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30 July 2012

Mr Michael Carter
Chief Executive Officer
QR Network Pty Ltd
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Brisbane QLD 4001

Dear Mr Carter

Draft Decision on QR Network's proposed standard access agreements

On 29 April 2011, QR Network submitted to the Authority its proposed alternative standard access agreements (SAAs) and a marked-up set of proposed amendments to QR Network's 2010 access undertaking, in accordance with clause 5.2(n) of its 2010 approved access undertaking.

Subsequently, on 18 May 2011, QR Network submitted the explanatory notes designed to support its submission.

The Authority published QR Network's proposal and explanatory notes on its website, requested submissions from stakeholders, and received seven submissions in response. On 2 November 2011, QR Network made a submission responding to stakeholder submissions.

The Authority has considered QR Network's proposal in accordance with the requirements of clause 5.2 of the access undertaking. On 27 July 2012, the Authority made a draft decision (**attached**) proposing not to approve QR Network's proposed SAAs.

The Authority is seeking submissions in relation to the draft decision by 5.00 pm on 25 September 2012.

Should you have any question about this matter, please contact Ravi Prasad on 07 3222 0533.

Yours sincerely

A solid black rectangular box used to redact the signature of the Chief Executive Officer.

EJ Hall
Chief Executive



Draft Decision

Proposed Standard Access Agreements

July 2012

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SUBMISSIONS

This report is a draft only and is subject to revision. Public involvement is an important element of the decision-making processes of the Queensland Competition Authority (the Authority). Therefore submissions are invited from interested parties concerning its assessment of QR Network's proposed alternative Standard Access Agreements. The Authority will take account of all submissions received.

Written submissions should be sent to the address below. While the Authority does not necessarily require submissions in any particular format, it would be appreciated if two printed copies are provided together with an electronic version on disk (Microsoft Word format) or by e-mail. Submissions, comments or inquiries regarding this paper should be directed to:

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The **closing date** for submissions is 25 September 2012.

Confidentiality

In the interests of transparency and to promote informed discussion, the Authority would prefer submissions to be made publicly available wherever this is reasonable. However, if a person making a submission does not want that submission to be public, that person should claim confidentiality in respect of the document (or any part of the document). Claims for confidentiality should be clearly noted on the front page of the submission and the relevant sections of the submission should be marked as confidential, so that the remainder of the document can be made publicly available. It would also be appreciated if two copies of each version of these submissions (i.e. the complete version and another excising confidential information) could be provided. Again, it would be appreciated if each version could be provided on disk. Where it is unclear why a submission has been marked "confidential", the status of the submission will be discussed with the person making the submission.

While the Authority will endeavour to identify and protect material claimed as confidential as well as exempt information and information disclosure of which would be contrary to the public interest (within the meaning of the *Right to Information Act 2009 (RTI)*), it cannot guarantee that submissions will not be made publicly available. As stated in s187 of the *Queensland Competition Authority Act 1997* (the QCA Act), the Authority must take all reasonable steps to ensure the information is not disclosed without the person's consent, provided the Authority is satisfied that the person's belief is justified and that the disclosure of the information would not be in the public interest. Notwithstanding this, there is a possibility that the Authority may be required to reveal confidential information as a result of a RTI request.

Public access to submissions

Subject to any confidentiality constraints, submissions will be available for public inspection at the Brisbane office of the Authority, or on its website at www.qca.org.au. If you experience any difficulty gaining access to documents please contact the office (07) 3222 0555.

Information about the role and current activities of the Authority, including copies of reports, papers and submissions can also be found on the Authority's website.

PREAMBLE

This draft decision proposes to reject QR Network's alternative standard access agreements (SAAs).

The Authority received 7 submissions from stakeholders. Stakeholders generally support the intent of the alternative SAAs, which is to split obligations and responsibilities for below-rail access between the end user (i.e. mining company) and train operator. However, stakeholders thought the measures did not go far enough in providing end users with the ability to effectively manage their access rights.

End users have previously, and on multiple occasions, expressed their preference for an alternative contracting system which allows them to control their underlying access rights, while not being responsible for operational matters. They argue that this will increase competition in the above-rail market not just at the time a haulage contract is being negotiated, but over the life of that haulage contract.

Indeed, this matter was raised in the wake of the O'Donnell report into the performance of the coal supply chain in 2007. End users are also particularly interested in controlling their underlying access rights where they are being asked by QR Network to underwrite network investments.

In general, stakeholders wanted the ability to hold access rights without necessarily having to decide and lock in, up front, which train operator(s) would use these rights over the term of the agreement. With this, stakeholders also wanted the flexibility to change train operators, including at short notice, to maximise the use of their access rights over the life of the agreement.

The Authority considers that greater flexibility in accessing QR Network's rail network is critical to increasing above-rail competition, but subject to the legitimate, and demonstrable, operational constraints of the network.

The Authority acknowledges that QR Network's proposed split contracting makes some considerable progress in enabling an end user to manage their access rights, without being responsible for operational matters. However, the Authority considers that QR Network's proposal falls short of users' expectations in key respects that the Authority believes, without QR Network having demonstrated evidence to the contrary, can be achieved via amendments to the proposed arrangements.

The Authority's key focus in this decision is therefore on draft amendments to QR Network's proposed alternative SAAs to give end users greater flexibility in managing their access rights which, in turn, increases competition in the above-rail market and the competitiveness of the Queensland coal industry.

QR Network has proposed an end user be able to initially appoint multiple operators to share an end user's train service entitlements, but that the appointment period be for a minimum 7 day period. Further, any reallocation of train service entitlements between the appointed operators is to occur at least 21 days prior to the day of the operation of the train service.

In contrast, stakeholders requested greater flexibility for end users to initially appoint one or more operators within a short timeframe (i.e. 10 business days) and that there be no minimum appointment period. Stakeholders also requested an ability to reallocate entitlements at short notice (namely 48 hours prior to the scheduled running of the train or even at shorter notice). Stakeholders have cited their experiences in the Hunter Valley to establish that such arrangements are technically feasible.

In this regard, the Authority has largely accepted stakeholders' proposals, namely no minimum appointment period for operators and an ability for end user to reallocate entitlements with at least 48 hours notice. In doing so, however, it is recognised that any reallocation must have regard to the

network's operational constraints, which are likely to be more binding the closer the requested reallocation occurs to the day of operations.

In addition, the Authority has also proposed a range of amendments where the split contracting structure has meant that the relevant sharing of risks and obligations have unnecessarily changed.

For instance, QR Network currently requires the party with whom it contracts (the end user or the operator) to maintain relevant securities and insurances. QR Network has retained some of these requirements in both of the alternative SAAs, meaning that both the end user and operator will bear this burden. Given the splitting of responsibilities, the Authority recommends QR Network to remove or amend some of these obligations (such as the removal of the requirement that the end user maintain third party motor vehicle insurance).

Conversely, QR Network is currently liable for consequential loss for some matters to the party with whom it contracts (i.e. either the operator or end user). Under the alternative SAAs, QR Network proposed that it only be liable for consequential loss to the operator. The Authority considers that given that the split arrangements provide for QR Network to contract with two parties, not just one, QR Network should be liable to both the operator and end user for consequential loss. While this will result in some duplication in liability, the provisions for claiming consequential loss are very narrow.

QR Network and stakeholders also sought a number of other changes in the alternative SAAs. For instance, some stakeholders sought changes to the "force majeure" provisions to compel QR Network to reinstate any damaged rail infrastructure. Similarly, QR Network sought an indemnity for above-rail operational issues from both the end user and the operator, rather than just the party contracting with QR Network, as occurs under the current SAAs.

The Authority has not accepted these changes as they are different to the terms of the existing SAAs, would alter the balance of risks between the parties and are not necessary to implement the split contracting structure.

These and other matters are outlined in further detail in this draft decision.

Way Forward

The Authority seeks stakeholders' comments on all matters discussed in this draft decision. The Authority has already considered QR Network's May 2011 proposal, and stakeholders' extensive comments on that proposal and QR Network's supplementary submission in September 2011.

Submissions are due by 25 September 2012.

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GLOSSARY

2010 Undertaking	QR Network's 2010 undertaking
AAC	Access Agreement Coal
ARTC	Australian Rail Track Corporation
BMA	BHP Billiton Mitsubishi Alliance
EUAA	End User Access Agreement
OAAC	Operator Access Agreement Coal
QCA Act	Queensland Competition Authority Act 1997
QRC	Queensland Resources Council
SAA	Standard Access Agreement
TOA	Train Operator Agreement

1. ALTERNATIVE STANDARD ACCESS AGREEMENTS

QR Network has submitted an alternate form of standard access agreements (SAAs) for the Authority's approval as required by the 2010 access undertaking (the undertaking), including the consequential amendments required to the undertaking to give effect to the new arrangements.

QR Network's application proposes to split the current SAAs into two separate agreements with the effect that matters associated with the management of access rights are separated from matters associated with train operations.

The Authority has published QR Network's application and received detailed submissions from stakeholders, as well as a response from QR Network on stakeholders' submissions.

The Authority has considered QR Network's proposal in line with the criteria set out in the undertaking.

The Authority has made a draft decision to not approve QR Network's proposal. The reasons for the Authority's draft decision, and the amendments it requires QR Network to make in order for it to approve the alternative SAAs, are set out in chapters 2 to 6. The Authority has invited QR Network and stakeholders to comment on this draft decision and will take into account any submissions it receives by the due date before making its final decision.

1.1 Background

In October 2010, the Authority approved QR Network's 2010 access undertaking (the undertaking). The undertaking sets out the terms and conditions under which QR Network will provide access to the relevant parts of its rail infrastructure.

The undertaking also includes two standard access agreements (SAAs). These are included in the undertaking to guide access negotiations between QR Network and access seekers and provide for:

- (a) coal mines to contract directly with QR Network to acquire access rights (access agreement coal – AAC) – it is then open for the coal mines to subcontract with a train operator to haul its coal; and
- (b) train operators to contract directly with QR Network to acquire access rights (operator access agreement coal– OAAC) – the train operator can then directly contract with the mines to haul their coal.

As well as assisting the timely negotiation of access to QR Network's rail network, the SAAs also include a discrete list of matters to be considered in finalising the negotiation of access arrangements.

It is noted that QR Network and an access seeker can negotiate different terms to those in the SAAs. However, if any disputes arise that need determining (by arbitration), the Authority's determination must be consistent with an approved undertaking (and the SAAs by virtue of their forming part of the undertaking) (s 119 of the QCA Act).

When the undertaking and SAAs were approved in October 2010, it was recognised that a number of matters concerning the SAAs remained unresolved, including the preparation and approval of a new form of access agreement.

QR Network and coal companies considered that the existing SAAs were not entirely satisfactory and, in particular, coal companies had expressed a strong desire for the development of an alternative form of SAAs that allowed them to:

- (a) obtain, and secure, access rights separate from the need to simultaneously finalise details of the train operator; and
- (b) contract with one or more train operators, or have the ability to more efficiently change the nominated train operator, to avoid needing to primary responsibility for obligations and exposure relating to the operation of train services (and then having to seek to back-to-back obligations and exposures in the haulage agreements executed with rail haulage operators).

As such, the undertaking included processes that required QR Network to submit, for the Authority's approval, a new form of SAAs within six months following the approval of the undertaking containing:

- (a) a proposed end user access agreement (EUAA) – which allows users of rail haulage services to contract directly with QR Network for access rights without bearing liability and obligations for above-rail operation issues, so long as one or more railway operator(s) nominated by the user has entered into an operator agreement with QR Network (cl. 5.2(n)(i));
- (b) a proposed train operator agreement (TOA) – which allows one or more railway operator(s), nominated by the end user to assume liability and obligations in relation to above-rail operational issues associated with some or all of the users' access rights (cl. 5.2(n)(ii)); and
- (c) if necessary, any consequential amendments to the undertaking to give effect to the new form of SAA (cl. 5.2(n)(iii)).

In April 2011, QR Network submitted its proposed EUAA, TOA and consequential amendments to the undertaking required to give effect to the new form of SAAs. In addition, QR Network provided explanatory notes to go with its proposal in May 2011.

According to the process contained in cl. 5.2(f) of the undertaking, the Authority must decide whether or not to approve QR Network's proposal.

1.2 Approval Process for the New SAAs

The Authority's assessment and approval of QR Network's proposal is based on the undertaking's requirements and criteria.

In assessing QR Network's proposal, cl. 5.2(d) of the undertaking requires the Authority to publish the proposed SAAs, invite persons to make submissions on it and consider any submissions it receives.

In approving QR Network's proposal, clause 5.2(e) of the undertaking states that the Authority may approve the SAAs only if it:

- (a) is satisfied that the proposal is consistent with the undertaking, including the guiding principles in clause 5.2(n) as set out above and those contained in Schedule E;
- (b) considers it appropriate to do so having regard to various aspects as listed in s. 138(2) of the QCA Act, which include the public interest, including the interest in having competition in markets, and any other issues the Authority considers relevant; and

- (c) has published QR Network's proposal, invited stakeholders to make submissions on it and has considered any submissions it receives.

The Authority has published QR Network's proposal and, in response to its invitation, received submissions from seven stakeholders.

In response, QR Network provided a supplementary submission (November 2011) which included some amendments to its original May 2011 submission to address a number of the concerns raised by stakeholders.

The Authority has considered all submissions made by stakeholders, including the amended proposal QR Network submitted in November 2011.

Authority's Approach

Following a review of all submissions on QR Network's proposal, the Authority has not sought to undertake a fundamental redraft of the terms of the SAAs. Rather, the Authority's approach has been to seek to retain consistency between the existing SAAs and the proposed new SAAs as far as is possible, while ensuring the proposed new SAAs contain the various rights and obligations for the relevant parties to give proper effect to the new contracting style.

This general approach has been adopted as:

- (a) the Authority has previously accepted the existing SAAs as being appropriate;
- (b) QR Network is currently a party to numerous access agreements based on the existing SAAs (and earlier SAAs approved in connection with previous undertakings which are predominantly the same) and the Authority considers it is appropriate for QR Network to have a substantial degree of consistency in the rights and obligations it has under the various forms of access arrangements;
- (c) the intention is for the proposed SAAs to provide an alternative to, rather than replace, the existing SAAs, such that a material net change to the risk profile in favour of end users/operators or QR Network may result in end users/operators requiring QR Network to enter an access agreement based on the type of SAAs least favourable to QR Network;
- (d) the reference tariffs to be charged by QR Network will not vary depending on the type of access agreement entered, such that there should be no material net change to QR Network's risk profile where it enters access agreements based on the proposed SAAs; and
- (e) the provisions of the undertaking regarding the submission of the proposed SAAs do not provide for the amendment of the existing SAAs.

Given this, the Authority's assessment has focussed on whether the new SAAs:

- (a) are consistent with the undertaking – they have appropriately allocated the existing responsibilities/obligations under the new arrangements between the train operator and the end user such that the:
 - (i) TOA is focussed on train operations; and
 - (ii) EUAA is focussed on access rights;

- (b) in allocating the existing responsibilities, ensure that the risk that each party bears remains unchanged or, if the risk profile does change it is justifiable and appropriate given the splitting of access rights and operational responsibilities;
- (c) provide flexibility in the utilisation of access rights; and
- (d) enable the split arrangement to operate effectively, are commercially balanced and necessary.

In relation to (b), the Authority notes that allocating obligations between each of the SAAs to ensure the outcomes described in (a)(i) and (ii) is not necessarily achieved simply by reallocating existing rights and obligations between one of the other of the end user and operator. As such, it is not always possible to keep the risk profile exactly the same and, in some instances, a more appropriate change is required in order for the SAAs to operate effectively.

The Authority notes that, as a result of its approach, the Authority has not adopted aspects of QR Network's or stakeholders' proposals that sought to amend the risk profiles of the parties beyond that which exists in the current SAAs. The Authority notes that these are matters that can be raised as part of the development and consultation on the upcoming replacement undertaking (i.e. UT4), at which time the Authority will consider all existing SAAs.

Given the Authority's approach, the balance of this decision will cover:

- (a) chapter 2 – discusses aspects of QR Network's alternative SAAs that provide for end users to utilise their access rights, including through appointing new operators and varying the utilisation of access rights between engaged operators;
- (b) chapter 3 – discusses aspects of QR Network's alternative SAAs where rights and obligations have not been appropriately allocated between the end user and operator or differ from those that currently exist;
- (c) chapter 4 – discusses changes required to effect the splitting of obligations between the end user and operator, such as notice provisions, and whether they are reasonable;
- (d) chapter 5 – discusses aspects of QR Network's alternative SAAs where rights and obligations in the alternative SAAs are appropriately allocated between the end user and operator and in a manner consistent with the current SAAs; and
- (e) chapter 6 – considers the appropriateness of QR Network's consequential amendments to the 2010 undertaking to implement the alternative SAAs.

Appendix A of this draft decision includes recommended drafting changes to address these and other matters.

1.3 Way Forward

The draft decision outlines matters on which the Authority particularly seeks input from interested parties, and as such does not seek to address each of the elements of QR Network's proposal separately.

Instead, **Appendix A** of the draft decision includes detailed drafting that is consistent with the Authority's approach and shows all of the amendments required by the Authority. Appendix A includes a number of amendments that are not discussed in detail, but are nonetheless consistent with the Authority's approach. Interested parties should rely on their

own analysis of the Authority's proposed amendments to determine whether there are additional matters on which they wish to comment.

If the Authority decides to reject QR Network's proposed new SAAs, it will give QR Network a notice in writing stating the reasons for its refusal and require QR Network to amend, and resubmit, its proposal.

