



Alternate Form of Access for Coal Carrying Train Services

Explanatory Notes for Proposed Standard
Access Agreements and Consequential
Amendments to the 2010 Access
Undertaking

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Introduction

Purpose and Structure

On 29 April 2011, QR Network submitted to the QCA for approval, in accordance with clause 5.2(n) of the Undertaking:

- two Proposed Standard Access Agreements (**Alternate Form of Access**); and
- proposed consequential amendments to the Undertaking which are necessary to give effect to the Alternate Form of Access.

This document has been prepared to support that submission. It sets out:

- the rationale for the allocation of functions and responsibilities between a Train Operator and an End User in the Proposed Standard Access Agreements; and
- the basis for the proposed consequential amendments to the Undertaking which are necessary to give effect to the Proposed Standard Access Agreements.

The document is structured as follows:

- Section 1 outlines the consultation undertaken in the development of the Alternate Form of Access and proposed structure of the Proposed Standard Access Agreements.

- Section 2 explains the underlying policy basis for allocation of functions and responsibility between the End User and the Train Operator;
- Section 3 details the consequential amendments the Undertaking.

In this document:

- All references to the Undertaking are to the QR Network 2010 Access Undertaking;
- All clause and subclause references are to the Undertaking, except where otherwise indicated; and
- All defined terms are with reference to the definitions in the Undertaking, except where otherwise indicated.

Requirements of the 2010 Access Undertaking

Clause 5.2(n) requires QR Network to, within six (6) months after the Approval Date, submit to the QCA:

- “(i) a Proposed Standard Access Agreement which can be entered by users of rail haulage services to contract directly with QR Network for Access Rights without bearing liability and obligations for above rail operational issues, subject to utilisation of those Access Rights being conditional on one or more Railway Operators nominated by the user entering an operator agreement with QR Network of the type described in Clause 5.2(n)(ii);*
- (ii) a Proposed Standard Access Agreement which can be entered into by one or more Railway Operators, nominated by such users who are Access Seekers or Access Holders pursuant to a user agreement with QR Network of the type described in Clause 5.2(n)(i), under which they can utilise some or all of the user’s Access Rights, subject to assuming liability and obligations in relation to above rail operational issues; and*
- (iii) if necessary, any consequential amendments to this Undertaking to give effect to the Proposed Standard Access Agreements submitted in accordance with Clauses 5.2(n)(i) and (ii) (including, for example, to provide flexibility for short term scheduling of Train Services) provided that any such amendments do not alter the scope and nature of this Undertaking.”*

QR Network refers to the Proposed Standard Access Agreement developed in accordance with:

- Clause 5.2(n)(i) of the Undertaking as an ‘End User Access Agreement’ (**EUA**); and
- Clause 5.2(n)(ii) of the Undertaking as a ‘Train Operator Agreement’ (**TOA**).

QR Network sought an extension to the deadline for submitting the Alternate Form of Agreement until 30 April 2011. The QCA advised QR Network of its approval of that extension in a letter dated 21 April 2011.

Background

In response to industry comments regarding improving long term certainty of Access Rights, QR Network developed the concept of an Alternate Form of Access where End Users could directly contract with QR Network for Access Rights without assuming obligations for performance by a Train Operator as would be required under the Standard Access (Holder) Agreement.

In 2009, QR Network circulated a draft model of an Alternate Form of Access which split access rights between the End User and Train Operator. End Users and Train Operators expressed support for the Alternate Form of Access in the consultation process leading up to finalisation of the Undertaking. However, that consultation process did not conclude that the Alternate Form of Access should replace or substitute the existing Standard Access (Operator) Agreement.

In April 2010, QR Network made a commitment to consult on, develop and submit the Proposed Standard Access Agreements to the QCA within 9 months of the approval of the Undertaking. This timeframe was reduced to 6 months to facilitate timely resolution of the Alternate Form of Access.

Section 1 Consultation and Proposal

Consultation

As noted, QR Network previously circulated an Alternate Form of Access model for stakeholder comments in 2009. This model reflected QR Network's proposed position at the time on the allocation of functions and responsibilities between End Users and Train Operators.

To comply with the requirements of 5.2(n) and to ensure that stakeholders had an opportunity to raise any issues arising through the negotiation and development of the commercial structure proposed by the Australian Rail Track Corporation for application to the Hunter Valley Coal Network, QR Network released a discussion paper in December 2010. This paper sought customer and stakeholder comments on the key objectives and issues which should be addressed in the allocation of functions and responsibilities.

Based on the level of responses received, QR Network also undertook a number of engagement sessions with the Queensland Resources Council (QRC), Train Operators and a number of End Users to improve its understanding of the key issues stakeholders were seeking to incorporate in the Alternate Form of Access. QR Network has sought to balance the interests of Train Operators, End Users and other stakeholders based on the feedback provided in these sessions and the responses received to the discussion paper.

