NEW HOPE GROUP

Queensland Rail's 2020 Draft Access Undertaking:

Initial Submission – Volume 2

Undertaking and Standard Access Agreement

17 October 2018

Volume 2 – Undertaking and Standard Access Agreement

1 Structure of NHG Submission

The NHG submission addresses each of the components of the 2020 DAU as follows:

(a) Volume 1 provides:

(i) an overview of NHG's submissions;

(ii) comments on the regulatory framework applicable to the QCA's consideration of the 2020 DAU and the roles and powers of the QCA;

(iii) submissions in respect of the area of most concern to NHG, being the West Moreton and Metropolitan reference tariffs, including in respect of:

(A) allocation of network costs to coal services;

(B) the appropriate WACC and underlying WACC parameters, including asset beta and market risk premium;

(C) the appropriate capital expenditure allowance; and

(D) the appropriate operating and maintenance expenditure allowances.

(b) this Volume 2, provides comments on the NHG's other concerns in relation to the proposed changes to the wording of:

(i) the 2020 DAU; and

(ii) the standard access agreement (***SAA***).

2 Access Undertaking

2.1 Overview

NHG acknowledges that QR has sought to make incremental changes from AU1 to the 2020 DAU (rather than the wholesale changes which characterised the previous AU1 consideration process).

While NHG does not support all the changes QR is proposing, NHG has determined to adopt a similar approach.

Accordingly:

(a) NHG's submissions provide commentary on each of the amendments proposed by QR (and where changes are non-contentious and/or otherwise acceptable, NHG has indicated that is the case); and

(b) NHG submissions do not seek to re-argue each point considered during the last process, and rather only make submissions regarding:

(i) changes QR proposes which NHG consider will have a material adverse impact and are inappropriate; and

(ii) other highly material matters which NHG consider must be changed in order for the approved access undertaking to be appropriate.

NHG first addresses the 6 issues on which the QCA Notice specifically sought stakeholder comment, before providing a response on all other changes.

2.2 Mechanism for amending the Operating Requirements Manual (Cl 4.3, Sch G)

NHG is not supportive of the proposed amendments to the 2020 DAU in relation to the Operating Requirements Manual (the ***ORM***).

QR has proposed to remove the ORM from the 2020 DAU (see the deletion of Schedule G), and replaced the need for QCA approval for amendments with a requirement to consult with third parties that will be materially affected (see clause 4.3 2020 DAU).

This would reverse the findings of the QCA, made as recently as June 2016, in respect of AU1 that it was appropriate to make the ORM part of the undertaking, and provide the QCA with oversight of proposed amendments.

In particular, the QCA Decision (at 75-76) noted in respect of the QCA's position:

> *We consider that our requirements provide an appropriate balance between Queensland Rail's legitimate business interests in having the ability to amend the ORM, the public interest, an access holders' and access seekers' interests in having a consistent set of operating requirements (s. 138(2)(a), (b), (d), (e) and (h)). Consistency of operating requirements promotes efficiency and productivity, as access holders and seekers can appropriately plan and prepare their operations without having to adapt to idiosyncratic or individual variants to the requirements.*
>
> *Despite these changes reducing the ability to amend the ORM promptly, we still consider that they are appropriate, given the fundamental importance of every access holder being able to rely on the operating requirements.*

Source: QCA Decision, Queensland Rail's Draft Access Undertaking, June 2016

There is nothing to suggest that the appropriateness of that position has changed.

From the perspective of a user of Queensland Rail's network, the ORM is an important document, as it provides detail on:

(a) issues that need to be resolved as a pre-condition to obtain access, such as interface and environmental risk assessments; and

(b) operational matters regarding issues like network control and communication.

That transparency and certainty assists in more efficient negotiation of access and more efficient operation of the network (and the supply chain more generally including mining and above rail operations).

NHG considers it is a significant step-backwards to remove the transparency and protections which currently exist in relation to the ORM.

While QR has proposed it would consult on amendments (with those stakeholders it judges will be materially affected), there is no protection provided for an affected access holder if either QR does not consider they are materially affected (even though the stakeholder does) or, following consultation, a stakeholder does not consider proposed amendments are appropriate.

As noted in the QCA June 2016 Decision, the SAA clauses already make the requirements to comply with the ORM subject to laws, and NHG is not convinced that there is anything in the ORM which would ever require urgent changes.

To the extent that there is a critical change required, NHG considers the QCA would expedite its consideration of a DAAU in relation to such changes (with a limited period of consultation appropriate to that context).

Accordingly, NHG submits that the provisions in relation to the ORM from AU1 should be reinstated.

2.3 Amendments to capital expenditure approval process (Sch E)

NHG is not supportive of the changes to Schedule E clauses 1.5 and 3.2(e), 4.2(c) and 5.3(c).

Taken as a whole, those changes are clearly an attempt to make it harder for the QCA to make a determination that capital expenditure is not prudent (and therefore should not be accepted into the regulatory asset base).

It is also not clear to NHG how these amendments are 'incorporating lessons from AU1 process' as the QR Submission suggests.

QR proposes to amend Clause 1.5 to require reasons to be given in a very prescriptive manner (that would go beyond the sort of reasons that administrative decision-makers more typically have to give). The QCA already gives reasons for its decisions, and there are also statutory rights to obtain reasons which exist under the *Judicial Review Act 1991* (Qld). Consequently, NHG does not see the justification for being so prescriptive in relation to the provision of reasons.