If QR Network does not resubmit the proposed new SAAs, or if the Authority refuses to approve a resubmitted proposal, the undertaking provides the Authority with the ability to prepare its own new SAAs.

Invitation to Comment

The Authority seeks submissions in relation to its draft decision to reject QR Network's proposed alternative SAAs. Submissions must be received by **5pm on 25 September 2012**.

The Authority will take account of all submissions received before making its final decision.

2. EXERCISE OF ACCESS RIGHTS

QR Network's proposed alternative SAAs seek to enhance the flexibility of end users in managing their access rights by allowing an end user to:

- (a) initially appoint (i.e. nominate) one or more train operators to utilise their train service entitlements in respect of below-rail access rights; and*
- (b) subsequently reallocate (i.e. vary) train service entitlements between train operators.*

Stakeholders are concerned that QR Network's proposals do not go far enough in addressing their objectives for greater flexibility in managing their access rights.

The Authority considers that the ability of an end user to appoint one or more train operators and subsequently reallocate entitlements between operators is necessary to increase competition in the above-rail market. This must, however, be balanced against QR Network's ability to effectively and safely manage its rail network given any operational constraints.

To this end, the Authority has proposed amendments to aspects of QR Network's proposal to enhance an end user's flexibility to exercise their access rights, in particular:

- (a) the process for initially appointing train operators and then subsequently reallocating train service entitlements between them; and*
- (b) the contracting structure to support this.*

The Authority considers its amendments adequately balance the needs of end users for increased flexibility in managing their access rights with QR Network's constraints in managing its rail network. In doing so, the Authority had regard to aspects of similar arrangements that are already in place in respect of the Hunter Valley rail network.

These matters are discussed in greater detail below.

2.1 Introduction

A key objective of the alternative SAAs is to provide end users with greater control and flexibility in managing their access rights. This has the potential to promote greater competition between competing rail operators with the effect of stimulating efficiency improvements in the above-rail market.

The Authority considers that these processes should provide end users with sufficient flexibility to manage their access rights, but should also be feasible to implement. In order to be operationally feasible, the processes must take account of QR Network's legitimate operational constraints – i.e. that QR Network can perform capacity and scheduling functions and continue to ensure the safe-working of the network.

To be contractually feasible, the processes need to be supported by an appropriate contract structure that can be practically implemented by QR Network, end users and operators. A structure that is overly administrative or cumbersome is likely to mitigate any potential benefits gained from increased control and flexibility for end users.

There are currently arrangements in the Hunter Valley (under the ARTC undertaking approved by the Australian Competition and Consumer Commission) that allow mining companies to hold and manage their access rights and stakeholders have pointed to some aspects of these arrangements as being desirable.

The Authority considers that there is merit in considering aspects of the Hunter Valley regime in assessing QR Network's proposed arrangements. That such a regime has been implemented is indeed evidence that introducing flexibility into the holding and managing access rights is achievable, albeit within an operating environment that is not exactly the same as that which currently exists in Queensland.

This chapter provides the Authority's position on key aspects of QR Network's proposal, namely in relation to:

- (a) appointing train operators and reallocating access rights; and
- (b) the contracting structure in which this will occur.

Taken together, these processes should provide additional flexibility to end users and be feasible to implement for all parties involved.

The Authority is also currently assessing QR Network's proposed system rules for the Capricornia (Blackwater and Moura) and Goonyella systems. This will provide a further opportunity for all parties to consider more detailed measures that promote flexible and efficient system operations.

2.2 Appointing Train Operators and Reallocating Access Rights

QR Network's proposals in relation to appointing train operators and reallocating (or varying) access rights are based on the principles that:

- (a) the end user is granted access rights by QR Network under the terms of an EUAA; and
- (b) only a train operator appointed by the end user can use that end user's access rights under the terms of a TOA (i.e. end users are not entitled to operate train services).

So long as an end user is not in material breach of any of its obligations under the agreement, QR Network proposed that it can use the processes for:

- (a) *nominating train operators* – to appoint one or more train operators to use its access rights; and
- (b) *varying access rights* – to:
 - (i) re-appoint the access rights to another operator; and / or
 - (ii) change the period for which the access rights are to be appointed to an operator; or
 - (iii) withdraw the previous appointment of a train operator.

QR Network has proposed that it would accept the appointment of a train operator on similar conditions to that included in the current SAAs. Namely, QR Network does not have to accept the appointment of a train operator by an end user if the operator is in material breach of any of its obligations under the TOA, *unless* it is satisfied that the operator is financially sound and capable of performing its obligations under the TOA.

In the alternative SAAs QR Network has proposed new timeframe requirements for both appointing train operators and re-appointing access rights (including withdrawing) – specifically, an end user must give a minimum of 30 days notice for a request to appoint a

train operator or elect to re-appoint (or withdraw) their allocation of access rights to a train operator.

In doing so, QR Network proposed that there be no process or timeframe requirements in which it had to subsequently negotiate and execute a TOA with the relevant operator. In particular, QR Network excluded negotiations on any TOA from the negotiation framework under Part 4 of the undertaking. Part 4 remains applicable to the negotiation process for any EUAA.

QR Network also proposed that end users must appoint an operator, or elect to re-appoint an operator for no less than three (whole) calendar months.

QR Network argued that these timeframes were required to allow QR Network to 'incorporate or consider the impacts of the nomination from both a capacity and scheduling perspective' (QR Network sub. no. 1:10).

Stakeholders' comments

Stakeholders argued that the QR Network's proposed processes for appointing and reappointing (including withdrawing) train operators were unnecessarily restrictive and prevented end users from effectively managing their access rights. On this, Anglo American argued that:

It is critical to the operation of UT3 that End Users are completely free to choose the above-rail haulage provider of their choice. The fundamental purpose of UT3 is to allow for competition between above-rail service providers. Therefore, any contractual restrictions in the EUAA and the TOA which may limit the right of End Users to choose, or use, their preferred above-rail service provider, is fundamentally inconsistent with the regulatory regime. (Anglo American sub. no. 1: 7)

To address this, stakeholders said that greater flexibility and control in managing their access rights could be achieved by amending QR Network's proposal by:

- (a) streamlining the process to appoint the train operator(s) and clarifying QR Network's criteria for approving an appointment, which included the 'pre-approval' of train operators – i.e. QR Network would approve the appointment of any third party which the end user may later seek to allocate train paths to; and
- (b) providing for the reallocation of access rights to occur more effectively, including by reducing the time periods for reallocating access rights.

The above matters are discussed in turn below.

Appointing train operators

Stakeholders said the EUAA should provide greater certainty around processes for approving the appointment of train operators.

Stakeholders proposed amendments to reduce QR Network's apparent discretion to assess the proposed appointment of an operator. This included requiring:

- (a) the EUAA to specify the relevant criteria and process that QR Network must use to assess whether an operator is 'financially sound' so that QR Network's expectations are understood upfront (QRC sub. no. 1: 6, BMA sub. no. 1: 5); and
- (b) QR Network to 'act reasonably' when making a decision on a proposed appointment (Anglo American sub. no. 1: 7, QRC sub. no. 1: 6).

Stakeholders also argued that the EUAA should require QR Network to promptly respond to requests regarding the appointment of train operators. The QRC said that QR Network should provide a written response to the end user within 10 business days and outline QR Network's decision to accept or reject the proposed appointment of the train operator. The QRC said that when QR Network:

- (a) accepts the train operator appointment, it must be required to promptly do all things required to ensure that any delay to train services are minimised; and
- (b) rejects the train operator appointment, it should include the reasons for that decision in the written response to the end user (QRC sub. no. 1: 6).

Stakeholders further argued that providing for 'pre-approval' of operators would provide greater flexibility in appointing new operators (QRC sub. no. 1: 6) and in short term planning, particularly if there are train operation issues and the reallocation of a train path to an alternative operator could prevent the end user from otherwise losing its scheduled train path (BMA sub. no. 1: 2).

Varying access rights

Stakeholders were concerned that the requirements for reappointing and allocating access rights between appointed train operators would prevent end users from effectively managing their haulage requirements. Stakeholders argued that the proposed process was cumbersome and lengthy (BMA sub. no. 1: 6), reduced flexibility in managing train operations (Asciano sub. no. 1: 9) and created unnecessary administrative barriers for end users to manage their access rights (QRC sub. no. 1: 5).

The 30 day notice period and the requirement for a 3 month minimum appointment period was of particular concern. Vale argued that:

... such conditions prevent users from effective management of haulage requirements forcing them to lock into longer term contracts; which naturally favours existing above-rail contractors. This limits users' ability to utilise ad-hoc paths with other operators. This is likely to unduly limit the flexibility of access holders to utilise capacity, the net result of which will likely be the less efficient use of that capacity. (Vale sub. no. 1: 2)

Stakeholders argued that shorter timeframes to notify QR Network of a reappointment (including withdrawal) or allocation of access right (i.e. 48 hours) would be adequate and practicable (QRC sub. no 1: 14), particularly if train operators are pre-approved (BMA sub. no. 1: 2-3).

Stakeholders also requested removing the requirement that (re)appointments and allocations apply for at least 3 months (QRC sub. no. 1: 13, BMA sub. no. 1: 2-3, Vale sub. no. 1: 2). On this, Asciano argued that aligning transfers with the weekly scheduling or similar operating or system rules procedures would provide 'substantial additional flexibility' for end users and above-rail operators (Asciano sub. no. 1: 9). BMA also said that flexibility would be increased if long, short and spot (day of operation) term changes in operators were allowed to take place (BMA sub. no. 1: 6).

Finally, stakeholders noted that where an end user reappoints or withdraws its access rights, the EUAA should require QR Network to vary the TOA with the operator to reflect such changes (Anglo American sub. no. 1: 15, QRC sub. no. 1: 14).

QR Network's Response

In response to stakeholder comments, QR Network proposed a number of amendments to the process of reappointing access rights. In doing so, QR Network said it sought to address stakeholders' concerns and provide greater flexibility to align allocations of access rights with the scheduling and planning environment (QR Network sub. no. 2: 4). In particular, QR Network proposed that end users be required to:

- (a) give 14 days' notice (outside the 7 day planning cycle) of a reappointment of the access rights (previously it had proposed 30 days notice); and
- (b) reappoint access rights in minimum increments of 7 days (previously it had proposed 3 months minimum) (QR Network sub. no. 2: 4).

Beyond this, QR Network said that an alternative train operator could be allocated access rights over a shorter period of time when the appointed train operator was unable to use the access rights, namely either by:

- (a) using an ad hoc train service;
- (b) nominating entitlements under cl. (c) of the Contested Train Path Decision-making process; or
- (c) obtaining agreement between the parties to schedule the train service under cl. (b) of the contested train path decision-making process (QR Network sub. no. 2: 4).

QR Network accepted a requirement that it should do what is necessary to promptly provide for approval of the appointment of a train operator (QR Network sub. no. 2: 3).

However, QR Network said that it is 'not likely to be feasible to implement' stakeholders' proposals to provide for 'pre-approval' for train operators because QR Network would be required to execute a TOA with any rail operator that an end user may wish to use – and that may not be actually utilised in the future. Moreover, QR Network argued that pre-approval will 'not necessarily expedite' the ability of an operator to use access rights because the TOA only provides the right to utilise access rights where the necessary conditions of operation have been satisfied (QR Network sub. no. 2: 4).

Authority's Analysis and Decision

The Authority shares stakeholders' concerns that the appointment of a train operator and reallocation of access rights processes in the EUAA would limit the ability of end users to effectively manage their access rights. The Authority has proposed a number of amendments to the alternative SAAs that it believes would be both feasible and would provide a level of flexibility that would be satisfactory to end users.

Nominating train operators

The Authority sees benefits in the EUAA providing greater clarity over the process for approving train operator appointments, particularly that QR Network be required to respond to a request to appoint a train operator in a timely manner. This does not require amendments to the appointment of a train operator process itself. Rather, that QR Network be required to respond to a proposed appointment request, including reasons for its decision, in a timely manner.

The Authority considers that stakeholders' suggestion that QR Network respond within 10 days is not unreasonable, and notes that similar arrangements are contained in the ARTC

model when end users appoint a train operator (cl. 4.4 of the ARTC indicative access holder agreement).

The Authority also considers that TOA negotiations should be subject to the relevant parts of the negotiation framework in Part 4 of the undertaking – i.e. excluding those elements relating to underlying access rights. To do otherwise would mean there would be no timeframe within which QR Network would be required to finalise and execute a TOA between it and the relevant train operator.

This process will require QR Network to

- (a) acknowledge an access application by the relevant operator in 10 business days;
- (b) require additional information be provided to it within 30 days and for QR Network to acknowledge receipt of it within 10 days; and
- (c) provide an indicative access proposal within 30 days of acknowledgement.

The Authority notes that an alternative to such an approach is for an expedited negotiation process for TOAs to be provided separately for in the undertaking. This may be beneficial not just for end users in terms of appointments, but also for current and future train operators.

Stakeholders are invited to submit their views on the negotiation process for TOAs as part of this draft decision.

The Authority notes that stakeholders were concerned that the criteria for QR Network accepting a train operator appointment were unclear and suggested that it be clarified – e.g. on what basis would QR Network determine whether a train operator was ‘financially sound’.

The Authority has considered these concerns but does not believe that any changes to QR Network’s proposal are appropriate. The Authority believes it is significantly more useful for stakeholders to understand why a decision has been made, than attempt to provide (in advance) a potential list of reasons in the form of more detailed criteria. Relevantly, the concept of “financially sound” is also used but not defined in the current SAAs and the Authority is not aware of substantial shortcomings with this approach which have become evident to date.

In any event, it is always open for an end user to dispute QR Network’s decision under the dispute resolution processes in the alternative SAAs.

The Authority notes stakeholders’ suggestion that the process for appointing a train operator could be improved by providing for a ‘pre-approval’ of train operators but does not believe that any changes to QR Network’s proposal are appropriate. Pre-approval would require QR Network to be responsible for maintaining some form of pre-approved register, which may be administratively cumbersome, particularly as a train operator’s capabilities, security or other factors may change over time. There is also a threshold jurisdictional issue of whether the Authority could compel QR Network to negotiate with a party who is not an actual access seeker, but may potentially become one if they are subsequently pre-approved and then appointed by an end user.

In this context, the Authority notes that end users could achieve a similar outcome by, at the outset, appointing any train operators they expect to use over the life of the access agreement – even if this means allocating a minimal amount of access rights to be utilised by the second

or third appointed train operator. Taken together with the arrangements the Authority has proposed for allocating and reallocating access rights, stakeholders should have sufficient flexibility to manage the utilisation of access rights, including between their appointed train operators.

Varying access rights

The Authority shares stakeholders' concerns that the process for appointing and allocating access rights in the EUAA would prevent end users from flexibly managing and utilising access rights during the scheduling process – of which an integral part is providing for users to reallocate access rights between operators at short notice. As such, the Authority has proposed a number of amendments to QR Network's alternative SAAs it believes would be feasible and would provide a greater level of flexibility to end users.

The Authority notes that, in response to stakeholder comments, QR Network amended its proposal with regard to the conditions around reappointing access rights:

- (a) notice period – QR Network now proposes an end user give 14 days' notice outside the 7 day planning cycle (previously 30 days) to reappoint train operators;
- (b) minimum variation period – QR Network now proposes a 7 day minimum variation period (previously 3 months) for an end user reappoint access rights between train operators.

QR Network also identified a number of potential alternatives open to end users seeking variations in a shorter time period (ad hoc train services and the contested train path decision making process).

However, it is not clear to the Authority that QR Network's revisions to the process for reappointing access rights, or its suggested alternatives, will, in practice, provide the flexibility that end users are seeking.

First, it is not evident to the Authority why QR Network requires 14 days (outside of the 7 day planning cycle – so in effect 21 days prior to day of operations) notice to give effect to a reappointment or a minimum appointment period of 7 days.

In the case of cargo assembly mode of operation, port and rail requirements constantly change as the day of operation draws closer. Having a requirement that gives QR Network 3 weeks' notice to use an alternate operator will prevent the end user from having the ability to respond to the environment in which they operate. It may also jeopardise the end users ability to effectively manage the use of their access rights.

In addition, requiring a minimum reappointment period of 7 days would be equally limiting. Rather than substituting one operator for another for a particular train path or paths to respond to conditions at the time, the end user must (under QR Network's revised proposal) actually propose a 7 day change – necessitating a change of short term plans in order to respond to a current situation.

In this regard, the Authority notes that the ARTC requires an end user to provide 48 hours notice of a reallocation and has no minimum variation period. It is not clear why this approach could not be implemented by QR Network. Indeed, the Authority understands that the Hunter Valley Coal Chain Coordinator that largely administers the arrangements in the Hunter Valley may accept a variation at even shorter notice.

While there are differences in the Hunter Valley and central Queensland networks, the Authority has not been presented with information that indicates that such differences are so material to preclude the shorter reallocation timeframes that exist in the Hunter Valley and which end users want to be introduced into central Queensland.

One difference is that:

- (a) in the Hunter Valley the network operator is not vertically integrated with train operators; whereas
- (b) in central Queensland QR Network is vertically integrated with its related party train operator (QR National) and that it might have, or be perceived to have, an incentive to limit the degree of competition in the above-rail market.

The Authority does not consider that such a difference would be an appropriate basis for proposing more inflexible reallocation procedures.

Second, the Authority does not consider that QR Network's suggested solutions for switching to alternative operators within a short timeframe adequately addresses end user's requirements for greater flexibility.