Proposal

QR Network examined a number of potential options for the development of the Alternate Form of Access. These options included:

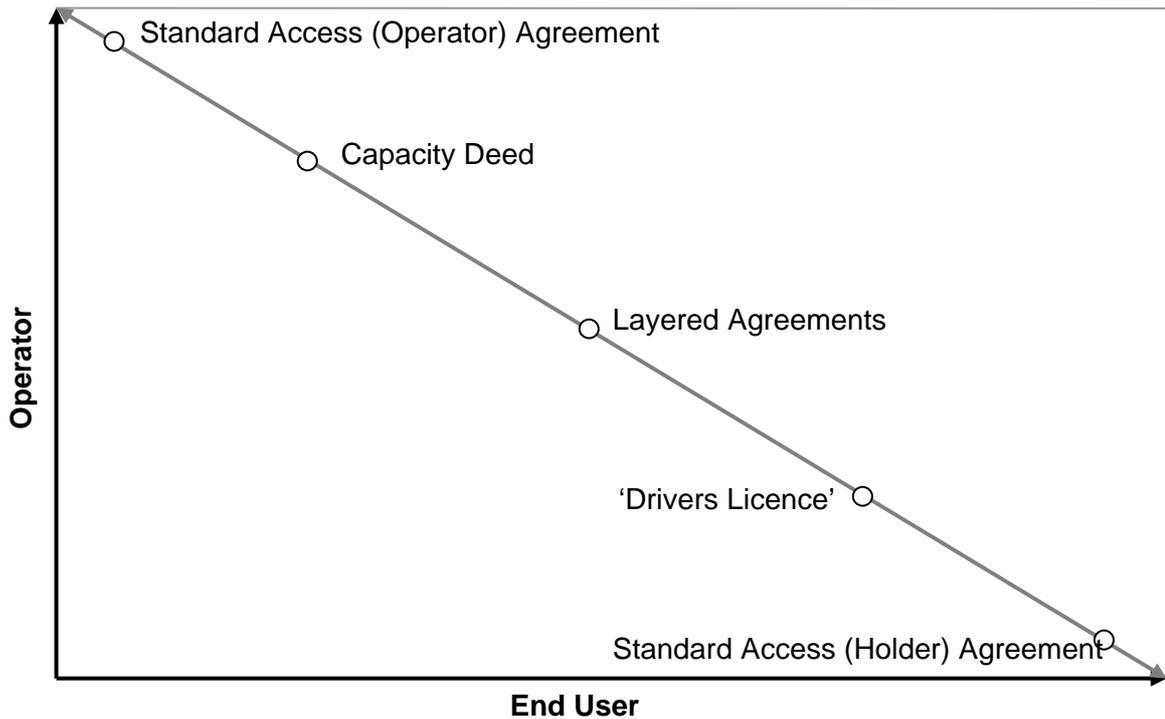
- A capacity deed model whereby the Train Operator executes an access agreement consistent with the Standard Access (Operator) Agreement but is constrained from exercising various functions within that agreement except with the consent of the holder of the capacity deed. The deed need not be for the same duration as the access agreement;
- A layered agreement where the End User is able to contract for the Access Rights and nominate train paths to a Train Operator for performance under a linked operator agreement (similar to ARTC proposed model); or
- A drivers licence model whereby the End User has responsibility for all aspects of the management of the access rights and a Train Operator is able to operate train services in the

day of operations environment following acceptance of a scheduled train order from the End User.

These agreements would each allow for a different level of control of the management and performance of access rights relative to the existing standard access agreements.

The varying degrees of control are conceptualised in Figure 1.

