

Response to QCA Issues Paper on Queensland Rail's Draft Access Undertaking 1 – (Sept 2012)

 QueenslandRail



Introduction

On 30 March 2012 Queensland Rail Limited (Queensland Rail) submitted to the Queensland Competition Authority (QCA) a voluntary draft access undertaking (AU1) under section 136(1) of the *Queensland Competition Authority Act 1997* (Qld) (QCA Act). AU1 is Queensland Rail's first draft access undertaking in relation to the declared service under the QCA Act for which Queensland Rail is the owner and operator.

On 30 April 2012 the QCA released an issues paper seeking stakeholder responses to specific questions regarding AU1. Comments were due with the QCA no later than Friday 13 July 2012. The QCA considered that stakeholders had raised a number of issues in their submissions on which other stakeholders would want to comment. On this basis the QCA sought further comments in respect of submissions by Friday 14 September 2012. This document is in response to the QCA's request for further comments.

Due to the complexities involved and the variety of views from stakeholders, Queensland Rail has not provided responses in relation to all comments at this time nor addressed all matters that may relate to AU1. Where Queensland Rail has not responded to a matter raised by a stakeholder in its submission, this does not indicate Queensland Rail's agreement with the stakeholder/issue.

Queensland Rail will undertake further consultation and subsequently make further submissions in the near future including, for example, in respect of the following matters:

- the investment framework (Extensions) including user funding and Access Conditions;
- the West Moreton coal Standard Access Agreement;
- the provision of additional cost information through reporting, the setting of Floor/Ceiling Revenue Limits or the introduction of Reference Tariffs on the Mount Isa and/or North Coast Line; and
- the Operating Requirements Manual.

Queensland Rail appreciates the opportunity afforded by the QCA to provide comments on stakeholder submissions. Attachment 1 contains Queensland Rail's comments. Queensland Rail continues to consider key points raised by stakeholders and intends to work closely with the QCA and industry to further develop AU1.

Attachment 1: Queensland Rail's response to stakeholder submissions relating to AU1

Item No.	AU1 Section	Clause	Stakeholder Comments	Queensland Rail Responses
1	Term of Undertaking	1.1	Stakeholders responded with varying views on the Term of the Undertaking, proposing Terms from between 3 and 10 years.	Queensland Rail maintains that the current proposed Term is appropriate. That is, "Queensland Rail's Draft Access Undertaking 1 (AU1) should have a Term of at least four years but no more than five years commencing on the Approval Date. This Term is consistent with relevant Australian rail regulatory precedent. There is a low risk of circumstances changing sufficiently during the proposed Term to render AU1 irrelevant or inappropriate. Material issues regarding costs to, and lack of certainty for, Queensland Rail and stakeholders may arise from having a Term that is shorter or longer than the proposed Term.
2	Scope	1.2	The Queensland Resources Council (QRC) considers there is merit in specifically including an upfront reference within the Scope section that recognises any Dispute with respect to AU1 will be resolved by the QCA (in accordance with Part 6.1 provisions). This would provide clarity to Access Seekers and Customers as to the process to resolve Disputes associated with AU1.	AU1 has been drafted to be an easy to understand document that has intentionally avoided unnecessary repetition. Queensland Rail, therefore, considers the inclusion of an upfront reference within the Scope section to items already specified in Part 6.1 of AU1 adequately addresses this issue.
3	Scope	1.2.3 (b)	Xstrata considers that under AU1 Queensland Rail has the ability to remove parts of its Network without consultation or QCA approval. QR National is seeking the introduction of a dispute mechanism to the QCA for amendment to the line diagrams.	The line diagrams will be placed on the internet as information for Access Seekers. However, Queensland Rail's service that is available for third party Access is determined through AU1's definitions (e.g. definition of "Access", "Network"), rather than through the line diagrams. The dispute resolution process in AU1 is available if an Access Seeker considers it is being denied Access to a part of the service covered by AU1. In any event, Queensland Rail has an incentive to keep any viable track open for Access in order to generate Access Charges.
4	Scope	1.3	QR National considers Clause 1.3(a) should be amended to remove the requirement for AU1 to be applied consistently between Access Seekers in the same circumstances, to reflect that the principles included in AU1 already address the circumstances for differentiation. That is, Clause 1.3(a) should state that AU1 will be applied in a manner that is consistent between Access Seekers.	Clause 1.3(a) provides comfort to Access Seekers that AU1 will be applied in a manner that is consistent between Access Seekers in the same circumstances. Queensland Rail considers that the Clause is appropriate as drafted. It is reasonable that the provision be restricted to Access Seekers in the same circumstances, which is consistent with the requirements of the QCA Act.
5	Scope	1.3	QR National acknowledges that the reference to section 100 in the QCA Act obligates the parties to negotiate in good faith. QR National believes that AU1 would benefit, from a transparency perspective, if the obligation was explicitly stated in AU1 (with or without specific reference to the legislation).	Section 100(1) of the QCA Act contains the obligation that the access provider and Access Seeker must negotiate in good faith. This obligation under the QCA Act is binding upon Queensland Rail and an Access Seeker. AU1 has been drafted to be a simplified document that, to the extent practical, avoids repetition. On this basis Queensland Rail believes that the AU1 drafting is sufficient.
6	Preparing and Submitting an Access Application	2.1 & 7.1	Two stakeholders sought clarification as to whether the confidentiality provisions of AU1 include, in the definition of Confidential Information: <ul style="list-style-type: none"> o Access Applications (Asciano); and o information that might reasonably be expected to affect the commercial affairs of the owner (presumably this is meant to refer to the 'Access Seeker'), including information relating directly to the Access Seeker's future markets and business strategies (QR National). 	Queensland Rail confirms that the definition of Confidential Information (Clause 7.1) in AU1 is a standard definition of Confidential Information and that it extends to Access Applications and other strategic information from Access Seekers. In any event, Queensland Rail notes that if at any time an Access Seeker has any doubt as to whether any information is Confidential Information, then the Access Seeker is able to indicate to Queensland Rail at the time of disclosure that the information is confidential.
7	Ability to depart from AU1	2.1.1(c)	AU1 makes it clear that the Access Seeker must unconditionally agree to comply with the requirements of the undertaking, with failure to do so grounds for Queensland Rail to reject the Access Application. QR National stated that this is overly restrictive, and should be qualified by a materiality threshold.	Clause 2.1.1(c) acts so that if an Access Seeker does not agree to comply with the requirements, obligations and processes in AU1, then Queensland Rail may refuse to accept the Access Application. Such a refusal, if it occurs, will take place at the beginning of the Access Application process. Clause 2.6.3(a)(i) gives Queensland Rail the right to give a Negotiation Cessation Notice where the Access Seeker fails to comply with AU1 but Queensland Rail may only do so if Queensland Rail (acting reasonably) is of the opinion that the non-compliance is material. Queensland Rail considers that this Clause is appropriate.
8	Preliminary Information	2.1.3	QR National suggested there should be a stronger obligation on Queensland Rail to provide preliminary information for Access Seekers, with the type of information to be included specified upfront and published on the Queensland Rail website. It is QR National's view that Schedule D of the Temporary Undertaking should be reinstated with the information provided at no charge. QR National is also of the view that, for transparency, the documents referred to in the definition of the Operating Requirements, that is the standards, systems, procedures, protocols, should also be publicly available on the Queensland Rail website.	Previous Queensland rail undertakings have included prescriptive requirements in relation to the provision of information to ensure that an infrastructure provider in an integrated organisation that is operating Above Rail Services in competition with third party freight Operators cannot withhold information to hinder or slow down third party Access. These prescriptive requirements are not necessary in AU1 as Queensland Rail has no incentive to inhibit Access. Rather, it is in Queensland Rail's interest to assist to facilitate Access to its Network. In relation to the statement on the Operating Requirements and associated standards, Queensland Rail currently makes available relevant documents required by Access Seekers and Access Holders via the Queensland Rail website portal.

