



Final Decision

QR Network's 2010 DAU

September 2010

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PREAMBLE

This Final Decision completes the Authority's response to QR Network's 2010 Draft Access Undertaking (2010 DAU); overall the Authority's decision is to not approve the 2010 DAU. The Final Decision incorporates the Authority's June 2010 draft decision on reference tariffs and revenue caps for coal train services in central Queensland. Essentially that earlier draft decision established the return that the Authority regards as appropriate for the operator of the below-rail infrastructure – which is a natural monopoly.

The parts of the current Final Decision that were not covered in the June draft decision, focus on issues that the Authority must face in regulating a vertically integrated entity that operates above-rail coal train services on the below-rail infrastructure that it also owns and operates. To date, QR has operated as a vertically integrated entity under government ownership. The Queensland Government is currently in the process of offering the vertically integrated entity (QR National) for sale to the private sector. The Authority recognises that under private ownership the primary, and quite legitimate, responsibility of the management of the entity will be to run the operation in the interests of its private shareholders. This will elevate the importance of the Authority's role in promoting competition in markets that depend on access to QR's monopoly below-rail infrastructure. Principal among these are the above-rail coal haulage market and the coal market itself.

In confronting its responsibilities, the Authority recognises that from the regulatory point of view the main justification for the vertical-integration model is operational efficiencies that it offers in coordinating above-rail and below-rail elements in providing coal-haulage services. At the same time, the Authority notes that third-party access to the below-rail infrastructure has been a feature of the central Queensland system for some time and that this will continue to be a significant feature in the future. Hence, the vertically integrated model will not completely avoid the need for QR Network to tackle the problems of coordinating third-party as well as related-party above-rail operators on it below-rail infrastructure. The Authority notes also that many of the operational problems that have arisen in the central Queensland export coal haulage system have been whole-of-chain issues rather than issues confined to the rail component of the chain. The Authority has addressed this latter issue explicitly in chapter 11 of this Final Decision.

A prime motivation for the Authority's Final Decision is its view that it should seek to constrain the motivation that the vertically integrated QR National will have to use its ownership of the monopoly below-rail infrastructure to enhance the prospects of its above-rail business relative to actual or potential third-party competitors. A business model built on transferring monopoly power from the below-rail business to the above-rail business in this way would not be compatible with competition policy. While accepting that QR Network's 2010 DAU sought to address a range of issues raised by the Authority in its December 2009 draft decision and subsequently by other stakeholders, the Authority considers that in the context of privatisation more needs to be done to strengthen the regulatory regime. The Queensland Government has recently strengthened the legislative framework of the *Queensland Competition Authority Act 1997* (the QCA Act) to facilitate this, albeit not the extent that some stakeholders would have preferred.

Within this amended legislative framework, the Authority has proposed a number of amendments to the 2010 DAU to address its own and other stakeholders' concerns with the existing draft. It has sought to strengthen ring-fencing arrangements and to expose QR Network's decision making to greater scrutiny, by way of independent compliance audits or detailed public and regulatory reporting requirements. In particular, the Authority requires that;

- (a) all access agreements between QR Network and related-party train operators be conducted on an arms-length basis;
- (b) all access seekers be provided with the same level of service and the same opportunity to access the network;

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- (c) QR Network not engage in any anti-competitive cost shifting, cross-subsidisation or price/margin squeezing;
 - (d) QR Network not discriminate unfairly between access seekers or access holders when making decisions to expand the network;
 - (e) the flow of confidential information from QR Network to other parties (in particular related parties) be restricted;
 - (f) auditors be approved annually and the scope of the audits be extended to include all regulatory issues in the undertaking;
 - (g) QR Network expand the scope and detail of its quarterly and annual reports; and
 - (h) QR Network retain its 2008 undertaking arrangements that allow declared assets to be transferred to QR Network on the request of an access seeker.

The coal industry has expressed particular interest in capacity related matters – that maintenance should be undertaken in ways that do not deprive the network of train paths and that the network should be expanded in line with the anticipated growth of the coal industry in central Queensland. In response, the Authority has proposed that the amended undertaking include an investment framework. This recognises that it cannot compel QR Network to fund expansions. The Authority’s proposed framework restricts the rate of return that QR Network can obtain from funding network expansions to the regulated weighted average cost of capital (WACC), unless it can obtain the Authority’s approval for a higher rate, justified by the particular risks of the investment. The Authority’s proposed investment framework also allows an option for users to fund expansions if QR Network is unwilling to do so on terms that the Authority is prepared to approve.

Way Forward

The Authority anticipates that QR Network will be resubmitting a revised 2010 DAU shortly after the release of this Final Decision.

Provided that revised DAU is consistent with this decision, the Authority will indicate its intention to approve the revised undertaking and will be providing only a short consultation period, as stakeholders will have already had a significant opportunity to comment on all matters related to the revised 2010 undertaking.

This Preamble should not be read as a substitute for the detail contained in the Final Decision. The Final Decision should also be read in conjunction with the Authority’s June 2010 and December 2009 draft decisions. In addition, the Authority’s mark-ups of the 2010 DAU and Standard Access Agreements contain a number of minor amendments which are not discussed in detail in this decision document but which should be included in a resubmitted 2010 DAU for completeness and accuracy. This Final Decision document sets out the Authority’s decisions, and reasons for those decisions. .

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GLOSSARY OF TERMS

2008 undertaking	QR Network's 2008 undertaking, as amended through the June 2010 extension DAAU
ABS	Australian Bureau of Statistics
AER	Australian Energy Regulator
ASX	Australian Securities Exchange
ASX-AOI	Australian Securities Exchange Accumulation All Ordinaries Index
bp	basis point
BRTT	Below-rail transit time
CAPM	Capital Asset Pricing Model
CCC	Common cost contribution
CPI	Consumer price index
CNR	Capacity notification register
CQCR	Central Queensland coal region
DAU	Draft access undertaking
DAAU	Draft amending access undertaking
DBCT	Dalrymple Bay coal terminal
DORC	Depreciated Optimised Replacement Cost
EBITDA	Earnings before interest, tax, depreciation and amortisation
EIRMR	Environmental Investigation and Risk Management Report
egtk	Electric gross tonne kilometre
EOI	Expression of Interest
GAPE	Goonyella-Abbot Point Expansion
HVCN	Hunter Valley coal network
IAP	Indicative access proposal
IPO	Initial public offering
IRMP	Interface Risk Management Plan

MCI	Maintenance cost index
Mtpa	Million tonnes per annum
QCA Act	Queensland Competition Authority Act 1997
QR Ltd	QR Ltd, which was split from Queensland Rail on 1 July 2010, and is proposed to be privatised as a subsidiary of a new company, QR National Ltd.
QRNA	QR Network Access
QR Network	The regulated below-rail infrastructure business owned by QR Ltd
QR National	QR Ltd holding company proposed to be listed on the ASX
QR Services	means QR Services, a business group within QR.
QRC	Queensland Resources Council
QTC	Queensland Treasury Corporation
Queensland Rail	Queensland Rail Ltd (formerly known as QR Passenger), which was split from QR Ltd on 1 July 2010.
RAB	Regulatory asset base
RFP	Request for Proposal
SBR	Surat Basin railway
SWR	System-wide and regional
TI Act	Transport Infrastructure Act 1994
WACC	Weighted average cost of capital
WICET	Wiggins Island coal export terminal
WICT	Wiggins Island coal terminal

1. PROPOSED INVESTMENT FRAMEWORK

Following the Queensland Government's announcement of its intention to float QR Ltd, including the central Queensland coal region (CQCR) network, the mining industry expressed concern regarding future expansion of the rail network. Industry has been particularly concerned that QR Network would use its control over network expansions as leverage to obtain returns in excess of the regulated WACC.

QR Network's 2010 DAU has sought to extend the arrangements in the 2009 DAU to allow it to aggregate access applications to better match capacity expansions with future capacity needs. QR Network's proposals would increase its freedom to negotiate access conditions to match risks that it believes are associated with the significant expenditure required to meet industry's growth prospects. At the same time, QR Network has proposed a voluntary obligation to undertake infrastructure enhancements under \$300 million.

The Authority has sought to synthesise the positive aspects of the views of the coal industry and QR Network on this issue.

Consistent with the QCA Act, the Authority aims to promote efficient investment in the network, link revenues to efficient costs and require QR Network to negotiate in good faith with all access seekers. The QCA Act allows the Authority to make determinations requiring the network to be extended but not at the cost of QR Network.

The Authority has sought to preserve the negotiate/arbitrate framework within the QCA Act. However, it believes that an unconstrained negotiation framework would unduly tilt the balance of negotiations towards QR Network and away from access seekers and the public interest in an expanding coal export industry. The Authority does not accept that there is a balance in the negotiating positions of QR Network and access seekers/customers that is sufficient to prevent an open ended negotiation process from frustrating or, ultimately, to denying access.

The Authority does not accept that QR Network should be able to earn returns in excess of those that reward them for the risks associated with operating the coal railway. To the extent that QR Network wants to earn returns in excess of the regulated WACC, it needs to justify this on the basis of additional costs or risks incurred.

The Authority accepts that, to ensure the adequacy of the central Queensland rail network, the mining industry may have to demonstrate a willingness to contribute to the funding of its expansion. The Authority intends that the regulatory regime should provide sufficient certainty regarding the availability and treatment of user-funded investments.

In setting out a framework for investment in the coal network, the Authority recognises that a significant amount of work remains outstanding in finalising the detailed arrangements to put the framework into practice. The Authority will work with all stakeholders to achieve this.

1.1 Background

In its submission accompanying the 2009 DAU, QR Network argued that the 2008 access undertaking did not readily address issues raised by the development of new major projects. For instance, it noted that the capacity management arrangements in Part 7 did not specifically address circumstances where:

- (a) supply chain expansion planning was not sufficiently progressed; or
- (b) greenfield corridors or new port facilities would be required to provide requested access.

For managing access applications and developing infrastructure enhancements for ‘major projects’, QR Network (sub. 1:58) required a process that involved it:

- (a) requesting access conditions to address the financial risks associated with major new investment projects;
- (b) departing from the standard queuing rules and allocating capacity on a case-by-case basis for major projects; and
- (c) undertaking only commercially justifiable infrastructure enhancements.

In its December 2009 draft decision, the Authority accepted that it was reasonable for QR Network to have some discretion on when it decides to expand network capacity. However, the Authority also considered that, if QR Network decided not to proceed with a particular project, it should justify that decision, particularly for projects included in the master planning process. The Authority also decided that QR Network should advise access seekers of:

- (a) the nature and extent of the commercial damage it believes it would suffer if it proceeded with a project; and
- (b) how they would have to address QR Network’s legitimate commercial concerns in order to induce QR Network to proceed with a project.

In submissions in response to QR Network’s 2010 DAU re-submission, stakeholders expressed concerns about the ‘inability’ of the current access undertaking to compel QR Network to invest in its own network, with stakeholders claiming that QR Network has:

- (a) withheld investment in mainline expansions and routine system enhancements;
- (b) demanded greater than the regulated rate of return for expansion projects; and
- (c) demanded other ‘unreasonable’ conditions of access (QRC, sub. no. 81, Anglo American, sub. no. 83, Xstrata, sub. no. 77).

Many stakeholders argued that QR Network should be obliged to expand the network within the timeframes necessary to meet the needs of users. They added that QR Network should not be able to force users to choose between project delays and accepting (possibly onerous) access conditions.

While QR Network accepted that its access undertaking should address these issues, it did not accept that it should be compelled to invest in the network. In particular, it noted that s. 119 of the QCA Act restricts the regulator from requiring the access provider to pay some or all of the costs of extending the facility (QR Network, sub. no. 70:30).

Accordingly, the 2010 DAU includes a revised capacity expansion framework which allows users to fund expansions and extensions if they are unwilling to accept the terms and conditions proposed by QR Network.

QR Network’s 2010 DAU

QR Network’s 2010 DAU involved a significant rewriting of its capacity expansion framework, which was subsequently amended in response to stakeholders’ comments. The initial framework and subsequent June 2010 amendments are each discussed below.

Initial Submission – April 2010

QR Network's model for capacity expansion in the CQCR (formerly major projects) makes a distinction between infrastructure *extension* and infrastructure *expansion*.

In the 2010 DAU, an *extension* is defined as infrastructure that connects a coal system to a loading or unloading facility, or will connect a coal system to other rail infrastructure. QR Network proposes that, for all *extensions*, if it chooses not to construct because:

- (a) it does not consider the project to be commercially justified, or
- (b) the miners do not agree to its proposed terms and conditions,

then it will provide users with access to its land to construct the extension. With access to QR Network's land, users can then fund, build and own the extending infrastructure. Depending on whether or not commercial terms and conditions are agreed, QR Network may or may not be the railway manager (QR Network, sub. no 70:33).

Expansions are defined as infrastructure that is required to expand, create or enhance capacity in an individual coal system (other than an extension to a system). QR Network proposed to divide expansions into projects estimated to cost less than \$300 million (incremental investments) and projects costing more than \$300 million (significant investments).

Under its proposed model, QR Network noted that it:

...will undertake all Minor Expansions and Major Expansions where the capital expenditure is reasonably expected to be less than \$300 million, so as to provide sufficient Available Capacity to provide Access Rights sought by an Access Seeker provided that Expansion is in the Central Queensland Coal Region (QR Network, sub. no, 67:71).

A major expansion is defined as an expansion for the purpose of creating or providing additional capacity as a result of the expansion or development of a loading or unloading facility. A minor expansion includes all expansions that are not 'major' expansions.

For 'significant' investments (i.e. those costing more than \$300 million), QR Network proposed a process similar to the one outlined in the Authority's December 2009 draft decision, namely that:

- (a) once QR Network has identified that a significant investment is required, it will call for an expression of interest (EOI) from parties that would be interested:
 - (i) in being granted access rights in respect of the available capacity anticipated to be generated from the significant investment; and
 - (ii) in funding or underwriting the cost of prefeasibility studies, if required by QR Network;
- (b) QR Network will commence a pre-feasibility study once the users have agreed to fund the study (if required by QR Network);
- (c) during the pre-feasibility study, QR Network will issue a request for proposals (RFP) to the interested parties in relation to the available capacity that is anticipated to arise from the significant investment based upon the following information:
 - (i) the anticipated costs and project timetable;
 - (ii) whether QR Network is prepared to fund the investment and, if so;

- (A) any access conditions being sought;
 - (B) the minimum amount of participants needed to proceed (a participation threshold determined on a project by project basis); and
 - (C) the reasonable period over which conditions will be negotiated, having regard to the scale and nature of the project, the period for users to procure funding and the desirability of avoiding unnecessary delays in the negotiation process;
- (d) at any time during the process, QR Network can indicate that it is not prepared to fund the project. If the participants choose to self-fund, they must indicate to QR Network prior to the end of the condition-negotiation period; and
- (e) QR Network will allocate available capacity only to users that have agreed to access conditions (if requested) and will likely be able to secure access rights at an offloading facility (e.g. port or power station).

Where user funding applies, QR Network will give access seekers a reasonable opportunity to fund the development costs and expenses of the expansion. QR Network will proceed with the expansion where:

- (a) the contributors have entered into a user funding agreement; and
- (b) the user funding agreement funds the expansion completely (QR Network does not bear any project development or capital costs or expenses as a result of, or in connection with, the expansion).

QR Network will also ensure that user funding agreements comply with certain specified principles, including:

- (a) the contributor must have a direct interest in obtaining capacity;
- (b) the agreements will be supported by security arrangements in favour of QR Network;
- (c) expansions will be owned and operated by QR Network;
- (d) users must enter into an access agreement for allocated capacity;
- (e) user contributions must be recognised as a rebate under the funding agreement;
- (f) each user will have a first right of refusal for the proportion of capacity created reflecting their funding contribution until rebates are completely paid out, or access rights assigned;
- (g) each user may transfer its access rights to another user;
- (h) QR Network will be entitled to recover reasonable fees for provision of services as a railway manager; and
- (i) the funding agreements must set out contributors' involvement in design, construction and procurement (QR Network, sub. no. 67: 73-75).

In proposing that it be entitled to recover fees in relation to providing railway manager services associated with user funded infrastructure, QR Network noted that the fees would be based on the regulatory and commercial risks it will face by recovering operating and maintenance costs on assets for which it obtains no economic return. QR Network lists the risks it will face in connection with a user funding arrangement as follows:

- (a) liabilities and losses arising from the provision of access;
- (b) asymmetric risks;
- (c) misalignment between actual and operating and maintenance costs with regulatory allowances; and
- (d) performance risk in regard to revenue cap and incentive regimes (QR Network, sub. no. 70:38).

QR Network noted that regulatory frameworks approved in the Victorian Freight Network Pricing Order and the Authority's 2006 Envestra Gas Distribution decision have previously recognised management fees in relation to operating costs. QR Network has used these frameworks as a basis for proposing to collect a 3% management fee for providing railway manager services on user funded investments.