For example, an ad hoc train service is not the same as an access holder using its access rights. The ad hoc train service has a different access charge and can only be used if it does not interfere with other traffic. So while an end user may be seeking to use its allotted train path, but simply replacing one train service operator with another, the use of an ad hoc service is prohibited if it will cause any existing railway operator's scheduled train service/s not being met, or a planned possession not being met.

Similarly, QR Network's suggestion of using the 'Contested Train Path Decision-making Process' has its own shortcomings. The definition of a contested train path does not readily fit with this situation and the rules are not designed for the purpose QR Network suggested. In particular, priority is given to a train operator requesting their "status quo" entitlements, or to a train operator who has been most disadvantaged by QR Network Causes in the preceding year. These operators will not necessarily be the ones picking up "extra" services due to an end user reallocation. Also, in relation to obtaining agreement between the parties to schedule the train service under cl. (b) of the Contested Train Path Decision-making process, there is no incentive for the operator who is losing a service to agree to another operator gaining that service.

Given these considerations, the Authority proposes to require the EUAA provide for end users to give at least 48 hours notice of reallocations (i.e. within the 7 day planning cycle) to switch between appointed operators, with no minimum variation period..

While this proposal will provide end users with an increased amount of flexibility, it may not always be the case that such a request can be accommodated, particularly as the day of operation draws closer.

The process described above gives end users an ability to take the access right/s it has allocated to one appointed train operator and reallocate them to another, thereby taking advantage of both of their appointed operators.

An alternative approach that the Authority also considered involved 'overlapping allocations' – that could provide end users with the same flexibility, but may also be simpler from an administrative point of view.

The concept of ‘overlapping allocations’ involves the end user having the ability to appoint two (or more) operators to use the same access rights – i.e. a portion of access rights may be utilised by one or more appointed operators.

Once the end user has appointed the access rights to its train operators, it could then decide as part of the 7 day scheduling cycle which of the operators shall utilise the access right or train path and inform QR Network of this – and, as part of this scheduling cycle, they could seek to reallocate which of its appointed train operators they want to operate the scheduled train service up until 48 hours prior to the day of operations.

The process of overlapping allocations can be distinguished from the process of reappointing access rights from one appointed operator to another, in that the process of reappointing allocations is no longer required – the end user can switch train operators simply by informing QR Network which of its appointed train operators will actually be utilising the access right.

The Authority also notes that a similar option is available to access holders as part of the ARTC’s arrangements for the Hunter Valley.

At the same time, such an option does raise some complexities that would otherwise not need to be considered including, among other things, the effect ‘overlapping allocations’ would have on:

- (a) capacity reductions – i.e. where access rights are reduced through a pro-rata basis between operators based on their nominated rights;
- (b) QR Network’s operations – i.e. whether it is feasible for QR Network and train operators to only find out who is operating the train service (on an ongoing basis, rather than just in the event of one-off reallocations) quite close to the day of operation and, at the very least, 48 hours notice; and
- (c) notices and contract amendments – i.e. the notices to train operators and amendments to the train operation agreements that occur when end users reallocate their access rights.

Given these complexities, the Authority has not proposed any amendments to put this type of system into effect at this time – particularly as it is not clear whether stakeholders have an appetite for such an option to be explored or whether there would be practical problems that would prevent QR Network from implementing it. However, the Authority would be keen to receive stakeholders’ views on this matter, including any benefits and / or operational issues that such an option may be likely to pose.

Draft Decision 2.2

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

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

2.3 Contract Structure

The exercise of access rights is impacted not only by the processes described in the proceeding section, but also by the contracting structure. The contracting structure needs to:

- (a) support the procedures and processes for managing access rights;
- (b) be administratively feasible for QR Network to implement; and
- (c) practical to use by all parties (QR Network, end users and train operators).

The Authority has proposed amendments to enhance the effectiveness of the contracting structure to meet the proposals outlined above. Among other matters, the Authority proposes haulage operators should enter separate TOAs for each EUAA. This is partly to ensure any breach by an operator related to utilisation of one end user's access rights does not result in a termination or suspension of a TOA relating to multiple end users that impacts other end users.

The Authority considers its amendments will enhance the flexibility of end users in managing their access right in a way that can be practically implemented by QR Network. These matters are discussed in greater detail below.

QR Network's Proposal

QR Network proposed that the alternative form of SAAs contain arrangements whereby:

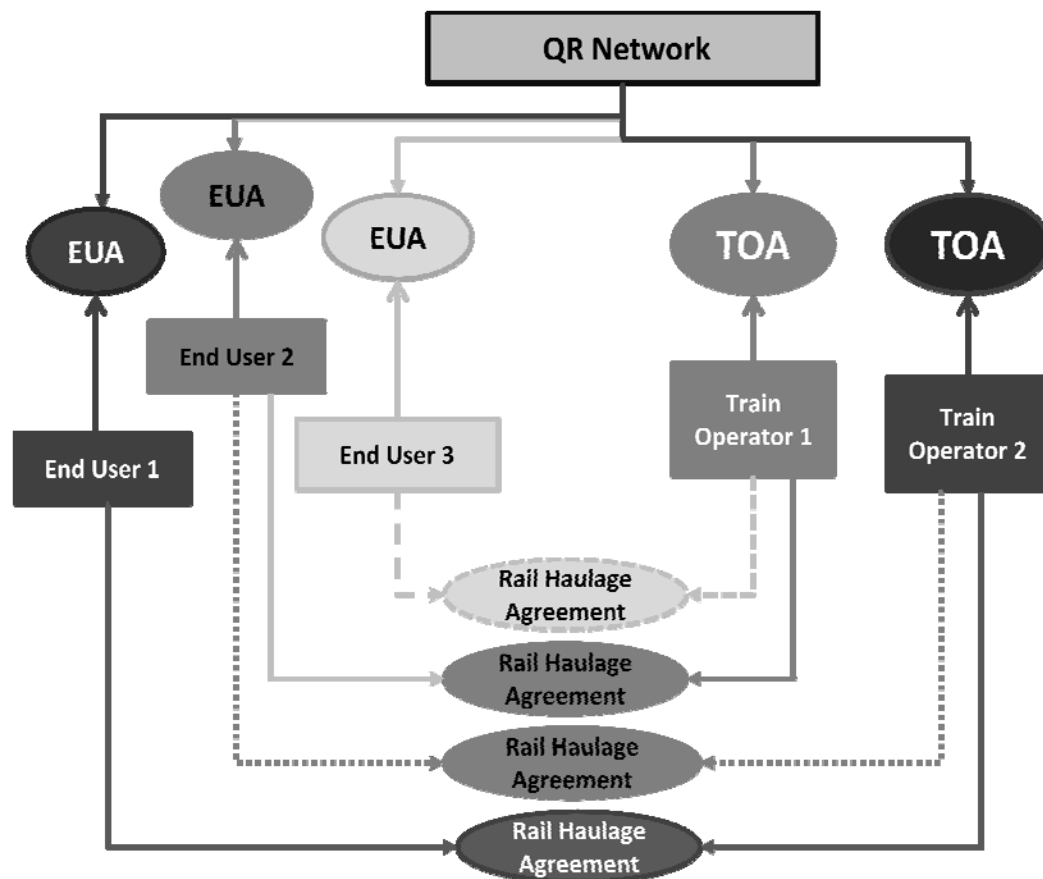
- (a) an end user (under the EUAA) – would contract with QR Network for access rights on nominated parts of the rail network; and
- (b) a train operator (under the TOA) – would contract with QR Network to utilise an end user's access rights to operate train services on nominated parts of the rail network.

The EUAA specifies an end user's access rights in terms of train service entitlements, along with a description for each origin-to-destination entitlement in a schedule (Schedule 1).

The TOA provides for a single operator to contract with QR Network to operate train services for some or all of the train operator's customers. In particular, the TOA sets out, where one or more end users have appointed the operator, the share of each end user's access rights that will be used by the train operator to operate train services on the network (Schedule 1).

Further, the TOA can only be entered into by QR Network and a train operator on the basis that QR Network has entered into an EUAA in respect of access rights for which the train operator has been appointed to utilise.

The Authority understands that QR Network's proposed contracting structure provides for it to contract with multiple end users for underlying access rights, while having a single TOA with each train operator (see **Figure 1**).

Figure 1: QR Network's proposed contracting structure.

Stakeholders' Comments

Stakeholders were concerned about the workability of the contract structure proposed by QR Network.

In particular, stakeholders did not consider it appropriate for each operator to have a single TOA that sets out the access rights of multiple end users. Stakeholders said that under this arrangement, a breach by an operator in respect of one end user's access rights would materially and adversely impact on all other end users, even if the breach only related to the trains operated for a single end user (BMA sub. no. 1: 5, QRC sub. no. 1: 6-7).

Stakeholders said that a better approach would be to have a separate TOA for each end user (BMA sub. no. 1: 4, QRC sub. no. 1: 6). Stakeholders considered that such an approach would prevent an operator's breach in respect of one end user's rights impacting on other end users and would be more practical and administratively efficient. Stakeholders also said that this would allow end users to better align their access rights to operators and prevent the need for confidentiality requirements to protect each end user's information within a single TOA (QRC sub no. 1: 7).

QR Network's Response

QR Network said its proposal did not mandate or preclude having a separate TOA for each end user. However, QR Network indicated that any user preference, including having separate contracting arrangements, is a matter better managed through the negotiation of above-rail haulage arrangements (QR Network sub. no. 2: 3)

Authority's Analysis and Draft Decision

The Authority does not consider that QR Network's proposal provides, with enough clarity, the option for separate TOAs to be entered into for each EUAA. In any case, the Authority sees benefit in clarifying the operation of the alternative SAAs and, further, considers there are clear advantages in requiring that there be a separate TOA for each EUAA.

The TOA provides for a number of circumstances where QR Network may terminate the TOA (cl. 21). While some of these are actions by an operator and will apply to all of its operations across a range of access holders (such as insolvency, or suspension/cancellation of accreditation), in other cases, some breaches may only apply to a train operation for a single access holder (such as a failure to pay money owing, or a breach in relation to a rollingstock configuration authorisation).

Given that the failure to pay money to QR Network may result from a failure by an end user to pay money to the operator (given access charges payable by the operator are often simply passed through to the end user via the haulage contract), there does not appear to be sufficient justification from a risk mitigation perspective for all the operator's access rights to be terminated (i.e. the TOA being terminated with respect to all users).

Accordingly, the Authority's draft decision is that the SAAs be redrafted to provide for separate TOAs for each EUAA.

It is accepted that separate TOAs could impact on the timeframes to execute an agreement and may lead to an increase in administrative costs for QR Network. However, in reality, the Authority believes these impacts are likely to be minimal. Once an operator has agreed a TOA with QR Network, it is unlikely that fresh negotiations will be required for each additional TOA entered into. In such circumstances, presumably, negotiations will only be required to address a limited number of matters relevant to that additional TOA – e.g. providing train service descriptions that correspond with the appointed access rights or other specific matters that the operator believes will change the risk profile for that agreement.

Draft Decision 2.3

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

2.4 Assessment of the Alternative SAAs in the Context of System Rules

The Authority is currently assessing QR Network's proposed system rules for the Capricornia and Goonyella systems – and is awaiting QR Network's submission on the system rules for the northern Bowen Basin that takes into account the interaction of traffics on the Goonyella system going to the terminals at the ports at Abbot Point and Hay Point.

In this context, some stakeholders also queried how the alternative SAAs would operate in the context of the QR Network's proposed system rules.

The Authority accepts that the alternative SAAs will need to operate in the context of any system rules that are approved in the future, in much the same way that the current SAAs will need to operate in the context of the finalised system rules.

In this regard, the Authority notes that any consideration of system rules and QR Network's alternative SAAs must have regard to the same criteria, including Schedule E of the undertaking which makes reference to the Network Management Principles.

The system rules, once approved, will provide a detailed operating framework which will impact on coal chain participants and QR Network's operations. Given this, the Authority has not proposed that the alternative SAAs provide this level of detail. Rather, the Authority has sought to address key issues relating to operational flexibility through the alternative SAAs, whilst recognising that detailed operational rules will ultimately be finalised through the Authority's approval of system rules.

3. RESPONSIBILITIES NOT CONSISTENT WITH EXISTING SAAS

Stakeholders are concerned that the current SAAs do not allow end users to effectively manage their access rights without being responsible for above-rail operations.

The 2010 undertaking sought to address this concern by requiring QR Network to submit an alternative form of SAAs that would allow an end user to contract with QR Network for access rights, while its nominated operator could separately contract with QR Network for above-rail access related to these access rights.

In this context, the Authority's analysis has focussed on aspects of the alternative SAAs that:

- (a) do not allow an end user to effectively manage its access rights without also being responsible for operational matters; and*
- (b) impose additional obligations on parties beyond that which exist in the current SAAs.*

The Authority considers that these aspects of QR Network's proposal do not satisfy the approval criteria for the alternative SAAs in cl. 5.2(e) of the 2010 undertaking as they may have the effect of not providing parties with an alternative to the existing SAAs, which the Authority considers not to be an appropriate outcome. For example, this occurs where the alternative SAAs:

- (a) seek to change the risk profiles of parties beyond that in the current SAAs and that change cannot be justified on the basis of a change in risk due to the new contracting arrangement; and/or*
- (b) constrain the ability of parties to engage in flexible contracting for the effective utilisation of access rights.*

The Authority has proposed amendments to the alternative SAAs to address these concerns.

3.1 Billing

QR Network's current SAAs require the end user or train operator to pay the access charges under the AAC or OAAC, respectively. They also provide for disputed invoices to be resolved by expert determination.

Under the alternative SAAs, QR Network proposed that the end user pay the take-or-pay charge (i.e. access rights unused by operator), and the operator pay the remainder of the access charges.

QR Network said that the take-or-pay component is intended to ensure that QR Network and the other parties are not financially exposed to an individual customer's decision to underutilise its access rights. QR Network argued that the take-or-pay obligations should reside in the EUAA as the end user is ultimately responsible for ship scheduling, for terminal and coal availability, and for placing train orders indirectly through the train operator.

QR Network also said that access charges are subject to a multi-part reference tariff with two incremental reference tariff components (AT₁ and AT₂) that are subject to the operational decision-making of the train operator. QR Network believed that as capacity and risk consequences are reflected in these price signals, the train operator should remain responsible for paying the remainder of the access charges (QR Network sub. no. 1: 11).

Stakeholders' Views

ARTC noted that under its undertaking all charges are paid by the end user, which is administratively simpler. ARTC said that this was appropriate as, under its model, the end user contracts to a set of service assumptions for each operator for each haul and it is the end user's responsibility to ensure that the operator operates the train in accordance with the service assumptions (ARTC sub. no. 1: 8).

Asciano also argued that it is more consistent for an end user to pay directly for the rights, rather than having them channelled through the operator as this creates unnecessary administrative and operating costs for the operator. However, Asciano conceded that this was a second order issue as systems and processes are in place to allow the train operator to pay these charges (Asciano sub. no. 1: 11).

QRC said that the EUAA should include an option for the end user to elect to pay all access charges and for no access charges to be levied under the TOA (QRC sub. no. 1: 16).

QRC said that the dispute resolution provisions should be amended to require QR Network to pay any amounts determined to be payable by QR Network to the end user after the term of the EUAA has expired (QRC sub. no. 1: 15).

QR Network's Response

QR Network did not accept stakeholders' comments requesting changes to its proposed approach to billing. In doing so, QR Network re-iterated its earlier point that the operator should pay the non-take-or-pay elements as access charges are dependent on the performance of the operator under the TOA. In addition, QR Network said that:

- (a) it would be administratively inefficient to implement duplicate billing practices to recover the other non-incremental tariff components from the end user; and
- (b) efficient contract administration required that party who ordered and the party who operated the train service should be the only parties involved in disputes about the billing of train operations based on an operational decision by the train operator. QR Network said it did not wish to become a party to disputes between a train operator and an end user on whether the rail operator's performance was aligned to the service expectations of the end user. QR Network said this would occur where the (full) access charge was recoverable under the EUAA (QR Network sub. no. 2: 5).

Authority's Analysis

The Authority does not accept QR Network's proposal that the end user must pay the take-or-pay charge (i.e. access rights unused by operator), and the operator must pay the remainder of the access charges.

Rather, the Authority considers it reasonable for the end user to have the option to make all payments.

The Authority considers that both the payment of access charges and of take-or-pay obligations are compensation to QR Network for providing access to its network. It is, therefore, not unreasonable for an end user to have the right for these obligations to be contained in the EUAA as this agreement deals with matters associated with the acquisition of access rights.

The Authority notes QR Network's observation that a portion of the access charge (i.e. AT₁ and AT₂) will affect the operator's performance and should be levied on the operator.

However, the Authority understands that current industry practice for access rights held via access agreements based on the OAAC is for access charges to be simply passed on to the end user through the haulage agreement. Under the AAC, the end user is wholly responsible for paying access charges, and take-or-pay obligations. Consequently, the train operator currently does not face the consequences of its performance, as this is either directly payable by, or simply passed on to the end user. It is, therefore, not evident to the Authority why the alternative SAAs should be used to achieve outcomes that differ from the current SAAs and that, in seeking to do so, it is likely to be ineffective as train operators are likely to simply continue to pass that obligation on to the end user in the same way that they do under existing access agreements based on the OAAC.

The Authority also does not consider that there are administrative difficulties with providing the end user with an option to pay all of the access charge provided that choice is made at the time of entering the access agreement, particularly as these payments are made under the AAC.

Indeed, the Authority notes that the ARTC undertaking provides for all relevant payments to be made by the end user and that the ARTC considered that this approach was administratively simple.