Item No.	AU1 Section	Clause	Stakeholder Comments	Queensland Rail Responses
9	IAP	2.4.1	QR National stated that there should be a greater commitment by Queensland Rail to provide an Indicative Access Proposal (IAP) within the nominated 20 day timeframe. The option to take longer than 20 days should only be under exceptional circumstances. In addition, compliance reporting should include the number of IAPs provided outside the 20 day timeframe.	<p>Queensland Rail believes that the timeframe is consistent with provisions of rail access undertakings in Queensland over the past 12 years. Queensland Rail will always endeavour to respond as soon as possible, however, does not believe that further drafting is required and that the current timeframes are appropriate. Queensland Rail needs to have the ability to extend the time period for complex IAP responses.</p> <p>Under Clauses 5.2.2(d) to (f), various information must be included in annual reports relating to Queensland Rail's compliance with the timeframes for IAPs.</p>
10	IAP	2.4.2	Given the relationship between price and terms and conditions, in order to assess an IAP, Access Seekers require an understanding of the terms and conditions that would apply. QR National believes, for clarity and transparency, Clause 2.4.2 should identify the material divergences from the Standard Access Agreement (SAA). This is relevant for both coal and non-coal freight given that the SAA is directly related to coal services and is a precedent for non coal services.	<p>The terms & conditions will be dependant on knowing all the characteristics of the haul which is typically not known and/or provided at the Access Application/IAP stage. Additionally, while many aspects of the SAA might be informative in negotiations for a non-coal Access Agreement, the SAA is not a precedent non-coal access agreement. As such, Queensland Rail considers the current approach to be appropriate.</p>
11	Negotiation Cessation	2.6.1	QR National requested that a greater obligation be placed on Queensland Rail to continue negotiations where the parties agree to extend the Negotiation Period, rather than the current provision that Queensland Rail has no obligation to continue the negotiations beyond the Negotiation Period.	<p>Queensland Rail considers that the current provisions are effective. AU1 provides for the negotiation to continue beyond 9 months. A 9 month period is considered to be a reasonable time period for negotiations as it has been included in Queensland rail access undertakings since 2001.</p> <p>An extension to this period will occur where it is agreed by both parties. If the parties agree to extend the 9 month period then under AU1 that extended period will apply (not the 9 month period) and Queensland Rail will be obliged to continue to negotiate despite the expiry of the 9 month period.</p> <p>It is in Queensland Rail's commercial interest to encourage commercially viable Access to its Network. Therefore, Queensland Rail has an inherent interest to continue negotiations with genuine Access Seekers that go beyond 9 months. An access undertaking is intended to provide certainty for all parties.</p>
12	Issues addressed during negotiations	2.6.2	QR National states that there should be additional flexibility in the process to facilitate negotiations. For example, there should be the ability for an Access Seeker to revise its application (to some extent) as well as stronger obligations on Queensland Rail to provide additional information as required by an Access Seeker during the negotiation process. In addition, at this stage of the negotiation, Queensland Rail should have stronger obligations in terms of providing an indicative Access Charge and more detailed Capacity Analysis. In particular, there should be a clearer obligation on Queensland Rail to investigate capacity expansions, where required, to accommodate the Access Seeker.	<p>AU1 aims to provide certainty to all parties. It is necessary to define an Access Application to provide such certainty. Queensland Rail notes that there is nothing in AU1 that prevents the parties from agreeing to take the negotiations in a direction that results in an outcome different from the original Access Application and IAP.</p> <p>Clause 2.6.2(a)(i) contains an obligation for Queensland Rail to provide additional information to an Access Seeker. Queensland Rail considers that this Clause is sufficient protection for an Access Seeker and places a reasonable obligation on an access provider. Queensland Rail additionally considers that Clauses 2.6.2(a)(v) and (vi) are sufficient with regard to obligations to provide an indicative Access Charge and Capacity Analysis. In reading Clause 2.6.2(a)(vi), the definition of Capacity Analysis should also be referred to for full context.</p>
13	Negotiation of an Access Agreement	2.6.1(b)(ii) & 2.7.2 (d)	Asciano states that negotiation time lines in AU1 (i.e. Clause 2.6.1(b)(ii) where 9 months is identified as a maximum timeframe for negotiations & the 1 year requirement in Clause 2.7.2 d) are inconsistent. Asciano believes that the timeframe to apply in 2.7.2 (d) should be 6 months (or less).	<p>Queensland Rail notes Asciano's concern and advises that the two time periods relate to two separate and distinct processes.</p> <p>The first time period under Clause 2.6 (b)(ii) is in relation to the Negotiation Period as a whole, which is to be completed within 9 months. The second time period of 1 year under Clause 2.7.2 (d) is in relation to circumstances where there is an existing Access Holder and a new Access Seeker lodges an Access Application for the first Access Holder's Capacity seeking it upon expiry of the existing Access Holder's Access Agreement. The Clause provides that the right to renewal process provided for in Clause 2.7.2(c) where a Reference Tariff applies will not be applicable where the existing Access Agreement has less than 1 year to expire. Therefore, there is no inconsistency with regard to the timeframes.</p> <p>Clauses 2.7.2(b) to (d) recognise industry's desire for a preference to be given to renewals. Queensland Rail also needs certainty that it will have trains running on the Network. AU1</p>

