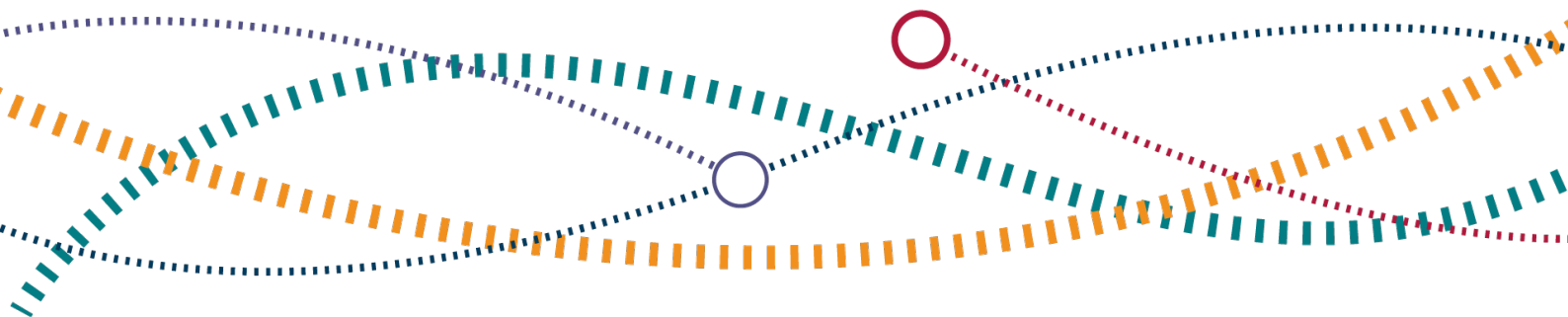




Criteria and procedures for the approval of depot access agreements

01 December 2023



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1. Introduction

- 1.1 This is the fourth edition of the Criteria & Procedures for the approval of Depot Access Agreements document.
- 1.2 The purpose of this document is to set out the criteria and procedures we expect to follow in exercising our functions under sections 17 to 22A of the Railways Act 1993, as amended ([the Act](#)), and under the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 (as amended) - (the [2016 Regulations](#)). This document supports our aim of having clear and transparent processes that are as straightforward as possible for applicants to follow, and which facilitate timely and efficient consideration of applications by the Office of Rail and Road (ORR).
- 1.3 We will consider every application on its merits, and this document should not be interpreted as committing ORR to making a particular decision. It may be revised and reissued from time to time to take account of further experience and changing circumstances, and readers are advised to confirm via the ORR [website](#) that this remains the most recent edition.
- 1.4 We expect train operators, Network Rail Infrastructure Limited (Network Rail), and other relevant facility owners, to follow the procedures outlined here when negotiating and submitting proposed new depot access agreements, and amendments to existing agreements, for our approval. This will help us to process applications more quickly.
- 1.5 Applications can be made to us in the following ways:
 - a submission under the General Approval for depots (2017) which provides for the approval of new Depot Access Agreements and for amendments to agreements, without the need to seek our prior specific approval. The agreements and amendments must fall wholly within the terms of the General Approval;
 - a submission for specific approval, of new agreements and amendments to agreements, where the General Approval does not apply and where the parties agree the terms of the agreement or of the amendments;
 - a submission under section 17 or 22A of the Act, for instances where the parties cannot agree on the terms of a new access agreement, or where a user with an existing approved access agreement is seeking amendments to

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it which will permit more extensive use of a facility, and agreement on the terms cannot be reached.

- 1.6 The parties should have due regard to the expected timescales for processing applications set out in Chapter 3. Where these procedures are not complied with, or sufficient time is not allowed for the process to be completed, our approval may not be obtained in the desired timescales.
- 1.7 We encourage any party seeking to make an application with us to first discuss and, where possible, agree the application with all relevant parties.
- 1.8 This document is structured as follows:
 - (a) Chapter 2 explains the framework which applies to the regulation of depot access under the Act and under the [2016 Regulations](#);
 - (b) Chapter 3 sets out the procedures for applications to ORR and the use of general approvals;
 - (c) Chapter 4 gives guidance on topics commonly raised in applications which are not dealt with elsewhere in the document;
 - (d) Annex A lists the key policy documents referred to in this document and which are relevant to depot access; and
 - (e) Annex B sets out our processes in a series of flowcharts.
- 1.9 All publications referred to in this document are available from the ORR [website](#) , and/or other sources indicated in the document.

2. Regulation of access to depots

Introduction

- 2.1 This chapter explains the framework that applies to the regulation of depot access including the Act, the 2016 Regulations and the concurrent application of the Competition Act 1998. It also explains the function of Depot Access Agreements, the Depot Access Conditions and Depot Annexes, as well as our approach to appeals and disputes.

Regulatory Framework

- 2.2 The regulatory framework applying to depot access was established by the Act. It is complemented by the 2016 Regulations. Further information on this, and on ORR, is available in Annex C of the document, [Starting Mainline Rail Operations](#).

The Railways Act 1993

- 2.3 Under the Act, a party (for example, a train operator) may only enter into a contract with a facility owner (e.g. Network Rail or another train operator) for permission to use that owner's railway facility if ORR so directs, or has given approval prospectively under a general approval. The railway facility may be track, a station or a light maintenance depot. Once contracts have been entered into following our directions, or through the automatic approval of a general approval, they become access agreements. Proposed contracts that have been agreed by the parties require our approval and direction under section 18. Subsequent agreed amendments require our approval under section 22.
- 2.4 For the purposes of this guidance, the term “agreement” will be used to describe either an access contract or an access agreement.
- 2.5 Where the parties have not been able to agree on the terms of an agreement, the person requiring access (the beneficiary) can apply to ORR to issue directions under section 17 of the Act, requiring the facility owner to enter into the agreement as determined by ORR. Similarly, where the parties have not been able to agree on the terms of a proposed amendment to an existing agreement to permit more extensive use of a facility, the beneficiary can apply to ORR under section 22A of the Act to issue directions to require the amendment of the agreement as determined by ORR.

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- 2.6 The statutory regulated access regime does not apply where a facility is exempt from the regime under section 20 of the Act, including by virtue of the [Railways \(Class and Miscellaneous Exemptions\) Order 1994](#) (the CMEO), or is exempted by the [Channel Tunnel Rail Link Act 1996](#). However, regulation 32 of the 2016 Regulations provides all applicants for access with the right of appeal to ORR, even in relation to facilities which are otherwise exempt under other legislation. This is discussed further in paragraphs 2.8-2.9 below.
- 2.7 The majority of depots in Great Britain are leased by Network Rail to a depot facility owner (DFO). The DFO operates the facility. Most depots are operated by a train operating company operating in accordance with an agreement awarded by DfT or Scottish Ministers. Some depots, however, are operated by train manufacturers or other third parties.

The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 (the 2016 Regulations)

- 2.8 The [2016 Regulations](#) apply to the allocation of capacity and entitlements to access, the levying of charges, and provide for open access for all types of rail freight services.
- 2.9 The 2016 Regulations provide for a right of appeal to ORR for any applicant that feels aggrieved and considers it has been wrongly denied access to a facility or service, or that the terms for obtaining access are unreasonable or discriminatory. Appeals can also be brought against an infrastructure manager's charging system, or charging matters associated with access to unregulated facilities/services.

ORR's approach to the regulation of access to depots

- 2.10 In exercising our functions under the Act to determine access to the network, we must have regard to our [statutory duties](#); most of these are set out in section 4 of the Act. We must exercise our functions in the manner we consider is best calculated to achieve those duties.
- 2.11 The ORR also has duties set out under the Channel Tunnel Rail Link Act 1996, and the Crossrail Act 2008.
- 2.12 In scrutinising proposed agreements or amendments submitted for our specific approval and in determining whether, and on what terms, to direct that access be granted, we expect to focus on:

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- (a) actual and potential impacts on third parties;
- (b) any areas of disagreement;
- (c) any deviations from our published model agreements; and
- (d) consistency with our previous decisions (where appropriate).

2.13 New agreements or amendments submitted under a general approval will be scrutinised in accordance with the criteria and procedures described in paragraphs 3.6 - 3.11 below.

Depot Access Agreements

2.14 Depot Access Agreements provide a user with permission for its trains to use a light maintenance depot and to obtain light maintenance services. The agreement is between the Depot Facility Owner (DFO) and the beneficiary, and sets out terms for access to the depot and charges for light maintenance services. Depot Access Agreements can also be used where there is a third party procuring depot services on behalf of another train operator.

Depot Access Conditions and Depot Specific Annexes

2.15 Depot Access Agreements incorporate by reference the relevant Depot Access Conditions and depot specific annexes.

2.16 Depot Access Conditions (DACs) are standard rules, which govern the relationship between all the contracting parties at a depot, covering matters such as the process for agreeing changes to the depot (Part C), access charging (Part F) and the remedies available when things go wrong (Part H).