June 2010 – Subsequent Proposal

In June 2010, QR Network provided an updated proposal to the Authority. The overarching principle of the updated framework was for access seekers to have a clear choice on how significant investments will be funded based on three alternate investment options, namely:

- (a) access seekers choosing to self-fund a significant investment at any stage (whereas in the original framework, self-funding was an option during the condition negotiation period);
- (b) access seekers choosing to accept any QR Network proposal for it to invest in the expansion; or
- (c) a combination of options (a) and (b).

QR Network noted that it would not discriminate between access seekers who self-fund and access seekers who agree to its proposals when allocating rail capacity.

The new framework is based upon QR Network's stage gate process¹, with added triggers and timelines for the process, namely:

- (a) EOI from parties interested in access rights for available capacity to be generated by the significant investment, will be triggered by:
 - (i) QR Network, if it believes a significant expansion is required to provide capacity to support demand;
 - (ii) a current or proposed port owner (or operator); or
 - (iii) access requests on the capacity notification register which exceed 70% of the expected project capacity; and
- (b) RFP from parties interested in relation to the available capacity that is anticipated to arise from the significant investment will be triggered by:
 - (i) QR Network; or

¹ QR Network's stage gate process for the evolutionary development of a project through a number of discrete stages, namely: (1) concept, (2) pre-feasibility, (3) feasibility, (4) execution and (5) operation.

- (ii) a written request to proceed by more than one applicant and the applicants' combined nominated tonnes exceeding 70% of the expected project capacity.

QR Network also added the following timelines:

- (a) three months between an RFP being triggered and being issued;
- (b) a maximum of six months to negotiate access conditions; and
- (c) at least six months (where relevant) for access seekers to arrange finance for a user-funded expansion (this is six months prior to the proposed date of project execution).

QR Network also committed to providing a standard user funding agreement (SUFA) within six months of approval of the 2010 DAU. A user funding agreement will either be agreed, or determined by the Authority for each significant expansion. QR Network proposed that the standard user funding agreement will incorporate the following principles:

- (a) a tax effective funding scheme;
- (b) QR Network ownership and operation of the significant expansion;
- (c) periodic rebates to user funders which include:
 - (i) the capital return component of tariffs (depreciation and return on capital); less
 - (ii) an operations and risk adjustment which reflects the additional operation and maintenance risk attributable to QR Network arising from the significant expansion;
- (d) transfer and assignment provisions allowing for:
 - (i) transfer to another user funder approved by QR Network (who must also have a direct interest in the access rights); and
 - (ii) transfer of the rights and obligations arising from the user funding agreement to a third party;
- (e) project governance arrangements for the significant expansion such as:
 - (i) project consultation requirements including technical engagement and consultation;
 - (ii) provision of technical information to user funders; and
 - (iii) user funder involvement in oversight of project development and execution;
- (f) QR Network being the managing contractor for the significant expansion and entitled to earn fees for the provision of these services; and
- (g) dispute resolution procedures and matters which must be referred to the Authority for arbitration, including:
 - (i) security requirements for managing project cash flow risk;
 - (ii) operating and maintenance cost risk adjustments;
 - (iii) QR Network's project management fees;

- (iv) any variations sought to the SUFA; and
- (v) any other matter.

QR Network proposed that user funders be involved in project governance in the following manner.

First, user funders will be given the opportunity to participate in the progression of the significant expansion projects through the pre-feasibility and feasibility studies and, after sanction, in the execution phase.

Second, QR Network will establish a project committee involving all user funders and QR Network. Users will be invited to join the committee when they elect to fund the expansion. The committee will be briefed on, and will consider matters that involve the project scope, cost, construction and timing. In addition, user funders will be entitled to receive technical information and reports regarding the projects and will be briefed by QR Network project managers on status, progress and key decisions required by the project committee.

Lastly, when considering key decisions, the project committee will take into account:

- (a) QR Network's interests as an owner, operator and manager of the significant expansion;
- (b) the proportion of the cost that is user funded versus QR Network funded; and
- (c) each user-funder's proportion of the total of user funding.

Stakeholders' Comments

Stakeholders' fundamental concern was that the access framework was unable to compel investment where it was clearly economic and reasonable. Many stakeholders expressed the view that the 2010 DAU does not promote the economically efficient operation of, use of and investment in, QR Network's infrastructure. Stakeholders also said that the 2010 DAU did not promote the interests of access seekers and was not in the public interest.

DBCT Management, commented on the inconsistency of its being required to expand its terminal in response to bona fide access applications (at the regulated rate of return) while QR Network is not (DBCT, sub. no. 76:1).

Stakeholders' comments on QR Network's proposals regarding obligation to invest in the network generally fall into four categories:

- (a) the undertaking is ineffective as it allows QR Network to seek unreasonable access conditions;
- (b) there are excessive delays in infrastructure expansion and in routine enhancements of mainlines;
- (c) there is no recourse for industry participants to avoid QR Network's demands or delays; and
- (d) QR Network's proposed 'credible' alternative, or user funding proposal, is deficient.

Unreasonable access conditions

Stakeholders accepted that, under some circumstances, it may be reasonable for QR Network to require access conditions on a significant investment. An access condition is defined as a

condition that mitigates QR Network's exposure to the financial risks associated with providing service.

Anglo American said that an access condition will only be reasonable and required if it addresses the risk of asset stranding (Anglo American, sub. no. 83:12).

The QRC accepted that, under some circumstances, significant investments could raise financiability issues, but that this should not allow unfettered discretion to demand onerous access conditions for undertaking such projects.

The QRC argued that the 2008 undertaking provides opportunities for QR Network to demand returns greater than regulated returns on any proposed capital project on its network. The QRC also noted that QR Network's ability to demand above-regulated rates of return, due to the lack of a 'credible alternative' within the regulatory framework, has undermined numerous elements of the undertaking, particularly the pricing principles that are intended to prevent the extraction of monopoly rents (QRC, sub. no. 81:4-5).

Xstrata questioned whether QR Network's 2010 DAU would effectively protect industry from QR Network exercising its monopoly power to deliver monopoly rent. Xstrata noted that, until now, the Authority and the Australian Competition and Consumer Commission (ACCC) have not had to address this fundamental principle since no Australian regulated business has sought to directly challenge this principle by putting a monetary threshold on any obligation to invest at the regulatory WACC (Xstrata, sub. no. 77:3).

Anglo American submitted that a prime example of the inequity of bargaining power between QR Network and industry is the negotiation regarding the capacity of the Wiggins Island Coal Export Terminal Project (WICET). Anglo American said that the development effectively apportioned all the risk to the users and allowed QR Network to determine and vary the commercial principles set out in its RFP at its sole discretion. In addition, it said that QR Network is seeking a 15% per annum pre-tax WACC (6% higher than the regulated return)². QR Network also sought additional access conditions such as requiring:

- (a) construction costs to be shared 50/50 between users and QR Network; and
- (b) 100% of the contracted capacity be subject to take-or-pay arrangements.

Stakeholders were also concerned that the WICET project included expansion works that had been included in previous master plans and accepted through the customer vote process. Anglo American noted that certain projects to expand capacity on the Blackwater system had been proposed long before the WICET project was developed and that by 'repackaging' these projects as part of the WICET project, QR Network will seek to earn the 15% return rather than the regulated rate of return (Anglo American, sub. no. 83:11).

Xstrata was concerned about QR Network's assertions that a 'WACC uplift' is not considered an access condition, but is a 'negotiated outcome' that sits outside of the access undertaking (Xstrata, sub. no. 77:6).

Syntech submitted that QR Network had sought higher than regulated returns in compensation for accepting higher risks on significant investments but that this justification did not hold weight when the expansions in question are to be underwritten by enforceable take-or-pay commitments (Syntech, sub. no 80:2).

² It should be noted that the 15% WACC cited here is a pre-tax WACC that is equivalent to a 13.57% post-tax WACC that is, in turn, directly comparable to the Authority's post-tax WACC of 9.96%. This WACC would provide QR Network with a return on equity of 18.01%, which is 8.02% above the Authority's benchmarked cost of equity of 9.99%.

Xstrata noted that users will have an incentive to seek access at times when the next expansion is not a 'significant expansion', to avoid paying the uplift associated with QR Network's claimed additional risk. Xstrata also commented that, although this will result in discriminatory prices for capacity, QR Network is indifferent to the pricing complexity this creates for users, as QR Network would receive a WACC 'uplift' sufficient to meet its commercial business objectives (Xstrata, sub. no. 77:6).

Xstrata stressed that QR Network has hidden behind its 'commercial negotiation' framework to legitimise requiring a WACC uplift, thereby making it difficult for industry to unravel the risk-reward relationship underpinning any WACC uplift proposal (Xstrata, sub. no. 77:7).

Excessive Delays

Stakeholders were concerned about unexplained delays in undertaking routine enhancements of existing rail mainlines, including projects already approved in past customer voting processes.

Many stakeholders said that QR Network had withheld investment, not just in major projects, to extract higher than regulated rates of return or non-standard access conditions from users.

Xstrata said that, in its view, track expansions were running up to two years behind port expansions in the three major export supply chains of Abbot Point, Dalrymple Bay and Gladstone (Xstrata, sub. no. 77:1).

Anglo American said that QR Network could take a long period of time to negotiate with industry and then make a 'decision' not to expand (e.g. the Goonyella to Abbot Point Expansion GAPE). Anglo American said that by the time it had become clear that a decision could not be reached between QR Network and interested parties, some parties were left with no time to challenge the access condition sought by QR Network as being unreasonable. Thus, some parties were left with the option of agreeing to unreasonable access conditions or missing out on GAPE capacity (Anglo American, sub. no. 83:10).

No Recourse

Anglo American said that, under the current undertaking, if QR Network chooses to impose an access condition on a significant investment, and said that the access condition was necessary to mitigate its financial risk, this access condition would be deemed to be reasonable. However, access seekers or users would be unable to challenge QR Network's position on the basis that the access conditions were unreasonable. Anglo American said that access seekers would have no legal rights unless they could establish that QR Network's additional requirements fell outside the definition of 'access condition' which includes, for example:

- (a) an upfront contribution;
- (b) a payment of an access facilitation charge; or
- (c) a varied or additional take-or-pay arrangement.

Anglo American said that proving that an additional requirement requested by QR Network is not 'by definition' an access condition is difficult (Anglo American, sub. no. 83:13).

The QRC's key concern was that the Authority's dispute resolution process was lengthy and could be used by QR Network to stall investment, or be used as a negotiating tool to extract onerous commercial terms. The QRC said that any Authority determination process was likely to take a minimum of six months and would be subject to appeal which could further protract the process. Thus, stakeholders did not consider the Authority's dispute resolution process to be a viable option to dispute QR Network's practices (QRC, sub. no. 81:11).

QR Network's User Funding Option

Anglo American said that QR Network's option of allowing coal customers to undertake user funded expansion would not constrain QR Network from requiring unreasonable terms and conditions on infrastructure expansion for two reasons.

First, under QR Network's initial proposal, a user-funded expansion could not be undertaken until QR Network had considered whether or not to undertake the expansion itself – giving QR Network the advantage of controlling the process and the ability to delay³.

Second, the 2008 access undertaking already provided a right for parties to construct infrastructure and connect it to the rail network (an extension). Anglo American said that QR Network believed there was a contestable market for constructing and managing railway infrastructure. Anglo American disagreed with that view and saw significant impediments to a third party constructing and connecting infrastructure to the CQCR (Anglo American, sub. no. 83:10-11).

The QRC said that, under a user-funded expansion, QR Network could still seek a higher than regulated WACC and a reduced risk profile, regardless of whether this was justified by the project's underlying risk. Thus, if QR Network priced its offer to construct, just below that of the users, there would be a financial incentive to accept QR Network's terms, or access conditions (QRC, sub. no. 81:9).

Xstrata said that QR Network had created two tiers of investment for user-funded investment, with priority in queuing and timing being given to those users who accepted QR Network's WACC uplift proposal (Xstrata, sub. no. 77:8).

Xstrata noted that QR Network had said that it would not be commercially disadvantaged as a result of user funding. Xstrata said that it is not clear if this related to a 'no worse off economic test', or whether it related to QR Network remaining in a position where it still obtained the benefit of an uplift in the WACC margin as a result of being user funded.

Xstrata said that because QR Network looks for a margin to compensate it for:

- (a) the costs of managing the infrastructure (including train control) as part of the CQCR; and
- (b) the risks imposed simply because a user has funded the infrastructure,

user-funders are relegated to a different investment path which was subject to QR Network's willingness to assist with investments.

Xstrata said that QR Network's proposed 3% margin would bring the cost of user funding up to the level QR Network is demanding for a WACC uplift. Xstrata requested the Authority to consider all areas of the 2010 DAU where QR Network seeks to obtain a margin for undertaking its core business activities. Xstrata was concerned that QR Network was compartmentalising individual elements of its business activities and requiring a margin to complete tasks for which it was already compensated through system wide and regional costs (Xstrata, sub. no. 77:8-9, 15).

Xstrata also noted that QR Network had not proposed a user funding deed that would set out the terms and conditions for the user funding option. Rather, it said that QR Network had proposed a number of caveats to its involvement in facilitating a user funding option, namely:

³ This provision was removed in QR Network's June 2010 proposal.

- (a) providing security on terms required by QR Network;
- (b) requiring QR Network to own and operate any user funded infrastructure;
- (c) requiring QR Network to design, procure and build the user funded enhancement;
- (d) limiting users' business interests to construction timeframes and prudence of costs;
- (e) requiring a rebate agreement back to the funding users at the regulated WACC (rather than at the cost of funding);
- (f) limiting the capacity ownership option to the initial tranche of capacity, so a funding user can only use a portion of the generated capacity with the remainder being 'gifted' to QR Network to subsequently sell at the regulated rate;
- (g) preventing a funding user from retaining the latent capacity created by a simple operational improvement at the port or mine load out; and
- (h) omitting any discussion of who bears the asset stranding risk where the expansion has an economic life of more than 20 years.

In addition, Xstrata said that QR Network did not place an obligation on itself to outline terms and conditions for capacity rights generated by user expansions, including ownership rights to any capacity generated. Nor has it endeavoured to provide a rebate or revenue model that would enable industry investors to ensure subsequent users of the infrastructure contributed to the recovery and return on investment of the cost borne by the funding investor when making the investment (Xstrata, sub. no. 77:9-10).

Stakeholder Proposals

The QRC said that, to address industry's concerns, the undertaking must:

- (a) oblige QR Network to invest in projects that meet defined criteria – i.e. in all cases where the relevant projects are integrated with the existing network and where segregating the project, from a financing and pricing perspective, would be impractical;
- (b) allow QR Network to seek alternative terms and conditions, or a 'financiability review' as determined by the Authority, for projects where the defined criteria are not met;
- (c) contain a robust industry funded investment model that enables access seekers to fund network expansions where QR Network is either not meeting its obligations, or is threatening to stall investment in order to demand unreasonable access conditions, e.g. a higher than regulated WACC;
- (d) oblige QR Network to either extend, or facilitate an access seeker extending, the network; and
- (e) where QR Network fails to meet an investment obligation, include a process that:
 - (i) allows industry to fund, and if necessary construct, the project, and
 - (ii) gives industry the opportunity to seek an Authority or Court determination to force QR Network to meet its funding obligation.

The QRC said that the \$300 million threshold should be replaced with defined criteria as a monetary threshold could allow QR Network to game the investment process by aggregating

projects into a single nominal project. In its place, QRC suggested obliging QR Network to undertake all expansions in the 'enmeshed' system including projects (QRC, sub. no. 81:8):

- (a) that are linked, at both ends, to the network;
- (b) where over 60% of usage will involve pre-existing train services;
- (c) that are replacement capital;
- (d) that are required to service existing contracted below rail train paths; or
- (e) that are required to meet any shortfall in capacity associated with a capacity expansion.

Xstrata agreed with the QRC's enmeshment proposal and suggested additional criteria where QR Network should be obliged to invest, namely:

- (a) age replacement capital investment;
- (b) sustaining capital investment (formation strengthening, passing loops and duplications to facilitate operational improvements);
- (c) expansion investment;
- (d) any capital where it is impossible to distinguish usage among customers; and
- (e) circumstances where it is not practical to have a third party construct rail infrastructure (Xstrata, sub. no. 77:4).

The QRC said that, where the defined criteria are not met and QR Network is not obligated to invest in its network, QR Network should be able to seek the Authority's approval of access conditions. The QRC referred to this as a financiability review that would involve:

- (a) QR Network seeking approval of access conditions as soon as possible, but within a specified timeframe, after the EOI is triggered;
- (b) the Authority approving access conditions to the extent necessary to ensure the financiability of any investment (this would include stakeholder involvement); and
- (c) QR Network bearing the onus of proof to justify the appropriateness of the access conditions sought.

The QRC also said that QR Network could choose from a package of access conditions, including:

- (a) accelerated depreciation;
- (b) longer term access agreements;
- (c) provision of security;
- (d) short term funding of projects by users;
- (e) longer term funding; or
- (f) as a last resort, a higher WACC for the project.

