritisation of pricing principles to provide equity of access charges amongst Access Seekers is met by both the provision of price/ cost information that allows the parties to commercially negotiate and an undertaking to meet the objectives of reaching an appropriate balance between the legitimate business interests of QRail, the public and Access Seekers (as discussed in this section under the heading Preamble). This approach is consistent with the provisions of the ARTC IAU.

### 3.7.2 Structure of access charges

The AU1 no longer includes provisions regarding the structure of Access Charges. Under s 168A(b) of the QCA Act, the pricing principles "*should allow for multi-part pricing*". It is QRN's view for the AU1 to comply with the Act, the pricing principles must address the structure of Access Charges.

### 3.7.3 Price differentiation

The limits on price differentiation in the AU1 are broadly similar to those in the QR Network access undertaking. Inevitably there is some discretion in applying this and it is in the interests of Access Seekers that the basis for price differentiation by QRail is fair and transparent.

QRail have made a change to the ability to price differentiate between Access Seekers in relation to the ability to commercially provide access under cl 3.3(b)(ii)(B)(1) in AU1. In the current Undertaking, it is the change in Transport Service Payments which is the trigger for price differentiation, whereas in the AU1 it is a change to the ability to commercially provide access which may include changes to Transport Service Payments. It is QRN's view that changes to the ability to commercially provide access is already addressed in clause 3.3(b)(ii)(B)(2) and the re-wording of cl 3.3(b)(ii)(B)(1) creates unnecessary *uncertainty regarding the circumstances in which they may be price differentiation*.

### 3.7.4 Reference tariffs

The AU1 provides for a reference tariff for the West Moreton System, but for no other traffics. This approach is reasonable given that other traffics are unlikely to be near the revenue ceiling.

It is QRN's view that all consequential price risk associated with a review of the reference tariff and methodology should be assessed at the time of the full review of the West Moreton System Reference Tariff. Any changes made to the provisions regarding the West Moreton System reference tariff should revert to provisions in the current Undertaking.

### 3.7.5 Availability of cost/price information for non reference tariff services (s 101(2) of QCA Act)

Due to the diversity of the QRail network, QRN considers that the QRail AU1 needs to strike a balance between being general enough in application to cover all scenarios, and being sophisticated enough to recognise that the same measures will not achieve the same outcomes in all parts of the network. Pricing is one area where this sophistication is necessary and where QRN is looking for a range of different measures to suit the different parts of the network and the markets they service.

For the Western System coal traffics, QRail has proposed the continuation of the QCA endorsed access arrangements and reference tariffs. The rest of the QRail network has been left subject to the governing pricing principles, and predominantly the pricing limits of a floor and ceiling approach. QRail states that it is not likely to be able to price anywhere near the ceiling because of constraints placed on it by market based factors – whether they be the existence of a road alternative or the ability of an end user to pay.

The provision of information on costs (and other matters) is an obligation on the Access Provider under s101(2) of the QCA Act and QRN considers that QRail could do more to encourage the use of its rail network, without compromising its own ability to recover both its efficient costs and a return comparable to the regulatory and commercial risks it takes. The approach taken in the West Australian regime, whereby floor and ceiling costs are required to be published annually on a line section basis, would provide greater price transparency and enable Access Seekers with a better basis upon which to determine the reasonableness of access charges.

In respect to existing traffics that are looking to continue using the QRail network, such an approach would also provide some comfort that they will not face the prospect of significant price increases in the future, after they have invested in rollingstock and other assets, and have less bargaining power than a start-up business might.

QRail considers such an approach would be appropriate for the Mount Isa line and the North Coast line.

### 3.7.6 Rate review provisions

The circumstances in which a contracted access charge (where there is no reference tariff) can change should be limited to a Material Change as per the SAA. Please note comments with regard to item 61 in Section 3. In addition, rate review provisions should be limited to agreements that have a term longer than 5 years.

## 3.8 Network Management Principles

This section states that QRail will perform scheduling and provide capacity-related information in accordance with the Network Management Principles, which are included in Schedule B of AU1.

### 3.8.1 Schedule B Network Management Principles

It is QRN's view that the objective of the Network Management Principles (NMP) are to:

1. Provide certainty regarding the management of capacity;
2. Maximise the efficient use of the network;
3. Ensure all operators are treated fairly and in a non-discriminatory way; and
4. Address the requirements of operators and the infrastructure maintenance provider.

These objectives are facilitated by having:

1. Transparent processes in place in relation to scheduling and transit management; and

2. A consultative framework that, consistent with the original intention of Network Access in 2000, “*optimises the sharing of capacity and encourages co-operation between railway operators and railway manager(s) to improve overall service, and provide service patterns and connections that meet the needs of users*”<sup>39</sup>.

### 3.8.1.1 Key Provisions in relation to possession planning

A significant issue for Operators and their Customers is the lost capacity associated with Possessions. The potential impact depends on whether they are scheduled and included in the MTP or occur outside of the MTP. Consultation with operators regarding possessions occurs in order to change the MTP and when a possession is scheduled outside of the MTP that will have an adverse impact on the TSEs. It is QRN’s view that the NMP and associated protocols should reflect the following general principles in relation to possessions (that is, variations to the MTP or in addition to the MTP):

- Possessions outside the MTP should be limited to Urgent or Emergency Possessions. Any other possession should be resolved as part of a variation to the MTP.
- Urgent and Emergency Possessions should, other than for exceptional circumstances, be undertaken within the relevant timeframes. That is, an Urgent Possession should be undertaken within 3 months after the detection of the problem and an Emergency Possession should be undertaken within 5 business days after the detection of the problem.
- A notice with regard to a change to the scheduled possessions or possessions in addition to the MTP must be provided to Operators in a timeframe that is inline with the time horizon for the planned works. Consultation should then commence with Operators once the notice is given. For example, where QRail is contemplating a change in Maintenance Strategies that will have a significant impact on the operations, consultation may be required to commence as far as 18 months out from the anticipated commencement.
- the notice should include the extent and exact impact (within reason, for example, QRN acknowledges that consultation around a conceptual change to maintenance strategies will by its nature not be exact) on the Train Service Entitlements, the intent of the possession and what alternative arrangements are proposed.
- In the event the timeframes for the activity are not achievable, QRail must notify Operators as soon as practicable and provide a revised and continuing estimate of the anticipated completion of the works. In addition, the Operator should be notified where the objectives of a possession are not met which may require additional possessions.
- QRail should have an obligation to mitigate the impact on Operators and use reasonable endeavours to provide a useable path. Decisions should be made in the context of achieving an optimal result for the railway manager and Operators (including the requirements of the Operator’s customers) by having regard to the flow on effects on the train schedule and the respective costs incurred. This is directly related to the objective of maximising the efficient use of the network.

### 3.8.1.2 Train Planning Principles

Capacity is defined as “*the capability of the network, including additional capacity from expected Expansions*”<sup>40</sup>. Under 1.1(a) of Schedule B, “The MTP will indicate the Capacity necessary to satisfy Train Service Entitlements, all of QRail’s passenger Train Services and time allocated for Planned Possessions.”

QRN would like QRail to clarify how the MTP will differentiate between the existing capability of the network and what is expected.

In the absence of Access Agreements for Passenger services, it is unclear to QRN how capacity will be assessed in relation to those services. QRN notes that the obligations in the TIA are in relation to the regularly scheduled passenger services. The reference in cl 1.1(a) to “*all of Queensland Rail’s passenger Train Services*” seems to imply that the MTP will include both the regularly scheduled passenger services and the special event services.

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<sup>39</sup> QCA, “Draft Decision, QR Draft Access Undertaking, Volume 2”, [www.qca.com.au](http://www.qca.com.au), 2000, p258

<sup>40</sup> See Part 7.1, AU1

Given the capacity allocation of passenger services is subject to ministerial direction, it is QRN's view that both the ministerial direction (and variations) and the related MTP should be publicly available to aid in transparency and service planning.

Under clause 1.1(g), the MTP may be modified without consultation if in QRail's opinion no Access Holders are adversely affected. Access Holders should have the right to dispute QRail's opinion if they disagree. For example, if QRail has the same obligation under cl 1.1(d) to notify Access Holders at least 30 days prior to the commencement of the modification then, if an Access Holder believes a modification will have an adverse impact and is able to demonstrate that modification, it should be postponed until there is a resolution of the conflict.

In relation to TRTs, QRN seeks an amendment to both cl 1.1(h)(ii)(B) and cl 1.2(f)(ii)(B) of the Network Management Principles to include a provision that allows for the Operator to withhold consent in relation to a modification of the MTP or DTP if the Operator is unable to obtain the agreement of the Adjoining Network Rail Infrastructure Manager for an uninterrupted train path.

### 3.8.1.3 Train Control Principles

Clause 2(e)(ii) and (iii) allow for information to be provided to an Access Holder subject to reasonable terms and conditions. QRN requests clarification of what is required by QRail that is in addition to provisions such as Intellectual Property and Confidentiality already contained in the Access Agreement.

QRN would like clarification on when a train service is considered on-time. Under the current SAA, a train is considered on time if it is within 3 minutes of the scheduled time. QRN notes that in Brookfields Train Management Guidelines (WA) the definition of an on-time freight train is within 15 minutes prior to and after its scheduled departure time. In past decisions regarding the train management guidelines by the ERA, this was considered consistent with the definition of Healthy trains for ARTC IAU. [add in reference]

Finally, it is QRN's view that the NMP should be attached to the SAA on execution.

## 3.9 Reporting

Comprehensive reporting arrangements are an important element of a light handed access regime as transparency will help provide confidence in the regime. QRN considers the following reporting a minimum requirement of a light handed regime:

- quarterly performance reports – it is QRN's view that the Service Quality Performance Reporting by ARTC in the IAU is the appropriate benchmark;
- annual report on performance of the access regime – should be extended to include the number of disputes received in relation to the provisions of the Undertaking and not just to those received in relation to the preparation of an Indicative Access Proposal (IAP). The preparation of an IAP is only one step in the process;
- Financial reports – the only publicly available financial information for Access Seekers is that provided in the Annual Reports required under the *Corporations Act* and the Coal Reference Tariffs. It is QRN's view that in a light handed regime there should be significantly more information available. QRN would like to see information publicly available similar to the ARTC model, such as:
  - planned capital expenditure;
  - regulatory asset base;
  - floor and ceiling prices
  - corridor strategies; and
  - periodic reporting of unit costs

QRail have removed the reference to annual below rail financial statements. However, there remains a legislative requirement to prepare a cost allocation manual with the QCA having the ability to require accounting records to be published. QRN notes that the requirement is for the declared service which is different from the services included within the scope of AU1. It is QRN's view that transparency in cost allocation separating the passenger operations (which includes declared infrastructure) and below rail costs (that are within the scope of the undertaking) remains important.

As per the discussion in Section 1 regarding the Market, what is relevant information for Access Seekers is the corridor information as opposed to an aggregate view on coal and non-coal freight.