2.17 Depot annexes cover the details relevant to the specific depot, such as a depot plan, a description of the services and facilities, and a description of the DFO's own services.

2.18 At depots where Network Rail is the landlord, the annexes also include a copy of the standard collateral agreement between Network Rail and each beneficiary. Collateral agreements create a direct contractual link between a beneficiary and Network Rail. Should Network Rail fail to fulfil its obligations to a beneficiary as set out in the DACs or in certain circumstances, other obligations as set out in an access agreement, then a beneficiary can use the collateral agreement to require Network Rail to perform them.

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2.19 Under the Act, ORR only has the power to direct or approve new access agreements or amendments to existing agreements. In cases where there are no beneficiaries at a depot, there will be no access agreements in place (only a lease between the landlord and the facility owner). In such circumstances, ORR cannot “approve” the depot annexes. However, a set of depot annexes can be submitted for inclusion on our Public Register, and an ORR reference number will be allocated, but ORR cannot formally approve the annexes in the same way that we must approve access agreements and amendments to them.

Proposals for changes to a depot

2.20 The procedure for issuing a Proposal for Change is set out in Part C of the [Depot Access Conditions](#). Network Rail, a Facility Owner or any Relevant Operator can make a Proposal for Change in accordance with the Part C process.

2.21 ORR is listed as a consultee for certain Proposals for Change. These Proposals for Change should be sent directly to the relevant ORR Inspector.

2.22 The Stations and Depots team will not typically comment on Proposals for Change if submitted to us, and will await formal submission for our approval of any subsequent amendments to depot access documentation (see chapter 3). We will provide general advice, if requested, in advance of any submission.

Sections 17 and 22A

2.23 Sections 17 and 22A of the Act exist for the protection of train operators and others who need access to railway facilities but who cannot agree terms with a facility owner. They can be used whenever there has been a failure, for any reason, to reach agreement on the terms of access. Usually this will arise where the prospective user considers that the facility owner is demanding unfair terms for access or is unfairly refusing access altogether. It should of course be remembered that what may at first appear to be unfair behaviour on the part of the facility owner could subsequently be established to be justifiable. That is a matter to be tested in the section 17 or 22A process.

2.24 Where the parties cannot agree on the terms of a new access agreement, section 17 provides for a prospective user of a railway facility to apply to ORR for us to give directions to the facility owner to enter into an agreement with the applicant. Section 22A applies where a user with an existing approved access agreement is seeking amendments to it, which will permit more extensive use of

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the facility in question, such as accessing a greater number of depot services. Note that section 22A cannot be used to extend the duration of an access agreement. In such cases, either a new agreement will be required or an amendment made to the expiry terms of the existing agreement.

- 2.25 We expect facility owners to engage in negotiations with prospective users in an open, constructive and responsive way. Facility owners should provide prospective users with necessary information in a timely manner.
- 2.26 We also expect prospective users to try in good faith to reach agreement with facility owners on terms of access, wherever possible, before submitting applications under sections 17 or 22A. In that respect, it is important that prospective users begin discussions with facility owners early enough to allow time to follow the section 17 or 22A processes and obtain directions from ORR should that become necessary. Our expected timescales for dealing with applications are set out in chapter 3.
- 2.27 Whilst agreed applications under section 18 or 22 are of course desirable to all parties, if negotiations with a facility owner are not making sufficient progress and time is running short, a prospective user may wish to submit a section 17 or 22A application. This does not mean that negotiations should not continue in parallel. Such an application is simply rational business practice for a prospective user not to allow itself to lose important protections it may eventually need. If the stance taken by the facility owner is regarded by a prospective user as unfair, the prospective user should not feel it necessary to persevere fruitlessly with negotiations until there is only just enough, or not enough, time for a section 17 or 22A application to be dealt with.
- 2.28 It is for ORR to determine the fair and efficient terms of access, regardless of whether or not the parties have reached agreement on all pertinent points in negotiations. We will base our decision on the public interest as defined by our statutory duties. We are required, if appropriate, to put the public interest above the private commercial interests of the facility owner and the applicant. For instance, we may have to take into account considerations that may be of little or no concern to the parties, but which affect the interests of third parties, for example rail users, funders or other potential users of the facility.
- 2.29 We will nevertheless have regard to, but by no means be constrained by, what the parties have agreed. It is therefore important that in their negotiations the parties have, as far as reasonably practicable, thoroughly considered the issues

so that we and consultees can have the benefit of a developed proposition for proposed access.

Appeals and disputes

- 2.30 By incorporating the relevant access conditions, Depot Access Agreements contain mechanisms for resolving disputes between industry parties, once the agreement has been entered into.
- 2.31 Condition H5 of the DACs, sets out the terms for the resolution of disputes and claims. Most disputes or claims arising out of the relevant access conditions or an access agreement are resolved in accordance with the Access Dispute Resolution Rules (ADRR). The ADRR, which are annexed to the Network Code, establish the Access Disputes Committee (ADC). The ADC appoints the relevant ADRR panel.

Appeals under the 2016 Regulations

- 2.32 Regulation 32 of the 2016 Regulations (also discussed in paragraphs 2.8-2.9 above) provides applicants¹ with a general right of appeal to ORR if they feel they have been unfairly treated, discriminated against or are in any other way aggrieved. This may be against a decision by an infrastructure manager, a terminal or port owner, a service provider or a train operator. The appeal may be in relation to facilities that are otherwise exempt from the Act under section 20, provided that these facilities have not themselves been identified as excluded from the scope of the 2016 Regulations (as outlined in paragraph 4 of the Regulations). In July 2021 we published updated [guidance](#) on the approach we will adopt in considering appeals under these Regulations. The procedure for appeals under the Regulations is largely the same as the procedure for applications under sections 17 or 22A of the Act.
- 2.33 Where the matter of an appeal is one for which directions may be sought under sections 17 or 22A of the Act, then an application should be made under these provisions and will be dealt with using that process, rather than by way of the appeal mechanisms available under the 2016 Regulations. For any other matters, appeals should be lodged with us under the 2016 Regulations.

¹ “Applicants” are defined as: a railway undertaking or an international grouping of railway undertakings or other persons or legal entities, such as competent authorities under Regulation (EC) No 1370/2007 and shippers, freight forwarders and combined transport operators, with a public service or commercial interest in procuring infrastructure capacity.

Exemptions

- 2.34 Our approval of a contract providing access to a facility is not required where the facility in question is exempt from that requirement. A facility owner may apply to us or to the Secretary of State for an exemption, under section 20 of the Act. Exemption can be in respect of the whole or part of the facility and conditions can be attached which, if broken, may lead to revocation of the exemption. Exemptions under section 20 apply only to the provisions of sections 17, 18 and 22A of the Act; they do not provide exemption from the appeal mechanisms contained in the 2016 Regulations.
- 2.35 The Secretary of State exempted certain classes of railway facility from the access (and licensing) provisions of the Act under the terms of the [Railways \(Class and Miscellaneous Exemptions\) Order 1994](#). This exemption applies to certain railway assets that were already privately operated in the period prior to the coming into force of the Act and for facilities (including networks) for which the regulatory regime established by the Act was considered inappropriate.

Consistency with competition law

- 2.36 Agreements which are restrictive of, or which distort, competition or which could amount to an abuse of a dominant position, may fall for consideration under the Chapter I or Chapter II prohibitions, respectively, of the Competition Act 1998 (CA98).
- 2.37 When exercising our powers under the Act in approving access agreements, we will have regard to our statutory duties including the duty to promote competition in the provision of railway services for the benefit of users. Our duty to promote competition is an important factor in our assessment, however, it is only one of a number of duties which need to be balanced together in order to fulfil our regulatory obligations. Our assessment and balancing of the duty to promote competition does not entail the type of analysis we would undertake under competition law.
- 2.38 The Competition and Markets Authority (CMA) and ORR are not able to grant an individual exemption from the Chapter I prohibition. It is, therefore, the responsibility of the parties to ensure that any agreement that they enter into is compliant with competition law. For further information on the application of competition law in the railway sector please refer to our [guidance](#).