The QRC said that the undertaking should include a robust industry funding model for those network expansions when QR Network is not willing to meet its obligations. The QRC said that the industry funding should be included as one of the access conditions to eliminate the complexity of pricing, the risk of customer cross subsidisation and the risk of intergenerational equity (that would result from QR Network's proposal) as part 6 of the undertaking already contains provisions that outline cost sharing among users of the system (QRC, sub. no. 81:10-11).

Xstrata said that industry must be given the opportunity (where ever feasible) to: self fund; design; procure; construct; and own extensions to the network.

Xstrata said that it preferred that all projects should be undertaken at the regulated WACC. However, as QR Network could seek a WACC uplift, Xstrata said it was necessary to seek competitive mechanisms to counter-balance QR Network's current ability to take all new infrastructure investments outside the regulatory process. To address this concern, Xstrata said that the undertaking should provide that (Xstrata, sub. no. 77:13-14):

- (a) where QR Network seeks an access condition on an infrastructure expansion, it will apply to have those access conditions approved by the Authority as the base for the establishment of reference tariffs;
- (b) the Authority will allow industry the first right to undertake the investment via a user funded expansion, or a user owned expansion process at the Authority endorsed reference tariff;
- (c) if industry is comfortable with allowing QR Network to undertake the investment, then industry can waive this right;
- (d) as customers subsequently seek to gain access to the infrastructure funded by industry, these customers will be given the opportunity to either:
 - (i) pay the reference tariff set at the Authority's endorsed reference tariff, with a rebate to be distributed to the original investors; or
 - (ii) buy into the funded asset (at the written down value) in proportion to the capacity required. Purchasing customers would then obtain the benefit of the rebate mechanism should other customers elect to pay the reference tariff.

To facilitate user funded expansions and extensions, Xstrata said that QR Network must develop a standard expansion deed that clarifies the terms and conditions for industry funding and construction, including:

- (a) identifying the commercial arrangements and risk allocations in an industry funded access agreement and QR Network's obligations to facilitate industry funding;
- (b) providing industry with the option to control and manage the design, procurement, construction and potentially the ownership of the investment. QR Network's 'legitimate business interests' must be clearly defined to ensure that it cannot discriminate between its own and industry's investment proposals;
- (c) provide full and open access to all relevant feasibility studies approved and undertaken under the Coal Rail Infrastructure Master Plan process ;
- (d) provide full and open access to any feasibility study underwritten by industry via a funding agreement should industry elect to fund; and

- (e) clearly set out QR Network's pricing and industry funding mechanisms taking into account:
 - (i) the tax effectiveness of the mechanisms;
 - (ii) how the mechanisms will work in the context of multiple access seekers participating;
 - (iii) how QR Network intends to avoid the potential for cross subsidisation between existing and subsequent users of the system; and
 - (iv) the terms and conditions of capacity rights generated by private expansion projects.

In support of this proposal Xstrata said it had developed a standard Expansion Protocol Deed that could be used as a template for all customer initiated investment projects going forward, with key elements including:

- (a) the customer initiating the investment being allowed access to QR Network information and studies in order to plan the proposed expansion;
- (b) QR Network being involved in the planning process; and
- (c) QR Network having close contact with the expansion process as an owner and operator.

Xstrata noted that its expansion deed addressed QR Network's obligation to:

- (a) facilitate private expansion projects on or adjacent to its rail infrastructure, including access rights to the corridor;
- (b) ensure access to the corridor land will be provided wherever reasonably possible;
- (c) take all reasonable steps to facilitate the connection of third party rail infrastructure within a reasonable time frame;
- (d) ensure QR Network has an obligation to not discriminate in any dealings with third party railway infrastructure providers wanting to connect to the rail network;
- (e) provide access to QR Network's train control management system to enable the blending of services in the day of operations environment; and
- (f) provide for QR Network to be nominated as the 'railway manager of last resort' to recognise the provision of such a service must be provided on efficient terms and conditions with a dispute resolution process (Xstrata, sub. no. 77:13).

Authority's Draft Investment Framework

On 22 July 2010, the Authority released a draft investment framework for comment that took into account both QR Network's proposed investment framework and stakeholders' comments on that framework. The Authority's proposal contained a set of principles designed to guide the development of an investment framework that the Authority proposed would be incorporated into QR Network's undertaking.

The Authority's draft framework was based on the following five premises:

- (a) QR Network cannot be forced to fund an expansion or extension of its network (other than in accordance with a voluntary submitted access undertaking);

- (b) all expansions and extensions of the network should take place under the auspices of an undertaking to ensure fairness to all parties;
- (c) QR Network should not be able to exploit its monopoly power by investing in the network other than on the basis of Authority's approved rate of return and access conditions that are commensurate with the risk of the investment;
- (d) negotiations on access conditions should be conducted within tight timeframes, with access seekers able to refer a dispute to the Authority for arbitration at any time during the negotiations; and
- (e) users should have the right to fund expansions at their own option.

The Authority received submissions from eight stakeholders, including the QRC, coal companies, DBCT Management and QR Network. In general, QR Network did not support the proposed framework as it believed that it involved too much regulatory intervention into its negotiations with its customers. In contrast, the coal companies generally supported the framework, indicating that the proposed level of regulatory involvement and a viable user funding option were key elements required to counterbalance QR Network's monopoly power.

In addition, stakeholders commented that:

- (a) the proposed framework required further information and development; and
- (b) an interim investment framework should be established in the 2010 access undertaking to allow for development of a more descriptive framework over time.

The key issues identified in submissions with respect to the investment framework are discussed below. Detailed issues concerning access conditions and pricing are discussed in chapter 6 of this decision.

Negotiation and Arbitration

QR Network's main concern with the Authority's proposal was that:

...it discourages and disrupts the ability of the parties to negotiate directly and effectively.

QR Network said that the allocation of risks arising from a major expansion (such as asset stranding), should be a matter for commercial negotiation between the parties involved. It stated that, in its framework, QR Network and users would initially seek to negotiate a commercial outcome in allocating risks (and hence funding). In its view, the Authority being in a position to arbitrate in complex commercial negotiations, would create uncertainty and significantly increases the risk of regulatory error (QR Network, sub. no. 96:1-2,4).

QR Network noted that its framework sought to obtain a market based outcome rather than relying on regulatory discretion to determine the reasonableness of the terms and conditions of a contract (QR Network, sub. no. 96:3). QR Network also noted that it is important to recognise that the negotiate-arbitrate regulatory model typically envisages provision of access to existing infrastructure and, under these circumstances, arbitration by a regulator provides an effective means of resolving a dispute (QR Network, sub. no. 96:4).

QR Network said that the Authority's proposal was at odds with the negotiate-arbitrate model, which has its origin in the 1995 Competition Principles Agreement, which provides that:

...wherever possible third party access to a service provided by means of a facility should be on the basis of terms and conditions agreed between the owner of the facility and the person seeking access.

QR Network also said that the Authority's proposed framework was likely to reduce any incentive for parties to constructively engage in commercial negotiations and was likely to result in a complex and protracted process – which in turn can hold up necessary network investment (QR Network, sub. no. 96:1-2).

QR Network was concerned that regulatory intervention in the negotiation process would fundamentally change the dynamics of the negotiations and may even compromise the negotiations as:

- (a) users may be able to 'game' the negotiation depending on their expectation of what the Authority's position might be;
- (b) parties to the negotiation may become entrenched in their pre-arbitration positions, making agreement less likely;
- (c) some parties may always seek to 'test' the Authority's position by referring the matter to it for a determination in the knowledge that, at worst, they always have the option of self funding the investment; and
- (d) one party could also undermine the negotiations by instigating arbitration prematurely (QR Network, sub. no. 96:5).

QR Network suggested that regulatory intervention in access negotiations was unnecessary as its customers comprise a small number of large sophisticated organisations with the ability to independently exert significant countervailing market power. QR Network said that the sophistication of its customers was evident in their participation in major infrastructure developments such as the:

- (a) WICET;
- (b) Queensland Coal Rail Infrastructure Group; and
- (c) Newcastle Coal Infrastructure Group.

It said that this provided clear evidence that users are willing and able to coordinate themselves to develop and fund infrastructure, and can also exert countervailing market power in negotiating terms and conditions for major expansions (QR Network, sub. no. 96:6).

As a result, QR Network argued that the regulatory focus should shift from whether the terms and conditions being sought by the service provider fit within the 'normal regulatory paradigm', to ensuring that the negotiation process for coal producers to enter into user funding arrangement is workable (QR Network, sub. no. 96:5).

QR Network added that, in terms of the Authority forming a view on whether QR Network is able to raise finance, it:

... is not an appropriate role for the QCA to determine whether QR Network is unable to fund an expansion due to capital management constraints or finance market limitations. More importantly, since QR Network's funding decisions tend to be made on a portfolio basis, it would be required to divulge sensitive commercial information to the QCA about other unrelated projects and decision-making processes (QR Network, sub. no. 96:5).

In contrast to the views expressed by QR Network, the coal industry did not dispute the need for an effective arbitration mechanism – indeed their comments focused on how such an arbitration process might work.

The QRC said that the Authority should publish an arbitration guideline to inform interested parties about the principles that are likely to guide the Authority when considering a binding arbitration regarding:

- (a) the scope of a project and project timelines; and
- (b) a user funding agreement including:
 - (i) security requirements;
 - (ii) variations from the Authority-approved standard user funding agreement; and
- (c) access conditions referred to under the proposed structured negotiation process (QRC, sub. no. 98:7).

BMA added that the Authority's arbitration processes should cover disputes arising under user funding agreements once those agreements have been put in place.

BMA also stressed that the arbitration process must promptly resolve disputes, otherwise customers will be reluctant to exercise their right to arbitration because of concerns that a project will be delayed pending dispute resolution (BMA, sub. no. 93:3).

Genuine Alternative to QR Network's Funding

While the coal companies had previously argued that QR Network should be required to invest to expand the network, their submissions now reflect a more general acceptance that QR Network cannot be forced to fund all investment, and therefore focus on ensuring the user funding is a genuine alternative.

Xstrata added that QR Network's mandatory investment obligations cannot be relied upon to deliver future expansions, especially as QR Network may aggregate projects to take them above the \$300 million limit for mandatory expansion. Xstrata said that this might be acceptable, provided that the Authority's foundation premise that "users should have the right to fund expansions at their option, even if QR Network is willing to do so", is properly implemented in the access undertaking to ensure that this right is one that is available to users in a way which can be practically exercised by them (Xstrata, sub. no 97:2).

Generally, stakeholders' submissions stressed the importance of 'getting' the user-funding investment alternative right. QR Network also highlighted that this was also an important component of its proposed investment framework.

Xstrata submitted that the user funding model was probably the most effective counterbalance to QR Network's monopoly power. However, Xstrata said that QR Network's user funding model does not provide a credible and competitively robust industry investment alternative, and that of most concern was that the:

... lack of clarity around processes underpinning the user funded model could provide a significant opportunity for QR Network to frustrate and stifle any attempt by industry to self fund its own expansion pathways (Xstrata, sub. no. 97:2).

The QRC noted that in the absence of an obligation on QR Network to fund infrastructure enhancements, the regulatory framework must include a mechanism to provide access seekers with a genuine alternative to accepting QR Network's terms of funding. It argued that an effective alternative would constrain the ability of QR Network to seek onerous terms for funding because it would be exposed to a competitive finance market.

The QRC added that as the user funding option and the associated protections are not sufficiently developed and documented, it is too early to conclude that regulatory oversight and approval of access conditions are not necessary. Further, the QRC said that it would not like to see the Authority constrained with an overly prescriptive set of rules regarding the terms of access that can be approved (QRC, sub. no. 98:4).

BMA said that the user funding framework must provide a reliable, efficient, and effective avenue for users to fund expansions without frustration by QR Network and should include:

- (a) detailed mechanisms for user funded expansions to provide certainty to users and to deliver a viable and real alternative to expansion terms proposed by QR Network; and
- (b) prompt enforcement and dispute resolution process, to ensure that the user funded expansions cannot be delayed or frustrated by QR Network (BMA, sub. no. 93:1).

Macarthur was concerned that user funding was not a viable option for all stakeholders. Macarthur said that some industry participants, who do not have ready access to capital to fund expansions to the network, will be reliant on QR Network to fund expansions. Macarthur said that for these companies the user funding option does not impose any practical constraint on QR Network's funding terms.

Macarthur said that in the absence of a firm obligation to fund an expansion, some industry participants will be beholden to QR Network's proposed funding conditions and that rejection of those funding conditions will mean that QR Network could simply refuse to invest. While Macarthur acknowledged that referring a dispute with QR Network to the Authority for a determination of 'reasonable' terms and conditions would provide some pressure on QR Network, it was still QR Network's decision whether or not to invest based on those terms and conditions. As a result, Macarthur was concerned that industry participants who are unable to fund an expansion would be left without a path forward (Macarthur, sub. no. 95:1-2).

Accordingly, Macarthur said that, under certain circumstances, it may be appropriate for QR Network to earn a return on capital for an expansion in excess of the regulated WACC to reflect increased risks of that investment. If QR Network's proposed 'return' is reasonable, taking into account all of the circumstances surrounding the expansion, Macarthur said that it would be prepared to accept what has been offered and move forward (Macarthur sub. no. 95:2).

QR Network noted that the assumption in the Authority's proposed framework that smaller users may be unable to fund the upfront capital costs of expansions has not been substantiated. According to QR Network, the costs of developing and constructing even a relatively small greenfield mining operation are significant and pose sizeable barriers to entry in the market, limiting participation to companies with the financial capacity to be able to fund such an investment. QR Network added that this type of investment involves significant risk and this will be a key consideration for external capital providers in both providing and pricing funding.

QR Network concluded that if a coal company could raise the capital to fund its own mining operation, it should be able to raise the funds to contribute to the costs of expanding the rail network as access charges represent a reasonably small proportion of a mine's total production cost (QR Network, sub. no. 96:7).

A number of stakeholders rejected QR Network's proposal that funding of expansions should be limited to access seekers. The QRC argued that the source of funds should not influence QR Network's performance in terms of project delivery (QRC, sub. no. 98:6).

Xstrata noted that a useful addition to the user funding model proposed by the Authority would be the inclusion of third party equity as an additional funding source for users who may not

want to fund the expansion with their balance sheet. Xstrata said that by allowing any party to fund an expansion, all users could fully investigate their investment options and competitively source project finance from third party financiers such as other miners, bank/financiers, or other coal related infrastructure providers like an export coal port (Xstrata, sub. no. 97:2).

DBCT Management also supported removing limitations on parties other than access seekers of the rail network funding investments. DBCT Management said that any delay or reluctance to invest in the Goonyella Coal Chain would cap its ability to grow its business at DBCT. DBCT Management noted that a broadening of the scope of parties who could invest in the network would result in a deeper capital pool, for industry and the State, for financing the numerous rail projects under consideration.

Accordingly, DBCT Management argued that any interested party should be allowed to invest in the network in accordance with the investment framework. DBCT Management said that as QR Network's interests are protected (e.g. a guarantee of ownership and of being the operator), the source of finance used to construct an expansion should be of no relevance (DBCTM, sub. no. 94:1).

The QRC also argued that the user funding alternative must be applicable to all of QR Network's expansions, extensions and other enhancements to the declared service (QRC, sub. no. 98:6).

Capacity Allocation

BMA submitted that any 'existing' queue for additional capacity should be respected such that, where the capacity requirements of all users cannot be met by an expansion, the opportunity to fund the expansion should be offered in the order of the relevant queue to those users who have enough evidence of sufficient port and mine capacity at the time capacity is to be delivered. BMA suggested that without this protection, QR Network would have the incentive to deal with those users more likely to accept its access conditions, rather than those users who want to fund the expansion themselves (BMA, sub. no. 93:3-4).

Macarthur said that the rights of self funding users, versus non-funding users, should be clarified. Specifically, Macarthur did not support the notion that a user who funds an expansion should be able to retain the capacity that is developed, but not required by the funding user. Macarthur said such an arrangement could lead to market foreclosure issues and inefficient underutilisation of the available capacity (Macarthur, sub. no. 95:2).

QR Network argued that any right of first refusal for latent capacity created by an expansion must be designed carefully to avoid anti-competitive outcomes in the market for terminal and coal handling services. For example, if a user has the first right of refusal, this may create an incentive to over-invest in rail capacity to provide a basis for locking-in capacity rights for future port expansions. QR Network noted that it has only sought to provide users a right of first refusal for the capacity of an expansion to avoid distorting capacity allocation and to ensure that negotiations for services in downstream markets are independent of the right of first refusal (QR Network, sub. no. 96:9).

QR Network said that network investments tend to be lumpy, with some expansions being cheaper than others. It said that this could give rise to inter-temporal equity concerns. To address this concern, QR Network said that the funding agreement should be separated from the access agreement so that the funding agreement is solely an investment instrument with rebates based on incremental revenues associated with that investment. It said that this will avoid the commercial and contractual complexity associated with the timing of the expansion and the allocation of capacity to users of the network (QR Network, sub. no. 96:9).

