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24 April 2013

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Dear Mr Carter

**FINAL DECISION: AURIZON NETWORK'S PROPOSED STANDARD ACCESS AGREEMENTS**

On 29 April 2011, Aurizon Network submitted its proposed alternate form of standard access agreements (alternative SAAs) to the Authority, in accordance with clause 5.2(n) of the 2010 access undertaking (the undertaking).

Aurizon Network's proposal included an End User Access Agreement (EUAA), a Train Operations Agreement (TOA) and amendments to the undertaking required to give effect to the alternative contracting structure.

The Authority has considered Aurizon Network's proposal in accordance with the requirements in clause 5.2(e) of the undertaking.

The Authority has decided not to approve Aurizon Network's proposal. The Authority's decision document (attached) sets out the reasons for not approving the proposal, and indicates how the proposal should be amended for the Authority to approve it. The decision includes detailed drafting showing all the Authority's required amendments for the EUAA, TOA and undertaking.

The Authority requires Aurizon Network to amend its alternative SAAs and the undertaking in the way described in the Authority's final decision and to resubmit these by no later than **29 May 2013**.

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

Yours sincerely

A black rectangular redaction box covering the signature of Malcolm Roberts.

Malcolm Roberts  
Chairman



**Final Decision**  
**Aurizon Network Alternative Standard  
Access Agreements**

**April 2013**

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The Authority wishes to acknowledge the contribution of the following staff to this report

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**GLOSSARY**

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2010 undertaking	Aurizon Network's 2010 access undertaking
AAC	Access Agreement Coal
BMA	BHP Billiton Mitsubishi Alliance
CTPDMP	Contested Train Path Decision-making Process
DTP	Daily Train Plan
EUAA	End User Access Agreement (Coal)
ITP	Intermediate Train Plan
NMP	Network Management Principles
OAAC	Operator Access Agreement Coal
QCA Act	<i>Queensland Competition Authority Act 1997</i>
QRC	Queensland Resources Council
RTCA	Rio Tinto Coal Australia
SAA	Standard Access Agreement
Schedule G	Network Management Principles
TOA	Train Operations Agreement (Coal)
TSE	Train Service Entitlement

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## EXECUTIVE SUMMARY

End users have been keen to have an alternative to the existing contracting structure for access to the coal network in central Queensland. In particular, end users wanted two key outcomes from the alternative standard access agreements (SAAs), namely to provide them with:

- (a) an ability to manage their portfolio of access rights without being responsible for operational issues; and
- (b) greater flexibility in engaging operators to utilise their underlying access rights.

The Authority's final decision on the alternative SAAs seeks to provide these outcomes. In doing so, the Authority has worked closely with Aurizon Network to resolve many of the concerns it expressed in response to the draft decision.

The Authority's final decision is to reject Aurizon Network's proposed alternative SAAs. The Authority's decision seeks to split the existing obligations under the current SAAs and allocate them, in a much clearer way, to the end user and operator respectively. End users should not be responsible for operational issues as they are undertaken by the operator. Similarly, operators should not be responsible for underlying access rights which they do not own.

The Authority has retained its position that there be no minimum appointment period for an operator. The Authority has also retained the ability for an end user to reallocate access rights to another operator with at least 2 business days' notice (changed from at least 48 hours in the draft decision). Relevantly, this is consistent with Aurizon Network's current scheduling practices for ad-hoc services under the network management principles.

To support these arrangements, the Authority has provided for an end user to be able to execute its agreement and then negotiate with competing operators to utilise these rights. This approach has meant the Authority has retained its position in the draft decision that both the end user and operator be access seekers for the purposes of the approved 2010 access undertaking (the undertaking) and the *Queensland Competition Authority Act 1997* (the QCA Act). To do otherwise would mean that an operator would lose the protections of the arbitration provisions in the QCA Act, and the undertaking, which apply to access seekers. This is unfair as operators currently have these protections under the operator access agreement coal where they contract directly with Aurizon Network for access rights.

In doing so, the Authority recognises Aurizon Network's concerns about the administrative burden of negotiating with both an end user and operator in respect of the same underlying access rights. Operators will now be required to more clearly establish their bona fides as an access seeker (i.e. they are either negotiating or have concluded a haulage agreement with an end user) – thereby avoiding the necessity for Aurizon Network from having to engage in time-consuming negotiations with operators that have little prospect of being able to use the rights they are seeking.

Collectively, the above measures have the potential to significantly improve end users' flexibility to manage their access rights and increase the effectiveness of competition between operators.

The Authority accepts that there are other matters which, while considered, have not been addressed in this decision as they are not matters which are necessary to give effect to the split contracting structure of the alternative SAAs. Stakeholders are invited to raise these matters in the context of the draft replacement undertaking (i.e. UT4) where they can be addressed in a consistent manner across all forms of the SAAs.

## Way Forward

This decision constitutes a written notice from the Authority to Aurizon Network for the purposes of clause 5.2(h) of the undertaking. It states the reasons for the Authority refusing to approve Aurizon Network's proposed alternative SAAs and the way it should be amended.

The Authority requires Aurizon Network to amend its alternative SAAs (and related consequential amendments to the approved undertaking) in the way described in Appendix A of this decision and resubmit the alternative SAAs (and related consequential amendments to the approved undertaking) to the Authority by no later than **29 May 2013**.

If Aurizon Network complies with this notice, the Authority will approve the resubmitted proposal if it considers it appropriate to do so having regard to the requirements of clause 5.2(i) of the undertaking.

If Aurizon Network does not comply with the notice, or if the Authority decides not to approve Aurizon Network's resubmitted proposal, the Authority may prepare its own alternative SAAs pursuant to clause 5.2(c) of the undertaking. Under these circumstances, the Authority is currently minded to publish any such proposal and conduct public consultation before it prepares a further final decision.

Submissions are **not** invited on this final decision.



## 1. ALTERNATIVE STANDARD ACCESS AGREEMENTS

*Aurizon Network<sup>1</sup> has submitted the alternative form of standard access agreements (alternative SAAs) for the Authority's approval as required by the 2010 access undertaking (the undertaking).*

*Aurizon Network's proposal, in effect, 'splits' the current SAAs into two separate agreements so that matters associated with managing access rights are separated from matters associated with train operations. Aurizon Network has also included consequential amendments to the approved undertaking that it considers are necessary to give effect to the new arrangements.*

*The Authority has considered Aurizon Network's proposal in line with the criteria set out in the undertaking, taking into account the information provided by Aurizon Network to support its proposal and stakeholders' comments and submissions on the alternative SAAs and on the Authority's draft decision.*

*The Authority has made a decision to refuse to approve Aurizon Network's proposal. The Authority has identified ways for the alternative SAAs to provide end users with greater control and flexibility in managing their access rights, having regard to Aurizon Network's legitimate, and demonstrable, operational requirements.*

*In accordance with clause 5.2(h) of the undertaking, the Authority requires Aurizon Network to amend its alternative SAAs and consequential amendments to the approved undertaking in the way described in Appendix A of this decision and resubmit the amended proposal to the Authority by no later than 29 May 2013.*

### 1.1 Context

Aurizon Network's 2010 access undertaking (the undertaking) sets out the terms and conditions under which Aurizon Network will provide access to its rail network.

The undertaking includes two SAAs. These guide access negotiations between Aurizon Network and access seekers and provide for:

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

As well as assisting the timely negotiation of access to Aurizon Network's rail network, the SAAs include a discrete list of matters to be considered in finalising the negotiation of access arrangements. Parties can agree to other terms and conditions on a case-by-case basis – but if negotiations fail, the Authority would have regard to the SAAs in resolving a dispute.

When the undertaking and SAAs were approved in October 2010, it was recognised that a number of matters concerning the SAAs remained unresolved. Aurizon Network and coal companies considered that the existing SAAs were not entirely satisfactory. In particular, coal companies had expressed a strong desire to develop an alternative form of SAAs (alternative SAAs) that allowed them to:

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<sup>1</sup> On 3 December 2012, QR Network Pty Ltd changed its name to Aurizon Network Pty Ltd. Hereafter, this decision refers to Aurizon Network Pty Ltd.

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

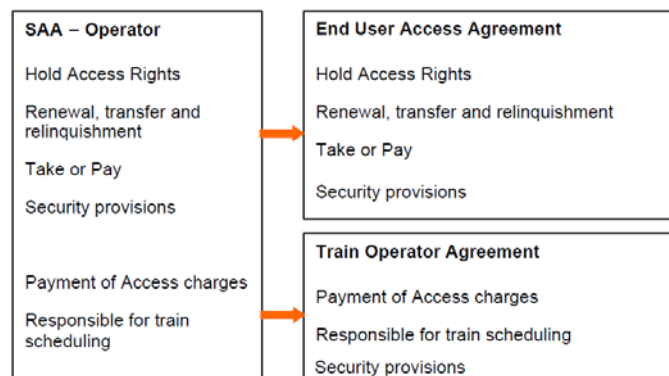
As such, the undertaking included processes that required Aurizon Network to submit, for the Authority's approval, the alternative SAAs within six months following the approval of the undertaking containing:

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

In April 2011, Aurizon Network submitted its proposed EUAA, TOA and consequential amendments to the approved undertaking required to give effect to the alternative SAAs. Aurizon Network provided explanatory notes to go with its proposal in May 2011.

## **1.2 Aurizon Network's Proposal**

Aurizon Network has proposed alternative SAAs that 'split' the current approved SAAs into two separate agreements (EUAA and TOA) with the effect that matters associated with the management of access rights are separated from matters associated with train operations (Figure 1).

**Figure 1: Allocation of functions and responsibilities from current SAAs**

Source: Aurizon Network, sub. no. 1:6

Aurizon Network’s proposed alternative SAAs are based on the commercial terms of the approved OAAC, allocated between the EUAA and TOA as appropriate. In doing so Aurizon 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. (Aurizon Network, sub. no. 1:8)*

Under these arrangements, Aurizon Network proposed that:

- (a) an end user be primarily responsible for negotiating access rights and managing alternative SAAs (Aurizon Network, sub. no. 1: 14);
- (b) an end user has control over its access rights but requires a train operator to utilise them (Aurizon Network, sub. no. 1: 8) ;
- (c) an end user may reallocate its access rights between its appointed train operators for a minimum three month period, with at least 30 days’ notice (Aurizon Network, sub. no. 1: 10);
- (d) the train operator is the access holder for the purpose of scheduling and operating train services (Aurizon Network, sub. no. 1: 10);
- (e) an end user is responsible for the take-or-pay component of access charges and a train operator is responsible for the remainder of the access charges (Aurizon Network, sub. no. 1: 11); and
- (f) Aurizon Network is liable to the train operator, but not the end user, for consequential loss arising from Aurizon Network wrongfully suspending the operator's train services (cl. 20.3(b), TOA’s General Conditions of Contract).

Aurizon Network has also proposed consequential amendments to the approved undertaking to give effect to the alternative SAAs. This included a number of ‘implementation provisions’ to the undertaking as well as proposed amendments seeking 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 (Aurizon Network, sub. no. 1:10).

### 1.3 Process for Considering Aurizon Network's Proposal

The Authority has considered Aurizon Network's proposal in accordance with the requirements of clause 5.2 of the undertaking.

The Authority is required to either approve or refuse to approve the draft alternative SAAs within 60 days of its submission, or such longer period as advised in writing by the Authority. The Authority extended the time within which it must make its decision to 30 June 2013.

Consistent with clause 5.2(d) of the undertaking, the Authority published Aurizon Network's proposal on its website, invited stakeholders to comment and provided Aurizon Network with an opportunity to respond to those comments. The Authority received submissions from seven stakeholders on Aurizon Network's proposal. In response, Aurizon Network provided a supplementary submission (November 2011) which included some amendments to its original May 2011 submission to address a number of the concerns raised by stakeholders.

On 30 July 2012, the Authority released a draft decision to not approve Aurizon Network's alternative SAAs. That draft decision proposed a number of substantial amendments to Aurizon Network's proposal – with detailed drafting to reflect the proposed changes.

The Authority received eight submissions in response to its draft decision, including suggested amendments to the Authority's proposed detailed drafting.

Over the assessment process, Aurizon Network has moved from their original proposal in a number of areas. The Authority has assessed Aurizon Network's original proposal, as outlined below, having regard to Aurizon Network's revised positions.

### 1.4 The Authority's Approach

In considering this matter, the Authority has had regard to the assessment criteria contained in the undertaking (see section 1.4.1), the information provided by Aurizon Network supporting its proposal and stakeholders' comments, submissions and alternative drafting.

#### 1.4.1 Assessment Criteria

The factors affecting the Authority's consideration and approval of Aurizon Network's proposed alternative SAAs are set out in the undertaking. The Authority may only approve a proposed SAA if it:

- (a) is satisfied that the proposal is consistent with the undertaking, including the guiding principles in clause 5.2(n) of the undertaking and those contained in Schedule E (cl. 5.2(e)(i));
- (b) considers it appropriate to do so having regard to various matters listed in section 138(2) of the *Queensland Competition Authority Act 1997* (the QCA Act) (cl. 5.2(e)(ii)); and
- (c) has published Aurizon Network's proposal, invited stakeholders to make submissions on it and has considered any submissions it receives (cl. 5.2(e)(iii)).

## The 2010 Access Undertaking

The Authority must be satisfied that the proposed alternative SAAs are consistent with the undertaking, including the guiding principles in clause 5.2(n) of the undertaking that provide for:

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

and the principles in Schedule E of the undertaking (which describe the principles to be included in standard access agreements generally).

## The QCA Act

The Authority may approve the proposed alternative SAAs only if it considers it appropriate to do so, having regard to the matters mentioned in section 138(2) of the QCA Act, being:

- (a) the object of Part 5 of the QCA Act, which is:

*... to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets (s. 69E).*
- (b) the legitimate business interests of the owner or operator of the service;
- (c) the public interest, including the public interest in having competition in markets (whether or not in Australia);
- (d) the interests of persons who may seek access to the service;
- (e) the effect of excluding existing assets for pricing purposes;
- (f) the pricing principles in section 168A of the QCA Act, which are that the price of access to a declared service should:
  - (i) generate expected revenue for the service that is at least enough to meet the efficient costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved;
  - (ii) allow for multi-part pricing and price discrimination where it aids efficiency;
  - (iii) not allow a related access provider to set terms and conditions that discriminate in favour of the downstream operations of the access provider (or a related body corporate), except to the extent the cost of providing access to other operators is higher; and
  - (iv) provide incentives to reduce costs or otherwise improve productivity; and

- (g) any other issues the Authority considers relevant.

### Implications for the Authority's Assessment

The Authority has sought to weigh the arguments and information provided, paying particular attention to the guiding principles in clause 5.2(n) and Schedule E of the undertaking and the section 138(2) matters of the QCA Act. In doing so the Authority paid particular attention to whether the proposed alternative SAAs:

- (a) provide a contract structure which enables users to contract with Aurizon Network for access rights without bearing liability for operational issues (in accordance with the cl. 5.2(n) requirements);
- (b) appropriately balances Aurizon Network's, end users' and train operators' interests (s. 138(2)(b), (c) & (e), QCA Act) by, among other things seeking to ensure that:
  - (i) the new arrangements appropriately allocate existing responsibilities/obligations between the various parties;
  - (ii) the new arrangements appropriately allocate risk between the various parties; and
  - (iii) the split arrangement operates effectively and commercially; and
- (c) promotes effective competition in upstream and downstream markets (s. 138(2)(a) & (d), QCA Act) – to the extent that giving end users greater flexibility in managing their access rights increases competition in the above-rail market and the competitiveness of the Queensland coal industry.

In making its decision at this time the Authority has sought to provide end users with greater control and flexibility in managing their access rights.

Having had regard to all the factors it is required to consider, the Authority considers that it is appropriate to retain consistency between the existing SAAs and the proposed new SAAs as far as is possible, despite the restructuring of the contractual relationship. In particular, the Authority has focussed on whether:

- (a) the new SAAs appropriately allocate the existing responsibilities/obligations under the new arrangements between the train operator and the end user; and
- (b) the risk that each party bears remains unchanged or, if the risk profile does change it is justifiable and appropriate given the splitting of access rights and operational responsibilities.

The Authority considers this approach is appropriate as:

- (a) it has previously accepted the existing SAAs as being appropriate;
- (b) it is in all parties' interests to have a substantial degree of consistency in the rights and obligations under the various forms of access arrangements, especially as Aurizon Network is currently a party to numerous access agreements based on the existing SAAs (and earlier SAAs approved in connection with previous undertakings which are predominantly the same);

- (c) arrangements that lead to a material change to the risk profile under the alternative SAAs may inappropriately distort parties' choices between the alternative SAAs and existing SAAs;
- (d) maintaining the same risk profile under the alternative SAAs for the remainder of the regulatory period is consistent with the existing approved reference tariffs (which will not vary depending on the type of access agreement entered); and
- (e) the provisions of the undertaking regarding the submission of the proposed SAAs do not provide for the amendment of the existing SAAs.