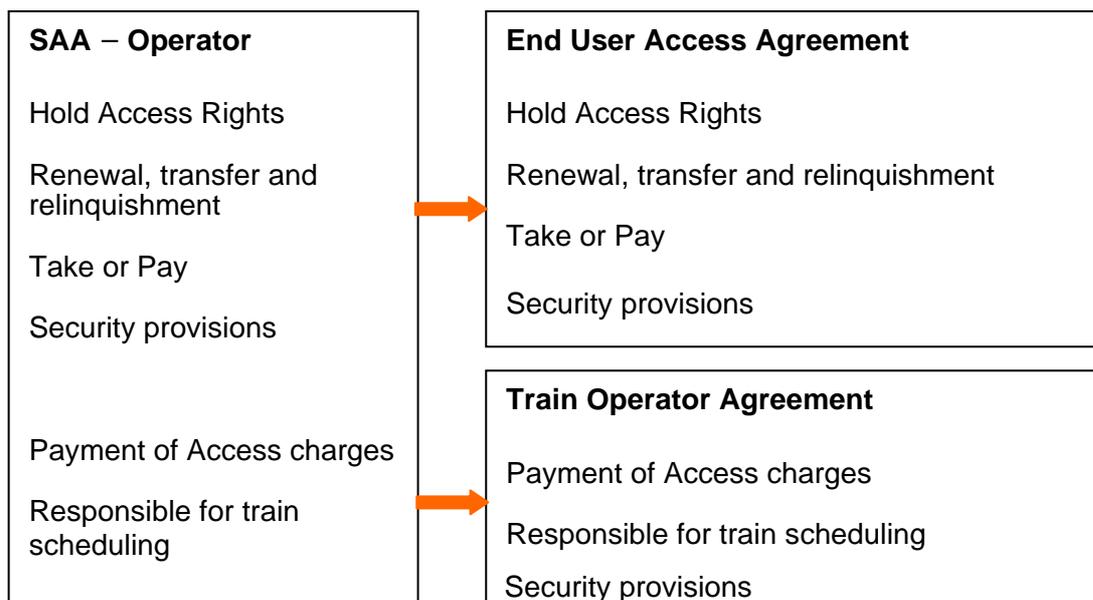
Figure 1 - Control Diagram



On the basis of its analysis and stakeholder engagement, QR Network concluded that the capacity deed and the drivers licence models were not viable as they failed to meet the objectives of an efficient access regime and appropriate balance the legitimate interests of End Users, Train Operators and other stakeholders.

As a result, QR Network believes that a layered agreement is the preferred model. The proposed allocation of functions and responsibilities between the EUA and the TOA is outlined in Figure 2.

Figure 2 – Allocation of functions and responsibilities from current SAA’s



In developing the EUA and the TOA, QR Network has sought to apply the following principles:

- the agreements should allocate functions and responsibility to the most appropriate party;
- the agreements should not result in conflict between the administration of a Standard Access (Operator) Agreement and the Alternate Form of Access;
- there should be no requirement for transition from the current form of agreement to the Alternate Form of Access;
- a customer who wishes to hold a Standard Access (Operator) Agreement should not be disadvantaged relative to one who holds the Alternate Form of Access;
- there should be parity of agreements within the operating and scheduling processes;
- the current Standard Access (Operator) Agreement should still available to Access Seekers; and
- the agreements should not seek to change the risk level or risk profile assumed in the scope and nature of the access undertaking as required by Clause 5.2(n)(iii).

As such, the Proposed Standard Access Agreements are based on the commercial terms of the approved Standard Access (Operator) Agreement, allocated between the EUA and TOA as appropriate.

QR Network has avoided unnecessary amendments to terms used in the EUA and TOA which also appear in the approved Standard Access (Operator) Agreement. However, a limited number of amendments have been made to these terms to address drafting issues which appear in the approved Standard Access (Operator) Agreement. These amendments correct minor cross-referencing errors, definitional errors and unintended omissions. For the same reasons, QR Network has negotiated similar variations to the Standard Access (Operator) Agreement with individual Access Seekers.

A summary of these amendments and their explanation is set out in the table 1.

Table 1. Summary of Variations from the Standard Access (Operator) Agreement

Clause Ref.	Drafting	Explanation
1.1	<p>The following definitions have been inserted or amended in the draft EUA: Access Rights Reduction, Available Capacity, Capacity, Change in Existing Capacity, Committed Capacity, Common Corridor, Conditional Access Holders, Conditional Access Rights, Existing Capacity, Major Periodic Maintenance (also inserted into the draft TOA), Nominated Access Rights, Notice of Intention to Transfer, Planned Capacity, Relinquishment Date, Resumption Notice, Supply Chain Operating Assumptions, System Premium, Train Service Entitlement and Transfer Date.</p> <p>The definition of “Unloading Facilities” has also been inserted into the draft TOA.</p>	<p>These terms were used as defined terms (or were used in the definitions of terms that were used as defined terms) in the approved Standard Access (Operator) Agreement but were not defined or defined using incorrect cross references.</p> <p>Where possible, the terms have been defined consistently with how those terms are defined in the Undertaking.</p>
1.1	<p>Paragraph (e) “QR Network complying with its Passenger Priority Obligations” has been inserted into the definition of QR Network Cause in both the draft EUA and TOA.</p>	<p>Paragraph (e) was unintentionally omitted from the approved Standard Access (Operator) Agreement.</p>
1.1	<p>The definitions of both “Reduction Factor” and “Relinquishment Fee” have been amended in the draft EUA.</p>	<p>Amendments made to correct use of defined terms within those definitions as defined in the Standard Access (Operator) Agreement.</p>
4.2, 4.3, 4.4 and 4.5	<p>In addition to amendments related to the Alternate Form of Access, minor amendments have been made to Clauses 4.2, 4.3, 4.4 and 4.5 of the EUA.</p>	<p>Amendments made to correct cross referencing, use of defined terms and typographical errors contained in the Standard Access (Operator) Agreement.</p>

Section 2 Allocation of Function and Responsibilities

General explanatory notes about the Alternate Form of Access

In developing the Alternate Form of Access, QR Network looked at the current obligations and responsibilities under the current forms of Access Agreement with a view to minimising the number of significant amendments but provide Train Operators and End Users with a framework that effectively integrates with the existing contractual structures.