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- 2.39 Agreements may be challenged under competition law by third parties: either by private litigation through the courts or by a complaint to the competition authorities (the CMA and ORR have concurrent jurisdiction as competition authorities to examine claims under CA98)
- 2.40 To the extent that access agreements are entered into in compliance with ORR's directions made under section 17-22A of the Act, the parties may seek to argue that they are excluded from the scope of the prohibitions. When implementing competition law, ORR must act with a view to securing that there is no inconsistency between the principles it applies, and the principles laid down in rulings of the European Court before 31 December 2020 but may depart from such rulings made before that date where it is considered appropriate in light of specified circumstances. If a challenge were to be investigated, parties would have to take advice on the individual circumstances of their case. In general terms, it would be necessary to demonstrate that the legislative regime of the Act absolutely required them to act in the way complained of and would have prevented the parties from having any scope to make an agreement that would not have contravened competition rules.
- 2.41 Access agreements entered into under section 18, in reliance of a general approval given by ORR are not the subject of ORR directions and may therefore be subject to action under CA98, as can agreed amendments to access agreements entered into under section 22 of the Act, or any amendment provisions contained in access agreements themselves.
- 2.42 Finally, section 22(6A) of the Act prevents either the CMA or ORR issuing enforcement directions or interim directions under the Competition Act 1998 in relation to access agreements, although interim directions may be issued over matters of conduct related to an access agreement where there is reasonable suspicion that an abuse of dominance under Chapter II has occurred.

3. Making an application: criteria, procedures and timescales

Introduction

- 3.1 This chapter explains the procedures we expect to follow when considering applications for agreements granting access to depot facilities for light maintenance services. Through these procedures, our aim is to ensure that our consideration of applications is undertaken in a timely manner and is wholly consistent with our statutory duties under the Act and the 2016 Regulations. This chapter also sets out the process for submitting access agreements and amendments under the wide-ranging General Approval, submitting access agreements and amendments for specific approval, the procedure whereby ORR deals with appeals and disputes, and our process for applications involving the exemption of facilities from the provisions of the Act.
- 3.2 This chapter is divided into nine sections:
- (a) general matters (concerning the submission of applications, the need for ORR's approval and our timescales);
 - (b) general approvals (concerning the submission of applications under a General Approval);
 - (c) model agreements – this section contains information on, and links to, the types of agreements which parties can enter into;
 - (d) specific approval of applications under section 18 (where we are being asked to approve a new agreement under section 18 of the Act that requires specific approval);
 - (e) specific approval of applications under section 22 (where we are being asked to approve amendments to an existing approved agreement or to the DACs, as incorporated into an existing approved agreement, under section 22 of the Act, which require specific approval);
 - (f) applications under section 17 and 22A (where the parties have not been able to agree terms, in whole or part, and we are asked to direct the DFO to enter into an agreement under section 17, or to direct under section 22A that an amendment be made to an existing approved agreement in order to

permit more extensive use of the facility to which the existing agreement applies);

- (g) confidentiality, consultation and ORR's public register;
- (h) termination of existing agreements; and
- (i) new depots.

General matters

Validity of agreements

3.3 Our role in approving access agreements is established by the Act, which states that a facility owner shall not enter into an access agreement unless:

- (a) it does so pursuant to directions we have made under sections 17 or 18 of the Act; or
- (b) we have issued a general approval prospectively permitting agreements of that type to be entered into; or
- (c) the facility in question is exempt from sections 17 and 18 of the Act; either because we have granted an access exemption under section 20 of the Act, or it is already exempt by virtue of other legislation (for example, the CMEO or Channel Tunnel Rail Link Act 1996).

Any access agreement which is entered into otherwise is void (i.e. has no effect in law).

3.4 Similarly, any amendment to an access agreement is void unless:

- (a) we have approved the amendment under section 22 of the Act; or
- (b) we have issued a general approval permitting amendments of that type to be made; or
- (c) it is made pursuant to directions that we have given under section 22A.

General approvals

- 3.5 We have powers under sections 18 and 22 of the Act to issue general approvals. Under these, we may give our approval in advance, without the need for specific approval, to:
- (a) the making of access agreements of a specified class or description;
 - (b) amendments of a specified description to a particular access agreement; and
 - (c) amendments of a specified description to access agreements generally or to access agreements of a particular class or description.

The General Approval for depots (2017)

- 3.6 The [General Approval for depots \(2017\)](#), came into effect on 6 February 2017. The General Approval means that nearly all agreements, which are consistent with the model agreements and which have been agreed by the parties, will be automatically approved.
- 3.7 The General Approval also allows parties to make amendments to access agreements, as long as these modifications fall wholly within the terms of the General Approval.
- 3.8 Agreements and amendments to agreements that do not fall wholly within the terms of the General Approval can be submitted for consideration of our specific approval.
- 3.9 As we will not routinely check the accuracy of agreements and amendments to agreements submitted under the General Approval, it is the responsibility of the parties concerned to make sure their agreements make sense and are enforceable, and that the agreement is covered by the terms of the General Approval.

Entering into new access agreements

- 3.10 In order for the General Approval to apply to new agreements, parties must use the ORR-issued model access agreements (available on our [website](#)), subject to making any “permitted departures”. Such “permitted departures” are set out in the General Approval and include the right to complete areas which have intentionally been left blank in order that relevant details can be inserted; to complete areas marked by square brackets; to fill in tables; and to select one of various alternative words or phrases.

Amendments to access agreements

- 3.11 The General Approval only applies to amendments that do not go beyond the alterations specified in the General Approval.
- 3.12 For the purposes of clarification, “changes to existing agreements” refers also to changes to the Depot Access Conditions and associated depot specific annexes, as a consequence of the depot change process (as outlined in the relevant access conditions). This is because the access conditions and annexes are incorporated by reference into access agreements.

Restrictions on amending access agreements

- 3.13 There are a number of specific restrictions on making amendments to agreements. These have been included in order to prevent standard terms and substantive clauses of model agreements being created, changed, deleted, overridden or redefined without our specific approval (unless such modification is expressly permitted by the General Approval).

ORR reference numbers

- 3.14 When parties use the General Approval for entering into new agreements, or for amending agreements, ORR will issue a reference number upon receipt of the signed and dated agreement or amendments. Parties should be aware that the General Approval provides ORR’s pre-approval of an Access Agreement or an amendment. ORR will acknowledge receipt of a submission made in accordance with the General Approval, will issue it a reference number and will arrange for the Agreement or amendment to be placed on our public register. This is an administrative process and does not constitute a formal approval; formal approval occurs at the point that the parties sign and date a new Agreement or, in the case of an amendment, once the parties sign and date the Amending Agreement or agree the term of the Amending Document and submit it to ORR.

Guidance note

- 3.15 A comprehensive guidance note is available for the General Approval. It explains the scope and application of the General Approval and describes the changes made to the model access agreements.
- 3.16 The guidance note should be referred to when parties are entering into or amending access agreements. As mentioned above, the guidance note is available on our [website](#).

Timescales

3.17 We aim to process a submission made under the General Approval within six weeks from the date of receipt of all information, although we will always try to process these submissions as quickly as possible. This timescale does not affect the date on which the generally approved agreement comes into force.

Model agreements

3.18 ORR has issued model [Depot Access Agreements](#), which are available on our website. The relevant agreement should be used when making a submission for approval to ORR.

3.19 As part of the General Approval implementation process (described in 3.6-3.11 above), the model agreements were amended to include a condition precedent requiring a copy of the agreement to be sent to ORR within 14 days of the agreement being signed and dated by the parties. The provisions of an agreement shall not have effect until this and all other condition precedents have been satisfied in full. As described in 3.12, the General Approval will only apply to new agreements where the parties use the model agreements. If parties wish to make bespoke changes to an agreement, which fall outside the scope of the General Approval, then that agreement must be submitted for consideration of our specific approval. It is important to note that the General Approval does not mean that customisation cannot be considered.

3.20 Two types of model agreement exist for depot access. These are as follows:

- (a) a standard Depot Access Agreement which covers general access, or,
- (b) a non-TOC beneficiary Depot Access Agreement, for use when a third party is procuring depot services on behalf of another party.

3.21 Where applicants are unclear about any part of the model agreements, or on any aspect of the application process, they may wish to contact the Stations & Depots team (StationsandDepots@orr.gov.uk).

Specific Approval – applications to enter into new agreements under Section 18

3.22 An access agreement that does not fall wholly within the terms of the General Approval must be submitted to ORR for consideration of our specific approval.

Submission of an application

- 3.23 We would expect applications made under section 18 to reach us at least six weeks before the proposed commencement date of the agreement. ORR cannot ensure approval by the date specified should this condition not be met. Under section 18(5) of the Act, the responsibility for making the application lies with the facility owner. However, we will also accept the submission from the beneficiary, where this has been agreed with the facility owner.
- 3.24 All applications should be submitted electronically to the Stations & Depots and Network Code team at StationsandDepots@orr.gov.uk, and contain the draft agreement and letters or emails of consent from both the facility owner and beneficiary. We will request an electronic application, should the submission not be made in this manner.
- 3.25 All applications should be made using the model agreements available on our website (see 3.18 – 3.21). Should parties wish to make material deviations from these model agreements, we would expect explanations for such departures to be provided upon submission to ORR.