That said, the Authority accepts that it is not always possible to keep the risk profile exactly the same in order for the alternative SAAs to operate effectively. In some cases, it was necessary to alter the risk profiles of the parties to enable the split arrangement to operate effectively, flexibly and in a commercially balanced way.

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

### The Authority's Decision

This decision outlines the reasons why the Authority has decided to refuse to approve Aurizon Network's proposed alternative SAAs and the ways it should be amended.

While the Authority acknowledges that Aurizon Network's proposal makes some considerable progress in enabling an end user to manage their access rights, without being responsible for operational matters, it nevertheless has identified more appropriate ways for the alternative SAAs to meet end users' expectations, having regard to Aurizon Network's legitimate, and demonstrable, operational requirements.

Chapter 2 sets out the Authority's consideration of aspects of Aurizon Network's alternative SAAs that provide for end users to utilise their access rights, including through appointing new operators and varying the utilisation of access rights between appointed operators.

Chapter 3 sets out the Authority's consideration of responsibilities of parties contracting under the alternative SAAs that are not consistent with the current SAAs, to reflect that end users have greater control over their access rights and are not liable for above-rail operational issues.

Chapter 4 sets out the Authority's consideration of additional responsibilities that contracting parties face under the alternative SAAs but not the current SAAs, to reflect the intent of the alternative contracting structure.

Chapter 5 sets out the Authority's consideration of responsibilities under the alternative SAAs that are consistent with the current SAAs, to reflect that some amendments requested by stakeholders are not necessary to give effect to the alternative contracting structure and may unjustifiably change the risk profiles of parties to the contract.

Chapter 6 sets out the Authority's consideration of the required amendments to the approved undertaking to enable the split contracting structure to operate effectively, in a manner which does not unnecessarily alter the risk profiles of the parties.

Appendix A includes detailed drafting that is consistent with the Authority's approach and shows all of the amendments required by the Authority. Appendix A includes a number of amendments that are not discussed in detail, but are nonetheless consistent with the Authority's approach. For example, Appendix A includes specific amendments that improve the transparency and clarity of the alternative SAAs.

### **Written Notice**

This decision provides Aurizon Network with written notice of the Authority's decision for the purposes of clause 5.2(h) of the undertaking. It states the reasons for the Authority refusing to approve Aurizon Network's proposed alternative SAAs and the ways the proposed SAAs to be resubmitted by Aurizon Network should be amended.

The Authority requires Aurizon Network to amend its alternative SAAs (and related consequential amendments to the approved undertaking) in the way described in Appendix A of this decision and resubmit the alternative SAAs (and related consequential amendments to the approved undertaking) amended in that manner to the Authority by no later than 29 May 2013.



## 2. EXERCISE OF ACCESS RIGHTS

*The contract structure and processes for managing access rights included in the alternative SAAs affect the way end users will utilise and manage their access rights over the life of the contract.*

*In Aurizon Network's proposal, an end user would hold access rights under the terms contained in the EUAA and may nominate one or more train operators to utilise those access rights under the terms and conditions contained in the TOA. A train operator would, therefore, not be prevented from holding a single TOA under which it could utilise (if nominated) the access rights of end users under multiple EUAAs.*

*The EUAA also contained processes for end users to manage their access rights so that, for example, an end user could reallocate access rights between its approved train operators.*

*The Authority's draft decision proposed to give end users increased flexibility in managing their access rights, including providing for end users to switch operators (i.e. reallocate access rights) up until 48 hours prior to the day of operation.*

*While stakeholders did not support Aurizon Network's proposal, they had mixed comments on different aspects of the Authority's proposed alternatives. For instance, while end users supported having the ability to switch operators 48 hours prior to the day of operation, Aurizon Network did not consider this feasible as it would lead to complications with allocating system capacity effectively.*

*In making its final decision, the Authority has focused on ensuring that the arrangements in place provide:*

- (a) contractual arrangements – that support processes for managing access rights, that are administratively feasible for Aurizon Network to implement and are practical to use by all parties (i.e. Aurizon Network, end users and train operators); and*
- (b) processes for managing access rights – that balance end users' desire for increased flexibility, with Aurizon Network's requirement to effectively and safely manage its rail network.*

*The Authority's amendments largely mirror those proposed in the draft decision. The Authority's analysis and reasoning are provided below.*

### 2.1 Contract Structure

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

- (a) under an EUAA – an end user contracts with Aurizon Network for access rights on nominated parts of the rail network; and*
- (b) under a TOA – a train operator contracts with Aurizon Network to use the relevant end user's access rights to operate train services on the nominated parts of the rail network.*

Aurizon Network's proposed EUAA specifies an end user's access rights in terms of train service entitlements (TSEs) and contains a description for each origin to destination entitlement in Schedule 1 of the EUAA.

Aurizon Network's proposed TOA provided for a single train operator to contract with Aurizon Network to operate train services for *some or all* of the train operator's customers.

In particular, the TOA sets out, where one or more end users have appointed the train operator, the share of each end user's access rights that will be used by the train operator to operate train services on the network.

In addition, Aurizon Network's proposed TOA can only be entered into by Aurizon Network and a train operator on the basis that Aurizon Network has entered into an EUAA in respect of the access rights for which the train operator has been appointed to use.

### **Draft Decision**

The Authority's draft decision proposed that Aurizon Network be required to amend the contracting structure so that train operators must enter into a separate TOA for each EUAA – i.e. train operators would not have the option of entering into a single TOA that provided the right to operate train services contracted under multiple end user EUAAs.

The Authority saw clear benefits from this proposal because it removed the possibility of cross-default risk – i.e. the risk of multiple end users being affected if a train operator breaches its TOA, even if the breach occurs in respect of operating services for a single end user.

In requiring this contract structure, the Authority accepted that there may be an increase in administrative costs but that this increase would be minimal in reality. This was because once an operator has entered into a TOA with Aurizon Network, it is unlikely that protracted fresh negotiations would be required for each additional TOA. For instance, operating plans and environmental management systems could be settled in the first TOA and largely replicated in subsequent TOAs, leaving specific matters such as train service descriptions that correspond with the allocated access rights, to be addressed in each additional TOA.

### **Stakeholders' Views on Draft Decision**

Mining companies (end users) generally supported the Authority's decision (Anglo American, sub. no. 2: 1; QRC, sub. no. 2: 3; Vale, sub. no. 2: 2). For example, Anglo American agreed that having a separate TOA for every EUAA was necessary in order to eliminate the risk of cross-default (Anglo American, sub. no. 2: 1).

However, stakeholders also wanted to ensure that the contracting structure provided for the ability to pool TSEs during train scheduling (QRC, sub. no. 2: 8; Anglo American, sub. no. 2: 1).

Aurizon Network's and Aurizon Holdings' (above rail) preference was for the contract structure to be the result of a negotiated outcome, not mandated by the Authority (Aurizon Network, sub. no. 2: 8; Aurizon Holdings (above rail), sub. no. 2: 11). Reflecting this, Aurizon Network said it was willing to provide alternative drafting that would allow for either form of contracting (i.e. a separate TOA for each EUAA, or a TOA encompassing multiple EUAAs) and did not preclude the Authority's proposed approach.

Aurizon Network and Aurizon Holdings (above rail) also considered that a number of clauses in Aurizon Network's proposed TOA partially addressed the cross-default risks (e.g. suspension and termination) and, with minor amendments, this issue could be resolved without imposing the Authority's proposed contract structure (Aurizon Network, sub. no. 3: 11-12; Aurizon Holdings (above rail), sub. no. 2: 12).

Aurizon Network and Aurizon Holdings (above rail) argued that there would be considerable administrative complexity and cost from requiring a single TOA for each EUAA (Aurizon Network, sub. no. 2:8; Aurizon Holdings (above rail), sub. no. 2:12). Regarding the

administrative benefits of allowing for multiple end users to be linked to a single TOA, Aurizon Network said:

*While it is beneficial for transparency and the implications of a potential breach, it still may create greater efficiencies if a TOA can combine multiple train services in one TOA in terms of contract management and administration and may reduce the risk of a breach of the TOA (Aurizon Network, sub. no. 2: 8).*

### Authority's Analysis and Final Decision

The Authority maintains its position that a contracting structure that provides for each EUAA to be linked to a separate TOA will best support the end users having greater flexibility in managing their access rights and will be administratively feasible and practical to use by all parties.

The Authority notes that mining companies, while supportive of the contracting structure, were concerned to ensure that this contracting structure does not result in a loss of flexibility in their ability to pool train paths for scheduling purposes under the alternative SAA arrangements.

The Authority can confirm that the alternative SAA contracting structure will not affect the ability to 'pool' train paths because:

- (a) the EUAA – provides for the end user's nominated train operator to act as the *access holder* for the purpose of ordering train services; and
- (b) the undertaking – provides for Aurizon Network to aggregate an *access holder's* train paths in the scheduling process, including determining what train orders get priority over others (see Chapter 6 for more on the train operator as the 'access holder' for the purposes of train ordering).

Together, these arrangements will allow the train operator (as the 'access holder') to pool train paths derived from TOAs, as well as train paths in existing access agreements where the train operator is the 'access holder' for the purpose of train scheduling.

The Authority also recognises that Aurizon Network's and Aurizon Holdings' (above rail) preference was to allow the contracting structure to be negotiated. In addition, both did not believe that setting the contracting structure so that each EUAA required a separate TOA was practical from an administrative (including cost) perspective or necessary to resolve cross-default risks.

On this, the Authority remains of the view that:

- (a) mandating the contract structure – is important to give parties certainty and create a transparent standard suite of arrangements available to commence negotiations; and
- (b) each EUAA being linked to separate TOAs – is important to transparently remove cross-default risk, while continuing to retain other benefits, such as pooling and having the ability to suit TOAs to individual end user requirements.

In addition, the Authority is not convinced that the contracting structure will be highly administrative and costly. The Authority remains of the view that most aspects of a train operator's TOA can be replicated in subsequent TOAs that are to be negotiated – making the first TOA the most administrative and costly, and subsequent TOAs much less so.

Accordingly, the Authority's decision is that the contracting structure for the alternative SAAs provides for each EUAA to be linked to a separate TOA.

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**Final Decision 2.1:**

**The Authority requires Aurizon Network to amend its proposal so that a separate TOA must be entered into in respect of each EUAA.**

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## 2.2 Appointing Train Operators

Aurizon Network's alternative SAAs provided for:

- (a) an end user to nominate one or more train operators to utilise its access rights (recitals of Aurizon Network's proposed EUAA); and
- (b) Aurizon Network to accept the train operator nomination on similar conditions to that provided in the existing SAAs, i.e. Aurizon Network is not obliged to accept an end user's train operator nomination if that train operator is in material breach of any of its obligations under the TOA and unless it is satisfied that the train operator is financially sound and capable of performing its obligations under the TOA (cl. 2.3(c), EUAA).

### Draft Decision

The Authority's draft decision accepted Aurizon Network's proposal that an end user could nominate one or more train operators under an EUAA using a criteria to accept a train operator nomination that is similar to that included in the existing SAAs. While stakeholders had concerns regarding the conditions in which Aurizon Network could reject a train operator nomination, the Authority considered that these concerns were best addressed by the dispute resolution processes in the alternative SAAs (QCA draft decision, p. 11).

The Authority's draft decision did however propose amendments to Aurizon Network's proposal so that Aurizon Network must respond to an end user train operator nomination in a timely manner. In this regard, the Authority proposed a 10 business day timeframe in which Aurizon Network must respond to such a request. The Authority considered that this arrangement would provide end users with greater certainty over the approval of train operator nominations in a reasonable timeframe (QCA draft decision, pp. 10-11).

### Stakeholders' Views on Draft Decision

Aurizon Network said the Authority's proposed 10 business day response timeframe would be reasonable provided the train operator is able to meet all operational requirements for utilising an end user's access rights. Otherwise, Aurizon Network said it should be entitled to reject an operator that is not in a position to immediately sign/vary a new/existing TOA (Aurizon Network, sub. no. 3: 5).

### Authority's Analysis and Final Decision

The Authority has largely maintained its draft decision positions.

The Authority notes that while Aurizon Network supported the Authority's proposed 10 business day response timeframe for nominating a new train operator, Aurizon Network

proposed amendments to enable itself to reject a train operator nomination if that train operator is unable to immediately sign a TOA.

The Authority considers Aurizon Network's proposal reasonable as Aurizon Network should not be obliged to accept train operator nomination without satisfying the requirements in the TOA. In addition, the Authority notes that Aurizon Network has indicated that a rejection does not mean the train operator will not be accepted, merely that relevant operational matters still need to be negotiated. In this regard, the Authority considers that, in the event of such a rejection, Aurizon Network should be required to use its *best endeavours* to finalise arrangements with the nominated train operator (so that a TOA can be accepted and readily signed). Accordingly, the Authority has included drafting to give effect to this.

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**Final Decision 2.2:**

**The Authority accepts Aurizon Network's criteria for accepting a train operator nomination.**

**The Authority also accepts that Aurizon Network may reject a train operator nomination if that operator is not in the position to sign a TOA.**

**The Authority requires Aurizon Network to amend its proposal so that:**

- (a) it must respond to an end user's train operator nomination within 10 business days; and**
  - (b) if it rejects a train operator nomination (on the basis that more information is required to finalise a TOA), it must use its best endeavours to finalise the arrangements so that a TOA can be accepted and readily signed.**
- 

## 2.3 Reallocating Access Rights

Aurizon Network initially proposed to provide an end user with the ability to reallocate its access rights between its approved train operators for a minimum of three months, with at least 30 days notice (cl. 2.3(b), EUAA).

Following stakeholders' comments on Aurizon Network's initial proposal, Aurizon Network agreed to remove its requirement for a minimum reallocation period and to revise its notification timeframe for reallocating access rights to 21 days (i.e. 14 days outside the 7 day planning cycle). Aurizon Network also pointed to alternative arrangements that would allow an end user to reallocate access rights between its approved train operators over a shorter time period, including by:

- (a) operating an ad-hoc train service;
- (b) nominating entitlements under clause (c) of the Contested Train Path Decision-making Process (CTPDMP); or
- (c) obtaining agreement between relevant parties to schedule the train service as permitted under clause (b) of the CTPDMP (Aurizon Network, sub. no. 2: 4).

## Draft Decision

The Authority's draft decision proposed to allow an end user to reallocate access rights between its approved train operators with no minimum reallocation period, up to 48 hours before the day of operation. The Authority considered that this would provide end users with flexibility in managing their access rights during the scheduling of train services for coal haulage.

In reaching its draft decision, the Authority did not believe that Aurizon Network had provided evidence as to why a minimum 14 days' notice was required for a reallocation request. Also, the Authority noted that other regimes, such as the regime applying to Australian Rail Track Corporation's Hunter Valley network, are able to accommodate reallocation requests with 48 hours' notice. The Authority also did not believe that Aurizon Network's alternative solutions adequately addressed end users' requirements for greater flexibility – for instance, when utilising an ad-hoc train service, that ad-hoc train service will not be guaranteed unless it does not adversely affect other train service/s.

On this basis, the Authority was of the view that Aurizon Network had the ability to accommodate such reallocation requests and, in turn, provide the flexibility that end users sought (QCA draft decision, pp. 12-14).

## Stakeholders' Views on Draft Decision

Stakeholders generally supported the Authority's proposals for reallocating access rights between approved train operators.

### No minimum reallocation period

The QRC and Vale supported the Authority's proposal for no minimum reallocation period for reallocating access rights between approved train operators (QRC, sub. no. 2: 2-3; Vale, sub. no. 2: 2).

Aurizon Network also supported the Authority's proposal so long as the reallocation process did not inadvertently create discrepancies between an end user's monthly entitlement and its approved train operators' allocated access rights. Aurizon Network added that, to the extent that an end user wishes to reallocate its access rights between its approved train operators (in a given month), the actual and scheduled month to date usage of paths should not exceed that end user's monthly entitlement (Aurizon Network, sub. no. 3: 7).

### 48 hour reallocation

End users supported the Authority's proposed minimum 48 hours' notice period to reallocate access rights between approved train operators (QRC, sub. no. 2: 2-3; Vale, sub. no. 2: 2), with Asciano commenting that the amendment should be achievable by an operator in a normal operating environment (Asciano, sub. no. 2: 1).

BMA said that the Authority should clarify that the amendment is capable of being used for longer term and broader reallocation of access rights between train operators (BMA, sub. no. 2: 2).