QR also proposes to amend Clause 3.2(e), 4.2(c) and 5.3(c) in relation to the assessment of prudency of capital expenditure, prudency of standard of works and prudency of costs of capital expenditure such that:

(a) the factors the QCA is currently required to have regard to, will only be had regard to 'where relevant' (suggesting that some of them are not always relevant); and

(b) including another mandatory factor that applies where any of the other categories of information are not available, to capture any other information provided by QR that is capable of demonstrating the matters of which the QCA is required to be satisfied

NHG considers that all of the mandatory factors set out in clause 3.2(e), 4.2(c) and 5.3(c) will be relevant to an assessment of prudency for projects, and it is not appropriate to seek to introduce a further layer of complexity by requiring the QCA to consider whether each of those factors are relevant.

NHG has no issue with QR having the ability to submit additional information to the QCA beyond the mandatory factors the QCA must take into account (as QR already does). However, elevating such information provided by QR to a mandatory consideration is not appropriate. The QCA should continue to have the right to determine whether any additional information provided by QR should be taken into account (and the appropriate weight it should be given).

Accordingly, NHG submits that the new clause 1.5 of Schedule E should be deleted and the changes proposed to clause 3.2(e), 4.2(c) and 5.3(c) should not be made.

2.4 Limits on price differentiation (Cl 3.3)

NHG is not supportive of the proposed amendment to clause 3.3, but has focused its comments on those changes which relate to coal carrying services on the West Moreton and Metropolitan network.

NHG considers it should be made much clearer that, other than clause 3.3(c), the remainder of clause 3.3 is not applicable to coal carrying services on the West Moreton and Metropolitan network, or how reference tariffs are determined.

If the other provisions of clause 3.3 were to apply to coal carrying services on the West Moreton and Metropolitan network or related reference tariffs, NHG is concerned that QR's proposed drafting for clause 3.3 takes a very QR centric (and therefore) one-sided view of how to determine an appropriate price. For example, no reference is made to the efficient costs, the affordability and competitiveness of charges, earning a return on investment that is commensurate with the regulatory and commercial risks involved (rather than being reflective of monopoly pricing) and other factors addressing the interests of access holders or access seekers. References to principles of that type would need to be introduced in order to make the proposed clause 3.3 more balanced.

In relation to clause 3.3(c), NHG considers that the drafting should be varied to make it clearer that the only way in which charges can be varied for such coal carrying services is to reflect differences in efficient cost or risk involved in providing such a service.

Potential drafting is provided below for the QCA's consideration:

(c) For a coal carrying Train Service operating either solely on the Metropolitan System or on both the West Moreton System and the Metropolitan System, the description of which otherwise differs from the Reference Train Service, Queensland Rail may only impose Access Charges that vary from the Reference Tariff that would otherwise apply, to reasonably reflect differences in the efficient cost or risk to Queensland Rail of providing Access for that Train Service compared to the Reference Train Services; or

2.5 Mechanism for determining pricing at renewals (Cl 3.3(h))

In relation to coal services that utilise the West Moreton and Metropolitan system, NHG has always understood that all services would be charged based on the West Moreton and Metropolitan system coal reference tariffs (consistent with clause 3.3(h)(v) and 3.3(i) of QR's proposed drafting).

NHG is willing to support the insertion of the proposed clause 3.3(i) to make this position clearer.

As non-reference services are not currently directly relevant to NHG, NHG has not provided detailed submission on QR's other proposed amendments in respect of renewal pricing for non-reference services.

2.6 Ad-hoc Planned Possessions (Sch F)

NHG is not supportive of QR's proposed introduction of a new category of 'Ad Hoc Planned Possessions', and the related consequential amendments to the Network Management Principles (***NMP***) in Schedule F.

QR proposes that a new type of possessions be introduced 'Ad Hoc Planned Possessions', and that such possessions become a permitted reason for the Daily Train Plan (***DTP***) varying from the Master Train Plan (***MTP***) on three months' notice (in a manner which, as a result of QR's other proposed amendments, cannot be objected to or disputed).

Schedule F already provides provisions in respect of Emergency Possessions, Urgent Possessions and Planned Possessions. The definitions of those types of possessions and their treatment under the NMP was robustly debated in connection with consideration of AU1.

As a matter of principle, NHG considers that for a possession to both be 'ad hoc' and 'planned' is illogical. To the extent the possession is truly planned – then it should fall within the definition of a Planned Possession (i.e. one that is entered into the Train Schedule), and if it is not then the Urgent Possession and Emergency Possession definitions cater for such unforeseen possessions.

It seems that QR wishes for 'Ad Hoc Planned Possessions' to be possessions that are not entered into the MTP 'because it is not a regularly scheduled Possession'. This raises the obvious question as to why it is that all planned possessions cannot be included in the MTP as Planned Possessions. NHG sees no logical reason why that could not be the case.

It is important for access holders to be able to properly and efficiently plan their logistics chain, such that the MTP should be as accurate a representation as possible of the Planned Possessions to occur.

By allowing greater potential for variation from the MTP, NHG is concerned that the introduction of Ad hoc Planned Possessions (and more particularly their treatment under the NMP) will

provide QR with the ability to add additional closures at only 3 months' notice to accommodate inadequate planning of routine maintenance.

While NHG continues to hold the views that it provided in its submissions in respect of AU1, namely that the current drafting goes beyond what is necessary in terms of accommodating QR possessions without proper planning, it would be willing to accept a continuation of the AU1 position.

2.7 Dispute resolution mechanism only applying to access seekers not access holders (cl 6.1.2)

NHG is not supportive of the deletion of clause 6.1.2(b), but supports the deletion of the previous reference to disputes in relation to clause 7 of Schedule D (which relates to the Adjustment Amounts which applied in connection with the AU1 reference tariffs).