The QRC was concerned about the apparent imposition of the ‘current capacity resumption provisions’. It said that the Authority should consider approving specific relinquishment provisions, where justified, and that user funding should be a consideration in determining whether a specific relinquishment provision should be applied. For example, the QRC said that this could include consideration of the proposed production demand profile (ramping-up expectations from mines), the timing of available capacity of current and planned unloading facilities and the overall scale of the investment. The QRC also said that it was mindful that these provisions should not be misused to eliminate access from other potential users or create unnecessary competition-policy concerns, and therefore, there may be merit in preserving a degree of flexibility in these arrangements (QRC, sub. no. 98:9).

Authority’s Oversight of Access Conditions

The QRC noted that the Authority’s oversight and approval of access conditions might be unnecessary if there was a competitive market for finance in which QR Network enjoyed no advantage due to its position as a monopoly service provider.

The QRC accepted that there were advantages and disadvantages in having the Authority’s oversight:

- (a) advantages: the incentives for QR Network to use its monopoly power, or to force acceptance of its preferred finance terms will be reduced as it will only be able to impose access conditions deemed reasonable by the Authority; and
- (b) disadvantages: users may find themselves in a position where they are satisfied with QR Network’s terms, or where QR Network’s terms are preferable to an alternate source of funds, but may be unable to accept those terms if the Authority deems them unreasonable (QRC, sub. no. 98:4).

To enable user funding as a genuine alternative for investment finding, the QRC suggested that the Authority should approve a number of standard agreements, including:

- (a) a standard user funding agreement;
- (b) a network protection and safety agreement (in the event the users are forced to construct enhancement projects); and
- (c) any other documents necessary to underpin the investment framework (QRC, sub. no. 98:6).

Expansion Process

Stakeholders commented on a number of aspects of the expansion process including: the triggers for an expansion, the importance of timelines and deadlines, determination of scope for a project and collaboration with interested parties throughout the process.

The QRC said that any funding user and all unloading facilities (whether single or multi-user) should be able to initiate an expansion process. Also, the QRC argued that users should be able to trigger investment in the system which is not strictly considered an expansion (e.g. the ‘robustness’ projects proposed by QR Network in past master plans) (QRC, sub. no. 98:10).

BMA also said that QR Network should initiate the expansion process regardless of whether the facility is a multi-user facility, not just in response to a single user facility (BMA, sub. no. 93:2).

BMA, Anglo American, Xstrata and the QRC all stressed the importance of including timelines and deadlines in the investment framework.

BMA noted that when a below rail expansion is required to match the construction or expansion of an unloading facility, then the timeframes set by the Authority should ensure that the below rail expansion can be completed as close as practicable to the commissioning date of the terminal expansion (BMA, sub. no. 93:2).

The QRC said that close attention will be required to develop the appropriate timetables, deadlines and information requirements. Specifically, QRC submitted that project objectives should be established, then scope, timing and costs required to achieve those objectives, should be tightly defined (QRC, sub. no. 98:11). Further, the QRC said that:

Development of specific timeframes for each step of the process, and effective mechanisms to prevent delay where these timeframes are not met, is critical to ensuring that user-funding options are effective and are a genuine alternative to QR Network funding (QRC, sub. no. 98:6).

Anglo American also noted that timeframes in the expansion are critical and that further guidance from the Authority is required (Anglo American, sub. no. 100:3).

Xstrata proposed a form of project management where funding users will have ‘approval rights’ at set times in the expansion process which align with QR Network’s stage gate process for its own internal approval and management of projects (i.e. concept, pre-feasibility, feasibility, design and construction) (Xstrata, sub. no. 97:4).

Xstrata also said that QR Network’s attention to management and planning of an expansion development is necessary. For instance, Xstrata noted that one of the inherent flaws in the current regulatory regime is the unwillingness of QR Network to progress pre-feasibility or feasibility studies in a timely manner to align with a mine development’s project studies. Xstrata added that given the significant investment costs facing mines in expanding the rail network, the impact those costs have on a mine’s project could be the critical factor in whether a project goes ahead.

To give effect to the expansion process in the investment framework, Xstrata submitted that regulatory obligations must be placed on QR Network to manage and develop comprehensive pre-feasibility projects to:

- (a) anticipate the potential expansion and extension options available to meet industry demand; and
- (b) allow industry to access capacity with reasonable notice to QR Network (Xstrata, sub. no. 97:2).

The QRC also said that it was not clear what approach would ‘actually’ be undertaken in assessing the scope of expansion projects. The QRC was particularly concerned to ensure that projects generated sufficient capacity to meet the needs of all users seeking capacity. The QRC said that if QR Network was unwilling to invest, there are clearly two other options available:

- (a) scale the project to match the available funding; or
- (b) delay the project until some users are willing to provide funding to meet the needs of all of the users.

The QRC said that funding users would then be faced with a choice of either providing funding for the benefit of the other users on terms that were considered unacceptable by QR Network, or, wait until all users are willing to provide funding (QRC, sub. no. 98:9).

Rio Tinto said that the Authority should further clarify whether funding users will have a right to review and to re-scope projects – i.e. could a sole funder of an expansion have the right to re-scope a project to prevent excess capacity being created (Rio Tinto, sub. no.99:2).

Lastly, BMA said that there should be a collaborative approach taken between user funders and QR Network in relation to all key matters including a project's:

- (a) scope;
- (b) cost;
- (c) procurement strategy (including competitive tender, as appropriate);
- (d) construction; and
- (e) timing.

BMA said that funding users should be able to participate in QR Network's decision-making process on these matters, with any disputes being referred to the Authority for arbitration (BMA, sub. no. 93:3).

Specific Responsibilities

The QRC said that roles and responsibilities of the coal producers, the Authority and QR Network should be defined within the access undertaking and the yet to be developed template agreements. The QRC proposed the following:

- (a) **coal producers** – users must have the absolute right to fund any expansion, extension or other necessary below-rail investment, where:
 - (i) the source of funds should not influence QR Network's performance in terms of project delivery;
 - (ii) users who fund must receive priority in the allocation of capacity resulting from that funding; and
 - (iii) users may opt for the user funding option at any stage in the process;
- (b) **QR Network** – QR Network's 2010 DAU will reflect the premise that QR Network cannot be forced to invest in expansions or extensions, except to the extent that it voluntarily commits to do so. QR Network should be obliged to undertake replacement capital expenditure (as part of a commitment to maintain the network). QR Network must also develop a specific employee code of conduct, or formal employee compact, for QR Network employees who will be the critical interfaces between users and project delivery matters to clarify roles and responsibilities;
- (c) **Authority** – the Authority must:
 - (i) ensure QR Network is not exploiting its monopoly power, by ensuring that QR Network's access undertaking contains adequate protections to ensure user funders will not be disadvantaged;
 - (ii) approve the suite of standard agreements required to enable user funding to be a genuine alternative to accepting QR Network's terms. This includes, the standard user funding agreement, a network protection and safety agreement (in the event

users are required to construct) and any other documentation that may be required to underpin the investment framework;

- (iii) publish an arbitration guideline to inform interested parties about the principles that the Authority will be guided by when considering a binding arbitration regarding:
 - (A) the scope of the project and project timelines; and
 - (B) a user funding agreement including: security requirements, and any variations from the approved standard user funding agreement; and
- (iv) publish an arbitration guideline to inform interested parties about the principles to guide the Authority when considering access conditions referred to under the proposed negotiation process (QRC, sub. no. 98:6-7).

Asciano noted that the Authority should consider including supply chain planning bodies in its investment framework (e.g. as a trigger for a network expansion). In addition, Asciano suggested that planning bodies could also be involved in coordinating expansions and expansion timings by collecting access requests and aligning expansion timetables (Asciano, sub. no. 92:6).

Further Detail Required

The QRC said that the investment framework should include sufficiently developed obligations, procedures and documentation to ensure that investment and project delivery occurs in a relatively automatic, timely and structured way.

The QRC said that although the Authority's proposed concept paper addresses some of their concerns with QR Network's proposed investment approach, the Authority's proposals were only at a principle level and that further detail will be required to implement the principles (QRC, sub. no. 98:5-6).

BMA suggested that detailed drafting that gives effect to the statements of principle in the proposed investment framework, must be done with a high degree of detail, clarity and certainty. Otherwise, any right for users to fund an expansion will be illusory and QR Network will be able to exploit its monopoly power in respect of expansions (BMA, sub. no. 93:1). BMA said that, ideally, the Authority should not approve any draft access undertaking unless it contains a fully documented investment framework. If this does not occur, BMA said that the undertaking should:

- (a) enshrine, in reasonable detail, the investment framework principles which the fully documented framework must address: the level of detail should not be less than contained in the Authority's proposal; and
- (b) set out a timetable for developing the framework and, if QR Network fails to provide an appropriate framework in accordance with that timetable, the Authority will draft the details of the investment framework.

BMA recommended the investment framework be in place no later than 31 December 2010 (BMA, sub. no. 93:2-3).

Xstrata said that it was concerned about a lack of clarity around processes underpinning the user funding model that could provide a significant opportunity for QR Network to frustrate and stifle any attempt by industry to self fund its own expansion pathways (Xstrata, sub. no 97:2).

Asciano said that the term 'ownership' (in the following statement) should be clarified:

QR Network should have ownership and operating responsibility for the network, other than user specific extensions. This should include expansions funded by users.

Asciano considered that ownership and operatorship status should be clarified in a scenario where a user specific extension (owned by the user) is extended or expanded so that it serves multiple users and is no longer user specific; for example, a spur line to a single mine site may be expanded so it serves multiple mine sites (Asciano, sub. no. 92:7).

How to Proceed

The QRC proposed that the following should occur:

- (a) an interim investment framework should be established within the 2010 DAU that is broadly based on the Authority's proposed concept paper;
- (b) interim arrangements should be less prescriptive than suggested in the concept paper in regard to the approval of access conditions in order to ensure that the Authority is able to approve a range of possible outcomes in cases where these conditions are supported by access seekers; and
- (c) QR Network should commit to submit for approval, a fully documented investment framework, including standard agreements, no later than June 2011.

The QRC said that establishing an interim framework was essential – not simply because the experience gained from testing the framework will assist in finalising a detailed framework, but because some significant projects must be progressed in the coming 12 months (QRC, sub. no. 98:8).

Xstrata said that the Authority's proposed investment framework should be included as part of the Authority's final decision so that a transparent and competitive investment framework be given immediate effect (Xstrata, sub. no. 97:1).

Authority's Analysis and Decision

The Statutory Negotiate-Arbitrate Framework

As a monopolist can gain market power by restricting investment and creating scarcity for the supply of their services, the regulatory regime must include a framework to provide for efficient investment.

The Authority has been presented with a range of arguments on how to foster growth of the rail network in central Queensland in line with the growth of the coal industry. These have ranged from industry arguments that QR Network should have strong legislative or regulatory obligations to invest in the network to QR Network accepting that it will fund expansions below \$300 million but arguing that for more significant investments it should be free to negotiate terms and conditions for access. The QR Network view is that there is a reasonable balance of negotiating power between it and industry participants.

In considering these arguments, the Authority has been guided by part 5 of the QCA Act, in particular the object of part 5 which is:

... to promote the economically efficient operation of, use of and investment in, infrastructure ... with the effect of promoting effective competition in upstream and downstream markets.

While the QCA Act does not detail a framework to promote efficient investment, it does provide some guidance beyond reliance on a negotiate-arbitrate model.

In particular, s. 137(2)(g) specifically provides for an undertaking to include terms relating to extending a facility.

Moreover, in the event of an access dispute, s. 118(1)(d) provides for the Authority to make an access determination requiring an access provider to extend, or permit the extension of, the facility. If the access provider does not fund the extension, the Authority has the power to determine the ownership of the extension.

In making any such determinations, s. 119(2)(b) and (c) provide that the Authority cannot require the access provider to pay the costs of extending the facility and cannot provide for someone other than the access provider to be the owner of the existing facility (without the agreement of the access provider).

It is evident therefore that the access undertaking and the Authority have legitimate roles in providing for the expansion of the rail network in central Queensland, but with key limitations in relation to funding of expansions required by access determinations and ownership of the existing facility.

Rationale for the Authority's Approach

QR Network has argued, apart from a key concession in relation to incremental investments, that it should be free to negotiate commercial terms with the users of its network. While the Authority accepts that the counterparties to those negotiations are sophisticated transport or coal companies, it does not accept that this eliminates the significant advantages that economies of scale and scope bestow on QR Network. Access negotiations may result in contractual arrangements that provide significant benefits to both of the contracting parties. However, there can be no guarantee that those arrangements are efficient in enabling all users to gain access to the network at the levels they require. Some possible outcomes could have adverse impacts on the interests of access seekers, and on the public interest by limiting the growth of the Queensland coal industry and the Queensland economy more generally.

It is also now a matter of the public record that the counterparties to those access negotiations are significantly dissatisfied with how some of the negotiations have progressed in the past and that the undertaking has been deficient in assisting them to address their concerns. These coal and train companies are particularly concerned about how negotiations may progress in the future without significant protections being added to the 2010 access undertaking.

The Authority sees considerable merit, and deficiencies, in the different proposals that have been presented to it. In making its decision on this matter, the Authority has sought to synthesise stakeholders' proposals rather than to develop its own investment framework.

The Authority's preferred investment framework is based on the following key principles (see appendix 1 which contains the full details of drafting to be incorporated in the undertaking):

- (a) QR Network cannot be forced to fund an expansion or extension of its network, but it can agree to fund these investments;
- (b) all expansions and extensions of the network should take place under the auspices of an undertaking to ensure fairness to all parties;
- (c) when investing in the network, QR Network should not be able to exploit its monopoly power to secure rates of return or access conditions more favourable than those approved by the Authority as commensurate with the risk of the investment;

- (d) negotiations on access conditions should be conducted within tight timeframes, with access seekers able to refer disputes to the Authority for arbitration at any time during the negotiations; and
- (e) users should have the right to fund expansions at their own option.

The Authority has retained the five key principles from its July 2010 draft principles paper – but it has sought to supplement those proposals to address the concerns of smaller companies that may have difficulty in participating in the funding of network expansions.

The Authority considers that its proposed approach will address the key stated objectives of both QR Network and the coal industry, namely, that QR Network be rewarded for the commercial and regulatory risks it bears, and no more.

In its formal submissions to the Authority, QR Network has only ever argued that it should be able to negotiate access charges and conditions that reflect the costs and commercial and regulatory risks that it bears. While QR Network has not argued for achieving returns in excess of these costs or risks, the possibility that it might seek to achieve excess returns (or is alleged to already have done so) has been a key concern of the coal industry. Such an outcome is likely to be a breach of the undertaking's pricing principles.

The Authority's approach relies to a considerable extent on the countervailing market power provided by network users' option to fund network expansions in circumstances where QR Network is unable or unwilling to fund. However, the Authority is not convinced that this countervailing power will be a sufficient constraint on QR Network's market power without amendments to the undertaking. As owner and operator of the existing network there is much that QR Network could do to frustrate or delay the expansion of the network even when users have opted to fund the expansion. Its ability to do this could allow it to secure rates of return for funding expansions that are in excess of the coal industry's cost of capital.

The Authority considers that the best way to avoid the possibility of such an outcome is to require the Authority's approval for rates of return and access conditions that QR Network is attempting to secure, with QR Network required to justify returns in excess of its regulated WACC by reference to additional risks that the relevant investments entail.

In coming to this position, the Authority accepts the view presented by the QRC and a number of the coal companies, that the effectiveness of any investment framework depends on the effectiveness of a user funding model as both:

- (a) an effective deterrent for the use of QR Network's market power; and
- (b) an alternative funding mechanism if QR Network is unable or reluctant, for whatever reason, to fund an expansion.

Negotiation Framework for Access Conditions

The Authority does not agree that access negotiations should occur unconstrained. The access undertaking and the included access agreements should include guidance on how access disputes should be arbitrated. These instruments should provide additional clarification on the access framework within the QCA Act. In doing so, they should seek to limit the range of areas where disputes can arise and to provide guidance to the Authority on how disputes should be resolved. This proposition is not novel and has not been disputed by QR Network in the past.

The Authority believes that it is reasonable for the undertaking to include guidelines on how negotiations for access conditions will take place and for those negotiations to take place within the framework of the access undertaking.

Key features of the Authority's proposed negotiation framework include the requirements that:

- (a) upon commencing access negotiations, QR Network must provide the Authority and access seekers or their customers with the set of access conditions it is seeking and the explanation for how the proposed access conditions address identified costs and risks;
- (b) the default access-condition negotiation period should be 60-days but should be extendible to 120 days, or in limited circumstances beyond 120 days;
- (c) at any time within the negotiation, period any access seeker or its customer can refer the matter to the Authority for dispute resolution; and
- (d) if all parties agree to access conditions, the agreed conditions will be submitted to the Authority for approval.

The Authority considers that a framework with a limited window for negotiations and provisions for disputes to be referred to the Authority at any time, will place a premium on all parties to adopt reasonable positions in the negotiations – in a similar fashion to the incentives in a final-bid arbitration. There will be a strong incentives to negotiate in good faith to ensure that all parties remain within the negotiations rather than resorting to dispute resolution.