Also, while directly billing the end user might impose an additional administrative impost on them, it will be a choice they can make and:

- (a) it is likely to be less costly than having payments channelled through an operator and ultimately paid by the end user; and
- (b) will allow the operator's security to be reduced to the level of its deductibles (see section 3.2 of Security).

Finally, in terms of billing disputes, the Authority is not persuaded by QR Network's argument that an option for an end user to make all payments will lead to it inadvertently becoming involved in billing disputes between the operator and the end user. The end user already pays both the access charge and the take-or-pay amounts under the existing AAC. QR Network, therefore, already faces a risk that it will become involved in another party's billing dispute and this risk is no greater if the end user exercises the option to pay all charges under the EUAA.

The Authority separately considers it reasonable to provide end users (or the train operator) with an ability to refer disputed amounts to the dispute resolution processes after the expiry of an end user agreement (or train operator agreement) as disputes could extend beyond the term of any such agreement. To do otherwise may create an incentive for QR Network to delay resolution until the relevant agreement expires.

Similarly, the Authority considers that a reciprocal arrangement should also apply for monies owed by the end user (or train operator) to QR Network as they would, otherwise, have a similar incentive to delay dispute resolution.

Draft Decision 3.1

The Authority requires QR Network to amend:

- (a) **Clause 3 and Schedule 3 of the EUAA and Clause 2 of the General Conditions of Contract and Schedule 3 of the TOA, and other aspects of the proposed alternative SAAs where relevant, such that an end user has the option on initial execution of the access agreement to pay all components of the access charge;**
 - (b) **Clauses 8 of the EUAA to enable the end user and QR Network to refer disputed amounts to dispute resolution after the expiry of the EUAA; and**
 - (c) **Clause 15 of the General Conditions of Contract of the TOA to enable the operator and QR Network to refer disputed amounts to dispute resolution after the expiry of the TOA.**
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3.2 Security

QR Network's current SAAs require that QR Network be provided with security of 12 weeks worth of access charges, either by the end user or the train operator under the AAC or OAAC, respectively.

In general, the provisions relating to security are broadly replicated in QR Network's proposed alternative SAAs. However, QR Network has proposed that both the end user and operator will each provide security of 12 weeks worth of access charges i.e. the EUAA requires the end user to provide security and the TOA requires the train operator to provide security; each to the value of 12 weeks worth of access charges.

QR Network justified this approach on the basis that both the train operator and the end user have a range of financial obligations to QR Network, the most significant being that the train operator is responsible for paying the access charge and the end user is responsible for take-or-pay obligations.

While stakeholders' main concerns related to the level of security, they also raised a number of other concerns about the security proposals in the alternative SAAs – these matters are dealt with in turn below.

3.2.1 Level of Security

Stakeholders' views

Stakeholders' key concern was that QR Network's proposal for both the end user and operator to provide 12 weeks security was a doubling of security compared to the existing AAC.

Asciano argued that a train operator does not hold access rights so linking the security to the access charge is a misalignment of the rights and liabilities under the agreement (Asciano sub. no. 1: 12).

While the QRC accepted that an increase in security was required due to the splitting of the existing obligations, it said that:

... security under the TOA should be reduced to a level reflecting the deductibles under the Operator's relevant insurances if the End User:

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

OR

– accepts liability, under the EUAA, for any unpaid Access Charges under the TOA (QRC sub. no. 1: 8).

QR Network's response

QR Network has subsequently indicated that it would be willing to accept an arrangement whereby security under the TOA was limited to the deductibles under the operators' insurances, provided the end user indemnified QR Network for any unpaid access charges or other payments payable under the TOA (QR Network, sub. no. 2: 5).

Authority's analysis

The Authority accepts that it is reasonable that the level of security should be related to the risk that an amount owed is unpaid.

The Authority also accepts that it is not possible to keep the risk profile in the context of 'split' access agreements exactly the same as under a single access agreement, such that some increase in aggregate security held by QR Network is appropriate under the alternative SAAs. That is, QR Network has the problem of a default risk in respect of two separate parties, not just one under the proposed split SAAs.

Notwithstanding this, a doubling of security requirements, effectively to 24 weeks, compared with only 12 under existing arrangements, is excessive.

The Authority sees some merit in the QRC's suggestion, and in QR Network revised approach, to reduce security to the level of deductibles if a user indemnifies QR Network against a failure by the operator to pay its access charges. This would increase the maximum security required by QR Network (i.e. security for the end user remains at 12 weeks of access charges but the operator will have to provide security to the extent of its deductibles). However, an increase in total security required is an acceptable outcome, given the increased credit risk posed by dealing with two entities as opposed to one.

In the section 3.1 above on billing, the Authority proposes that the end user have the option to be liable for both access charges and take-or-pay obligations under the EUAA. Where an end user exercises this option, it would effectively remove the risk under the TOA that access charges would go unpaid. In these circumstances, it would therefore be reasonable for the level of security in the TOA to be reduced to the level of the train operator's deductibles and in the EUAA be retained at 12 weeks of access charges (as is currently the case under the current AAC).

The Authority's draft decision 3.2.2 sets out the Authority's conclusion on this matter.

3.2.2 Other Security Related Matters

Stakeholders' views

QRC and Anglo American said that QR Network must not unreasonably withhold or delay the approval of the security to be provided by an operator under the TOA (QRC sub. no. 1: 9, Anglo American sub. no. 1: 13). QR Network did not support this approach (QR Network, sub. no. 2: 5).

QRC added that QR Network should notify the end user if the operator does not provide acceptable security and that the end user should have the option to step in and provide the necessary security on behalf of the train operator (QRC sub. no. 1: 9).

QRC also said that there needs to be a level of certainty on what terms of security should be acceptable to QR Network. In this regard, the QRC attached to its revised draft of the EUAA, a proposed form of a bank guarantee from the end user to QR Network (QRC sub. no. 1: 8).

In response, QR Network said it did not support including a form of a bank guarantee as it may not align with the form issued by an end user's preferred financial institution (QR Network sub. no. 2: 5).

Authority's analysis

The Authority considers that a requirement for QR Network to consider an application for security under the TOA in a timely manner is reasonable and does not impact on QR Network's risk profile compared to the existing SAAs. The Authority notes that such a requirement also reduces the potential for a vertically integrated QR Network to delay consideration of security application from train operators that compete with its related above-rail operator(s).

The Authority also considers it reasonable to provide the end user with scope to step in and provide security for an operator. While this will mean that the TOA is not entirely a stand-alone contract from the EUAA, this approach is reasonable given that the end user may have the financial resources to provide security, on behalf of the train operator, in an efficient manner. It would also provide a remedy to the end user if QR Network will not allow an operator to commence operations in the absence of appropriate security, which would obviously then impact on the end user.

Finally, the Authority notes that the EUAA and TOA stipulate that a bank guarantee must be on terms reasonably acceptable to QR Network. However, the Authority accepts the concerns of stakeholders that this provides no certainty as to what terms are acceptable to QR Network when negotiating with banks. At the same time, the Authority also accepts QR Network's argument that a pro forma guarantee may not align with what is acceptable to the end user's or train operator's banks. Given this, the Authority proposes that the standard bank guarantee (as proposed by the QRC) be appended to the EUAA and TOA and if this is not acceptable by the end user's or operator's banks, then security must be on terms reasonably acceptable to QR Network. The Authority considers that this approach does not change the risk profile of either party.

Draft Decision 3.2.2

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

- (a) where an end user elects to pay both the non-take-or-pay and take-or-pay components of the access charge, the level of the operator's security required under the relevant TOA is to be reduced to the level of the operator's deductibles;**
 - (b) QR Network is precluded from unreasonably delaying the acceptance of the operators' security and to enable the end user to provide security in the event that QR Network decides the operator's security is unacceptable; and**
 - (c) a standard bank guarantee be included in the EUAA and TOA, and if that is unsuitable to the end user or the operator, security must be on terms reasonably acceptable to QR Network.**
-

3.3 Insurance

QR Network's current SAAs require the access holder or operator (under the AAC or OAAC respectively) to have the following insurances:

- (a) carrier liability for \$10 million;
- (b) motor vehicle third party liability of \$20 million; and
- (c) public liability of \$350 million.

The end user is currently not required to maintain these insurances where the operator contracts for access rights through the OAAC.

Under the alternative SAAs, QR Network had initially proposed that the end user and the train operator should both hold each of these three insurances.

Stakeholders' Views

QRC and BMA argued that the types and levels of insurances should reflect the relevant risks associated with each party's performance of their obligations (QRC sub. no. 1: 9, BMA sub. no. 1: 9).

BMA also noted that end users are not required to provide insurances under the ARTC undertaking (BMA sub. no. 1: 9).

QRC said that as the objective of the alternative SAAs is for the end user to be absolved of liabilities for rail operational issues, it is not appropriate for the end user to be required to hold motor vehicle insurance (QRC sub. no. 1: 9).

Both QRC and Anglo American said it is not appropriate for the end user to be required to hold carrier liability insurance (Anglo American sub. no. 1: 13, QRC sub. no. 1: 9).

QRC also said that it is not appropriate for the end user to be required to hold public liability insurance to the same extent as the operator (QRC sub. no. 1: 9). Anglo American went

further and said that end users should not have to hold public liability insurance at all (Anglo American sub. no. 1: 13).

QR Network's response

QR Network said end users should be required to maintain motor vehicle insurance as it considered that it is conceivable that an end user's vehicle may enter QR Network premises (QR Network sub. no. 2: 5)

However, QR Network accepted stakeholders' comments that end users should not hold carrier liability insurance (QR Network sub. no. 2: 5).

QR Network maintained that end users should hold public liability insurance as the EUAA provides QR Network with the ability to hold the end user liable for incidents which are not related to train performance, but may arise due to the actions of the end user (e.g. loading practices). QR Network argued that such actions may give rise to an incident on the mainline which has the potential to result in a maximum exposure consistent with an incident which was associated with the actions of a railway operator. As such, QR Network argued that the level of insurance requirements should be consistent between the EUAA and the TOA (though insurance requirements will be subject to commercial negotiations on a case-by-case basis) (QR Network, sub. no. 2: 5).

Authority's Analysis

The Authority considers that, consistent with its approach on security, the requirements for insurances should reflect the risks associated with the relevant party's activities.

The Authority considers that end users should only be held responsible for the actions of operators to the extent that an end user's actions directly impact on QR Network. This is consistent with intent of the alternative SAAs to allow end users to manage their access rights without becoming involved in operational issues.

The Authority does not consider that an end user should be required to maintain motor vehicle third party insurance, particularly as under the current SAAs, only the operator is required to maintain this insurance (i.e. under the OAAC). Further, the Authority is not aware of circumstances where QR Network requires other parties who may enter its premises to have such third party insurances.

The Authority does not accept a requirement for end users to maintain carrier liability as they do not conduct rail haulage operations. Relevantly, QR Network has accepted this in its response to stakeholder submissions.

The Authority also does not consider that an end user should be required to maintain public liability third party insurance. While the way in which a train is loaded may lead to an incident on the mainline, this should be the operator's liability and managed in the TOA. It then remains open to the train operator to seek to manage this risk by including appropriate liability arrangements with the end user in the haulage agreement.

The Authority's position on insurances is consistent with the ARTC access undertaking that does not require the end user to maintain any insurances.

The Authority also notes that the EUAA currently provides that an end user's staff (which, given the definitions in the alternative SAAs, arguably includes the operator) to indemnify QR Network for all claims for damage in respect of loss or damage to property. In these circumstances, the current drafting of the EUAA appears to make the end user responsible

for the actions of an operator. However, the Authority understands that any loss or damage caused by the operator would be covered under their public liability insurance. The Authority therefore requires that the definition of ‘end user’s staff’ should be revised to explicitly exclude the operator (see section 3.9 on Definitional matters). This avoids doubling up of liability and clarifies that the operator is liable for operational matters (as they are best able to manage the risks associated with operational issues).

Draft Decision 3.3

The Authority requires QR Network to amend Schedule 4 of the EUAA such that the requirement that the end user must hold carrier liability, motor vehicle third party liability and public liability insurances is deleted.

3.4 Liabilities and Indemnities

3.4.1 Liability for Infrastructure

Under the current SAAs:

- (a) QR Network will not be liable to the end user or operator; and
- (b) the end user or operator cannot make any claim for loss of, or damage to, real or personal property,

arising out of the standard of infrastructure. The exception to this is where such loss or injury results directly from the failure of QR Network to perform maintenance works or that QR Network was negligent in performing these obligations.

In the EUAA, QR Network has retained provision for liability for the standard of infrastructure, but QR Network’s liability does not extend to where it has negligently performed maintenance works.

Stakeholders’ submissions

QRC and BMA noted that QR Network’s liability under EUAA for the standard of infrastructure is narrower than in the current AAC. They said that in the AAC, QR Network is liable for claims where it has failed or has been negligent in carrying out maintenance works. However, in the EUAA, QR Network is only liable where it has failed to perform the maintenance works, not where it has been negligent (QRC sub. no. 1: 7, BMA sub. no. 1: 7).

QRC argued that there:

... is no reason why the position under the EUAA should not be the same as the Access Agreement Coal. QRC consider[ed] that QR Network should therefore be liable in these circumstances where it has negligently performed its Maintenance Work (QRC sub. no. 1: 7).

QRC and BMA added that QR Network should also be liable where damage is caused or (to the extent of the contribution) contributed to by QR Network’s negligence (QRC sub. no. 1: 7, BMA sub. no. 1: 7). This drafting is not contained in the AAC.

QR Network’s Response

Following review of stakeholder submissions, QR Network accepted that the drafting of the EUAA be amended to extend QR Network’s liability for infrastructure to negligent actions. However, in doing so, QR Network proposed to replicate the current provisions in the AAC,

rather than accepting stakeholders' drafting which included the phrase "caused or (to the extent of the contribution) ..." (QR Network sub. no. 2: 7).

Authority's analysis

The Authority agrees with QRC and BMA that QR Network had sought to narrow its liability under the EUAA by initially deleting the reference to 'QR Network's negligence in performing these obligations'. The Authority supports stakeholders' view that the position in the EUAA should be the same as under the current SAAs as this retains the risk profiles of the various parties.

However, the Authority considers that the amendments proposed by stakeholders, whereby QR Network would be liable where damage is caused or (to the extent of the contribution) contributed to by QR Network's negligence, goes beyond the provisions in the current SAAs. This is because they extend QR Network's liability to wilful default and not just negligence. It also extends the concept of negligence beyond negligence in performing the obligations, to any negligent act or omission.

Given this, the Authority accepts QR Network's revised proposal to replicate the words from the existing SAAs, with the reference to QR Network's negligence in performing its obligations being re-inserted. This will maintain the existing risk profiles of the parties without narrowing or increasing the scope of the liability.

Draft Decision 3.4.1

The Authority requires QR Network to amend Clause 8 of the EUAA to provide for QR Network to be liable for the standard of infrastructure where it has been negligent in performing its obligations in respect of the standard of the infrastructure under the TOA.

3.4.2 End User Liability for Above-rail Operational Issues

Under the AAC, the end user is required to indemnify QR Network and third parties for above-rail operational issues. QR Network proposed to include this requirement in both the EUAA and TOA.

Stakeholders' submissions

Anglo American, QRC and BMA said that the requirement for the end user to indemnify QR Network and other parties for claims that result from conduct outside the end user's control should be removed from the EUAA (Anglo American sub. no. 1: 13, QRC sub. no. 1: 21-22). In particular, the QRC and BMA noted that the key objective of the proposed alternative SAAs was to allow end users to contract directly with QR Network for rights of access to QR Network's rail network without bearing liability and obligations for above-rail operational issues since such liability was to be borne by the relevant train operator.

Given this, QRC and BMA said that the indemnity should be deleted from the EUAA as QR Network:

- (a) will have the benefit of an identical indemnity from the operator;
- (b) has the right to approve each operator nominated by the end user; and
- (c) will receive security from each operator for the performance of its obligations (QRC sub. no. 1: 21-22, BMA sub. no. 1: 6).

Authority's analysis

The Authority accepts that QR Network's approach retains the original drafting of the SAAs. However, as with the provisions relating to security and insurance (see sections 3.2 of Security and 3.3 of Insurance), replicating the same wording in the two new SAAs changes the risk profile in favour of QR Network.

Under the existing SAAs, QR Network only had one access agreement with one party (the operator or the end user), so it was only indemnified by one party. The indemnity covered all relevant loss in the anticipation that the party would have to use the haulage contract to provide for back-to-back liability which might arise under that indemnity due to the fault of the party that was not directly contracting for access with QR Network. The inclusion of the indemnity in both the EUAA and the TOA therefore advantages QR Network relative to its position under the current SAAs.

Given this, the Authority considers that in order to maintain the risk profiles of the parties unchanged under the alternative SAAs, operational indemnities or indemnities relating to the operator's conduct should only be in the TOA. This approach is also consistent with the Authority's position that, where possible, an end user should be able to contract for access rights without being responsible for operational issues.

Draft Decision 3.4.2

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

3.4.3 QR Network Cause

The current SAAs provide that train services that were not operated as a result of a "QR Network Cause" are excluded from the calculation of the take-or-pay charges.

QR Network has retained the existing provisions in the EUAA and TOA but has included an additional requirement of QR Network complying with its passenger priority obligations.

Stakeholders did not comment about the inclusion of the passenger priority obligation in the definition of QR Network Cause. Rather, stakeholders argued that the definition of QR Network Cause should be broadened to include a breach of the TOA so that a breach of this agreement did not relieve QR Network of its obligations under the EUAA (BMA sub. no. 1: 12, QRC sub. no. 1: 7, Anglo sub. no. 1: 13).