QR has proposed to delete clause 6.1.2(b) which previously provided for certain disputes to be able to be brought by access holders, being disputes in relation to clause 7 of Schedule D (Adjustment Amounts), clause 2.4 of Schedule F (Changes or modifications to the MTP), clause 1.2.3 (Line Diagrams).

Those three types of disputes need to be considered separately.

The deletion of the reference to clause 7 of Schedule D is appropriate as the Adjustment Amounts relates to the previous adjustment amount payments owing in connection with the AU1 reference tariffs.

The deletion of the reference to clause 2.4 of Schedule F has presumably been proposed by QR on the basis that they have also proposed deleting that clause. As noted in the summary table below, NHG does not support the deletion of that clause, as it remains appropriate (except potentially where variations to the MTP occur for emergencies) for access holders to have a right to dispute such variations, given that variations inevitably result in cancellations, and typically take or pay and demurrage costs.

It is not clear why QR has deleted the potential to dispute changes to line diagrams under the dispute resolution process in Part 6, particularly given that the right to dispute in accordance with the dispute resolution process is still referred to under clause 1.2.3(f). In any case, NHG does not support the ability to dispute in accordance with the dispute resolution process being removed. Given that the line diagrams portray which parts of the network are subject to the access undertaking, it is important that users have transparency and certainty of the scope of the access undertaking, and can ensure that network components that are intended to be regulated remain so. Additionally, it is vital to the expedition of any dispute to require that it be conducted in accordance with an appropriate dispute resolution framework, as is currently provided under clause 6.1.2.

2.8 Summary of NHG views on changes

The below table provides a consolidated summary of NHG's views on each of the other changes proposed by QR in the 2020 DAU (from the applicable wording in AU1) – that were not specifically covered in the QCA Notice.

	Amendment	Clause	NHG Response
1	Updated preamble	Preamble	**Supported by NHG** the updated preamble is preferable to the previous preamble due to not making some of the unsubstantiated claims contained in the previous wording.
Part 1 Application and scope			
2	DAU – 5 year term	1.1, Terminating Date definition	**Supported by NHG** NHG acknowledges that a 5 year term is a standard and reasonable regulatory term, subject to the undertaking containing appropriate arrangements in respect of the West Moreton and Metropolitan system reference tariffs under all likely volume scenarios.
3	Deletion of proviso that passenger priority obligations and preserved train path obligations are 'subject to Schedule F'	1.2.1(b)(ii)	**Acceptable to NHG** on the basis that Schedule F (containing the Network Management Principles) does not appear to have been inconsistent with Passenger Priority Obligations and Preserved Train Path Obligations in any case.
4	Master Planning – requirement for industry funding and restriction to Mt Isa / West Moreton system	1.5	**Not supported by NHG**. NHG has a number of concerns with QR's proposals in respect of the master planning process. Firstly, funding for the master planning process in respect of QR's major systems should at least be materially contributed to (if not entirely met) by QR as the infrastructure provider. Planning for future investment in its network is surely ordinary course of business activities that QR would be anticipated to be undertaking irrespective of immediate customer demand and funding. NHG does not agree that requiring customers to fund master planning processes is somehow more 'fit for purpose' as QR claims in the QR Submission. NHG's proposed position is more consistent with what occurs in respect of the other Queensland regulatory infrastructure providers (Aurizon Network and DBCT Management) who both undertake master planning in respect of their infrastructure without it being conditional on customer funding. Secondly, even if customer funding was required, the provisions proposed by QR are unworkable. In particular QR's proposal involves customers having to commit to

			funding a master planning process without: • QR being required to publish a scope, budget and timeframe for the master planning process prior to seeking approval (with protections provided to funding customers in relation to cost overruns); and • funding customers being provided with any customer input or oversight in relation to QR's conduct of the master planning process. Consequently, as proposed, NHG considers that industry would be highly unlikely to seek to utilise the master planning process. Both of these matters should be addressed in clause 1.5 by the process being revised to involve: • upon a request from a Regional Network Planning Group, QR being obliged to prepare a scope, budget and time frame for development of a master plan (and potential infrastructure options to meet demand expectations); and • the Regional Network Planning Group being provided with a reasonable opportunity to engage with QR and QR being obliged to negotiate in good faith with the group in relation to scope, budget, timeframe and funding arrangements. Thirdly, it is also not clear to NHG why the Master Planning Process should only apply to the West Moreton system and Mt Isa system. NHG notes that it has coal tenements near other parts of QR's network, and considers that if customer demand for further investment exists, QR should be required to proceed with master planning on other parts of its system where customers provide funding for that (with NHG acknowledging that customer funding may be more appropriate for master planning outside QR's major systems). In respect of the North Coast Line (which QR indicates the Department of Transport and Main Roads undertakes the planning for), it may be that the current provisions cannot be simply applied to the North Coast Line – but there should be a way for existing or potential users of that system to gain some transparency in relation to the plans for future investments and expansion of the line.
Part 2 Negotiation process			
5	Permitting access to be applied for	2.1.1	**Not supported by NHG**. NHG has no concerns with providing QR and access