Consideration and criteria for approval

- 3.26 You will receive an automated email to confirm receipt of the application. We will assign a case officer to deal with it and will then:
- (a) check that ORR approval under section 18 of the Act has been requested;
 - (b) check that the agreement follows an approved ORR model agreement (apart from noted departures), is complete, and is factually correct;
 - (c) check that the parties concerned have given consent to the provisions of the agreement;
 - (d) check that any material deviations from the model agreement have been explained and agreed by the parties, are contractually sound, and do not prevent ORR from approving the agreement. This may involve, for example, seeking advice from our Legal Team; and
 - (e) check that there are no other issues of regulatory concern. Issues may include:
 - (i) whether the level of any charges for access to a depot and/or services to be provided, are fair and appropriate. We may compare

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the charges against those levied by the same DFO at the same depot to a different beneficiary.

- (ii) whether any parts of the Depot Access Conditions are being expressly disapplied. A detailed explanation will be required.
- (iii) whether any additional or amended terms within an agreement appear unfair or discriminatory towards the parties, or the interests of third parties, for example other rail users, funders or other potential users of the facility. ORR will not be able to approve an agreement where we deem its terms unfair or discriminatory, as this would be inconsistent with our section 4 duties (described below).

3.27 Overall, when considering whether to approve a depot access agreement, we will have particular regard to our section 4 duties, and more specifically our duties:

- (a) to protect the interests of users of railway services (section 4(1)(a) of the Act);
- (b) to promote the use of the railway network in Great Britain for the carriage of passengers and goods, and the development of that railway network, to the greatest extent that it considers economically practicable (section 4(1)(b) of the Act); and
- (c) to enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance (section 4(1)(g) of the Act).

3.28 Taking account of all of our duties, and the above criteria, we may then ask for changes we would wish to see made to the agreement before we will approve it.

Directions

3.29 Once we are satisfied that we are able to approve an agreement, we will then issue directions to the DFO to enter into it with the beneficiary within a specified period. The directions are also copied to the beneficiary.

3.30 ORR will assign a unique reference number which should be inserted to the top right hand corner of the cover sheet of the agreement before signature by the parties, to ensure all parties have a uniform referencing system. The reference

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number should also be used in all future correspondence regarding the approved agreement.

- 3.31 Until the access agreement is signed and dated (made) none of the provisions contained within it are applicable. A copy of the signed and dated agreement must be sent to ORR within 14 days of it being made, in accordance with section 72(5) of the Act, and clause 2.1.7 of the access agreement.
- 3.32 The facility owner will be released from its duty to comply with the directions if the beneficiary fails to enter into the access agreement on the terms as directed by the date specified.

Timescales

- 3.33 On receipt of all relevant information, we will reach a decision on whether to approve the agreement within six weeks, although we will always try to complete the approval process in as short a time as possible.

Specific Approval – applications to make amendments to an agreement under Section 22

- 3.34 Prior to making a submission to ORR for specific approval, the parties should satisfy themselves that the amendments they are seeking are not covered by the [General Approval](#).

Submission of an application

- 3.35 Where amendments are not covered by a General Approval, specific approval must be sought. Applications should be submitted electronically to StationsandDepots@orr.gov.uk, and contain the amendments and letters of consent from the DFO and beneficiary or beneficiaries.
- 3.36 We advise parties to consider using the model amending agreements or amending document found on our [website](#) to reflect the proposed amendments. Amending agreements should be used when parties wish to change the content of an existing depot access agreement. The amending document should be used when a party wishes to amend the Depot Access Conditions and Depot Specific Annexes.

Consideration and criteria for approval

- 3.37 You will receive an automated email to confirm receipt of the application and we will assign a case officer to deal with it.

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3.38 For amendments to Depot Access Conditions and Depot Annexes, we will expect to:

- (a) check that ORR approval under section 22 of the Act has been requested;
- (b) check that there is consent or deemed consent for the amendments from other depot users whose agreements are affected, in accordance with Parts B or C of the Depot Access Conditions;
- (c) check, where an objection has been received, whether the submitting party has included an explanation of how the objection has been dealt with and whether the amendments have been accepted by the depot parties;
- (d) request from the submitting party clarification or copies of consents as necessary; and
- (e) check that the proposed amendments are clear, and that factual information is correct.

3.39 For amendments to Depot Access Agreements we will expect to:

- (a) check that ORR approval under section 22 of the Act has been requested;
- (b) check that the other party has agreed to the proposed amendments to the agreement;
- (c) consider the potential impact of each amendment on other beneficiaries (or potential beneficiaries) at the depot;
- (d) consider whether each proposed amendment raises any issues of discrimination against other beneficiaries (in particular, charges for services);
- (e) consider whether the amendments are clear and enforceable; and
- (f) check whether the contracting parties' particulars, names of depots etc are correct.

3.40 Taking account of all of our section 4 duties, and the above criteria, we may then ask for changes we would wish to see made to the agreement before we would approve it.

Approval

- 3.41 Under section 22, we do not issue directions to the parties. Ultimately, we may only approve or reject proposed amendments. If there are proposed amendments that we cannot immediately approve in their current form, we will suggest the changes that need to be made so that we can give our approval. Once we are satisfied that we are able to approve the amendments, we will issue an approval notice to the submitting party.
- 3.42 Upon approval, ORR will assign a unique reference number which should be used in all future correspondence regarding the approved amendments.
- 3.43 Copies of approved amending documents will be placed on the public register immediately, along with a copy of the approval notice.
- 3.44 Amending agreements should be signed and dated by the parties once ORR approval has been given. A copy must be sent to ORR within 14 days of the amending agreement being signed and dated.

Timescales

- 3.45 On receipt of all relevant information, we will reach a decision on whether to approve the amendments within six weeks, although we will always try to complete the approval process in as short a time as possible.

Applications under Sections 17 and 22A

- 3.46 Sections 17 and 22A of the Act provide for a party to apply to ORR for access to a depot where they have been unable, for whatever reason, to reach agreement with the facility owner. Section 17 provides for a party to make an application to ORR for it to direct a facility owner to enter into a new agreement. Section 22A only applies where a beneficiary with an existing agreement is seeking amendments to that agreement to have more extensive use of the facility. It should be noted that section 22A cannot be used to extend the duration of an existing agreement. In such circumstances, a new agreement under section 17 would be required to take effect on the expiry of the existing agreement.
- 3.47 Schedule 4 to the Act establishes certain mandatory elements of the process for applications under sections 17 and 22A, including some minimum fixed timescales. The overall process we expect to follow is, nevertheless, the same in most respects to that for applications under sections 18 and 22, comprising the five key steps described below.

Step 1 – Development

- 3.48 We recognise that the steps taken to address any issues arising out of access to a depot may be limited where a beneficiary, or prospective beneficiary, has not reached agreement with the facility owner. On the other hand, the beneficiary's (or prospective beneficiary's) recourse to section 17 or 22A may reflect disagreement only on a few specific aspects of a proposed agreement. In order to process an application swiftly, we will therefore wish to see the outcome of the steps taken to address such issues.
- 3.49 We wish to encourage the parties to negotiate and agree terms with each other wherever possible, in order to promote the most effective working relationship in the delivery of services. Where a party considers it likely that agreement will not be reached, we strongly encourage early consideration being given to submitting a section 17 or 22A application, rather than regarding such an application as a last resort, given the timing considerations that apply to any application. The submission of a section 17 or 22A application need not mark the end of negotiations. It would be possible for the application to be withdrawn and an agreed application under section 18 or 22 submitted. However, it may be more expedient to continue the section 17 process whilst having regard to the fact that the disagreement between the parties has been resolved.
- 3.50 Also, where, through further negotiation, parties reach an agreement on certain aspects of a proposed agreement, we will take into account any joint representation they make alongside such other representations as we might receive through our wider consultation. We strongly encourage operators to discuss their requirements with ORR at an early stage.

Step 2 – Discussion with other operators

- 3.51 Where a train operator intends to make a section 17 or 22A application, we recommend that it discusses informally at an early stage its plans with those operators likely to be most affected by its proposals. This will help to identify the main concerns that other parties are likely to have and enable the applicant train operator to attempt to resolve those concerns sooner rather than later.

Step 3 – Submission of application to ORR

- 3.52 Any application for directions under section 17 or section 22A must be made in writing to ORR and must:
- (a) contain particulars of the required rights or terms of access;

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- (b) specify the terms which the applicant proposes should be contained in the required access agreement or proposed amendment; and
- (c) include any representations that the applicant wishes to make with regard to the required rights or terms of access to be contained in the required access agreement or proposed amendment.

3.53 We have developed application forms to be completed by the applicant covering the standard information we will require. The application forms, which can be found on our website [here](#), set out the information we need in order to consider an application and to facilitate the process of consulting other bodies. The forms also seek information on the extent to which the rights sought differ from those already held in any existing agreement, any changes in the services to be used, and any impact on existing beneficiaries. This information is helpful in assisting us (and consultees) to gain a swift understanding of the practical implications of the rights sought in comparison to the current position. In particular, we will wish to understand exactly what is in dispute between the applicant and the facility owner, and what, if anything, has been agreed. As explained in 2.22 – 2.28 above, applicants should note that our scrutiny of a proposed application will not be limited to areas of disagreement.