The Authority notes that under the current SAAs, the definition of QR Network Cause does not include an explicit reference to a breach of an access agreement. However, it does include in the definition of QR Network Cause, 'any other action by QR Network which directly resulted in the Infrastructure not being so available'. This provision has been retained in the alternative SAAs.

The Authority considers that the above provision can be construed to cover breaches of the relevant SAA (including a TOA) as a QR Network Cause to the extent they result in the relevant rail infrastructure not being available. As such, the Authority considers that QR Network's current proposal appropriately addresses stakeholders concerns.

Given this, the Authority is of the view that, in the absence of further information, any explicit reference to a breach of the TOA being a QR Network cause may increase QR

Network's risk profile beyond that which presently exists. On this basis, the Authority does not seek for this provision to be amended.

Separately, the Authority requires QR Network to remove the reference to its passenger priority obligations in its proposed definition of QR Network Cause.

As there is no reference to QR Network's passenger priority obligations in the current SAAs and the inclusion of this term is not necessary as part of the split arrangements, the Authority considers the widening of the definition of QR Network to include this wording unnecessarily alters the risk profiles of the parties.

Draft decision 3.4.3

The Authority requires QR Network to amend the definition of "QR Network Cause" in Clause 1 of the EUAA and Clause 1 of the General Conditions of Contract of the TOA to remove the reference to QR Network's "Passenger Priority Obligations".

3.4.4 Consequential Loss

Under the current SAAs, QR Network is liable to the access holder or operator (under the AAC or OAAC respectively) for consequential loss for wrongful suspension. QR Network, or the access holder or operator (under the AAC or OAAC respectively) are also liable to each other for a wrongful audit or inspection that they initiate.

The aforementioned parties are not liable for consequential loss in all circumstances where it is ultimately found that the grounds for suspension, audit or inspection (as applicable) did not exist. Rather, the party that initiated the suspension, audit or inspection (as applicable) will be liable for consequential loss only if no reasonable person in its position could have formed the view that the grounds for suspension, audit or inspection (as applicable) existed and provided the access holder or operator (as applicable) took all reasonable steps to mitigate the loss. QR Network is not liable for consequential loss to the other party with which they do not have an access agreement (whether that is the access holder or operator) due to the operation of an access interface deed (AID). This deed removes QR Network's liability for consequential loss to this party.

Also, while not specific to consequential loss, the existing SAAs contain other limitations on QR Network's liability which apply in the circumstance where QR Network would otherwise be liable for consequential loss.

Under the alternative SAAs, QR Network proposed that it only be liable to the operator (under the TOA) for consequential loss for wrongful suspension, audit or inspection, and not be liable for consequential loss in any circumstances to the end user (under the EUAA). QR Network also proposed that the other limitations on liabilities be retained unchanged from the current SAAs.

Stakeholders' submissions

QRC, BMA and Anglo American said that the protections for the end user under the AAC should be provided in the EUAA (QRC sub. no. 1: 7, BMA sub. no. 1: 8, Anglo American sub. no. 1: 13). In other words, these stakeholders wanted QR Network to be liable to the end user for consequential loss for wrongful suspension, audit and inspection.

QR Network's response

Having reviewed stakeholder submissions, QR Network maintained its position regarding consequential loss. In support, QR Network said the position to exclude itself from liability for consequential loss under the alternative SAAs was consistent with the current OAAC (QR Network sub. no. 2: 7).

Authority's analysis

The Authority accepts that QR Network's consequential loss provisions in the alternative SAAs are consistent with the OAAC. Under this regime, QR Network is not liable to the end user for consequential loss.

However, the Authority notes that unlike the current SAAs where QR Network only has an access agreement with a single party (i.e. the operator under the OAAC or end user under the AAC), the alternative SAAs provide for QR Network to have detailed contracts in relation to access with two parties (i.e. the operator and the end user).

In this circumstance, the Authority considers:

- (a) QR Network and the operator should retain the right to initiate audits and inspections as they relate to operational matters;
- (b) QR Network should retain the right to suspend – which will become part of both the EUAA (where access rights are being suspended) and the TOA (where rights of a particular operator to operate train services on behalf of an end user are being suspended);
- (c) where the operator initiates a wrongful audit or inspection under the TOA, it should have liability for consequential loss to QR Network (subject to the 'no reasonable person' test referred to above); and
- (d) where QR Network initiates a wrongful suspension (of access rights or operational rights), audit or inspection, it should have liability for consequential loss to both the operator (under the TOA) and the end user (under the EUAA) (subject to the 'no reasonable person' test referred to above).

The Authority notes that the last point (QR Network being liable to both the operator and end user) would arguably increase the risk profile of QR Network. However, to do otherwise would not provide the end user with adequate protection for any wrongful suspension, audit or inspection.

This is one of the issues in respect of which the Authority considers the TOA and EUAA should not merely replicate the position in one of the AAC or OAAC. The TOA and EUAA are designed to provide the end user with greater control over their access rights and any adverse impacts on them.

In that context, it is appropriate that the narrow exclusions for consequential loss caused by QR Network's conduct should also extend to the end user.

The Authority also notes that the QR Network's liability for consequential loss will only apply in very narrow circumstances, namely where no reasonable person in QR Network's position could have formed the view that the relevant grounds existed and only if the end user took all reasonable measures to mitigate the loss (and any liability would also be limited by the other limitations on QR Network's liability contained in the EUAA). Consequently any increase in QR Network's risk profile arising from this position is very limited in nature.

Given these considerations, it is proposed that the consequential loss liabilities in respect of suspensions, audits and inspections be inserted into the EUAA in addition to being provided in the TOA.

In addition, the Authority considers that QR Network should not face duplication in liability for particular loss or damage (i.e. a claim for particular loss or damage made under both the EUAA and TOA). Therefore, the Authority proposes that QR Network not be liable to the end user for wrongful suspension where the same loss or damage has been claimed under the TOA.

Draft Decision 3.4.4

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

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

The current SAAs provide that QR Network will not be liable for claims by the operator for an “operational constraint” unless they were caused by QR Network’s breach of the agreement with the access holder.

The alternative SAAs maintain this requirement in the TOA, but remove them from the EUAA. This results in QR Network not being liable to the operator for operational constraints where they are caused by its breach of the EUAA.

Stakeholders’ Views

QR National said that the definition of an “operational constraint” should be refined to differentiate between operational constraints beyond QR Network’s control (e.g. wet weather events) and those which could have reasonably been avoided had QR Network chosen to maintain the network in a different manner (QR National sub. no. 1: 6).

Authority’s Analysis

The Authority does not consider it appropriate to alter the definition of an “operational constraint” given they are retained unchanged from the current SAAs. To do otherwise would alter QR Network’s risk profile.

However, given the splitting of the existing agreements under the alternative regime, the Authority considers that there may be circumstances where QR Network breaches the EUAA resulting in increased operational constraints. Given this, the Authority considers it appropriate to amend the TOA to extend QR Network’s liability for operational constraints to both a breach of the TOA and any relevant EUAA. Doing so will maintain QR Network’s risk profile in comparison to the existing SAAs.

Draft decision 3.4.5

The Authority requires QR Network to amend Clause 7 of the General Conditions of Contract of the TOA to clarify that QR Network is liable to the operator for an operational constraint caused by either a breach of the EUAA or the relevant TOA.

3.5 Suspension

3.5.1 Rights of Suspension

The current SAAs provides for QR Network to suspend the right of the access holder or operator (under the AAC or OAAC respectively) to operate train services for specified events or circumstances. These events and circumstances relate to both access rights and train operations, and include:

- (a) failure to pay amounts owing;
- (b) failure to maintain relevant securities and insurances;
- (c) insolvency;
- (d) assignment of access rights in a manner inconsistent with the agreement;
- (e) failure to comply with train operation requirements, including rollingstock configurations; and
- (f) suspension of an operator's accreditation.

They also provide for QR Network to lift the suspension where any default has been remedied.

Under the alternative SAAs, QR Network proposed to retain a right to suspend the operation of train services in the TOA, with an acknowledgement of this right in the EUAA. While the detailed events and circumstances leading to the suspension of train services are listed in the TOA, they are not listed in the EUAA. The TOA provides for QR Network to lift the suspension where the operator has remedied its default. However, the TOA does not explicitly require QR Network to lift the suspension where the end user has remedied its default.

Stakeholders' Views

QRC said that the circumstances leading to QR Network's suspension rights under the TOA may be unknown to the end user as they are not contained in the EUAA. To resolve this issue, QRC said that the suspension rights must be agreed between QR Network and the end user (QRC sub. no. 1: 28-29).

Stakeholders also said it should be clear that the suspension of train services will be lifted where the end user has remedied its default (QRC, sub. no. 1: 30, Anglo American sub no. 1: 14).

Authority's Analysis

The Authority notes that any suspension of train services impacts not just the operator, but also the end user as it impacts on their ability to use their access rights. Given this, the Authority considers it important that suspension rights are clearly articulated.

Under the alternative SAAs, QR Network's specific suspension rights are contained in the TOA, but not the EUAA.

However, the grounds for suspension in the TOA relate to both actions of the operator and the end user. For instance, QR Network can suspend the right of the operator to operate train services in relation to:

- (a) the operator failing to meet its obligations for payment of amounts due, train operations, infrastructure management, incidence management and insolvency; and
- (b) the end user failing to meet its obligations for security, insurance, insolvency and assignment.

The Authority accepts that QR Network has not increased the circumstances in which it can suspend train services (except to the extent necessary because of there being two counterparties – i.e. each counterparty can fail to pay access charges or retain the required insurances etc).

However, the Authority considers it preferable for the TOA and the EUAA to only include suspension rights where they relate specifically to operational and access right issues respectively with an acknowledge in each agreement of the impacts of suspension in the other agreement. In doing so, the Authority also considers that the EUAA should be amended to provide for QR Network to lift the suspension of train services under the EUAA once the end user has remedied any default and action has been taken to prevent its recurrence.

The Authority considers that this approach is consistent with the intent of the alternative SAAs, which was for the end user and operator to be responsible for access rights and operational issues respectively.

Draft Decision 3.5.1

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

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

The Authority also requires QR Network to amend Clause 13 of the EUAA to require QR Network to lift an end user's suspension for default, once it has been remedied and action has been taken to prevent its recurrence.

3.6 Termination by QR Network

The current SAAs provide that QR Network may, by notice to the operator (end user), immediately terminate the OAAC (AAC) upon the occurrence of certain events or circumstances where the default (such as non-payment of amounts) continues. However, termination can only occur where QR Network has first exercised its rights of suspension.

Under the alternative SAAs, QR Network has retained these termination arrangements in the TOA. QR Network has amended the termination clause in the EUAA such that, in general, it relates to a narrower range of event or circumstances that are specific to the end users. However, QR Network has included an additional termination event not included in the current SAAs, namely that QR Network could terminate the EUAA if the end user failed to comply in any material respect with its obligations in relation to infrastructure management (i.e. clause 6). In particular, the end user must:

- (a) not cause or continue any obstruction; and
- (b) notify QR Network of any damage to, or disrepair of, or failure in, the operation of the nominated network which the end user's staff (which potentially includes the operator) becomes aware of.

QR Network has also removed the requirement in the EUAA that it must exercise its rights of suspension prior to termination.

Stakeholders' Views

QRC and Anglo American stated that an end user's obligation to advise QR Network of matters affecting the operation of the network should be removed from the EUAA as the condition of the network is not within an end user's knowledge (Anglo American sub. no. 1: 10) (QRC sub. no. 1: 30). In this regard, Anglo American noted that:

An End User cannot be subject to obligation to notify QR Network of a matter within the knowledge of the Operator and to suffer the potential consequence of termination of the EUAA if the End User breaches clause 6(b)(ii) for a failure to notify when the Operator has not informed the [End User of the obstruction. This matter is best dealt with under the TOA and not the EUAA (Anglo American sub. no. 1: 10).

Anglo American proposed that at the very least, the termination for a breach of an infrastructure standard should be limited to where the end user causes or continues to cause an obstruction (Anglo American sub. no. 1: 10).

QRC also stated that termination rights should not include failure to pay amounts that are subject to the dispute resolution provisions of the EUAA (QRC sub. no. 1: 30).

Anglo American and the QRC separately argued that a suspension right exists to provide end users with an opportunity to cure a default before termination applies (Anglo American sub. no. 1: 16, QRC sub. no. 1: 30-31). In this regard, the QRC argued that QR Network's proposal to enable it to terminate without first exercising its rights of suspension were inconsistent with the current SAAs.

Following consideration of stakeholder comments, QR Network acknowledged that the EUAA should include the relevant notice and remedy period in the current OAAC prior to QR Network exercising its rights to terminate (QR Network sub. no. 2: 6).

Authority's Analysis

The Authority accepts that QR Network has included an additional ground in the EUAA for termination, namely where the end user has not complied with the infrastructure management provisions.

The Authority agrees that an end user should not be liable for failing to notify QR Network of damage or disrepair of infrastructure if it is outside their actual knowledge. This is because the end user is not responsible for operational matters. This is addressed by the

Authority's proposed amendment to the definition of "End User's Staff" (see section 3.9 on Definitional matters).

However, where the end user does become aware of such damage or disrepair, the Authority considers it reasonable that an end user should be encouraged to advise QR Network of these matters. In this context, the Authority notes that end users already have an incentive to notify QR Network of such matters, as a failure of the network to operate effectively may impact on them as they are liable under the take-or-pay arrangements. QR Network's proposed drafting of the end user's obligations in respect of infrastructure management already provides for this and the Authority does not propose any further amendments in this respect.

Separately, the Authority considers it is reasonable for QR Network to not terminate an access agreement for failure to pay amounts that are under dispute resolution.

The Authority accepts that both of the above matters are not contained in the current SAAs. As such, in isolation, their inclusion would impact on the risk profile of the parties.

However, the Authority considers that these matters impact on the risk profiles of the various parties in different directions and are reasonable and consistent with the effective operation of the split contracting structure. Indeed, collectively requiring end users to notify QR Network of damage/obstruction to the network and preventing QR Network from terminating regarding unpaid amounts that are subject to dispute resolution does not materially alter the overall balance of risks for parties.

Given this, the Authority accepts:

- (a) QR Network's inclusion of the additional termination ground, provided it is limited to where the damage or disrepair of the network is known to the end user; and
- (b) stakeholders' proposal that QR Network not be able to terminate the EUAA for failure to pay amounts that are under dispute resolution.

Separately, the Authority notes a cure period has been included in the TOA requiring QR Network to have first exercised its rights of suspension prior to termination. However, this provision has been removed from the EUAA. The Authority considers that this cure period provided by the requirement to first exercise a corresponding suspension right should also be included in the EUAA, which is something that QR Network has already indicated it is willing to do.

The Authority also considers that the EUAA should require QR Network to notify the end user if they have issued a termination notice to the train operator. This is also something that QR Network has already indicated it is willing to do.

Draft Decision 3.6

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

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

3.7 Timeframes for QR Network to Request Forecasts on Train Services

The current SAAs allow QR Network to request an access holder or operator (under the AAC or OAAC respectively) to provide information on volume estimates every 6 months so QR Network can plan for the maintenance and upgrading of the network.

Following QR Network's request, the party must provide a written response within 30 days that sets out its best estimate of volumes over the next 6 year period in terms of:

- (a) the number and frequency of train services required;
- (b) the gross tonnage to be transported;
- (c) the average number of gross tonnes per train to be transported; and
- (d) any changes in rollingstock or rollingstock configuration which will vary any of the above.

This information must consist of monthly forecasts for the first year, and then annual forecasts for the remaining 5 years.

For its part, an access holder or operator can request, not more than once in any 6 month period, that QR Network provide information on forecasts of major planned infrastructure enhancements relating to the access holder's nominated network for the next 6 year period.

Under the current arrangements, the information provided by an access holder or operator to QR Network (or vice versa) is prepared and supplied in good faith and does not represent a warranty as to the accuracy of the forecasts provided.

Under the alternative SAAs, QR Network has, with regard to the:

- (a) *information requirements* – retained the arrangements under both the EUAA and TOA. In doing so, QR Network has removed the requirement for an end user to provide train operation related forecasts (relating to (c) and (d) above); and
- (b) *frequency of permitted requests* – increased the number of requests it can make, i.e. QR Network can request the information every 3 months (previously it was every 6 months). However, QR Network retained the limit on the ability of an end user or train operator to make a request to once every 6 months.

Stakeholders' Views

QRC and Anglo American said the forecasting obligations imposed on end users or operators should not be more onerous than those contained in the existing arrangements – i.e. QR Network should not be able to request forecast information more than once in any 6 month period.

In addition, both QRC and Anglo noted that under QR Network's proposal, both the end user and the operator would be providing the same forecast information and, as such, questioned whether it was necessary to have both (Anglo sub. no. 1: 13, QRC sub. no. 1:18).

Authority's Analysis

The Authority accepts that the frequency of reporting obligations should not be more onerous than those contained in the existing SAAs. Accordingly, the Authority does not accept QR Network's proposal to provide it with the ability to require haulage information every 3 months and requires QR Network's frequency of permitted requests to remain at once in any 6 month period.

The Authority also accepts that requiring both the end user and operator to provide the same overlapping information imposes unnecessary compliance costs and creates the risk of inconsistent information being provided on expected train services. In this regard, the Authority considers that the end user is better able to satisfy the reporting obligations. In particular, the end user is better placed to provide forecasts of the frequency of train services required and the level of tonnage to be transported. It is also not clear that an operator will be better placed to provide information on train tonnages and train configurations given the Authority's proposed changes to enhance an end user's flexibility to vary the allocation of its access rights across train operators (see chapter 2 on Exercise of Access Rights).

