

New Hope Corporation Limited



**New Hope**  
Corporation Limited

Submission on Queensland Rail's 2015  
Draft Access Undertaking

Volume 4

Standard Access Agreement

5 June 2015

## 1 Introduction

This Volume 4 of the NHC submission on QR's 2015 DAU comprises NHC's submissions on the body of the QR's 2015 DAU.

It should be read in the context of being part of NHC's 5 volume submission:

- (a) Volume 1 – Introduction to NHC Submissions and Regulatory Framework
- (b) Volume 2 – West Moreton Coal Reference Tariffs
- (c) Volume 3 – Access Undertaking
- (d) Volume 4 – Standard Access Agreement
- (e) Volume 5 – Responses to QCA Paper and Adjustment Charges

Consequently it does not seek to duplicate submissions made in each of those volumes, each of which relate to QR's 2015 DAU as well.

NHC considers that it is not appropriate for the QCA to approve QR's 2015 DAU under s. 138(2) of the QCA Act for the reasons set out in each of the 5 volumes. Accordingly it requests that the QCA make a decision to refuse to approve QR's 2015 DAU and set out the ways in which the 2015 DAU should be amended, in accordance with s. 140 QCA Act.

This volume sets out the amendments the NHC considers are required to the Standard Access Agreement (which forms part of the 2015 DAU) in order for the 2015 DAU to be appropriate for the QCA to approve.

## 2 Executive Summary

NHC considers that QR's 2015 DAU is not appropriate having regard to each of the matters set out in s. 138(2) QCA Act. In particular, it fails to give sufficient weight to the following paragraphs in section 138(2) QCA Act:

- (a) the object of Part 5 of the QCA Act – particularly regarding the efficient operation of and use of significant infrastructure (not just investment which appears to be QR's sole focus);
- (d) the public interest;
- (e) the interests of persons who may seek access to the service (not just the interests of QR as owner and operator which appears to be QR's sole focus);
- (g) the pricing principles mentioned in section 168A – include not just 168A(a) that QR incorrectly asserts is somehow 'paramount' but principles such as that in 168A(d), 'provide incentives to reduce costs or otherwise improve productivity'; and
- (f) any other issues the authority considers is relevant.

Those same concerns apply in respect of the Standard Access Agreement itself.

NHC does not take issue with the concept of simplifying the Access Agreement, or separating the Operating Requirements Manual – but those type of changes should not become a cover for shifting of the risk profile of operators and end users from that provided for under the current standard access agreement. This requires a clause by clause comparative review and NHC requests that the QCA carefully consider the substantive changes which have been made given the limited time stakeholders have had to undertake such a review.

NHC makes a number of suggestions about how the Standard Access Agreement should be amended to more appropriately reflect the balancing of those factors.

### **3 Structure of this volume**

The body of this volume contains submissions on particular high level issues relevant to the Standard Access Agreement.

Annexure A contains a table providing detailed comments on each of the provisions of the Standard Access Agreement.

Annexure B contains a table providing suggested drafting amendments on particular issues (noting that the limited time permitted for submissions means that NHC is not in a position to provide detailed drafting on the vast majority of the issues of concern).

For consistency throughout this submission we will adopt the language used in Queensland Rail's draft Standard Access Agreement and refer to the miner or end user who holds the access rights in its own right as the Operator's Customer.

### **4 Tripartite Structure**

One of the most significant changes from the standard access agreement previously submitted by Queensland Rail is the shift to a tripartite agreement whereby the Operator's Customer may also be a party to the access agreement.

NHC acknowledges and appreciates that Queensland Rail are seeking to put in place a mechanism that would allow NHC (and other miners) to have greater control over the access rights that they use. However, NHC is concerned that the current format does not yet provide the level of transparency or control that NHC is seeking.

In broad terms NHC is seeking:

- (a) For the Operator's Customer to hold a bundle of rights and obligations relating to the underlying capacity, including:
  - (i) control over the capacity – i.e. transfers, relinquishment, assignment, renewals (without requiring the consent of the operator);
  - (ii) flexibility to engage multiple operators to use access rights without being disadvantaged in relation to take or pay or requiring the consent of the operator;
  - (iii) responsibility for payment of charges;
  - (iv) interface risk management as it relates to activities of the end user regarding activities such as loading;
  - (v) provision of all notices and information; and
  - (vi) involvement in disputes.
- (b) For the Operator (or Operators) to hold a bundle of rights and obligations relating to the operational matters, including all responsibility for:
  - (i) above rail services;
  - (ii) compliance with QR operational requirements;
  - (iii) interface risk management (except as it relates to activities of the end user regarding activities such as loading);
  - (iv) scheduling; and
  - (v) incident response.

That approach is similar in nature to the approach adopted in the Aurizon Network 'alternative form' standard access agreements (sometimes referred to as the split form agreement) and the ARTC access and 'sub-operator' agreements. NHC is not wedded to either of those contract structures and considers they can be achieved through a tripartite arrangement with appropriate amendments. However, the QCA should refer to those arrangements as a guide for the appropriate allocation of rights and responsibilities between the Operator and Operator's Customer.

It is imperative that the Operator's Customer cannot not lose its access rights by Operator action or inaction. It is also essential that the Operator's Customer receives early notification of any Operator behaviour which may lead Queensland Rail to suspend or terminate the service. In addition there are some amendments which are required on a practical level to facilitate the Operator's Customer holding the access rights, including making the miner directly responsible for payment obligations, the establishment of security and ensuring that take or pay obligations reflect the potential for multiple operators being engaged by the Operator's Customer. NHC has raised these issues with Queensland Rail and they are receptive to amending the agreement to address these concerns.