Capacity Entitlements – transfer, relinquishment and termination of Access Rights

The right to determine the amount and control of access rights is the fundamental change under the Alternate Form of Access. The right to hold, transfer, relinquish and terminate access rights will vest with the End User under the proposed EUA. This change reflects comments from coal customers during consultation that they wish to control access rights over a longer period of time without having to assume responsibility for daily train operations.

This is in contrast to the current and most commonly used Standard Access (Operator) Agreement where the Train Operator has the ability to determine these factors. The current Standard Access (Holder) Agreement provides Access Holders the rights to control and determine access rights. However, these agreements have not been readily adopted by coal customers because of the perceived obligations for the performance of rail operations.

The Alternate Form of Access provides that access rights are provided to a Train Operator by the End User under a TOA for the operation of specified train services. The use of these access rights does not extend to the ability to transfer, relinquish or terminate the access rights without the End Users' agreement. The End User can at any time extinguish a Train Operators use of the access rights and redistribute these to another Train Operator.

Train Service Entitlement

Schedule 1 of the EUA will specify Train Service Entitlements (**TSE**) with a description of the rollingstock and configuration to be utilised for each origin to destination entitlement along with a base access charge for the TSE.

The proportion of this service to be operated by a Train Operator under a TOA will be included in the Schedules in the TOA with the specified base access charge associated with that TSE.

Where an End User is negotiating Access Rights they may elect to provide QR Network with a conceptual operating plan prepared by their nominated Train Operator or QR Network and the Access Seeker can develop an assumed operating plan which will form the basis of the TSE. This will be measured against the applicable Reference Train for the origin to destination haul and the base access charge will be determined using these factors. This possibility was acknowledged by the QCA in the Final Decision when it summarised the QRC's comments:

*'The QRC stated that the development of a new contracting framework would allow mines to attain a greater degree of flexibility in haulage contracts as mines can obtain access rights prior to securing haulage contracts and can secure these rights beyond the date of contracted rail haulage services. This will result in the end customers avoiding obligations and exposure relating to the operation of train services.'*¹

¹ QCA, Draft Decision, re: QR Network's 2009 DAU (December 2009), Page 132

Where a Train Operator's operating plan materially departs from the assumed operating plan QR Network may, in consultation with the End User and the Train Operator, amend the TSE in the TOA. These requirements are not specific to the Alternate Form of Access as similar provisions are included in clause 5.6(e) of the Standard Access (Operator) Agreement as follows:

5.6(e) *In the event that the Operator:*

- (i) *does not comply in any material respect with the Train Service Description; and*
- (ii) *the Operator fails to demonstrate to the reasonable satisfaction of QR Network when requested to do so, that the Operator will consistently comply with the Train Service Description for the remainder of the Term*

then, following consultation with the Operator, QR Network will be entitled to:

- (iii) *vary the Train Service Description to a level it reasonably expects to be achievable by the Operator for the remainder of the Term having regard to the extent of previous compliance with the Train Service Description (ignoring, for the purpose of assessing previous compliance, any non-compliance to the extent that the non-compliance was attributable to another Railway Operator or to QR Network); and*
- (iv) *vary the Agreement (including, without limitation, the Operator Performance Level and the Base Access Charges) to reflect the impact of the change in the Train Service Description.*

Subclause 5.6(e)(iv) is without limitation which allows QR Network to vary the TSE should it be considered necessary to do so to ensure other users of the network are not adversely impacted by a Train Operator's decision not to comply with the train service description on which the relevant Access Rights have been contracted.

The likelihood of QR Network being required to exercise its rights under this clause to vary a TSE is limited because of the direct negotiation with the Train Operator when originally negotiating the Access Rights. However, this likelihood becomes more material where an End User seeks to negotiate an assumed operating plan without the involvement of a nominated Train Operator and that Train Operator is subsequently unable to conform to the assumed operating plan.

The increase in the probability of needing to vary the TSE is driven primarily by the contracting model. Accordingly, due to this increased likelihood QR Network has included drafting within clause 16.2 of the EUA to explicitly recognise that non-conformance with the assumed operating plan could result in a variation in the contacted TSE's.

Train Operations

Train Operators have expressed the desire to retain as much control and interaction with QR Network as possible with regard to the planning, scheduling and operation of train services on the network. It is also QR Network's intent to maintain as much of the status quo as possible in its interaction with Train Operators in its proposed Alternate Form of Access. This should ensure that the proposed Alternate Form of Access does not introduce inefficiencies or conflicts into the train scheduling and operations environment. End Users are, and will continue to be, able to exert influence or control over a Train Operator through the specific terms of their haulage contract.

Once train paths are nominated to a Train Operator under a TOA, the Train Operator will be the Access Holder for the purpose of all aspects of the Network Management Principles. This ensures the Train Operator is able to apply the TSE nomination process applied in the Contested Train Path Decision Making Process (Appendix 2 to Schedule G) on the same basis as if it had contracted for the TSE through a Standard Access (Operator) Agreement.

