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**Decision on Queensland Rail's  
Standard Access Agreement for Coal  
Carrying Services (Access Holder  
Agreement)**

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*April 2003*

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## **1. BACKGROUND**

### **1.1 Introduction**

QR's access undertaking requires it to submit to the Authority for its approval, a draft standard access agreement for coal-carrying train services. QR's access undertaking also provides that the access holder may be either the operator of a train service or an access holder who then sub-contracts the above-rail train services to an accredited railway operator. This obligation to prepare a standard access agreement was partially fulfilled when the Authority approved a draft standard access agreement for train operators ('operator agreement') on 31 October 2002. At that time, QR committed to developing a standard access agreement for an access holder to accommodate the alternative contracting structure.

On 16 December 2002, QR submitted to the Authority a draft access holder agreement for coal-carrying train services ('the December draft of the access holder agreement').

The Authority wrote to interested parties in December 2002 seeking comments on the December draft of the access holder agreement by 7 February 2003. The Authority received one submission (from the Queensland Mining Council (QMC)).

#### *Role of an approved standard access agreement*

Once approved, the standard access holder agreement will form part of QR's access undertaking, together with the standard operator agreement (both called the "standard access agreement"). The standard access agreement provides greater certainty for both QR and access seekers (in this case, an end-user, such as a mine) as it provides a basis for access negotiations. QR and an access seeker may agree to terms and conditions that differ from that of the standard access agreement. However, in the event of a dispute, the standard access agreement becomes the default agreement.

#### *Process for approval of a draft access holder agreement*

QR's access undertaking (clause 5.2) requires the Authority to either approve or refuse to approve the draft access holder agreement within 60 days of its submission, or such longer period as advised in writing by the Authority. The Authority extended the time within which it must make its decision on the December draft of the access holder agreement to 30 April 2003. On 28 April 2003, QR withdrew the December draft of the access holder agreement and submitted a revised draft access holder agreement ('the revised access holder agreement'). This decision relates to the Authority's approval of the revised access holder agreement.

### **1.2 Authority's decision on the draft access holder agreement**

The Authority's key objective in assessing the December draft access holder agreement was to ensure that it contained a set of rights and obligations on QR and the access holder that are consistent with the approved operator agreement. Any differences between the two agreements should only reflect the different contracting structure.

Taking into account the QMC's submission, the Authority raised a number of matters with QR on which it sought amendments.

The amendments sought by the Authority can be broadly categorised into two groups: first, amendments designed to provide greater clarity and certainty about the obligations and rights applying to each party; and second, amendments to take account of the different contracting structure, such as acknowledging the operator's role even though the agreement is between QR and the access holder.

Examples of changes to the December draft of the access holder agreement include:

- the Authority sought explicit acknowledgement that an access holder may engage more than one operator to operate train services under the agreement or change operators from time to time during the term. This change addresses the QMC's main concern to ensure that a mine owner could establish long-term access rights, for example, for the life of a mine, while retaining the flexibility to utilise the competitive rail haulage market; and
- clarifying that the obligation to hold certain insurance policies will lie with the access holder and/or operator, depending on the risk to be covered. In some cases, such as public liability insurance, this may require both the access holder and operator to hold insurance. Other insurance, such as carrier liability insurance, is most likely to be held by the operator only.

On 28 April 2003, QR withdrew the December draft of the access holder agreement and submitted a revised draft access holder agreement ('the revised access holder agreement') that addressed all of the Authority's concerns. Accordingly, the Authority has approved QR's revised access holder agreement in accordance with clause 5.2 of QR's access undertaking.

Part A of the Authority's decision outlines the matters raised by the Authority with QR in regard to the December draft of the access holder agreement and the amendments agreed with QR that meet the Authority's concerns. Part B provides a 'marked up' copy of the December draft of the access holder agreement that shows all of the amendments required by the Authority. There are a number of minor amendments that are not discussed in Part A, however these are reflected in Part B.

**PART A**

## 2. CONTRACTING STRUCTURE

The main difference between the operator agreement and the access holder agreement is that the latter's contracting structure reflects the introduction of a third party. The Authority is aware that there are a number of ways in which to structure a commercial contract of the type contemplated by the draft access holder agreement. These are discussed below.

### 2.1 Approaches to contracting structure

One approach is to have a 'three-way' agreement where QR contracts separately with the access holder for the capacity entitlements and the access holder's train operator for the operational matters. Another approach is to have a 'back to back' contracting structure whereby QR places all rights and obligations on the access holder. That is, QR contracts with an end-user (for example, a mine) for the access rights. The mine then sub-contracts with a train operator to perform the train services. Under this approach, the onus is on the access holder to ensure that the operator undertakes all of the obligations the access holder has committed to in its access agreement with QR.