The Authority does not agree with QR Network's arguments that the Authority's proposed framework is inconsistent with the negotiate-arbitrate framework of the QCA Act and the Competition Principles Agreement or that it will unnecessarily result in the Authority becoming involved in complex commercial matters.

While the Authority acknowledges that its proposal permits commercial matters to be referred to the Authority for arbitration at any time during the negotiation period, it notes that this could occur anyway within the arbitration framework set out in the QCA Act.

The Authority also believes that it is reasonable for the agreed access conditions to be brought to the Authority for approval. The expansion of the network and the associated costs, reference tariffs and access conditions may all have an impact on stakeholders that are not party to negotiations – non-expanding access holders or future access seekers and their customers for example.

The Authority therefore maintains the view expressed in its draft investment framework paper, that even agreed access conditions should be brought to the Authority for approval.

However, the Authority accepts that if the access conditions have been agreed by all parties to the negotiations then the Authority's scrutiny of the conditions should exclude some matters that it would need to consider when arbitrating disputes on non-agreed access conditions. In particular, if the access conditions have been agreed then it would usually presume that they are in the interests of QR Network, the access seekers and their customers.

Accordingly, where the access conditions have been agreed, the Authority's approval process will focus on: the interests of non-expanding access holders, future access seekers and their customers; the public interest; and whether the conditions are consistent with the QCA Act and the approved QR Network access undertaking.

These are all considerations that are particularly relevant for expansions of the mainline network, but are not relevant for single-user spur lines. As a result, the requirement for agreed access conditions to be approved by the Authority will apply to significant investments but not to single-user spur lines. The arbitration arrangements that already exist in the undertaking will

apply to resolving disputes in the event that an access seeker or their customer is dissatisfied with the access conditions proposed for a single-user spur line.

Scope of Access Conditions

Access conditions were included in past undertakings to provide scope for QR Network to address asset stranding risks associated with single-mine spur lines.

The Authority's consideration of QR Network's proposal to expand the use of access conditions for significant investments, and stakeholder's comments on that proposal (e.g. equity with subsequent users), are discussed in detail in chapter 6 of this decision.

Nevertheless, it is relevant to note, that the Authority has accepted QR Network's proposal that the use of access conditions can be expanded to significant investments, including mainline expansions and not just new greenfields corridors as proposed in its December 2009 draft decision. The Authority is tightening up the drafting of the access-conditions arrangements to ensure that the access conditions proposed are reasonable to address the costs or risks associated with particular investments.

In terms of the justification for access conditions, the Authority:

- (a) accepts that there may be circumstances where a particular investment could justify an increment over the standard regulated WACC, but this will be limited to a number of key time varying factors (e.g. risk free rate and debt margin) and will not apply to other coefficients (e.g. asset beta and market risk premium); and
- (b) believes that increments to the WACC should not be used as a means of compensating QR network for bearing other particular risks (e.g. construction cost risk or counter-party default risks). Rather, such risks should be assessed through a cash flow analysis where assessments of the probability of certain outcomes are clearly identified.

The Authority is also proposing to define a set of matters that cannot be included as access conditions; including any requirement that access conditions be confidential and any limit on the ability of access seekers to dispute access conditions with the Authority.

The Authority also considers that if QR Network eventually decides that it is unable or unwilling to fund an expansion then it should be required to provide a statement to the Authority setting out the reasons for that decision. The Authority would publish that statement on its website. The statement is for information purposes only and it is not the Authority's intention to assess the veracity of the contents of the statement or to comment on the statement. The Authority considers that where the decision not to fund was made by QR Network's holding company (as it expects will be the case, as it will most likely be the entity making decisions in relation to large capital projects on the coal rail network) the ultimate holding company will be required to provide a similar statement.

This requirement is similar to the position the Authority adopted in its December 2009 draft decision but which was not included in the 2010 DAU.

User Funding

Both QR Network and other stakeholders have come to the conclusion that, in the event that QR Network is unable or unwilling to fund an expansion of the network, then the only recourse is for users to fund the expansion. The Authority accepts that this is consistent with the provisions of the QCA Act which expressly allows access determinations to require extension of a facility where funded by an access seeker.

The Authority accepts that the undertaking should include an arrangement for users to indicate at any time that they are willing and able to fund an expansion. QR Network would ultimately manage the necessary construction works and ultimately own and operate expansions to its existing facilities. Users should have the ability to construct, own and operate extensions to the network.

The Authority has not set out in this decision every last detail of how user funding of expansions will be implemented. Rather, it has included:

- (a) a set of principles that it sees as fundamental to implementing an effective user funding model;
- (b) an obligation on QR Network to develop, and submit for the Authority's approval, a detailed user funding framework (including a standard user funding agreement) to be included into the undertaking; and
- (c) the ability for the Authority to develop its own user funding framework to be included in the undertaking if the Authority rejects QR Network's user funding framework.

The Authority sees that user funding arrangements have many similarities to access conditions, in particular as they relate to the return of monies, security, obligations on other users of the expansion infrastructure (including subsequent users), pricing and queue management arrangements.

The Authority's views on how these matters should be addressed in the context of access conditions is discussed in chapter 6 of this decision and will not be repeated here.

Nevertheless, it is relevant to note that the Authority considers that there should be uniformity in the way in which these matters are dealt with, irrespective of whether they relate to risk mitigation measures for funds supplied by QR Network or by users of the network. This will be particularly relevant where an investment is partly funded by QR Network and partly funded by network users.

There are a number of key changes in the Authority's proposed investment framework included in this decision relative to the draft circulated in July 2010.

First, the Authority largely accepts QR Network's position that user funding should be limited to access seekers. The Authority considers, however, that aspects of QR Network's proposed restriction are too limited. In particular, limiting user funding to access seekers would, in many cases, involve QR Network's related-party train operator, QR Freight, providing capital that QR Network has declined to provide. As this is unlikely to have been the intended result, the Authority's proposed drafting allows either an access seeker or its customer to be the party involved in funding network expansions. The Authority notes that:

- (a) the issue of whether user funding should be limited to the access seeker highlights the necessity for QR Network to finalise a new form access agreement making a clearer distinction between the holder of the access rights and the obligations of the train operator (see chapter 5 for further details on this issue); and
- (b) there would be nothing in the arrangements of the undertaking preventing third parties from providing the funds for new investments to access seekers or their customers.

Second, the Authority has also accepted that in the case of user-funded expansions, non-funding users should not be required to pay a price premium to funding users. The Authority has formed the view that the undertaking's arrangements for pricing access are reasonable and that

no distinction should be drawn between how those arrangements apply in relation to who funds a new expansion. This approach will also prevent an already complex access undertaking from becoming even more complex.

The third difference relates to the Authority's concern that smaller companies that are unable to participate in funding of an expansion may not be able to gain access to the network.

In response to the release of the Authority's draft investment framework, a number of coal companies argued that they may be unable to access finance on reasonable terms to participate in user funding. The Authority is particularly concerned that there may be no safety net for such companies given the investment framework of the QCA Act, where QR Network is not obliged to fund expansions. This is despite the objective of part 5 of the QCA Act that includes promoting economically efficient investment to promote effective competition in upstream and downstream markets, which include the market for the extraction, supply and sale of coal.

The Authority considered a number of options for the larger companies to fund expansions for the smaller companies. However, this approach involved relying on the cooperation of the larger coal companies and/or requiring the Authority to establish and manage funding arrangements for coal industry participants. However, the Authority has no clear jurisdiction to regulate disputes between coal industry participants directly. Moreover, arrangements relying on the cooperation of coal industry participants do not require regulatory arrangements if they are truly cooperative. As a result, the Authority accepts that the investment framework should not include obligations on funding users to provide funding for users that are unwilling or unable to participate in user funding of an expansion.

Given this, the Authority considers that QR Network's voluntary obligation to fund expansions should be widened to include some share of costs of significant expansions. The QR Network funding can then be used to fund part of the expansions that would be used by those users that are unable to contribute.

The Authority accepts that this should not be an open ended commitment and that it should be limited to 30% of the costs of any significant expansion and to no more than \$300 million for the term of an undertaking. In addition, QR Network should be able to test users' claims that they are unable to contribute to the funding of a significant investment.

Contrary to the intention of the Authority's earlier (July 2010) draft, these arrangements will not preclude cases in which the contributions of the funding users and QR Network cannot meet the costs of an expansion that satisfies the requirements of all users. Effectiveness of the investment framework therefore requires the following additional mechanisms.

First, if the funding arrangements are sufficient to guarantee the capacity requirements of funding users only, then the funding users should receive preferential allocation of the capacity created by the expansion and non-funding users should enter the queue to determine which users are allocated any additional capacity.

Second, if QR Network's and the funding users' contributions are insufficient to cover the costs of the minimum efficient capacity expansion, then all users should be requested to increase their contributions. If no further contributions are forthcoming, QR Network should not be obliged to progress the expansion. However, if sufficient further contributions are forthcoming then the capacity rights should be allocated in the manner described above (i.e. funding users' requirements are met first and then the requirements of non-funding users are managed in accordance with the queue management rules).

Incremental Investments

QR Network has included in its 2010 DAU a voluntary commitment to fund infrastructure enhancements, valued at below \$300 million, to expand the network to meet the requirements of an access seeker. This is a significant commitment as it is not an obligation imposed by the QCA Act. Given the government's recent amendments to the QCA Act, QR Network will be legally obliged to comply with this commitment.

The Authority considers that it would be reasonable for QR Network to expand the scope of this voluntary commitment.

In its supporting submission, QR Network indicated that it was willing to undertake the expenditure necessary to replace aging or redundant capital. This commitment was not mirrored in the 2010 DAU, which only referred to incremental capital expenditure; that is, network expansions valued at below \$300 million. The Authority considers that it would be reasonable to include replacement capital expenditure within QR Network's voluntary commitment. It notes that replacement capital expenditure has averaged around \$25 million per annum.

Part 11 of the undertaking addresses QR Network's planning obligations in the event of a shortfall in system capacity resulting from an incorrect forecast of capacity to be delivered by an expansion or from capacity having been eroded by changes in system operating assumptions. The Authority considers that it is reasonable for the definition of incremental investment to include projects designed to recover capacity shortfalls. That is, QR Network should be obliged to fund expansions forecast at under \$300 million in response to an access holder that has had their contracted capacity compressed seeing to recover the shortfall in capacity.

Change of Definitions

In its 2009 DAU, QR Network drew a distinction between an:

- (a) *expansion* – increase in the capacity of the existing network; and
- (b) *extension* – elongation of the network.

These distinctions are significant as QR Network has proposed that access seekers can construct, own and operate extensions but not expansions. Similarly, QR Network's commitment to fund incremental investments applies to expansions but not extensions.

However, references in the QCA Act to 'extensions' to the network using a much wider definition would encompass both expansions and extensions as defined by the 2010 DAU. While there may have been some doubt on this point at the time QR Network submitted the 2010 DAU, the QCA Act amendments clarify the term extension and remove all doubt that it covers both an expansion of, and an extension to, an existing network.

The Authority sees merit in amending the definitions in the 2010 DAU to align it with the changes to the QCA Act, in particular:

- (a) references to extensions to the network will refer to what were previously defined as expansions and extensions;
- (b) a new term, a customer specific branch line, will be introduced; and
- (c) reference to the term expansion will be deleted from the 2010 DAU, but will be replaced with the concept of infrastructure enhancements that are extensions other than customer-specific branch lines.

The Authority notes that these changes will have the effect that:

- (a) QR Network's obligations in relation to incremental investments will relate to what were previously defined as expansions; and
- (b) a user's ability to construct, own and operate infrastructure connected to QR Network's infrastructure will relate only to a customer specific branch line.

As might be expected, QR Network's and all stakeholders' submissions are drafted with reference to the way in which expansions and extensions are defined in the 2010 DAU. For ease of composition, the Authority has retained the 2010 DAU definitions when discussing the investment framework in this decision. However, it has proposed changes to the text of the 2010 DAU which gives effect to the revised definition of a network extension that is consistent with the QCA Act.

Ownership

While s. 118 of the QCA Act provides for the Authority to make an access determination requiring a facility to be extended, s. 119 says that any such determination cannot result in the access seeker, or someone else, becoming an owner of a facility without the existing owner's agreement (s.119 (b)).

In its submissions, QR Network said it would be the owner of all expansions, and may or may not be the owner of extensions to the system. For instance, QR Network proposed to be the owner and operator of all infrastructure constructed in a user funded expansion.

The Authority accepts that QR Network's proposal is consistent with s.119 (b) of the QCA Act.

Moreover, as an expansion of the network will often involve expanding part of the multi-user mainline infrastructure (e.g. passing loops and duplications or other modifications to existing assets), significant operating difficulties would be created if user-funded expansions were owned by the funding users – e.g. separate access agreements would apply for the different access providers.

Users have not expressed any interest in owning network expansions and QR Network has indicated that it is willing to extend its network when, in its opinion, it is commercially justified (including QR Network proposed access conditions). Where this is not the case, QR Network has agreed to facilitate the connection of the relevant access seeker's private rail infrastructure to its declared network.

The Authority considers that this arrangement is reasonable as it is consistent with s. 119(b) of the QCA Act.

Moreover, QR Network has relatively limited monopoly power in relation to constructing and owning spur lines provided that connecting the private infrastructure to its network and on-going management of train movements between its network and the private infrastructure are managed in a non-discriminatory manner. The Authority considers that QR Network's proposals in this regard are reasonable subject to developing greater clarity on the terms and conditions associated with connection agreements (see section 8.4 of this decision for further details).

Expansion Process

The Authority considers that the engineering and commercial processes associated with network expansions should operate in parallel with, and as far as practicable independent of, each other.

In particular, feasibility studies and detailed design work should take place irrespective of which party or parties ultimately fund an expansion.

This approach is consistent with that set out in QR Network's revised framework. This includes timelines for the main phases of its investment framework which align with its stage gate project development process. For example, QR Network has proposed that the EOI be issued during the concept stage of the stage gate process. This proposal is consistent with stakeholders' expressed preferences.

QR Network has said it would seek EOIs either when:

- (a) QR Network believes an expansion is needed to meet supply chain demand;
- (b) a request is received from an owner or operator of an expanding or new multi-user unloading facility; or
- (c) QR Network has received access requests that would utilise in excess of 70% of the expected project capacity.

The Authority considers that these triggers are reasonable but that, as suggested by the QRC and BMA, all unloading facilities, whether they are single or multi-user facilities, should have the ability to trigger the expansion process. QRC argued that any user willing to fund an investment should be able to initiate this process. This would avoid the prospect that a single-user facility would have a specific negotiation process with QR Network.

The Authority also accepts Asciano's suggestion that supply chain bodies should be included in the investment process. Asciano submitted that supply chain bodies could, for example, initiate a network expansion. The Authority considers that this suggestion has merit, in particular as QR Network has committed itself to undertake master planning activities in consultation with the supply chain group (see chapter 11 of this decision for more details).

Under QR Network's revised framework, an access seeker may elect to self fund an expansion during the expression of interest phase, or at any time thereafter. Given this, the Authority considers that an additional trigger should be included such that the EOI phase would be triggered not simply on the basis that QR Network has received requests for capacity that are greater than 70% of total capacity, but where funding users are willing to fund all costs associated with 70% of total capacity. It is the Authority's view that the initiation of an expansion should not be held up if users have indicated to QR Network they are willing meet at least 70% of the costs associated with the proposed project.

The Authority also notes stakeholders' comments that funding users should be able to directly participate in the investment process – i.e. in return for funding a project, funding users should have a right to participate in developing and managing the project including having a role in determining its scope.

Again, this is consistent with QR Network's proposal. QR Network has indicated that at the end of the concept phase, it would share the details derived from the concept study and would provide its: preferred project scope and its expected timelines for completing the prefeasibility study. QR Network also proposed that at this time, users will be required to confirm: (1) their ongoing expression of interest in the expansion capacity; (2) acceptance of the scope of the expansion and (3) funding (or underwriting) of the prefeasibility study costs, if requested by QR Network. QR Network also said that it is at this expression of interest stage that users can elect to fund the expansion.

As noted above, under QR Network's proposal, it is expected that interested users will indicate whether they are interested in funding a feasibility study (if required by QR Network) in their response to the expression of interest.

It is the Authority's view that it is reasonable to request that users fund the cost of a feasibility study. The Authority accepts that the risk that a project may not go ahead is greater at the feasibility stage than further along in the project. If a project does not ultimately proceed, QR Network would have expended costs on the study, but would not have new access holders or customers on which to levy reference tariffs to recoup the costs of the study – such costs would, therefore, have to be recouped from the non-expanding customers. In addition, by requesting the users fund the study, a level of financial responsibility is placed on access seekers to ensure their capacity requests are reasonable.

Therefore the Authority sees merit in an arrangement whereby QR Network can request funding for a feasibility study from access seekers. Any such funding should be subject to a user funding agreement. Thus, users who have funded a feasibility study should be repaid through the same arrangements as applies to user funding for the entirety of the expansion project.