On the basis of current network utilisation planning assumptions, performance criteria for breach or negligence under the revenue cap and other commercial settings QR Network considers that Train Operators remain best placed to manage inter and intra month variability of TSE consumption on behalf of the End User. Train Operators are required to resource a train operating plan which departs from the uniform railing profile and are therefore best placed to match 'borrow-lend' within its customer base. These arrangements also mitigate the potential take or pay liability where take or pay is triggered by a System Forecast. QR Network notes that the Network Management Principles do not restrict or prohibit borrow-lend arrangements between Train Operators but acknowledge this requires the consent of the relevant parties.

Accordingly, in order to enable Train Operators to continue to provide this buffer arrangement it is necessary for the Alternate Form of Access to provide the Train Operators the position of Access Holder for the End User's TSE's in the application of Schedule G.

Path Nomination and Notification period

The EUA includes appropriate provisions for the End User to nominate TSEs for inclusion in TOA. The portion of the access entitlement that is provided to the Train Operator under the TOA is included in Schedule 1 of the TOA and the base access charge for this service is inserted in Schedule 3

The End User may periodically vary a nomination and to the extent that this occurs QR Network will provide the Train Operator with a notice of variation to the train service description in Schedule 1 of the TOA. These arrangements are commensurate with the customer initiated transfer provisions where the customer is able to transfer the Access Rights from a Train Operator to another Train Operator provided certain threshold conditions are satisfied.

While the Undertaking does not prescribe a minimum notification period or detail the nature of the Access Rights which may be subject to a customer initiated transfer, QR Network considers that the EUA should include this detail to ensure the effected parties have sufficient certainty from a resource planning and commitment perspective.

Where the End User seeks to nominate a variation pursuant to clause 2.3 of the EUA the nomination must:

- be given to QR Network within 30 days of the proposed commencement date of the Access Rights; and
- represent a minimum period of the three (3) whole calendar months.

The 30 day notice period is proposed to allow QR Network to incorporate or consider the impacts of the nomination from both a capacity and scheduling perspective. As the Undertaking does not include an ability to vary TSEs on a prospective basis arising from previous variations from the assumed operating plan (nor is it indemnified for potential non-performance arising solely from departing from the operating plan) QR Network will, to the extent feasible, need to mitigate these commercial risks.

Where no paths have been nominated by End User for operation by a Train Operator, the take or pay obligations associated with the access entitlement will be still be payable to QR Network. QR Network also has the ability to review the access entitlement to ensure that the access entitlement can be operated and is not capacity being hoarded. Consistent with rights under the Standard Access Agreement, QR Network has the ability to reduce the access rights held under an EUA where it believes the access rights can not be utilised

Payments

QR Network notes that under the layered agreement a number of payment options could be implemented including:

- all payments made under the TOA;
- take or pay made under EUA and Access Charges under the TOA; or
- all payments made under the TOA.

The appropriate allocation of these payments should largely reflect the objective of the payments and how those payments may be best achieved.

Additional capacity is typically provided under long term take or pay contracts. The take or pay is intended to ensure that QR Network and other parties are not financially exposed to an individual customer's decision to underutilise its access rights. The End User is ultimately responsible for ship scheduling, terminal and coal availability and placing train orders indirectly through the Train Operator. As a result, QR Network considers the take or pay obligations should reside in the EUA.

Where the End User has not fully allocated its Access Rights to a nominated Train Operator(s) under a TOA the End User's take or pay will be determined with reference to the base access charge and assumed rollingstock configuration included in the schedules to the EUA.

Access Charges in the Central Queensland Coal Region are subject to a multi-part reference tariff. Two of the reference tariff components (AT1 and AT2) are incremental access charges and hence subject to the operational decision making of the Train Operator. Accordingly, as the predominant capacity and risk consequences are reflected in these price signals, QR Network considers that Train Operators should remain responsible for the payment of access charges. It is likely to be administratively inefficient to implement duplicate billing practices to recover the other non-incremental tariff components from the End User.

In addition, QR Network considers efficient and effective contract administration requires that any disputes regarding the billing of train operations based on an operational decision by the Train Operator should only involve the party who ordered the train service and the party who operated the train service. It is preferable that QR Network does not become a party to disputes between the Train Operator and End User as would occur where the access charges are recoverable from the EUA. In contrast, where a billing dispute involves a billing error by QR Network then this will be appropriately resolved between QR Network and the Train Operator without the involvement of the End User.

Security

QR Network notes that the separation of the access functions and responsibilities will give rise to liabilities or payments to QR Network under both the TOA and the EUA. QR Network considers two options are available to assign obligations for providing security for these liabilities or payments:

- Option 1. Obtain security from both the End User and the Train Operator; or
- Option 2. Obtain security from the End User for all payments and liabilities arising under both the TOA and EUA.

Option 2 may reduce the transaction costs associated with the duplication of security obligations but would also render the End User liable for the operational liabilities which is contrary to a key objective of the Alternate Form of Access.