Aurizon Holdings (above rail) said it did not object to the amendment and suggested consequential amendments to enable it to work effectively. In particular, Aurizon Holdings (above rail) said the amendments should require:

- (a) end users, when reallocating their access rights, to include statements to Aurizon Network containing each relevant operator's:

- (i) agreement to the reallocation; and
  - (ii) preliminary assessment of reallocation impact on its ability to comply with obligations under its TOA; and
- (b) Aurizon Network to notify relevant parties of its decision prior to the Daily Train Plan (DTP) and also include the proportion of access rights remaining for the purpose of the CTPDMP (Aurizon Holdings (above rail), sub. no. 2: 10-11).

Aurizon Network was concerned that the Authority's proposal could lead to complications for allocating paths and optimising train schedules, including:

- (a) adversely impacting on the capacity of the entire supply chain;
- (b) leading to strategic gaming by end users; and
- (c) creating a risk that parties may receive allocations that are not aligned with their entitlements (Aurizon Network, sub. no. 3: 6-7).

Aurizon Network said it needed *adequate time* to respond to a variation and proposed aligning the notice period to the System Rules or at least 7 days. In this regard, Aurizon Network said:

*[Aurizon] Network's proposed drafting amendments to the EUAA contemplate alignment with the timing requirements for train orders to be submitted (as detailed in Schedule G of the Undertaking). By aligning to this timeframe, [Aurizon] Network will have sufficient time to vary the existing agreements, and also schedule train services in an efficient manner (Aurizon Network, sub. no. 3: 6).*

## Authority's Analysis and Final Decision

The Authority has largely maintained its draft decision with regard to the minimum reallocation period and the reallocation notification timeframe. These matters are discussed below.

### Minimum reallocation period

The Authority notes that Aurizon Network and end users have accepted the Authority's proposal of having no minimum reallocation period for a reallocation request.

The Authority agrees with Aurizon Network that the minimum reallocation period should not inadvertently create discrepancies between an end user's monthly entitlement and its train operators' allocated access rights. This is necessary to ensure that access rights are allocated based on each end user's monthly entitlement and, in doing so, prevents an end user from being disadvantaged or advantaged against other end users that contract with Aurizon Network.

### 48 hour reallocation

The Authority remains of the view that Aurizon Network can implement reallocations at short notice. However, the Authority has refined its position from the draft decision so that an end user must provide at least 2 business days' (or such other period of time as specified in the System Rules) notice in order to reallocate access rights between its approved train operators.

The Authority has given thorough consideration to the existing applicable provisions in the Network Management Principles (NMP) and their interactions with the arrangements in the



alternative SAAs. Accordingly, the Authority notes that the NMP, with at least 2 business days' (or such other period of time as specified in the System Rules) notice prior to the day of operation, allows for a variation of a scheduled train plan (i.e. the DTP), subject to certain conditions. In this regard, the Authority considers that a minimum 2 business day (or such other period of time as specified in the System Rules) notice period is preferable because it aligns with the timing requirement in the NMP.

Rather than incorporating new arrangements into the alternative SAAs or amending the NMP, the Authority considers that there is significant benefit in utilising the existing arrangements, where possible. The benefit of this is where the undertaking (including the NMP) can be amended over time, arrangements that are put into access agreements could be difficult to amend and may subject Aurizon Network to different obligations under different access arrangements. Further, the Authority notes that, in providing an end user with the ability to reallocate access rights between its approved train operators, it does not necessarily require any amendment to the NMP as the EUAA (with the Authority's amendments) would allow for it.

Under the NMP, an end user can make reallocation requests by providing at least 2 business days' (or such other period of time as specified in the System Rules) notice to Aurizon Network and utilising one of the following clauses:

- (a) clause 4(d)(ii) – Aurizon Network receives a request from a party to run an ad-hoc train service, provided that the ad-hoc train service would not result in any existing access holder's scheduled train service not being met, or a planned possession being met; or
- (b) clause 4(d)(vi) – Aurizon Network, infrastructure service providers, and all affected access holders otherwise agree.

In partnership with these clauses, the Authority has refined its amendments to the EUAA so that:

- (a) reallocated train services that are scheduled (and ultimately operated) as ad-hoc services will be treated as utilising part of an end user's contractual entitlements for take-or-pay purposes – this means that take-or-pay will not accrue on reallocated train services that are actually provided; and
- (b) Aurizon Network will be required to agree, and use its reasonable endeavours to procure its subcontracted infrastructure service providers to agree (for the purposes of clause 4(d)(vi) and clause 4(g) of Schedule 10 of the TOA) to variations required to accommodate a reallocation provided such variations would not result in any existing access holder's scheduled train services not being met or a planned possession not being met – this would be anticipated to increase the likelihood of Aurizon Network accepting a reallocation request.

Combined, the Authority considers that these arrangements would give end users their requested flexibility to manage their access rights.

While the Authority understands that Aurizon Network currently treats ad-hoc services provided as having been provided as part of an end user's contractual entitlement for take-or-pay purposes in any case, the Authority has clarified this in the drafting to ensure it is absolutely clear this is the case.



Although not exactly the same as the proposed 48 hour reallocation in the draft decision, the Authority considers that its revised proposal will provide end users with their requested flexibility to manage their access rights.

The Authority notes Aurizon Network's concerns about the Authority's proposed 48 hour reallocation provision but is not convinced that these are insurmountable (subject to changing the period to 2 business days or such other period of time as specified in the System Rules). These concerns relate to:

- (a) strategic gaming by end users – while the Authority acknowledges this as a theoretical possibility, it notes that this is unlikely to occur for two reasons:
  - (i) *lack of information* – end users are unlikely to work out the proportion of railings to aggregate contract paths run by individual train operators to determine who would get preference in a potential CTPDMP at any given time; and
  - (ii) *train operator incentives* – when an under-railing occurs to a particular train operator, the train operator is incentivised to weigh the consequences of fulfilling its haulage obligations to its existing customers (i.e. end users), and not simply accommodating any new customer's reallocation of TSEs to itself to the detriment of other customers;
- (b) the impact of reallocation on supply chain capacity – the Authority does not expect Aurizon Network to accommodate the reallocation unless there is sufficient capacity; and
- (c) risk of misaligning an end user's monthly entitlement with its train operators' access rights – the Authority does not see this as a concern given it should not happen with Aurizon Network applying *due diligence* when allocating TSEs and access rights.

The Authority notes the comments and suggestions raised by Aurizon Holdings (above rail) and considers it appropriate to implement the arrangement for Aurizon Network to respond to an end user's reallocation request within a certain timeframe. On this, the Authority has included amendments to the alternative SAAs so that:

- (a) where a reallocation request is given to Aurizon Network prior to 1200 hours on the Wednesday before the first relevant Intermediate Train Plan (ITP) is finalised, Aurizon Network is to notify the end user and the relevant train operator of its acceptance or rejection within the lesser of 10 business days and the period remaining prior the relevant ITP being finalised (or such other period of time as specified in the System Rules); or
- (b) where a reallocation notice is given to Aurizon Network after 1200 hours on the Wednesday before the first relevant ITP is finalised, Aurizon Network is to notify the end user and the relevant train operator of its acceptance or rejection before the first relevant DTP is settled (or such other period of time as specified in the System Rules).

However, the Authority does not consider Aurizon Holdings' (above rail) remaining suggestions reasonable for implementation.

First, it is not necessary for Aurizon Network to include information on the proportion of access rights remaining in its response (i.e. acceptance or rejection of a reallocation request). This is because Aurizon Network's response itself would provide sufficient information to an end user and its train operators which, accordingly, would allow the determination of the

proportion of access rights remaining. Further, notwithstanding any information on the proportion of access rights remaining, it is noted that an access holder can submit train orders in excess of its nominated weekly entitlement and be scheduled in accordance with the CTPDMP.

Second, a train operator should not have the right to accept or reject an end user's reallocation request, particularly given access rights belong to end users under the alternative SAAs and end users will be incentivised to ensure the train operators that they allocate rights to will be able to utilise those rights.

Third, it is not reasonable for a reallocation request to include each relevant train operator's preliminary assessment of reallocation impact on its ability to comply with obligations under its TOA. This is an operational issue that should be managed between Aurizon Network and relevant train operators.

Following BMA's request for clarification on the coverage of the Authority's proposal, the Authority confirms that it considers that its proposal does not preclude longer term and broader reallocation of access rights. In this regard, it should be noted that any such reallocated access rights (i.e. access rights that have not been scheduled into an ITP and may consist of more than one access right) are not considered ad-hoc train service/s. Instead, these reallocated access rights will be scheduled as per the scheduling principles in the master train plan (if applicable), the ITP, and finally, the DTP (as per Schedule 10 of the TOA).

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**Final Decision 2.3:**

**The Authority requires Aurizon Network to amend its proposal so that:**

- (a) an end user may reallocate its access rights between its approved train operators by giving Aurizon Network at least 2 business days' (or such other period of time as specified in the System Rules) notice before the day of operation;**
  - (b) no minimum variation period is required for reallocating access rights between approved train operators;**
  - (c) it is clear that reallocated train services that are scheduled as ad-hoc services (and ultimately operate) will be treated as utilising part of an end user's contractual entitlements for take-or-pay purposes where notice of the reallocation is given to Aurizon Network at least 2 business days' (or such other period of time as specified in the System Rules) before the day of operation;**
  - (d) Aurizon Network is required to agree, and use its reasonable endeavours to procure its subcontracted infrastructure service providers to agree (for the purposes of clause 4(d)(vi) and clause 4(g) of Schedule 10 of the TOA) to variations required to accommodate a reallocation provided such variations would not result in any existing access holder's scheduled train services not being met or a planned possession not being met – to increase the likelihood of Aurizon Network accepting a reallocation request;**
  - (e) where a reallocation notice is given to Aurizon Network prior to 1200 hours on the Wednesday before the first relevant ITP is finalised, Aurizon Network is to notify the end user and the relevant train operator of its acceptance or rejection within the lesser of 10 business days and the period remaining prior to the relevant ITP being finalised (or such other period of time as specified in the System Rules); and**
  - (f) where a reallocation notice is given to Aurizon Network after 1200 hours on the Wednesday before the first relevant ITP is finalised, Aurizon Network is to notify the end user and the relevant train operator of its acceptance or rejection before the first relevant DTP is settled (or such other period of time as specified in the System Rules).**
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## **2.4 Other Matters**

Beyond the matters discussed and decided above, the Authority notes other matters that were raised in relation to the exercise of access rights, including the 'pre-approval' of train operators and 'overlapping allocation' of access rights. These matters are discussed below.

### **Pre-approval of Train Operators**

While not an option proposed by Aurizon Network, some stakeholders believed that the alternative SAAs should contain arrangements for the 'pre-approval' of train operators by

Aurizon Network. Some stakeholders said that this would provide greater flexibility in utilising their access rights because of the ability to reallocate access rights between train operators in the day of operation environment.

### Draft decision

The Authority did not require any amendment to the alternative SAAs to provide for pre-approval of train operators. The Authority considered the process would introduce unnecessary complexity to Aurizon Network's proposed alternative SAAs, when end users could achieve a similar outcome by nominating one or more train operators that they expect to use over the life of their access agreements – even if it meant apportioning minimal access rights to each train operator (QCA draft decision, pp. 11-12).

### Stakeholders' Views on Draft Decision

While the QRC supported the Authority's alternative suggestion, it said the Authority should reconsider providing for pre-approval. The QRC said pre-approval was important in ensuring compatibility between a train operator and Aurizon Network, for the purpose of commencing a TOA. Further, the QRC argued that pre-approval should be acceptable to Aurizon Network as it is non-binding and will not compromise Aurizon Network's rights to refuse such nomination at a later period (QRC, sub. no. 2: 3).

BMA maintained its view that the Authority should provide for pre-approval, saying that the Authority's jurisdictional concern could be overcome by requiring an end user to certify a reasonable likelihood of it allocating part of its access rights to that potential train operator within a stated period of time. BMA also suggested alternative approaches to pre-approval for the Authority's consideration, including:

- (a) having an expedited process for negotiating TOAs for an existing EUAA, subject to certain operational matters being required for addressing; or
- (b) reducing the timeframes for nominating a train operator for an existing EUAA (BMA, sub. no. 2: 1-2).

### Authority's Analysis and Final Decision

The Authority notes BMA's and the QRC's comments regarding pre-approval but remains of the view that such an approach should not be implemented as it is unclear whether the benefits of pre-approval (particularly if it is non-binding in nature) would outweigh the costs of introducing additional complexity into the alternative SAAs.

The Authority also does not accept that the BMA alternatives to pre-approval are appropriate as the Authority considers the timeframes proposed to be included in the EUAA (i.e. the 10 business days) are already a reasonably expedited timeframe for where an EUAA already exists. The period and process for negotiating a TOA is considered further in the Authority's analysis of necessary consequential amendments (see Chapter 6).

However, given that some stakeholders feel strongly about this issue, it may well be one that can be raised and considered further as part of the Authority's assessment of the replacement undertaking (i.e. UT4).

## Overlapping Allocations

### Draft Decision

The Authority invited stakeholders to comment on the proposed concept of overlapping allocations, an alternative approach which could provide end users with the same flexibility in reallocating access between their approved train operators but making it administratively simpler to do so (QCA draft decision, pp. 13-14).

### Stakeholders' Views on Draft Decision

Stakeholders supported the Authority's proposed concept of overlapping allocations as it provides a high degree of flexibility in managing their access rights without having to formally amend TSEs between TOAs to reallocate access rights between approved train operators (BMA, sub. no. 2: 3; RTCA, sub. no. 2: 12; Vale, sub. no. 2: 2).

However, stakeholders' response to the feasibility of implementing this concept was mixed.

While Vale agreed with the Authority that there is some complexity around the treatment of capacity resumptions (Vale, sub. no. 2: 2), RTCA did not consider any practical or operational reasons that could preclude implementing overlapping allocations (RTCA, sub. no. 2: 12-13). RTCA argued that:

- (a) there was no need to manage reductions in 'nominated rights' granted to train operators, assuming all access rights and TSEs reside with the end user;
- (b) it is unclear why overlapping allocations should have any material impact on Aurizon Network's operations given the same below-rail infrastructure and arrangements are being utilised regardless of the identity of the train operator; and
- (c) the concern regarding notices and contract amendments can be eliminated through negotiations under haulage arrangements, as well as making amendments to the current system rules processes (RTCA, sub. no. 2: 12-13).

### Authority's Analysis and Final Decision

While the Authority notes stakeholders' support for overlapping allocations, it does not consider it appropriate to implement the arrangement at this time for two reasons.

First, the Authority considers that any complexity identified from providing this arrangement would require detailed consideration before implementation is possible. In this regard, it is not clear to the Authority that every complexity surrounding the provision of this arrangement has been readily identified. For example, in addition to the complexities mentioned in the draft decision, the Authority has identified complexities relating to:

- (a) uncertainty about how the CTPDMP (which form part of the NMP in Schedule G of the undertaking) would operate; and
- (b) train operator difficulty in forecasting capacity to provide services as part of a train scheduling process.

In this respect, the Authority is of the view that providing this arrangement requires considerable time to identify and then consider each and every relevant complexity.

Second, the Authority notes that this arrangement is not necessary to give effect to the alternative SAAs, which is mainly focused on splitting the responsibilities/obligations

between the end user and the train operator, and providing flexibility in the utilisation of access rights.

Given this, the Authority considers that this matter is better placed in the upcoming development of the replacement undertaking (i.e. UT4) for consideration and therefore encourages stakeholders to raise it at that point in time.

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**Final Decision 2.4:**

**The Authority does not require Aurizon Network to amend its proposal to provide for a pre-approval of train operators.**

**The Authority also does not require Aurizon Network to amend its proposal to allow an end user to overlap access rights between its approved train operators.**

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### 3. RESPONSIBILITIES NOT CONSISTENT WITH EXISTING STANDARD ACCESS AGREEMENTS

*The Authority's draft decision proposed an appropriate boundary for responsibilities of the end user and train operator under the alternative SAAs, which differs from those in the existing SAAs.*

*End users and operators have mostly accepted the Authority's amendments to the alternative SAAs. Aurizon Network has also accepted most of these amendments in principle but has suggested alternative drafting to that proposed by the Authority in a number of areas in the EUAA and TOA. Aurizon Network, on several occasions, noted that the Authority's initially proposed drafting amendments to these contracts went beyond what the draft decision required.*

*In making this final decision, the Authority has aimed to appropriately preserve the risk profiles of Aurizon Network, end users and operators. The Authority has also borne in mind that haulage agreements lie outside the undertaking's regulatory scope (such that it is not appropriate to simply rely on parties contracting haulage on particular terms to resolve issues that might arise from the TOA/EUAA). The Authority has also considered the requirement that the end user should only be liable for above-rail operational issues where its actions can materially impact on the operator's ability to meet underlying TOA requirements.*

#### 3.1 Billing

Aurizon Network's draft alternative SAAs provided that the end user pay the take-or-pay charges (i.e. charges in respect of access rights unused by operator) and the operator pay the remainder of the access charges (i.e. charges in respect of network usage). They also provided that any disputed amounts concerning access charges could not be arbitrated under the dispute resolution process, on or after the expiry of an access agreement.