QR adopted this second 'back to back' contracting structure in its December draft of the access holder agreement.

QMC considered the 'back to back' contracting structure clearly placed the responsibility on the access holder for the operator's performance. QMC argued that "the alternative of a 'three way' agreement between all parties has some merit but runs the risk of creating ambiguous, duplicate or contradictory overlap at the interfaces of the contractual structures".

The Authority notes the 'back to back' model adopted by QR in the agreement is a typical and commercially reasonable approach to structuring third party access. Under the model, QR does not have a direct contractual relationship with the operator. Instead, the access holder is responsible for ensuring that the operator complies with the conditions of access, including any relevant directions or instructions from QR. This approach also avoids introducing uncertainty and complexity into the access holder agreement, which could be created if the agreement attempted to allocate risks, rights and obligations between three separate entities. The Authority further notes that QR's 'back to back' model allows the access holder to freely and independently negotiate the terms and conditions of its contract with its train operator.

Accordingly, the Authority accepts that the 'back to back' contracting structure of the December draft of the access holder agreement is an appropriate way to structure this type of commercial arrangement as it protects the legitimate business interests of QR and the access holder.

### **3. INDEMNITIES AND LIABILITIES**

The December draft of the access holder agreement establishes the relationships between each party in terms of indemnities and liabilities arising from the agreement.

#### **3.1 Multiple operators (clause 14.10)**

The December draft of the access holder agreement included provisions to clarify the relationship between QR, the access holder and the train operator. In particular, it stated that there is no contractual relationship between QR and the operator and that the access holder is responsible for all conduct of the operator under the agreement.

In its submission on QR's December draft of the access holder agreement, QMC stated that its primary interest in this type of agreement is to enable a mine owner to establish long-term access rights, for example, for the life of a mine, while retaining the flexibility to utilise the competitive rail haulage market. QMC considered that the December draft of the access holder agreement was unclear whether an access holder could exercise access rights through more than one operator. That is, a mine may wish to sub-contract its access rights under its access holder agreement with QR to more than one train operator. Moreover, the QMC was concerned that the December draft of the access holder agreement may not provide for an access holder to change operators during the term of an agreement without entering into a new access agreement with QR. QR's view was that the December draft of the agreement allowed for this situation.

Nevertheless, the Authority believed it would be beneficial to all parties if this was clarified in the agreement.

To address the Authority's concerns, the revised access holder agreement includes additional provisions, clarifying that an access holder may engage more than one operator under its agreement with QR (clause 14.10(d)) and to allow the access holder to change the operator during the term of the agreement (clause 14.10(e)). QR's interests as a network manager are protected by requiring the access holder to keep QR informed of the train services being run by each operator. The revised draft provides that the access holder will negotiate and agree with QR any amendments to the agreement to reflect the change in the allocation of train services (clause 14.10(f)). It also provides clarification that, in making any of the changes envisaged by these provisions, the access holder is not entitled to use additional access rights unless agreed with QR.

The Authority believes these amendments provide an acceptable balance in the interests of QR and the access holder.

#### **3.2 Relationship with operator (clause 14.10(b))**

The December draft of the access holder agreement stated that any conduct of the operator which constitutes a breach of the agreement, or which would have constituted a breach had it been the conduct of the access holder, shall be deemed to be a breach of this agreement by the access holder.

Since submitting the December draft of the access holder agreement, QR has advised that, to give full effect to the 'back to back' structure contemplated by this agreement, this provision needs to be broadened to cover not just a breach but also any act or omission by the operator.

The Authority notes that QR's proposed amendment is consistent with the intent of the operator agreement and does not extend the liability of the access holder beyond what is envisaged under the operator agreement. In particular, it serves to ensure that QR has recourse against the access

holder, or can hold the access holder liable in the event of a breach or any act or omission by the operator. However, as it is qualified as to apply only to matters ‘under the agreement’ and ‘for the purposes of this agreement’, the Authority notes this clause will only make the access holder liable for acts or omissions of the operator which occur in the course of conduct undertaken for, or on behalf of, the access holder under the agreement.

Consequently, the Authority accepts this amendment to clause 14.10(b) in the revised access holder agreement.