Rio Tinto wanted further clarification on whether funding users would have a right to review and re-scope projects. The Authority notes that in its June revised proposal, QR Network provided for user funder participation in project governance.

It is the Authority's view that QR Network would collaborate with funding users to ensure that an expansion project would accommodate the needs of all users seeking additional capacity who are willing to commit to the approved terms and conditions of the expansion. This is regardless of whether or not these users agreed to provide funding for the expansion. Thus, it is the Authority's view that QR Network should collaborate with interested parties at the EOI phase to ensure that the expansion is scaled to meet the expected demand.

Moreover, users' commitments to fund a feasibility study should be considered significant enough to allow for their involvement and full participation in project development through to sanction in QR Network's proposed execution phase. Where a user has agreed to fund either the project in its entirety, or a feasibility study, it is expected that the user and QR Network will enter into a user funding agreement. The Authority considers that the standard user funding agreement should outline the rights of both the funding user and QR Network in project governance.

On the whole, it is the Authority's view that users who opt to fund an expansion should be given the opportunity to collaborate with QR Network in relation to all key matters that affect the cost and the timing of the project. This includes, but is not limited to:

- (a) the project scope;
- (b) cost;
- (c) procurement strategy;
- (d) construction; and
- (e) timing.

QR Network proposed that during the pre-feasibility stage of project development it will issue a request for proposal containing the anticipated costs, timelines, funding expectations, access conditions and the negotiation period for QR Network and users to negotiate access conditions and other relevant matters. The request for proposal should contain a clear statement that a user

may elect for user funding at any time during the process. As set out in chapter 6 of this decision, any request for access conditions should also include a justification based on the costs and risks faced by QR Network in the particular investment.

The Authority notes comments from the QRC, BMA, Anglo American and Xstrata regarding the need for appropriate timetables and deadlines within the expansion process. The Authority considers that QR Network's linkage of its investment framework to its stage gate process for internal project management has helped address some of stakeholders' concerns with expansion timings.

The Authority agrees with QR Network's proposal to develop timelines for pre-feasibility studies within its concept study. This should be extended to include the development of timelines throughout the project in consultation with the pertinent stakeholders. If developed in a collaborative fashion, it is expected that the timing expectations of all parties will be considered when developing the timelines. The timelines could then be reassessed and reset throughout the project development process in conjunction with all relevant parties.

While adherence to timelines is critical for any project, the Authority accepts that it is particularly important for user funded expansions to ensure that user funding remains a credible constraint on the exercise of monopoly power by QR Network.

The Authority considers that, in the event of significant delays in the expansion process, users should have the right to step in and control the construction process until completion.

The Authority accepts that this would require a change in the management team for the construction works mid-way through a project and that people, other than QR Network, would become responsible for managing the construction of assets that QR Network will ultimately own and operate.

As a result, it is an option that neither the funding users nor QR Network will want to see exercised. Nevertheless, this option should be included in the investment framework as a last resort and as a credible constraint on the potential exercise of monopoly power.

The Authority considers that there should be clear rights in the undertaking to provide for funding users to take over management control of expansions with details to be included in the standard user funding agreement. These arrangements should be guided by principles including that:

- (a) funding users can trigger the step-in rights if there has been a material delay in the planning or construction of an expansion;
- (b) QR Network can dispute (and the Authority arbitrate on) whether there has been a material delay in planning or constructing an expansion;
- (c) if QR Network accepts, or the Authority determines, that there has been a material delay, QR Network will provide all reasonable endeavours to allow users to finalise the construction of the expansion, including by
 - (i) providing access to their land and property,
 - (ii) directing their employees to cooperate with the users and their contractors, and
 - (iii) transferring or novating the contracts for the procuring or supply of goods and services to the user (or users)

to allow the expansion to be completed; and

- (d) QR Network must be compensated for any reasonable costs borne in transferring management responsibility for completing the expansion to a user (or users).

The Authority notes the QRC's comment that to enable user funding as a genuine alternative for investment funding, the Authority should approve a number of standard agreements, one of which is a standard network protection and safety agreement. The QRC noted this agreement would be necessary in instances where users are forced to undertake construction of an infrastructure enhancement.

The Authority agrees that an agreement will be needed for instances where users step in to construct a project. The Authority considers that QR Network should, as part of its consultation for the standard user funding agreement, develop a list of principles that will form the basis of a standard network protection and safety agreement (or having a template of such agreements as a schedule to the user funding agreement). It expects the agreement to address the following (non-exhaustive) list of issues in relation to user construction on QR Network's below rail network:

- (a) QR Network granting to the users' constructors a sufficient level of access to complete construction of the infrastructure enhancement;
- (b) QR Network sharing planning and design information with users' constructors to enable them to complete the infrastructure enhancement;
- (c) QR Network's approval of project design, studies and standards;
- (d) users' constructors undertaking the expansion at a satisfactory level of technical, engineering and safety standards;
- (e) QR Network being responsible for train scheduling;
- (f) parties developing interface risk management and emergency response plans; and
- (g) dispute resolution and arbitration.

Decision 1.1:

The Authority require QR Network to:

- (a) **include as Schedule J of the Undertaking the 'Investment Framework Principles' as set out in Appendix 1; and**
 - (b) **amend the other Parts of the Undertaking as set out in Appendix 1 in order to implement the core principles from the Investment Framework Principles.**
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2. SCOPE AND INTENT OF THE UNDERTAKING

Part 2 of QR Network's 2010 DAU sets out the undertaking's purpose, the range of services covered and the term, including the circumstances when it will expire.

QR Network has agreed with most of the changes to part 2 the Authority required in its December 2009 draft decision on QR Network's 2009 DAU, including the duration of the undertaking, the definition of termination triggers, intent of the undertaking and the obligation to provide access to land, supply of electricity and transfer of assets owned by QR related parties.

In its December 2009 draft decision, the Authority also required QR Network to procure an undertaking from the QR Ltd Board that stated that QR Ltd and its subsidiaries would enable QR Network to comply with its obligations under its approved undertaking (particularly for parts 2 and 3). While QR Network has accepted that requirement in principle, the Authority has yet to receive the required deed. In addition, with the impending privatisation of QR Network, its ultimate parent will now be QR National Ltd. The Authority therefore requires QR Network to submit a separate undertaking deed from the QR Ltd Board and subsequently the QR National Ltd Board that enables QR Network to comply with its obligations under parts 2 and 3 of the 2010 DAU where its compliance is, in part, reliant on the cooperation of QR Ltd, QR National Ltd or a QR related party. While these matters are included in part 2 of the 2010 DAU, they are discussed in chapter 3 of this draft decision along-side the discussion of the ring-fencing arrangements as they involve similar issues of principle.

QR Network has also introduced some new clauses relating to transitional provisions and non-discriminatory behaviour. These amendments have been largely introduced to reflect the changes to QR Ltd's corporate structure and to provide for further changes to the ownership and operating circumstances of QR Ltd resulting from the proposed Initial Public Offering (IPO). Some of these provisions are no longer required in the 2010 DAU as they were approved as part of the June 2010 amendments to the 2008 undertaking and, due to QR's restructure in the interim, the 2010 DAU when re-submitted will only relate to the central Queensland coal rail network.

On the basis of the matters raised by the stakeholders in response to the Authority's draft decision and the 2010 DAU, the Authority has not substantially altered its position from its December 2009 draft decision. However, the Authority is proposing to strengthen the non-discriminatory behaviour provisions in the undertaking.

2.1 QR Ltd restructure and transitional provisions

Background

On 8 December 2009, the Queensland Government announced the restructure and planned sale of QR Ltd. The restructuring took effect on 30 June 2010 and the sale is currently proposed to take place later in 2010 through an IPO.

As a result, QR Ltd's above-rail passenger business and the metropolitan and regional below-rail networks have been transferred to a new Government owned Corporation (GOC) called 'Queensland Rail Limited'. QR Ltd's above-rail coal and freight businesses and the below-rail network in the central Queensland coal region (CQCR) are proposed to be publicly listed and trade as 'QR National'. The shares in the existing QR Ltd have been transferred to a new holding company called QR National Ltd which will be the entity listed on the Australian Stock Exchange. QR National will not itself hold any substantial operating assets, but will hold the shares in QR Ltd. QR Network will hold a long term lease over the CQCR. Parts of the

North Coast line that lie in the CQCR will be owned by the new GOC (i.e. Queensland Rail) but operated by QR Network.

Section 9(j) of the *Infrastructure Investment (Asset Restructuring and Disposal) Act 2009 (Qld)* provided for the Minister to issue a transfer notice (ultimately issued on 30 June 2010) setting out how the 2008 access undertaking would be applied to QR Network and Queensland Rail after the 30 June 2010 separation.

In connection with the restructure, the Government has amended the *Queensland Competition Authority Regulation 2007* (the QCA Regulation) and the *Queensland Competition Authority Act 1997* (the QCA Act).

The amendment to the QCA Regulation separated the previous declaration for the Queensland rail network into two separate declarations – one for the CQCR network (owned by QR Network) and one for the remainder of the Queensland rail network (owned by Queensland Rail).

The State Government has framed the CQCR declaration by reference to the assets used to provide the declared service as opposed to the owner or manager of declared service (except in relation to new associated branch lines access to which are included in the declaration if owned or leased by the owner or lessee of the mainline or a related body corporate). The declaration of the non-CQCR network will refer to railways for which Queensland Rail is the manager.

To ensure that the existing 2008 undertaking applied to the two newly created QR entities, on 28 June 2010, the Authority approved an amendment to the 2008 undertaking to provide for QR Ltd's restructure and privatisation, including the responsibility for managing the rail network. The amendment included:

- (a) the transition arrangements to facilitate the restructure of QR Ltd into public and private entities prior to the proposed IPO;
- (b) allowing Queensland Rail and QR Network to share an access seeker's/holder's confidential information between each other for the purpose of coordinating the negotiation or provision of access. This is necessary to ensure smooth coordination of train services that travel across both networks (QR Network, sub. no. 70:14) – see chapter 3 of this decision for further details;
- (c) applying the 2008 undertaking to:
 - (i) Queensland Rail until June 2011 or until the Authority approves a separate subsequent undertaking submitted by Queensland Rail; and
 - (ii) the CQCR network until June 2011 or until the Authority approves the 2010 DAU.

It should be kept in mind that the 2010 DAU was submitted prior to the 2010 pricing DAAU being contemplated, and therefore the 2010 DAU contains a number of provisions relating to the restructure which are no longer necessary as these are already contained in the (amended) 2008 undertaking.

QR Network's 2010 Proposal

QR Network included in its 2010 DAU transitional arrangements to facilitate the restructure of QR Ltd into public and private entities prior to the IPO, keeping in mind that the restructure occurred on 30 June 2010 by way of a transfer notice.

Stakeholders' Comments

The QRC supported the proposed approach of 'Queensland Rail' (the new GOC entity) submitting its own undertaking following the approval of the 2010 DAU. The QRC recommended that the process should be robust rather than merely extracting existing provisions to create a new document. The process should contain a robust methodology for deriving the western system tariffs while assessing other terms of the undertaking appropriate to the needs of the region. In this regard, the QRC stated that:

QRC would appreciate if the QCA could verify these arrangements, within any forthcoming decision, and ensure the transitional provisions outlined in clause 12.5 are appropriate (QRC, sub. no. 82:8).

Authority's Analysis and Decision

The Authority approved the transitional arrangements when it approved the 2010 pricing DAAU on 28 June 2010.

Until the Authority approves a separate access undertaking for Queensland Rail, Queensland Rail will be a party to QR Network's approved 2008 access undertaking by virtue of the transfer notice which was issued under the *Infrastructure Investment (Asset Restructuring and Disposal) Act 2009*. The transfer notice provided that the 2008 access undertaking only applies to Queensland Rail in so far as the non-CQCR network is concerned and to QR Network in so far as the CQCR network is concerned. The 2008 undertaking will apply to only Queensland Rail after the approval of QR Network's 2010 DAU.

Accordingly, the Authority believes that, to the extent the transitional arrangements have already been included in the amended 2008 undertaking, the proposed arrangements are no longer required in QR Network's 2010 DAU.

Decision 2.1:

The Authority requires QR Network to delete clause 12.5.1 and 12.5.2 from Part 12 of the 2010 DAU.

2.2 Non-Discriminatory Treatment

Background

In response to the December 2009 draft decision and in the context of the impending IPO, stakeholders have expressed heightened concerns about QR Ltd using its monopoly power in providing below-rail services to adversely affect competition in above-rail services.

Asciano, Xstrata and Rio Tinto expressed concerns that a privately owned QR Network could discriminate between above-rail operators in favour of QR National thereby reducing competition (Xstrata, sub. no. 54:2 and Rio Tinto, sub. no. 52:2). In particular, Asciano stated that:

It has on record a number of concerns, particularly, around the controls or lack of them, on ring fencing and effective non-discrimination between rail operators (Asciano, sub. no. 78:2).

Asciano argued that the 2008 undertaking only partially deals with discriminatory behaviour and improvement is required to:

- (a) effectively structurally separate the above- and below-rail business units of QR Ltd;

- (b) prohibit preferential treatment;
- (c) enforce the arrangements including audits on compliance and penalties for any breach of the undertaking; and
- (d) ensure that QR Network manages all track and facilities so there can be effective above-rail competition.

Rio Tinto stated that the privatisation of a vertically integrated business presents a challenging regulatory task. This is because the Queensland Government has indicated that the sale/lease agreement of QR Ltd is unlikely to include specific competition protections requested by industry (Rio Tinto, sub. 52:2).

Xstrata expressed concerns that a privately owned QR Network could discriminate between above-rail operators in favour of QR National thereby reducing competition (Xstrata, sub. no. 54:2).

QR Network's 2010 Proposal

As a result of the proposed sale of QR Ltd, both the Queensland Government and QR Network have amended the legislative framework (both the QCA Act and the *Transport Infrastructure Act 1994* (the TI Act)) and the 2010 DAU to address stakeholders' concerns about the proposed privatisation of the integrated above- and below-rail coal business in central Queensland.

QR Network's 2010 DAU includes a new obligation that QR Network will not unfairly discriminate between access seekers/holders in providing access except where there is an express provision to the contrary in the access undertaking or an access agreement with the relevant access holder. In this regard, QR Network states that:

Clause 2.2 has been inserted to stipulate QR Network's commitment to provide non-discriminatory access but with stated exceptions (QR Network, sub. no. 70:4).

QR Network stated that the proposed provisions are similar to section 16 of the *Rail Access Code (2000)* in the Western Australian regulatory regime, which states that a network operator will not discriminate between one proponent and another.

QR Network has also introduced a complaints mechanism whereby an access seeker/holder can formally complain to QR Network if it has been discriminated against. QR Network is required to investigate and respond to the claims of an access seeker. If the complainant is not satisfied with QR Network's investigation, the Authority can instigate an audit in accordance with the provisions of the undertaking.

Stakeholders' Comments

Stakeholders welcomed the inclusion of the non-discrimination clause in the 2010 DAU but, at the same time, were concerned that the proposed drafting was ineffective.

Asciano said that above-rail competition cannot thrive without an effective non discrimination regime and added that:

The new non discrimination clause (clause 2.2) is qualified to the extent that it is useless. In effect the clause states that QR Network won't discriminate unless they are allowed to do so by their access agreements and access undertaking. Thus QR Network could agree an access agreement with a QR related operator and this discriminatory behaviour would not be prevented by this non discrimination clause (Asciano, sub. no. 78:7).

Asciano was also concerned that the proposed non-discrimination clause was qualified with the term ‘unfairly discriminate’. Asciano said it was not clear what the terminology meant and it therefore rendered the term ‘discrimination’ meaningless and ineffective.

Asciano recommended that the undertaking should include:

- (a) a broad, non-qualified, non-discrimination provision relevant to above-rail operators;
- (b) a commitment to deliver equivalence in services, quality of services, access charges, access rights, train service entitlements and train control;
- (c) a prohibition on anti-competitive cost shifting, anti-competitive cross subsidies and margin squeezing; and
- (d) a general annual audit of QR Network’s compliance with these obligations.

Asciano also indicated that a complaints based audit is not effective as it is not always the case that an access seeker can know that it has been discriminated against.

QRC echoed Asciano’s concerns saying that:

the current drafting could validate unfair discrimination in favour of a related party by virtue of the inclusion of such provisions in the related party’s access agreement....QRC considers that QR Network should undertake not to enter into any access agreement with a related party which provides for discrimination in favour of that party (QRC, sub. no. 82:8).

QRC recommended that an effective non-discrimination clause should:

- (a) be limited to the extent that any non-discrimination has been endorsed by the Authority, e.g. price differentiation based on cost or risk allocation;
- (b) specifically include extensions or expansions to rail infrastructure within the scope of the clause (i.e. clause 2.2 (a) (i));
- (c) empower the Authority to investigate and identify potential cases of discrimination, based on the Authority’s assessment of the reasonableness of claims or evidence;
- (d) provide for the Authority to undertake an audit of QR Network’s decision-making procedures; and
- (e) provide that, when QR Network staff make decisions, they do so in accordance with established procedures and principles to ensure greater consistency and accountability.