	other than through an Access Application (must be in the form of an Access Application *unless otherwise agreed by Queensland Rail*).		seekers more flexibility in relation to the 'form' of an application for access (which is what the QR Submission indicates the rationale is for these amendments). Similarly, NHG would be supportive of express provisions regarding renewals/extensions not requiring all of the information contained in Schedule B (which the definition of Access Application). However, it appears to NHG that the outcome of the amendment would be to potentially make a request made in another form not an 'Access Application' for the purposes of the undertaking, which has substantial consequences for how the remainder of Part 2 of the 2020 DAU (and particularly the queuing framework) operate. No change has been made to the definition of Access Application for example to recognise forms that do not reflect the information required under Schedule B. If the concern is simply that an access application should be able to made without providing all the information under Schedule B, it would be preferable to achieve that by changing the definition of Access Application to allow QR to waive that requirement (either generally or in relation to extension / renewal requests specifically). Otherwise, it seems appropriate that all access applications made in a different form should be treated as 'Access Applications' for the purposes of the undertaking.
6	Preliminary steps – providing for initial capacity information and other preliminary information provided to be provided by QR to access seekers to be non-binding	2.1.2	**Not supported by NHG.** QR's Submission states that this amendment facilitates preliminary, non-binding discussions that would be particularly beneficial to new access seekers and end user access seekers. However, given that new access seekers would necessarily rely on the information provided to them by QR in preliminary discussions, we struggle to see how amendments that provide for a reduction in QR's accountability to maintain and produce accurate and up-to-date records would assist new access seekers. QR can appropriately explain the assumptions made in relation to, or the estimated nature of, capacity information or other information at the time it is provided. It is therefore not appropriate to simply provide a blanket exclusion of the type QR has proposed.
7	Extension of permitted disclosures of	2.2.2(d)	**Acceptable to NHG, subject to reciprocal extensions for access**

	confidential information by QR		**holders/seekers**. NHG appreciates that QR may have the need to make disclosures to the extended list of entities proposed to be specified (particularly in connection with seeking internal approvals). The same issues exist for access seekers/holders - in particular, access holders/systems also need the ability to disclose information of this type to their controlling entities. The confidentiality regime should therefore also permit disclosure as necessary to related bodies corporate of the access seeker and their board members and senior management (which will occupy a corresponding position to the access seeker as the Rail Authority and its board members and senior management have in relation to QR).
8	Obligation for Access Seeker to give QR written notice if it does not intend to proceed with an Access Application on the basis of the relevant Indicative Access Proposal (***IAP***) as soon as reasonably practicable after receiving the IAP.	2.5.1(b)	**Acceptable to NHG** provided it is clear that the qualification is having formed the intention not to proceed, this is a reasonable position for facilitating access to those who are genuinely seeking new access.
9	Insertion of 'AU1' in the list at 2.8.3(a)(ii)(A) which specifies instruments that an Access Seeker (or any Related Party of the Access Seeker) must not be (or have been at any time in the previous two years) in Material Default of.	2.8.3(c)(ii)(A)	**Acceptable to NHG** – the principle is that compliance with the existing or previous undertaking is what is relevant.
10	Renewal rights have been: (1) limited to coal and minerals traffics; (2) reduced from a term of 10 years to no more than five years; and (3) coal (and mineral) producers are entitled to a one-off renewal right only	2.9.3	**Not supported by NHG.** Long-term evergreen renewal rights are imperative for coal producers to underwrite long-term investments and assure finance for new projects. Investment in a mine involves high sunk costs, with a view to return over a longer payback period. Coal is also a bulk product, such that for most West Moreton and Metropolitan network mines, it would be economically unviable to transport coal by road (and the provisions of QBH's lease require transport by rail in any case). Consequently there

	– which is considered to have been extinguished if a renewal right was exercised under AU1.		are no substitutable transportation options for West Moreton coal. Those are the very reasons that the previous QCA Decision considered it appropriate to provide renewal rights for coal services. The limitations of a 5 year maximum renewal and making one-off renewal rights appear to overlook the fact that typical mining operations have a materially longer mine life than might be provided by an initial contract and one 5 year extension. The threat to certainty of access that these amendments create has the potential to have a chilling effect on investment in the West Moreton region. It appears to NHG from the QR Submission and the supporting HoustonKemp Report that QR's position on renewal rights has been heavily influenced by concerns about allocative efficiency and locking in inefficient pricing. However, it is absolutely clear that neither of those issues has any application to West Moreton / Metropolitan system coal services. In particular, those asserted justifications have no application to the West Moreton / Metropolitan coal services where: • at the same time QR is also making submissions about low tonnage scenarios (so there is no real question of allocative inefficiency – i.e. paths not being allocated to the entity that values them the highest); and • where reference tariffs are reviewed at each regulatory reset (including under the DAAU process) such that the reference tariff remains appropriate to the circumstances throughout the regulatory period. There is no indication that (at least for the rail corridor from the West Moreton region to the Port of Brisbane) that the rail is capacity constrained such that QR ought to have greater discretion to allocate those paths to any given Access Seeker. Irrespective of what the QCA ultimately considers is appropriate in respect of other services, it is very clear that it is inappropriate for renewal rights of West Moreton / Metropolitan coal services to be limited in the manner proposed by QR.
Part 3 Pricing rules			
11	Deletion of carve out that nothing in	3.0(c)(iii)	**Supported by NHG** – as this provision only related to the adjustment amounts

	this Part 3 will preclude Access Charges, that would otherwise be payable for Reference Train Services or coal carrying Train Services on the West Moreton/Metropolitan Systems from being the subject of an adjustment as referred to in clause 7.1 of Schedule D (also deleted and discussed at paragraph 25 below).		previously relevant to the reference tariffs under AU1.
12	Amendment to require the QCA to take Transport Service Payments that are made towards the maintenance and operation of the rail transport infrastructure into account in determining a Floor Revenue Limit.	3.2.2	**Matter for further QCA consideration** - NHG does not feel sufficiently well informed to provide a view as to the impacts on pricing that might result from this proposal. For example, the level of any Transport Service Payments which are made in respect of the West Moreton and Metropolitan systems is not known to NHG (and NHG assumes that other stakeholders have a similar lack of visibility regarding Transport Service Payments on other QR systems). However, as this provision does not apply to West Moreton / Metropolitan coal services, NHG has not provided further submissions on its appropriateness at this stage.
13	Amendment of the limits on price differentiation to allow QR to adjust its access charge based on the characteristics of the service provided and broader costs and risks.	3.3 (and cross references in 2.4.2(d))	**Not supported by NHG**. See section 2.4 of this submission above.
Part 4 Operating requirements			
14	QR proposes to remove the Operating Requirements Manual under Schedule G in favour of publishing the Operating Requirements Manual on the QR website.	4.3	**Not supported by NHG**. See section 2.2 of this submission above.
Part 5 Reporting			
15	Timing of provision of quarterly	5.1	**Acceptable to NHG** – the quarterly report is important for providing an insight into