## 4. INSURANCE

The December draft of the access holder agreement placed obligations on both the access holder and the operator in relation to insurance. The Authority's concerns in regard to these obligations are discussed below.

### 4.1 Required insurance policies (clauses 13.1, 13.2 and Schedule 7)

The operator agreement requires the operator to take out and maintain insurance for the risks and on the terms specified in Schedule 7. These required insurances include public liability insurance, employee insurance, carrier liability insurance, motor vehicle (non-Act) insurance and motor vehicle insurance.

The December draft of the access holder agreement stated that the access holder and the operator must take out and maintain insurance for the risks specified in Schedule 7. QR has informed the Authority that it is not its intention that all of the insurance policies outlined in Schedule 7 must necessarily be held by both the access holder and operator. Rather, some risks will apply to the access holder and some to the operator, and the relevant party should take out insurance cover for that risk as appropriate. For instance, carrier liability insurance is most likely to be held by the operator only.

QMC considered that there appeared to be some unnecessary duplication in regard to insurance requirements. Specifically, QMC thought that it should be sufficient that the access holder ensures that the required insurance cover is taken out and that QR should not be concerned how this is done, provided the access holder provides evidence that the required insurance cover is appropriately held by either the access holder or operator.

The Authority believed that clause 13.2 of the December draft of the access holder agreement should clarify the insurance obligations. The Authority accepts that it may be reasonable that certain insurance is held by either the access holder or operator, or both, depending on the risk to be covered. The key issue is that QR needs to be satisfied that all of the relevant risks are covered by insurance. Whether that insurance is held by the access holder, operator or both is not an access issue between QR and the access holder but rather a commercial matter between the access holder and the operator. This reflects one of the positive features of the back to back contracting structure – that is, the agreement does not need to allocate risks between the access holder and operator.

To address this concern, the Authority sought an amendment to the December draft of the access holder agreement clarifying that it is the access holder and/or operator, as appropriate, that must take out the required insurance. The Authority understands that such an amendment avoids the possibility of requiring the access holder to take out unnecessary duplicate insurances. In addition, such an amendment would not preclude the access holder and operator taking out primary and secondary policies respectively in order to reduce overall insurance costs. Secondary policies are used commercially to 'top up' risks already insured by another party, to the extent that the other party's insurance proves inadequate. Often they are important where the actions of both parties have caused or contributed to the same risk or loss.

The revised access holder agreement has been amended to address the Authority's concerns by clarifying that the obligation to hold the insurances specified in Schedule 7 will apply to the access holder and/or operator, as appropriate (clauses 13.1 and 13.2). Minor amendments have also been made to Schedule 7 to clarify these obligations. These amendments protect QR's interests in ensuring the relevant risks are covered by insurance, while providing greater certainty to the access holder and operator as to their insurance obligations.

## **4.2 Access holder to pay excesses/deductibles (clause 13.9)**

The operator agreement provides that the operator must pay all excesses/deductibles in respect of any claims by it or any other insured for which it is responsible. This obligation was transferred directly to the access holder in the December draft of the access holder agreement, with explicit acknowledgement that the access holder is responsible for payment of excesses/deductibles owed by the operator.

The Authority believed that it is not appropriate for the access holder to be obliged to pay all excesses/deductibles owed by the operator under the operator's own insurance policies. Where the operator has separate insurance for a particular risk, the operator should pay any excesses/deductibles due under any claim. As the operator is not a party to the access holder agreement, the Authority believed that placing an obligation on the access holder to cause the operator to pay any excesses/deductibles required would better reflect the structure of this agreement. QR's interests are protected in that either the access holder or operator will be obliged to pay any excesses/deductibles due. However, if the operator fails to pay, the access holder would be accountable as it is responsible for the conduct of the operator under the agreement.

The revised access holder agreement has been amended to address the Authority's concerns (clause 13.9).

## **5. TRAIN OPERATIONS**

The Authority has sought a number of amendments to the December draft of the access holder agreement regarding the operation of train services, including compliance with QR's access undertaking and compliance with scheduled times.

### **5.1 Compliance (clause 5.1(a))**

The operator agreement states that, to the extent relevant to the performance of its obligations under this agreement, the operator must observe and comply with all matters outlined in clause 5.1(a). This includes applicable laws, the conditions of the operator's accreditation and QR train control directions.

The December draft of the access holder agreement provided that, to the extent relevant to the performance of its obligations under this agreement, the access holder must observe and comply with, and cause the operator to observe and comply with all matters in clause 5.1(a).