##### Draft Decision

The Authority's draft decision required Aurizon Network to amend the EUAA and TOA so end users would have the option to pay all parts of the access charge (i.e. take-or-pay and the usage components).

The Authority considered that both take-or-pay and network-usage charges were essentially compensation to Aurizon Network for providing access to the network. Given that access rights resided with the end user via the EUAA, the Authority considered it was reasonable that the end user have the option to elect to pay all components of the access charge.

The Authority also proposed that the EUAA and TOA be amended so disputed amounts could be resolved after these access agreements expired. The Authority considered this reasonable as disputes could continue beyond the term of the agreements, especially if such disputes were complex. These proposed amendments removed the incentive for contractual parties (i.e. Aurizon Network, end users or train operators) to delay dispute resolution to a period after the expiry of an access agreement.

##### Stakeholders' Views on Draft Decision

Vale and the QRC supported the Authority's amendments to billing arrangements (Vale, sub. no. 2: 4; QRC, sub. no. 2: 4). The QRC also noted that an added advantage of the option for the end user to pay all access charges was that there was no risk of duplicated security requirements for the end user and train operator.

Aurizon Holdings (above rail) said that operators, like end users, should have the option to pay all components of the access charge and for pass-through issues concerning access charges to be negotiated between end users and their nominated train operators. In this context, Aurizon Holdings (above rail) argued:

*...the EUAA, TOA and DAU should not limit the ability of operators to commercially negotiate with its customers for the provision of this service offering. (Aurizon Holdings (above rail), sub. no. 2: 13)*

Further, Aurizon Holdings (above rail) said that the Authority's current drafting assumed that any access charges paid by the operator (i.e. the usage component) are passed in full to the end user (Aurizon Holdings (above rail), sub. no. 2: 13).

Aurizon Network supported the Authority's amendments to dispute resolution arrangements but noted the Authority's proposed drafting for the EUAA and TOA was too broad (Aurizon Network, sub. no. 3: 9). Aurizon Network suggested alternative drafting to give better effect to the Authority's amendments.

### **Authority's Analysis and Final Decision**

The Authority has not changed its position that the EUAA and TOA be required to be amended so end users would have the option to pay all components (take-or-pay and non-take-or-pay components) of the access charges.

But the Authority does not consider it appropriate for the operator to also have this option because this would mean the operator would be responsible for the take-or-pay component as well as the usage charge. This would, among other things, create complications for determining take-or-pay balances if an end user changes allocations between operators part way through the year. This is because take-or-pay charges are annual and are based on the aggregate train services not operated across all of the operators for the end user.

The Authority also accepts that its drafting does not provide for train operators to pass through a portion of the access charge to the end user. However, the Authority notes that it is open for the parties, as part of the separate haulage agreement, to negotiate financial adjustments relating to the components or proportion of access charges to be borne by both parties.

In any event, it is open for train operators and end users to contract under the OAAC (being one of the current SAAs). This option would enable the operator to pay all components of the access charge, and negotiate the extent of pass through of access charges (or a single price for both haulage and the underlying access) to the end user as part of the haulage agreement.

The Authority has also retained its position that disputed amounts can be resolved after the EUAA and TOA expire. In doing so however, the Authority accepts that Aurizon Network's proposed drafting more appropriately achieves this result. This is because Aurizon Network's drafting only provides for the dispute resolution clause to survive termination (which remains sufficient to meet the principles set out in the Authority's draft decision on this point). Given this, the Authority accepts Aurizon Network's proposed drafting on this matter.



**Final Decision 3.1:****The Authority requires Aurizon Network to amend:**

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

**In doing (b) and (c), the Authority accepts drafting amendments proposed by Aurizon Network for Clause 8.6 of the EUAA and Clause 15.6 of the General Conditions of Contract of the TOA.**

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## 3.2 Security

Aurizon Network's draft alternative SAAs required both the end user (under the EUAA) and operator (under the TOA) to each provide security of 12 weeks of access charges.

The draft alternative SAAs did not account for a situation where Aurizon Network unreasonably withholds or delays the acceptance of security provided by the operator.

### 3.2.1 Level of Security

#### Draft Decision

The Authority considered Aurizon Network's proposal unnecessarily increased security requirements beyond those necessary to implement the split form of access agreements. The Authority therefore required the EUAA and TOA to be amended so the level of an operator's security required under the TOA, where the end user elects to pay all components of the access charge, be reduced to the operator's level of deductibles instead of 12 weeks of access charges.

The Authority also required that the end user have the option to provide security for the operator in the event that Aurizon Network did not consider the operator's security acceptable.

#### Stakeholders' Views on Draft Decision

The QRC supported the Authority's position that the level of security required under the TOA should be reduced to the level of an operator's deductibles where the end user pays all components of the access charge. However, the QRC noted an operator's deductibles could exceed 12 weeks of access charges. The QRC said the security required under the TOA in

such cases should be capped at an amount equal to 12 weeks of access charges. The QRC said that this would be consistent with the OAAC (QRC, sub. no. 2: 4).

The QRC also suggested alternative security arrangements where the end user elects to pay take-or-pay charges and the operator pays usage charges. In this regard, the QRC requested that an end user have the ability to guarantee Aurizon Network for any unpaid access charges under the TOA. The QRC said, in this context, security under the EUAA would be 12 weeks of access charges and security under the TOA would be the lesser of 12 weeks of access charges and the deductibles under the operator's insurances (QRC, sub. no. 2: 4).

Conversely, the QRC said the train operator (under a TOA) should have a similar ability to guarantee unpaid charges under the linked EUAA. In this case, security under the TOA would be 12 weeks of access charges, while that under the EUAA would be the lesser of 12 weeks of access charges and the end user's insurance deductibles. The QRC said it recognised this would place the operator in a difficult position if train paths are reallocated by the end user to another operator. However, the QRC noted this risk could be managed via the haulage agreement the operator has with the end user (QRC, sub. no. 2: 4).

Aurizon Network considered that it should have recourse to security provided by the end user where the end user steps in to provide security for the operator (Aurizon Network, sub. no. 3: 9-10).

#### Authority's Analysis and Final Decision

The Authority accepts that where the end user elects to pay all components of the access charge, the train operator should provide security to the lesser value of 12 weeks of access charges or the deductibles under its insurances.

The Authority recognises the possibility that 12 weeks of access charges might be lower than the deductibles of the train operator's insurances. This view is also consistent with the operator's security requirements under the OAAC, where an operator's security is limited to 12 weeks of access charges even if its insurance deductibles might be larger.

Separately, the Authority has maintained its position that the end user can only step in to pay the security of the operator if Aurizon Network deems the security provided by the operator is unacceptable.

Where the end user only pays take-or-pay charges, the Authority does not support the QRC's view that the end user should have the option to guarantee unpaid access (usage) charges of the operator under the TOA, when the Authority is already providing for the end user to have the option of simply accepting primary liability for all access charges in any case. At a broad level, the Authority's view is that security should be matched to the party with the payment/liability obligation. If the end user does not want the operator to have any security obligations for access charges, the end user should exercise its right to pay all components of the access charge. Relevantly, this option is not provided for under the OAAC.

Conversely, the Authority does not consider it appropriate for the train operator to guarantee the unpaid access charges of the end user. As noted in section 3.1 (Billing) above, given the annual nature of the take-or-pay component of the access charge, it is unclear how the security provisions would operate if the end user should switch to another operator during the billing period.

In addition, the Authority accepts that Aurizon Network should have recourse to the security an end user provides when providing security for the purposes of the TOA (i.e. in cases where the operator's security is deemed unacceptable by Aurizon Network). This is because

Aurizon Network would have been entitled to do so had the operator paid acceptable security.

To the extent the security provided by the end user for the purposes of the TOA is separate from the security provided by the end user for the purposes of the EUAA, Aurizon Network should only have recourse to the security provided for the purposes of the TOA for defaults or liabilities arising under the TOA.

### **3.2.2 Other Security Related Matters**

#### **Draft Decision**

The Authority required amendments to the EUAA and TOA so Aurizon Network would be precluded from unreasonably delaying the acceptance of a train operator's security.

The Authority also required amendments to provide for a standard bank guarantee to be appended to the EUAA and TOA, and if security was offered on different terms, then the security must be provided on terms reasonably acceptable to Aurizon Network.

The Authority considered these amendments would expedite and simplify the security requirements for the EUAA and TOA, and not impact on Aurizon Network's risk profile.

#### **Stakeholders' Views on Draft Decision**

Aurizon Network accepted the amendments to the EUAA and TOA (Aurizon Network, sub. no. 3: 9-10).

Vale agreed with the Authority's position but suggested the alternative SAAs stipulate a timeframe of 10 business days for Aurizon Network to consider accepting the operator's security (Vale, sub. no. 2: 4).

#### **Authority's Analysis and Final Decision**

The Authority does not accept that that Aurizon Network needs to consider acceptance of an operator's security within 10 business days. This provision is not contained in the current SAAs and its inclusion is not necessary to effect the alternative form of contracting.

The Authority considers that such changes should be addressed in the context of the next undertaking.

**Final Decision 3.2.2:**

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

- (a) where an end user elects to pay both the non take-or-pay and take-or-pay components of the access charge, the level of the operator's security required under the TOA is the lesser of 12 weeks of access charges and the operator's deductibles;**
  - (b) Aurizon Network is precluded from unreasonably delaying the acceptance of the operator's security and to enable the end user to provide security in the event that Aurizon Network decides the operator's security is unacceptable;**
  - (c) a standard bank guarantee be included in the EUAA and TOA, and if the security offered to Aurizon Network is on different terms, the security must be on terms reasonably acceptable to Aurizon Network; and**
  - (d) Aurizon Network has recourse to security provided by the end user for the purposes of the TOA (in place of the operator), in cases where the end user steps in to provide security where Aurizon Network considers the operator's security unacceptable.**
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### **3.3 Liabilities and Indemnities**

#### **3.3.1 End User Liability for Above-rail Operational Issues**

Aurizon Network's draft alternative SAAs required the end user to indemnify Aurizon Network and third parties for above-rail operational issues in both the EUAA and TOA.

##### **Draft Decision**

The Authority required Aurizon Network to amend the EUAA to remove the requirement for the end user to provide operational indemnities or indemnities relating to the operator's conduct (cl. 8 of the EUAA). The Authority did not consider it appropriate for the end user to be responsible for above-rail operating issues given the contracting structure of the alternative SAAs.

##### **Stakeholders' Views on Draft Decision**

Aurizon Network considered the Authority's proposed drafting to clause 8.3 of the EUAA limited the indemnity to a greater extent than required by the draft decision. Aurizon Network submitted its own drafting for the Authority's consideration (Aurizon Network, sub. no. 3: 10).

Vale supported the Authority's proposed amendments but submitted that clause 8 of the EUAA, though consistent with the current SAAs, reflected an inappropriate risk allocation. Vale noted the Authority:

- (a) had proposed to limit the liability of the end user to third parties for loss or damage that is incurred during transportation to the extent that the end user or its staff contributed to such damage (cl. 8.3 'liability to third parties'). Vale believed that only the train operator should provide an indemnity for loss or damage during transportation on train services, and that clause 8.3 should therefore be removed. Vale said if the Authority intended to retain clause 8.3, then there should be a similar indemnity from Aurizon Network to end users for any loss or damage caused by Aurizon Network or its staff;
- (b) did not provide for end users to elect to use loss-adjustment processes other than those set out under clauses 8.7 relating to 'determination of liability' and 8.8 relating to 'loss adjuster'. Vale said end users should have the option to do this; and
- (c) did not remove the limit on claims for negligence or default occurring within 12 months of notice of the claim being given (cl. 9.2 'limitation on claims'). Vale said the 12 month limit should only apply when the occurrence of the event of circumstances giving rise to the claim ought to have been known. Vale said it is not reasonable that the clause be applicable where the circumstances are beyond the knowledge of the end user.

The QRC supported the Authority's amendment to remove the requirement for the end user to provide an indemnity for the actions of the operator (clause 8.1 of EUAA) but proposed that the following be added to clause 8.1:

*For clarification, nothing in this clause 8.1 requires the End User to indemnify Aurizon Network for an act or omission of an Operator.*

The QRC said this amendment is required because the indemnity relating to the clause is given in respect of matters "arising out of the Agreement" and does not cover issues emerging prior to signing of these agreements (QRC, sub. no. 2: 5).

### Authority's Analysis and Final Decision

The Authority considers that the drafting amendments proposed by Aurizon Network for clause 8.3 of the EUAA are appropriate.

The Authority notes that clause 8.2 of the EUAA relates to Aurizon Network's indemnity to the end user, while clause 8.3 relates to the end user's liability to third parties. There was an asymmetry between the consistency of obligations between clauses 8.2 and 8.3, in that Aurizon Network would be absolved for any damage it caused if it was not deliberately negligent (clause 8.2) while the end user does not enjoy similar protections (clause 8.3). The Authority's draft decision sought to make the clauses consistent by amending clause 8.3 of the EUAA to more closely reflect the criteria under clause 8.2.

However, the Authority notes that the equivalent clauses in the current SAAs (i.e. clauses 14.2 and 14.3) are also asymmetric and align with Aurizon Network's originally proposed EUAA. The Authority's proposed amendment to clause 8.3 of the EUAA would, in this context, change Aurizon Network's risk position relative to the current SAAs. On this basis, the Authority considers Aurizon Network's position on how clause 8.3 of the EUAA should be drafted is more appropriate because it would retain the same risk position for Aurizon Network as under the existing SAAs.

Given this, the Authority also does not accept Vale's view that, if the Authority was minded to retain clause 8.3 of the EUAA, Aurizon Network should provide an indemnity to end users for liability to third parties. This is because Vale's proposed change would make the

alternative SAAs inconsistent with the current SAAs, and alter Aurizon Network's risk position.

Separately, the Authority is not inclined to amend the loss adjustment provisions in the EUAA given they are consistent with the provisions in the current SAAs and any amendment would alter the risk profile of the parties. Notwithstanding this, the Authority notes that clause 8.7 (a) of the EUAA appears to address Vale's concerns as it permits the end user to negotiate an alternative loss adjustment process with Aurizon Network. Indeed, the procedures set out in clauses 8.7 and 8.8 of the EUAA relate to circumstances where the end user and Aurizon Network have failed to reach an agreement about the loss adjustment process to apply.

The Authority does not accept that a liability limitation should only apply to end users when the occurrence of the event giving rise to the claim ought to have been known. This is because the current SAAs do not contain this provision, and the proposed amendment would change the risk profiles of the relevant parties.

Separately, the Authority does not consider that drafting amendments proposed by the QRC to clause 8.1 of the EUAA are necessary to protect the end user for any acts or omissions of the operator. This is because the clause, as already drafted, provides for the indemnity to cover certain acts or omissions of the end user and its staff. The clause does not extend the indemnity to acts or omissions of the train operator (given that at least on the Authority's required drafting, the operator is specifically excluded from the EUAA's definition of End User's Staff).

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#### **Final Decision 3.3.1:**

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

**In doing so, the Authority accepts drafting amendments proposed by Aurizon Network for Clause 8.3 of the EUAA, so that this clause is consistent with Clause 14.3 of the current SAAs.**

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### **3.3.2 Consequential Loss**

Aurizon Network's draft alternative SAAs provided that Aurizon Network would be liable to the operator (under the TOA) for consequential loss for wrongful suspension, audit or inspection. They did not provide that Aurizon Network would be liable to the end user (under the EUAA) for consequential loss.

#### **Draft Decision**

The Authority required Aurizon Network to amend the EUAA, and make other amendments where necessary, to provide that:

- (a) Aurizon Network is liable to the end user for consequential loss for wrongful suspension, subject to the condition that the same loss or damage has not been claimed under the relevant TOA;
- (b) Aurizon Network is liable to the end user for any wrongful audit or inspection under the TOA; and

- (c) the liabilities for consequential loss are to be subject to the same limitations that currently exist in the AAC.

The Authority considered these amendments necessary as the alternative SAAs provide for Aurizon Network to contract with two parties, rather than just one.

### Stakeholders' Views on Draft Decision

Aurizon Network said the Authority's proposed amendments were not appropriate because they would substantially increase Aurizon Network's risk exposure to consequential loss.

Aurizon Network explained that while the drafting of consequential-loss liability provisions in the AAC and the OAAC are very similar, the risk position of Aurizon Network under each form of agreement is different. Aurizon Network said consequential loss under the OAAC occurs when the operator's train service is delayed, while consequential loss under the AAC is triggered by a failure of the operator to transport the end user's coal.