Providing a functional agreement enabling a customer to hold access rights and have potential above rail operators compete to provide services utilising those rights is anticipated to help to drive down above rail tariffs. This is a good outcome for users and for the State of Queensland (by enhancing the competitiveness of the Western system coal mines and, as a result, the likely utilisation of QR's infrastructure).

## **5 Inappropriate risk allocation**

A primary advantage of the tripartite structure is that risks can be allocated to the party most capable of managing them. NHC is concerned that there remain several key areas in which risk has been inappropriately allocated.

The first of which is based on Queensland Rail's obligations to maintain the network. The primary obligation of Queensland Rail under this agreement is to provide an appropriately maintained network on which an Operator can operate train services. It is therefore critical that Queensland Rail warrants the condition of the Network both for work undertaken by Queensland Rail and third parties and that such obligation not be weakened by limitation of liability or by passing the risk for assessing the condition of the network to the Operator.

The maintenance obligation needs to be heightened to reflect both:

- (a) being able to provide the contracted access (except to the extent of force majeure type events beyond QR's reasonable control); and
- (b) Prudent Practices, such that the rail is maintained to a standard that is the same or better than the condition it was in at the start of the agreement.

A second area is the use of broad and vague drafting in relation to "substances" or "things" which may be on or in or lost from rollingstock or brought on to the network, such drafting broadens the Operator's liability without providing any clarity as to the threat that Queensland Rail are seeking to protect against. It has been ventured that this may be a covert attempt to make the Operator responsible for [REDACTED], and if this correct it is preferable that Queensland Rail provide clear drafting that deals specifically with that issue allowing for a proper analysis of the obligations.

A third area of concern is Queensland Rail's scope and use of the Material Change definition. It is particularly concerning that Queensland Rail has broadened the application of Material

Change to Reference Train services which were previously exempt. The definition includes a Change to Credit which is in part comprised of any change in funding or other support received by Queensland Rail from any Authority in relation to the Network and when considered in the context of the definition of Network suggests that there will be instances where Queensland Rail is entitled to collect additional money from a service because a different part of the network or another commodity which used to attract funding no longer attracts funding.

Further categories of inappropriate risk allocation is where Queensland Rail has sought to pass obligations to the Operator which the Operator is not in a position to manage including those contained in clauses 7.3(b)(vii) and 7.3(b) (viii) (A) and the removal of Queensland Rail obligations to repair the network after a force majeure event.

The final area which NHC would like to highlight is land tenure security, it is fundamental to Queensland Rail's ability to provide the service for which they are contracting that it holds and maintains appropriate land tenure. NHC is concerned that the current drafting does not adequately address this risk.

## **6 ABCD Timetabling and Western System Alignment Calendar**

NHC proposes that an alternative mechanism should be used for dealing with non-provision of access that acknowledges the unique nature of scheduling on the West Moreton system. At least in respect of the West Moreton system, all references to possessions other than Emergency Possessions should be deleted because the Western System Alignment Calendar which is negotiated between stakeholders using the ABCD timetabling parameters timetables all other possessions and enhancements being performed on the system. The parties acknowledge that the same number of paths are not provided each week but during any rolling 4 week period the access holder will receive the equivalent of four times the weekly entitlement of access paths. The stakeholders use the West Moreton system alignment calendar to align maintenance and once set can only be amended by negotiation and with a minimum of [REDACTED] months' notice. The [REDACTED] month timeframe allows miners to coordinate shipping stems to meet sales contracts. NHC proposes that if QR fails to provide the paths as listed in the Western System Alignment Calendar and is not excused( see discussion on clause 13.6(b) below for carve-outs), QR should be liable to pay a performance deduction fee as an offset to costs associated with rescheduling.

## **7 Payload Variation**

[REDACTED]

This would both improve the efficiency and capacity of the Western System. NHC is concerned that unless the standard access agreement provides the right to move to a different reference train and the right to relinquish paths without payment of a relinquishment fee there will be no incentive for a miner to invest the capital required.

## **8 Looking Forward**

In light of the tight time frames to respond to the Queensland Rail submissions, NHC has favoured an approach which highlights issues rather than seeking to provide detailed drafting. NHC would welcome the opportunity to provide drafting as part of an ongoing process of consultation and engagement with both Queensland Rail and the QCA.

## Annexure A – Summary of NHC Comments

Clause Reference	NHC's Issues
<p><b>Cover Page</b></p> <ul style="list-style-type: none"> <li>• "no conditions precedent are necessary"</li>   <li>• The Access Holder is the rolling stock operator</li> </ul>	<ul style="list-style-type: none"> <li>• In 2008 the average time taken to obtain a mining lease was approximately 2 years, it is now estimated to take 5 years. NHC 's view is that with increasingly complicated and lengthy approvals associated with obtaining regulatory approvals required for mining, it is likely that access seekers will be required to run access negotiations in parallel with mining lease applications and as such a condition precedent related to grant of a mining lease may be necessary to ensure that capacity is not warehoused.</li>   <li>• As discussed, in the body of this volume, NHC wants to hold the underlying access rights in its own right. The Access Agreement should be amended to appropriately allocate rights and responsibilities between the end user and the operator.</li> </ul>
<p><b>1. Term and Renewal</b></p>	<ul style="list-style-type: none"> <li>• NHC accepts the proposed drafting subject to the inclusion of a condition precedent as discussed above.</li> </ul>
<p><b>2. Grant</b></p>	<ul style="list-style-type: none"> <li>• Accepted</li> </ul>
<p><b>3. Relationship with Operator's Customer</b></p>	<ul style="list-style-type: none"> <li>• Clause 3 requires amendments to reflect that the access rights are held by the miner. Below rail access is a critical component of supply chain security heightened by the [REDACTED] trucked into the Port of Brisbane. In order for NHC to ensure that it can meet downstream contractual commitments it is critical that it not be in a position where actions of a third party namely the Operator could result in it losing its right to access the West Moreton system. While NHC is willing to work with the proposed tripartite structure – the existing split form arrangements (in the Central Queensland Coal region and Hunter Valley network regulatory frameworks) provide a useful guide for how rights and obligations should be allocated between the parties to provide the end user with the degree of control and responsibility required.</li>   <li>• Clause 3.3 needs to be tightened – as not all information should be provided to the Operator where Access rights are paid for and controlled by</li> </ul>