	network performance reports		network performance, such that NHG considers it is important, but is not concerned with the slight change in timing (provided the QCA would only extend the date in special circumstances).
16	Limitation of the Train Service types QR is required to report on to coal, bulk mineral, freight and long distance passenger services, and introduction of 30 minute threshold regarding late state of possessions	5.1.2	**Exclusion of reporting on Metropolitan passenger services acceptable to NHG, but suggest further consideration of appropriateness of 30 minute threshold for late possession timing** – NHG understands QR's intention is to remove the need to provide these reports in respect of Metropolitan passenger services. NHG acknowledges that that information is not as useful to non-passenger service users and consequently does not object to its removal. NHG acknowledges that some degree of materiality should reasonably be applied to the start/finish times of planned possessions. Whether 30 minutes is appropriate for all systems is something the QCA should consider further (as it is not clear to NHG on what basis the 30 minutes has been proposed as an acceptable threshold) or how many possessions that are currently reported on would not be reported on at that threshold. In the absence of compelling evidence that a 30 minute threshold is appropriate, NHG submits a shorter 'grace' period might be more appropriate.
17	Timing of annual network performance report	5.2.1	**Acceptable to NHG** – NHG understands that QR needs this extension due to the need for the Queensland Audit Office to confirm some of the financial components of the report.
18	Insertion of the word 'material' – requiring QR to only provide a commentary on any material differences between actual expenditure and forecast expenditure identified by the information prepared to the clause	5.2.2(k)	**Further clarity preferable** – NHG suggest that rather than the reporting threshold being expressed as 'material differences' there should be a more objective and transparent threshold (set both by reference to what the QCA considers a material dollar value and as a percentage of the relevant forecast expenditure category and impact on any applicable reference tariff).
Part 6 Administrative provisions			
19	Deletion of requirement to treat an Access Seeker as an Access Holder for the purposes of a dispute under clause 7 of Schedule D, clause 2.4 of	6.1.2	**Not supported by NHG** – See section 2.7 of this submission above.

	Schedule F or clause 1.2.3 of the Undertaking.		
20	Requirement for QCA to have regard to the opinion of a safety expert in determining access disputes	6.1.4	**Not supported by NHG, but could be supported with minor amendments** – NHG is comfortable with the QCA being required to engage and have regard to a rail safety expert, but considers: • the QCA needs the ability to appoint its own independent safety expert if QR and the party to the dispute cannot reach agreement on the identity of the expert (as the fact that they remain in dispute suggests there is a real possibility of that being the case); and • This requirement should only apply where at least one of the parties to the dispute considers there is a relevant safety issue.
21	Deletion of sub-clause (f) which requires a report made under clause 5.2.2(i) to include historical information from 1 July 2013 including actual maintenance, changes to the RAB and system volumes.	6.4(f)	**Supported by NHG** – NHG acknowledges this report related to the Adjustment Amounts which applied in connection with the reference tariffs under AU1.
Part 7 Definitions and interpretation			
22	Amendment of the definition of Accredited to specify that accredited includes the requirement to be accredited and any conditions applying to that accreditation or exemption) in accordance with Part 43 Division 4 of the ~~TRSA~~RNSL.	7.1	**Not supported by NHG** – it is not clear what the purposes of these amendments are. Where the defined term 'Accredited' is used in the body of the undertaking, it does not refer to or make relevant any possible conditions that might apply. Accordingly, NHG suggests these changes should not be made.
23	New definition: Ad hoc Planned Possession		**Not supported by NHG.** See section 2.6 of this submission above.
24	Allotted time threshold definition changes to include a threshold for long term passenger services		**Matter for QCA consideration** – NHG does not feel sufficiently informed as to whether this is an appropriate allotted time threshold for long distance passenger services (but acknowledges that a threshold is necessary to reflect QR's proposal

			that general passenger services should not affect the on-time reporting and only long distance passenger services should be reported).
25	Deletion of Adjustment Amount and Adjustment Train Services		**Acceptable to NHG** – NHG understands this relates to the previous adjustments which applied during AU1, and which will cease to be relevant during the term of the 2020 DAU.
26	Insertion of definition of AU1 (means Queensland Rail's Access Undertaking approved by the QCA on 11 October 2016).		**Acceptable to NHG** – is an appropriate update so the references remain to the prior undertaking
27	Amendment of the Endorsed Variation Event definition		**Not supported by NHG**. An increase in contracted coal volumes or a change to the QCA levy are both clearly appropriate grounds for an Endorsed Variation Event. Unlike QR, stakeholders have no way of 're-opening' the tariff to make it more appropriate during the regulatory term of an approved access undertaking where circumstances materially change. Endorsed variation events are important because QR is required to approach the QCA with changes to tariffs in those events. Without those grounds being included, Access Holders have no means of reopening the reference tariff for consideration or change. The QR Submission does not appear to provide any particular reasons for this proposal. The evident result of it would be that: • if contracted volumes grew beyond the forecast volumes used to set the tariffs, QR would be over-recovering (i.e. gaining monopoly profits above the efficient maximum allowable revenue set by the QCA); and • if the QCA Levy was lower that assumed, QR would again be over-recovering. Given QR always has the power to bring draft amending access undertakings, or, in certain circumstances to submit a Review Event application to address perceived under-recoveries, removing these types of Endorsed Variation Events will lead to a