The auditing requirements proposed in AU1 are less stringent than those which presently apply. Specifically, auditing of reporting obligations will not automatically occur. Rather, the QCA has the right to request an audit, to be conducted at its own cost, in relation to whether any specific conduct or decision of QRail complies with the undertaking. As the accuracy of information is an important protection for customers in a light handed access regime, the weakening of audit obligations is of concern to QRN.

## 3.10 Administrative provisions

This section of the AU1 addresses dispute and complaint resolution processes and factors constraining QCA decision-making.

### 3.10.1 Dispute resolution process

An effective and efficient dispute resolution process is a critical element of a light handed regulatory regime as it provides a key protection for Access Seekers.

QRail has proposed two broad stages for its dispute resolution process:

- resolution by escalation – under this step a dispute gets ‘escalated’ in three steps, initially it is referred to representatives of the parties, then to senior management representatives, then to chief executives (or their nominee, which must be more senior than the previous step); and
- failing resolution in the first stage, either party may refer the dispute to the QCA, which will resolve the dispute in accordance with Division 5, Part 5 of the QCA Act.

Importantly, the intermediate step of referring a dispute to expert determination has been removed.

Moving to a light handed regulatory framework is reasonable for a business such as QRail’s, but the very light handedness of the regulatory framework increases the need for effective and efficient dispute resolution processes to be in place. Importantly, there should be minimal barriers in place for Access Seekers to be able to access outcomes via dispute resolution.

As formal QCA arbitrations are very time consuming and expensive processes, over-reliance on this mechanism to resolve access disputes is unlikely to be in the interests Access Seekers. Moreover, there are a range of matters that may be in dispute that are technical in nature and for which expert resolution is most appropriate. It is in the interests of Access Seekers for the expert resolution step to be included as part of the dispute resolution process, as expert resolution is likely to be a faster and cost effective way to resolve most disputes.

## 3.11 Other matters

### 3.11.1 Interface with Central Queensland Coal Network

As QRail’s network interfaces with QR Network’s Central Queensland Coal Network, it is QRN’s view that the AU1 and SAA must address issues associated with the operation of this interface to ensure it is efficient and workable. The following section provides further discussion on the issue of Through Running Trains. QRN notes that the concerns and recommendations raised have largely been adopted by QR Network in the draft Goonyella System Rules. For consistency, QRN considers that these concerns should also be addressed in QRail’s AU1 and SAA.

### 3.11.2 Through Running Trains

QRN operates Through Running Trains (TRT) on the QRail network. These are services that run over both the QRail and the QR Network’s rail networks in the course of their journey from origin to destination. TRT cross one or more Network Interface Points (NIP) which are those locations where the QRail and QR Network rail infrastructure meet.

### 3.11.2.1 *Changed risk profile*

As a result of the creation of the two separate rail networks in Queensland on 30 June 2010, operators of TRT must negotiate two Access Agreements with two separate Access Providers where previously only one agreement and one provider was necessary.

A TRT operating over both the QRail and QR Network tracks has a different risk profile to a train service that had the same operation prior to the split of the rail network. In other words, these services are exposed to additional risk simply as a result of the changes made to the rail network in June 2010. This is because vis-à-vis (or other Access Holder) the network provider only takes responsibility for making its own network available and whilst previously anything that happened anywhere on the network in Queensland was the responsibility of the one network provider, now that is not the case.

Under the previous arrangement where there was only one Queensland rail network and one network provider, QRN only required one Access Agreement, and its exposure to Take or Pay (TOP) charges for paths not provided by the network provider was excluded where the failure to provide the path resulted from Force Majeure ('FM') or a below rail cause (such as track maintenance or speed restrictions)<sup>41</sup>. QRN also had a cause of action for any loss resulting from a cancellation or delay of its train services attributable to a below rail cause or an FM event<sup>42</sup>.

A FM or below rail cause, in this scenario, could have occurred anywhere on the entire QR Network rail network (as it existed before 30 June 2010).

Under the current arrangement, where there are two Queensland rail networks and two network providers, and QRN requires two Access Agreements to run TRT, its exposure to TOP and its ability to claim for any losses resulting from the cancellation or delay of its services has altered.

An example demonstrates this clearly: when Cyclone Yasi hit North Queensland in 2011, QRail declared FM over its network. QR Network did not declare FM but it could not through schedule those trains that typically continue on to the QRail network because of the FM there. As a result, a number of TRT heading north were stranded on the QR Network track. In addition, some trains were not permitted to enter the QR Network track from the QRail network (at the southern-most NIP) because QR Network knew it wouldn't be able to through schedule those trains back onto the QRail network (at the northern-most NIP).

Prior to the creation of the two separate rail networks, this situation would have constituted an FM event that prevented QR Network from making the relevant parts of the rail network available, and QRN's inability to operate the relevant trains would have been caused by a "QR Network Cause" and those trains would have been excluded from the calculation of TOP. QRN would also have been entitled to claim for any losses suffered as a result.

After the creation of the two separate rail networks, this situation would only constitute an FM event that prevented QRail from making the relevant parts of its network available. QRN would not be charged TOP for the services it did not run on the QRail network. In relation to QR Network, however, it is still able to make its network available for QRN's trains. QRN would be liable to pay TOP for train services on the QR Network track – both those QR Network prevented from entering its network at the southern-most NIP and those stranded at the northern-most NIP – irrespective of the fact that those trains were delayed and/or cancelled as a result of an FM event on the adjoining network.

This means an additional exposure for operators of TRT.

There are also other exposures for TRT that can be demonstrated by way of practical example: a derailment on the QRail network north of the QR Network track means that a TRT approaching the southern NIP from Brisbane is not allowed to enter the QR Network track because it cannot be given a through running path. Nonetheless, that path is considered to have been made 'available' by QR Network. The operator will pay TOP for it, and will be taken to have

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<sup>41</sup> See definition of "QR Network Cause" and Schedule 3 of the 2008 SAA

<sup>42</sup> See clauses 15.3 and 15.4 of the 2008 SAA

consumed the path. In other words, if the operator's TSE entitled it to 10 services per week, not only will the operator have to pay TOP but it will lose that path from its entitlement, notwithstanding it did not get to use it through no fault of its own. QR Network has no obligation to find and offer the operator another path.

This sort of scenario may be more likely to occur closer to or on the day of operation, and for those events that happen further out from day of operation there is arguably a greater likelihood that both QR Network and QRail will be able to reschedule affected services so that an operator is not losing both financially (in terms of TOP) and operationally (in terms of a contracted path).

The accuracy of delay and cancellation 'causes' is particularly important in the above circumstances. There is a question of how far back QRail will look in determining cause. For example, it is necessary to ensure that where a service enters the QR Network late as a result of QRail cause that when it re-enters the QRail network the root cause is identified, acknowledging that the TSE is for the full origin - destination. There is also a question concerning the systems QRail uses for classification of causes and whether they envisage activities on an adjoining network. If not, QRN considers that they should be amended to do so.

Some TRTs will pass through several coal systems, as well as utilising the QRail network. Without an alignment of maintenance windows across both Queensland networks (and the systems within those networks) TRTs face massive disruption to their services. This potential disruption to services has added significance given the altered risk position faced by operators of TRTs under the split Queensland rail network. As such there is a requirement to ensure there is a coordinated process for the organisation of network closures across both networks.

### *3.11.2.2 Recommendations*

To address TRT issues, QRN proposes that there should be an explicit requirement on the railway manager who is co-ordinating the TRT (that is where the service originates and terminates on one railway manager's network but for part of the service, uses a third party's network) to enter into and maintain an Interface Agreement with the adjoining network manager that addresses the following:

1. As an extension of the issue of certainty of 'System Wide Requirements' (discussed in section 1 of this paper), if QRail wants to effect an amendment to System Wide Requirements applying to rail infrastructure containing a NIP, it would need to consult with the rail manager of the adjoining network (namely QR Network) to ensure that the amendment didn't leave an operator of TRT unable to comply with 'System Wide Requirements' on that adjoining network.
2. The scheduling and train control of TRT demand specific attention. In particular, both rail managers will need to coordinate to ensure an uninterrupted train path is scheduled for a TRT across a NIP. This coordination will be necessary when a Train Schedule is initially prepared for a TRT, as well as at any time a network manager proposes to change the MTP or DTP affecting a TRT. There is also a need for coordination and alignment of planning and scheduling for maintenance and possession planning across the QRN network and the QRail network where TRT operate.
3. Recognition of communication processes necessary between the network providers themselves and the network providers and the operators regarding the status of TRT to ensure that the appropriate cause of any cancellations and/or delays affecting those services anywhere on their journey is agreed and recorded by both network providers.
4. Interface risk assessments relating to a NIP need to include both network managers.
5. Recognition that the operator of a TRT has a reasonable excuse to withhold its consent to a request from a network manager to make a long-term change to the times at which a TRT operates if they are unable to get the agreement of the adjoining network manager to provide an uninterrupted train path for the affected train services over the NIP.

The SAA should then include a requirement for the co-ordinating railway manager to comply with an Interface Agreement (with definition of the Interface Agreement addressing the above points) and advise of any variations in the Interface Agreement. In addition if the co-ordinating railway manager is then in breach of the Interface Agreement the Operator of the TRT should be able to make a claim against the railway manager.

### *3.11.3 Matters to be included in access agreement*

QRN has provided detailed discussion in section 4 in relation to the provisions of the Standard Access Agreement. QRN acknowledges the intent is to align the Access Agreement Principles included in Schedule C and the Standard

Access Agreement. It is QRN's view that Schedule C must be reviewed once the provisions of the Standard Access Agreement are finalised.

## 4 Standard Access Agreement

### 4.1 Overview

The Standard Access Agreement (SAA) provides certainty to Access Seekers on the terms and conditions that will apply in relation to the provision of access. Whilst the Standard Access Agreement is specific to the transportation of coal, it provides a precedent for non-coal traffic. It is QRN's view that the objective of balance in relation to the SAA, requires risk to be held by the party best placed to control and mitigate the risk. In addition the interests of all parties are served when the SAA is clear and transparent with regard to the allocation of risk.

The fundamental provisions required to meet these objectives are:

1. access rights and the train service entitlement must be clearly defined;
2. the railway manager is responsible for the management and control of the network. There must be a clear obligation to maintain infrastructure to an objective and measurable standard consistent with the Rollingstock Interface Standards, Network Management Principles and the Train Service Entitlement;
3. the railway manager is responsible for train control;
4. the railway manager's ability to vary train services should be subject to:
  - bona fide consultation;
  - timely notification relevant to the planning horizon of the variation;
  - an obligation on both parties to use reasonable endeavours to mitigate the impact of the variation;
  - the ability for the operator to not agree to the variation, if it results in a change that adds material cost or risk to the Operator's (or the Operator's customers) operations; and
  - Passenger Priority Obligations, but not derogate from the contractual entitlements of the Operator;
5. any changes to the operating parameters, standards, procedures, infrastructure or equipment that would have a material impact on Operator's activities requires consultation and should consider the consequential impact on the Operator and the obligations to the Customer under the Rail Haulage Agreement, with an ability for the operator to be compensated for any adverse affects;
6. the Operator is responsible for the safe operation of its rollingstock on the network and must ensure that at all times its rollingstock and rollingstock configurations comply with all applicable laws, the rollingstock specification and the Rollingstock Interface Standards specified in the agreement; and
7. liabilities and indemnities must be clearly defined and reflect the relative expertise of each party.