	<p>the Operator's Customer, eg information relating to payment.</p> <ul style="list-style-type: none"> <li>• Clause 3.5 lists representations and warranties to be given by the Operator's Customer and Clause 23 lists representations and warranties given by the Operator. If QR is seeking such warranties it should be required to give reciprocal representations and warranties.</li> <li>• Clause 3.5(vii) Queensland Rail has clarified that it intended this warranty to reference information provided by the Operator's Customer rather than the Operator but in any event this is an unnecessarily broad warranty both in terms of what material is covered and also as to who may be providing the information. As currently drafted an Operator's Customer could be in breach of a warranty if a person in an administrative position has inadvertently provided information which was incorrect. This clause should be deleted unless Queensland Rail can define with more clarity what it is seeking to protect against.</li> </ul>
<p><b>4. Accreditation</b></p>	<ul style="list-style-type: none"> <li>• This clause should also place an obligation on Queensland Rail to maintain its accreditation as a railway manager. This contractual obligation would provide a greater level of certainty for the Access Holder.</li> </ul>
<p><b>5. Payment Obligations</b></p>	<ul style="list-style-type: none"> <li>• This is a consequential amendment that flows from the Operator's Customer holding the access rights, payment should be made by the Operator's Customer directly to Queensland Rail. There is no reason why the Operator needs to have a copy of the invoice. All take or pay discussions should also be held directly with the Operator's Customer.</li> <li>• 5.1(c) This clause should reference the Operator's Customer rather than the Operator.</li> <li>• 5.2 Time for payment of an invoice should run from the time an invoice is received rather than the invoice date. This will ensure that the Operator's Customer has the benefit of the full 10 Business days when making a payment.</li> <li>• 5.7 Queensland Rail should not be entitled to issue a new Interim Take or Pay Notice where the ten day period in clause 5.7(d) has passed or if the Interim Take or Pay Notice has been disputed once it has issued an amended Interim Take or Pay Notice in accordance with clause 5.7(e).</li> </ul>
<p><b>6. Network Management</b></p>	

	<ul style="list-style-type: none"> <li>• 6.1 It is of critical importance to an Access Holder that the Network be maintained appropriately, as such Queensland Rail's obligation to maintain the network is a cornerstone obligation. Queensland Rail should be required to maintain the track in accordance with Prudent Practices to a standard that is the same or better than the condition it was in at the start of the agreement. 6.1(c) NHC considers that Queensland Rail should retain some liability for third party works where they have a contractual relationship with the third party. Queensland Rail is the party most able to manage risks associated with maintenance of the network and where it has a contractual relationship with the third party it is position to back to back the liability. NHC is also concerned as to how this obligation interacts with clause 13.4 where Queensland Rail seeks to limit its liability, (see below for further comment on clause 13.4).</li> <li>• Clause 6.2 allows Queensland Rail greater control whilst increasing uncertainty and risk for the Access Holder as to when trains may run. This may in turn increase costs for the Operator in rescheduling trains and rostering staff. It may also have adverse impacts along the supply chain and result in increased wharfage and shipping costs or potentially mean freight is not delivered to contractual delivery times. At a minimum the definition of Network Control Directions should include reference to the Network Management Principles and Queensland Rail should at least have to act reasonably when issuing Network Control Directions.</li> <li>• 6.2(e)(iii) NHC acknowledges that s265 TIA allows passenger train priority once a train is running late, however this subclause should be deleted because it expands Queensland Rail's rights to allow the network controller the discretion of deciding that a train "may" become delayed and therefore making a judgement that to avoid that, a train service should be prioritised. NHC is concerned that this will lead to network controllers adopting a very conservative method of evaluation resulting in a higher level of path cancellations.</li> </ul>
<p><b>7. Train Operations</b></p>	<ul style="list-style-type: none"> <li>• 7.1 Queensland Rail should have an obligation to act reasonably when deciding terms and conditions of approval to operate a train service outside the terms of this agreement.</li> <li>• 7.3(b)(v) NHC is concerned re the broad and ambiguous nature of "other substance or things" Queensland Rail should clarify what it is seeking to capture. NHC is concerned that this may be a</li> </ul>