Given this, it is proposed that the reporting requirements be removed from the TOA and inserted into the EUAA.

Draft Decision 3.7

The Authority requires Clause 4 of the EUAA relating to forecasts to be amended to be consistent with the equivalent requirements in the current SAAs.

The Authority requires Clause 4.2 of the General Conditions of Contract of the TOA to be removed.

3.8 Weighbridges and Overload Detectors

The current SAAs provide that QR Network or the access holder/operator (under the AAC or OAAC respectively) can require the accuracy of weighbridge or overload detector be tested. The current SAAs provide that the party who requests the test pays the cost of the test if the weighbridge or overload detector is accurate. Conversely, the cost of the test is borne by the party responsible for the weighbridge or overload detector if these devices are found to be inaccurate.

Under the alternative SAAs, QR Network proposed to retain this clause in the TOA and exclude it from the EUAA.

Stakeholders' Views

QR National said that the EUAA should contain this clause as the end user is the ultimate beneficiary of tonnages transported and has an interest in the accuracy of tonnages measured (QR National sub. no. 1: 5).

Authority's Analysis

The Authority notes that there may not be sufficient incentive for a train operator to question the accuracy of any weighbridge or overload detector, particularly if a test is likely to indicate over-measurement (i.e. the operator is utilising less of the end user's access rights than it should).

The Authority agrees with QR National that the end user should have the ability to question the accuracy of weighbridge or overload detector given it is the ultimate beneficiary of tonnages transported.

Further, the Authority notes that excluding the clause in the EUAA would alter the risk profile of the parties as the clause is contained in the current SAAs.

Given these considerations, the Authority accepts that that it is appropriate this requirement be included in the EUAA.

Draft Decision 3.8

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

- (a) the end user can question the accuracy of weighbridge or overload detector if it believes that measurements may be inaccurate; and**
 - (b) the cost of conducting such a test will be borne by the party responsible for the weighbridge or overload detector if test measurements fall within tolerances, or by the party giving notice if test measurements indicate otherwise.**
-

3.9 Definitional Matters

The current SAAs contain a range of defined terms relevant to operational matters. These include "Master Book of Rules", "Noise Planning Levels" and "QR Network's Right of Way". Under the alternative SAAs, these operational terms are contained in both the EUAA and the TOA.

The current access holder SAA (the AAC) also defines "access holder's staff" to include the operator. Under the alternative arrangements, the EUAA does not contain a definition of an "access holder's staff". However, it defines an "end user's staff" to include contractors of the end user.

Stakeholders' Views

QRC said that the EUAA contained a range of defined terms (including those listed above) that are not relevant to the end user which should be deleted (QRC sub. no. 1: 12).

QRC also said that the definition of "end user's staff" should be amended to specifically exclude the operator as the end user should not be responsible for the operator's acts or omissions (QRC sub. no. 1: 20).

Authority's Analysis

The Authority accepts that defined terms in the EUAA (TOA) which are not relevant to the end user (operator) should be removed.

The Authority notes the definition of an “end user’s staff” in the EUAA does not specifically include or exclude the operator and is, in this respect, ambiguous.

The Authority considers that if the operator falls within the definition of the end user's staff in the EUAA, QR Network could terminate the EUAA for a breach by the operator. The Authority does not consider that this would be consistent with the intent of the alternative SAAs; that is, to split responsibilities for access rights and operational matters between the end user and operator respectively.

Given this, the Authority proposes to amend the definition of “end user’s staff” to specifically exclude the operator.

Draft decision 3.9

The Authority requires QR Network to amend Clause 1 of the EUAA and Clause 1 of the General Conditions of Contract of the TOA to remove defined terms that are not used.

The Authority requires QR Network to amend Clause 1 of the EUAA to exclude the operator from the definition of an “End User’s Staff”.

3.10 Most Favoured Nation Clause

The current SAAs contain a most favoured nation status clause in respect of access charges. This clause allows the access holder or railway operator to notify QR Network where it believes QR Network has entered into an access agreement with another party on more favourable terms.

In these circumstances, QR Network must advise the access holder or railway operator on whether it agrees/disagrees with the notice, including providing reasons if it disagrees, or varying the access charge of the relevant access holder or railway operator if it agrees.

Under the alternative SAAs, QR Network proposed to retain the existing clause in the TOA and exclude it from the EUAA.

Stakeholders' Views

QRC said that the EUAA should also contain a most favoured nation status clause (QRC sub. no. 1: 33).

Authority's Analysis

The Authority considers it reasonable for the EUAA to include a most favoured nation clause. In particular, where the end user elects to pay all the relevant charges, a most favoured nation clause would enable the end user to query whether other access holders were receiving more favourable payment terms from QR Network (see also section 3.1 of Billing).

The Authority also considers that the inclusion of this provision in the EUAA is reasonable given it is contained in the current SAAs. To do otherwise would alter the risk profile of the parties.

Draft Decision 3.10

The Authority requires QR Network to amend Clause 17 of the EUAA to include a “Most Favoured Nation Status” clause.

4. ADDITIONAL PROVISIONS FOR SPLITTING RESPONSIBILITIES

The relationship between the operator and the end user should largely be governed by the terms of the haulage agreement, which is an above-rail agreement and is not subject to regulation by the Authority. The Authority accepts that QR Network should not be unnecessarily drawn into matters relating to the relationship between the operator and the end user.

However, this will not always be possible as implementing the alternative SAA structure requires more than allocating existing responsibilities and obligations between an operator and end user as the actions of the operator can impact on the end users, and vice versa. For instance, under the:

- (a) TOA, QR Network may suspend or terminate an operator's access to the rail infrastructure because of some default by the operator. This may impact on an end user's ability to utilise its rights under the EUAA; and*
- (b) EUAA, QR Network may resume an end user's access rights which may impact on the operator's ability to operate train services.*

There may be circumstances where the end user is not aware that the train operator will be suspended, or where the train operator may not be aware that the end user's access rights are to be resumed.

Given this, in some circumstances, the alternative SAA structure may require additional provisions to manage the risks created from the splitting the obligations and responsibilities under the current SAAs. This largely relates to QR Network's notices to the train operator being copied to the end user, and vice versa.

This chapter identifies those aspects of QR Network's proposal which require additional provisions due a change in contracting structure.

The Authority is inclined to accept those provisions that are necessary to ensure that the risk profiles of the parties are commercially balanced, or are otherwise necessary to effectively implement the split contracting structure. Where the risk profiles of the parties are unnecessarily altered as compared to the current SAAs, the Authority is inclined to reject these changes.

4.1 Control over Access Rights

QR Network's current SAAs contain notice provisions that require QR Network to notify end users and operators on a range of issues including suspension, termination and train service entitlements.

Under QR Network's alternative SAAs, in some cases, QR Network is required to notify one contracting party (i.e. the end user or the operator) even though QR Network's actions will impact on the other contracting party.

Stakeholders expressed concerns that their inability to become aware of such actions can adversely impact on their responsibilities and obligations. End users expressed a desire to be made aware of operational matters which could impact upon the utilisation of their access rights. Similarly, operators expressed a desire to be made aware of changes in the allocation of an end user's access rights that would impact on the performance of operational matters.

To address the aforementioned concerns, some stakeholders wanted a form of tripartite contract to enhance awareness of contracting matters across all parties. Tripartite contracting

involves an agreement between QR Network, the train operator and the end user to ensure that all three parties understand their respective obligations and responsibilities.

In this regard, QRC argued that:

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

- the Operator and QR Network may not vary, amend or change the Train Operations Agreement without the prior written agreement of the End User;*
- the Operator and QR Network may not suspend or terminate (in whole or in part) the Train Operations Agreement (including the provision of Access Rights) other than in accordance with the Train Operations Agreement and then only after giving the End User a copy of the notice and a reasonable time period to remedy the cause of the suspension or termination;*
- the Operator may not waive any rights under the Train Operations Agreement without the prior written agreement of the End User;*
- the Operator and QR Network must give the End User a copy of any notice of dispute or force majeure at the same time providing such a notice to the other party;*
- QR Network or the Operator (as the case may be) must provide the End User with any notice, correspondence or other information exchanged or developed under or in respect of the Train Operations Agreement; and*
- ... [parties] may not assign the Train Operations Agreement without the prior written agreement of the End User (QRC sub. no. 1: 10-11).*

QR Network's response

QR Network did not support tripartite contracting and argued that the alternative SAAs are not intended to provide a framework for managing the commercial relationship between the train operator and the end user. QR Network said that that these contractual obligations could be reflected in the rail haulage agreements between the end user and operator (QR Network sub. no. 2: 6)

Authority's analysis

The Authority does not consider that tripartite contracting is an appropriate response to protecting the rights of the end user and the operator to actions under the TOA and EUAA respectively (i.e. under the alternative parties' contract with QR Network).

Tripartite contracting is not consistent with the intent of the alternative SAAs which is to separate the contracting obligations for access rights from operational matters. Tripartite contracts may also impose undue contracting obligations on QR Network and affect the balance of risk between QR Network and end users and operators.

Notwithstanding this, the Authority acknowledges that the actions and outcomes in respect of the TOA or the EUAA can have implications for the end user and operator respectively.

As a general principle, the Authority accepts that end users and operators should be made aware of changes in the other contract which impact upon them. This enables the parties to take measures to better protect and manage their access rights and is consistent with an effective SAA structure which allows end users to contract for access rights and operators to contract for train operations. This approach is also consistent with the ARTC undertaking.

The Authority also accepts that in some circumstances, end users and operators should be able to influence outcomes under the EUAA and TOA respectively, particularly where they are directly relevant to their rights.

The following sections consider notice requirements and other mechanisms which can address this.

4.2 Notice Requirements for Defaults by Operators

The current SAAs provide for QR Network to give notice to the end user (or operator) under the AAC (or OAAC) prior to suspending or terminating the access agreement. Under the alternative SAAs, QR Network is required to give notice to the operator, but not the end user.

Stakeholders' Views

Under the alternative SAAs, end users argued that they should be made aware of a default by an operator under the TOA as it would have implications for the EUAA, namely in respect of:

- (a) force majeure – Anglo American said that an end user's consent should be required to terminate a TOA after an extended force majeure event while QRC said that notices served to the operator for the extended force majeure event should also be served to the end user (Anglo American sub. no. 1: 14; QRC sub. no. 1: 27). BMA said that an end user should have a right to step-in to remedy any default of the operator and end users should have the rights to appoint another operator (BMA sub. no. 1: 10); and
- (b) suspension and termination – Anglo American, QRC and BMA wanted suspension notices to be served on the end user as well as the operator. Anglo American and BMA also argued for step-in rights to remedy an operator's default (Anglo American sub. no. 1: 14, QRC sub. no. 1: 9, BMA sub. no. 1: 9-10).

QR Network's Response

QR Network accepted that end users should be informed of suspension and termination notices under the TOA. QR Network also accepted that in these circumstances, a potential remedy would be for the end user to allocate access rights to an alternative operator. However, QR Network did not accept step-in rights for operational matters (QR Network sub. no. 2: 6).

Authority's Analysis

The Authority accepts that it is reasonable for the end user to be provided with a copy of the notices served by QR Network on the operator for the above matters. This is because any actions which may lead to a suspension or termination of an operator's TOA will impact on the end user's ability to utilise their access rights.

However, the Authority does not accept it is reasonable to require the end user's consent prior to termination of a TOA or to provide the end user with step in rights to remedy any defaults in relation to operational issues. This is because such provisions are not consistent with the intent of the split contracting structure to allocate the obligations of the end user and operator into separate contracts. It would also increase the risk profile of QR Network relative to the current SAAs which require QR Network to only interface with one party in respect of access rights. End users should, of course, have the right to renominate a different

train operator in the event that their original train operator was either suspended or terminated by QR Network.

Draft Decision 4.2

The Authority requires QR Network to amend:

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

The current SAAs provide for QR Network to contract with a single party for access rights, i.e. the end user or operator. As such, they do not provide for dispute resolution mechanisms with the non-contracting party (i.e. the operator where the end user contracts with QR Network or the end user where the operator contracts with QR Network).

Under the alternative SAAs, provisions for a relationship between the EUAA and TOA are included.

The EUAA provides for disputes in relation to the TOA to be referred to an adjudicator, with the end user bound by the dispute resolution provisions. The EUAA also provides for amendments to the EUAA due to changes in the TOA.

In contrast, the TOA only provides for disputes in relation to the EUAA to be referred to an adjudicator with the operator bound by the dispute resolution provisions. The TOA does not contain the reciprocal requirement to amend the TOA due to changes in the EUAA.

Stakeholder Views

QR National said that the dispute resolution provisions in the TOA should be amended to remove the requirement for the operator to comply with the dispute resolution provisions of the EUAA as it is not a party to this agreement (QR National sub. no. 1: 6).

Anglo American said that the end user should only be required to comply with the dispute resolution provisions of the TOA where the matter is relevant to the end user or where the end user has been joined as a party. Anglo American also said that the clause should be amended to provide protection against an end user's access rights being modified without an end user's consent (Anglo American sub. no. 1: 14).

QRC said that:

...[the dispute resolution provisions in the EUAA] should be amended to clarify that the End User is only required to comply with the dispute resolution provisions of the TOA and be bound by a decision of an Adjudicator under the TOA to the extent that such referral and decision do not prejudice the End User's rights under ... [the EUAA] (QRC sub. no. 1: 31-32).

QRC also said that:

... [‘the amendments due to change to the TOA’] clause is not acceptable. The End User’s Access Rights should not be modified other than with its approval (QRC sub. no. 1: 32).

Asciano said that end users and QR Network should be obliged to consult with above-rail operators prior to placing any rights, obligations or liabilities on the above-rail operators. Asciano also proposed that rail operators should have a right to review access agreements and other arrangements between the end user and QR Network to ensure that the above-rail operator can meet any obligations or exercise rights under these agreements (Asciano sub. no. 1: 7).

Authority’s Analysis

The Authority considers that, in practice, there may be disputes which necessarily involve all three parties.

In these circumstances, quarantining disputes might result in 2 disputes under the 2 separate agreements which relate to the same subject matter. Alternatively, quarantining disputes may impact on the effectiveness of any dispute resolution outcome.

For example, the Authority notes that there could be a dispute under the TOA as to whether the risk management procedures put in place by the operator were sufficient. If it is determined, as a result of this dispute, that the procedures are insufficient and the operator is prevented from operating, the end user is prejudiced (as it cannot use that operator to give effect to its access rights). In these circumstances, the Authority notes that the end user is necessarily bound by the terms of the decision as its access rights cannot be utilised.

The Authority does not accept QR National’s position that the operator should not be bound by the dispute resolution provisions in the EUAA as these only relate to procedural matters.

However, the Authority accepts that the arguments of QRC, Anglo American and Asciano have some validity.

The Authority considers that QR Network’s proposal should be amended to enable both the end user and the operator to become aware of, and seek to influence, the outcomes of any dispute resolution process if the result of the dispute resolution is likely to affect them. This will allow the end user and operator to be aware of potential required amendments to the TOA and EUAA which could impact on them.

Further, the Authority considers that it is also reasonable for parties to be bound by the outcomes of a dispute if they were given the option to join any dispute (irrespective of whether they did or did not exercise that option). To do otherwise, would impact on the effectiveness of these provisions.

The Authority also notes that the split contracting structure means that the EUAA and TOA are designed to operate separately, but in tandem. Therefore, there may be circumstances where an amendment to the EUAA must impact on the TOA (or vice versa). To do otherwise could render the agreements inconsistent (see Chapter 2 on Exercise of Access Rights in particular).

The Authority accepts that controls are necessary to ensure that parties are aware of their respective rights and obligations, particularly where these rights and obligations are amended. Given this, the Authority considers that any amendment to the EUAA due to changes in the respective TOA only apply where the operator is nominated by the end user to run its train services. This is consistent with the Authority’s proposal for separate TOAs for

each EUAA in Chapter 2. In addition, the Authority considers it reasonable that the TOA not be amended without the end user's consent, unless the amendments relate to operational matters (which are not the responsibility of the end user).

Finally, the Authority notes that the above-rail haulage agreement between the end user and operator is the primary agreement that defines the relationship between these parties. Notwithstanding this, it is also reasonable for both the end user and the operator to have the right to share their respective below-rail agreements, once they are finalised. This provides for all parties to be aware of any rights and obligations in the separate agreement which may impact on them.

Draft decision 4.3

The Authority requires QR Network to amend Clauses 16 and 23 of the EUAA and General Conditions of Contract of the TOA respectively in respect of disputes such that:

- (a) either party to a dispute (QR Network and one of the operator/end user) can join the entity which is a party to the other contract (the end user/operator, as applicable);**
- (b) each of the TOA/EUAA have provisions requiring a party to participate in a dispute where joined;**
- (c) where a party has an option to join a dispute, they are bound by the outcome, irrespective of whether they exercised the option to join the dispute; and**
- (d) an adjudication in any dispute binds all parties to the dispute.**

The Authority requires QR Network to amend Clauses 16 and 23 of the EUAA and General Conditions of Contract of the TOA respectively in respect of amendments to counter-party agreements such that:

- (a) any amendment to the EUAA due to changes to TOA should only apply where the operator is nominated by the end user to run its train services; and**
- (b) no amendment to the TOA is permitted without the end user's consent, except for operational matters that do not have consequential impacts on the end user's access rights, the utilisation of the access rights or the relevant EUAA.**

The Authority requires QR Network to amend Clauses 17 and 24 of the EUAA and General Conditions of Contract of the TOA, respectively, to permit the operator and end user to provide each other copies of their respective agreements.