The table in section 4.2 below provides additional discussion to that included in Section 1. However, as a general comment, it is QRN's view that significant uncertainty is created as a result of the use of terms such as "in accordance with this agreement", "Queensland Rail's absolute discretion" and "in Queensland Rail's opinion". Whilst QRN does not believe the current SAA should be adopted as a matter of course, there are a number of provisions which have been developed over time, in this and like jurisdictions, to protect the rights of Access Seekers.

## 4.2 Discussion and Recommendations

Item	Issue	Clauses	Description	Suggested Resolution
1	Access Rights	2, 26.1 6.1	Access Rights are narrowly defined in terms of the definition of Rail Transport Infrastructure under the TIA. This could result in increased access charges as activities that would normally be expected to be included (and previously have been included) as part of the service for which the access charge applies, will in future be considered as “ancillary services”. For clarity the definition of Access Rights should be amended to reflect the definition of the Access in the current SAA. See discussion in 2.3.2.1.	Access be defined in line with current SAA. Activities and services included in Access Rights should be defined in the SAA in line with discussion in sections 1 and 2. .
2	Renewal of access rights		There is no obligation on QRail to negotiate an extension in good faith prior to expiry of access agreement. This creates uncertainty for customers in relation to the access rights on the expiry of the existing term.	Revert to existing SAA obligation to negotiate in good faith for an extension 12 months prior to expiry.
3	Nominated Network		<p>QRN queries why QRail hasn't kept the reference to 'Nominated Network' given that the SAA will have to include a diagrammatic representation of the network to which the access agreement applies (in Schedule 2 presumably).</p> <p>This is separate to the issue of how QRail has proposed to deal with line diagrams under AU1 (and SAA) and how this relates to the definition of 'Network' under the SAA. For clarity it is QRN's view that the line diagrams should be amended to reflect the infrastructure included within the scope of the Undertaking to which the parties have access.</p>	<p>Revert to Nominated Network approach under existing SAA.</p> <p>Other comments (in section 2) relating to the treatment of line diagrams in AU1 and SAA are also relevant.</p>
4	Accreditation	3	QRail has removed its obligation to maintain and provide evidence of their Accreditation. A Railway Manager's general obligation under their accreditation to maintain the infrastructure to a certain safety standard. Operators reasonably rely on the conditions of Accreditation to give some assurance regarding the safe operation of their services together with the specific terms and conditions included in an access agreement. It is reasonable then to expect that the Accreditation	Accreditation obligations be mutual on both parties and the “continues to be provided” obligation be clarified.

Item	Issue	Clauses	Description	Suggested Resolution
			<p>obligations in the access agreement should be mutual. This is a generally accepted principle included in the access agreements in each jurisdiction in which QRN operates.</p> <p>In addition QRail have incorporated wording that requires the Operator to “ensure that QRail is and continues to be provided” with material details of the Accreditation and all relevant supplementary material. Clarity is required in terms of what “continues to be provided with” means. QRN would like clarity that if the Operator notifies QRail with regard to any amendments and notices received by the Authority and provides documentary evidence of Accreditation when requested in writing, will this meet the “continues to be provided” obligation. If so, this should be clarified in the proposed SAA.</p>	
5	Payment Obligations – Queensland Rail Cause	4	<p>QRN's issues in relation to clause 4 relate to definition of QRail Cause and liability in relation to QRail Cause.</p> <p>QRail has changed the definition of QRail Cause from “any other action by QRail which directly resulted in the Infrastructure not being available” to “any other action by Queensland Rail other than Queensland Rail exercising a right or complying with an obligation in accordance with this agreement, the Access Undertaking or any applicable Law”. In addition QRail has limited the availability of relief from take or pay under QRail Cause where the infrastructure is unavailable as a result of any other person. Both of these changes result in a reduction in QRail's obligation as a Railway Manager to make the infrastructure available. For example under this SAA QRail is able to impose a speed restriction, and under this definition of Q QRail Cause if that speed restriction results in delays in Train Services such that all contracted Train Services can not be met by QRail, there is no relief from Take or Pay for the Operator.</p> <p>QRN does not understand the need to include in the definition of QRail Cause “complying with any applicable Law”. As the railway manager, QRail should clearly state the circumstances in which an existing law may impact on the infrastructure availability. Likewise the SAA should reflect the specific provisions of the undertaking that will impact on the TSE so that Operator's are able to clearly understand the risk they are</p>	<p>QRail Cause definition to revert to previous position and include a provision for the parties to agree decisions around QRail Cause at least monthly.</p> <p>Remove clause 4.1(c)(i) and see discussion on Indemnities and Liabilities later in this table for more detail.</p> <p>Delete “in any way” and replace with “primarily”</p> <p>Delete following words from paragraph (c) “...other than Queensland Rail exercising a right or complying with an obligation in accordance with this agreement, the Access Undertaking or any applicable Law...”</p> <p>Delete “or any other person.</p> <p>After “(other than Queensland Rail” insert “or any Related Party”</p>

Item	Issue	Clauses	Description	Suggested Resolution
			<p>contracting to.</p> <p>Whilst QRN understands the need for QRail to have flexibility in order to manage the network, the concept of balance would require that in an environment where Operators pay 80% of access charges if they are unable to use the contracted services, it is reasonable to expect the railway manager to provide relief if any item in their direct control results in the infrastructure not being available.</p> <p>In line with this, QRN believes that the circumstances where any other person may impact on the availability of the infrastructure falls within corridor security issues that are the responsibility of the railway manager.</p> <p>QRail have included in clause 4.1(c)(i) a statement that where the access charges are adjusted for QRail Cause, no other remedy or Claim against QRail in relation to QRail Cause is available. It is QRN's view that the right for relief of Take or Pay due to QRail Cause is not mutually exclusive to the right to make a Claim or seek another remedy for breach of the agreement. In the first instance, QRail Cause deals with short term issues, whereas Claims are generally for issues that are sustained over a longer term or result in a significant financial impact. In addition if the railway manager has breached the agreement or was negligent the potential impact may be greater than the take or pay and as such this clause essentially imposes another cap on QRail's liability to what is an even more risk averse position than the current arrangements which are seen as very low risk.</p> <p>See discussion in Section 1 concerning QRail's Access Offering.</p> <p>Also see discussion below in this table on Indemnities and Liabilities.</p>	
6	Payment Obligations – Reciprocity of interest payable for disputed amounts	4.5	QRail has failed to ensure that 4.5 applies equally to QRail and an operator. As worded it does not appear to cover the situation where a dispute is resolved in an operator's favour and QRail must credit the operator. In such a situation QRail should have a reciprocal obligation regarding the payment of interest on the amount in question.	Change heading of 4.5 to "Interest on Overdue and Overpaid Payments" and change the wording to make the obligation to pay interest reciprocal (as in 2008 SAA).

Item	Issue	Clauses	Description	Suggested Resolution
7	Maintenance of the Network – Infrastructure Standard	5.1(a)	<p>Comments in section 1 on the QRail Access Offering in relation to the maintenance of the network are applicable here. QRN has issues with the removal of maintenance obligations on QRail's part that are linked to objective rollingstock standards as well as the ability for the operator to operate in accordance with its Train Service Entitlement.</p> <p>In terms of information provision by QRail, previously the operator had an ability to inspect infrastructure prior to commencing operations to assess Standard of Infrastructure and assess operational, environmental and safety risks. There should be significant information available from QRail to be able to assess this risk and this should not derogate from QRail's obligation to provide and maintain infrastructure for operation of Train Services.</p> <p>In addition, QRN's concern regarding the certainty of "System Wide Requirements" is relevant here. The SAA fails to deal with this critical issue.</p> <p>A separate issue relates to the fact that QRail has no obligation to report on the Infrastructure Standard and associated service levels. QRN considers the Key Performance Indicators included in Schedule 5 of ARTC's Indicative Access Agreement (15 July 2008) to be an appropriate benchmark.</p>	<p>Revert to 2008 SAA approach to maintenance of the network obligations upon QRail.</p> <p>Include provisions similar to those in 2008 SAA dealing with "System Wide Requirements".</p> <p>Include key performance indicators in line with ARTC Indicative Access Agreement.</p>
8	Maintenance of the Network – Rail Infrastructure Operations	5.1(b)	<p>QRN considers it unreasonable for QRail to have no obligations to perform Rail Infrastructure Operations (RIO) in accordance with any reference to an Operator's contractual entitlements. See discussion in section 1 concerning QRail's Access Offering and the issue of Train Control decisions needing to be made in accordance with to the NMP and the Operating Requirements Manual (ORM).</p> <p>QRN considers that the NMP and ORM should ensure that QRail must use reasonable endeavours to plan RIO so as to minimise disruptions to scheduled train services.</p>	<p>Revert to provisions in 2008 SAA concerning the imposition of Operational Constraints and make publicly available the Operating Requirements.</p>

Item	Issue	Clauses	Description	Suggested Resolution
9	Maintenance of the Network – Third Party Works	5.1(c)	<p>QRail has no liability for any costs, expenses, losses or damages incurred by the Operator in relation to Third Party Works. This provision contracts away QRail's obligation to provide a safe and reliable network.</p> <p>In permitting Third Party Works, QRail has an obligation to ensure that the Standard of Infrastructure remains appropriate to meet the TSE obligations. In addition, QRail would have an obligation to ensure that Third Party Works do not interfere with the safe operation of the Network under their.</p> <p>5.1(c) does not allow for any Take or Pay relief. Should the third party damage the network, the operator would have no recourse to recovery for damages. This is unreasonable given QRail are solely responsible for the conditions under which they allow access to the Corridor.</p>	<p>QRN would expect to be able to seek reimbursement through QRail with respect to third party works/damage – should be deemed to be a planned possession. Should also include a liability value.</p> <p>Third party works obligations should be subject to QRail's obligations to QRN (and in particular, should at reasonably to mitigate the impact of Third Party Works on Operators) and QRail's accreditation and their own safe operation standards.</p> <p>Where damages are incurred as a consequence of Third Party Works but contributed to by QRail's negligence or default/breach of the SAA, then to the extent of the contribution by QRail, the operator should be able to make a claim. In addition, where the Third Party Works, requires a possession of the network, the Operator should have relief of take or pay.</p>
10	Operational constraints	5.2	<p>Whilst QRN recognises the need for flexibility to manage the network like wise Operators require certainty with regard to the service they are contracting. In the example where an operational constraint, such as a speed restriction, results in TSE's not being met the Operator should have recourse to QRail through both relief of take or pay and where the Operational Constraint is a result of a breach by QRail, QRail should be liable for any Claims in the event QRail was in breach or negligent be able. Also see item 7 in relation to key performance indicators.</p> <p>The requirement of the Operator and QRail to provide forecast information is now included in the ORM. QRN believes the obligation to provide this information should be mutual, that is either both parties "will</p>	<p>Include recourse to QRail in the event Operational Constraint results in TSE not being met.</p> <p>In the definition of Urgent Possession and Emergency Possession, delete "intends to carry out" and replace with "must carry out".</p> <p>Amend the ORM 7.1(c) to reflect that QRail must provide the Operator with a forecast and delete from"...that may, in</p>