	<p>covert way of Queensland Rail seeking to make the Operator responsible for [REDACTED].</p> <ul style="list-style-type: none"> <li>• 7.3(b)(vii) should be deleted. It is unlikely that the Operator will be in a position to know what may "interfere with, hinder or prejudice" and therefore this is unreasonable requirement.</li> <li>• 7.3(b)(vii) (A) should be deleted as the Operator should not be responsible for managing and monitoring Queensland Rail's compliance with the Law.</li> <li>• 7.3(b)(x)(B) NHC is concerned that Queensland Rail is deliberately using vague drafting, namely "all things" in an attempt to covertly make the Operator responsible [REDACTED].</li> <li>• 7.4(a)(i) amend reference so Operator's Customer provides security.</li> <li>• 7.4(c) Queensland Rail needs to notify the Operator's Customer of its concerns re the Operator's compliance as soon as reasonably practicable, to allow the Operator's Customer to also monitor the situation. It is imperative that the Operator not be capable of jeopardising the Operator's Customer's access rights.</li> <li>• 7.8 The collection of data is valuable because it allows potential network efficiencies to be identified. Queensland Rail is the party best placed to collect the data, however the data is generated by the Operator providing a service to the Operator's Customer and therefore it is difficult to ascribe intellectual property rights to only one party.</li> <li>• 7.8(a) Clause should be amended to require QR to collect data that facilitates operational performance analysis. NHC considers that it would be beneficial to have a discussion between stakeholders as to what information should be collected.</li> <li>• 7.8(b) The Operator and the Operator's Customer should have a right to have the data provided on request.</li> <li>• 7.8(d) This clause should be deleted. For the reasons outlined above, it is inappropriate for QR to claim the IP rights.</li> <li>• 7.8(e) As QR is the only party in the position to collect this data it should be required to warrant that it has done so in accordance with Prudent Practices.</li> <li>• 7.9 (a) Throughout this clause Queensland Rail should be required to act reasonably to protect an Operator from being unable to operate a Train Service because Queensland Rail is acting capriciously.</li> </ul>
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	<ul style="list-style-type: none"> <li>• 7.9(b) NHC is concerned that Queensland Rail's unfettered restrictions in determining whether to approve and the conditions on which to approve, as discussed with regard to 7.9(a) above, when coupled with a requirement that the parties agree amendments to the agreement without even the requirement of being required to act reasonably and in good faith will make it virtually impossible to modify any rollingstock or train configurations. It is likely that Queensland Rail's broad discretion will discourage investment, to the detriment of efficiency and innovation, and potentially discourage new entrants. NHC therefore seeks a requirement that Queensland Rail act reasonably and in good faith be inserted and where the parties can't agree the right to refer it to the QCA for determination.</li> <li>• 7.11 Queensland Rail should also be required to notify the Operator of any damage or disrepair. There may well be matters which Queensland Rail knows, which could impact on train operations and which are not known to the Operator. Failure of Queensland Rail to provide information may have safety implications, affect efficient running of train services, result in damage to rollingstock and/or create unnecessary costs due to delays or accidents.</li> </ul>
<p><b>8. Operating Requirements Manual</b></p>	<ul style="list-style-type: none"> <li>• NHC considers that a balance needs to be found that allows sufficient stability with regard to the operating requirements, so that stakeholders are willing to make investments and sufficient flexibility that Queensland Rail is able to manage the Network safely and efficiently. NHC is also concerned that provision be made in the standard access agreement for a scenario in which the undertaking lapses. One solution is the establishment of three categories <ul style="list-style-type: none"> <li>• Queensland Rail should be entitled to unilaterally amend the ORM to correct typographic errors and update references to, or details for, persons or positions.</li> <li>• The second category should be amendments that are sought for safety matters or are by virtue of a Change in Law. Note: NHC has significant concerns re the expansive nature of the definition of Material Change. (see clause 18 comment below) The parties should meet and discuss in good faith the most appropriate way of amending the ORM to address the safety matter or Change in Law and an appropriate apportionment of costs. If the parties cannot agree then it should be referred to the QCA.</li> <li>• The third category are any other change to the ORM which may be made by agreement or with</li> </ul> </li> </ul>

	<p>QCA approval including the appropriate apportionment of costs.</p> <ul style="list-style-type: none"> <li>• 8.4 Queensland Rail should not be entitled to avoid compensation by submitting a draft access undertaking or draft amending access undertaking.</li> <li>• In relation to the entirety of clause 8 it is critically important that the introduction of the ORM does not become a way of altering the risk profile of access holders/operators (or give QR the right to do so unilaterally via changes to the ORM).</li> </ul>
<p><b>9. Interface Risk Management Plan</b></p>	<p>The IRMP is an integral part of managing risk on the system and it is imperative that all stakeholders, including the Operator's Customer are equally invested in complying with and reviewing it to ensure that all reasonably foreseeable risks are managed appropriately.</p> <ul style="list-style-type: none"> <li>• The Operator's Customer needs to be involved in the entire IRMP process and should have reciprocal obligations and rights.</li> <li>• 9.1(b) This should be a reciprocal obligation for Queensland Rail and the Operator's Customer.</li> <li>• 9.2 see below drafting</li> </ul> <p>Clauses 9.4 through to clause 9.9 deal with inspections, audits and investigations. NHC considers that rights to initiate an inspection or audit, provision of notifications when another Party initiates one of these process and notification of the results all form part of the bundle of additional rights which should be afforded to the Operator's Customer as the holder of access rights.</p> <ul style="list-style-type: none"> <li>• 9.4 The Operator's Customer should also have inspection and audit rights, including being provided with notifications given under 9.4 (b)(i).</li> <li>• 9.5 The Operator's Customer should also be notified.</li> <li>• 9.9 The Operator's Customer should also be provided with the results.</li> </ul>