Item No.	AU1 Section	Clause	Stakeholder Comments	Queensland Rail Responses
				provides a preference to existing Access Holders who wish to extend their Access Rights, but that preferential treatment needs to end at a point that is early enough for Queensland Rail to contract with another Access Seeker. Queensland Rail believes that it is arguable the time frame in Clause 2.7.2(d) should be longer to achieve that purpose, but considers that it represents a compromise between Access Holders desire for a renewal preference and Queensland Rail desire to maximise the use of the Network.
14	Negotiation of an Access Agreement	2.6.3 (c)	Some stakeholders considered that it is commercially inappropriate that in the event of an unsuccessful negotiation the Access Seeker must pay Queensland Rail's negotiation costs and that each party should be responsible for their own costs.	This only applies if Queensland Rail issues a Negotiation Cessation Notice. Queensland Rail can only issue a notice in certain circumstances that, in summary, reflect that a party is a "non-genuine" Access Seeker. In such a case, it is reasonable that Queensland Rail should be reimbursed as there is no other avenue for cost recovery (i.e. via Access Charges).
15	Frivolous access request	2.6.3(a)(ii)(D) and 2.6.4	Queensland Rail is able to reject an Access Application or cease negotiations if they determine the request is frivolous in nature. QR National suggested the references to Frivolous Access Requests be removed for a number of reasons including that it is QR National's view that it would be difficult for Queensland Rail to assess whether an Access Request is frivolous or not prior to the Negotiation Period.	<p>It is in Queensland Rail's legitimate business interest to reject Frivolous Access Applications. It is not in Queensland Rail's legitimate business interest to reject non-Frivolous Access Applications and Queensland Rail would not do so. Queensland Rail should have an ability to reject frivolous Access Applications.</p> <p>It is not normally in Queensland Rail's commercial interests to reject Access Applications but where the Access Application is frivolous this will result in Queensland Rail allocating resources to that Access Application potentially to the detriment of genuine Access Seekers and Queensland Rail's other business activities. Therefore, Queensland Rail needs to be able to short circuit the Access Application process before substantial resources need to be committed. Access Seekers are protected through the dispute and complaint resolution process contained in Part 6 of AU1 and Queensland Rail is only likely to use the right under clause 2.6.4 where the Access Application is clearly frivolous.</p>
16	Access Agreement	2.7	The QRC states that Queensland Rail should notify a Customer, within a reasonable time ahead of expiry, of the requirement to renew Access Rights (regardless if these are currently held by another party on the Customer's behalf).	<p>Queensland Rail understands the QRC's concern, but notes that this would be in contradiction to commercial-in-confidence provisions. Queensland Rail is unable to notify a third party of Renewal Rights relating to an Access Agreement which the third party is not a party to the contract.</p> <p>However, Queensland Rail also notes that the Customer could put in place arrangements with its Operator through its rail haulage agreement to achieve the outcomes that the QRC is seeking in their submission. This is because the Operator will be aware of when their Access Rights will expire. Queensland Rail considers this to be the most appropriate approach for resolving this request.</p>
17	Access Agreement	2.7	<p>Stakeholders made the following requests in relation to Access Rights:</p> <ul style="list-style-type: none"> o that the renewal right applies to the nominee of the Customer rather than to the current Access Holder; o that the transfer of Access Rights to a different origin/destination cannot proceed without consent of the Customer; o that the Customer may itself, without the consent of the Access Holder, trigger a transfer of Access Rights to an alternative Access Holder (e.g. change above rail Operators); and o Customers should have the ability to require the transfer of their existing Access Rights from the current nominated Access Holder. 	<p>Currently, Queensland Rail holds Access Agreements with Operators. Queensland Rail believes that for the rights highlighted by the QRC to be provided to end users that the end users would be required to negotiate an Access Agreement with Queensland Rail.</p> <p>There is nothing to preclude Queensland Rail and an end user from entering into an Access Agreement or a Capacity Deed. In addition, if the Customer's Operator is the Access Holder, then the matters raised can all be addressed in the rail haulage agreement with that Operator. The existing provisions in AU1, and more particularly the SAA, are adequate to address transfers.</p>
18	Access Agreement	2.7	While AU1 includes a general right for Train Services with an applicable Reference Tariff to renew Access Rights, the QRC contends that this right should be extended beyond this narrow group of services (that is, only some coal mines operating on the West Moreton System).	Non-Reference Tariff services are generally priced lower than the ceiling limit due to an Access Seeker's ability to pay. Non-Reference Tariff services vary greatly in all aspects including different traffics having very different prices. Under these circumstances Queensland Rail does not consider that renewal rights are applicable for these types of non-reference tariff traffics. If, for example, there is a traffic with a low Access Charge and, subsequent to the Access Agreement being signed, a more profitable traffic is seeking Access then Queensland Rail should not be required to re-sign an Access Agreement with the lower value traffic at expiry. Where Access Charges are below ceiling Queensland Rail should have the right to seek the best commercial outcome upon the expiry of the Access Agreement.
19	Access Agreement	2.7	Some stakeholders requested that the Access Agreement should be amended to ensure	The absence of a QCA approved SAA for end users does not prevent Queensland Rail and