Item	Issue	Clauses	Description	Suggested Resolution
			<p>use reasonable endeavours” or both parties “must provide”. In addition the obligation on QRail should be to provide a forecast of all construction or maintenance work proposed to be carried out, rather than what in QRail’s opinion will materially adversely affect the Operator’s operations.</p> <p>In line with the discussion in 3.8.1.1 the definitions of Urgent Possession and Emergency Possession should be amended to create a greater obligation on QRail in relation to the time allowed to rectify the fault.</p>	QRail’s opinion...”
11	Train Control	5.3	<p>As discussed in section 1, QRail “must” exercise Train Control by issuing a Train Control Direction and QRail must only issue Train Control Directions in accordance with the NMP.</p> <p>Train Control includes “monitoring” and “proper, efficient and safe operation and management of Network”. As referred to in section 1, this appears to be a broadening of scope for Train Control compared to the 2008 SAA wording which was “have regard to safe conduct of rail operations”</p>	<p>5.3(c)(i)-(ii) should be reflected in the NMP.</p> <p>5.3(d)(ii)-(iv) need to have an obligation to ‘must ensure’ and ‘must notify’.</p>
12	Communication Systems	5.3(d)(ii)(A)	Requirement to use communication systems that comply with Operating Requirements. Operating Requirements may change with no protection for Operator under “system wide changes clause”	Reintroduce obligations regarding System Wide Requirements
13	Passenger Priority clause	5.3(e)	<p>As discussed in section 1, QRN doesn’t consider this clause to be an accurate reflection of the Passenger Priority legislation. In addition, this level of detail is more appropriate in the NMP.</p> <p>QRN considers it reasonable that the SAA includes an acknowledgement by the Operator that QRail has an obligation to comply with the passenger priority legislation.</p>	5.3(e) should be removed and reflected in the NMP and should reflect the position at law.
14	Compliance	5.4	Under 6.2, the Operator has an obligation to act in accordance with Prudent Practices. It is reasonable, in QRN’s opinion for this to be a	Include an obligation to act in accordance with Prudent Practices.

Item	Issue	Clauses	Description	Suggested Resolution
			mutual obligation.	
15	Written consent if Train Services other than as per agreement	6.1	<p>The obligation is for the Operator to obtain prior written consent to Operate Train Services other than as per the agreement. This clause is potentially restrictive in relation to day of operation changes and would benefit by being subject to cl 6.4, which is the ability to make alterations to Train Services, as well as having a materiality threshold for the requirement to have prior written approval.</p> <p>QRN would like clarification on what is considered written consent. For example does the network controller providing a written approval of the train manifest constitute prior written consent.</p> <p>QRail's base service obligation is not clear. The definition of Train Services is a circular reference.</p> <p>See discussion in section 1 concerning QRail's Access Offering for more detail.</p>	<p>It would be beneficial for QRail to clarify that an Operator does not need to seek written consent if complying with a Train Control Direction. Additionally. This variation should not require consent of QRail if consistent with Train Route Acceptance.</p> <p>Obligations of QRail to be defined within agreement. Definition of Train Service in 26.1 should reference the Train Service Description rather than clause 6.1 so that it reads: "...means the operation of a Train in accordance with a Train Service Description....."</p> <p>Clarification is provided regarding what is considered written consent.</p>
16	Operator Compliance prior to commencing services – Operating Requirements Manual	6.2	<p>Operating Requirements Manual (ORM) proposes the following which QRN:</p> <p>6.2.1(b) Operator is obligated to not operate Train Services unless the Operator's Controller is contactable at all times. There may be circumstances either the train service is not on the Network or there is dark territory in which case the obligation on the Operator should be to have in place an alternate contact and procedure.</p> <p>6.2.2(e) Obligation exists for Train Crew to communicate with Operators Controller, and no obligation for QRail Train Controller to relay messages from Train Crew to Operator's Controller if unavailable for a period of time, this should be subject to safety considerations;</p> <p>6.3(b)(i)(B) Provisioning requirements are now required to be agreed in writing prior to 15 minutes prior to departure time - as per comments</p>	

Item	Issue	Clauses	Description	Suggested Resolution
			<p>above QRN would like clarification that if this information is provided with the train list, does that meet the requirements.</p> <p>6.3(b)(ii)(B) There is now a requirement within the Train List for Operators Controller to advise under which Access Agreement the Train is operating, as opposed to which Train Route Acceptance – QRN would argue that the TRA should nominate the Access Agreement and should remain that the TRA is the operational document that links to the commercial document.</p>	
17	Operator Compliance prior to commencing services	6.2	<p>The following must be observed and complied to by the Operator:</p> <p>(a)(i)(H) the Access Undertaking; QRN would like clarification on what in the Undertaking is required to be complied with prior to commencing services – given removal of the ringfencing arrangements. The Access Agreement should contain all of the applicable obligations.</p> <p>(b)(iii) The Operator must not doing anything which may be a material nuisance or annoyance or cause disturbance to QRail or occupiers or users of the Network or land adjacent to the Network in exercising rights under this agreement. This is unacceptable and the risk can be adequately managed through the IRMP.</p> <p>(b)(iv) Operator is obligated to not omit to do anything that would cause or contribute to the Network not being clean and presentable, well maintained etc. The proposed obligation may go to such things as keeping wagons that are considered unsightly off the network. This is unacceptable.</p> <p>(b)(v) Operator is obligated to not allow anything or substance to be deposited on Network that is not expressly required by Operating Requirements and Train Control Directions. Once again this risk should be dealt with in the IRMP. Generally the obligation is to ensure rubbish or toilet waste is not deposited on the Network – which is a more balanced requirement.</p> <p>(b)(viii) &amp; (ix) the obligation to operate Rollingstock should be in line with the objective and measurable standards such as the Rollingstock</p>	<p>(a)(i)(H) should include to extent applicable and clarify that where there is conflict the Access Agreement has precedence over Access Undertaking</p> <p>(b)(iii) should be removed as specific risks should dealt with under specific provisions of IRMP .</p> <p>(b)(iv)-(v) amended or remove as obligations regarding these provisions will be considered in 6.2(a)(i)(B) or IRMP and should have obligation to notify only if aware.</p> <p>6.2(b)(ix) should consider mirror provisions in existing standard access agreement (clause 5.8)</p> <p>6.2(c) should consider the obligations to be imposed on QRail to notify the operator of non-compliance and amend so that notification is “as soon as practicable”.</p>

Item	Issue	Clauses	Description	Suggested Resolution
			Interface Standards (see section 1 or cl 6.7 below for further comments)  (c) the obligation should be to advise QRail “as soon as practicable” rather than “immediately”.	
18	Compliance with scheduled time	6.3	<p>It is QRN's view that the intent of this clause should be for both parties to use their reasonable endeavours to ensure that Train Services comply with the Scheduled Times. The obligation on the Operator to operate train services only in accordance with the Train Service Description is already addressed in 6.1.</p> <p>In addition, this clause should provide clarification on what is deemed to be “in accordance with the Scheduled Time”. QRN considers a buffer of 15 minutes for freight (coal and non-coal) trains a reasonable approach and is in line with like jurisdictions..</p>	<p>Consideration should be given to reasonable variation to Scheduled Times (eg 15 minute variance to schedule similar to ARTC)</p> <p>Obligation should be to use ‘reasonable endeavours’ as per existing SAA, not ‘must only’ as per proposed SAA.</p> <p>Schedule Times should consider impact of operational constraints</p>
19	Alterations to Train Services	6.4	<p>(a)(ii)(B) Includes requirement that QRail’s reasonable endeavours to provide an alternative Train Service where an Operator is not able to meet Scheduled times is subject to whether QRail would incur additional costs or expenses. This should be a mutual obligation where QRail seeks to change the Scheduled Service for any reason. In addition, there should be a materiality threshold for costs incurred.</p> <p>(b) Proposes an obligation on the Operator to immediately notify whether they can accept an alternative Scheduled Time. Whilst this may be appropriate where the Operator notifies QRail immediately prior to the Scheduled Time, where notification is provided or where Scheduled Time variation is at QRail’s behest it is QRN's position that there should be subject to bona fide consultation. Notwithstanding this, alterations to Train Services should be subject to the NMP and the applicable protocol.</p> <p>(c) in line with the discussion above the timeframe for acceptance must be reasonable.</p>	<p>6.4(ii)(B) Reference to ‘additional costs’ should be changed to ‘material costs’ to prevent frivolous claims for costs.</p> <p>6.4(b) QRN proposes the removal of ‘immediate acceptance’.</p> <p>If Alternative Scheduled Time not reasonably acceptable to both parties available then Train Service should be cancelled by giving notice to other party. This is required to cover the risk that QRail imposes a possession without bonafide consultation – acceptable that not a Claim (except negligence or wilful default) but should be relief of Take or Pay obligation.</p>

Item	Issue	Clauses	Description	Suggested Resolution
20	Operator to Supply Information	6.5	<p>The obligation in 6.5(a) to comply with QRail's requirements should be subject to a reasonableness test.</p> <p>In the section 7 of the ORM, the Operator is required to advise QRail of a number of contacts. It is QRN's view that this information should be included in the Access Agreement for transparency.</p> <p>Please note previous comments with regard to system wide requirements.</p>	<p>Needs to be a test of reasonableness, rather than 'absolute discretion'</p> <p>Include schedule to agreement for contacts to be provided.</p>
21	Queensland Rail may supply data	6.6	<p>Under clause 6.6 (b) &amp; (e), if QRail makes decisions on the information affecting Operation of the Train Services or will be compiled and used in reports made publicly available by QRail then the Operator should be able to request access to that information and be able to rely on it.</p> <p>It is QRN's view that both parties must warrant the accuracy of all information supplied or used to make decisions.</p> <p>(c) The provisions here should relate to all Confidential Information. Therefore QRN recommends the Confidential Information clause be expanded to address these points.</p>	<p>QRN proposes the inclusion of obligation on QRail to provide rail specific data with respect to the operator that can be used for any purpose and where data is provided by QRail the obligation should exist for QRail to have validated that information (including performance related data).</p>
22	Authorisation of Rollingstock & Rollingstock Configurations	6.7	<p>Clause 6.7 does not define obligation for QRail to authorise Rollingstock Configuration Certificate. QRN's position is that the obligation should be on QRail to establish the Rollingstock Interface Standard and then there is a joint obligation on QRail and the Operator to implement control measures and assess the Rollingstock against the Rollingstock Interface Standard.</p> <p>6.7(a)(i)(B) should reflect an objective test to QRail's satisfaction with dispute resolution available if an agreement can't be reached.</p> <p>6.7(b)(iii) It is QRN's view that a distinction should be made between a permanent variation to the Rollingstock of train configuration and a temporary one. This clause incentivises QRail to amend Access Charges where there is a temporary reduction in the volumes carried in</p>	<p>Obligation on QRail should be to 'authorise' rather than 'acknowledge/be satisfied' the Rollingstock Configuration Certificate as per the existing agreement.</p> <p>6.7(a)(i)(B) is amended to reflect an objective test rather than QRail's rather than at QRail's absolute discretion.</p> <p>6.7(a)(ii) QRN proposes obligation should be on QRail's to issue certificate not for Operator to obtain, Operator's obligation is not to operate without having</p>