It is also feasible that the perceived transaction cost reductions under option 2 would be impaired if the End User seeks to back-end the obligation by requiring the Train Operator provide security to the End User for these payments or liabilities.

Accordingly, QR Network considers Option 1 is preferred and security should be provided by both the End User and the Train Operator.

Section 3 Consequential Amendments to the Undertaking

Drafting Principles

The purpose of this section is to detail the proposed consequential amendments necessary to effectively implement the Proposed Standard Access Agreements as required under Clause 5.2(n)(iii) of the Undertaking.

Specifically, clause 5.2(n)(iii) requires that QR Network submit to the QCA:

“if necessary, any consequential amendments to this Undertaking to give effect to the Proposed Standard Access Agreements submitted in accordance with Clauses 5.2(n)(i) and (ii) (including, for example, to provide flexibility for short term scheduling of Train Services) provided that any such amendments do not alter the scope and nature of this Undertaking”

Two key points are relevant to the application of this clause. First, the clause itself envisages that any amendments will be minimal and only those necessary to give proper effect to the Alternate Form of Access. As the Proposed Standard Access Agreements have not been developed concurrently with the drafting of the Undertaking, QR Network does not have the benefit of fully integrating the amendments into the body of the Undertaking. Therefore, the consequential amendments have been implemented indirectly through interpretation provisions in Clause 12.5 of the Undertaking. The preferred approach to drafting would ensure that the responsibilities and obligations of the respective parties to a negotiation should be capable of understanding without reference to interpretation clauses. However, the consequential amendments necessary to implement this approach and fully integrate the Alternate Form of Access would be quite extensive. As a consequence, QR Network has utilised interpretation provisions to conform to the expectations of Clause 5.2(n)(iii).

Second, the amendments should not change any of the regulatory or commercial principles embodied in the Undertaking. This restriction requires that QR Network ensure that it does not introduce indirect changes to the way capacity is managed. In this regard, the reference to ‘flexibility for short term scheduling of Train Service’ cannot amend any aspect of Part 7 or Schedule G. The nomination process in the EUA includes the relevant provisions for providing short term scheduling flexibility and is not addressed in consequential amendments to the Undertaking.

The key challenge in drafting the consequential amendments is that the End User and the Train Operator represent the Access Seeker or the Access Holder in relation to various provisions in the Undertaking. As a result, the proposed amendments seek to clarify the circumstances in which the End User or the Train Operator should be treated as the Access Seeker or Access Holder for the purposes of the Undertaking.

In developing the consequential amendments, QR Network has had regard to concerns raised by Train Operators in the consultation process on the form of contract being implemented by ARTC in the Hunter Valley coal network. The view expressed by the ACCC that the Train Operator is an access seeker in the context of those arrangements has also been addressed.²

In most circumstances, an End User will nominate a Train Operator who will already have negotiated an interface risk management plan and environment management plan with QR Network, and may indeed already have entered a TOA in relation to another End User. In those circumstances, the Train Operator will be able to provide QR Network with an executed TOA at the time of nomination without the need for any further negotiation. However, circumstances may arise in which negotiation is required between QR Network and a Train Operator, for example where a new or existing Train

² ACCC, *Position Paper in relation to the Australian Rail Track Corporation's proposed Hunter Valley Rail Network Access Undertaking* (21 December 2010), page 175.

Operator seeks negotiate amendments to the TOA (as is permitted under clause 5.1(d)(i)). In that case, the negotiation process under sections 4.5 and 4.6 should apply to those aspects related to the TOA.

A Train Operator is only able to enter a TOA where an End User has nominated that Train Operator pursuant to relevant provisions in the EUA. As the Train Operator is not required to submit an access application for Access Rights the negotiation period will commence where an End User provides QR Network with a written notification of its intention to nominate that Train Operator.

Similarly, it is also necessary to ensure that a Train Operator is also able to initiate a dispute resolution process under Part 10.1. As a result, Clause 12.5(e)(ix) provides that the access dispute may involve a tripartite resolution process between the End user, the Train Operator and QR Network.

The consequential amendments implementing these principles are included in the following section.

Detailed Drafting

Table 2 summarises the proposed interpretation provisions to be included in the Undertaking and the operation of the relevant clauses.

Table 2 Undertaking Interpretation Provisions

Clause Ref.	Drafting	Operation
12.5(a)	When making an Access Application, the Access Seeker must notify QR Network in writing as to whether the Access Seeker is seeking Access under the terms of either: (i) a Standard Agreement; or (ii) an End User Agreement and associated Train Operations Agreement(s).	The End User must make a declaration at the time of making an Access Application as to the form of Standard Access Agreement it is seeking to negotiate.
12.5(b)	Subject to Clause 2.4(b) and notwithstanding any other provision in this Undertaking, this Clause 12.5 applies where Access is being sought in accordance with Clause 12.5(a)(ii).	This clause provides that section 12.5 of the Undertaking only applies if the End User seeks to negotiate the Alternate Form of Access.