Rio Tinto supported Asciano’s submission in relation to specific third party operator access issues and asked the Authority to protect industry and third party rail haulage providers from QR Network’s exercise of monopoly power and discrimination in favour of its related companies. It also stated that, as Queensland Government’s sale/lease agreement is unlikely to include any specific competition protections, the coal producers are solely reliant on the effectiveness of the access framework for protection (Rio Tinto, sub. no. 73:2).

Authority’s Analysis and Decision

To date, the obligations under section 104 of the QCA Act extended only to discrimination in the form of preventing or hindering a user’s access to the declared service under an access agreement. Therefore, the Authority accepts that QR Network’s proposed (broader)

non-discrimination provisions in the 2010 DAU are a step in the right direction. However, further amendments are warranted.

The Authority also notes that the Queensland Government has amendmended to the QCA Act and the TIA to address industry concerns as a result of the privatisation of QR Ltd. The legislative enhancements relate to preventing anti-competitive behaviour with an explicit requirement that a vertically integrated access provider must not unfairly discriminate between access seekers in negotiations or under an access undertaking in providing access. The amendments include:

- (a) statutory obligations on the owner of the below-rail assets to not unfairly differentiate “between access seekers in negotiating access agreements or amendments to an access agreement relating to the service”(and a corresponding requirement to include provisions to this effect in undertakings from vertically integrated access providers). Also, the access provider must not unfairly differentiate between access seekers in a way that has a material adverse affect on the ability of one or more access seekers to compete with other access seekers (s. 100);
- (b) statutory obligations that an undertaking from a vertically integrated access provider must include a requirement that the access provider does not unfairly differentiate between users of the service in providing access and that access charges must only recover costs that are reasonably attributable to the provision of below-rail service (s.137(1A));
- (c) access agreements between a network company (including QR Network) and a related above-rail operator must be approved by the Board of the network company, and the Directors of a network company will have an obligation to not approve an access agreement with its above-rail business unless the Board is satisfied that the agreement is on arm’s length (TIA s. 438H); and
- (d) a requirement for an access provider to provide any information that enables the Authority to assess an access provider’s compliance with an approved undertaking in accordance with section 150A of the QCA Act.

Accordingly, the Authority sees merit in strengthening the 2010 DAU’s proposed non-discriminatory provisions consistent with the rationale for the new legislative amendments.

The Authority believes that some of the statutory amendments do not go as far as the stakeholders may have wanted, but that there is scope for the undertaking to include some complementary provisions that are consistent with the intent of the amendments. For example, the Authority has qualified its reference to access agreements to be consistent with the Act (s 168(c)), which allows differentiation pursuant to an access agreement provided that it does not amount to hindering or preventing access or providing favourable terms to related operators.

Accordingly, the Authority requires QR Network to insert a new clause 3.2 in the 2010 DAU that prohibits discriminatory decision-making. These provisions aim to address the following:

- (a) effective separation or arm’s length treatment of the privatised QR’s above-rail and below-rail activities;
- (b) preferential treatment to related parties;
- (c) anti-competitive cost shifting, anti-competitive cross subsidies and margin squeezing; and
- (d) compliance through audits.

The Authority is also proposing to amend QR Network's reporting requirements to ensure there is greater transparency in cost allocations, especially operating and maintenance costs. These are discussed in greater detail in chapter 3 of this decision.

The Authority agrees with Asciano that there should be a general audit provision in the undertaking for QR Network's compliance with the non-discrimination clause. A complaints based audit is not effective as it is not always the case that an access seeker can know that it has been discriminated against. The Authority will address the audit provision in parts 3 and 9 respectively.

Amongst other concerns, the proposed amendments to parts 3 and 9 address concerns raised by stakeholders, in particular by Asciano, with regards to variations to network rules that would operate in favour of a related entity.

The Authority agrees with stakeholders that the new provisions to prevent discrimination may be ineffective as they potentially allow QR Network to discriminate in favour of its related party access seeker/holder if discriminatory provisions can be included in the access agreements.

Therefore, the Authority requires QR Network to amend clause 2.2(a) of its 2010 DAU so that the non-discrimination provisions are limited to those endorsed under the QCA Act or the access undertaking, e.g. price differentiation based on cost or risk allocation.

Consistent with the amendments to the QCA Act, the Authority also requires QR Network to amend clause 9.5 in its 2010 DAU that imposes an obligation of QR Network to provide necessary information to the Authority to monitor compliance of an approved undertaking.

Decision 2.2:

The Authority requires QR Network to include a new clause 3.2 in part 3 of the undertaking as follows:

General principles of non-discrimination and independence

(a) QR Network will not, and will procure that its Related Parties do not:

- (i) engage in conduct for the purpose of preventing or hindering an Access Seeker's or Access Holder's Access; or**
- (ii) provide Access to Related Operators on more favourable terms than the terms on which QR Network provides Access to competitors of Related Operators (having regards to all of the terms on, and circumstances in which, Access is provided including the Access Charges and differences in the Access Rights provided).**

(b) QR Network will ensure that:

- (i) all transactions between QR Network and Related Operators in relation to Access are conducted on an arms-length basis;**
 - (ii) all Access Seekers, irrespective of whether they are a QR Party or a Third Party:**
 - (A) are provided with a consistent level of service; and**
 - (B) given an equal opportunity to obtain Access Rights, subject to the express provisions of the Act and this Undertaking; and**
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- (iii) all decisions made under this Undertaking are made in a manner that is consistent between all Access Seekers and/or Access Holders in the same circumstances.
- (c) QR Network must not engage in any activity or conduct (or agree to engage in such activity or conduct), either independently or with Related Operators, which has the purpose of, or results in or creates, or is likely to result in or create:
- (i) anti-competitive cost shifting;
 - (ii) anti-competitive cross-subsidies; or
 - (iii) anti-competitive price or margin squeezing.

Decision 2.3

The Authority also requires QR Network to amend clause 2.2 (a) as follows:

Non-Discriminatory Treatment

- (a) This Undertaking will be consistently applied to all Access Seekers, Access Applications and negotiations for Access. QR Network will not unfairly differentiate between Access Seekers in negotiating for the provision of Access or between Access Holders in providing Access including in relation to:
- (i) any decision relating to whether QR Network will undertake an Expansion;
 - (ii) assessing, allocating and managing Capacity; and
 - (iii) providing scheduling and Train Control Services in accordance with the Network Management Principles,
- except where is an express provision to the contrary in:
- (iv) the Undertaking or the Act; or
 - (v) an Access Agreement and the relevant conduct would not contravene Clause 3.2(a).

Decision 2.4

The Authority requires QR Network to amend clause 9.5(a) as follows:

- (a) The QCA has the right, by written notice, to request that QR Network provide to the QCA information or a document that the QCA reasonably requires for the purpose of:
- (i) performing its obligations or functions in accordance with either this Undertaking or an Access Agreement; or
 - (ii) developed pursuant to this Undertaking determining whether it should exercise powers in this Undertaking, such as requiring the conduct of an audit.
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The notice must include a description of the information or document required, the purpose for which it is required, and the day by which it is required, provided that the day stated in the notice must be reasonable.

2.3 Intent of the Undertaking

Background

The 2008 undertaking includes a section that sets out a high level statement of intent that draws on the access principles in the QCA Act and the TI Act.

QR Network proposed to broaden the intent section of the 2009 DAU by including additional provisions that emphasised QR Network's commercial risks and returns; in particular, its interests in recovering all reasonable costs and earning a reasonable return on its assets and new investments.

In its December 2009 draft decision, the Authority rejected QR Network's proposal on grounds that the intent section of the 2009 DAU did not reflect the objectives of Part 5 of the QCA Act which emphasises efficient costs and promoting competition in other markets. Accordingly, the Authority developed a revised draft of this section to address its concerns.

The QRC supported the Authority's revisions and added that the intent section of the undertaking should also recognise the role of the regulator while emphasising the right of the coal producers.

QR Network's 2010 Proposal

QR Network's 2010 DAU includes amendments to the intent section that QR Network states has the same effect as the Authority's proposed changes in the December 2009 draft decision. In fact, QR Network states that it is now better aligned to the QCA Act, in particular, with respect to the pricing principles in section 168 of the QCA Act. The proposed drafting also recognises QR Network's role in the whole of coal supply chain (QR Network, sub. no. 70:5).

Stakeholders' Comments

The QRC considers that the intent clause as currently drafted does not recognise the importance of end customers. The QRC argued that the intent of the undertaking should clearly articulate the rights of coal producers (which does not relate to the rights of the customer in their capacity as a direct access holder or access seeker). The QRC would like to see provisions within the intent section of the undertaking that provide end customers with access to the network on fair terms while allowing the end customers to efficiently invest in the network (QRC, sub. no. 82:10).

Authority's Analysis and Decision

The Authority has reviewed QR Network's revised drafting of the intent section and has concluded that the proposed new drafting has the same effect as those specified by the Authority in the December 2010 DAU.

While the Authority accepts that the QRC would like to see a greater recognition of customers' rights in the undertaking, this is not something the Authority is going to insist on. This is largely because the intent section is consistent with the QCA Act and merely guides the interpretation of other provisions in the undertaking, such that specific rights of end users

provided for elsewhere in the undertaking will not be limited by QR Network's proposed drafting.

Accordingly, the Authority approves the drafting of the intent section as proposed by QR Network in the 2010 DAU.

3. RING-FENCING ARRANGEMENTS

Part 3 of the 2010 DAU sets out the ring-fencing arrangements for managing confidential information, complaints handling, decision making procedures, compliance and enforcement.

QR Network has agreed with most of the changes to part 3 that the Authority required in its December 2009 draft decision, including the decision making provisions and the associated audit obligations, reviews of the yard control facilities, definition of major yards and reinstating the 2008 undertaking's ring-fencing provisions.

While QR Network has accepted in principle the requirement to provide an undertaking deed from the QR Ltd Board of Directors, the Authority has yet to receive a draft of it. Given QR Ltd's privatisation, the Authority now requires QR Network to procure an undertaking deed from QR Network's ultimate holding company (currently QR Ltd, but subsequently proposed to be QR National Ltd). This separate undertaking deed will ensure that QR Network is able to comply with its obligations under part 3 and part 2 of the 2010 DAU where it is reliant on QR Ltd (or other QR related parties) in order to do so. While these matters are included in part 2 and part 3 of the 2010 DAU, these are discussed in this chapter along-side the discussion of the scope of the undertaking and transfer of assets provisions as they involve similar issues of principle.

Given that QR Network remains a wholly owned and controlled subsidiary of QR Ltd, the Authority is proposing to strengthen various provisions in the 2010 DAU to address concerns raised by stakeholders. The Authority is particularly concerned about the 2010 DAU providing inadequate protection for sharing of access seekers confidential information with other railway managers or other infrastructure providers. Accordingly, QR Network must enter into separate confidentiality deeds with railway managers and other infrastructure providers when passing on confidential information of an access seeker for the purpose of providing and negotiating access. Further, sharing of access seekers/holders confidential information with other infrastructure providers should only be with the prior written consent of an access seeker/holder.

In addition, the Authority is proposing to strengthen the decision making audit provisions in the undertaking. The Authority maintains its position on the matter of costing manual from its December 2009 draft decision as the Authority has not found QR Network's revised arguments for not incorporating these principles compelling. The Authority is also proposing changes to the 2010 DAU that better reflect the legislative amendments to the QCA Act and the TI Act

3.1 Ring-fencing arrangements and management of confidential information

Background

Ring-fencing refers to separation of business activities, costs and decision making in an integrated entity. Ring-fencing aims to stop regulated businesses from exercising monopoly power or colluding with associated businesses to provide an unfair advantage over market competitors.

QR Network's 2008 undertaking includes a set of obligations and procedures governing the management and disclosure of an access seeker's/access holder's confidential information.

These arrangements require QR Network to have an annual audit conducted into its compliance with its ring-fencing obligations. Amongst other things, the audit report must identify whether QR Network has complied in all material respects with its information handling obligations under the access undertaking while providing details of any non-compliance. Further, under the

2008 undertaking, these provisions were strengthened through an undertaking deed from the Chief Executive of QR Ltd and a confidentiality deed between QR Network and QR Ltd.

In its 2009 DAU, QR Network had sought to wind-back its ring-fencing obligations by:

- (a) providing for the sharing of third party access seeker's confidential information with the QR Ltd Board, the QR Ltd CEO, the QR Ltd CFO and persons providing clerical assistance to them;
- (b) removing obligations on other QR related entities towards third parties in the event they receive confidential information relating to access requests;
- (c) withdrawing QR Ltd's Chief Executive undertaking, which included a promise to enter into a confidentiality deed addressing compliance by QR Ltd and its business groups with QR Network's ring-fencing obligations; and
- (d) removing the prescribed form ring-fencing confidentiality agreement between QR Network and an access seeker and replacing it with a set of broad principles contained in the undertaking.

In its December 2009 draft decision, the Authority rejected these changes as it did not accept that the information ring-fencing arrangements should be diluted on the basis of the changes made (at that time) to QR Ltd's corporate structure. The Authority required QR Network to retain the 2008 undertaking provisions.

Stakeholders supported the Authority's draft decision but urged the Authority to strengthen these provisions further given the impending privatisation of a vertically integrated QR Ltd.

In response to the Authority's 2009 draft decision, QRC supported the proposed rejection of ring-fencing provisions which limited effective separation, compliance and enforcement obligations on QR Network (QRC, sub. no. 55:7).

Asciano expressed concerns about the lack of ring fencing arrangements in QR Network's undertaking. It stated that the regulatory regime should be amended so that:

- (a) the majority of the Directors and Chair of QR Network Board are independent (i.e. not on the Board of QR Ltd or any related body corporate). This would ensure that confidential information about above rail competitors is not shared at the QR Ltd Board level;
- (b) notwithstanding section 187 of the Corporations Act 2001, the constitution of QR Ltd should be changed so that the Directors are required to act in the best interest of QR Network instead of its holding company;
- (c) a separate entity should operate each business unit under an independent Board;
- (d) QR Network has separate people, premises and IT systems from the rest of QR Ltd, with appropriate security arrangements governing access between the different businesses; and
- (e) there are limitations on the use of common consultants and the transfer of personnel between the different businesses (Asciano, sub. no. 49:8).

Asciano was of the view that the key to an effective regulatory regime is enforcement, where a breach by a regulated entity carried a suitable financial penalty. Asciano accepted that some of its proposals would be best placed outside the undertaking i.e. via amendments to the QCA Act.

Rio Tinto supported the Authority's decision to reinstate certain ring fencing obligations but expressed concerns that the current ring-fencing arrangements are inadequate, stating that:

Regulating privatised vertically-integrated entity, with an ineffectual ring-fencing framework, will inevitably make the regulatory process more intrusive, time and cost intensive, and ultimately result in higher access charges for rail users (Rio Tinto, sub. no. 52:2).

Xstrata said that robust ring-fencing arrangements and protections are important for the development of a competitive above-rail market (Xstrata, sub. no. 54:2).

QR Network's 2010 Proposal

In its 2010 DAU, QR Network has largely accepted the Authority's draft decision. The only outstanding matter relates to an undertaking deed from the QR Ltd Board enabling QR Network to comply with its obligations under parts 2 and 3 of the undertaking. While QR Network has accepted in principle the requirement for such a deed, it has yet to provide a signed copy of a deed to the Authority.

QR Network also introduced some new amendments to the 2010 DAU which are as follows:

Provision of Information to Other Railway Managers

These provisions allow QR Network to provide confidential information to the new Government owned entity which will be the railway manager for the below rail network outside the CQCR. This is necessary to ensure smooth coordination between the two railway managers in negotiating access agreements for, and operating train services that travel over rail infrastructure owned by more than one railway manager (clause 12.5.2(a)(E) (QR Network, sub. no. 70:15).

Provision of Information to Other Infrastructure Providers

QR Network proposes to share third party confidential information with other infrastructure providers to facilitate the alignment of capacity between different infrastructure providers. The new provisions allow QR Network to provide information on contracted tonnes to ports to the extent necessary for achieving capacity alignment and that the service provider has provided the necessary undertaking to keep the information provided by QR Network confidential (clause 3.3(d)(ii)(L) (QR Network, sub. no. 70:25).

External Flow of Confidential Information

QR Network has sought to amend the existing clause on the flow of confidential information to its external consultants and advisors. QR Network said that the proposed amendments provide a better balance between the obligations of QR Network and a third party in dealing with confidential information as the information can now be released by an external consultant subject to the approval of a third party access seeker/holder (clause 3.3.1(c) (ii) (B)).

Stakeholders' Comments

Asciano reiterated its concerns on the importance of effective separation, stating that:

To deliver a competitive above rail market, it is vital that there is effective separation between the monopoly providers above and below rail businesses (Asciano, sub. no. 78: 6).