Item	Issue	Clauses	Description	Suggested Resolution
			<p>order to maintain a fixed revenue stream. In addition, the Operator should be incentivised make decisions to maximise throughput based on the terms and conditions negotiated.</p>	<p>certificate.</p>
23	Amendments to Operating Requirements	6.8	<p>6.8(b) provides QRail the ability to amend Operating Requirements Manual and is only required to consult with the Operator and provide reasonable notice prior to making amendments if they will have a material adverse impact on operator.</p> <p>6.8(e)(ii) provides the Operator 10 days to amend their processes following a change to QRail's Operating Requirements. This period should be dictated by what is reasonable given the changes to be made.</p> <p>QRail have removed the System Wide Requirements. The current SAA (cl 5.10) limited the ability of QRail to amend Network Management Principles and Safe Working Procedures. Given these are no longer explicit it is QRN's position that removal of this existing obligation to consult and where appropriate seek agreement form the Operator results in the reduction in certainty of the access rights being contracted.</p>	<p>QRN proposes the inclusion of provisions similar to the existing SAA 5.10 and that of ARTC where by there is an obligation on the Network Provider to ensure reasonable endeavours to minimise disruption to Operators Train Services and to ensure the obligation on the Operator is to not withhold consent unreasonably in instances where agreement is required (including compensation).</p> <p>If an amendment to the Operating Requirements results in a material adverse impact on the Operator. The obligation should be to implement only if QRail is able to demonstrate a benefit and the Operator is compensated for cost (eg by safer operations or financial compensation).</p> <p>The cost-benefit assessment should not be limited to QRail but to the wider supply chain, unless directly complying with legislation (versus interpretation of legislation). QRN's position is that there should be an obligation of QRail to consult on any changes to the Operating Requirements Manual and that the dispute provisions under the access agreement would apply.</p> <p>QRN's position is that 10 business days should be amended to reflect a period</p>

Item	Issue	Clauses	Description	Suggested Resolution
				that takes into account the circumstances and the impact of the Operating Requirements amendment.
24	Entering and exiting the network	6.9	<p>Operator is solely responsible and bears the cost and risk of obtaining and maintaining any rights to use Private Infrastructure.</p> <p>The definition of Private Infrastructure includes adjoining networks. This clause needs to reflect the management of through running trains</p>	QRN proposes that QRail has an obligation to not unreasonably restrict access from the adjoining network and ensure that communication protocols between network providers exist to minimise disruption to Operator Train Services during time of Planned Possessions.
25	Interface Risk Management	7	<p>7(a) imposes an obligation on the Operator to not do anything, or permit anything to be done, which may give rise to Interface Risks that are not addressed in the IRMP. This should be a mutual obligation.</p> <p>Under the Operating Requirements Manual:</p> <p>2.2(b)(ii)(D) imposes an obligation on the Operator to identify environmentally sensitive areas on QRail's network, for example, waterways. It is QRail's obligation as the Railway Manager to identify environmentally sensitive areas on or near the Network.</p> <p>2.3 stipulates the risks to the environment that must be considered in any Interface Risk Assessment. The clause only considers what must be included by the Operator. For example, issues with regard to noise are a product of the rail and wheel interface. As such, QRail has an obligation to mitigate the risk to the same extent as the Operator.</p> <p>The Interface Risk Management is a joint assessment and both the SAA and the Operating Requirements Manual should better reflect this.</p>	QRN proposes that the Operating Requirements Manual should be amended to reflect joint responsibility of the parties to identify risk and have the appropriate measures in place.
26	Dangerous Goods	8.1	Given the Standard Access Agreement is specific to coal, QRN has no objection to this clause. However as the SAA will be used as precedent for non-coal freight, some of which is classified as Dangerous Goods,	Reintroduce clause 8.3 of current SAA.

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			QRN believes the current SAA provides greater transparency on the conditions to be met in the transportation of Dangerous Goods.	
27	Environmental damage	8.2	It is QRN's view that the obligations on the Operator with regard to Environmental Damage should be equivalent to the legislative obligations and reflected in the Interface Risk Assessment. Any costs or attribution of damages should be the result of an incident investigation.	Clarify the intent of cl 8.2.
28	Operator's Emergency Management Plan	8.3	QRail have removed some of the prescription in relation to the Operator's Emergency Management Plan (OEMP) and the associated standards. Providing there is a requirement to be met that both parties are satisfied that the OEMP complies with this agreement and there is an ability to have recourse to dispute resolution, QRN accepts this approach.	Amend the clause such that QRail is required to be satisfied that the OEMP complies with this agreement.
29	Obstructions	8.4	It is QRN's view that an Operator should only be liable for cost or loss in relation to the removal of an obstruction to the extent it is caused by the Operator's negligent act or omission.  This clause requires clarification of the ability of an Operator to refuse to use their equipment to remove another Operator's obstruction unless QRail accepts estimated costs of doing so.	8.4 (d) Amend the last line to read "to the extent caused or contributed to by the negligent act of omission of the Operator in removing any rolling Stock."  Include ability of Operator to refuse to provide assistance to another Operator if QRail does not accept the cost estimate of doing so.  Amend 8.4 to be subject to the IRMP..
30	QRail notification of Network Incident	8.5(a)	QRail will notify the Operator of any Network Incident that may reasonably be expected to materially adversely affect the Operator's Train Services.	QRN's position is that this clause should address QRail requirement to include in a notification the anticipated effect on the relevant Train Service and update the Operator from time to time as more information becomes available.

Item	Issue	Clauses	Description	Suggested Resolution
31	Operator notifiable events	8.5(b)	<p>8.5(b)(i) the definition of Incident includes Environmental Harm involving activities of Operator which duplicates the obligation to notify under 8.5(b) (ii) of any Environmental Harm.</p> <p>The Operator’s obligation should be to notify QRail in the event of a failure to comply with the IRMP as this addresses the “reasonably foreseeable risks” and the agreed controls in place.</p>	QRN position is that the IRMP should define the responsibilities in relation to the identified risks.
32	Inspection and audit rights	9	<p>QRail may at any time give a notice to the Operator requiring an inspection for the purpose of assessing the Operator’s compliance with this agreement or whether the Operator wagons are overloaded or not loaded safely.</p> <p>Previously, the inspection for compliance was in relation to the IRMP (including the Rollingstock Interface Standards), authorised Rollingstock Configurations, Safeworking Procedures and Safety Standards. These documents deal with the agreed levels of compliance in relation to the provision of Access and operation of Train Services. The proposed agreement does not recognise the role of the IRMP in managing risk.</p> <p>The agreement does not include a process regard notice or the grounds upon which QRail requires the inspection.</p> <p>To provide reasonable prior notice and mutuality or requirement to specify what the audit is for</p> <p>The agreement does not address the circumstances where QRail should only have rights to inspect when they are unable to determine compliance in any other way, acting reasonably. For example if compliance can be asserted by reference to available reports whether using QRail or the Operator’s information systems.</p> <p>No mutual right of the Operator to Inspect or audit.</p> <p>The cost of an inspection should be at the borne by the party requiring the audit, unless the stated grounds for the audit have been</p>	The provisions in the current SAA should be reflected either in the proposed SAA or the ORM.

Item	Issue	Clauses	Description	Suggested Resolution
			<p>demonstrated to exist.</p> <p>Must include cost provisions and be conducted by a suitably qualified person and/or suitable device(s) (eg calibrated overload detector)</p> <p>Any reports from an Inspection or Audit regarding compliance with IRMP should be made available to the inspected party.</p>	
33	Assumption of risk	10.1	<p>As currently drafted, this clause is very broad. Why should the Operator accept all risks and liabilities arising out of the agreement? The risk allocation in the Access Agreement needs to sit with the party which is best able to manage it. QRail, as an expert in railway infrastructure management and maintenance, is best placed to manage a number of risks imposed on the Operator under the proposed SAA.</p>	Delete this clause.
34	Operator's indemnity	10.2	<p>QRN notes that the explanatory document does not provide a rationale behind the risk and indemnities. On the face of it, it appears Q Rail is trying to exclude liability for absolutely everything under the agreement.</p> <p>The Indemnity as currently drafted is very broad and one-sided. There is no reciprocal indemnity from QRail as is under the current SAA.. In addition, the current SAA does not indemnified QRail for breach and QRN does not consider it reasonable to do so now. Without an indemnity, QRail still has the ability to sue QRN for breach of contract.</p> <p>It is QRN's view that the principles to be included should reflect clauses 14.2 and 14.4 of the current SAA. To that extent, this clause requires redrafting to better reflect this.</p>	<p>Include reciprocal indemnity from QRail:</p> <p>“Queensland Rail indemnifies the Operator against all Claims which may be brought against or made upon the Operator and all losses which the Operator suffers or incurs in respect of property damage, personal injury or death to the extent caused, or contributed to, by any negligent act or omission by Queensland Rail or Queensland Rail’s Associates.”</p> <p>Amend (a) to read:</p> <p>“in respect of property damage, personal injury or death to the extent caused, or contributed to, by any negligent act or omission by the Operator or the Operator’s Associates.”</p> <p>Delete 10.2(b) – this is too broad. QRN</p>

Item	Issue	Clauses	Description	Suggested Resolution
				<p>should only be liable if we are negligent, and this is would be covered in the suggested amendment to (a) above.</p> <p>Delete 10.2(c) – QRN would like to understand the rationale for the change in risk position from the current SAA</p> <p>Delete 10.2(d) and 10.2(e)</p>
35	Operator Responsible for Operators Associates	10.4	Clarify the intent of of clause 10.4. Specifically, is this clause intended to allow the Operator to subcontract its rights and/or obligations under the agreement <u>to any person</u> ? It is unclear as to whether this clause is intended to replace clause 14.11 of the existing SAA (Relationship with sub-contractors) – please clarify.	Clarify the intent of of clause 10.4 and redraft where appropriate.
36	General caps on liability	11.1	Under this clause QRail have proposed a cap on the aggregate liability of QRail to \$20 million per year, which is not a reciprocal right for the Operator. This cap on liability is very low. QRN suggest that liability for both parties should be uncapped. Alternatively if a cap is to be introduced a methodology should be adopted, rather than a fixed value, to allow for a commercially appropriate allocation of risk.	(a) Remove the cap on liability or adopt a methodology that can allow each contract to be assessed on its merits..
37	Consequential loss	11.2	<p>The Operator is liable for consequential loss incurred by QRail arising out of any claim by a third party including an Operator’s customer. This is a significant departure from the risk position in the existing SAA and is contrary to the position in like jurisdictions. QRN cannot under any circumstances accept liability for consequential loss.</p> <p>In addition, QRail have removed QRail’s liability for consequential loss in relation to inspection and audits and suspension. The inclusion of this liability of QRail provided balance to QRail’s rights in relation to inspection and audit and suspension. .</p>	<p>In 11.2(a), delete the words “Subject to clause 11.2(b)”.</p> <p>Delete clause 11.2(b).</p> <p>Include in cl 9 (Inspection and Audits) and cl 12 (Suspension) QRail liability for Consequential Loss.</p>