Item No.	AU1 Section	Clause	Stakeholder Comments	Queensland Rail Responses
			that Access can be held by an end user (without having to contract in relation to above rail operational matters).	an end user from negotiating an Access Agreement. In such circumstances, Queensland Rail would negotiate an Access Agreement with the end user in good faith through the negotiation provisions specified in AU1. Ultimately, if the parties could not reach agreement, then the end user could refer the matter to the QCA for an access determination. Queensland Rail is yet to receive an Access Application from an end user for Available Capacity. Queensland Rail considers that a QCA approved SAA should only be required where there is both a Reference Tariff and a demonstrated material demand for Access Rights from Access Seekers.
20	Access Agreement	2.7	The QRC has sought that Customers be provided the first right to execute replacement Access Agreements in the event that an existing Access Holder defaults and their Access Agreement is terminated due to no fault of the Customer.	Queensland Rail believes that the most efficient way to achieve the outcome sought by the QRC is for end users to enter into Access Agreements with Queensland Rail. Only parties to an Access Agreement should be afforded rights under that Access Agreement. Additionally: <ul style="list-style-type: none"> the end user could mitigate risks associated with an Operator defaulting under its Access Agreement, and that Access Agreement being terminated, by seeking provisions in its arrangement with the Operator to ensure the Operator is liable for any damage caused to the end user. the end user could include requirements in its rail haulage agreement that the Operator must notify the end user of any non-compliance by the Operator with the Access Agreement, and to provide any notices or other communications with Queensland Rail regarding any purported failure by the Operator to comply with the Access Agreement. With such provisions, the end user will be aware of whether Queensland Rail may be considering terminating the Access Agreement and could consider what steps it might take to protect its commercial activities. Indeed, in the unlikely event of a potential termination, the end user could also include provisions in the rail haulage agreement requiring the Operator to comply with its directions to remedy the non-compliance or, potentially, for the transfer of the Access Rights to the end user.
21	Access Agreement	2.7.2	Stakeholders questioned what would happen where there are mutually exclusive competing capacity requests with no material difference to Queensland Rail. AU1 does not specify how Queensland Rail will determine which Access Seeker will be allocated the Capacity in this circumstance.	Queensland Rail believes that queuing is appropriate where a vertically integrated monopoly competes with third party Operators. Queensland Rail does not compete with third parties for Access to its Network. As such, queuing is not appropriate for Queensland Rail's business. Queuing would impose unnecessary administrative costs upon Queensland Rail for no clear competitive benefit. Queensland Rail's proposed capacity management framework is consistent with those put in place by other below rail providers in Australia that are similar in structure to Queensland Rail, which allow Capacity to be allocated to the Access Seeker which in the below rail provider's opinion, is most favourable or will best utilise the Available Capacity. <p>In circumstances where 'identical' applications are received, or where it is not possible to determine which of two or more Access Applications are the most favourable to Queensland Rail, then Queensland Rail will use the time of lodgement as the determining factor. Queensland Rail will consider redrafting this provision to reflect this outcome.</p>
22	Access Agreement		In assessing the cost and risk to Queensland Rail of providing Access Rights under Clause 2.7.2(a)(iv)(B), QR National states that it is necessary to take into consideration the impact of Transport Service Payments (TSPs) received by Queensland Rail from the State Government.	The TSPs received by Queensland Rail from the State Government are irrelevant when assessing the cost and risk to Queensland Rail of providing Access Rights under Clause 2.7.2(a)(iv)(B).
23	Access Agreement		Access Seekers require a capacity commitment relatively early in order to proceed with negotiations. The present obligation on Queensland Rail to inform Access Seekers if there are mutually exclusive Access Applications does not provide sufficient certainty.	Capacity is only granted upon execution of an Access Agreement as this provides incentive for all parties to finalise genuine negotiations. There would be significant difficulties to be overcome in the negotiation process if capacity was to be reserved on the basis of Access Applications. Queensland Rail believes that it should be sufficient that the Access Seekers know whether there is Available Capacity, whether Extensions are needed and whether there are competing Access Applications.
24	Access Agreement	2.7.2 (c)	Xstrata made the following comments in relation to Clause 2.7.2 (c):- <ul style="list-style-type: none"> the requirement that an existing Access Holder commit to the period of Access which the new Access Seeker is proposing is potentially unworkable for the owner for an existing mine which may have a shorter remaining mine life than the term sought by 	<ul style="list-style-type: none"> Queensland Rail needs to protect its commercial interests in relation to the renewal of existing and new Access Seekers. An Access Seeker (including the mine) can contract Access for longer terms to match the mine life. AU1 does not prevent an Access Holder lodging an Access Application for an