**10. Incident, Environmental and Emergency Management Plan Requirements**

- 10 NHC appreciates that a coordinated response is required with regard to incidents, emergency responses and handling environmental issues, however, it is imperative that Queensland Rail be required to act in the interests of the system as a whole rather than in its self-interest, this includes when determining whether to approve an emergency plan, ensuring that the emergency plan will allow a coordinated response and in taking responsibility for obstructions caused or contributed to by Queensland Rail. Queensland Rail's proposed standard access agreement seeks to impose a significant level of oversight for Operator emergency plans, which we consider to be appropriate but Queensland Rail needs to assume a higher level of responsibility for its role than is currently drafted.
- 10.1(f) insert acting reasonably on the fourth line after Queensland Rail
- 10.1(i) Queensland Rail should be required to warrant that the Operator's Emergency Plan that it has approved is consistent with Queensland Rail's and all other Network Participant's emergency management plan and will allow for a coordinated response to Network Incidents or other emergencies.
- 10.2 When this clause is read in conjunction with the limitation of liability clause it is unclear what liability if any that Queensland Rail assumes if it causes or contributes to an Obstruction.
- 10.2(b) The Operator should only be responsible for Queensland Rail's reasonable direct costs.
- 10.2(c) In the first line delete "use reasonable endeavours to" and delete the last sentence "A failure by Queensland Rail to consult with the Operator does not affect the validity of anything done by Queensland Rail under clause 10.2(b)."
- 10.4 The Operator's Customer should be provided with a copy of the investigation findings.
- 10.6(a) On one interpretation of this clause it is arguable that this clause refers not only to events caused by the Operator but to all events in connection with the Network which may cause, for instance, Environmental Harm. NHC considers that clarification is required to ensure that the Operator is only responsible for Environmental Harm etc that they have caused and only to the extent of their contribution. A reciprocal obligation should be placed on Queensland Rail. NHC is also concerned as to how this clause and in particular 10.6(a)(iv) will interact with the indemnity that Queensland Rail gives in clause 12.

	<ul style="list-style-type: none"> <li>• Queensland Rail 10.6(b)(i) insert "acting reasonably" before "considers".</li> <li>• 10.6(c) NHC is concerned that there may be a number of ways of addressing Queensland Rail's concerns and that it would therefore be beneficial for all stakeholders, including the Operator's Customer and any other affected users of the system, to meet to agree a course of action and appropriate apportionment of costs. If the parties can't agree then it should be referred to the QCA.</li> <li>• 10.7 It is imperative that when the Operator and Queensland Rail consult in good faith and act reasonably when determining appropriate noise mitigation measures. Where agreement cannot be reached it should be referred to an expert. It is also NHC's preference that, as noise mitigation is unlikely to be customer specific, Queensland Rail pay for the noise mitigation measures and then recover by adding these measures to the asset base or maintenance budget as appropriate.</li> </ul>
<p><b>11 Inspection of Trains and Rolling Stock</b></p>	<ul style="list-style-type: none"> <li>• 11 All coal trains are weighed prior to leaving the loading facility as such no coal train enters the main line overloaded. Queensland Rail should only be allowed to weigh, measure and inspect a coal train at its respective coal loadout facility. This will ensure that the efficiency of the system is not compromised.</li> </ul>
<p><b>12 Risk and indemnities</b></p>	<ul style="list-style-type: none"> <li>• NHC welcomes the inclusion of reciprocal indemnities, however considers the below drafting is a better reflection of the true risk allocation. (See Annexure B below for 12.1(a) drafting) <ul style="list-style-type: none"> <li>• 12.2 This clause is an unreasonable expansion of risk previously held by the Operator.</li> <li>• 12.3 NHC does not propose to carry dangerous goods but notes the unreasonably broad indemnity, in particular Queensland Rail are not responsible for their contribution.</li> <li>• 12.6 A reciprocal obligation for Queensland Rail for its Associates should be included.</li> </ul> </li> </ul>

<p><b>13 Limitations on liability</b></p>	<ul style="list-style-type: none"> <li>• Clause 13 represents a better alignment of risk than that proposed by Queensland Rail in its withdrawn Standard Access Agreement, however NHC remains concerned regarding the following areas.</li> <li>• 13.1 NHC is concerned re expansion of QR's rights to claim consequential loss. All consequential loss should be excluded bar that dealt with under clause 13.1(b)(ii)(A).</li> <li>• 13.4 Clause 6.1 (a) states that Queensland Rail will maintain the Network in a condition such that the Operator can operate Train Services in accordance with this agreement. It is therefore inappropriate that QR seeks to limit this obligation in clause 13.4. Liability should be uncapped.</li> <li>• 13.6(d) Queensland Rail should not be allowed to contract to fail, this buffer of 10% is not required because clause 13.6 already carries a significant number of carveouts and the ABCD system used to create the Western System Alignment Calendar makes provisions for planned possessions including urgent possessions and rail infrastructure operations. The inclusion of a 10% threshold drives overcontracting behaviour as customers seek to ensure that they have sufficient capacity to meet sale commitments.</li> <li>• The provision of access paths is the primary obligation under this agreement. NHC is concerned that the costs associated with a lost path will not meet the thresholds set in clause 13.2 and a separate regime should be instituted to incentivise Queensland Rail to perform. A performance deduction of \$500 per path should be paid by Queensland Rail to the Operator's Customer when in any rolling four week period the Operator's Customer has not received the sum of four times the nominated weekly train paths listed in schedule 1 and the reason for this failure cannot be attributed to the Operator, another Network Participant, Force Majeure Event, Emergency Possession, event on Private Infrastructure or any action taken by Queensland Rail (acting reasonably) or by an Authority in response to, or as a consequence of, an emergency<sup>1</sup> or a genuine safety risk (including a Network Incident), or any personal injury to or the death of any person on or near the Network, any Rolling Stock or any land or other thing on or near the Network. This amount of \$500 represents a genuine estimate of NHC's costs associated with a cancelled path and is comprised of wages for</li> </ul>
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<sup>1</sup> An emergency includes any actual or impending circumstance that poses a threat of causing or contributing to:

- injury or death of any person;
- the destruction of or material damage to any real or personal property; or
- a material interference with, or loss or disruption of, a person's normal business operations.