Item	Issue	Clauses	Description	Suggested Resolution
38	Exclusion of liability	11.3	<p>On the face of it, QRail is attempting to exclude liability in relation to all obligations under the agreement. This is very unbalanced and is a significant change in the risk position compared with the current access agreement.</p> <p>QRail should assume a level of performance risk that provides certainty to Access Holders with regard to the contracted entitlements.</p> <p>QRN considers a balanced approach to the items exclusion of liability is as follows:</p> <p>11.3(a) in relation to liability for loss of product, it is reasonable that QRail liability should be limited to where they are negligent or in breach of the agreement;</p> <p>11.3(b) Claims in respect of delays to Train movements should be reciprocal and reflect the degree of control by the defaulting party. (see further discussion at 11.6);</p> <p>11.3(c) given the risk imposed on the Operator at 10.1 and in relation to the infrastructure standard in cl 21, this clause results in the Operator taking risk for things under the control of the railway manager. This clause should be deleted;</p> <p>11.3(d) QRail liability in relation to Obstructions 8.4(b) or (c) should be limited to QRail negligence.</p> <p>11.3(e) is too broad an exclusion and should be deleted; and</p> <p>11.3(f) the Operator should have the right to rely on Data provided by QRail as such this clause should be deleted.</p>	<p>As per comments above in relation to clause 10.2, add a reciprocal indemnity so that QRail is indemnifying the Operator for negligence.</p> <p>Delete 11.3(c), (e) and (f)</p> <p>Add an additional clause that states that any exclusion of liability does not apply to or limit any of the following liabilities:</p> <p>(b) liability to the extent Queensland Rail is paid or indemnified by an insurer under an insurance policy required by the Agreement, or is entitled to be paid or indemnified for the liability by such an insurer;</p> <p>(c) liability to the extent Queensland Rail would have been entitled to be paid or indemnified for the liability by an insurer under an insurance policy required by the Agreement, but for a failure by Queensland Rail to effect and maintain the insurance policy as required by the Agreement;</p> <p>(d) liability to the extent</p>

Item	Issue	Clauses	Description	Suggested Resolution
				Queensland Rail recovers compensation for its liability to QR National from another person (including any subcontractor and whether by way of indemnity or otherwise) which compensation will be net of the costs of recovery incurred in the recovery action.
39	Full details of Claims	11.4(a)	It is unreasonable to require Operators to provide full details of the claim to QRail within 12 months of the occurrence of the event. Generally, an Operator can provide notice of its intention to make a claim 12 months after the occurrence but is unlikely to be in a position to submit all supporting details and data until the completion of all investigations.	Amend 11.4(a) to read “notice and provisional details of the Claim have been given to the other party ...”
40	Claim threshold	11.4(b)	In the current access agreement the minimum threshold for a claim is \$50,000. This has increased to \$500,000. QRN does not understand the rationale for increasing this threshold and changing the risk position.	Reduce threshold to \$50,000.
41	Claims in respect of non-provision of access	11.6	<p>As per comments in 11.3 above, QRN is of the view that the current SAA provides a balanced approach in relation to Claims in respect of the non-provision of access and in respect of delays to Train Movements. This is demonstrated by the reciprocal rights to both parties in relation to claims in respect of delays in Train Movements. It is QRN's view that clause 11.3(b) should be deleted and replaced with 15.4 from the current SAA and clause 11.6 should be deleted and replaced with 15.3 of the current SAA.</p> <p>15.3 of the current SAA, provides transparency on the cause of the non-provision of access, that is it is directly related to whether QRail have made the Infrastructure available for the Operator to operate the train service at the Scheduled Time or a reasonable alternative time.</p>	<p>Delete 11.3(b) and replace with 15.4 of the current SAA.</p> <p>Delete 11.6 and replace with 15.3 of the current SAA.</p> <p>Amend the new clauses to reflect that the claim event is “not predominantly attributable” to reasons listed in the new clause.</p> <p>Reflect in the agreement that QRail is liable for negligence or breach in relation to the Interface Agreement with the</p>

Item	Issue	Clauses	Description	Suggested Resolution
			<p>Replace 11.6(a) with 15.3(a) of current SAA.</p> <p>Previously if a claim event was attributable to Major Periodic Maintenance the Operator would not have a right to make a claim. Under 11.6, the Operator will not be able to make a claim in the event of any possession, including urgent or emergency possessions, any construction, operational or maintenance activity or any inspection or investigation. This effectively results in QRail not being accountable for the provision of access.</p> <p>With regard to Private Infrastructure, given the Access Provider should have an Interface Agreement, as discussed in section 2 above, in the event that QRail is in breach of that Interface Agreement, the Operator should have recourse to QRail if that breach results in the non-provision of Access or delay in Train Services.</p> <p>Notwithstanding the above, it is QRN's view that the intent of the change in wording in the first in wording in the first paragraph of the clause should be clarified. That is "and shall only have a claim to the extent that" versus "shall only have a claim to the extent that each of the following is satisfied". It is unclear as to whether QRail have intended to change the risk position or not.</p>	<p>adjoining network owner.</p>
42	Suspension	12	<p>The provision, as presently drafted, provides QRail with the option of either electing to suspend or terminate the AA for any of the events listed in clauses 13.1(a) to (j).</p> <p>The current SAA prescribes a number of "material" circumstances which may lead to suspension and addresses any remaining "default of due performance" in 19.1(x) – allowing that for a right of suspension to exist under 19.1(x) it must continue for 30 days after a notice from QRail of the default. The proposed SAA is not as prescriptive and seeks to address what isn't listed in both 12.1(a)(iii)(B) and 13.1(a).</p> <p>It is QRN's view that the current SAA provides greater certainty to Operators of what circumstances might lead to suspension together with a reasonableness in relation to what is "material". In addition, there are a number of circumstances where the current SAA acknowledges</p>	<p>Include clause that QRail must first exercise its rights under suspension prior to exercising its rights of termination.</p> <p>Prescribe the circumstances that will lead to "material default".</p> <p>Limit QRail's predictive ability to breach of safety considerations only.</p> <p>Include ability by Operator to make a claim against QRail if rationale for suspension is not reasonable.</p>

Item	Issue	Clauses	Description	Suggested Resolution
			<p>that the trigger for suspension is whether the default results in another Operators entitlements being adversely affected or has caused an increased risk to the safety of any person or material risk to property. It is QRN's view that the Suspension (and Termination) clause should more clearly denote what would be considered a material breach resulting in suspension (or subsequently termination).</p> <p>By including that a right of suspension is available where it is QRail's opinion that an Operator will, or intends to fail, to comply with the circumstances outlined in 12.1(a)(iii), the proposed SAA provides QRail with an almost unfettered right to suspend the Operator's rights under the access agreement. This is unacceptable, the predictive ability of QRail resulting in suspension should be limited to safety considerations.</p> <p>As per previously, in the event the rationale for suspending the Operator's rights are not reasonable, the Operator should be able to make a Claim against QRail that includes Consequential Loss.</p>	
43	Termination by QRail	13	<p>The current SAA provides that terminating events are generally an escalation of the events that result in suspension. For example, under the current SAA, if a default in payment continues for 7 days it creates a right of suspension whereas the default must continue for 30 days before it is a terminating event<sup>43</sup>. The proposed SAA does not differentiate between suspension and terminating events.</p> <p>QRail ceasing to hold the Sublease or any other Land Tenure would be a material default, impacting on QRail's ability to perform or comply with this agreement and as such in the event of this occurring the Operator should have the right to terminate, not QRail. See also discussion in</p>	<p>Differentiate between material events that give rise to suspension and those that give rise to termination.</p> <p>Include clause that QRail must first exercise its rights under suspension prior to exercising its rights of termination.</p> <p>Delete 13.1(d) and add to 13.2</p>

<sup>43</sup> Queensland Rail, "2008 Undertaking, Operator Access Agreement Coal", [www.queenslandrail.com.au](http://www.queenslandrail.com.au), cl 19.1 and 20.1

Item	Issue	Clauses	Description	Suggested Resolution
			relation to clause 25.18.	
44	Termination by the Operator	13.2	<p>The proposed SAA has removed the grounds for termination by the Operator in the event of cancellation of QRail's accreditation (clause 20.2(b) current SAA).</p> <p>Clause 13.2(c) adds a further condition to what is in the current SAA by limiting the Operator's right to terminate if QRail fails to perform under the agreement only in circumstances where QRail's liability is not limited or excluded or where it is not otherwise liable.</p>	<p>Restore the accreditation grounds for termination.</p> <p>Delete clause 13.2(c) from "other than where this agreement ...".</p>
45	Remedy	13.3	<p>In order to reduce the potential for dispute, QRN would favour amendments to clause 13.3(a) that specify the minimum reasonable periods, unless otherwise agreed, to remedy the event.</p> <p>13.3 (b) limits compensation payable by QRail to any limits and exclusions of liability under this agreement. In addition QRail have removed the clause that states termination does not prejudice a party's right to make a Claim or recover damages or avail itself of other remedies under this Agreement or at Law. QRN believe a more balanced approach is to delete 13.3(b) and replace with 20.4(a)(i) from the current agreement.</p>	<p>Insert specific timeframes rather than "reasonable period" in clause 13.3(a)(i)</p> <p>Delete 13.3(b)</p> <p>Reinstate 20.4(a)(i) from current agreement.</p>
46	Termination for Change in Control	13.4	Does not include an exception for shares and publicly listed company.	Should include exception for shares in a publicly listed company (ie be consistent with clause 21.2(d) of the existing SAA).
47	Obligations and other rights upon termination or expiration	13.5	13.5(b) is effectively a survival clause and has already been included in clause 25.14.	Delete 13.5(b) and refer to the survival provisions in clause 25.14 (which already includes a reference to clause 13.5).
48	Insurance	14.1(c), 14.3	QRail have included provisions that require operators to enter into a co-insured agreement with QRail. It is QRN's view that it is more	14.1(c)(i) & 14.3 Delete "each an Insured Party" and replace with "and noting