4.4 Train Services

The current SAAs provide that where the access holder or operator (under the AAC or OAAC respectively) does not comply with the train service description, in any material respect, QR Network will be entitled to vary the train service description and the agreement following consultation with the access holder.

Under the alternative SAAs, QR Network is not required to consult with, or provide notice to, the end user prior to making any variation to the TOA, although the end user can subsequently dispute the variation.

Stakeholders' Views

End users said that QR Network's proposal was not consistent with the principle that an end user should have control of its critical rights to access the rail network, without accepting liability for above-rail operational issues.

To address this, QRC proposed the following changes be made to the EUAA:

- (a) variations to train service description should only be made with the consent of both the end user and QR Network;
- (b) as a minimum, the end user must have a right to first withdraw or vary (if appropriate) its nomination of the non-compliant operator before QR Network commences the process of consulting with the operator and the end user to vary the train service description;
- (c) a provision should be included requiring QR Network to promptly notify the end user where an operator is not complying with a train service description;
- (d) any assessment, that would vary the train service description, should not take into account any non-compliance on account of a force majeure event – the identical provision in the TOA should also be amended;
- (e) where the operator and QR Network agree to vary the performance levels established under the TOA and any associated variations to the train description, the parties must seek the end user's prior consent and the end user must have a right to first withdraw its nomination of the operator;
- (f) provide the end user with an opportunity to rectify non-compliance; and
- (g) any disputes in relation to varying the train services description is to be subject to the relevant dispute process under the EUAA (QRC sub. no. 1: 19-20).

BMA said that both the EUAA and the TOA grant QR Network a unilateral right to vary the train service description where an operator has not complied in any material respect with such a description, and such a variation may significantly alter the access rights granted to an end user. BMA suggested that any such variation should only be made:

- (a) with the consent of both the end user and QR Network; or
- (b) under a regime where the end user is given the opportunity to cure the default.

BMA also stated that, as a minimum, the end user must have a right to first withdraw or vary (if appropriate) its nomination of the non-compliant operator (BMA sub. no. 1: 8).

Anglo American said that QR Network should not include the performance levels clause in the EUAA or the TOA as, in the majority of cases, QR Network has 100% take-or-pay contracts and any underutilisation of train services does not impact upon QR Network (Anglo American sub. no. 1: 9).

Asciano believed that, in instances where the end user intends to vary the nomination, the train operator should be involved in the nomination of train service entitlements to ensure that either adequate resources are available to meet an increased nomination or that resources can be redeployed in the event of a reduced nomination. Asciano suggested that this is best addressed in the EUAA and TOA, but considered that, in any event, there should be an

obligation on the end user in the EUAA to notify the train operator of any variation to train service entitlements agreed with QR Network (Asciano sub. no. 1: 12).

Similarly, QR National argued that the TOA should include a minimum notice period in circumstances where the end user varies the nominated train operator (QR National sub. no. 1: 5).

QR Network's Response

Following consideration of stakeholder comments, QR Network said it was reasonable that the EUAA only include an obligation to provide notices regarding variations to the train service description to the end user where QR Network has issued similar notices under the TOA. In particular, QR Network said that:

[t]his provides the End User an opportunity to address the matter directly with the Railway Operator. This is a reasonable requirement as train paths may potentially be reduced in the TOA while the End User retains the take or pay liability on the total aggregate train paths in the [EUAA]. The End-user may seek to encourage the operator to perform in accordance with the Train Service Description or change operators (QR Network sub. no. 2: 8).

QR Network did not seek for the end user to become involved in a dispute between QR Network and the operator on the TOA. Rather, QR Network said that:

[the] specification of accountabilities of the Railway Operator to the End User for variation from the Train Service Description should be within commercial arrangements between the railway operator and the End User (QR Network sub. no. 2: 8).

Authority's Analysis

The terms of the train service description is critical to the ability of an end user to utilise their underlying access rights.

While QR Network has a right to vary the train service description, it cannot seek to do so in an unfettered manner. Both the operator and the end user have a right to dispute QR Network's proposed variation to the train service description. In particular, the end user has an ability, albeit limited, to seek expert determination. In finalising the matter, the expert would need to take into account all relevant matters and may impose a different outcome to that initially proposed by QR Network.

Regarding QRC's concerns, the Authority's position is as follows.

The Authority does not accept the proposals by QRC as set out in paragraphs (a) and (d) above – noting, that BMA made a similar point to that made by the QRC in relation to paragraph (a). The Authority considers these matters go beyond the current SAAs and are not necessary to implement a split contracting structure. In particular, it is not appropriate to allow an end user to veto a change in the train service description where the operator does not comply with aspects of its obligations to QR Network in relation to the TOA.

However, the Authority considers it reasonable that an end user be notified of any actions that QR Network may take against an operator that impact on the train service description. The Authority understands that QR Network has subsequently accepted the need for such notices.

In addition, the Authority considers that the notice period must be sufficiently adequate to provide the end user with an opportunity to take appropriate measures to protect the utilisation of its access rights including by engaging in dispute resolution or by switching to an alternative operator.

The Authority also proposes that QR Network be allowed to alter the train service description only for as long as the existing operator remains the operator or until the operator has implemented reasonable measures which satisfy QR Network (acting reasonably) that future non-compliance with the previous train service description is not likely – after which it would revert to the previous train service description. That would allow an end user to protect its access rights by changing the operator or requiring the operator to take steps to prevent future non-compliance.

The Authority accepts the remaining proposals by the QRC (i.e. paragraphs (b), (c), (e), (f) and (g)) – noting, that BMA made similar points to those made by the QRC in relation to paragraph (b) and (f). The Authority considers that these measures are generally necessary for an end user to protect their ability to utilise their access rights and does not pose additional risk or onerous obligations on QR Network.

The Authority also considers that providing the end user with the ability to withdraw and/or vary its nomination of the non-compliant operator is essential to providing users with the ability to flexibly manage their access rights (see also chapter 2 on Exercise of Access Rights).

As discussed in section 4.3 above, the Authority also considers that it is reasonable to enable the end user to have the option to join a dispute regarding train services. This is consistent with the provisions in the current SAAs that an end user is able to dispute matters relating to train service entitlements. At the same time however, it is also reasonable for the end user to be bound by the outcome of any dispute resolution process, irrespective of whether they elected to join the dispute. To do otherwise may impact on the effectiveness of the dispute resolution process, particularly where an outcome affects the operator and the end user.

The Authority acknowledges Asciano's and QR National's positions that any variation in train service entitlements, agreed by the end user with QR Network, may impact on an operator's resource deployments. However, the Authority notes that the TOA already requires QR Network to notify the operator of a variation by the end user. The Authority notes that it is open to the end user and the operator to supplement this obligation through the separate haulage agreement if necessary. Given this, the specific proposals by Asciano and QR National are not accepted.

Finally, the Authority does not accept Anglo American's separate contention that performance levels should not be adjusted as QR Network has 100% take-or-pay contracts as it is not consistent with the position in the current SAAs. Moreover, the Authority considers that if non-compliances of this sort do not result in consequences it will reduce the rail system capacity and potentially result in other end users not being provided access.

Draft decision 4.4

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

- (a) any notices relating to a variation in an operator's train service description are provided to the end user;**
 - (b) an end user has the option to join a dispute regarding train services but is also bound by the outcome of the dispute resolution process;**
 - (c) an end user has a right to first withdraw or vary (if appropriate) its nomination of the non-compliant operator before QR Network commences the process of consulting with the operator and the end user to vary the train service description;**
 - (d) the end user is promptly notified where an operator is not complying with a train service description in any material respect; and**
 - (e) only with the consent of the end user, the operator and QR Network may agree on variations to the performance levels established under the TOA and any associated variations to the train service description. Also, the end user must have a right to first rectify any non-compliance, including by allowing the end user to withdraw its nomination of the operator.**
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5. RESPONSIBILITIES CONSISTENT WITH EXISTING SAAS

Stakeholders have sought some amendments to QR Network's proposed alternative SAAs on the basis that they differ from the existing arrangements. QR Network has also raised this position in commenting on stakeholder submissions.

The Authority's proposed amendments have focussed on implementing a split contracting structure that provides greater flexibility to end users in managing their access rights, while not being responsible for operational matters. These matters are outlined in detail in the preceding chapters.

In doing this, the Authority is not seeking a fundamental redraft of other aspects of the alternative SAAs. Rather, the Authority is inclined to accept aspects of QR Network's proposal which are consistent with the existing arrangements and which do not change the risk profiles of the parties.

These matters are outlined below.

5.1 Security

The security provisions in the current SAAs do not take into account the financial default risks (i.e. creditworthiness) of the end user or operator but provide for a maximum security QR Network can request which could feasibly be reduced by negotiation. This position is retained unchanged in the alternative SAAs.

BMA and QRC argued that end users or operators who have an investment grade credit rating should not be required to provide security (BMA sub. no. 1: 87, QRC sub. no. 1: 8).

The Authority notes that the ARTC undertaking for the Hunter Valley allows security to be adjusted to reflect an end user's creditworthiness. In particular, the ARTC undertaking requires an end user to provide security of 3 months worth of take-or-pay charges if they do not have a minimum long term credit rating of BBB from S&P or Baa2 from Moody's.

However, the Authority considers that the insertion of a minimum credit rating criterion in either the EUAA or the TOA would change the risk profile of the parties beyond that which currently exists. The Authority, therefore, is not proposing to amend the alternative SAAs in this respect. However, in forming this view, the Authority notes that the EUAA retains some flexibility in respect of security requirements as it retains scope for security to be set differently through negotiation on a case by case basis.

5.2 Force Majeure

QR Network has retained unchanged the provisions relating to force majeure from the existing SAAs, including retaining:

- (a) the concept of 'good engineering practices' as a force majeure event; and
- (b) an ability for it to terminate the operation of a nominated network that is damaged or destroyed by a force majeure event if, in its reasonable opinion, it is uneconomic to repair or replace, unless the end user or operator agrees to fund the costs of repair or replacement.

Stakeholders were concerned that the concept of "good engineering practices" and "uneconomic to repair" were vague and subjective and could increase the potential for disputes (Vale sub. no. 1: 3, Anglo American sub no. 1: 11-12). Anglo American also

considered that there should be an obligation on QR Network to reinstate any damaged rail infrastructure.

The Authority accepts that the aforementioned concepts such as ‘good engineering practice’ are open to interpretation. They are also not concepts related to force majeure in the ARTC undertaking.

However, they are concepts included in the existing SAAs and any amendment to these provisions in the alternative SAAs will alter QR Network’s risk profile compared to the current SAAs – particularly any change to the “uneconomic to repair” provision relating to the responsibility of track repairs following damage.

Given these considerations, the Authority does not propose any amendment to QR Network’s proposals relating to force majeure in the alternative SAAs.

5.3 Adjustment to Capacity

QR Network has retained unchanged the provisions relating to capacity adjustment clauses from the existing SAAs, including retaining:

- (a) an ability for it to reduce access rights:
 - (i) if the operator, for any reason other than the occurrence of a force majeure event or the failure of QR Network to make the access rights available, does not operate over any four consecutive quarters with at least 85% of its train services allowed under its train service description for that period (an anti-hoarding provision);
 - (ii) where the change in existing capacity due to an infrastructure enhancement is less than planned and insufficient to provide all conditional access holders with their conditional access rights; and
- (b) an ability for it to terminate the underlying access rights where they have been reduced, relinquished or transferred.

Stakeholders were generally supportive of the capacity adjustment provisions although they expressed concerns over specific details of the clauses. However, many of these concerns also apply to the existing SAAs.

Vale argued that the anti-hoarding provisions were overly broad given the actual coal system capacity is not well defined and the lack of short term capacity transfer mechanisms to manage short term capacity inefficiencies. Vale also said that QR Network’s liability with respect to capacity enhancement could not be set without reference to the risk it has borne over the entire project process (Vale sub. no. 1: 2).

QRC said that QR Network should be required to provide either party with the right to terminate the EUAA where there are no longer access rights. QRC and Anglo American also said there should be an obligation for QR Network to vary the TOA to reflect any resumption of access rights in the EUAA (QRC sub. no. 1: 17, Anglo American sub. no. 1: 13).

The Authority notes Vale’s and QRC’s concerns in relation to network capacity and termination of the EUAA. As these provisions are consistent with the current SAAs, any change is likely to impact on the risk profiles of the parties relative to the current SAAs. Also, as the proposed changes are not necessary to implement a split contracting structure, the Authority is minded to not require amendments to these provisions.

However, the Authority does accept that QR Network should be required to vary the TOA to reflect any resumption of rights under the EUAA. This is necessary to ensure consistency between both split agreements (see Clause 4.1(g) of the Authority's proposed marked up EUAA in Appendix A).

5.4 Termination for Default of Material Obligation

The current SAAs provide for QR Network to terminate the AAC or OAAC where the access holder or operator respectively is in continuing default of any obligation not expressly listed.

QR Network has retained unchanged this provision in both the EUAA and TOA.

Anglo American and QRC said that QR Network should only be able to terminate the EUAA in circumstances where the default is material (Anglo American sub. no. 1: 14; QRC sub. no. 1: 31). QR Network rejected this position arguing that it would be a variation from the current agreements.

The Authority notes that the position of stakeholders is consistent with that contained in the ARTC access undertaking. It would also seem to be reasonable that QR Network be precluded from terminating access agreements for non-material defaults of obligations, particularly where they are not explicitly identified.

However, to date, the Authority is not aware of QR Network terminating user agreements for defaults over minor matters which do not go to the heart of the commercial arrangement with the end user. Also, a change to the alternative SAAs would result in a different risk profile compared to that in the current SAAs.

Given this, the Authority is not proposing to require that this termination right be amended in the alternative SAAs.

5.5 Non Provision of Access

The current SAAs provide that the access holder or operator (under the AAC or OAAC respectively) can make a claim for non provision of access where the train service is cancelled as a result of QR Network not making the network available to the operator and QR Network being unable to reschedule at a reasonable alternative time.

QR Network has retained this provision in both the EUAA and TOA.

QR National argued that there was no definition of "reasonable alternative time" and an operator may have constraints which limit the number of reasonable alternative times it can use a train path to operate a train service. QR National therefore sought that a reasonable alternative time be defined as being such a time agreed with the operator (QR National sub. no. 1: 4).

The Authority notes that the provisions in the EUAA and TOA are the same as the relevant clauses in the current SAAs. Therefore, there is no lesser or greater recognition of the concept of a "reasonable time" having to be reasonable for the operator in the alternative SAAs.

In addition, the Authority does not consider that splitting of the current SAAs increases the risk that a reasonable alternative time (for the operator) cannot be scheduled.

Given this, the Authority's position is to not require this provision be amended.

5.6 Assignment by End User

Assignment refers to a person's transfer of rights and obligations to another person.

The current SAAs provide that QR Network may not unreasonably withhold its consent to an assignment by an end user or operator (under the AAC or OAAC respectively) of its rights under the access agreement.

QR Network has retained this provision in both the EUAA and TOA.

Anglo American requested that the EUAA be amended to specify the form of evidence required to be provided by the end user to QR Network of the financial soundness and capability of the assignee (Anglo American sub. no. 1: 14).

The Authority accepts that it may be possible to prescribe the types of evidence required to satisfy QR Network of the financial soundness and capability of the assignee. However, the Authority does not consider that the splitting of the agreements changes the effect of this provision. Given this, the Authority considers that any amendment would create a distinction between the alternative SAAs and the current SAAs which is not required by the splitting of responsibilities in the alternative SAAs.

On this basis, the Authority does not require an amendment to the requirement that QR Network may not unreasonably withhold its consent to an assignment by an end user or operator (under the EUAA or TOA respectively) of its rights.

5.7 End Users' Renewal of Term

QR Network's proposed EUAA retains a provision from the current SAAs that an end user can seek to renew its contract at the expiry of the term, with only minor changes relating to the split contracting structure.

Anglo American requested this provision be clarified to allow end users to renew the expiring contract on the same terms (Anglo American sub. no. 1: 13).

Given QR Network's proposal is consistent with the existing obligations in the current SAAs, the Authority's position is to not require this provision be amended.

5.8 Transfer of Access Rights

QR Network's proposed SAAs enable the permanent and temporary transfer of an end user's access rights where the access rights sought by the transferee are for the same type of train service entitlements. These provisions are substantially unchanged from the existing arrangements.

Stakeholders argued that greater flexibility was required in the alternative SAAs to allow for the short term transfer of access rights to other end users to enable them to better manage their portfolio of access rights (Vale sub. no. 1: 2, BMA sub. no. 1: 6).

The Authority accepts that it is reasonable to permit user transfers where the origin/destination pairs are unchanged as system capacity should be unaffected. However, the Authority does not consider it reasonable to provide users with unlimited flexibility to transfer access rights to other access seekers. This is because transfers that have different origin/destination pairs to those that currently exist may well impact on system capacity, the ability of QR Network to meet its contractual commitments to other access holders and therefore QR Network's risk levels.

The Authority also considers that these changes are not necessary to implement a split contracting framework.

In this context, the Authority does not require a change to QR Network's proposal.

5.9 Assignment by QR Network

QR Network's current SAAs provide that QR Network may assign its rights under the access agreement without the consent of the access holder, subject to the assignee being bound in respect of QR Network's obligations under the access agreement.