	<p>employees and contractors associated with rescheduling a train service.</p>
<p><b>14 Suspension</b></p>	<ul style="list-style-type: none"> <li>• NHC appreciates that it is essential that Queensland Rail be able to suspend services where the Operator is engaging in behaviour which is a safety risk. NHC seeks notification as early as possible if there is a problem with the Operator's performance.</li> <li>• 14.2 the notice contained in this clause should also be provided to the Operator's Customer.</li> <li>• 14.3 As the Operator's Customer will be responsible for payment of access charges this clause should reference the Operator's Customer rather than the Operator.</li> </ul>
<p><b>15 Default and termination</b></p>	<ul style="list-style-type: none"> <li>• NHC appreciates that a balance will need to be found whereby Queensland Rail retains the right to terminate the agreement in certain circumstances and the Operator's Customer has certainty that it cannot not lose its access rights by Operator action or inaction and receives early notification that the Operator has engaged or Queensland Rail reasonably expects the Operator to behave in a way that would trigger the right to terminate as listed in clause 15.1. The default and termination clause will also have to be amended to reflect Queensland Rail's right to terminate because of Operator's Customer caused circumstances.</li> <li>• 15.1(d) requires significant amendment Queensland Rail must be responsible for securing and maintaining land tenure and the relevant authorisations, permits and entitlement to confer rights on the Operator and perform this agreement. This clause does not distinguish as to what has caused the loss of tenure etc and as such would allow Queensland Rail to terminate the agreement even where it has been Queensland Rail action or inaction has caused the loss of land tenure etc.</li> <li>• 15.1(f) NHC can appreciate Queensland Rail's need to be able to terminate this agreement in the face of repeated breaches however, the Operator's Customer must not lose access rights because of a termination of this agreement and should also be notified when the Operator is in breach or if Queensland Rail considers that the Operator is likely to be in breach to allow the Operator's Customer to seek to manage the Operator's behaviour or chose to transfer the access rights to an alternative operator.</li> </ul>

	<ul style="list-style-type: none"> <li>• The Operator's Customer needs to be notified if clause 15.1(g) is capable of being triggered.</li> <li>• 15.1(h) this clause should reference the Operator's Customer rather than the Operator.</li> <li>• 15.2 termination rights should reside in the Operator's Customer not the Operator.</li> <li>• 15.3 This clause should be clarified to make sure that, where the Operator is the defaulting party, the Operator's Customer also receives a notice.</li> <li>• Delete Clause 15.4 Queensland Rail should not have the right to terminate this agreement because of a Change in Control of the Operator, the choice of Operator is for the Operator's Customer to make. Queensland Rail should also not have a right to terminate for a Change in Control of the Operator's Customer because the security rights in this agreement are sufficient to negate payment risk.</li> <li>• 15.6 NHC is concerned about the ambiguous nature of "other substance or things" Queensland Rail should clarify what they are seeking to guard against.</li> </ul>
<p><b>16. Insurance</b></p>	<ul style="list-style-type: none"> <li>• NHC is broadly comfortable with the insurance commitments required by Queensland Rail but considers that the Operator's Customer and Queensland Rail should also hold some obligations with regard to insurance.</li> <li>• NHC suggests it would be appropriate to require the Operator's Customer to hold insurance in similar terms as those contained in the End User Agreement as drafted by the QCA.</li> <li>• Queensland Rail should also state its liability with regard to holding insurance.</li> </ul>
<p><b>17 Security</b></p>	<ul style="list-style-type: none"> <li>• The purpose of security is to derisk breach of payment obligations, however where the risk of breach is low a mandatory requirement potentially increases the financial burden on an Operator/Operator's Customer. It is more reasonable that security be given in 'appropriate cases'</li> <li>• The Operator's Customer as holder of the access rights and responsible for payment should also be responsible for establishing, if appropriate, security.</li> <li>• 17.2(a) and (c) will need to be amended to reflect that payment is made by the Operator's Customer.</li> </ul>




	<ul style="list-style-type: none"> <li>• 17.3(a)(i) should be qualified so that Queensland Rail is required to act reasonably in considering what is relevant.</li> <li>• Queensland Rail should be required to return the security as soon as practicable and in any event no later than three months after the expiry or termination of the agreement.</li> </ul>
<p><b>18 Adjustment for changes</b></p>	<ul style="list-style-type: none"> <li>• Throughout the term of the agreement NHC agrees that it is important that there is a clear mechanism as to how amendments to schedule 3 will be undertaken. It is important that any adjustment include savings to Queensland Rail as well as adverse financial impacts. NHC considers that the definition of Reference Tariff Provisions should be amended so that it applies only to the Reference Tariff and not to its application or interpretation. One area of particular concern is the take or pay provisions. ToP forms part of the Access Holder's risk profile and the level of risk posed by ToP forms part of an Access Holder's consideration ahead of entering into an agreement. It is therefore critical that the Take or Pay mechanism remains stable throughout the Term.</li> <li>• 18.1(e) subject to how an adjustment is handled re period between 1 July 2013 and the Access Agreement date the QCA will need to consider the implications, if any, on this clause.</li> <li>• 18.1(f) this should reference the Operator's Customer rather than the Operator.</li> <li>• NHC considers that amendments to the adjustment for a Material Change clause is a further area in which Queensland Rail has sought to alter the previous risk allocation.</li> <li>• 18.2 Material Change used to only apply to non-reference tariff trains but has been expanded to include reference train services albeit with a provision to ensure that there is no double dipping where the change is addressed under schedule 3. This change in application coupled with the an extremely broad definition of Material Change has generated concern that an access holder using a reference train could become responsible for putting Queensland Rail in the position it would have been in had funding associated with another user of the network not been cut.</li> <li>• 18.2(e) NHC is concerned that there may be a point where the additional costs associated with a Material Change means that it is no longer economic to operate and therefore seeks the right for the Operator's Customer to be able to elect to terminate the agreement.</li> </ul>