			long term bias towards QR over-recovering across the regulatory term.
28	Amendment of the definition of Operating Requirements Manual		**Not supported by NHG**. See section 2.2 of this submission above.
29	New definition: Special Events		**Not supported by NHG.** There are no circumstances in which a 'Special Event' (as defined here) would be sufficient reason to restrict access to the network that could not already be contemplated in the MTP – such that it is not appropriate to exist as an excuse to make variations from the MTPs. In particular, all of the events listed (except, on a very generous reading, perhaps events in the category of item (j)) are planned sufficiently in advance (or occur annually) such that QR would have abundant time to account for these events in the MTP without needing the right to make variations to the MTP that adversely impact on scheduling of coal services. Given the annual nature of the specific events listed in the definition, NHG cannot see how it is appropriate to allow disruptions to scheduling on only 2 business days' notice (without any consultation) – which is what QR has proposed. In addition, parts of the definition (particularly paragraphs (i) – Major sporting events and (j) other events notified by DTMR as requiring additional passenger services) are very wide and could create very significant disruptions at late notice.
30	Amendment to the WACC		**Not supported by NHG.** NHG considers that 7.47% per annum nominal post-tax is a clearly inappropriate WACC, based on a flawed consideration of various parts of the WACC parameters. Please see the detailed submissions on the appropriate WACC and approach to reference tariffs in Volume 1, section 8 of this submission.
31	Amendment of the definition of Terminating Date to mean the earlier of: (a) 30 June 2025; (b) in respect of any part of the service to which this Undertaking relates, the date on which that part of the service ceases to be a declared		**Further clarification preferable** – given that it is evident from the declaration review as it relates to QR's access services that stakeholders have raised arguments about the access criteria applying differently to different parts of QR's network, it needs to be absolutely clear that the undertaking would continue to apply to those parts of the service that remain declared following such a review. NHG suggests the following wording is added to the end of paragraph (b) to provide certainty to all stakeholders about that outcome: (with this Undertaking continuing as it relates to those parts of the service which remain a declared service for the

	service for the purposes of Part 5 of the QCA Act; and (c) the date on which this Undertaking is withdrawn in accordance with the QCA Act.		purposes of Part 5 of the QCA Act), or that similar amendments are made to clause 1.1 of the 2020 DAU to make this clear.
Schedule B			
32	Correction of a typographical error at clause 7(b) of Schedule B Access Application information requirements. 'Identify' to 'identity'.	Sch B 7(b)	**Acceptable to NHG** – appropriate correction
Schedule D Reference Tariffs			
33	Deletion of references to Ebenezer	2.2(a), 3.1(e)	**Supported by NHG –** NHG agrees that with the Ebenezer mine shut it is not necessary for it to continue to be listed as a nominated loading facility and for there to be a reference tariff for it.
34	West Moreton and Metropolitan system coal reference tariffs		**Not supported by NHG.** NHG considers that the proposed tariffs are inappropriate and reflect a flawed application of the building blocks methodology. Please see the detailed submissions on the appropriate WACC and approach to reference tariffs in Volume 1, sections 5 to 11 of this submission.
35	Removing the reference to Metropolitan path constraints and altering the reference to West Moreton System path constraints to 97 weekly return train paths	3.1(f)	**Not supported by NHG.** QR has not provided any evidence to indicate that these path constraints have been lifted in practice. Please see detailed submissions on this issue in Volume 1, section 7.
36	Deletion of the Notional Reference Tariff	3.2	**Supported by NHG.** Deletion is acknowledged to be part of removing the references to the previous Adjustment Amounts applied to reference tariff services in AU1.
37	Amendment of First Escalation Date to mean 1 July ~~2017~~2021	3.3	**Supported by NHG.** This appropriately reflects that the first date on which the Reference Tariff escalates is 1 July 2021 (and annually on the Escalation Date – being the 1 July of each year – thereafter).
38	Deletion of Adjustment Amounts	7	**Acceptable to NHG** – NHG understands this relates to the previous adjustments

			which applied during AU1, and which will cease to be relevant during the term of the 2020 DAU.
Schedule E Maintaining the Regulatory Asset Base			
39	Change of timeframe for requirement to provide the QCA with details for capital expenditure to be considered as part of the RAB (from within four months to within six months)	1.3(a)	**Acceptable to NHG** – NHG understands from QR this timing extension is required as a result of the Queensland Audit Office timing. Assuming that is true, NHG is happy to accept this change as appropriate.
40	Insertion of a requirement for the QCA to give a statement of reasons about its calculation etc. of the Regulatory Asset Base	1.5	**Not accepted.** See section 2.3 of this submission above.
41	Limitation of factors to be considered by the QCA by insertion of the words 'where relevant' and insertion of a provision that allows QR to produce (effectively) alternative information if the information being requested by the QCA is 'not available'.	3.2(e), 4.2(c) and 5.3(c)	**Not accepted.** See section 2.3 of this submission above.
Schedule F Network Management Principles			
42	Amendments throughout to include and account for the proposed addition of Ad Hoc Planned Possessions	Various	**Not supported by NHG.** See section 2.6 of this submission above in relation to the introduction of Ad Hoc Planned Possessions.
43	Amendment to allow varying the MTP for Special Events on 2 business days' notice	Sch F 2.2	**Not supported by NHG.** see the reasons above at item 29 of this Table.
44	Deletion of the ability for Access Holders to disputes variations to the MTP	2.4	**Not supported by NHG -** NHG considers that without a dispute provision of this nature it would be possible for QR to proceed with possessions that are contrary to the Schedule F NMP and significant cost and disruption to stakeholders and their logistics chain.