Item No.	AU1 Section	Clause	Stakeholder Comments	Queensland Rail Responses
			<ul style="list-style-type: none"> the new Access Seeker. that to obtain protection, an existing Access Holder can be required to apply for new Access at any time during the term of their Access Agreement other than the last 12 months. it does not provide a right of renewal on the existing terms of the Access Holder's Access Agreement, making it possible that a failure to reach agreement on an extension prior to the time periods noted in Clause 2.7.2 (c) and the resulting potential inability to extend Access Rights, can arise from Queensland Rail requesting onerous terms for an extension rather than the Access Holder failing to promptly seek an extended term. 	<ul style="list-style-type: none"> extension of its Access Agreement. Clause 2.7.2 only comes into effect when an Access Seeker is seeking rights that will only be available on the expiry of the Access Holder's Access Application. If Queensland Rail is believed to be requesting onerous terms, then the matter could ultimately be referred to the QCA for an access determination.
25	Access Agreement	2.7.3 & 7	<ul style="list-style-type: none"> AU1's definition of Available Capacity excludes capacity required to comply with Passenger Priority Obligation. In AU1, the definition of Available Capacity has additionally been amended to also exclude capacity: “(b) ...for the purposes of: ...attending to and performing activities associated with safety matters or the management of safety risks; and (c) Capacity that is not available as a result of: an operational constraint from time to time; or restrictions imposed or required from time to time in accordance with any Law”. 	<ul style="list-style-type: none"> Where Capacity is preserved under AU1's Passenger Priority Obligation, then it will not be available to be contracted by third party Access Seekers. As such, it is excluded from the definition of Available Capacity. However, the exclusion of Capacity required to comply with a Passenger Priority Obligation or a Preserved Train Path Obligation is only excluded to the extent that it cannot be allocated by Queensland Rail to the relevant Access Application. Queensland Rail needs to be able to put in place Operational Constraints to allow normal operation of a safe network. Where Capacity is allocated for this purpose it will not be available to be contracted. Therefore, it has been excluded from the definition of Available Capacity.
26	New Standard Access Agreements	2.8	New Hope submits that Clause 2.8 of the AU1 should be widened to allow the QCA to require Queensland Rail to submit a proposed form of Access Agreement in which the rights and obligations of above-rail Operators are separated from those relating to Capacity and payment obligations e.g. an end user agreement. Several other stakeholders have also requested that Queensland Rail develop a standard end user agreement.	<p>AU1 contains provision for the QCA to require Queensland Rail to submit additional SAAs. Under Clause 2.8(a), the QCA could require Queensland Rail to submit a proposed SAA for a different type of Train Service - that is, one not currently covered by the SAA in Schedule D. This could, potentially, include a Train Service of the type mentioned by New Hope - one which separates the rights and obligations of above-rail Operators from those relating to capacity and payment obligations; or any other variation of structure.</p> <p>AU1, including Schedule C, do not contain anything inconsistent with using such an alternative structure. The lack of a standard end user agreement does not in any way preclude Queensland Rail and an end user from negotiating an Access Agreement.</p> <p>SAAs should only be required by the QCA where there is sufficient demand from Access Seekers to warrant this. Queensland Rail notes that it is yet to receive an Access Application from a Western System end user for available Capacity. Therefore, Queensland Rail does not consider that there is material demand to use an end user agreement at this time.</p>
27	Prudential Requirements	2.9	<ul style="list-style-type: none"> QR National has sought clarification as to whether the Material Default provisions of AU1 (Clause 2.9.1(b) of AU1) could result in a default in a signed Access Agreement or whether it is only applicable to the Access Application Process. In relation to the Prudential Requirements, Queensland Rail has not provided Access Seekers with the right to an explanation of the grounds for the refusal to negotiate. This hinders the ability of the Access Seeker to redress the noncompliance and continue negotiations or access the dispute resolution provisions. 	<ul style="list-style-type: none"> Queensland Rail confirms that Clause 2.9.1 of AU1 only relates to Access Seekers. Clause 2.9.1 of AU1 does not override the terms of Access Agreements. Clause 2.6.3(a)(iii) provides that if Queensland Rail (acting reasonably) is not satisfied that an Access Seeker meets the prudential requirements in Clause 2.9.1 of AU1, then Queensland Rail may give a Negotiation Cessation Notice. A Negotiation Cessation Notice will need to include the reasons why it is being given.
28			AU1 requires Access Seekers to meet prudential requirements and to demonstrate that they do so within a reasonable time period of no more than 10 Business Days. QR National considers that it is in the interests of the Access Seeker to demonstrate compliance in a timely manner, and so it should be at the discretion of the Access Seeker to determine a reasonable time.	It is in Queensland Rail's legitimate business interest for AU1 to include prudential requirements and that reasonable time periods be included in which an Access Seeker is to demonstrate their satisfaction of these requirements.
29	Structure of Access Charge	General comment	QR National suggests that s.168A(b) of the QCA Act, the pricing principles requires AU1 to have multi-part pricing.	<p>Queensland Rail's pricing principles are consistent with this provision and allow for multi-part pricing consistent with 168A(b) of the QCA Act. Additionally, by way of clarification Queensland Rail notes that the QCA Act states that an undertaking is required to allow multi-part pricing "where it aids efficiency" rather than containing an open ended obligation.</p> <p>AU1 does not include provisions for the structure of Access Charges and this is consistent</p>