In this context, Aurizon Network said the risk of bearing consequential loss under an OAAC is higher relative to the AAC but the penalty is lower. Aurizon Network argued that under the current SAAs, it is subject to either of those risks but that the Authority's proposed amendments to the EUAA would cause Aurizon Network to have to bear both risks. Aurizon Network considered this to be a significant change to its risk position and unnecessary given the Authority's guiding principle was to, where reasonable, preserve the risk profiles of the entities participating in the alternative SAAs relative to the current SAAs (Aurizon Network, sub. no. 3: 11).

Aurizon Network also said the matters covered by consequential loss are fundamentally related to train operations and therefore belong in the TOA.

Aurizon Network also added that the Authority's initial view in the context of the 2001 undertaking was that consequential-loss provisions were necessary to avoid discrimination between above-rail operators. In particular, Aurizon Network noted the Authority had said<sup>2</sup>:

*...that [Aurizon] Network [should] be subject to liability for consequential losses in certain circumstances. The circumstances identified were those where [Aurizon] Network, as an access provider, had the potential to cause significant damage to a competitor of its related operator, through breaches of the access agreement. This purpose for the original inclusion of the consequential loss liability in the SAAs indicates that, in splitting rights and obligations under the alternate form of SAAs, it is more appropriate to include this provision in the TOA – the agreement with the train operators (who may be competing with [Aurizon] Network's related operator). (Aurizon Network, sub. no. 3: 11).*

Aurizon Network therefore considered it suitable that consequential-loss liability provisions only exist in the TOA.

### Authority's Analysis and Final Decision

The Authority has maintained its position that Aurizon Network should be liable to both the operator and the end user for consequential loss in the event of any wrongful suspension, audit or inspection of the operator's train services.

The Authority accepts Aurizon Network's view that its liabilities for consequential loss under the OAAC (to the operator) and AAC (to the end user) are different. Aurizon Network's liability for consequential loss under the OAAC broadly reflects the loss of profit from haulage operations (or extra costs) borne by the operator as a result of the wrongful

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<sup>2</sup> Final Decision on QR Network's 2001 Draft Access Undertaking, p.12.



suspension, audit or inspection. By contrast, Aurizon Network's liability for consequential loss under the AAC is potentially more substantial and can include the loss of profits from lost coal sales.

However, the Authority does not consider that this justifies Aurizon Network's position that it be only liable to the operator for the above consequential loss.

Any wrongful suspension, audit or inspection that impacts on train operations will also directly impact the end user, whose potential consequential losses suffered may be greater than those of the operator. The Authority does not consider that an end user can effectively manage its access rights if Aurizon Network bears no liability for such wrongful acts.

The Authority notes that one option open to the Authority would have been to limit Aurizon Network's liability to only the end user. However, the Authority considers it necessary to retain Aurizon Network's liability to the operator as any wrongful suspension, audit or inspection will directly impact on an operator's ability to undertake and manage operational matters. This protection is also necessary to constrain Aurizon Network's ability to take action that may harm an above-rail operator that competes with Aurizon Holdings (above rail).

The Authority therefore retains its requirement for proposed amendments to the consequential-loss liability provisions, which provide that Aurizon Network be liable to both the end user and operator, rather than a single party, for such losses.

The Authority accepts that its position will increase Aurizon Network's risk profile relative to the existing SAAs. However, the Authority has noted that, in splitting rights and obligations between the parties, there may be circumstances where the risk profiles of the parties cannot be kept unchanged. The treatment of consequential loss is one such circumstance (and it is not possible to replicate both the positions applying under the AAC and OAAC – which as described above are recognised to be different). The Authority considers its proposed treatment is appropriate to enable end users and operators to manage their access rights and undertake operational matters respectively.

In doing so, the Authority reaffirms its view that Aurizon Network's liability for consequential loss will only apply in very narrow circumstances. This liability is only triggered where:

- (a) no reasonable person in Aurizon Network's position could have formed the view that the relevant grounds for suspension existed; and
- (b) the affected end user took all reasonable measures to mitigate the loss.

Consequently, any increase in Aurizon Network's risk profile arising from this position is very limited.

The Authority has included some additional drafting in clauses 13.8 and 20.3 of the TOA's General Conditions of Contract and clauses 9.5(d) and 13.4 of the EUAA to ensure there is no potential for double counting.



**Final Decision 3.3.2:**

**The Authority requires Aurizon Network to amend Clauses 9.5 and 13.4 of the EUAA and Clauses 13.8 and 20.3 of the General Conditions of Contract of the TOA to provide that:**

- (a) Aurizon Network is liable to the end user for consequential loss for wrongful suspension;**
  - (b) Aurizon Network is liable to the end user for any wrongful audit or inspection under the TOA;**
  - (c) the liabilities to the end user for consequential loss are subject to the same limitations as those in the AAC; and**
  - (d) Aurizon Network is not liable to an operator under the TOA for any loss or damage arising from the operator's liability to the end user in connection with a wrongful suspension, audit or inspection (and Aurizon Network is not liable to the end user under the EUAA for any loss or damage to the end user included in a claim by the operator under a TOA in respect of that wrongful suspension, audit or inspection).**
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**3.4 Rights of Suspension**

Aurizon Network's draft alternative SAAs retained the right to suspend the operation of train services in the TOA, with an acknowledgement of this right in the EUAA. The detailed events and circumstances leading to the suspension of train services were listed in the TOA but not the EUAA.

The TOA provided for Aurizon Network to lift the suspension where the train operator has remedied its default, but does not explicitly require Aurizon Network to do so where the end user has remedied its default.

**Draft Decision**

The Authority required Aurizon Network to amend the EUAA and TOA so:

- (a) the suspension of some or all of an end user's access rights will occur in circumstances pertaining to the end user's contractual obligations (cl. 13, EUAA);
- (b) an end user's suspension for default has to be lifted by Aurizon Network once the default has been remedied and the end user has taken action to prevent its recurrence (cl. 13, EUAA); and
- (c) the nominated operator's rights to operate train services (using the end user's access rights) are only suspended in circumstances pertaining to operational matters (cl. 20, TOA's General Conditions of Contract).

The Authority considered these changes consistent with the intent of the alternative SAAs, which was for the end user and operator to be responsible for managing access rights and operational issues respectively.

## Stakeholders' Views on Draft Decision

Aurizon Network accepted the Authority's draft decision but considered the Authority's proposed amendments to clause 13 of the EUAA could be simplified and did not need to provide for the suspension of a portion of an end user's access rights. Aurizon Network said this clause relates to an end user's overall performance for the access agreement, and not a specific portion of access rights. Therefore, suspension under the EUAA should apply to all of an end user's rights (Aurizon Network, sub. no. 3: 12).

Aurizon Network submitted its own drafting for the Authority's consideration.

## Authority's Analysis and Final Decision

The grounds for suspension of an end user's access rights in clause 13 of the EUAA relate to non-payment of amounts owing, failure to provide security, failure to meet insurance requirements, insolvency events and prohibited assignments.

The Authority accepts Aurizon Network's argument that these grounds relate to the performance of the end user generally, rather than a default that relates to a particular portion of an end user's access rights. The Authority has amended clause 13 accordingly.

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### Final Decision 3.4:

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

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

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

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## 3.5 Termination by Aurizon Network

Aurizon Network's draft alternative SAAs provided that Aurizon Network could, by notice to the operator, immediately terminate the TOA upon the occurrence of certain events or circumstances where a default (such as non-payment of amounts) continues. However, termination could only occur where Aurizon Network has first exercised its rights of suspension.

The draft alternative SAAs also provided that Aurizon Network could terminate the EUAA if the end user failed to comply in any material respect with its infrastructure management obligations (cl. 14, EUAA). In particular, the EUAA provided that the end user must:

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

Relative to the current SAAs, Aurizon Network removed the requirement in the EUAA that it must exercise its rights of suspension prior to terminating the EUAA.

### **Draft Decision**

The Authority did not require changes to provisions in the alternative SAAs relating to Aurizon Network's ability to terminate the EUAA where an end user failed to comply with its infrastructure-management obligations (cl. 14.1(b), EUAA). In doing so, the Authority accepted that Aurizon Network could terminate the EUAA where the end user does not notify Aurizon Network of damage or disrepair it becomes aware of.

The Authority considered that it was reasonable for an end user to notify Aurizon Network of these matters, and that end users would have an incentive to do so anyway as the failure of the network to operate effectively may adversely affect their access rights, especially their liability under take-or-pay arrangements.

Separately, the Authority required Aurizon Network to amend the EUAA so Aurizon Network is precluded from terminating the EUAA for failure by the end user to pay amounts that are under dispute resolution.

The Authority accepted that the above matters are not contained in the current SAAs and, in isolation, their inclusion would impact on the risk profile of the parties. However, the Authority considered that these matters impact on the risk profiles of the various parties in different directions, and are reasonable and consistent with the effective operation of the split contracting structure.

The Authority further required Aurizon Network to provide that the end user is provided with notice and a remedy period prior to termination (i.e. during the suspension period), consistent with what is contained in the TOA.

### **Stakeholders' Views on Draft Decision**

Vale supported the Authority's proposed termination arrangements but strongly argued that clause 14.1(b) of the EUAA should be removed given the:

- (a) condition of the railway is an operational matter and such expertise lies with Aurizon Network and the train operator;
- (b) termination right may be triggered even if the end user was not aware of the extent of the damage and may have assessed that the rail was in operational state due to the lack of expertise;
- (c) end user already has sufficient incentive to pass on any relevant knowledge; and
- (d) liability of assessing damage should lie with Aurizon Network and not the end user (Vale, sub. no. 2: 4).

Aurizon Network raised a number of issues on the drafting proposed by the Authority for clause 14 of the EUAA.

Regarding the draft decision to preclude Aurizon Network from terminating the EUAA for failure by the end user to pay amounts that are under dispute resolution, Aurizon Network considered the Authority's proposed amendments were not necessary to give effect to the alternative SAA structure but undertook to implement them.

However, in doing so, Aurizon Network argued that it too should be protected from a scenario where the end user wanted to terminate the EUAA for failure by Aurizon Network to pay amounts under dispute resolution. Aurizon Network considered that clauses 14.2 (c) of the EUAA and 21.2(c) of the TOA's General Conditions of Contract needed to be amended to reflect this.

Regarding the draft decision to ensure the end user is provided with notice and remedy period prior to termination, Aurizon Network accepted the decision but wanted to amend the drafting to take account of the fact that not all termination events give rise to a right of suspension. Aurizon Network said the Authority's drafting proposed that termination can only occur once Aurizon Network has exercised a right to suspend. Aurizon Network proposed amendments to clauses 14.1(g) of the EUAA and 21.1 of the TOA's General Conditions of Contract to reflect this(Aurizon Network, sub. no. 3: 12).

### **Authority's Analysis and Final Decision**

The Authority has maintained its position that the end user should advise Aurizon Network of any incidents on the network that the end user becomes aware of. As outlined in the Authority's draft decision, if the end user is already incentivised to inform Aurizon Network about such faults, then being prescriptive in the EUAA about this matter should not materially affect end users.

In relation to the issue of lack of expertise of the end user, the Authority notes that if the end user fails to discover or become aware of the issue with the network because of their lack of expertise, they will not be in breach of clause 6 of the EUAA (because it is based on requiring notification of issues actually discovered or of which the end user has actual awareness).

The Authority has therefore maintained its position that Aurizon Network can terminate an end user's access rights if the end user fails to report damage or disrepair to the network of which it has become aware.

The Authority accepts Aurizon Network's position that end users should not be able to terminate an EUAA because Aurizon Network has not paid amounts that are under dispute resolution – Aurizon Network's argument is reasonable as all contracting parties should be protected from these risks.

The Authority also accepts that there are certain circumstances where Aurizon Network can terminate an EUAA without first issuing a suspension notice. For example, Aurizon Network need not issue a suspension notice if wanting to terminate an end user's access where rights where the end user has caused an obstruction to the rail network. In light of the above, the Authority accepts the principles proposed by Aurizon Network (although it has varied the drafting slightly from that proposed by Aurizon Network).

**Final Decision 3.5:**

**The Authority requires Clause 14 of the EUAA and Clause 21.2(c) of the General Conditions of Contract of the TOA be amended so both Aurizon Network and the end user are precluded from terminating the EUAA for failure by the respective parties to pay amounts that are under dispute resolution.**

**The Authority requires Clause 14 of the EUAA be amended such that:**

- (a) the end user is provided with notice and a remedy period (where suspension occurs) prior to termination; and**
- (b) Aurizon Network is to provide the end user with a copy of any termination notice provided to the operator.**

**In doing so, the Authority requires Aurizon Network to amend Clause 14.1 of the EUAA and Clause 21.1 of the General Conditions of Contract of the TOA, to reflect there being certain circumstances where Aurizon Network can terminate an EUAA without first issuing a suspension notice.**

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### **3.6 Weighbridges and Overload Detectors**

Aurizon Network's draft alternative SAAs provided that the operator can request the accuracy of weighbridge or overload detector be tested (cl. 3, TOA's General Conditions of Contract). The TOA also provided that the party who requests the test pays the cost of the test if the weighbridge or overload detector is accurate. Conversely, the cost of the test is borne by the party responsible for the weighbridge or overload detector if the detector is found to be inaccurate.

The EUAA did not contain this requirement.

#### **Draft Decision**

The Authority's position was that Aurizon Network should amend the EUAA to also contain these requirements, namely that:

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

#### **Stakeholders' Views on Draft Decision**

Aurizon Network and Aurizon Holdings (above rail) accepted the Authority's reasoning but identified a drafting error in the Authority's draft decision box on this matter (Aurizon Network, sub. no. 3: 13; Aurizon Holdings (above rail), sub. no. 2: 13) – although the same error was not repeated in the detailed EUAA drafting provided on this issue in the draft decision.

## Authority's Analysis and Final Decision

The Authority has rectified this error in the final decision.

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### **Final Decision 3.6:**

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

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

*The relationship between the operator and the end user should largely be governed by the terms of the haulage agreement, which is an above-rail agreement and is not subject to regulation by the Authority. The Authority accepts that Aurizon Network should not be unnecessarily drawn into matters relating to the relationship between the operator and the end user. Stakeholders, like Aurizon Holdings (above rail), accepted that position.*

*However, in its draft decision, the Authority considered that this would not always be possible as implementing the alternative SAA structure requires more than allocating existing access responsibilities and obligations between an operator and end user. This is because the actions of the operator can impact on the end users, and vice versa.*

*In some circumstances, the alternative SAA structure may require additional provisions to manage the risks created from the splitting the obligations and responsibilities under the current SAAs. These largely relate to Aurizon Network's notices to the train operator being copied to the end user, and vice versa.*

*The Authority accepted provisions that are necessary to ensure that the risk profiles of the parties are commercially balanced, or are otherwise appropriate, to effectively implement the split contracting structure. Where the risk profiles of the parties are proposed to be unnecessarily altered compared with the current SAAs, the Authority has rejected these changes.*

### 4.1 Background

The current SAAs contain provisions that require Aurizon Network to notify end users and operators on a range of issues – including notices relating to suspension, termination and train service entitlements.

In providing for the split contracting structure, in some cases, Aurizon Network maintained a requirement to notify one contracting party (i.e. the end user or the operator) even though Aurizon Network's actions could also impact on the other contracting party.

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

In its draft decision, the Authority acknowledged that the actions and outcomes in respect of the TOA or the EUAA can have implications for the end user and operator respectively. The Authority also accepted that, as a general principle, end users and operators should be made aware of changes in the other's contract that impact upon them.

This enables the parties to take measures to better protect and manage their commercial interests, and is consistent with an effective SAA structure that allows end users to contract for access rights and operators to contract for train operations. Stakeholders' responses to the Authority's draft decision focussed on two key aspects of the aforementioned notice arrangements, namely: the notice of defaults by operators; and notice of variations in train services.

## 4.2 Notice Requirements for Defaults by Operators

Aurizon Network's draft alternative SAAs required Aurizon Network to give TOA default notices to the operator but not the end user.

### Draft Decision

The Authority required Aurizon Network to amend:

- (a) the EUAA and TOA to impose an obligation on Aurizon Network to issue notices to, and consult with, the end user for any extended non-performance due to force majeure (cl. 12, EUAA; cl. 19, TOA's General Conditions of Contract);
- (b) the EUAA to provide suspension and termination notices under the TOA to the end user (cls. 13 and 14, EUAA); and
- (c) the TOA to require Aurizon Network to provide suspension notices under the TOA to the end user (cl. 20, TOA's General Conditions of Contract).

The Authority considered these changes necessary as any action that leads to a suspension or termination of an operator's TOA will impact on the end user's ability to utilise its access rights.

### Stakeholders' Views on Draft Decision

Aurizon Network accepted providing information about operator defaults to the end user but was concerned about confidentiality.