QR Network has retained this provision in both the EUAA and TOA, with the assignee bound in respect of QR Network's obligations to the end user and operator respectively.

QRC sought as a condition that the end user's interests under TOA should not be prejudiced in any assignment process (QRC sub. no. 1: 31).

The Authority considers that there would be difficulties in implementing QRC's position as demonstrating an end user's interests are not prejudiced is difficult to determine, particularly at the time of the proposed assignment.

For example, where QR Network is unable to conclusively demonstrate that the assignee can provide the same level of performance in delivering below-rail train services, it may be arguable that the end user's rights will be prejudiced. However, this may only be established after QR Network has assigned its rights.

Given the above, the Authority considers that QRC's position will create considerable uncertainty for the parties as to when an assignment by QR Network will "prejudice" the interests of an end user under a relevant TOA.

In this context, the Authority considers that QR Network's risk profile would increase relative to the current SAAs.

Given QR Network has not sought to alter the obligations beyond that contained in the current SAAs, and the potential uncertainties associated with QRC's proposed drafting, the Authority's position is to not require this provision be amended.

5.10 Miscellaneous Limitations on Liability

There is a range of limitations on liability in various provisions throughout the current SAAs. These other provisions limit QR Network's liability for the impacts on train services from:

- (a) imposing operational constraints, e.g. speed restrictions or maintenance possessions;
- (b) giving directions following an incident, e.g. an instruction relating to train movements;
- (c) damage to, or loss of freight as a result of responding to an incident on the network, e.g. actions taken to restore the network following an incident, including removing obstructions; and
- (d) carrying out inspections or audits to assess compliance with the interface risk management plans (including rolling-stock standards).

QR Network's alternative SAAs include the above limitations on liability in both the EUAA and TOA.

The EUAA includes general provisions limiting QR Network's liability in respect of each of the matters described above. The TOA includes the same matters with greater detail around the operational aspects, including setting out QR Network's responsibilities for network maintenance and responding and managing incidents on the network.

Stakeholders' Comments

Stakeholders did not raise concerns on QR Network's limitations on liability for imposing operational constraints.

On the remaining limitations of liability, stakeholders were generally concerned about whether the existing limitations on liability had been transferred appropriately and correctly between the EUAA and TOA and had appropriate linking references. In some cases, stakeholders also requested a narrowing of the application of the liability provisions.

In terms of giving directions following an incident, QRC said that this limitation of liability was not contained in the current access holder SAA (i.e. the AAC). Rather, QRC said that under the existing arrangements, the access holder may recover the reasonable direct costs incurred by the operator in complying with the QR Network Train Control Direction (QRC sub. no. 1: 25).

QRC and Anglo American also said that the limitation of liability on QR Network for giving directions following an incident should be amended to clarify that it will only apply where QR Network has complied with the relevant operational provisions in the TOA (i.e. it has issued a Train Control Direction where it is reasonable and practicable to do so) (Anglo American sub. no. 1:13, QRC sub. no. 1: 25).

Regarding damage to, or loss of freight, QRC argued that QR Network's proposed provision should be amended to ensure that QR Network is only not liable where it has complied with the requirements of TOA (i.e. that QR Network has used reasonable efforts to consult with the operator and the actions by QR Network are reasonable) (QRC sub. no. 1: 23).

Regarding carrying out inspections or audits, QRC also argued that QR Network's proposed exclusions from liability for conducting an inspection or audit under the terms of the TOA was not consistent with the position in the AAC. The QRC said that QR Network should not be excluded from liability if it carries out an inspection or audit without reasonable grounds to do so, and loss or damage occurs.

Stakeholders also argued that QR Network's liability in relation to carrying out inspections or audits should be extended.

QR Network's liability in relation to inspections and audits is limited so long as it adheres to the conduct requirements set out in clause 13.4(c) of the TOA – i.e. which states that in conducting the inspection or audit QR Network must not interfere unreasonably with rolling-stock and must use reasonable endeavours to avoid damage and minimise disruption to the other party's business.

QRC noted that where QR Network requires such an inspection or audit, it has the right to require the operator's rolling-stock be available at such locations as QR Network may reasonably require (including not on the nominated network). QRC considered that this may disrupt the end user's operations (QRC sub. no. 1: p. 26).

Given this, QRC and Anglo American said that the QR Network's liability should be limited only if QR Network has complied more broadly with all of the inspection and audit requirements set out in clause 13 – i.e. along with seeking to minimise damage, injury and

disruption (cl. 13.4(c)), QR Network must also satisfy other requirements, including for provision of information, notice periods and requirements for inspection and who pays the costs of inspection (e.g. all requirements from cl. 13.4(a) to (e)) (QRC sub. no. 1: 26, Anglo Coal sub. no. 1: 14).

Authority's Analysis

The Authority has assessed QR Network's proposal, in the context of stakeholder comments, and believes that, QR Network has properly replicated the limitations on liability as per the current SAAs and has done so in a way that will give proper effect to the alternative SAAs.

In particular, regarding:

- (a) *giving directions following an incident* - QR Network has properly replicated the existing arrangements to the EUAA and TOA. On this the Authority notes that;
 - (i) the existing arrangements limit QR Network's liability in respect of QR Network directions following an incident;
 - (ii) the existing arrangements that allow an access holder to recover costs of complying with a direction are replicated in the EUAA and TOA to the same effect – but the operator can now recover any costs directly from QR Network itself through the TOA, rather than via the end user; and
- (b) *remaining matters* – QR Network has properly replicated the existing arrangements between the EUAA and TOA;

The Authority has also considered whether linking provisions are required so that, as stakeholders' suggest, the EUAA is linked to performance of certain obligations by QR Network under the TOA.

Given that QR Network will have entered into a TOA it must, by virtue of that contract, comply with the requirements under that contract. In addition, the Authority considers that the arrangements QR Network has proposed adequately replicate the existing arrangements and, where necessary, point to the relevant provisions of the TOA that must also be satisfied. As such, there is no apparent reason for the EUAA to contain further provisions requiring that QR Network comply with the 'relevant' clauses in the TOA.

The Authority notes that some stakeholders argued that the current arrangements were not sufficient and that QR Network's liability in respect of inspections and audits should be broadened. In particular, the QRC and Anglo proposed amendments that would mean that QR Network would become liable if it breached any of the inspection and audit provisions (cl. 13.4), not merely the requirement to minimise damage, injury and disruption (cl. 13.4(c)).

The Authority does not consider that such an amendment is appropriate. This goes further than the position in the existing arrangements and, in this instance, the Authority does not believe it is reasonably required to give proper effect to the new contracting arrangements.

Accordingly, the Authority has proposed to accept QR Network's proposed arrangements with regard to other liability limitations as they appear in the EUAA and TOA.

Draft Decision 5.10

The Authority proposes that no amendments be made to the other liability limitation provisions within the EUAA and TOA (except any minor amendments included in the mark-up in Appendix A).

6. CONSEQUENTIAL AMENDMENTS

QR Network has proposed consequential amendments to the 2010 undertaking to give effect to the alternative SAAs.

Stakeholders were generally supportive of the proposed amendments. However, concerns were raised that some amendments go beyond that required to give effect to the alternative SAAs, while other amendments do not provide sufficient clarity on their operation. Stakeholders were particularly concerned that confusion would arise on the interpretation of “access holder” in the undertaking, as the term could apply to either the end user or operator.

The Authority’s proposed position is to only accept amendments to the undertaking that are necessary to give effect to the alternative SAAs.

These are amendments necessary to enable the split contracting structure to operate effectively, in a manner which does not unnecessarily alter the risk profiles of the parties. The Authority also considers that any amendments should enable the alternative SAAs to operate in parallel with the current SAAs.

To achieve this outcome, the Authority reviewed both QR Network’s amendments and proposed its own amendments, including clarifying the application of the term “access holder” to either the end user or operator as the case may be.

The Authority’s position is outlined below.

QR Network’s Proposal

QR Network has proposed consequential amendments to its approved undertaking which it considers are necessary to implement the new form of access agreements. In doing so, QR Network said the amendments:

- (a) were minimal and were necessary to give effect to the proposed arrangements; and
- (b) do not change the regulatory or commercial principles already embodied in the undertaking.

The majority of QR Network’s proposed amendments to the 2010 undertaking are contained in a proposed a new section called ‘implementation provisions’ (cl. 12.5).

QR Network said it has not amended Part 7 (capacity management) and Schedule G (network management principles) of the 2010 undertaking. As such, the amendments do not give effect to its proposed provisions for increasing scheduling flexibility (see chapter 2 on Exercise of Access Rights).

QR Network’s proposed consequential amendments relate to:

- (a) notifications – requiring an access seeker to specify when negotiating with QR Network as to whether they are seeking access under the current SAAs or the alternative SAAs (cl. 12.5(a));
- (b) providing for the alternative SAAs – clarifying the purpose of the new form of agreements, guiding the interpretation of the undertaking so it is consistent with the alternative SAAs, identifying where the undertaking should apply to either the end user or the train operator and the prioritisation of these rights (rights of end user take priority) (cl. 12.5(b),(d),(e)(v),(e)(vi),(g));

- (c) disclosing confidential information – enabling QR Network to disclose information (cl. 12.5(e)(i-ii)):
 - (i) to an end user or operator if it is necessary to resolve matters relevant to the performance of obligations under an EUAA or TOA or in connection with the safe operation of the rail infrastructure;
 - (ii) to an access seeker for the purpose of assessing whether QR Network has received competing access applications;
- (d) negotiation arrangements – to clarify and provide for:
 - (i) the negotiation and management of access rights to only apply to the end user (cl. 12.5(e)(iii));
 - (ii) the negotiation of certain issues by train operators during the negotiation period (cl. 12.5(e)(iv));
 - (iii) the end user to elect to have the train operator present at the negotiations of the EUAA (and the same for the operator while negotiating the TOA) (cl. 12.5(e)(iv)); and
 - (iv) the end user to negotiate the operating plan with or without the involvement of a train operator (cl. 12.5(e)(vii));
- (e) reporting arrangements – to clarify QR Network’s obligations in relation to quarterly reports (cl. 12.5(e)(viii));
- (f) disputes – providing for joint dispute resolution/arbitration (cl. 12.5(e)(ix)); and
- (g) customer initiated transfers between train operators – ensuring that the variation in train nominations under an EUAA has the same effect and operation as a customer initiated transfer under cl. 7.3.7 of the undertaking. Provisions also clarify requirements for paying adjustment charges – i.e. QR Network can require an end user to agree to pay adjustment charges prior to transferring access rights to ensure that an end user cannot reverse a variation for the purpose of avoiding having to pay adjustment charges (cl. 12.5(f)).

The 2010 undertaking also defines the term “access holder” as a person that holds access rights. QR Network’s consequential amendments do not propose to alter this definition, notwithstanding the sharing of access rights in the alternative SAAs between the train operator and the end user.

Rather, QR Network has sought to clarify the application of the term “access holder” in the alternative SAAs by providing that, *inter alia*:

- (a) to the extent that an operator’s rights are inconsistent with an end user’s rights, the rights of the latter will prevail; and
- (b) the operator and end user cannot jointly be the “access holder” and in the event of uncertainty, the operator is deemed to be the access holder.

Stakeholders’ Views

Stakeholders were broadly supportive of the consequential amendments. However, concerns were raised on the following matters:

- (a) transitional provisions should be included to enable access holders to transition without penalty from the current SAAs to the alternative SAAs (BMA sub. no. 1: 2);
- (b) amendments to the undertaking should be limited to only those necessary to implement the alternative SAAs, with other housekeeping amendments undertaken through a separate process (Asciano sub. no. 1: 5);
- (c) access rights should be prioritised between an end user and operator to account for circumstances where the operator's rights take priority (Asciano sub. no. 1: 11);
- (d) negotiations between the train operator and QR Network on train operations should be amended to allow the end user to manage the negotiations, including involving the train operator where relevant (QRC sub. no. 1: 38);
- (e) disclosing confidential information in connection with the safe operation of infrastructure should occur only where it is "reasonably necessary" (QRC sub. no. 1: 37); and
- (f) the application of the customer initiated transfer process should not apply to a change in the operator under the alternative SAAs (QRC sub. no. 1: 39).

Stakeholders were also concerned about QR Network's treatment of the concept of "access holder" in the 2010 undertaking and the two alternative SAAs.

Anglo American said that there is insufficient clarity concerning the concept of "access holder" and that it is critical that a coal producer is the "access holder" for the purposes of the 2010 undertaking. Moreover, Anglo American said that a detailed review of the term must occur in the undertaking and the alternative SAAs to ensure that the term was applied to the correct entity. Anglo American said that, as a second best alternative, the end user should be the access holder for particular issues (Anglo American sub. no. 1: 2-5).

QRC said that the end user should have the option to nominate the correct interpretation to apply in respect of the term "access holder" (QRC sub. no. 1: 14-15, 34).

Authority's Analysis

The Authority accepts that consequential amendments to the 2010 undertaking are necessary to implement the alternative SAAs.

This is because the undertaking currently provides for a single party (either the end user or operator) to contract with QR Network for below-rail access rather than a split contracting structure which provides for QR Network to have two separate contractual relationships. Further, as parties will have the option of contracting under either the current or alternative SAAs, amendments are necessary to ensure that both regimes can operate in parallel.

In considering QR Network's consequential amendments, the Authority's position is to only accept those amendments necessary to implement the alternative SAA structure and which do not unnecessarily alter the risk profiles of the contracting parties.

The Authority does not consider it necessary to provide transitional provisions to enable end users to transition to the alternative SAAs. Such transitional arrangements are not necessary to give effect to the alternative form of SAAs.

Similarly, the Authority does not accept amendments that are generally "housekeeping" in nature and which are not related to the implementation of the alternative SAAs. The Authority is of the view that if QR Network considers these amendments necessary, it should

propose them in a separate draft amending access undertaking. It is not appropriate for the Authority to consider such amendments in the context of the alternative SAAs, particularly given the Authority's consideration of them is subject to the specific approval criteria in Clause 5.2(e) of the undertaking.

Regarding the remaining concerns of stakeholders, the Authority's position is as follows.

The Authority has not proposed amendments at this stage to address Asciano's concerns that there may be situations where the operator's rights should take priority. Instead it has sought to determine the appropriate consequential amendments to the undertaking so that there is no inconsistency and the parties do not have to rely on an overly simplistic rule about which rights will prevail in the event of inconsistency. The Authority invites parties to provide further submissions in the context of this draft decision.

The Authority does not accept the QRC's position that the end user should have the ability to manage negotiations with QR Network on train operations, as in practice, it will be the operator who will need to negotiate these arrangements. The Authority notes that, in any event, the end user retains some control over the process through the corresponding haulage agreements and its ability to nominate different operators under the EUAA.

However, the Authority accepts the QRC's position that the disclosure of confidential information in connection with the safe operation of the network should only occur when it is reasonably necessary to do so. In this regard, it is noted that if disclosure is truly related to safety, QR Network should have no difficulties satisfying the reasonably necessary test in any case.

The Authority also accepts that the customer initiated transfer process in clause 7.3.7 in the 2010 undertaking was envisaged to operate in the context of the current SAAs and is not ideally suited to the operation of the alternative SAAs. Clause 7.3.7 is designed to apply where the end user actually transfers the underlying access rights to another party, not where the end user simply wishes to transfer the *use* of these rights to another train operator.

To address this, the Authority has proposed amendments to this clause to specifically exclude a change of operators under the alternative SAAs from being a *transfer* of access rights. This will prevent the potential for a relinquishment fee to be applied in the event of a change of operators where no underlying access rights are being relinquished or transferred.

Finally, at a broader level, the Authority accepts that under the alternative SAAs, the concept of access rights is relevant to both the end user (which will hold the underlying access rights) and the operator (who will utilise the access rights and have operational access to the below-rail network). On this basis, the Authority accepts that the application of the term should be clarified. In doing so, the Authority does not consider it appropriate that the end user always be the access holder for the purposes of the undertaking or that they be given the discretion or power to nominate the correct interpretation of the term. These approaches create complications given the interaction between the 2010 undertaking the two SAAs.

Rather, the Authority has undertaken a review of the term "access holder" in the 2010 undertaking and the two alternative SAAs and made revisions, where appropriate, to ensure consistency between the rights and obligations of the various parties and in a manner consistent with the intent of the alternative SAAs.

Draft decision 6

The Authority requires that the consequential amendments to the 2010 undertaking are as per the drafting provided in Appendix A.

REFERENCES

Anglo American. (2011) Submission re: Alternate Access Agreement, September.

Asciano. (2011) Submission re: QR Network Proposed Standard Access Agreements and Consequential Amendments to the 2010 Access Undertaking Relating to the Alternate Form of Access for Coal Carrying Services, September.

Australian Rail Track Corporation (ARTC). (2011) Submission re: QR Network 2010 Access Undertaking (2010 AU) Proposed Standard Access Agreements, September.

BHP Billiton Mitsubishi Alliance (BMA). (2011) Submission re: Alternative Form of Access Agreement, September.

QR National. (2011) Submission re: QR Network's Proposed Alternative Form of Access for Coal Carrying Train Services, September.

QR Network. (2011) Explanatory notes re: Proposed Standard Access Agreements and Consequential Amendments to the 2010 Access Undertaking, May.

QR Network. (2011) Submission re: Stakeholder Submissions on the Proposed Standard Access Agreements, November.

Queensland Resources Council (QRC). (2011) Submission re: QR Network's Proposed Alternative Access Agreements, September.

Vale. (2011) Submission re: QR Network's Proposed End User Access Agreement (Coal), September.