Item	Issue	Clauses	Description	Suggested Resolution
		and 14.8	appropriate for Operators to obtain insurance noting QRail's interest as an interested party only.  QRN notes that clauses 14.3(a)-(c) would not be required for a co-insured agreement.	Queensland Rail's interest as an interested party"  Delete 14.8
49	Insurable pollution damage	14.1(c)(iii)A	For pollution damage to be an insurable event, it must be both (a) sudden and accidental and (b) must result in personal injury or property damage.	Delete the words "without limitation" in (iii) and in the footnote  Amend 14.1(c)(iii)(A)(2) to read "injury (including death) to any person arising out of or in connection with the Operator's operations and activities on the Network". Delete (B)  Delete 14.1(c)(iii)(B)
50	Requirements in relation to co-insurance	14.1(c)(iv) and 14.1(d)(iii)	The requirement for a maximum deductible for any one claim of \$500,000 impacts on an Operator's ability to organise its insurance programs. The Operator's deductible may change during the term of the access agreement and the Operator's insurer may dictate the relevant deductible	Delete 14.1(c)(iv) and 14.1(d)(iii)
51	Other Insurances	14.1(e)	This clause as currently drafted is too broad.	Amend (e) to read "all other insurances that the Operator or the Operator's agents, consultants, contractors and their sub-contractors are required by Law to hold."
52	Certificates of Currency	14.6(a)	It is not standard practice for copies of insurances to be provided. It is more usual to provide certificates of currency.	Delete "copies of insurances" and replace with "certificates of currency"

Item	Issue	Clauses	Description	Suggested Resolution
53	Security	15	<p>The existing agreement contemplates that a security deposit is not delivered to QRail at the commencement of the contract but gives QRail the ability to require the operator to produce the security in defined circumstances. The requirement proposed by QRail is for security to be provided prior to the commencement of the contract with the ability for QRail to increase the amount of the security during the term of the contract. This creates uncertainty as to total cost of the contract in providing security over the term.</p> <p>Clarification should be provided with regard to when a security would be required by QRail.</p>	<p>Reintroduce clauses similar to existing 2.4(a) and (e).</p> <p>QRail to clarify when a security is required.</p>
54	Return of Security on Expiry	15.1(b)(D); 15.4(a)	It is QRN's view that the security should have an expiry date, and that the term of the security should align to the term of the Agreement. In addition, the security should be returned as soon as practicable on expiry of the agreement.	Security should expire at the end of the agreement. Security should be returned as soon as practicable on expiry of the agreement.
55	Interest payable on Cash Security	15.1(b)(i)	If a cash deposit is provided as security there is no obligation on QRail to pay interest.	Include obligation on QRail to pay interest at a defined rate.
56	Bank Guarantee	15.1(b)(ii)(B)	Rather than a credit rating of "A" or better by Standard & Poor's, the bank guarantee should be issued by an Australian Institution that has an investment grade credit rating.	Amend 15.1(b)(ii)(B) to reflect that the bank guarantee is issued by an Australian Institution that has an investment grade credit rating.
57	Review of Security by Operator	15.3	Operator has no right of review of Security during the term of the agreement	Include right of operator to request a review of the security.
58	Increasing Security	15.3(a)	QRail have the right to increase Security during the term of the agreement, creating uncertainty regarding the total contract cost. QRN would argue the credit risk this clause seeks to address is already	Remove QRail right to increase Security during the term of agreement.

Item	Issue	Clauses	Description	Suggested Resolution
			mitigated by the right to suspend the agreement under a number of circumstances.	
59	Time to deliver replacement Security	15.3(b)	QRail have reduced the timeframe to deliver a replacement security to 5 business days. It is QRN's view that the requirement to deliver replacement Security within 14 days is a more reasonable timeframe.	Revert to 14 days or 10 business days.
60	Adjustment for Changes – Reference Tariff	16.1	Clause 5, Schedule A of the Undertaking provides for the variation of Reference Tariffs. In the AU1 and the SAA the definitions of Endorsed Variation Event and Review Event have changed. It is QRN's view that the provisions in relation to the variation of the West Moreton Reference Tariff should be amended as part of a full review under 3.4.2(b) of the Undertaking and therefore any changes to address price risk should be rejected at this time.	Revert to the previous definition of Endorsed Variation Event and Review Event.
61	Adjustment for Material Change	16.2	<p>QR have proposed that the parties need to meet and agree within 5 business days of Queensland Rail providing notice before then reverting to the dispute resolution mechanism. QRN would argue having to meet by and agree on the same day does not provide an opportunity to negotiate in good faith as is required by the clause. As such, QRN sees benefit in the parties meeting within 5 days but believes additional time should be provided in order to negotiate and considers 20 business days from the time of notice reasonable.</p> <p>In order for the parties to meet and negotiate adjustments it is appropriate that Operators are given full details of the Material Change including:</p> <ul style="list-style-type: none"> <li>• the circumstances that give rise to the Material Change and impact on QRail</li> <li>• the amount by which the Access Charge will be varied</li> <li>• the methodology, data and assumptions used to vary the access charge</li> </ul>	<p>Require the notification regarding the Net Financial Effect of the Material Change to include:</p> <ul style="list-style-type: none"> <li>• the circumstances that give rise to the Material Change and impact on QRail</li> <li>• the amount by which the Access Charge will be varied</li> <li>• the methodology, data and assumptions used to vary the access charge</li> <li>• include information regarding the pricing limits in the Undertaking</li> </ul> <p>Allow 20 business days to reach agreement on Net Financial Effect.</p>

Item	Issue	Clauses	Description	Suggested Resolution
			<ul style="list-style-type: none"> <li>include information regarding the pricing limits in the Undertaking</li> </ul> <p>Under cl 16.2(b) "If a Material Change occurs, then Queensland Rail may notify the Operator giving details of the Net Financial Effect of that Material Change." It is QRN's view that any Material Changes should reflect the direct "efficient" costs of providing the services rather than a general impact on QRail as reflected in the current definition of Net Financial Effect.</p> <p>The definition of Material Change has been amended to include an "Impost Change, a "Change in Law", or a "Change to Credit".</p> <p>Change in Impost appears to align with the previous definition of Change in Relevant Taxes.</p> <p>"Change in law" where previously "Change in Law" only referred to changes in Law it now includes an amendment to or replacement of the Access Undertaking. QRN believes this is unacceptable, as it assumes there is some uncertainty with regard to the terms and conditions of the Undertaking. This is distinct from changes between undertakings as a result of a new regulatory period which should be dealt with if and when those changes are approved/ endorsed by the Regulator as transitional arrangements.</p> <p>"Change in law" also includes a change in the application or interpretation of the Access Undertaking resulting from a decision of a court or other Authority. It is unreasonable to impose this regulatory risk on Operators given they have no control over QRail's interpretation of their own Undertaking. It is up to QRail to ensure the Undertaking is sufficiently clear and workable.</p> <p>"Change in Credit" is a new term and includes changes to "fuel tax credit" and "diesel fuel rebate", QRN would expect that changes to these items would more likely have a material affect on QRail as a Railway Operator than QRail as a Railway Manager. Certainty is required by Railway Operators that the costs of access reflect those costs attributable to QRail as a railway manager and not those</p>	<p>16.2(b) amended to reflect material change in direct efficient costs of providing the services under the Agreement.</p> <p>Include that the Net Financial Effect of Material Changes should reflect the direct "efficient" costs of providing the services under this agreement.</p> <p>Remove (g) and (h) from the definition of Change in Law</p> <p>Provide process by which Access Seekers are provided transparency on the cost allocation methodology to ensure costs applicable to QRail as a railway operator will be incorporated in evaluation of Material Change. In addition to ensure Operator's understand what risk is imposed by this clause, provide examples of circumstances when it would apply.</p> <p>Delete (b) from definition of "Change in Credit".</p>

Item	Issue	Clauses	Description	Suggested Resolution
			<p>attributable to QRail as a railway operator.</p> <p>In addition, "Change in Credit" also includes the situation where any changes to the Transport Service Contracts (TSC) may result in increases to Access Charges. This is a new and unreasonable requirement. QRail is responsible for the negotiation of the TSC and Operators should not bear the risk of issues such as forecasting error or changes in Government expectations with regard to the cost of delivering contracted services. It is reasonable to expect that any change in Government Policy in relation to the support of the Network will take into consideration the impact on the ability of QRail to deliver those services and provide for transitional arrangements in order to provide contractual certainty for Operators.</p>	
62	Dispute Resolution	17	<p>General comments:</p> <p>The proposed agreement has removed the requirement to go to the Loss Adjustor<sup>44</sup>. The Loss Adjustor independently assesses the value of the loss and is integral to the claims process. The Loss Adjustor clause in the current SAA should be reinstated.</p> <p>In order to provide some guidance on the circumstances when it is appropriate for a dispute to go to expert versus, determination by court, QRN believes there may be some value in introducing materiality thresholds.</p>	<p>Restore the Loss Adjuster clause from the existing SAA.</p> <p>Introduce materiality thresholds in relation to resolution by expert or court.</p>
63	Resolution by escalation	17.2	<p>QRail has introduced a 3 step "informal" escalation process. Whilst QRN does not disagree in principle with the inclusion of this escalation process, we do note that the effect of this clause may be either the</p>	

<sup>44</sup> Queensland Rail, "2008 Undertaking, Standard Operator Access Agreement Coal" [www.queenslandrail.com.au](http://www.queenslandrail.com.au), clause 14.8

Item	Issue	Clauses	Description	Suggested Resolution
			duplication of steps completed prior to formal notification of a dispute, or to increase the number of “formal” disputes in order to avoid that duplication.	
64	Resolution of Disputes by Queensland Rail	17.5	This clause gives QRail (acting reasonably) the power to determine any dispute to which the provision applies after considering matters raised by the Operator. Therefore, providing QRail with the power to determine the dispute means the provision lacks independence with respect to dispute resolution.	Delete this clause.
65	Force Majeure Event Occurrence	18.1	<p>Under the drafting of this clause, whilst the party has an obligation to use reasonable endeavours to remove the effect of the Force Majeure (FM) Event there is no requirement to identify in the FM Notice details of those actions.</p> <p>In addition it is only the duty of the Affected Party to use reasonable endeavours to mitigate the affect of the FM event. This should be a mutual obligation.</p> <p>There should be a requirement on the Affected Party to notify the other party that the period of FM has ended and the Affected Party is able to resume full performance of their obligations under the Access Agreement.</p> <p>Prior to termination as a result of the FM, there should be an obligation on the parties to meet to identify alternative viable means to provide the suspended access rights.</p>	<p>The effect of the FM event should be based on obligation “<i>under each Access Agreement</i>”</p> <p>The FM notice should provide <i>full</i> details of the nature of event, impact and detail of actions taken to remove the effect of the FM event.</p> <p>Notification of the FM event should be “as soon as the Affected Party becomes aware”.</p> <p>Include a mutual duty to mitigate.</p> <p>The Affected Party should be required to issue a notice of when the suspension has ended and the full performance of obligations under the agreement will</p>