Item No.	AU1 Section	Clause	Stakeholder Comments	Queensland Rail Responses
				with the overarching objective to reduce the complexity of AU1 and to remove unnecessary detail. Moreover, the provisions regarding the structure of Access Charges included in the Temporary Undertaking provided little additional certainty for users regarding the structure of Access Charges (the provisions only indicated, in the case of Access Charges where no Reference Tariff applies, the structure that Access Charges may take).
30	Price Differentiation	3.3(b)(ii)(B)(1)	In the Temporary Undertaking, it is the change in TSPs which is the trigger for price differentiation, whereas in AU1 it is a change to the ability to commercially provide Access which may include changes to TSPs. It is QR National's view that changes to the ability to commercially provide Access is already addressed in Clause 3.3(b)(ii)(B)(2) and the rewording of Clause 3.3(b)(ii)(B)(1) creates unnecessary uncertainty regarding the circumstances in which there may be price differentiation. Queensland Rail should be able to differentiate Access Charges where it is no longer able to commercially provide Access to Train Services at the current Access Charges. A change to the TSPs is the mostly likely situation where this circumstance might arise. QR National advise that it is their understanding that Queensland Rail considered that the broader principle should be reflected even if this is only likely to be satisfied where the TSPs change over time.	Clause 3.3(b)(ii)(B)(1) of draft AU1 includes the principle that Queensland Rail should be able to differentiate Access Charges where it is no longer able to commercially provide Access to non-Reference Tariff Train Services at the current Access Charges for Access Holders. A change to the TSPs is the most likely situation where this circumstance might arise. It is reasonable that Queensland Rail includes this provision, particularly as it applies to traffics that are charged below the ceiling pricing limit. While Queensland Rail understands that Clauses 3.3(b)(ii)(B)(1) and (2) are likely to overlap, they are different criteria and could apply differently in different circumstances - for example, where TSPs change over time.
31	Rate review provisions	General comment	The circumstances in which a contracted Access Charge (where there is no Reference Tariff) can change should be limited to a Material Change as per the SAA. In addition, rate review provisions should be limited to agreements that have a term longer than 5 years.	This issue relates to Clause 3.5 of AU1 and in particular Paragraph (a) which refers to rate review provisions for changes over time in the cost and risk to Queensland Rail of providing Access. Clause 3.5 of AU1 allows Queensland Rail to negotiate a review provision to provide a pass-through of changes in cost or risk. Importantly, Clause 3.5 also works the other way. If Queensland Rail's cost or risk of providing Access decreases, this could potentially result in a corresponding decrease in Access Charges – depending upon the review clause drafted for the relevant Access Agreement. QR National proposes that Queensland Rail only be able to include rate review provisions for Material Change in Access Agreements with a term greater than 5 years. However, the time restriction does not make sense in Queensland Rail's particular circumstances. If there is a Material Change – for example, all TSPs are removed, then Queensland Rail should have the ability to review Access Charges. Inclusion of a rate review provision in an Access Agreement should not depend upon the term of the Access Agreement.
32	Reporting	5	Several stakeholders have requested that AU1 include audit provisions.	Queensland Rail has not included specific audit clauses as the QCA already has very broad information gathering powers under the QCA Act.
33	Reporting	5	Xstrata stated that in the absence of a Reference Tariff, the proposed negotiate-arbitrate model provides limited protections for Access Seekers in respect of pricing... To aid pricing negotiations it would be appropriate to require at least financial separation of the below rail business and the passenger business, and meaningful and transparent reporting of the costs relating to the below rail business. Such financial separation and reporting would have the dual benefits of going some way to addressing the asymmetric information issue and reducing the potential for cost shifting or cross-subsidisation between the regulated and unregulated businesses.	Queensland Rail operates under a QCA approved cost allocation manual (Costing Manual) and is required to produce audited annual below rail financial statements (refer to part 4.1.2 "Accounting Separation" in Queensland Rail's 'Submission Accompanying and Explaining the Draft Queensland Rail Access Undertaking 1'). Queensland Rail believes these existing arrangements are sufficient to address any potential for cost-shifting or cross-subsidisation between the regulated and unregulated business. Moreover, from a cost-benefit perspective, Queensland Rail is of the view that any further financial separation would not be warranted.
34	Reporting	5.3.2 (a)	Xstrata suggested that the purpose for which the QCA can obtain documents should presumably be similar to Clause 9.5 of the QR National AU. It currently would not allow the QCA to gain information to determine whether to exercise its powers under AU1 and the reference to "complying with this undertaking" should be to "performing its obligations or functions in accordance with this undertaking or an Access Agreement".	Queensland Rail notes Xstrata's comment and for the sake of clarity, Queensland Rail will consider redrafting this clause.
35	Dispute resolution	6.1	Two stakeholders requested resolution by expert determination be included in AU1.	AU1 includes a Dispute resolution process that applies to the application of the provisions of AU1. The Temporary Undertaking included a possible referral to an expert of a Dispute or question arising between an Access Seeker and QR Network. Queensland Rail believes the need for expert referral, in relation to application of AU1, is redundant given that the QCA should be able to resolve Access-related issues – as provided by the QCA Act. It should also be noted that despite expert determination not specifically forming part of the Dispute resolution process under AU1, this does not preclude the two parties from referring the Dispute to an expert if both parties agree. To alleviate stakeholder concerns Queensland Rail will consider including drafting in AU1 to highlight that Access Seekers and Queensland Rail may agree to undertake a different Dispute process to that provided