			NHG understands from QR that part of the concern relates to the fact that a dispute can be raised just prior to a possession taking place. NHG would be willing to resolve that issue by the access undertaking being amended so that in order for the possession to not take effect due to a dispute, the dispute would need to be raised within a minimum period out from the proposed planned possession (provided that QR had given sufficient notice for that to be possible).
Schedule G Operating Requirements Manual			
45	Schedule with ORM deleted.		**Not supported by NHG**. See section 2.2 of this submission above.
Schedule H Standard Access Agreement			
46	Standard Access Agreement amendments	Various	**Various** - See section 3 of this submission below.
Remaining non-contentious amendments throughout			
47	Change of description for each network to 'System' (e.g. West Moreton ~~Network~~ System).	Various	**Acceptable to NHG** - is a non-substantive change in terminology.
48	Insertion of definition of **RNSL** (being the Rail Safety National Law (Queensland) as defined in the *Rail Safety National Law (Queensland) Act 2017* (Qld)) to replace all references to **TRSA** (being the now repealed *Transport (Rail Safety) Act 2010* (Qld)). Replacement of TRSA with RNSL consistent throughout.	Various	**Acceptable to NHG** – reflects a change in the relevant laws.
49	References to the 2008 Undertaking are replaced with AU1.	Various	**Acceptable to NHG** – is an appropriate update so the references remain to the prior undertaking.
50	Various updates of clause cross-references	Various	**Acceptable to NHG** – other than where related amendments to which such cross-reference charges are consequential are not supported.
51	Various updates of relevant	Various	**Acceptable to NHG** – appropriate updating.

	timeframes (e.g., 2016-17 to 2020-21)		

2.9 Operational Route Manual

While not part of QR's proposed amendments, during the term of AU1, NHG has become aware of an issue with the Reference Train Service Description in Schedule D of AU1 which it would be appropriate to rectify.

The Reference Train Service description in Schedule D clause 2.1(c)(iii) refers to a maximum axle load with loading in excess of that maximum being 'dealt with in accordance with the relevant load variation table' as published by QR.

This is an important aspect of access to the network, as it imposes speed restrictions and other consequences based on that load variation table, and thereby impacts on throughput of the network and capacity. That is, it is a critical part of defining the parameters of the service that the reference tariffs are payment for.

Yet following enquiries of QR it has become evident that there is no separate document published for the purposes of the Reference Train Service, and that the load variation table has been replaced by Infrastructure Based Overload Limits – Western System Coal trains as listed currently in section 2.7.2 of Module 2 of the Operational Route Manual – which itself is not in any way referenced in the undertaking, transparent or regulated, and thereby beyond regulatory oversight.

As a result, the current arrangements create the position that the Operational Route Manual (including the load variation table) can easily be unilaterally changed by QR without any obligation on QR to undertake consultation or seek consent – and without any changes to the cost or risk profile for QR resulting from those variations being reflected in the applicable reference tariffs.

That evidently erodes certainty which access seekers and holders should have in relation to the level of access rights that QR is obliged to provide. This is contrary to public interest and the interest of the access holders and seekers in an efficient and competitive network.

NHG submits that, given the critical impact that infrastructure based overload limits have, the information currently contained in the Operational Route Manual should either be incorporated directly into the undertaking's train service description in Schedule D or included in the ORM (provided the QCA accepts NHG's submission that the ORM itself should continue to be part of the access undertaking.

2.10 Impact of Cross River Rail

The Queensland Government is promoting Cross River Rail, a tunnel project to increase the capacity across the Brisbane River for passenger trains. NHG considers this is highly relevant as part of the DAU2 process given that Cross River Rail is anticipated to be operational by 2024 (within the next regulatory period) and given the impact both the construction and operation of Cross River Rail will have on West Moreton coal services that utilise the Metropolitan system.

During construction, significant track closures are expected to impact coal train services to the Port of Brisbane. There are two possible consequences of the impact on coal train services to the Port of Brisbane. First, that there are not enough coal paths left around the closures to meet shipping contracts. Second, if the paths are clustered together around the closures, there may not be enough rolling stock to meet shipping contracts in the shorter operating window.

Additionally, once the Cross River Rail development is operational, disruptions to coal train services will become entrenched (even where the disruptions become consistent with planned services) and will continue to affect West Moreton coal train services in the long term.

While we acknowledge this may be an unintended outcome of the project, the paths available to coal trains will be of lower value. There will be a lesser proportion of continuous paths from the Western System, down the Toowoomba Range and through the Metropolitan system. In fact, the Toowoomba Range will have a lower capacity in that period instead of 113 return paths per week, being likely to be a lower figure because of the construction closures.

Consequently, NHG considers the appropriate means of mitigating the impact of the Cross River Rail on West Moreton coal train services both during construction and operation is to include a material change in system capacity as a new Review Event in Part 7 of DAU2.

The new Review Event would be arise due to a material change in the coal train paths available to West Moreton coal train services and would ensure the flexibility to vary the reference tariff to align with the variations in track closures at different stages of the Cross River Rail project, including in respect of the usability of train paths and discounting of the value of paths that necessarily are clustered around closures.

3 Standard Access Agreement

3.1 Overview

A robust SAA is essential to ensuring that access rights and the process for contracting those rights is sufficiently certain to promote an efficient and competitive system.