3.54 We must not give directions under section 17 or 22A where:

- (a) the railway facility in question has been exempted from the provisions of section 17 of the Act by virtue of section 20 of the Railways Act 1993, or by virtue of the CMEO;
- (b) we have received an appeal relating to the facility under the 2016 Regulations;
- (c) performance of an access agreement as contemplated by the proposed directions would necessarily involve the facility owner in being in breach of an existing access agreement; or
- (d) as a result of an obligation or duty owed by the facility owner which arose before 2 April 1994, the consent of some other person is required by the facility owner before the facility owner can enter into the proposed agreement or supplemental agreement.

Step 4 – Consideration, consultation and timescales

- 3.55 On receipt of an application under section 17 or 22A, we must²:
- (a) send a copy of the application to the facility owner and invite them to make written representations to us, allowing them at least 21 days for this;
 - (b) send the applicant a copy of the facility owner’s representations, allowing them at least 10 days to submit further representations;
 - (c) direct the facility owner to provide us with a list of ‘interested persons’³
 - allowing at least 14 days for the facility owner to respond;
 - (d) on receipt of the list, invite the ‘interested persons’ to make written representations, allowing them at least 14 days to respond; and
 - (e) copy any representations received from ‘interested persons’ to the applicant and the facility owner seeking any representations they wish to make, allowing them at least ten days to respond.
- 3.56 We may also commence the wider, statutory consultation at the same point as we invite representations from ‘interested persons’. This consultation will seek views from statutory consultees and consultees with a possible interest in the application. The consultation period must be not less than 14 days, and could be considerably longer depending on the nature of the application. If, after an initial review of the proposed agreement, we identify any key issues on which we would appreciate consultees’ specific comments, or which we wish to draw to consultees’ attention, we will send an email or letter detailing those issues.
- 3.57 In line with paragraphs 3.70 – 3.72 below, our consideration may involve a hearing.

Step 5 – Conclusions and directions

- 3.58 In accordance with the provisions of Schedule 4 to the Act, we must inform the applicant, the facility owner and any ‘interested persons’ of our decision. If we decide to give directions under section 17 to the facility owner requiring it to enter

² The statutory consultation that ORR must carry out in relation to s17 and s22A applications is set out in Schedule 4 of the Act.

³ The Act defines “interested person” as any person whose consent is required by the facility owner, as a result of an obligation or duty owed by the facility owner which arose after the coming into force of section 17 of the Act, before the facility owner may enter into the required access contract (Schedule 4, paragraph 1).

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into an access agreement or directions under section 22A for amendments to an existing agreement, the directions must specify:

- (a) the terms of the access agreement or the amendments to be made; and
- (b) the date by which the access agreement must be entered into, or amended, as the case may be.

They may also specify any compensation we have decided the facility owner should pay to any interested person. Subject to section 71(2) confidentiality exclusions, we will publish our decision and the reasons for it.

- 3.59 As with a section 18 application, for directions issued under section 17 the facility owner is released from its duty to comply with the direction if the applicant fails to enter into the access agreement on the terms as directed and by the date specified. This situation does not extend to directions issued under section 22A. Any direction issued under section 22A applies to both the facility owner and the applicant (i.e. both parties must enter into the agreement).
- 3.60 Once the agreement is entered into, the facility owner must send a copy to us within 14 days, after which a copy will be placed on our public register.

Confidentiality, consultation and ORR's public register

- 3.61 We are required under section 72 of the Act to maintain a [public register](#). Section 72 sets out what we must enter in the register. This includes every direction to enter into an access agreement, every access agreement and every amendment of an access agreement. Under section 72(3), we must have regard to the need for excluding from the register, so far as practicable, any matter which relates to the affairs of an individual or body of persons, where publication would or might, in our opinion, seriously and prejudicially affect the interests of that individual or body.
- 3.62 New access agreements and amendments to access agreements will not have information blanked out prior to being placed on ORR's public register unless a request for redaction is made to us. In considering whether to exclude material from wider circulation, we must have regard to the criteria under section 71(2) of the Act, which also apply to exclusions from the public register (i.e. whether publication of information relating to the affairs of an individual or body of persons would or might, in our opinion, seriously and prejudicially affect the interests of that individual or body of persons). We must also consider a

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request for redaction in line with ORR's policy on the [exclusion of information from station and depot access documentation](#). It is therefore important that applicants provide relevant reasons to support any request for excluding any confidential material from entry on the public register or publication generally.

- 3.63 Applicants under sections 17 or 22A of the Act should note that under the process established by Schedule 4 to the Act, we are obliged to send a copy of the application in full to the facility owner. Applicants should therefore not include any information within their submission which they do not wish other parties to see. We are also obliged to consult any 'interested person' identified by the facility owner on the application and invite written representations from them (see paragraphs 3.55 (c) & (d)).

Electronic copies

- 3.64 Many organisations have developed their own IT templates for documents, with macros and other auto-formatting that generate paragraph and page numbers, cross-references etc. Experience has shown that this can result in problems when sharing documents across systems (e.g. paragraph numbers disappear, and cross-references are lost), and it can make subsequent amendment of proposed agreements difficult (a particular issue where we are determining the form and content of an access agreement under a section 17 application).
- 3.65 We therefore wish to receive proposed agreements in electronic form in plain format, i.e. excluding any macros or other auto-formatting. Paragraph numbering should follow the convention in the relevant published model agreement, and should be typed in, not self-generated.
- 3.66 We strongly recommend applicants to begin from and continue with the relevant model agreements, which may be obtained from the [ORR website](#).

Complete submissions

- 3.67 All submissions made should be complete and include all relevant supporting documentation. This is particularly important where parties are making an application under a General Approval as it may mean that the agreement has not been properly executed and is therefore void. Please refer to the guidance note on our [website](#).
- 3.68 For submissions under sections 17 and 22A, the proposed agreement/amendment sought by the applicant must form part of the application and must be complete at the time of submission. This is a requirement of paragraph 2(1) of Schedule 4 to the Act.

False information

3.69 Section 146 of the Act provides that any person, in giving any information or making any application under the Act, who makes any statement which he knows to be false in a material particular, or recklessly makes any statement which is false in a material particular, is guilty of an offence. If false or misleading information has been given and our decision would otherwise have been different, the access agreement or amendment may be void on the grounds of fraudulent misrepresentation.

Hearings

3.70 A hearing enables us to probe and test issues of particular and wide-ranging regulatory concern together with relevant interested parties in a live environment. Being able to air issues with several parties at once allows us and others with an interest in an application to raise supplementary issues of concern and clarification as the hearing progresses. For example, an application may raise new issues that are of wide interest for other members of the railway industry; some aspects of a proposed contract could impact greatly on several other operators' current rights or plans. A hearing can be a useful and efficient opportunity to test the issues raised in written representations, and to test the recommendation that ORR staff might be minded to make, before final decisions are taken. A hearing may be held in addition to the specific meetings which we may offer, or require one or both parties to attend, to discuss specific aspects of an application.

3.71 However, given the time and resources required for hearings, we only hold them where we consider that they will add value to our decision making process. We will consider on a case by case basis whether a hearing is appropriate. If we decide to hold a hearing, we will invite all parties we consider likely to be directly and materially affected by, or to have a substantial interest in, the application. We will generally expect to put questions to the person seeking access rights, Network Rail and any relevant funding authorities. We may also invite others to present their concerns, and may also allow cross-questioning (through the chair). We will not expect those present to repeat material that has already been supplied in written representations, but may invite examples.

3.72 We will usually give attendees advanced notice of the agenda we expect to follow and its timing. For significant new contracts, a hearing may run for more than one day, and it may be appropriate to hold separate hearings to consider separate issues. It will always be open to those attending to arrange to be represented or assisted by legal advisers. A transcript will be taken of the

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hearing. A draft will then be made available to those attendees who have spoken to give them the opportunity to propose corrections to their own words, using Hansard Rules, before the hearing transcript is published on the ORR website (with any necessary confidentiality redactions). For matters that we consider should be confidential, in accordance with the test in section 71 of the Act, we may arrange for a hearing to be closed, in whole or part, and attended only by the relevant parties. We will not expect to accept further material or representations after the hearing has concluded, other than in response to any further questions we may pose, or as we may have requested or permitted before or during the hearing.

Termination of existing access agreements

- 3.73 Access agreements typically remain in effect until either the facility owner or the beneficiary has its contract with DfT or Scottish Ministers terminated (in the case where the DFO and/or beneficiary operates under such a contract) or if the DFO ceases trading as a registered company.
- 3.74 Should the parties to an agreement wish to terminate it prematurely, they can inform us in writing of their wish to do so, in line with the terms set out in the access agreement.