Clause Ref.	Drafting	Operation
12.5(c)	<p>The End User Access Agreement and the Train Operations Agreement (together with consequential amendments):</p> <p>(i) operate in the alternative to the Standard Agreement referred to in Volume 2 as the “Access Agreement Coal”;</p> <p>(ii) establish a new contractual structure in a manner consistent with and, from the date of approval by the QCA of the amended Undertaking including this Clause 12.5, in satisfaction of Clauses 5.2(n)(i) and (ii) such that:</p> <p>(A) an End User can contract directly with QR Network for Access Rights without bearing liability and obligations for above rail operational issues, subject to utilisation of those Access Rights being conditional on one or more Train Operators nominated by the End User entering a Train Operations Agreement; and</p> <p>(B) only Train Operators can use an End User’s Access Rights, subject to assuming liability and obligations in relation to above rail operational issues and the payment of Access Charges (other than for Take or Pay – which shall be paid by the End User).</p>	<p>This clause terminates the operation of Clause 5.2(n) of the Undertaking and clarifies the purpose of the ‘layered’ agreements.</p>
12.5(d)	<p>Where this Clause 12.5 applies, the provisions of this Undertaking must be interpreted and given effect in a manner that is consistent with the new contractual structure reflected in the “End User Access Agreement (Coal)”.</p>	<p>This clause guides interpretation.</p>
12.5(e)(i)	<p>Where this Clause 12.5 applies, for the purposes of this Undertaking:</p> <p>(i) notwithstanding Clause 3.4, QR Network may disclose to an End User or to a Train Operator information and notices arising from or in connection with:</p> <p>(A) for an End User, a relevant Train Operator’s Train Operations Agreement and the Access Rights under that Train Operations Agreement; or</p> <p>(B) for a Train Operator, a relevant End User’s End User Access Agreement and the Access Rights under that End User Access Agreement,</p> <p>to the extent that such a disclosure is:</p> <p>(C) reasonably necessary for the performance of obligations or the exercise rights under either the End User Access Agreement or Train Operations Agreement; or</p> <p>(D) in connection with the safe operation of the Rail Infrastructure;</p>	<p>This clause is an exception to the restriction placed on the disclosure of confidential information under Clause 3.4 of the Undertaking and ensures QR Network is able to disclose information to an End User or a Train Operator which is necessary to resolve matters relevant to the performance of the obligation under the relevant linked layered agreements.</p>

Clause Ref.	Drafting	Operation
12.5(e)(ii)	Notwithstanding Clause 3.4, if QR Network receives an Access Application from both an End User and a Train Operator for the same origin and destination points, QR Network may contact and disclose to the End User relevant details of the Train Operator's Access Application for the purpose of determining whether the two Access Applications are Competing Applications and may treat them as such in accordance with Clause 7.3.2 as if references to Customers were references to the End User, and references to Operators where references to the Train Operator;	This clause is an exception to the restriction placed on the disclosure of confidential information under Clause 3.4 of the Undertaking and allows QR Network to disclose certain information to an Access Seeker for the purpose of assessing whether QR Network has received competing Access Applications.
12.5(e)(iii)	Subject to Clauses 12.5(e)(iv) and (v), Part 4, Clauses 5.1 to 5.3 and Clauses 7.3 to 7.7 and any Schedule (to the extent referred to in those provisions) do not apply in relation to Access Rights held or proposed to be held by a Train Operator pursuant to an executed or proposed Train Operations Agreement;	This clause clarifies that certain provisions of the Undertaking relating to the negotiation of Access Rights and the management of those rights apply only to the End User.
12.5(e)(iv)	<p>Notwithstanding Clause 12.5(e)(iii), where a Train Operator has been formally nominated to QR Network by an End User as a Train Operator for that End User, that Train Operator will be treated as an Access Seeker for the purposes of Clauses 4.5 and 4.6 in respect of the rights of Access to be negotiated and utilised by the Train Operator for the purpose of the nomination by the End User.</p> <p>However:</p> <p>(A) the Train Operator will cease to be treated as an Access Seeker and QR Network may terminate negotiations with the Train Operator if, for any reason, the End User ceases to be an Access Seeker in respect of Access Rights that relate to that Train Operator's nomination;</p> <p>(B) the Access Rights negotiated with the Train Operator cannot be inconsistent with the Access Rights granted to the End User for which the Train Operator has been nominated; and</p> <p>(C) the End User shall have the right, at its election, to be present in any negotiation between QR Network and the nominated Train Operator for Access Rights relevant to the nomination, and shall have the right to have the Train Operator present at negotiations with QR Network over Access Rights to be granted to the End User;</p>	<p>This clause provides that a Train Operator will, for the purpose of the issues to be addressed during the negotiation period that are specific to the TOA, be subject the negotiation procedures in Part 4.</p> <p>Examples of issues that are likely to be negotiated by the Train Operator include the interface and environmental risk management plans.</p> <p>Subclause (C) allows the End User to, at its election, attend the negotiations of the TOA or permit the nominated Train Operator to attend the negotiation of the EUA.</p>
12.5(e)(v)	Notwithstanding Clause 12.5(e)(iii), references to a Railway Operator or a Nominated Railway Operator in Part 4, Clauses 5.1 to 5.3 and Clauses 7.3 to 7.7 may, as applicable, be a reference to a Train Operator	This clause clarifies the interpretation of the relevant provisions of the Undertaking in order to give proper effect to those provisions in the context of the Alternate Form of Access.