Item No.	AU1 Section	Clause	Stakeholder Comments	Queensland Rail Responses
36	Definitions	7	Asciano has requested clarification regarding whether the definition of Extension in AU1 should include asset replacement.	for in AU1. The definition of Extension in AU1 already includes an enhancement, expansion, augmentation, duplication or replacement of all or part of the Network (excluding Private Infrastructure). As such, it encompasses asset replacement. The definition of Extension in AU1 is consistent with the definition in the QCA Act.
37	Definitions	7.1	Asciano questions in their submission whether it should be clarified that Paragraph (b) of the WACC definition also provides a nominal post-tax rate (consistent with paragraph (a)).	Queensland Rail notes Asciano's comment and for the sake of clarity, Queensland Rail will consider redrafting this Clause.
38	Definitions	General comment	QR National stated that AU1 requires greater clarity regarding what is 'Access' including the drafting of the definition and that there should be upfront statements.	Queensland Rail has reviewed the definition of 'Access' in the AU1. Queensland Rail believes that the definition of Access in AU1 is applicable for all of the declared service, except to the extent that the scope of AU1 does not apply to Access to passenger assets by non-passenger Train Services.
39	Capacity	Schedule C	Xstrata is concerned that critical issues such as resumption, relinquishment and transfer of Access Rights have been removed from AU1 and placed in the SAA.	Clauses 18 and 19 of AU1's Access Agreement Principles (Schedule C) provide AU1's provisions relating to resumption, relinquishment and transfers for non-Reference Tariff services.
40	Dangerous goods	Schedule C	Xstrata and Asciano raised concerns that there are no principles provided in Schedule C in relation to Dangerous Goods - other than that they cannot be transported except as provided in the Access Agreement.	Queensland Rail clarified its approach to Dangerous Goods in its submission in response to the April 2012 QCA request for comments paper.
41	Operational Requirements	Schedule C	The principles in Schedule C suffer from often being so high level they provide no protections for Access Seekers. For example, the ability to impose Operational Constraints is completely unlimited in Schedule C, and does not include the obligation to use reasonable endeavours to minimise disruption which exists in the SAA.	Queensland Rail considers that the Schedule C Access Agreement Principles strike the appropriate balance between providing appropriate guiding principles for negotiations while leaving sufficient discretion to negotiate fit for purpose Access Agreements.
42	Security deposit	Schedule C 14	A security deposit should only be required if the Access Holder cannot meet certain financial criteria (credit rating etc).	Queensland Rail's Access Agreement Principles establish a default or baseline position for negotiations. If the parties wish to negotiate a varied position from the Access Agreement Principles, then that is available to the parties. If Queensland Rail inserted a specific creditworthiness threshold for the security requirement, the defined threshold would apply in all circumstances for Access Agreements. Queensland Rail's traffics vary greatly and so a "one size fits all" is not appropriate in this case. Queensland Rail notes that QR Network's SAA and Access Agreement Principles do not include a specific creditworthiness threshold.
43	Dispute resolution	Schedule C 16 (c)	This Clause allows Queensland Rail to determine Disputes in some instances even where Queensland Rail may be a party to the Dispute. This is not an appropriate principle.	Clause 16(c) of the Access Agreement Principles only applies in limited circumstances. Clause 17.5 of the SAA reflects this provision. It is only intended to operate in specific circumstances where Queensland Rail considers that it needs to be the person who determines the Dispute as those matters may affect the safe operation of its rail network or could adversely affect its rail accreditation or tenure. Queensland Rail is not willing to accept a decision by a third party where its ability to commercially operate its business may be adversely affected. Importantly, the provision only applies where a Dispute is not resolved by agreement between the parties, by an expert or by the Rail Safety Regulator.
44	FM Event	Schedule C 17 (b)	This Clause allows Queensland Rail to elect not to replace infrastructure damaged by a Force Majeure (FM) Event until the funding of the repairs is agreed with the other parties. This poses additional fundamental risks on Operators and shippers and is unfair. Asciano accepts that Operators and / or end users may have to fund infrastructure improvements but it is inappropriate to require them to fund repairs to existing infrastructure which results from an FM Event. Asciano believes that the risk of such events and the repair costs is implicit in the rate of return received by Queensland Rail. Xstrata considers that: <ul style="list-style-type: none"> o Queensland Rail should be obliged to fund all repairs and reinstate below an appropriate materiality threshold and also apply recoveries under any insurance policies relating to the relevant FM Event to fund the repair or reinstatement works; o user funding arrangements will need to be provided for where Queensland Rail elects not to proceed with repairs or replacement of parts of the rail network in the event of damage or destruction through a FM Event (which Queensland Rail proposes to have a right to do, see clause 17(b) of Schedule C AU1 and 18.1(D) of the SAA); and o the principles in Schedule C suffer from often being so high level they provide no 	Queensland Rail should only be required to replace infrastructure damaged in a FM Event where it is fully compensated to do so through Access Charges. Where a FM Event damages part of the Network, and it is not economic for the business to replace that part of the network (due to factors such as current and projected utilisation of that part of the network), the business should not be obliged to repair/replace damaged infrastructure. These proposed arrangements are consistent with similar provisions included in the former QR Network Coal SAA (Clause 18.5). Moreover, there are limits to Queensland Rail's ability to make ex-post adjustments to increase Access Charges in response to certain event. Queensland Rail's access charges do not have a formulaic link between access charges and the costs the businesses incurs. Without this direct link, the business has no mechanism to adjust charges to recover any additional costs associated with repairing/replacing a part of the network. The highly price sensitive nature of Queensland Rail's customers and their limited ability or willingness to pay also means that accounting for a major risk event after the fact is unlikely to be feasible. Where the business recovers an insurance payout for the damaged infrastructure in the FM