New depots

- 3.75 When new depots are added to the network, it is the facility owner's responsibility to ensure that the depot is added to their operating licence. Operators should arrange this through our [Licensing team](#).
- 3.76 The facility owner should work with the freeholder (typically Network Rail) to produce and agree a set of Depot Annexes, which can be submitted to ORR for inclusion on our Public Register, in accordance with section 72 of the Act. We will also assign a unique "DSA" reference, which should be used in all relevant future correspondence.
- 3.77 The Depot Annexes are incorporated by reference into all relevant Depot Access Agreements. Therefore, it is particularly important for the annexes to be produced and finalised before a beneficiary wishes to access the new depot. The annexes can be submitted to ORR at the same time that a new Depot Access Agreement is submitted.

4. Other issues

Introduction

- 4.1 Our aim is to see access agreements established that present the parties' obligations and remedies in a clear and legally robust form and which are straightforward for the parties to follow and use. This will foster a culture of compliance and efficiency, and lead to the delivery of better services. This chapter therefore addresses some of the other issues that may arise in a depot access application, in particular in the drafting of departures from the model agreements and some of the key pitfalls to avoid. It also addresses investment in enhancements at depots.

Investment in enhancements in depots

- 4.2 There are specific requirements for investing in enhancements at depots. We advise any potential scheme promoter to visit the “Investing in the rail network page” of our [website](#).

Public register

- 4.3 The contents of our public register are available free of charge on the ORR's website. Users can contact our [Information Centre](#) for assistance.

Incorporation of documents by other reference

- 4.4 As explained in Chapter 2, our access jurisdiction provides for us to supervise and determine all the terms on which access to railway facilities is apportioned, in those cases where the Act provides for our approval of an access agreement. That jurisdiction exists for the protection of railway industry participants and users in ensuring that the possible abuse of monopoly power and arrangements contrary to the public interest are checked and prevented, and the consumption of capacity is fair and efficient and meets the public interest criteria in section 4 of the Act. In order to do this, we need to be satisfied with all the factors that establish and may influence and change the effect of the access agreement.
- 4.5 By bringing into the access relationship external legal rights or obligations (from unregulated documents), the effectiveness of that jurisdiction for the benefit of railway industry participants and users could be diminished and important protections circumvented. For example, parties may wish to say in an

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access agreement that certain rights conferred in it are to be affected by or subject to change by reference to a separate, unregulated commercial agreement, such as an agreement for the carrying out of works for the improvement of physical facilities. The difficulty such a scheme presents is that the external agreement may be varied or replaced in a way that magnifies or otherwise alters its effect on the regulated access relationship, to the detriment of users and of the fair and efficient use of railway capacity. Because of its unregulated nature, this would happen without regulatory scrutiny or control, and the unforeseen and possibly unacceptable changes to the external document would be brought into and adversely affect the regulated relationship.

- 4.6 On the other hand, certain types of external documents are already subject to regulatory protections. In those cases, provisions in access agreements that allow the effects of these external instruments to flow through into the access relationship are likely to be acceptable. Railway Group Standards, the Rules of the Route and the Rules of the Plan and the ADRR are examples of external documents where all parties have regulatory protections against possible abuse of power or change in ways that may be unacceptable and harmful to the interests of others.
- 4.7 It may well be that, at the outset, when an access agreement is being considered, the external document whose effects the parties wish in some way to flow into the access relationship will be entirely acceptable. However, as illustrated above, our principal concern is that it may be changed over time so as to have an unacceptable effect on the access relationship. Since such changes are beyond our jurisdiction, we have no ability to stop this happening at the time. Accordingly, parties should expect ORR to require very substantial justification for their adoption.
- 4.8 For these reasons we will wish to:
- (a) see and review any documents referred to in proposed access agreements at the time the application is made (or before);
 - (b) be satisfied that the references and any obligations imported are appropriate and justified (in which we will also need to take into account the potential and the mechanisms for subsequent amendment of such documents), including flow-through; and

- (c) ensure that the documents are publicly available, or publish them ourselves (subject to section 71 confidentiality exclusions).

Executing and submitting agreements

4.9 It is the responsibility of the parties to an agreement to ensure that they execute their agreements correctly in accordance with English or Scottish law. However, as an aid, we set out below some guidance for executing agreements with the aim of preventing commonplace mistakes.

Signing and dating agreements

- 4.10 For an agreement to be valid, it must be signed and dated in the appropriate place. The date normally appears at the top of page one. It is not sufficient merely to date the front cover (which is not legally part of the agreement). We also request that the ORR reference number, which is stated in our directions, is added to the front cover of the agreement.
- 4.11 The date an agreement is made is the date on which both parties sign and date the agreement. Where the parties sign and date an agreement on different dates, the date the agreement is made is the later of the two dates of signature.
- 4.12 Any person signing an agreement on behalf of their company must have delegated authority to do so. It is for each company to ensure that the relevant people have the necessary authority. We recommend that the name of the signatory is printed under the signature so that it is clear who has signed the agreement on behalf of each company.

Amendments

- 4.13 Amending agreements (which are used where parties are amending their access agreement) must also be signed and dated by both parties to make the amendments valid. The ORR reference number, which is stated in the approval notice, should also be added to the front page of the amending agreement.
- 4.14 Amending documents (which are used for amending access conditions and annexes) do not need to be signed by all relevant parties at a depot. However, as part of the submission to ORR, evidence should be included to show that all relevant parties have been informed of the proposed amendments, and consented to them in accordance with the process and timescales outlined in the access conditions.

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- 4.15 Again, the ORR reference number stated in the approval notice should be added to the front page of the amending document.

Counterparts

- 4.16 It is legally valid to sign contracts in counterparts. This means the parties independently signing separate but identical copies. The two copies (counterparts) taken together form the contract and must be kept together. It is not acceptable to have one contract signed by one party and only the signature page from the second party, as there is no record of what the second party actually signed. Given the risk of non-identical contracts being signed by mistake, or one of the counterparts being mislaid or discarded in the belief that the second is just a copy of the first, we would suggest the contracts are only executed in counterparts if absolutely necessary, when time is limited, and it is not possible for both parties to sign a single copy of the contract.

Annex A: Links to related depot access policy documents

[General Approval for depots \(2017\) - guidance](#)

[Investment Framework Consolidated Policy & Guidelines](#)

[Template documentation](#)

[Exclusion of Commercially Sensitive Material in Station and Depot Access Agreements being placed in the Public Register](#)

[ORR's guidance on The Railways \(Access, Management and Licensing of Railway Undertakings\) Regulations 2016](#)

Annex B: Flowcharts

The following pages set out the process flowcharts for applications made under section 17, 18, 20, 22 and 22A of the Act. The purpose of these is to provide a high-level guide; if used, they should be read alongside the written guidance provided elsewhere in this document.

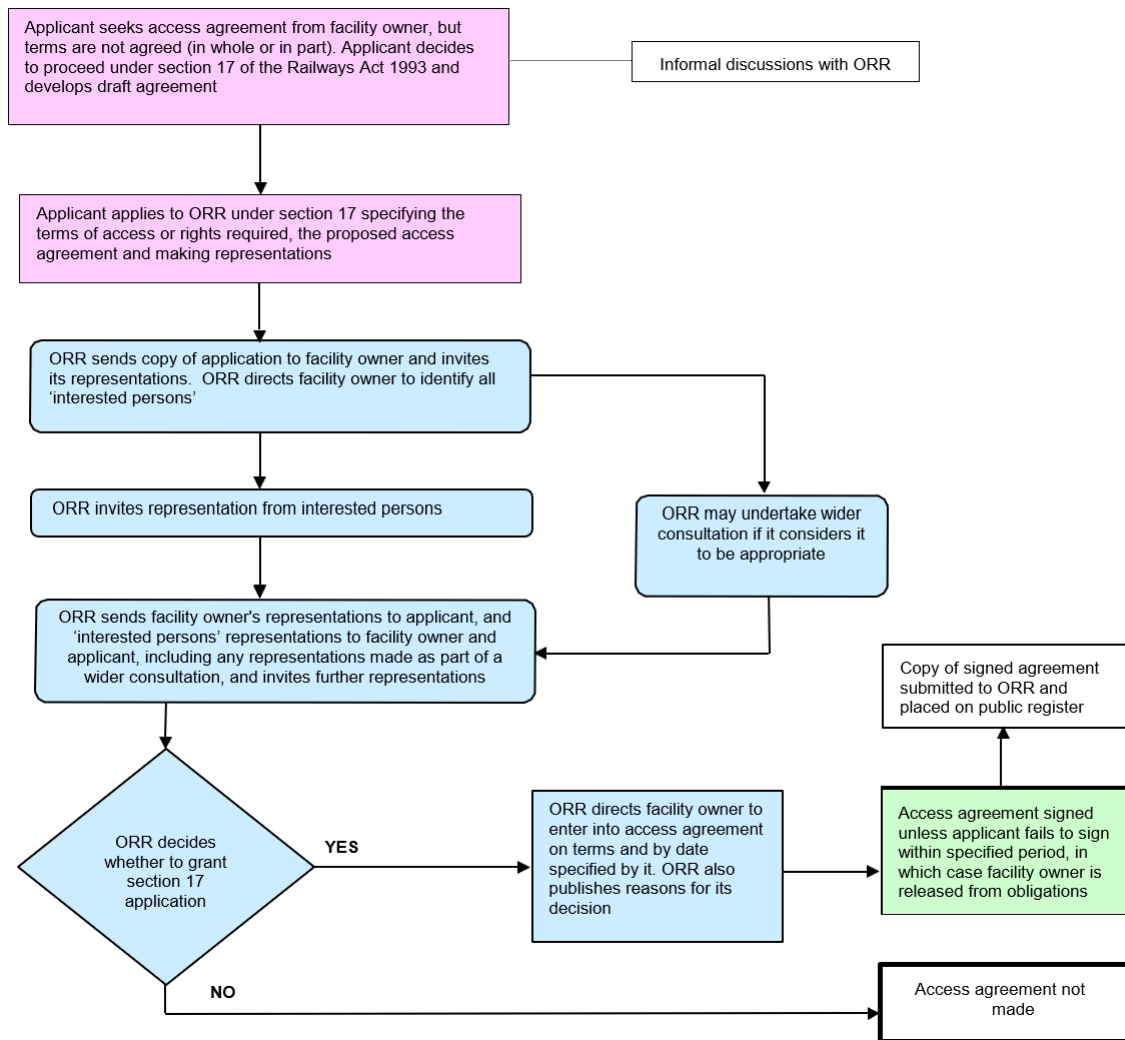
Key for section 17-22A application processes