It is the Authority's view that some of the matters listed in clause 5.1(a) apply to the operator only (such as the operator's Emergency Response Plan and the conditions of the operator's accreditation) and others apply to the access holder. The Authority believed that the clause should be amended to reflect that not all of the listed matters will apply to both the access holder and operator. In particular, the introductory sentence should be amended to say that the access holder must comply with and/or cause the operator to comply with, as applicable, the listed obligations, to clarify the allocation of these obligations among the operator and access holder.

QR's has amended the draft access holder agreement to reflect the Authority's concerns.

### **5.2 Compliance with QR's access undertaking (clause 5.1(a)(xvii))**

The operator agreement states that, to the extent applicable to the operator, the operator must observe and comply with the terms of QR's access undertaking (including the ringfencing obligations) in effect from time to time.

The December draft of the access holder agreement provided that the access holder must observe and comply with, and/or cause the operator to observe and comply with, to the extent applicable to the access holder and/or operator, the terms of QR's access undertaking.

QR's access undertaking sets out the framework within which access seekers and QR negotiate for access to QR's network. In the operator agreement, the operator is the access seeker and, as such, there are certain matters in QR's access undertaking that apply to the access seeker. In the circumstances envisaged by the access holder agreement, it is the access holder (eg. a mine) that is negotiating for access under QR's access undertaking. In this case, the operator is not a party to the access negotiations between QR and the mine. The operator is effectively a step further removed from the third party access framework set out in QR's access undertaking as its involvement is not as an access seeker but rather as a sub-contractor of the access holder. Its contract with the access holder is a separate commercial arrangement to the access agreement. Accordingly, the Authority believed that the operator should not be obliged to comply with QR's access undertaking.

QR's revised access holder agreement addresses the Authority's concerns (clause 5.1(a)(xvii)).

### **5.3 Compliance with scheduled times (clause 5.2(a))**

The operator agreement provides that the parties to the agreement (ie. QR and the operator) must use reasonable endeavours to operate train services in accordance with the relevant daily train plan and comply with all other scheduled times (clause 5.2).

The December draft of the access holder agreement also placed the obligation on the parties to the agreement (in this case, QR and the access holder) to operate in accordance with the daily train plan and to otherwise comply with scheduled times.

Both the access holder and the operator must comply with the train service description (the description of the access holder's train service entitlement in Schedule 1). In an operational sense, this entitlement is in part ultimately reflected in allocated scheduled times in the daily train plan. In practice, complying with the daily train plan and scheduled times applies more directly to the operator, as it is the operator that will be actually running the train services. As such, the Authority believed that the operational situation would be better reflected if the access holder is obliged to require the operator to operate train services in accordance with the daily train plan and otherwise comply with scheduled times.

To address the Authority's concerns, the revised access holder agreement has changed the drafting of this clause to place an obligation on QR to use reasonable endeavours to comply, and an obligation on the access holder to cause the operator to use reasonable endeavours to comply, with the daily train plan and otherwise with scheduled times (clause 5.2).

## **6. TRAIN SERVICE ENTITLEMENTS**

The Authority has sought a range of amendments to clause 3.1 (train services) and clause 3.2 (reduction of access rights) of the December draft of the access holder agreement.

### **6.1 Required insurances (clause 3.1(a)(xii))**

Clause 3.1(a)(xii) of the December draft of the access holder agreement stated that the access holder must have taken out the insurances required under clause 13, and provided evidence to QR of that insurance, prior to the commencement of train services.

To be consistent with the amendments sought by the Authority relating to insurance in clause 13, which provide that either the access holder and/or operator will take out insurance, as appropriate, the Authority believed that clause 3.1(a)(xii) should be amended to clarify the allocation of insurance obligations. In particular, the Authority believed that this clause should be amended to reflect that it is the access holder and/or the operator (as appropriate) that must take out the required insurances.

QR has revised the December draft of the access holder agreement to address the Authority's concerns.

### **6.2 QR to cooperate with the access holder (clause 3.1(b))**

Clause 3.1(b) of the December draft of the access holder agreement stated that QR will use all reasonable endeavours to cooperate with the access holder to facilitate the access holder's completion or compliance with clause 3.1(a). This clause lists a range of matters which must be completed prior to the commencement of train services, such as the interface risk assessment and the environmental investigation and risk management report and taking out insurance.

The Authority believed that, given many of the matters in clause 3.1(a) involve the operator as well as the access holder, this clause should be redrafted to place an onus on QR to use reasonable endeavours to cooperate with both the access holder and/or operator, as applicable, to acknowledge that some of these matters may involve the operator.