<p><b>19 Disputes</b></p>	<ul style="list-style-type: none"> <li>• Amend to reflect that there may be some disputes (eg payment) which are between Queensland Rail and the Operator's Customer and it is not appropriate for the Operator to be included in the dispute resolution or to receive any notification or information regarding the dispute.</li> <li>• 19.3(b)(i) each should include the President or his or her nominee.</li> <li>• 19.4 Operator's Customer should also have the right to refer a dispute to the Rail Safety Regulator.</li> <li>• 19.5 Delete all disputes should be resolved by agreement by the parties or by independent third parties.</li> </ul>
<p><b>20 Force Majeure</b></p>	<ul style="list-style-type: none"> <li>• NHC is concerned that force majeure is a further area in which Queensland Rail has sought to alter the risk allocation in favour of itself.</li> <li>• 20.1(d) is the key area of concern to NHC, Queensland Rail has removed its obligation to repair the network after a FM event. Queensland Rail could use this increased discretion to repair or not, to its advantage in any subsequent negotiations between an affected Access Holder and Queensland Rail. NHC is also concerned that no explicit provision is made as to how the cost of repairs will be shared across other access holders or rights that an access holder will have where another access holder elects not to participate.</li> <li>• 20.2 NHC considers that in light of the experience of the Western System with regard to the 2011 flood this timeframe should be extended from 3 months to 6 months.</li> </ul>
<p><b>21 Reduction and relinquishment of Access Rights</b></p>	<ul style="list-style-type: none"> <li>• The Operator must not be capable of losing the Operator's Customer's access rights.</li> <li>• The Operator's Customer must be the only party capable of relinquishing access rights.</li> </ul>
<p><b>22 Assignment</b></p>	<ul style="list-style-type: none"> <li>• It is NHC's view that in order to reflect the true allocation of risk associated with assignment, amendments need to be made in two key areas firstly assignment rights should be reciprocal and in full rather than a partial assignment and secondly the Operator's Customer rather than the Operator should be in control of an assignment.</li> </ul>

	<ul style="list-style-type: none"> <li>• 22.1 Queensland Rail's entitlement to assign should mirror the Operator's Customer's entitlement. This would include Queensland Rail remaining liable for performance of duties, responsibilities and obligations of its assignee.</li> <li>• 22.2 The entitlement to assign should be held by the Operator's Customer rather than the Operator. The Operator should only be entitled to assign their role as Operator contemporaneously with the assignment of the relevant haulage contract.</li> <li>• 22.3 The Operator's Customer should be entitled to create a charge but not the Operator.</li> </ul>
<p><b>23 Representations and warranties</b></p>	<ul style="list-style-type: none"> <li>• 23(a)(ix) should be deleted It is a primary responsibility of Queensland Rail to maintain the network in a condition that allows the Operator can operate Train Services, this clause purports to shift responsibility for assessing the standard and suitability to the Operator.</li> <li>• 23(a)(x) this is an unnecessarily broad warranty it is unclear what QR are seeking to protect against. (see above comment relating to clause 3.5(vii)).</li> <li>• 23(c) The Operator should have the right to inspect but not for the purpose of giving the warranty in clause 23(a) (ix).</li> <li>• 23(c)(v) Queensland Rail should be required to act reasonably in determining any other conditions.</li> </ul>
<p><b>24 Confidentiality</b></p>	<ul style="list-style-type: none"> <li>• Accepted</li> </ul>
<p><b>25 Notices</b></p>	<ul style="list-style-type: none"> <li>• The amendments that NHC seeks in relation to the Notice provisions are of a purely practical nature.</li> <li>• 25.2 (d) NHC queries the efficacy of including faxes. NHC suggests that inclusion of email should be considered.</li> <li>• 25.6 Representatives will also need to be included for the Operator's Customer.</li> <li>• 25.6(c) notifications of changes should be as soon as reasonably practicable rather than "on or prior to"</li> </ul>
<p><b>26 GST</b></p>	

	<ul style="list-style-type: none"> <li>Accepted</li> </ul>
<b>27 General</b>	<ul style="list-style-type: none"> <li>27.1(b) insert the same carveout as in 27.1 (a) "except where it arises from default by Queensland Rail".</li> <li>27.12 this clause needs clarification because arguably a relationship of agency is created between the Operator and the Operator's Customer.</li> </ul> <p>Land Tenure</p> <ul style="list-style-type: none"> <li>27.18 (f) should be deleted. Queensland Rail having the required land tenure is fundamental to its ability to provide the service for which it is contracting. Queensland Rail is also the party best placed to manage this risk. Queensland Rail should: <ul style="list-style-type: none"> <li>- warrant that it has appropriate rights to grant access;</li> <li>- be under a positive obligation to comply with its obligations under arrangements relating to land tenure;</li> <li>- notify the Access Holder immediately of any amendment, replacement, surrender, termination, expiry or determination of any land tenure.</li> <li>- provide an indemnity to the Access Holder in relation to the above.</li> </ul> </li> <li>27.19 The rights under this agreement should be held by the Operator's Customer.</li> </ul>
<b>28 Interpretation</b>	<ul style="list-style-type: none"> <li>"Emergency Possession" the fault should be qualified as a serious one and should be remedied with 24 hours.</li> <li>The definition of Access Undertaking to give certainty should be amended so that is the access undertaking in force at the time of entering into the agreement rather than as changed from time to time.</li> </ul>
<b>Schedule 1 - Reference Schedule</b>	<ul style="list-style-type: none"> <li>Should include Operator's Customer representatives for Contractual Meetings and Document Control.</li> </ul>