Access applicant only action

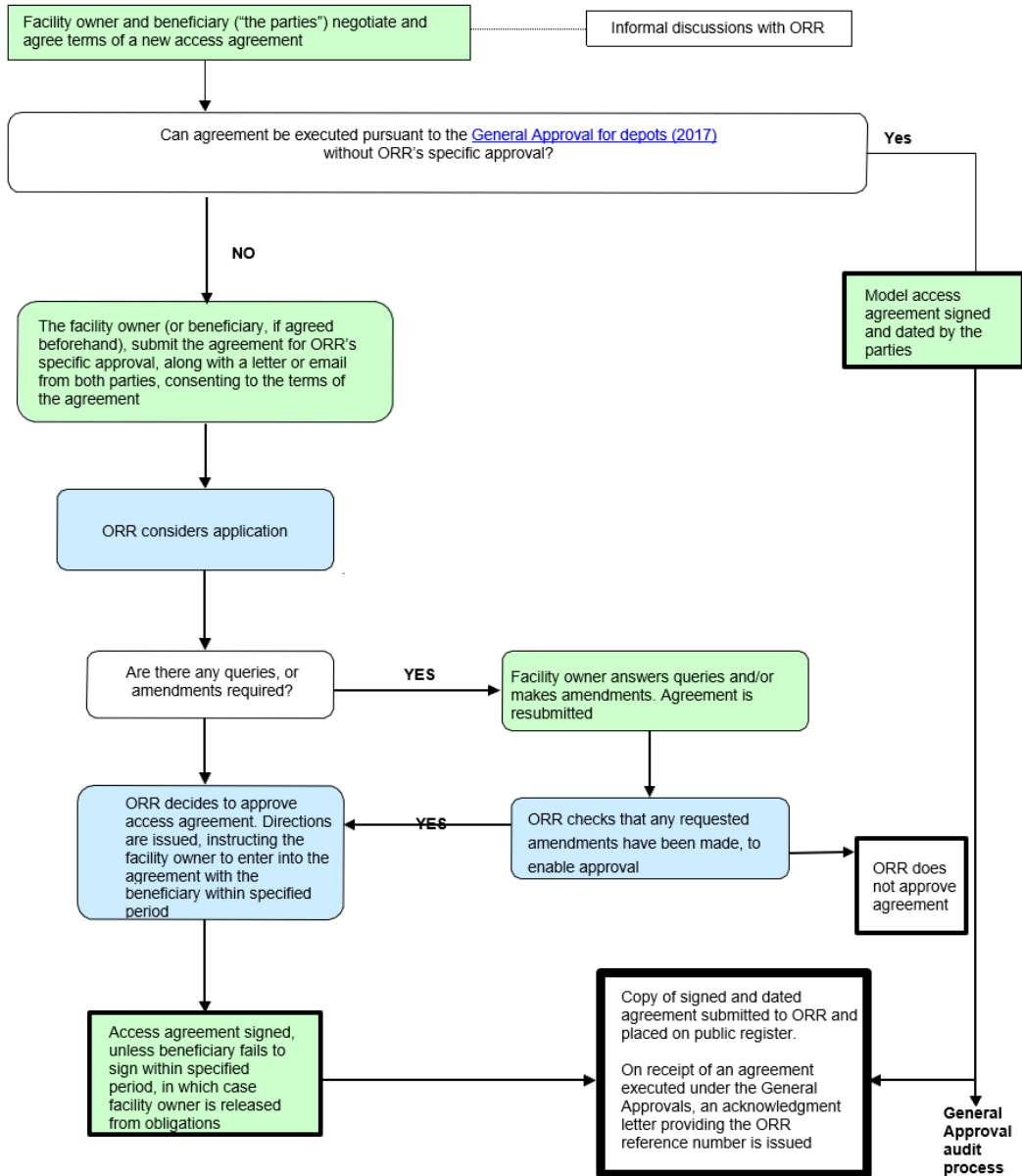
Joint facility owner - beneficiary action

ORR action

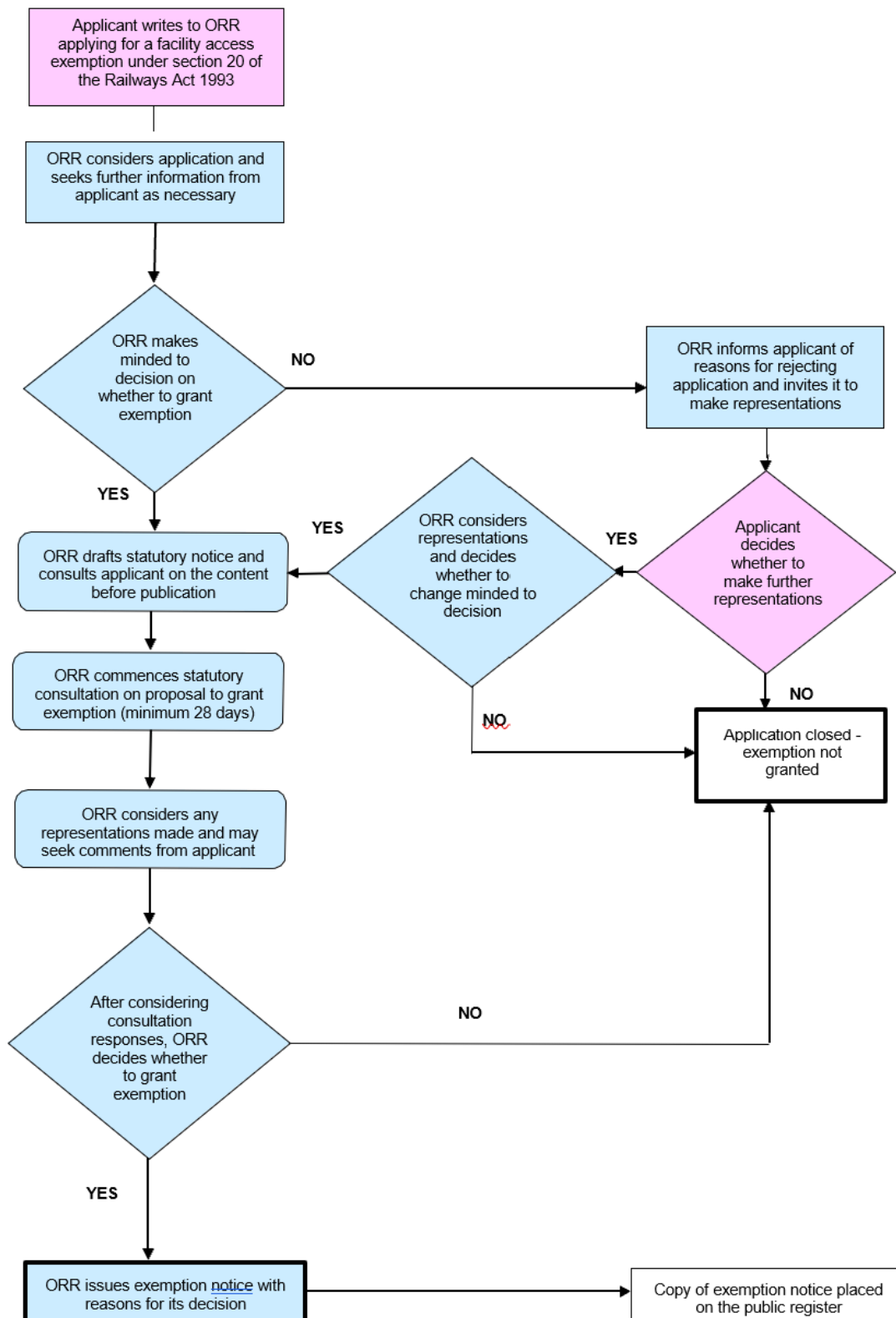
Section 17 – applications seeking directions from ORR where the terms for access cannot be agreed