Aurizon Network accepted the Authority's position in (a) above – it said it was willing to give end users a copy of the notice going to the operator because force majeure notices do not contain any confidential information regarding an operator's performance (Aurizon Network, sub. no. 3: 14).

Aurizon Network also accepted that it is reasonable to notify the end user of any suspension or termination as per (b) and (c) above. However, Aurizon Network proposed to only notify the end user of the fact of that suspension or termination, and not to provide the end user with a copy of the actual suspension/termination notice issued to the operator. Aurizon Network said this approach still gives the end user notice that an event has occurred, while ensuring that the discussion on the performance issues triggering the notice remain between the operator and the end user (Aurizon Network, sub. no. 3: 14).

### Authority's Analysis

The Authority notes Aurizon Network's position that, given confidentiality concerns, end users should be provided with notification of the suspension or termination, rather than the actual notice that is issued to the operator.

The Authority accepts that operators may consider it is commercially sensitive how they are alleged to be in default. However, a key intent of the alternative SAAs is to provide end users with greater control over their access rights. Given this, the Authority considers it appropriate that end users are able to obtain information on why its nominated operator(s) is potentially facing suspension or termination.

This information will also assist end users to assess whether it is in their commercial interests to change operators or to seek to have the operator rectify the default, potentially via enforcing rights the end user may have against the operator under the haulage agreement.



The Authority also notes that this position is consistent with the AAC, which effectively provides for the end user to receive information about an operator's performance in a suspension or termination notice (where suspension or termination triggers under the AAC can occur due to actions of the operator).

To ensure such disclosures are permitted, the Authority has amended the drafting of the TOA to expressly recognise that both the operator and Aurizon Network may disclose to the end user information and notices arising from, or in connection with, the TOA or the operational rights. These disclosures would only apply where they are required by the terms of the TOA or the relevant EUAA.

The Authority further notes there is no material cost difference in Aurizon Network sending the operator and end user copies of default notices under the TOA, compared with sending these to the operator while informing the end user that the notices have been issued to the operator. In fact, it is likely less costly to do the former. This position is consistent with Final Decision 3.5 above.

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**Final Decision 4.1:****The Authority requires Aurizon Network to amend:**

- (a) **Clause 12 of the EUAA and Clause 19 of the General Conditions of Contract of the TOA, to impose an obligation on Aurizon Network to issue notices to, and consult with, the end user for any extended non-performance due to force majeure;**
  - (b) **Clauses 13 and 14 of the EUAA to provide suspension and termination notifications under the TOA to the end user;**
  - (c) **Clause 20 of the General Conditions of Contract of the TOA to require Aurizon Network to provide suspension notifications under the TOA to the end user; and**
  - (d) **Clause 16.3 of the EUAA and Clause 23 of the General Conditions of Contract of the TOA to reflect the above requirements to give such notices and require notices to similarly be given for other provisions providing suspension or termination rights identified by the Authority.**
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### 4.3 Notice Requirements for Train Services

Aurizon Network's draft alternative SAAs provided that Aurizon Network is not required to consult with, or provide notice to, the end user prior to making any variation to the TOA, although the end user can subsequently dispute the variation.

The Authority considered that the terms of a train service description are critical to the ability of end users to utilise their underlying access rights. Given this, the Authority proposed changes to the draft alternative SAAs to require Aurizon Network to provide end users with early warning of potential issues in the performance of a TOA, thereby better enabling them to manage their access rights.

These matters are discussed below.

## Provision of notices

### Draft Decision

The Authority proposed that any notices relating to a variation in an operator's train service description be provided to the end user.

### Stakeholders' Views on Draft Decision

The QRC said that the Authority's decision to provide notices to the end user in certain circumstances (i.e. suspension and termination of access rights) did not go far enough. Rather, the QRC said it would be more appropriate for Aurizon Network to copy all notices and information exchanged under the TOA to the end user.

The QRC also said if the Authority is not minded to require this, then end users should be notified of events in respect of the TOA in the following circumstances (in addition to those notices already accepted by the Authority):

- (a) any proposal or agreement to vary the TOA;
- (b) any notice relating to an existing or proposed assignment of the TOA; and
- (c) any waiver of a right under the TOA.

The QRC also considered it important that the end user receive timely provision of notices given under the TOA, because the exercise of access rights and obligations under the TOA would potentially impact on the end user.

In this context, the QRC said, where Aurizon Network is required to give the end user a notice under the TOA, Aurizon Network should be obliged to give the notice as soon as reasonably practicable to the end user. The QRC noted the current drafting does not oblige Aurizon Network to give these notices to the end user within any time period (QRC, sub. no. 2: 6).

### Authority's Analysis and Final Decision

The Authority considers it important for end users to be made aware of circumstances or events relating to train operations that may impact on the utilisation of their access rights.

However, the Authority does not consider it appropriate for the end user to be provided copies of all notices sent to the operator. This may impose an unnecessary compliance burden on Aurizon Network or make Aurizon Network disclose confidential or commercially sensitive information that is unrelated to the end user's utilisation of its access rights.

Rather, the Authority considers that only TOA notices that compromise, or can potentially compromise, the end user's ability to manage its access rights should be copied to the end user. For example, in this final decision, the Authority has required Aurizon Network to provide TOA suspension and termination notices to the end user (see section 4.2 above).

The QRC has raised a number of concerns about TOA notices that it believes should be copied to the end user (QRC, sub. no. 2: 6).

The Authority does not accept the QRC's argument that Aurizon Network should provide notices regarding an existing or proposed assignment of the TOA to the end user. The

Authority considers that the haulage agreement is a more appropriate place to require the operator to notify its end user about any assignments of the relevant TOA.

However, the Authority accepts the QRCs position that Aurizon Network should notify the end user of any waiver of rights under the TOA that are most pertinent to the end user's access rights.

In particular, the Authority requires that Aurizon Network provide TOA notices to the end user regarding the waiver of rights relating to suspension or termination. However, the Authority does not consider this requirement should extend to notices of other waivers; this is because these notices are not as important to the end user's management of its access rights relative to suspension or termination. Further, the Authority considers that implementing this requirement would not be justified given the additional administrative burden that would be imposed on Aurizon Network. In any event, the end user can, via its haulage agreement, negotiate with the operator to be made aware of these waivers.

The Authority separately considers it important that operators be made aware of EUAA notices that could materially affect their business interests. In this regard, the Authority requires Aurizon Network to send EUAA notices to the operator on the following matters relating to the end user:

- (a) suspension;
- (b) termination;
- (c) reduction, relinquishment, transfer; and
- (d) exercise of access rights.

The Authority also accepts the QRC's concern that Aurizon Network did not have any timelines imposed on it to provide a copy of notices given under a TOA to the related end user. The Authority considers that there should be a requirement for Aurizon Network to distribute these TOA notices to the operator and end user at the same time.

Similarly, the Authority considers Aurizon Network should distribute EUAA notices (outlined in (a) to (d) above) to the end user and operator at the same time.

### **Options for end user to mitigate operator's non-compliance with train service description**

#### **Draft Decision**

The Authority required the EUAA and TOA be amended so an end user has a right to first withdraw or vary (if appropriate) its nomination of a non-compliant operator before Aurizon Network commences the process of consulting with the operator and the end user to vary the train service description.

The Authority also required that the end user be promptly notified where an operator is not complying with a train service description in any material respect.

#### **Stakeholders' Views on Draft Decision**

Aurizon Network said:

*... it is difficult to see what actions an end user can take under the EUAA to rectify the operator's non-compliance with its train service description, as the end user has no operational responsibilities (Aurizon Network, sub. no. 3: 14).*

Rather, Aurizon Network said that an end user has only three options in these circumstances, namely to:

- (a) change the operator;
- (b) amend the train service description to match operator performance; or
- (c) require the operator take action to comply through the haulage agreement.

Aurizon Network said the EUAA should more clearly reflect these options and place timeframes around this process to ensure the matter is addressed in a timely manner. In this context, Aurizon Network proposed that:

- (a) the end user would be notified of the operator's non-compliance;
- (b) Aurizon Network would use reasonable endeavours to consult with the operator and end user to rectify the issue;
- (c) the end user have the opportunity, within a nominated timeframe, to procure operator compliance or reallocate rights (some or all) to another operator;
- (d) following the expiry of that timeframe, to the extent that operator compliance has not materialised, Aurizon Network would consult with the end user and operator regarding required amendments to the train service description, and would implement these amendments; and
- (e) the end user would be provided with at least 30 days to nominate an alternative operator (in accordance with its right to do so under the EUAA) (Aurizon Network, sub. no. 3: 15).

Aurizon Network included drafting to implement these suggestions in the EUAA and TOA (cl. 5, EUAA; cl. 6, TOA's General Conditions of Contract).

Separately, Aurizon Holdings (above rail) was concerned that the Authority's amendment to allow an end user to withdraw or vary its operator nomination was not appropriate given this dramatically increased commercial risks borne by the operator.

Aurizon Holdings (above rail) noted that, under the current SAAs, the consequences to the access holder of changes in the service level (including the train service description) are managed through the haulage agreement. It said the risk to the access holder of Aurizon Network negligently altering the train service description is mitigated by the consultation process and access to dispute resolution (Aurizon Holdings (above rail), sub. no. 2: 14).

Aurizon Holdings (above rail) said the Authority's proposed amendments allowed the end user to vary the nomination of the operator prior to any consultation or dispute about any variation proposed by Aurizon Network. It argued these amendments increased the risk and consequence to the operator of changes in service levels, and did not adequately protect the operator's commercial interests.

In this context, Aurizon Holdings (above rail) requested clause 5(b)(i) of the EUAA, which relates to the ability of the end user to rectify any operator non-compliance (including

nominating an alternative operator), be removed given it unjustifiably increased the risk profile of the operator (Aurizon Holdings (above rail), sub. no. 2: 14).

### Authority's Analysis and Final Decision

The Authority accepts that Aurizon Network should be able to vary the train service description if the operator is not materially complying with the description and has failed to demonstrate its ability to consistently comply with this requirement in the future.

The Authority also accepts that an end user should be able to withdraw or vary its operator nomination to address its existing operator's non-compliance with the train service description.

However, the Authority recognises that the EUAA (as amended as per the Authority's draft decision) could be read as suggesting the end user can directly rectify operational matters, when such abilities clearly relate to the operator.

The Authority agrees with Aurizon Network that the EUAA should instead clearly identify the options end users have to address a risk of the operator not complying with the train service description.

Given this, the Authority considers it reasonable that both the operator and the end user be notified of the operator's non-compliance before the end user has the option to withdraw or vary its nomination of that operator.

The Authority also considers it appropriate that there be a fixed time period for the end user to respond to its operator's non-compliance. In this context, the Authority accepts Aurizon Network's proposal to give 30 days to the end user to:

- (a) procure compliance from the operator for the train service description; or
- (b) nominate an alternative operator.

The Authority accepts Aurizon Holdings' (above rail) position that the end user should not be able to withdraw or vary its nomination of an operator prior to any consultation process between Aurizon Network, the end user and the operator.

As noted above, the Authority considers it reasonable that both the operator and the end user be notified of its operator's non-compliance with the train service description, and that this must happen before the end user can withdraw or vary its nomination of that operator.

However, the Authority does not accept Aurizon Holdings' (above rail) view that the risk and consequences to end user of its operator's non-compliance with the train service description be contained only in the haulage agreement. This is because the intent of the alternative SAAs is to give greater flexibility to end users to control their access rights. A key example is the ability to renominate operators in the event an existing operator is non-compliant. This promotes above-rail competition because existing operators would be incentivised to perform appropriately to avoid a withdrawal or variation of its nomination from occurring.

It is of course possible that operators and end users may negotiate other restrictions on the ability of the end user to change allocations of the operator, but that is a matter for the negotiation of the haulage agreement.

The Authority acknowledges the possibility that Aurizon Network may negligently alter the train service description, and that this would adversely affect the operator if/when the end

user decides to nominate another operator. However, the end user would have the ability to dispute the changes to the train service description.

The Authority notes this renomination ability increases the risk borne by operators relative to the current SAAs (where at least under an OAAC the access rights themselves are held by an operator and changing operators is only possible under the customer-initiated transfer provisions in the undertaking), but this ability is necessary to reflect the intent of the alternative SAAs.

## Performance level variations and material changes

### Draft Decision

The Authority required amendments to the EUAA and TOA so the operator and Aurizon Network could agree on variations to the performance levels established under the TOA and any associated variations to the train service description, but only once they had secured the end user's consent (cl. 5, EUAA; cl. 6, TOA's General Conditions of Contract).

The Authority also required amendments to the EUAA and TOA so the end user and operator can become aware of, and seek to influence, the outcomes of any dispute resolution process that are likely to affect both parties.

### Stakeholders' Views on Draft Decision

Aurizon Network said the Authority's proposed amendment to performance level variations is unnecessary and brings the end user into matters that are operational. Aurizon Network said the TOA already:

*...provides that, to the extent that [a] change in performance levels impacts the train service description or the amounts payable, that the change is subject to and conditional upon the required amendments being made to the EUAA. (Aurizon Network, sub. no. 3: 15)*

Aurizon Network reasoned that this already ensures that changes to performance levels affecting matters in the EUAA can only be made with the end user's agreement (Aurizon Network, sub. no. 3: 15).

### Authority's Analysis and Final Decision

The Authority has maintained its position that variations for performance levels pertaining to the TOA and train service description should only be made with the consent of the end user.

The Authority does not accept Aurizon Network's view that the EUAA should not consider changes in the operator's TOA or performance levels (i.e. compliance with the train service description) that do not affect access charges.

The Authority considers that such changes may affect other non-charge related matters that the end user may deem important. Therefore, the Authority's position is that all performance level variations should require the end user's consent.

Separately, the Authority did not receive further submissions about the 'material change' regime. This regime refers to changes to laws and taxes, among other things, that have a material impact on the access tariffs Aurizon Network charges its customers.

Under the billing arrangement where the operator pays the usage component of the access charge, the Authority's draft decision provided for a material change regime in both the EUAA and TOA.

However, the draft decision prevented Aurizon Network from triggering a review under a clause in one agreement if it had already done so under the other agreement. It also did not provide that the operator/end user could be involved in the relevant negotiation or join the other relevant end user's/operator's dispute about the resulting changes to access tariffs.

Given that a material change is likely to increase amounts payable by both the end user and operator where such billing arrangements are adopted, the Authority has included the operator (where those billing arrangements are being used) in the material change process provided for in the EUAA.

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**Final Decision 4.2**

The Authority requires amendments to Clauses 5, 10 and 16 of the EUAA and Clauses 6, 17 and 23 of the General Conditions of Contract of the TOA, and any other aspects of the proposed alternative SAAs where relevant, such that:

- (a) TOA notices relating to the end user's ability to utilise access rights be copied to the end user;
  - (b) EUAA notices relating to the operator's commercial interests be copied to the operator;
  - (c) end users receive such TOA notices at the same time as the operator;
  - (d) operators receive such EUAA notices at the same time as the end user;
  - (e) the end user is promptly notified where the operator is not complying in any material respect with the train service description under a TOA and fails to demonstrate its ability to consistently comply with the description when requested to do so by Aurizon Network;
  - (f) Aurizon Network can vary the train service description subject to first notifying the end user and operator of the operator's material non-compliance and its failure to demonstrate future compliance, and providing at least 30 days to the end user to:
    - (i) procure the operator's compliance with the train service description; or
    - (ii) nominate an alternative operator to provide the relevant train services;
  - (g) only with the consent of the end user, the operator and Aurizon Network may agree on variations to the performance levels established under the TOA and any associated variations to the train services description;
  - (h) an end user has the option to join a dispute regarding train services but is also bound by the outcome of the dispute resolution process; and
  - (i) where the operator is paying the usage component of the access charges and the end user is paying take-or-pay charges, both the end user and operator should be involved in the process in respect of proposed changes to the access charges payable where a 'material change' has occurred.
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**4.4 Ancillary services agreement**

Ancillary services refer to, among other things, the repositioning of trains on the network for purposes of maintenance and provisioning. The existing SAAs and Aurizon Network's proposed TOA provided a schedule in which any ancillary services contracted could be included.



Aurizon Network's draft alternative SAAs did not consider the treatment of ancillary services required by the train operator any further as part of fulfilling its operational responsibilities under a TOA.

### **Draft Decision**

The Authority's draft decision did not consider ancillary services given no stakeholder had previously raised this matter.

### **Stakeholders' Views on Draft Decision**

Asciano noted that the alternative SAAs permit end users to hold access rights directly while operators are nominated by the end users to use those rights. In this context, Asciano considered that the alternative SAAs would require an ancillary services access agreement since operators needed to undertake movements on the network not directly linked to its contracting end users' access rights (Asciano, sub. no. 2: 2).