QR's revised access holder agreement takes account of the Authority's concerns.

### **6.3 Reduction of access rights (clause 3.2(f))**

The operator agreement provides that, where the customer (which is the entity with a rail haulage contract with the operator) provides notice to QR that it intends to change its railway operator for some or all of the access rights, QR must advise the operator of such notification and may reduce the operator's entitlement to operate train services accordingly. The December draft of the access holder agreement translated this right to the access holder.

The provision in the operator agreement is consistent with QR's access undertaking and is designed to provide a protection for a mine that wishes to change its operator. By allowing QR to reduce the operator's access rights after notice from the customer (ie. mine) that it is changing operators, this prevents a lack of capacity being a barrier to switching operators.

The Authority believed that this type of provision is only relevant where the access rights are held by the operator. It is not necessary in the context of the access holder agreement where the operator does not own the access rights. In fact, including this provision may have the effect of limiting the access holder's ability to change operators during the term as the access holder would still be utilising those access rights, regardless of which operator it used.

The revised access holder agreement addresses the Authority's concerns by deleting this provision.

## **7. MISCELLANEOUS MATTERS**

### **7.1 Conduct of inspection or audit (clause 12.4(c))**

The operator agreement states that, in exercising any right of inspection or audit, a party must not interfere unreasonably with the other party's trains and rolling stock or train movements on the nominated network and avoid damage or injury and minimise disruption to another party's business activities.

This same provision applies in the December draft of the access holder agreement. However, the term 'party' is defined as a party to the access holder agreement. As such, it does not include the operator.

The Authority was concerned that this clause did not recognise the operator's involvement in an inspection. In particular, given that it is the operator's trains and rollingstock that may be inspected, the Authority believed that the obligation not to interfere unreasonably with trains or rollingstock and to minimise disruption to business activities in the conduct of an inspection should extend to the activities of the operator.

QR's revised agreement addresses the Authority's concern and clarifies that the obligation not to interfere unreasonably with trains and rollingstock or to disrupt business activities, covers the operator's trains and rollingstock and business activities as well (clause 12.4(c)).

### **7.2 Suspension (clause 19.1(a))**

The operator agreement provides that QR may suspend an operator's train services if it fails to comply with any one or more of the events or circumstances outlined in clause 19.1. Clause 19.1 provides for the suspension to continue until the operator has remedied the relevant default or taken action to prevent its recurrence.

The December draft of the access holder agreement stated that such suspension shall continue until such as time as the access holder has remedied the relevant default or taken action to prevent recurrence.

QR's right to suspend train services may be triggered by actions of either the access holder (eg. failure to pay access charges) or the operator (eg. the operator's accreditation is cancelled). Given this, the Authority believed that the words 'or caused the operator to remedy the relevant default' should be added to the final sentence of clause 19.1(a) to reflect that the required remedial action may need to be undertaken by either the access holder or the operator.

QR has revised the access holder agreement to take account of the Authority's concerns.

### **7.3 Definition of Railway Operator**

'Railway Operator' is a defined term used throughout QR's access undertaking, operator agreement and access holder agreement. It is defined as having the meaning given to that term in the Transport Infrastructure Act. That is, 'Railway Operator' means a person who operates rolling stock on a railway.

Since submitting the December draft of the access holder agreement, QR has advised that this definition fails to cover access holders who are not operators. In particular, in certain clauses in the agreement where this term is used, the term should cover not just persons who operate rolling stock on a railway, but also access holders that are not accredited railway operators.

To address this concern, QR and the Authority have agreed to a revised definition of ‘Railway Operator’ that encompasses the intended meaning of the term throughout the agreement. There are also some consequential amendments to the agreement in the following clauses to be consistent with the new definition: definitions of ‘Common Corridor’ and ‘Reduction Factor’; clause 3.3 (relinquishment and transfer of access rights); clause 5.6(e)(iii) (performance levels); clause 12.4(e) (conduct of inspection or audit); clause 15.3 (claims in respect of non-provision of access); and clause 15.4 (claims in respect of delays to train movements).

These amendments are reflected in the revised access holder agreement. However, as this is equally an issue for QR’s undertaking and the operator agreement, the Authority understands that QR will propose similar amendments to these documents.



**PART B**

## **8. MARK UP OF DECEMBER DRAFT OF THE ACCESS HOLDER AGREEMENT**

A final 'mark up' of the December draft of the access holder agreement has been included to show interested parties all the amendments required by the Authority.