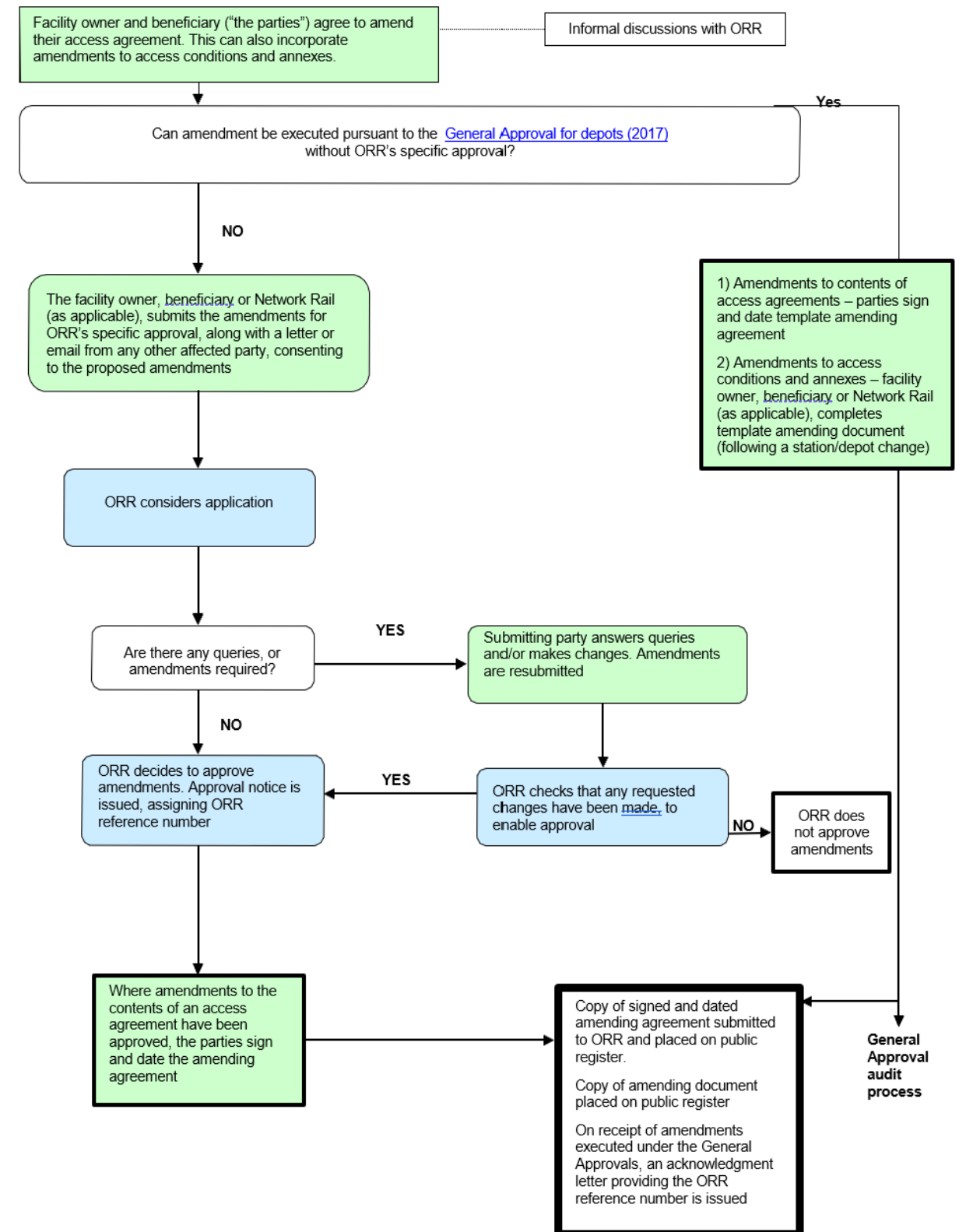
Section 18 – applications to enter into new access agreements



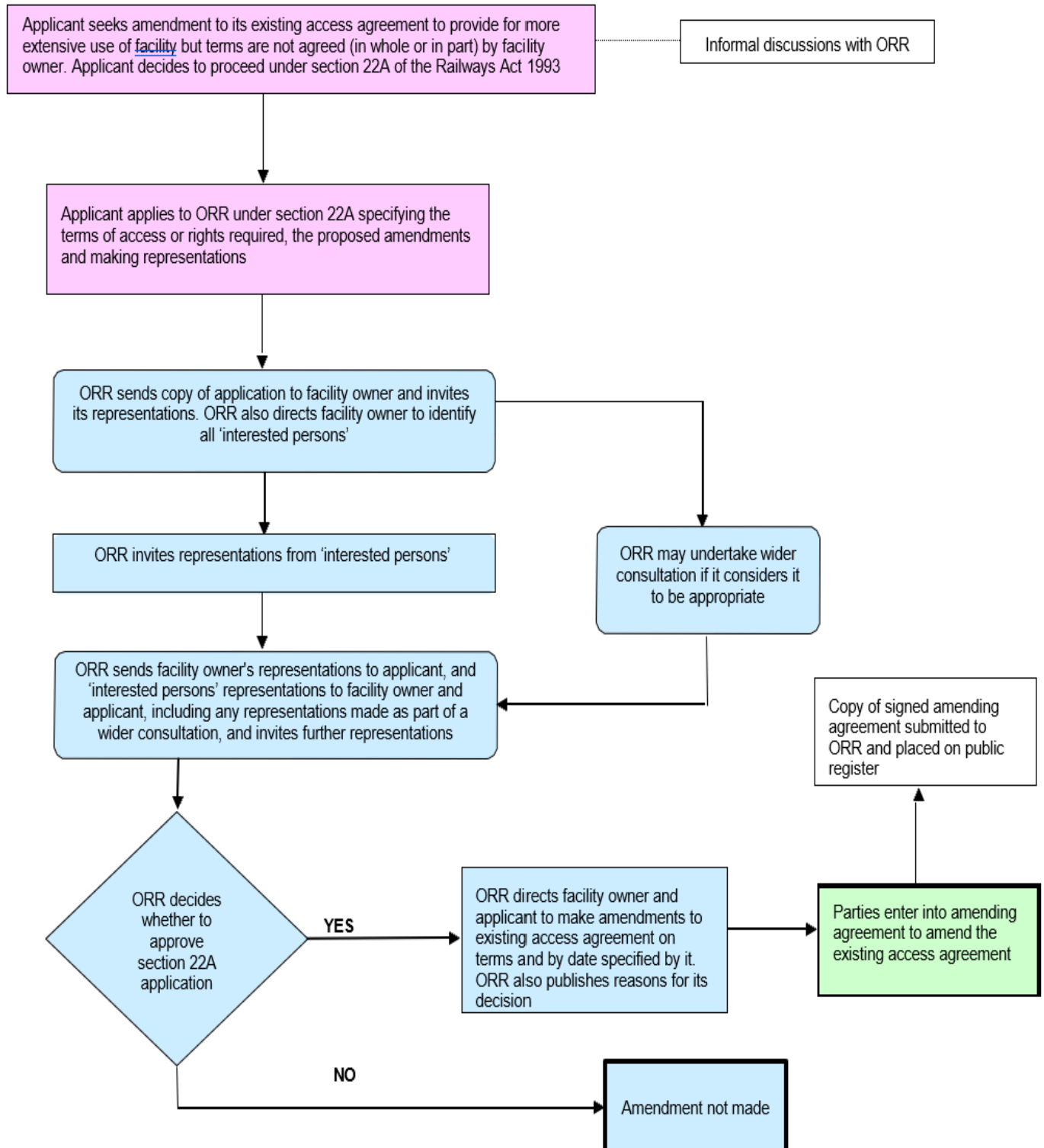
Section 20 – applications for facility access exemptions



Section 22 – applications to make amendments to an access agreement



Section 22A – applications seeking amendments to an existing access agreement for more extensive use of a facility





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