Asciano said current ancillary movements (e.g. required for maintaining and provisioning trains) are charged reference tariffs as if they are coal-carrying train services. In this regard, Asciano noted Aurizon Network was earning reference tariffs for network usage not regulated by the Authority. To address this, Asciano said a single ancillary services access agreement for each operator would be appropriate in light of the above (Asciano, sub. no. 2: 2).

### **Authority's Analysis and Final Decision**

The Authority does not accept that a single ancillary services access agreement is required to give effect to the alternative SAAs. The TOA provides for the operator and Aurizon Network to negotiate for ancillary services; this is consistent with the provisions in the current SAAs (cl. 3 and schedule 11, AAC; cl. 3.4 and schedule 11, OAAC).

Given this, including an ancillary services agreement in the alternative SAAs may change the risk profile of the parties beyond that appropriate to effect the split form of agreements.

Notwithstanding this, the Authority notes Asciano's concerns about Aurizon Network earning reference tariffs on train services not considered coal-carrying train services. The Authority suggests this matter be raised in the context of the next undertaking (and the related SAAs).

## 5. RESPONSIBILITIES CONSISTENT WITH EXISTING SAAS

*Stakeholders have sought some amendments to Aurizon Network's draft alternative SAAs on the basis that they differ from the existing arrangements. Aurizon Network has also made similar comments on stakeholders' submissions.*

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

### 5.1 The Authority's Approach

The Authority's draft and final decisions have focussed on implementing a split contracting structure that provides greater flexibility to end users in managing their access rights, while not being responsible for operational matters.

In doing this, the Authority is not seeking a fundamental redraft of other aspects of the alternative SAAs. Rather, the Authority has focussed on changes appropriate to implement a split contracting structure that allocates rights and responsibilities between the end user and the operator. These matters are outlined in the preceding chapters. In doing so, the Authority has considered it appropriate to retain unchanged, where possible, the risk profiles of the parties, as they are outlined in the current SAAs.

The Authority recognises that stakeholders have raised a range of other concerns relating to the application of existing provisions in the current SAAs. Where these matters impact on the risk profiles of the various parties and are not necessary to appropriately implement a split contracting structure, the Authority has not addressed these matters in this decision. Rather, the Authority invites stakeholders to raise these matters in the context of Aurizon Network's pending submission of its proposed 2013 draft access undertaking (i.e. UT 4).

The concerns of stakeholders on responsibilities in the alternative SAAs that are consistent with the current SAAs are outlined below.

### 5.2 Force Majeure

Aurizon Network's draft alternative SAAs retained the force majeure provisions from the existing SAAs, which included:

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

#### Draft Decision

The Authority's draft decision did not require any changes to the force majeure provisions.

#### Stakeholders' Views on Draft Decision

Vale said the force majeure provisions in the alternative SAAs were too ambiguous and broad. As an example, Vale said the definition of 'good engineering practices' in these provisions is vague and will likely lead to disputes between parties. Vale also noted:

*...the provision which allows [Aurizon] Network to determine whether to replace assets damaged by a force majeure event is not market standard nor appropriate. These provisions are significantly weighted in the favour of [Aurizon] Network (Vale, sub. no. 2: 5).*

Vale submitted it understood the Authority's position of ensuring consistency between the current and alternative SAAs, but said it is more important that the alternative SAAs contain an appropriate risk allocation (Vale, sub. no. 2: 5).

### Authority's Analysis and Final Decision

The Authority notes that Vale's proposed changes alter the risk profiles of the parties in a way not required to implement the alternative form of contracting. The Authority has therefore maintained its position not to amend Aurizon Network's proposals relating to force majeure in the alternative SAAs.

## 5.3 Adjustment to Capacity

Aurizon Network's draft alternative SAAs maintained the provisions relating to capacity adjustment from the existing SAAs, including retaining an ability for Aurizon Network to:

- (a) reduce access rights:
  - (i) if the operator, for any reason other than the occurrence of a force majeure event or the failure of Aurizon Network to make the access rights available, does not operate over any four consecutive quarters with at least 85% of its train services allowed under its train service description for that period (an anti-boarding provision);
  - (ii) where the change in existing capacity, due to an infrastructure enhancement, is greater than planned and insufficient to provide all conditional access holders with their conditional access rights; and
- (b) terminate the underlying access rights that have been reduced, relinquished or transferred (cl. 4.1, EUAA).

### Draft Decision

The Authority largely accepted Aurizon Network's proposal. However, the Authority proposed to amend the EUAA, so Aurizon Network must promptly amend the relevant TOA whenever any resumption of access rights under the EUAA has been effected (cl. 4.1(g), EUAA).

### Stakeholders' Views on Draft Decision

Aurizon Network proposed to remove clause 4.1(g) of the EUAA because it considered clause 2.3(h) already accounted for resumption of access rights under the EUAA having to flow through to the TOA (Aurizon Network, sub. no. 3: 16)

Separately, Vale said the Authority's amendments concerning resumption rights may increase the risk profile of individual end users (Vale, sub. no. 2: 3).

Vale said that under the OAAC (where the operator holds the access rights of multiple end users), the current resumption provisions in clause 7.3.5 of the undertaking are triggered where less than 85% of all operator's train services have operated over four consecutive quarters. In other words, where multiple end users are linked to a single OAAC, the 85% threshold applies to an average across the train operator's portfolio.

Vale was concerned that the Authority's proposed amendments to clauses 4.1(a) of the EUAA and 7.3.5(a) of the undertaking may mean that, under the alternative structure where an end user contracts under an EUAA, the 85% resumption threshold would apply to a single end user's access rights.

Vale said:

*[i]f this is correct that the trigger previously applied to the entirety of a Train Operator's portfolio and now will apply to each individual coal producer then there has been a significant change in the risk profile in terms of the application of resumption rights for individual coal producers (Vale, sub. no. 2: 3).*

### Authority's Analysis and Final Decision

The Authority has maintained its position that the EUAA should include a requirement for Aurizon Network to vary the TOA to reflect any resumption of rights for the end user. However, the Authority has considered and has accepted Aurizon Network's comments. Accordingly, the Authority requires deletion of clause 4.1(g) and amendment of clause 2.3(h) of the EUAA to remove the overlap of those provisions.

The Authority notes Vale's view that the Authority's amendments to resumption rights in the EUAA may increase the risk profile of individual end users. However, the Authority has maintained its position that resumption notices in the EUAA pertain to the end user's train service entitlement, and not those held collectively by its operator.

The Authority notes this position is no different to a situation where an end user holds access rights directly under an AAC (or an operator who holds access rights for a single end user under an OAAC). A trade-off of the alternative SAAs (and the AAC) is that an end user becomes more directly accountable for its own under-utilisation when choosing to hold access rights directly.

The Authority considers that end users valuing the capacity-resumption benefits (and any other benefits) under the OAAC more greatly than the increased control of access rights under the alternative SAA framework, should continue to be able to elect to have operators contract their required access rights under the OAAC. It is not appropriate that end users request more flexibility regarding their control of access rights but also seek the benefits that may accrue to operators, as access holders, under the OAAC.

In addition to the matters raised in 5.2-5.3 above, stakeholders have raised concerns on the draft decision that were not previously raised on Aurizon Network's original proposal. These are discussed below.

## 5.4 Assignment by End User

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

Aurizon Network's draft alternative SAAs provided that Aurizon Network may not unreasonably withhold its consent to an assignment by an end user or operator of its rights under the access agreement (cl. 15.2, EUAA).

### Draft Decision

The Authority's draft decision did not require any changes to the provisions relating to the assignment by end user.

### **Stakeholders' Views on Draft Decision**

BMA argued that the current test for assignment of a TOA is subjective and suggested it should be replaced with an objective test. In particular, BMA said the test should be aligned with the corresponding test for Aurizon Network rejecting an end user's nomination of an operator (or variation of a nomination) under the EUAA, including a reasonableness requirement (BMA, sub. no. 2: 2).

Vale argued that an end user should be able to assign its rights and obligations under the EUAA without the prior written consent of Aurizon Network where the assignment is to a related body corporate of the end user. Vale also said that once these rights and obligations are assigned to the related body corporate, the end user should not remain liable for the performance of the duties and obligations under the EUAA (Vale, sub. no. 2: 5).

### **Authority's Analysis and Final Decision**

The Authority notes that Aurizon Network has retained the provisions unchanged from the current SAAs. As such, the proposed changes requested by BMA and Vale alter the risk profiles of the parties in a way not required to implement the alternative form of contracting. The Authority has therefore maintained its position not to amend Aurizon Network's proposal relating to assignment of the end user under the alternative SAAs.

## **5.5 Reporting on consumption of train service entitlements**

Aurizon Network's draft alternative SAAs did not require Aurizon Network to provide monthly updates on year-to-date usage of train service entitlements (cl. 3.2(f), EUAA).

### **Draft Decision**

The Authority did not require any amendments to clauses of the alternative SAAs relating to reporting on consumption of train service entitlements.

### **Stakeholders' Views on Draft Decision**

BMA argued that the accounting governance arrangements in the EUAA are inadequate. In this regard, BMA suggested that the EUAA be amended to require Aurizon Network to provide monthly updates to the end user on year-to-date usage of contracted quantities and any estimated take-or-pay liabilities (BMA, sub. no. 2: 3).

### **Authority's Analysis and Final Decision**

The Authority notes that Aurizon Network has retained the reporting provisions unchanged from the current SAAs. As such, the Authority notes that BMA's proposed changes alter the obligations of the parties in a way that is not required to implement the alternative form of contracting. The Authority has therefore maintained its position not to amend Aurizon Network's proposals relating to reporting regarding the consumption of train service entitlements in the alternative SAAs.

## **5.6 Acceptance of end user's nomination of train operator**

Aurizon Network's draft alternative SAAs allowed Aurizon Network to reject an operator's nomination by an end user if Aurizon Network did not consider the operator was:

- (a) financially sound; or
- (b) capable of performing the obligations under the TOA (cl. 2.3, EUAA).

These provisions did not deviate from the current SAAs.

### **Draft Decision**

The Authority did not require any amendments to clauses of the alternative SAAs relating to criteria for Aurizon Network accepting train operator nominations.

### **Stakeholders' Views on Draft Decision**

The QRC supported the Authority's position (QRC, sub. no. 2: 3).

However, BMA considered the conditions in clause 2.3 of the EUAA were vague and permitted Aurizon Network to reject a nomination or variation on a number of 'financial' or 'capability' grounds. Accordingly, BMA suggested that the terms 'financial' and 'capable' be defined with reference to the rail accreditation criteria in the *Rail Safety Act* (Qld). (BMA, sub. no. 2: 3)

### **Authority's Analysis and Final Decision**

The Authority notes that Aurizon Network has retained the provisions unchanged from the current SAAs. As such, the Authority considers that the proposed changes are not required to implement the alternative form of contracting. The Authority has therefore maintained its position not to amend Aurizon Network's proposals relating to Aurizon Network's criteria for accepting train operator nominations in the alternative SAAs.

## **5.7 Transfer of access rights**

Aurizon Network's draft alternative SAAs provided that permanent and temporary transfers of an end user's access rights could occur where the access rights sought by the transferee are for the same type of train service entitlements (cl. 4.2, EUAA).

### **Draft Decision**

The Authority did not require any amendments to clauses in the alternative SAAs relating to the transfer and relinquishing of access rights.

### **Stakeholders' Views on Draft Decision**

Vale said clause 4.2(h) of the EUAA provided that the terms of the EUAA will apply until the transfer date of the underlying access rights. Vale considered this clause would work appropriately where the end user is seeking to transfer all of its access rights, but not where an end user only transfers some of them (cl. 4.2(c), EUAA) (Vale, sub. no. 2: 3).

### **Authority's Analysis and Final Decision**

The Authority does not accept Vale's view that clause 4.2(h) of the EUAA will not work appropriately when an end user transfers part of its access rights. The Authority considers clause 4.2(h) does not describe what happens to access rights that are not being transferred (i.e. rights being retained within that EUAA) – due to clause 4.2(h) only applying to the nominated access rights. The access rights that are not transferred remain subject to the EUAA as intended.

## 6. CONSEQUENTIAL AMENDMENTS

*The approved undertaking also needs to be amended to give proper effect to the alternative SAAs.*

*Stakeholders were generally supportive of Aurizon Network's proposed amendments to the undertaking. However, a number of stakeholders said that some amendments went beyond that required to give effect to the alternative SAAs and other amendments lacked clarity. A key concern was that confusion would arise over the nature and scope of access rights and the interpretation of "access seeker" or "access holder" in the undertaking.*

*The Authority requires that the approved undertaking be amended to enable the split contracting structure to operate effectively, in a manner which does not unnecessarily alter the risk profiles of the parties. In addition, the Authority requires that any amendments enable the alternative SAAs to operate in parallel with the current SAAs.*

*The Authority considers that amendments clarifying the definition of access seekers and access holders (including the negotiation of technical issues as part of a TOA) are necessary to give effect to the alternative SAAs. The Authority has not accepted Aurizon Network's approach of only an end user being an access seeker. This would withdraw a number of protections currently provided under the undertaking for train operators. It also results in the end user being primarily responsible for negotiating operational matters, which is part of what the alternative contracting structure was proposed to avoid.*

*In doing so, the Authority has sought to limit Aurizon Network's administrative burden by requiring it only respond to, and negotiate with, train operators that already have, or are engaged in negotiations with the relevant end user for, a haulage agreement for the relevant services.*

*The Authority has also required amendments to provide for confidentiality issues to be addressed under the undertaking, as well as other amendments in the interests of transparency and clarity.*

*The Authority has included detailed drafting to implement its approach in Appendix A.*

### 6.1 Amendments to the approved undertaking

Aurizon Network proposed to amend its approved undertaking to give effect to the alternative SAAs. In doing so, Aurizon Network said it sought to ensure the amendments:

- (a) were minimal and necessary to give effect to the proposed arrangements; and
- (b) did not change the regulatory or commercial principles already embodied in the undertaking (Aurizon Network, sub. no. 1:13).

Aurizon Network said a 'key challenge' in drafting the consequential amendments was clarifying 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. Reflecting this, Aurizon Network proposed amendments to the undertaking to:

- (a) provide for the negotiation and management of access rights for end users in accordance with the negotiation framework in the undertaking but limit the application of the undertaking for train operators to certain issues during the negotiation period and to clarify that these negotiations must occur. In effect, Aurizon Network proposed that only the end user was an "access seeker" for the purposes of the alternative SAAs (cls. 12.5(e)(iii), (e)(iv), (e)(vii));



- (b) identify where the undertaking should otherwise apply to either the end user or the train operator ((cls. 12.5(e)(v),(e)(vi));
- (c) clarify the prioritisation of rights – such that an end user’s rights will prevail to the extent that its rights and an operator’s rights are inconsistent (cl. 12.5(g)); and
- (d) provide for joint dispute resolution/arbitration (cl. 12.5(e)(ix)).

Aurizon Network also provided implementation provisions to give effect to the alternative SAAs, namely:

- (a) notifications – requiring access seekers to specify, when negotiating with Aurizon Network, whether they are seeking access under the current SAAs or the alternative SAAs (cl. 12.5(a));
- (b) providing for the alternative SAAs – clarifying the purpose of the new form of agreements, guiding the interpretation of the undertaking so it is consistent with the alternative SAAs (cls. 12.5(b),(d));
- (c) disclosing confidential information – enabling Aurizon Network to disclose information to end users or operators (cls. 12.5(e)(i-ii));
- (d) reporting arrangements – to clarify Aurizon Network’s obligations in relation to quarterly reports (cl. 12.5(e)(viii)); and
- (e) customer initiated transfers between train operators – to ensure consistency with the undertaking and to also clarify requirements for paying adjustment charges (cl. 12.5(f)).

## 6.2 Clarifying the nature and scope of access rights

The Authority accepts that the approved undertaking needs to be amended to implement the alternative SAAs. In particular, the Authority has sought to clarify the application of ‘access rights’ in the undertaking to enable the split contracting structure to operate effectively.

### Draft Decision

In its draft decision, the Authority argued that access rights are relevant to both the end user (who holds the underlying access rights) and the train operator (who utilised the access rights to have operational access to the below-rail network) (QCA draft decision, p. 63). Accordingly, the Authority’s proposed amendments to the undertaking provided for:

- (a) both end users and train operators to be ‘access holders’ or ‘access seekers’ for the purposes of the undertaking (QCA draft decision, Mark-up of QR Network’s 2010 Access Undertaking, Definitions);
- (b) the general treatment of end users and train operators as access holders or access seekers, to ensure consistency between the rights and obligations of the various parties (QCA draft decision, p. 63);
- (c) the specific treatment of end users and train operators in negotiating agreements and managing confidential information (see below); and
- (d) the specific treatment of end users and train operators as access holders or access seekers for limits on price differentiation, capacity relinquishment and the environmental risk management process and dispute resolution (QCA draft decision,



Mark-up of QR Network's 2010 Access Undertaking, cls. 6.1.2; 7.3; 8.2.1(i)(ii); 10.1.1(c)).