Clause Ref.	Drafting	Operation
12.5(e)(vi)	<p>Clauses 7.1, 7.2(c), 8.1 and 8.2 and any Schedule (to the extent referred to in those provisions) shall be construed to operate as between QR Network and actual or proposed Train Operators and do not apply as between QR Network and the End User or in respect of an End User Access Agreement (except to the extent relevant to Part 4 and subject to Clause 12.5(e)(vii)) – for example, a reference to an Access Holder in Schedule G is not a reference to an End User;</p>	<p>This clause provides that the operational aspects of the Undertaking only apply to Train Operators in the context of the Alternate Form of Access.</p>
12.5(e)(vii)	<p>In respect of Part 4, where QR Network is negotiating an End User Access Agreement with an Access Seeker:</p> <p>(A) QR Network and that Access Seeker will seek to agree an assumed Operating Plan and QR Network will make reasonable assumptions about the Rollingstock and Rollingstock Configurations for that Access Seeker's Train Services;</p> <p>(B) an Access Seeker is not obliged to prepare or participate in an Interface Risk Assessment, IRMP or EIRMR;</p> <p>(C) QR Network may make any other assumptions as are reasonably necessary; and</p> <p>(D) the End User may involve the Train Operator(s) in the development of a proposed Operating Plan, for the purposes of Part 4 (including for the purposes of determining a Train Service Entitlement during those negotiations);</p>	<p>This clause clarifies the manner in which certain matters in respect of the EUA will be negotiated with the prospective End User.</p> <p>The clause allows the End User to negotiate the Operating Plan with or without the involvement of a Train Operator.</p>
12.5(e)(viii)	<p>QR Network will comply with its reporting obligations under Part 9 in such a manner so as to appropriately distinguish between an End User Access Agreement and a Train Operations Agreement including to prevent any potential for double counting; and</p>	<p>This clause clarifies that reporting data will only be reported once.</p> <p>Note that quarterly performance reports are based on train operations and therefore are unaffected by the Alternate Form of Access.</p>
12.5(e)(ix)	<p>for the purposes of Clause 10.1, if a Dispute arises between QR Network and an End User or between QR Network and a Train Operator and Clause 10.1 applies, then:</p> <p>(A) either party to the Dispute may notify the relevant End User or Train Operator (as applicable) (Additional Disputee) of that Dispute; and</p> <p>(B) if such a notice is given to the Additional Disputee, then Clause 10.1 will apply to that Additional Disputee as though it was a party to the Dispute.</p>	<p>This clause provides for joint dispute resolution and arbitration.</p>

Clause Ref.	Drafting	Operation
12.5(f)	<p>Where an End User seeks to vary nominated Access Rights between Train Operators the varied rights will be treated as Transferred Access Rights within the meaning of Clause 7.3.7 and Schedule F, Section 2.3 and the process in Clause 7.3.7 shall, to the extent applicable, be followed as if:</p> <p>(i) references to the Customer were references the End User;</p> <p>(ii) references to the Access Holder were references the Train Operator from which Access Rights are proposed to be transferred; and</p> <p>(iii) references to the Access Seeker were references to the Train Operator to which the Access Rights are proposed to be transferred.</p> <p>Without limiting the operation of this Clause 12.5(f), QR Network must be satisfied as to the matter in Clause 7.3.7(b)(iv)(B), provided that the Adjustment Charges can be paid by the End User in place of the Train Operator.</p>	<p>This clause ensures that a variation in train nominations under an EUA has the same effect and operation as a Customer Initiated Transfer under clause 7.3.7 of the Undertaking.</p> <p>The clause also provides that QR Network can require an End User to agree to pay Adjustment Charges prior to the transfer of nominated Access Rights between Train Operators.</p> <p>These provisions are necessary to ensure an End User does not vary a nomination to another Train Operator prior to the calculation of Adjustment Charges and later reverses that variation for the purpose of avoiding the payment of Adjustment Charges.</p>
12.5(g)	<p>Where a Train Operator's rights under this Undertaking as the holder of the Access Rights provided to it pursuant to a Train Operations Agreement or the exercise of those rights are inconsistent with the relevant End User's Access Rights under this Undertaking or the End User's exercise of those Access Rights, the End User's Access Rights and the exercise of those Access Rights prevail to the extent of the inconsistency.</p>	<p>This clause determines priority of rights under the Undertaking.</p>