As noted by the QCA in previous decisions, the SAA facilitates the timely development of access agreements by providing ' a safe harbour' access agreement which the parties can adopt without the need for further negotiation, or which parties can use as a guide when negotiating alternative terms of access. [redacted]

NHG commends the approach adopted by QR of making minimal amendments to the SAA given the rigorous and recent review conducted as part of AU1. There are however, four classes of amendments proposed by QR in relation to the SAA which are of concern to NHG, each of which are addressed in the submissions below:

(a) the removal of 'good faith' obligations;

(b) amendment to clause 1.3 productivity and efficiency variations;

(c) increase in security; and

(d) amendment to limitation on liability for performance levels.

NHG accepts the other amendments made by Queensland Rail.

3.2 Good faith

NHG acknowledges QR's concerns regarding the potentially ambiguous nature of the phrase "in good faith", however, considers that the most appropriate course of action is not removal but rather the insertion of a definition.

There are numerous judicial decisions about the meaning of a duty of good faith, and there are significant points of consistency among those decisions. Consequently, NHG doubts that where there is an express duty of good faith there is that much uncertainty.

NHG suggests that the references to good faith be retained and that the appropriate way to resolve any uncertainty that QR is concerned about is to include a definition like the following (which provides a summary of the principles outlined in those previous judicial decisions):

Good Faith *means, in respect of the actions of a party:*

(a) acting honestly, reasonably and fairly;

(b) acting cooperatively so as to achieve the purposes of this Agreement;

(c) not acting dishonestly, capriciously, arbitrarily or for a purpose ulterior to this Agreement;

(d) not acting so as to deprive the other party of the intended benefits of this Agreement; and

(e) acting having had regard to the interests of the other party, while not being required to prefer the other party's interests to their own legitimate commercial interests.

The obligation of good faith is a key plank to ensuring that QR decision-making is neither frivolous nor opaque nor perceived to be those things and is critical to ensuring that access holders have certainty as to the relevant level of access rights that QR is required to provide.

3.3 Productivity and Efficiency Variations (Clause 1.3)

QR states in the DAU2 Explanatory Document that the amendments to clause 1.3 are to promote certainty.

However, NHG considers that the amendments proposed by QR will have the effect of potentially limiting the number of potential productivity and efficiency variations, including where the initial efficiency gain is specific to one aspect of the system and may not promote whole of supply chain efficiencies immediately.

This is a critical issue, as:

(a) it is well understood that one of the economic incentives that monopolists lack compared to suppliers in a competitive market, is the incentive to innovate; and

(b) the high coal supply chain costs for the West Moreton coal supply chain, requires innovation and productivity improvements to remain viable – with the existing users and haulage providers having made sustained efforts to find ways to produce greater efficiencies, but being dependent on QR's co-operation to implement the vast majority of supply chain efficiency improvements.

This clause was included in the SAA during the AU1 process to encourage productivity improvements and infrastructure investments that rely upon QR's infrastructure, promoting the effective and efficient utilization of Queensland Rail's below rail service, as well as promoting upstream and downstream competition and as such a narrowing of potential variations does not support the intent of the clause. It is highly inconsistent with the objective of Part 5 of the QCA Act, for a clause with such a clear purpose to be removed (particularly having been considered by the QCA to be appropriate just over 2 years ago).

NHG is also concerned that QR's amendments would introduce further ambiguity by the inclusion of the 'having regard to factors including' wording, such that QR can have regard to other undefined factors in its consideration.

QR has also removed the requirement to negotiate the variations in good faith. NHG considers that in order to realise potential productivity and efficiency improvements it is critical that good faith negotiations are undertaken by QR. This has a twofold benefit of both providing assurance to the access holder that QR has undertaken a bona fide consideration of the proposed variation and providing a platform where any misunderstanding of the proposed variation can be addressed. As noted above, NHG considers that any perceived uncertainty can be resolved or mitigated by providing a definition of good faith in the SAA (discussed at section 3.2 above).

3.4 Increase in Security

QR has sought to increase the security amount from an amount equal to 12 weeks' access charges to 'at least 6 months' access charges'.

NHG opposes this amendment on the basis that:

(a) this increased amount of security is unnecessary if QR appropriately monitors its access agreements given the obligation of the access holder to replenish security when it has been called upon by QR (and Access Holders should not be required to expend additional sums of money on larger bank guarantees where QR can manage the risk more appropriately);

(b) for shorter term access agreements, this will be an unduly high proportion of the total contract liability being secured (and given QR's approach to tariffs and renewal rights it seems likely that short term arrangements will become more common);

(c) there is no criteria provided for when such security can be requested, or even reference to QR having regard to the criteria in the SAA which apply when a review of security occurs; and

(d) there is no apparent maximum amount – 6 months appears to be expressed as a minimum, such that there is no cap on the amount which QR can ask for which is clearly contrary to the purpose of the SAA providing a reasonable 'safe harbour' for negotiations.

3.5 Amendment to Liability for Performance Levels (Clause 13.4)

QR seeks to limit its liability for Performance Levels except as set out in the agreed performance levels. On first appearance this arguably seems reasonable. However, once analysed is a potentially flawed approach, as it presumes that an equal level of bargaining power during the negotiation phase such that financial incentives can be easily and readily agreed without submitting to a lengthy dispute resolution process.

If adopted NHG submits that the QCA should consider actually setting the performance levels in the SAA (at least for West Moreton coal services) and including financial incentives as part of the performance levels.

4 Conclusions

For the reasons set out in this submission, NHG consider that the 2020 DAU (as submitted by QR) is clearly not appropriate to approve where proper regard is had to the matters in section 138(2) QCA Act.

If the QCA has any queries in relation to this submission, please do not hesitate to contact Sam Fisher, General Manager Marketing and Logistics on (07) 3108 3668.