In its draft decision, the Authority said that these changes were consistent with the intent of the alternative SAAs, by providing for the end user and train operator to be responsible for access rights and operational issues respectively.

In doing so, the Authority did not consider it appropriate that end users always be the access holders for the purposes of the undertaking or that they be given the discretion or power to nominate the correct interpretation of the term as this would create further complications given the interaction between the undertaking and the SAAs (QCA draft decision, p. 63).

The Authority further argued that it is not appropriate for the end user to be responsible for negotiating operational matters, because, in practice, it will be the operator who will need to negotiate these arrangements. That said, the Authority noted that the end user would retain some control over the process through the corresponding haulage agreements and its ability to nominate different operators under the EUAA (QCA draft decision, p. 63).

### EUAA/TOA negotiations

The Authority's draft decision sought to establish a workable process for negotiating access agreements. It sought to do this by requiring amendments to the undertaking that provided end users and train operators with the general protections for negotiations in Part 4 of the undertaking (QCA draft decision, Mark-up of QR Network's 2010 Access Undertaking, Part 4).

The Authority also proposed drafting to deal with EUAA/TOA negotiations in particular that:

- (a) provided for end users and train operators to be present in negotiations for access agreements;
- (b) required Aurizon Network and an end user access seeker to seek to agree an assumed operating plan in negotiating an EUAA; and
- (c) clarified that access rights negotiated between Aurizon Network and a TOA access seeker cannot be inconsistent with access rights granted to the relevant end user access holder (QCA draft decision, Mark-up of QR Network's 2010 Access Undertaking, cl. 4.5.3).

The Authority included detailed drafting to implement its approach.

### Stakeholders' Views on Draft Decision

Stakeholders accepted that it is important to clarify the nature and scope of access rights. RTCA said:

*The most significant issue in the alternative SAA process is the nature and scope of the set of rights that together constitute 'Access Rights' and clearly identifying which party owns and controls those rights. (RTCA, sub. no. 2:8)*

However, Aurizon Network and RTCA were concerned that the Authority's proposal to provide for a train operator to be a TOA access seeker/access holder will introduce unnecessary complexity and undermine the original aim of introducing alternative SAAs.

Aurizon Network argued that the access regime provides for it to ‘negotiate with one access seeker for the purpose of entering into one access agreement to utilise access rights’ (Aurizon Network sub. no. 2: ii). Aurizon Network said it had therefore proposed a contracting and negotiating framework based on the end user being the access seeker ‘for all material aspects’ of the access rights – i.e. access rights are granted to an end user under an EUAA, with the nominated rail operator using those rights under an executed pro-forma TOA. In practice, this meant that an end user would nominate the train operator at the time it entered into EUAA with Aurizon Network, not subsequently.

Aurizon Network said that the Authority’s proposed amendments substantially extended the rights of rail operators which, in turn, will materially increase the complexity of its commitment to implement alternative SAAs (Aurizon Network, sub. no. 2: ii, 17).

Aurizon Network was particularly concerned that it would be obliged to resolve any conflict or inconsistency should a train operator (as an access seeker) seek to operate train services in a way which differed from the preferences of the end user.

*Variations [to existing access rights or for new access rights] should not be negotiated with a railway operator under the TOA as they are not the primary access holder and have only been granted access rights from an end user in order to operate train services. ... It was not [Aurizon] Network’s intention that a railway operator could be an access seeker. (Aurizon Network, sub. no. 2: 17).*

RTCA was also concerned that the Authority’s proposed amendments introduced unnecessary complexity into the drafting of the undertaking and undermined the objective of ensuring that the end user retains direct control of its full set of access rights (RTCA, sub. no. 2: 9). It said:

*... the SAA process must ensure that the nature and scope of rights that together constitute ‘Access Rights’ are clearly identified and that coal producers directly own and control those rights. If this is not achieved, then any alternative SAA structure will fail to achieve the primary objective of clause 5.2(n) of the Undertaking. (RTCA, sub. no. 2:3)*

RTCA instead proposed that the full set of access rights be held by the end user, with some rights exercised through the train operator. In this way the end user would have:

- (a) responsibility under the approved undertaking for all EUAA/TOA negotiations;
- (b) direct involvement in disputes related to their train service entitlements (rather than being notified of a dispute); and
- (c) the right to participate in the development of any interface and environmental management plans which will relate to its train services.

RTCA argued that an alternative approach, that gives the end user ‘primacy’ but still recognises the operational role of train operators, will result in a ‘cleaner and more effective’ structure that is better aligned to the objectives of introducing alternative SAAs (RTCA, sub. no 2: 10). RTCA also sought to provide end users with expanded rights to participate directly in train path allocation and scheduling activities (discussed in detail in Chapter 2).

### [EUAA/TOA negotiations](#)

Stakeholders did not agree on whether, or how, the protections of Part 4 of the approved undertaking should apply to TOA negotiations.

Aurizon Network argued that a TOA ‘is not negotiated, it is simply executed’ (Aurizon Network, sub. no. 2: ii). However it accepted that certain matters may need to be addressed

with a train operator and that clauses 4.5 and 4.6 of the undertaking should apply for TOA negotiations when the end user has nominated the train operator and the end user is negotiating its EUAA.

The QRC argued that the relevant parts of Part 4 of the undertaking should apply to negotiation for TOAs which are being negotiated in parallel with a corresponding EUAA (either to the combined negotiation of the EUAA and TOA or through a separate expedited process where TOAs which are not negotiated in conjunction with an EUAA) (QRC, sub. 2: 3).

Stakeholders did not agree on whether the end user should have any rights or standing in the TOA negotiations. The QRC argued that end users should be able to participate, not just be present, in TOA negotiations, including providing for the end user (at its election) to negotiate a TOA in conjunction with the EUAA (QRC, sub. no. 2: 3, 9). Under RTCA's alternative proposal the end user would be responsible under the undertaking for all access negotiations (see above). On the other hand, Asciano argued that the end user should attend only as an observer (Asciano, sub. no. 2: 2).

### Authority's Analysis and Final Decision

In coming to a final position on this matter, the Authority notes that it does not share some stakeholders' views about the nature of a TOA and role of a train operator (as an access seeker or access holder) in giving effect to the alternative SAAs.

Importantly, the Authority is still not convinced that it is appropriate for the end user to be the *only* access seeker/access holder for the purposes of the undertaking. The Authority considers that it is necessary to provide for a TOA access seeker/TOA access holder (in addition to an EU access seeker/EU access holder) under the undertaking to implement the 'split form' approach. This particularly relates to protections under the negotiation framework (see below).

On this, no argument has been presented why the Authority's proposed approach is inconsistent with the existing definitions of what constitutes an access seeker/holder in the QCA Act or in the approved undertaking.

Both the AAC and OAAC are access agreements for the purposes of the QCA Act, and both contain provisions relevant to the underlying right to use infrastructure and train operations. The Act does not specify that some aspects of these agreements are access rights, while other aspects are not. The Authority particularly notes that where an end user negotiates an AAC or an operator negotiates an OAAC the operational aspects to be negotiated under a TOA are negotiated in the context of Part 4 of the undertaking. No compelling justification has been provided for why that should not continue to be the case.

Given this, the Authority does not accept that a split contracting structure should only provide for the end user to be an access seeker.

Indeed, the Authority notes that providing for both the end user and operator to be access seekers is necessary to ensure that these parties retain the existing protections in the Act, including in relation to seeking an arbitration on a dispute (s. 116 QCA Act). The operator would be denied these protections if they were not an access seeker for the purposes of the split structure or, failing that, other arrangements were put in place to provide these protections.

Given this, the Authority does not accept Aurizon Network's argument that the access regime can only require it to negotiate with one access seeker, and considers that neither the

undertaking nor the QCA Act preclude the undertaking being amended as proposed by the Authority. The Authority acknowledges that the existing provisions of Part 4 of the undertaking deal with a single access seeker. However, that is simply a result of the existing provisions being designed in the context of the AAC and OAAC. It does not provide any evidence to support Aurizon Network's contentions about the alleged restrictions of the access regime. The whole point of the provisions allowing consequential amendments is to enable appropriate changes to provisions like Part 4 as necessary to implement the new SAAs. The Authority also does not accept that providing for a TOA access seeker/TOA access holder necessarily undermines the objective of enabling an end user to better manage its access rights.

The Authority has also not adopted RTCA's alternative approach. Instead, the Authority has provided for the train operator to be ultimately responsible for negotiating operational matters (under the TOA) – but in doing so has not sought to unnecessarily restrict an end user from taking part in the negotiations. Should an end user wish to have more control over operational matters, it is always open to them to contract directly with Aurizon Network under an AAC and so also take more responsibility for operational performance.

### **EUAA/TOA negotiations**

The Authority has not accepted Aurizon Network's proposal regarding application of the negotiation framework because it results in the end user being primarily responsible for negotiating operational matters, which is part of what the alternative contracting structure was proposed to avoid (see above). In addition, Aurizon Network's proposal is not consistent with the current protections in the undertaking. For example Aurizon Network's proposal does not provide adequate protections for negotiation in the situation where an end user (with an executed EUAA) wants to switch to an alternative operator (who then needs to negotiate a new TOA part way through the term of the EUAA).

The Authority however, accepts that its approach may make Aurizon Network's negotiations more complex, as it will now have to negotiate with two counterparties, rather than one. However, the Authority considers these concerns will largely be addressed by the requirement for any TOA access rights to be consistent with the access rights granted under an EUAA, thereby limiting the scope of negotiable matters. This should not be a substantial additional burden on Aurizon Network (relative to existing contract structures), as negotiations with end users for an AAC would have involved negotiating operational matters and may even have necessitated the involvement of the train operator (or at the very least involved the end user taking the train operator's advice on positions to be taken in relation to such matters).

The Authority has also refined its draft proposal to ensure that Aurizon Network will only be required to respond to access applications and enter into negotiations for a TOA with train operators that certify that they are engaged in negotiations in respect of a potential haulage agreement (or is party to an existing haulage agreement) reflecting the access being sought as part of its access application and notification of intent. The Authority notes that once negotiations have started the undertaking provides for Aurizon Network to cease negotiations under certain conditions, including if Aurizon Network is of the reasonable opinion that the access seeker has no genuine intention to obtain or no reasonable likelihood of utilising the access sought.

The Authority also maintains that it is appropriate to provide a framework around the negotiation of the EUAA and TOA (and does not consider that the TOA is simply a pro-forma which it is not open to operators to negotiate as Aurizon Network proposes). This includes providing end users and train operators with the benefit of the negotiation framework protections contained in Part 4 of the approved undertaking. In implementing

this, the Authority has not sought to unnecessarily restrict the nature of negotiations and accordingly has not sought to restrict any party's role to that of an 'observer' and instead has provided for parties to 'be present and participate' in negotiations (see Appendix A, cl. 4.5.3 of Authority's Mark-up of the approved undertaking).

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**Final Decision 6.2:**

**The Authority requires that the consequential amendments to the 2010 undertaking to clarify the nature and scope of access rights are as per the drafting provided in Appendix A.**

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### 6.3 Other matters

Beyond clarifying the nature and scope of access rights, Aurizon Network proposed amendments around notifications, the treatment of confidential information and reporting to give effect to the alternative SAAs.

#### Draft Decision

In its draft decision, the Authority sought to address matters stakeholders raised in response to Aurizon Network's proposal. This included proposing amendments to clarify when information and notices relating to negotiations or in connection with an EUAA/TOA may be disclosed — so that disclosure should only occur when it is necessary for the negotiation of the relevant EUAA/TOA or to meet obligations or exercise of rights under the EUAA/TOA access agreement, or for the safe operation of the rail infrastructure (QCA draft decision, Mark-up of QR Network's 2010 Access Undertaking, cl. 3.4(e)).

The Authority also amended the reporting requirements – so that reports are presented in a manner that distinguishes between an EUAA and TOA (similar to Aurizon Network's original proposal cl. 12.5(e)(iii)) but also any train service under such agreements (QCA draft decision, Mark-up of QR Network's 2010 Access Undertaking, cls. 9.1(a); 9.2.2(d)(iii)).

These amendments improve the clarity and transparency of the introduction of the alternative SAAs, consistent with the Authority's overall approach.

The draft decision did not accept amendments that sought to enable end user to 'transition' to the alternative SAAs nor a number of 'housekeeping' amendments which went beyond what is needed to implement the alternative SAAs (QCA draft decision, p. 62).

#### Stakeholders' Views on Draft Decision

Stakeholders commented on the Authority's proposals in relation to information sharing and confidentiality.

Stakeholders accepted a process should exist around information sharing between parties. However, they did not agree that this necessarily required amendments to the approved undertaking, nor did they support the Authority's proposed drafting.

In particular, Asciano sought to strengthen and clarify the Authority's proposal arguing that:

- (a) operational information required in contractual negotiations, to meet contractual requirements or for safety should be required to be provided (rather than the drafting

where this information ‘may’ be provided) – with written consent provided before confidential information is released;

- (b) information required to meet contractual obligations or safety should be subject to the general ring fencing, disclosure and confidentiality provisions of the approved undertaking and attendant agreements; and
- (c) the Authority’s proposed drafting potentially allows Aurizon Network to inappropriately transfer information between it and its related above-rail operator, particularly where an access agreement is being negotiated (Asciano, sub. no. 2: 1–2).

In contrast, Aurizon Network argued that amending the approved undertaking to deal with confidentiality issues is unnecessary because these obligations are managed through the terms of the EUAA, TOA or the haulage agreement (Aurizon Network, sub. 2:2).

Aurizon Network also objected to a number of the Authority’s proposed drafting amendments which it said went beyond what is required to give effect to the alternative SAAs. This included the proposed change to the definition of Central Queensland Coal Region having ‘no relevance’ to the alternative SAAs (Aurizon Network, sub. 2: 18). Aurizon Network also saw little justification for the proposed amendments to reporting, arguing that these were not necessary and do not reflect reporting requirements for existing access agreements (Aurizon Network, sub. 2: 18). On this Aurizon Holdings (above rail) argued that the Authority’s proposed drafting around reporting raise ‘some concerns’ that commercially confidential information will be publicly available, particularly where there are only a limited number of EUAAs/TOAs executed (Aurizon Holdings (above rail), sub. 2: 14).

Stakeholders also proposed a number of amendments to the Authority’s proposed drafting in the interests of clarity and consistency.

### **Authority’s Analysis and Final Decision**

In coming to a view on the treatment of other matters under the undertaking, the Authority has sought to limit the amendments to those necessary to give effect to the alternative SAAs and that do not alter the scope and nature of the undertaking.

Accordingly the Authority has not required transitional provisions or other amendments that are generally ‘housekeeping’. Reflecting this, the Authority has further considered its position on its proposed amendments to the definition of the Central Queensland Coal Region and that clarify reporting requirements. The Authority accepts it is not necessary to include these amendments in the context of the alternative SAAs as they go beyond giving effect to the alternative SAAs. That said, the Authority considers there may be some benefit from including these amendments and will reconsider these issues in its assessment of Aurizon Network’s draft replacement undertaking (UT4) and related SAAs.

The Authority maintains that it is appropriate to provide a framework around the negotiation of an EUAA and TOA – that includes providing end users and train operators with the benefit of the negotiation framework protections contained in Part 4 of the approved undertaking (discussed above).

The Authority also considers that it is appropriate that confidentiality issues are addressed under the undertaking. The Authority does not accept Aurizon Network’s argument that confidentiality issues are already managed through the terms of the EUAA, TOA and haulage agreement because those agreements cannot address confidentiality issues which

exist in negotiating those agreements (i.e. confidentiality issues that necessarily arise before such agreements are executed and binding on the parties).

Reflecting this, the Authority requires Aurizon Network to amend the approved undertaking to provide for disclosure only when it is necessary for the negotiation of the relevant EUAA/TOA or to meet obligations or exercise of rights under the EUAA/TOA, or for the safe operation of the rail infrastructure. In doing so, the Authority has strengthened its drafting to address Asciano's concerns.

In addition to amendments to address matters described above, the Authority has also included amendments to reflect issues raised by stakeholders in response to the draft that it considers improve clarity and consistency. This includes amendments to ensure that train operators must enter into a separate TOA for each EUAA (see chapter 2).

The Authority considers that these amendments are consistent with the Authority's approach of only including amendments necessary to give effect to the alternative SAAs and that do not alter the scope and nature of the undertaking.

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**Final Decision 6.3:**

**The Authority requires that the consequential amendments to the 2010 access undertaking to address other matters are as per the drafting provided in Appendix A.**

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## **APPENDIX A: DETAILED DRAFTING**

The Authority's mark-ups of the EUAA, TOA and consequential amendments to the 2010 approved access undertaking are provided separately.



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