<b>Schedule 2 - Train Service Description</b>	<ul style="list-style-type: none"> <li>• Paths must be useable.</li> </ul>
<b>Schedule 3 - Calculation of Access charges and other charges</b>	<ul style="list-style-type: none"> <li>• Take or pay should first be capped within mines on the same system which are under common ownership (so that amounts paid for use above contract for one set of access rights is a deduction from take or pay obligations for access rights which are being underutilised in respect of a commonly owned mine); and</li> <li>• There should be a system cap on take or pay revenues (so that QR does not over recover through take or pay revenue where the system others transports equal to or more volume than contracted, such as through ad-hoc train services operating).</li> </ul>
<b>Schedule 4 - Interface Risk Management Plan</b>	<p>-</p>
<b>Additional Issues</b>	<ul style="list-style-type: none"> <li>• . This would both improve the efficiency and capacity of the Western System. NHC is concerned that unless the standard access agreement provides the right to move to a different reference train and the right to relinquish paths without payment of a relinquishment fee there will be no incentive for a miner or operator to invest the capital required. (In Annexure B below is some proposed drafting)</li> <li>• Safeguards to ensure that Operators can only hold capacity where they have a customer.</li> <li>• Through running trains the current agreement is silent on this issue but NHC considers that it should also be dealt with in the access agreement. NHC's position on this matter is outlined in volume 3 of NHC's submission.</li> </ul>

## Annexure B – Drafting Amendments

### 9.2 Review of IRMP

(a) The Operator and Queensland Rail must:

- (i) upon the reasonable request at any time by either of them; and
- (ii) for any new or varied Train Services from time to time,

but no less than once in any 12 month period, jointly review the IRMP, and amend it (including by replacing it) as necessary, to ensure that the Operator and Queensland Rail continue to agree that the Interface Risk Assessment is still applicable and all reasonably foreseeable Interface Risks are effectively managed under the IRMP.

(b) For the purposes of a review referred to in **clause 9.2(a)**:

- (i) if either Queensland Rail or the Operator is not satisfied that the Interface Risk Assessment is still applicable and all reasonably foreseeable Interface Risks are effectively managed under the IRMP, then those Parties will undertake a joint Interface Risk Assessment (including, if those Parties agree that it is appropriate, only in relation to specific matters or activities) as part of such a review; and
- (ii) if Queensland Rail and the Operator are not able to agree any matter in relation to such a review, either of those Parties may treat that inability to agree as a Dispute for the purposes of **clause 19**.

(c) Where the IRMP identifies that training of the Operator's Associates is required and the Operator can only obtain that training from Queensland Rail, then:

- (i) Queensland Rail will provide the Operator with that training; and
- (ii) the Operator must pay to Queensland Rail a reasonable commercial charge, as determined by Queensland Rail acting reasonably, for doing so.

(d) For clarity, the Operator must not:

- (i) operate any new or varied Train Services under this agreement unless the IRMP has been reviewed in accordance with this **clause 9.2** in relation to those new or varied Train Services (as applicable); and
- (ii) use any Rolling Stock or Train Configuration in operating a Train Service unless the IRMP has either been:
  - (A) prepared on the basis of the Train Services being operated using that Rolling Stock or Train Configuration (as applicable); or
  - (B) reviewed in accordance with this **clause 9.2** in relation to that Rolling Stock or Train Configuration (as applicable).

### Clause 12

12.1 (a) Subject to Clause 13 (and without limitation to clause 12.2), the Operator is solely liable for and releases, indemnifies and will keep indemnified the other Party and the other Party's Associates against all Claims of any nature suffered or incurred by or made or brought against the other Party or the other Party's Associates due to or arising out of this Agreement in respect of any loss of or damage to or destruction of real or personal property (including property of any Party) or personal injury to or death of any person in each case caused by or (to the extent of the contribution) contributed to by the wilful default or any deliberate or negligent act or omission of the Operator.

- (b) Subject to Clause 13 (and without limitation to clause 12.2), Queensland Rail is solely liable for and releases, indemnifies and will keep indemnified the other Party and the other Party's Associates against all Claims of any nature suffered or incurred by or made or brought against the other Party or the other Party's Associates due to or arising out of this Agreement in respect of any loss of or damage to or destruction of real or personal property (including property of any Party) or personal injury to or death of any person in each case caused by or (to the extent of the contribution) contributed to by the wilful default or any deliberate or negligent act or omission of Queensland Rail.
- (c) Subject to Clause 13, the Operator's Customer is solely liable for and releases, indemnifies and will keep indemnified the other Party and the other Party's Associates against all Claims of any nature suffered or incurred by or made or brought against the other Party or the other Party's Associates due to or arising out of this Agreement in respect of any loss of or damage to or destruction of real or personal property (including property of any Party) or personal injury to or death of any person in each case caused by or (to the extent of the contribution) contributed to by the wilful default or any deliberate or negligent act or omission of the Operator's Customer.

#### **Payload Variation/ Efficiencies Clause**

- (a) The Parties acknowledge that throughout the Term it is likely that by implementing business improvements and efficiencies, access capacity in the Current Nominated Network will be liberated (**Efficiencies**). [REDACTED]
- (b) In the event that an Efficiency is realised beyond a trial basis the Access Holder will then have the right at its sole discretion to adjust the level of Access Rights that it holds without cost (including payment of any Relinquishment Fee or take or pay). For the avoidance of doubt the Access Holder will only be entitled to relinquish whole paths.
- (c) Prior to an Efficiency being realised beyond a trial basis, Queensland Rail and the Access Holder will meet in good faith to negotiate a new Access Tariff taking into account the number of paths required, and the additional capacity made available on the system. In the event that the Parties fail to reach agreement on an appropriate Access Tariff within 30 days of a notice from either Party stating they wish to commence negotiations of a new Access Tariff based on Efficiencies, either Party may refer the issue to the QCA for a decision. Until such time as there is a new Access Tariff, whether through negotiation or by QCA decision, the existing tariff structure will apply with an adjustment to be undertaken once the new Access Tariff is determined.