Item	Issue	Clauses	Description	Suggested Resolution
				recommence.
66	Loss or Damage to Network	18.1(d)	<p>It should be clarified the circumstances in which QRail would not be prepared to finance the cost of repairing damage as a result of the FM event. For example under the current SAA, “<i>cost of repairing is not economic on the basis of the then and committed future utilisation</i>”<sup>45</sup> In addition, given QRail is a GOC and the nature of State Government support in relation to regional economies, prior to any notifications to Access Holders regarding the financing of repairs, QRail should be obligated to use reasonable endeavours to obtain the required financing via Government funding or Disaster relief funding.</p> <p>In order to ensure the repairs are “fit for purpose” there should be an opportunity for all relevant Operators to be consulted on the repairs and to contribute to the cost. To assist in that consultation process, it should be required that the expenditure will meet the prudence of scope, standard of works and cost tests.</p> <p>In relation to 18.1(d)(iii) the agreement to proceed with the repair should be based on reasonable terms and conditions. The current wording leaves open the circumstances where cost overruns may result in the repairs being partly completed unless the Operator pays the increased cost. In addition, given the cost of the repairs are to be paid in advance, the current wording also leaves open the scenario that if the repairs cost less than the estimate QRail is not obliged to refund the difference.</p>	<p>Amend the clause to clarify the test to be met in relation to the repair or replacement as a result of the FM event.</p> <p>Include obligation to use reasonable endeavours to seek Government funding either through the TSC or disaster relief funding.</p> <p>Include objective measures to allow the Operator to assess whether the repairs are “fit for purpose”.</p> <p>Amend clause 18.1(d)(iii) to reflect that the terms should be reasonable, and at a minimum Operators are only required to bear the actual costs.</p>
67	Force Majeure Termination	18.2	No consultation for identifying alternative to termination nor period during which alternative can be identified	QRN would propose 30 day period to identify alternative to termination.

<sup>45</sup> Queensland Rail, “2008 Undertaking, Standard Operator Access Agreement Coal”, [www.queenslandrail.com.au](http://www.queenslandrail.com.au), cl 18.5(a)

Item	Issue	Clauses	Description	Suggested Resolution
				<p>Force Majeure definition (g) to remove accident or accidental damage to any thing</p> <p>Force Majeure Definition (l) to remove reference to severe weather conditions</p> <p>Force Majeure Definition (m) to be removed</p>
68	Reduction in Access Rights	19.1	<p>If Operator fails to operate a Train Service for 7/12 occasions, QRail may give a notice to the Operator deleting the relevant Train Path from the Operator's Train Service Description. The purpose of this clause is to ensure the efficient use of the network and prevent the hoarding of access rights.</p> <p>The activation of this clause should leave QRail indifferent to the result. That is QRail is incentivised to act against hoarding where there is a demand for the access rights and not to make a commercial gain. In order to meet the intent, QRail should have to demonstrate there is a demand for the access rights in question and the Operator should have an opportunity to demonstrate that it has a legitimate demand for the access rights. If the paths are resumed the Operator should not have to pay any relinquishment fee.</p>	<p>Include process for Operator to show there is reasonable demand.</p> <p>Include process for QRail to demonstrate there is an alternative demand for the access rights.</p> <p>Exclude payment of relinquishment fee or any other fee on reduction of access rights.</p>
69	Relinquishment and Transfer of Access Rights	19.2	<p>The Operator has an opportunity to relinquish access rights providing it pays a Relinquishment Fee.</p> <p>There is a requirement to clarify that the Relinquishment Fee is a pro rata of the part of access rights being relinquished.</p> <p>The Relinquishment Fee is the Present Value of the aggregate Take or Pay charges until the end of the Term of the contract, using the WACC as the discount rate. If the remainder of the term is to be used for the calculation of the Relinquishment Fee, then there should be an obligation on QRail to refund on a pro rata basis, that part of the Relinquishment Fee relating to use by an Access Seeker over the same</p>	<p>Include a provision for prorata of partial relinquishment of access rights.</p> <p>In addition, there should be a reduction in the Relinquishment Fee (on a pro rata basis) if within the period to the end of the term those access rights have been provided to another access seeker/operator.</p>

Item	Issue	Clauses	Description	Suggested Resolution
			period until “the end of the Term”.	
70	Representations and Warranties	21	<p>The representations and warranties as presented by QRail are in QRail’s favour only. It is QRN’s view that as a matter of balance there should be mutual representations and warranties, and in addition to those matters already addressed each party should warrant it has and will maintain Accreditation. In line with QRail’s base obligation, it should warrant that it is entitled to grant access to the Operator. In relation to the matters included at:</p> <p>(viii) It is QRN’s view that it is QRail’s obligation to warrant that the standard of the Network is suitable for the purposes of Train Services and that the Rollingstock will safely interface with the Network, providing the Operator complies with the Rollingstock Interface Standard. This is the railway manager’s core expertise. As currently proposed, whilst the railway manager has the expertise and control regarding the standard of infrastructure , QRail have sought to contract out of this obligation and place the risk of the standard of infrastructure on the Operator.</p> <p>(ix) Operator has to warrant that all information it provides to QRail is correct. Each party should be able to rely on the information provided to them, as such QRN would argue this should be a mutual obligation. See further comment in clause 6.6, where QRail have sought to specifically exclude any obligations regarding the ability of the Operator to rely on the data supplied by QRail.</p>	Representations and warranties should be mutual and clause 21(a)(viii) should be amended to be a warranty by QRail.
71	Confidentiality	22	QRN believes that the definition of confidential information would be enhanced by including examples such as those included in the ARTC Indicative Access Agreement <sup>46</sup> . This would then clarify the need for	Clarify the requirement for Train Control Directions and to clear an incident by more clearly defining what is

<sup>46</sup> ARTC, “Indicative Access Agreement, 15 July 2008”, [www.ARTC.com.au](http://www.ARTC.com.au), ARTC, 2008, cl. 18

Item	Issue	Clauses	Description	Suggested Resolution
			confidentiality exceptions in relation to Train Control Directions and to clear an incident.	"Confidential Information".
72	Representatives of the Operator	23.6	<p>For clarity, it should be included in the Access Agreement all nominated representatives (both QRail and the Operator) including those required under the Operator Requirements Manual.</p> <p>In addition the requirement to update nominated representatives should be as soon as practicable.</p>	Include nomination of all (QRail and Operator) representatives and any changes to be notified as soon as practicable.
73	Entire understanding	25.11	No reference to schedules and other documents referred to in schedules as there is under clause 22.4 of the Current SAA.	Include reference to schedules and other relevant documents and parts of the agreement as constituting the entire agreement .
74	Sublease	25.18	This clause is much broader than clause 22.18 (Ownership of Land) in the current SAA, and provides that the agreement is subject to the terms of the sublease and any other land tenure. QRN does not understand the rationale for the change in this obligation.	Clarify the rationale for extending the obligations around Ownership of Land to the Sublease.
75	Intellectual property		QRail have removed the provisions in relation to Intellectual Property. The rights of both parties in relation to Intellectual Property must be protected.	Reinstate the clause on Intellectual Property.
76	Interpretation not to disadvantage a Party		This clause, in the current SAA, provides some protection to Operator's that the interpretation of the agreement will not favour QRail on the basis that it was written by QRail.	Reinstate clause.
77	Most Favoured Nation Status		QRail have removed the Most Favoured Nation clause which gave force to the rights in relation to the pricing principles in the Undertaking once an agreement has been executed. This clause should be reinstated.	Reinstate Most Favoured Nation clause.

## 5 Attachments

### 5.1 Preamble to ARTC Interstate Access Undertaking, 15 July 2008

#### 1. PREAMBLE

##### 1.1 Introduction

- (a) ARTC was established on 24 February 1998 as a company under the Corporations Law. ARTC's shares are fully owned by the Australian Government. ARTC was established as the entity to manage the granting of access to rail operators to the Interstate Rail Network. ARTC was created with an objective to create a single process of access to the Interstate Rail Network consistent with the Competition Principles Agreement and the National Rail Summit Heads of Agreement.
- (b) ARTC currently owns or leases and is responsible for the granting of access to that part of the Interstate Rail Network comprising the Network.
- (c) In ARTC's view, as a vertically separated provider of access, ARTC operates in a competitive environment where competitive pressure from other modes of transport (particularly road) place constraints on rail transport and access pricing. Accordingly, in ARTC's view, it is unlikely to be able to price in any of its markets at levels which will fully recover the full economic costs of its assets.
- (d) As the manager of a significant part of the Interstate Rail Network, ARTC has adopted the concepts of equity and transparency as key elements of its pricing policies. ARTC will not discriminate price on the basis of the identity of the customer. By so doing, ARTC seeks to stimulate customer confidence, competition and market growth in the rail industry in an evolving environment in which government owned vertically integrated railways have largely been replaced by privately owned operators with access to shared track infrastructure.
- (e) As an access provider, maintenance of the Network and Associated Facilities is a large component of ARTC's current cost structure. These services are either outsourced and managed under maintenance contracts entered into on commercial terms as a result of a competitive tender process, or, in ARTC's view, otherwise managed on an efficient basis. ARTC has adopted this practice with a view to ensuring that ARTC's cost structure will reflect efficient infrastructure practice.
- (f) ARTC has prepared this Undertaking voluntarily in pursuance of its charter objectives.
- (g) This Undertaking will be applied consistently to Access Applications where such applications are within the scope of this Undertaking as set out in Part 2.

##### 1.2 Objectives

This Undertaking is a voluntary undertaking submitted by ARTC under Part IIIA of the TPA. The intent of the Undertaking is to:

- (a) provide a framework to manage negotiations with Applicants for Access to the Network for the purpose of operating Services;

- (b) establish a workable, open, non-discriminatory, efficient and inclusive process for lodging and processing Access Applications;
- (c) use transparent and detailed methodologies, principles and processes for determining access revenue limits, terms and conditions;
- (d) reach an appropriate balance between:
  - (i) the legitimate business interest of ARTC:
    - (A) the recovery of all reasonable costs associated with the granting of Access to the Network;
    - (B) a fair and reasonable return on ARTC's investment in the Network and Associated Facilities commensurate with its commercial risk; and
    - (C) stimulate customer confidence, competition, and market growth in the rail industry;
  - (ii) the interest of the public:
    - (A) increase competition ensuring efficient use of resources;
    - (B) the promotion of economically efficient investment, use and operation of, the Network; and
    - (C) promoting other relevant social objectives, such as an increase of traffic from road to rail;
  - (iii) the interests of Applicants wanting Access to the Network, including:
    - (A) providing Access to the Network on fair and reasonable terms; and
    - (B) providing Access in a open, efficient and non-discriminatory manner;
- (e) provide an efficient, effective and binding resolution process in the event that ARTC and the Applicant are unable to negotiate a mutually acceptable Access Agreement; and
- (f) operate consistently with the objectives and principles in Part IIIA of the TPA and the Competition Principles Agreement.