Item No.	AU1 Section	Clause	Stakeholder Comments	Queensland Rail Responses
			protections for Access Seekers. For example, the length of a FM Event gives rise to a right to terminate is only described as being "prolonged".	<p>event, and it has determined that even with this payout that it is not economic to replace/repair the damaged part of the Network, the business should be able to re-direct any monies received as deemed to be appropriate by the business.</p> <p>FM Clauses are designed to provide for events which are outside the parties' control and which delay or prevent the carrying out of contractual obligations. A FM Clause may provide that, if a FM Event makes it impossible for a party to provide the contracted services under the agreement, then the agreement terminates. This would be the effect of the force majeure Clause in the draft SAA, had it only included Clauses 17(a) and (c). Clause 17(b), however, provides an option which may allow the agreement to continue in a particular circumstance, if the parties can reach agreement as to the funding of the cost of necessary repair work. This might be seen as analogous to the situation where the network operator agrees to extend the Network where there is a funding arrangement in place with the rolling stock Operator.</p> <p>Queensland Rail notes that in relation to the comments on Insurance that insurance may not be available for a variety of FM Events.</p>
45	Reduction and Relinquishment of Access Rights	Schedule C 18.2 (b)	Asciano considers that AU1 should not provide for a detailed and prescriptive process for the determination of the fee payable when an Access Holder relinquishes their Access Rights. Rather Asciano considers that for the purposes of a broad set of Access Agreement principles which are intended to form the basis of a commercial negotiation across a range of traffics, a relinquishment fee as outlined in Clause 18.2b is inappropriate and should be removed. If any relinquishment fee is required it should be determined in negotiation with reference to the nature of the traffics and access sought.	Queensland Rail notes that the working draft of AU1, which was released by Queensland Rail for stakeholder comment on 30 August 2011, incorporated the approach suggested by Asciano in their submission to the QCA. Queensland Rail amended AU1 to include a more prescriptive approach, which is similar in principle to the approach taken in the Temporary Undertaking, as the majority of stakeholders sought this amendment.
46	Tariff		The QRC, New Hope and Peabody expressed support for the proposed tariff reset for 30 June 2013.	Queensland Rail is working toward this outcome and will present an industry paper shortly.
47	Access Agreement	General comment	Various stakeholders sought that Queensland Rail develop SAAs for non-Reference Tariff traffics.	<p>Queensland Rail does not support the development of a freight SAA. A SAA should only be applicable where there is a Reference Tariff in place. Additionally, a SAA is more appropriate where there is a single product involved such as coal. Queensland Rail's non-coal freight traffics vary greatly in price, attributes and risk.</p> <p>Queensland Rail notes that Clause 2.8 in AU1 allows the QCA to require a new SAA where there is sufficient demand.</p>