The issues raised by Asciano were similar to its earlier submission and emphasised the need for an independent Board of Directors for QR Network and relevant amendments to the constitution of QR Network so that the Directors of QR Network are required to make decisions that are in the interests of QR Network rather than the QR Group.

QRC expressed concerns at the treatment of confidential information and the apparent failure of QR Network's compliance systems. QRC is aware of two breaches by QR Network relating to the inappropriate release of an access seeker's/holders confidential information. However, QRC is unaware of the outcomes of any investigations or the extent of the breach.

QRC echoed Asciano's ring-fencing concerns, recommending that:

- (a) there should be an independent QR Network Board with a limitation that no other related QR businesses would participate in any decisions of QR Network. QRC also welcomed the Government's initiative for legislative amendments that stipulated that majority of Directors on QR Network Board should be independent directors;
- (b) the constitution of QR Network must be amended such that directors of QR Network are explicitly required to make decisions in the interests of QR Network not the QR Group;
- (c) QR Network is obligated to have an investment committee independent from the QR Group with a clear obligation to undertake timely investment in below-rail infrastructure;
- (d) QR Network develops and submits to the QCA a ring-fencing and decision-making response manual outlining the timeframes and specific actions in an event of a breach of ring-fencing arrangements;
- (e) all staff involved in access related functions, or likely to receive third party confidential information, must be required to sign an annual responsibility statement that outlines the obligation and possible sanctions;
- (f) compulsory information sessions should be used to reinforce ring-fencing obligations among staff at all levels; and
- (g) there should be an explicit commitment from the QR Group to protect confidential information.

Emphasising the benefits of an effective and robust ring-fencing regime, the QRC said that a meaningful and transparent ring-fencing arrangement directly impacts the ability of third-party above rail operators to compete with QR Ltd's above rail business. The lack of an effective ring-fencing regime will result in the perception that competition is not fair in the above-rail market, leading to a skewed commercial operating environment (QRC, sub. no. 82:12).

Rio Tinto also supported Asciano's concerns around effective ring-fencing and non-discriminatory behaviour provisions (Rio Tinto, sub. no. 73: 2).

Anglo requested the Authority to remove provisions that allowed QR Network to provide confidential information to infrastructure providers without the consent of the owner of the confidential information (Anglo, sub. no. 83:3).

Xstrata was concerned that the proposed 2010 DAU failed to address issues relating to promoting competition in the above rail market and effective ring-fencing arrangements. Xstrata believed that stronger legislative arrangements are necessary to ensure that future access undertakings cannot be watered down over time (Xstrata, sub. no. 77:2).

Authority's Analysis and Decision

Asciano has been particularly concerned about the ring fencing arrangements. However, as mentioned earlier, Asciano accepted that some of the issues it has raised were beyond the scope of an access undertaking and were really concerns with the wider regulatory (legislative) framework.

In response to this and other stakeholders' concerns, the Government has amended the TIA and Part 5 of the QCA Act with a view to strengthening the arrangements applying to vertically integrated businesses.

The legislative enhancements relate to preventing anti-competitive behaviour and to separation between the above-rail and below-rail business units of a vertically integrated entity. The amendments seek to promote effective separation between the below-rail network and the above-rail entity:

- (a) the majority of directors of the network company must consist of persons who are not employed by QR National or a company having a substantial holding in QR National or engaged by a QR National company to provide advisory or consultancy services. However, the Authority understands that this does not preclude the majority of QR Network Directors being Directors who are also on the Board of QR National with the remainder being employees of QR National (TIA s.438G);
- (b) the Directors will be obliged not to approve an access agreement with QR National unless they are satisfied the agreement is on arm's length (TIA s.438H); and
- (c) a requirement that an access undertaking from a vertically integrated access provider must include a requirement that access charges must only recover those costs that are reasonably attributable to the provision of the (monopoly) service (QCA Act s.137).

Accordingly, the Authority has proposed strengthening the 2010 DAU's proposed ring-fencing arrangements in a manner generally consistent with the rationale of the legislative amendments but it has accepted that it is the legislation that should determine the extent of structural separation between the boards of QR Network and its parent company.

However, the Authority notes that lack of full separation places additional onus on the Authority to ensure that QR Network does not restrict competition in the above-rail market to the advantage of QR National.

In this regard, the Authority believes that the undertaking should contain provisions which attempt to ensure that the below rail services will be managed independently of the operation of train services. Accordingly, the Authority proposes that QR Network must seek approval from the Authority before a related QR party can become responsible for the provision of services that are integral to the provision of below rail services. Therefore, the Authority requires QR Network to amend clause 3.1.2 (d) by reinstating a provision similar to clause 3.1(d) from the 2006 undertaking which had this effect.

The Authority has also proposed substantial amendments to Part 2 of the undertaking which provides for effective separation or arm's length treatment of the privatised QR Ltd's above and below rail activities.

QR Network has proposed greater flexibility to share access seekers'/holders' confidential information with third parties, including with its consultants, other railway managers or other infrastructure providers. QR Network has sought these additional rights as the operation of railways in Queensland will increasingly involve coordination between a range of parties (e.g. two railways managers, other infrastructure service providers etc) to better coordinate the operation of coal supply chains (e.g. system operating assumptions and master plans).

However, in seeking additional rights to share confidential information with third parties, the Authority considers that QR Network has not always provided for appropriate checks and balances.

Therefore, the Authority proposes that the 2010 DAU be amended so that, where QR Network intends to share an access seekers'/holders' confidential information with other infrastructure providers (other than with railway manager for limited purposes as discussed further below), it must first gain the access seeker's/holder's permission, as is the case under the existing provisions of the undertaking (clause 3.3(d)(i)). QR Network must then enter into a binding confidentiality deed that requires the recipient of the information to maintain its confidentiality. This confidentiality deed needs to be a tripartite agreement between the owner of the information, QR Network and the recipient of the information to ensure that there is an effective enforcement arrangement in place at all times. Schedule B1 (confidentiality deed between QR Network and an access seeker) clause 2.1 (b)(xii) and 3.3(d) will need to be amended to give effect to this decision.

While the Authority agrees that sharing of an access seeker's/holder's confidential information with other infrastructure providers should be allowed for the purposes of improving the supply chain efficiency, this should not occur without an access seeker's/holder's prior approval. Therefore, the Authority requires QR Network to delete clause 3.4 (d)(ii)(L) from the 2010 DAU.

The Authority notes that it insisted on a similar arrangement as part of its June 2010 decision to further extend the operation of the 2008 undertaking. On that occasion, the relevant information sharing was between railway managers (i.e. QR Network Pty Ltd and Queensland Rail Ltd) and the Authority was a party to an agreement to ensure effective enforcement arrangements.

These arrangements should be retained in the 2010 DAU so that railway managers can continue to share confidential information with each other as long as it is limited for the purposes of providing and negotiating access over their respective infrastructure. The Authority notes that the 2010 DAU provides for the sharing of information between QR Network and Queensland Rail. The Authority considers that this provision needs to be generalised to cater for QR Network receiving confidential information from another railway manager.

However, to protect the rights of access seekers/holders, the Authority requires the 2010 DAU to be amended so that QR Network can share this information only when QR Network has already signed a tripartite confidentiality deed between QR Network, the Authority and the other railway manager. The role of the Authority in any such a deed is based on its being able to enforce and preserve the terms and conditions of the signed confidentiality deed.

Therefore, the Authority requires QR Network to insert a clause 3.3 (d)(ii)(L), similar to the one in the 2010 pricing DAAU, that allows a two-way sharing of an access seeker's/holder's confidential information between QR Network and another railway manager for the purposes of providing and negotiating access. To allow for this, the Authority also requires QR Network to amend Schedule B1 clause 2.1 (b) (the confidentiality deed between QR Network and an Access Seeker), to allow such sharing of an access seeker's confidential information with another railway manager. The Authority also requires QR Network to include as Schedule B2 a deed similar to the tripartite confidentiality deed (between QR Network, Queensland Rail and the Authority) that the Authority approved as part of its June 2010 decision.

The Authority anticipates that a similar requirement would be placed in Queensland Rail Limited's undertaking to ensure that the obligations on the two railway managers are identical.

Since the 2008 corporate restructure of QR Ltd, QR Network has been the owner and operator of CQCR rail infrastructure covered by the undertaking (rather than QR Ltd). As such, the access undertaking itself no longer binds QR Ltd nor any other QR entity with regard to any breach of the undertaking. Therefore, there is nothing preventing QR Ltd's above rail business from disclosing to third parties access seekers' confidential information.

To address this issue, the Authority maintains its view from the December 2009 draft decision that QR Network needs to procure from QR Ltd Board and other QR parties a legally binding deed agreeing to abide by, among other things, the obligations under Parts 2 and 3 of QR Network's approved undertaking. This obligation should also extend to QR National Ltd once it has been created.

The Authority will be seeking this undertaking prior to it approving the 2010 DAU. The only other option that the Authority considers would address this concern would be for the 2010 DAU to place a strict obligation on QR Network that no confidential information be shared with QR Ltd or any other QR party. However, this would not be workable.

Decision 3.1:

The Authority requires QR Network to amend the clause 2.5 as follows:

2.5 Ultimate Holding Company Support Deed ~~Undertaking of QR Board~~

2.5.1 QR Network to Procure Deed

QR Network will procure that its Ultimate Holding Company ~~the QR Board~~ provides an ~~undertaking to~~ deed in favour of the QCA which obliges the Ultimate Holding Company to ensure that all QR Parties will take such actions as are necessary to enable QR Network to comply with its obligations under this Undertaking where it is reliant on any QR Party in order to do so. In particular, that ~~undertaking deed~~ shall expressly require:

- (a) provision of access to land (in accordance with paragraph (ii) of the definition of "Access" in this Undertaking) which is owned by a QR Party or which a QR Party has, through a lease, licence or other arrangement with the owners of the land or pursuant to the TIA, the authority to authorise access to;
- (b) QR Parties to take the steps required to allow QR Network to obtain ownership of rail transport infrastructure (as defined under the TIA) in accordance with Clause 3.78.2;
- (c) QR Parties to take the steps required to allow QR Network to procure a sale or supply of electric energy in accordance with Clause 2.4(e);
- (d) QR Parties to comply with the arrangements prescribed in Part 3 (Ringfencing Arrangements) of this Undertaking; and
- (e) the Ultimate Holding Company to provide statements to the QCA as required by Clause 7.5.4(c)(ii).

2.5.2 Failure to Procure or Comply with Deed

- (a) **If QR Network's ultimate holding company has not provided a deed in favour of the QCA of the type required by Clause 2.5.1 that remains current, or QR Network's ultimate holding company fails to comply with the requirements of such a deed, then Clause 3.3.2 of this Undertaking will cease to permit disclosure of Confidential Information of Third Party Access Seekers and Third Party Access Holders other than to individuals within QR Network, until:**

- (i) **QR Network's ultimate holding company does provide a current deed of**
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the type required by Clause 2.5.1; or

- (ii) **If QR Network's ultimate holding company rectifies its failure to comply with the deed to the satisfaction of the QCA,**

as applicable.

Decision 3.2:

The Authority also requires QR Network to delete the definition of QR Board in part 12 of its 2010 DAU.

Decision 3.3:

The Authority requires QR Network to include as Schedule B2 in the access undertaking a confidentiality deed as prescribed in Appendix 3 between QR Network, another Railway Manager and the QCA that can be used to share an access seeker's confidential information between railway managers for the purposes of providing and negotiating access.

The Authority requires QR Network to amend Clause 3.4(d)(ii) of the 2010 DAU to insert another subparagraph as follows:

- (L) **if the party disclosing the Confidential Information is QR Network, to another Railway Manager of rail transport infrastructure as defined in the TIA but only to the extent required for the purpose of QR Network negotiating or providing Access or that other Railway Manager negotiating or providing access to that Railway Manager's rail transport infrastructure (as defined in the TIA), as applicable, in relation to the Access Seeker or Access Holder provided that the other Railway Manager has undertaken to keep the Confidential Information disclosed to it by QR Network confidential pursuant to a confidentiality deed in the form set out in Schedule B2.**

The existing Schedule B (and all references to it in the undertaking) are renumbered as Schedule B1 and the Authority requires QR Network to insert Clause 2.1(b)(xiii) into Schedule B1 with the same wording (subject only to including 'of the Undertaking' after the reference to Schedule B2).

Decision 3.4:

The Authority also requires QR Network to amend clause 2.1(b) of Schedule B1 (confidentiality deed between QR Network and an Access Seeker) and 3.3(d) by inserting another subparagraph (xii) and (M) respectively as follows:

2.1 (b)(xii)/3.3(d)(M) to an infrastructure provider for infrastructure forming part of the supply chain in respect of which Access forms a part for the purpose of facilitating the coordination of the capacity allocation process of that infrastructure provider and of QR Network, provided that the infrastructure provider has undertaken in an agreement to which both QR Network and the Access Seeker are a party, to keep the information disclosed to it by QR Network confidential and only use that information for the purpose for which it was disclosed.

The Authority requires QR Network to delete the previous clause 3.3(d)(L) of the 2010 DAU and clause 2.1(b)(xii) of Schedule B1 (confidentiality deed between QR Network

and Access Seeker) of its 2010 DAU.

Decision 3.5:

The Authority requires QR Network to amend clauses 3.1 and 3.3 of the 2010 DAU as follows:

3.1 Organisational structure

The Authority requires QR Network to insert a new clause 3.1.1 in its 2010 DAU as follows:

3.1.1 QR Corporate Structure

(a) QR Network has a number of Related Parties, including:

- (i) Railway Operators (“Related Operators”) which are competitors to other Third Party Railway Operators which may be Access Seekers and/or Access Holders; and
- (ii) providers of support services and/or corporate functions to both QR Network and Related Operators.

This Part 3 is intended, amongst other matters, to ensure that the provision of Below Rail Services by QR Network is managed independently of the provision of the above-rail services provided by Related Operators.

The Authority requires QR Network to amend clause 3.1(d) of the 2010 DAU as follows:

If it is proposed that Related Operators become responsible for matters integral to the provision of Below Rail Services, other than in accordance with Clause 3.1(c), ~~then QR Network will submit a Draft Amending Undertaking to the QCA including~~, for example:

- (i) if this arises due to QR varying its corporate structure during the Term;
- (ii) if QR Network wishes to assign to a Related Operator any of QR Network’s existing Below Rail responsibilities; or
- (iii) if QR Network has arrangements with:
 - (A) QR Services for any construction, maintenance or associated services for the purpose of providing Below Rail Services; or
 - (B) a QR Party for any services (including safety and environmental services) for the purposes of processing Access Application or providing Below Rail Services,

and QR Network seeks to terminate those arrangements and execute an agreement with a Related Operator for the provision of such services,

then QR Network will submit a Draft Amending Undertaking to the QCA and the Related Operator(s) may only take over responsibilities for such matters upon approval by the QCA of the Draft Amending Undertaking.

3.1.2 Independence of Senior Management

- (a) **QR Network must:**
- (i) **ensure that QR Network is managed independently from Related Operators; and**
 - (ii) **procure that Related Operators do not participate in the appointment or supervision of the executive management of QR Network.**

Decision 3.6

The Authority requires QR Network to replace all references to ‘QR Operational Business Group’ to ‘Related Operator’ in both Schedule B1 and B2 of the 2010 DAU.

Decision 3.7

The Authority requires QR Network to amend a number of clauses for consistency with the definitions provided in the undertaking so that they correctly refer to ‘QR Network’s Ultimate Holding Company’ instead of referring to ‘QR’. For example, in Clauses 2.5.1, 2.5.2, 3.4(d)(I), 3.4.2(a)(ii), the definition of ‘Authority’ and ‘Costing Manual’ in Part 12 and Schedule B1 (2.1(b)(iv)).

3.2 Decision making audit

Background

The 2008 undertaking requires QR Network to make decisions affecting third party train operators in the same way that similar decisions are made in relation to QR Ltd’s own train operator. As such, QR Network is required to comply with certain principles when making decisions which may materially affect a third party access holder’s rights. The 2008 undertaking also requires an annual external audit of QR Network’s compliance with its decision making procedures.

QR Network removed the decision making audit provisions and its associated obligations from its 2009 DAU on grounds that:

- (a) the rights of access seekers are protected through their access agreements which take precedence over any confidentiality provisions;
- (b) access seekers can rely on dispute resolution procedures to protect their rights;
- (c) to date, no complaints have been made by a third party access seeker/holder; and
- (d) QR Network is now a separate legal entity and operates at arm’s length from QR Ltd.

However, the Authority’s December 2009 draft decision proposed that the 2009 DAU should retain the decision making obligations and associated annual audit provisions in their entirety. The Authority considered that the decision making requirements provided access seekers/holders with greater confidence regarding QR Network’s decision making procedures. QR Ltd’s corporate restructure by itself did not guarantee consistent or equal treatment between QR related parties and third party access seekers as QR Network continued to be related to QR Ltd through both 100% ownership and control.

In response to the Authority's December 2009 draft decision and the Government's December 2009 announcement of a proposed privatisation of QR Ltd, stakeholders raised a number of concerns relating to non-discrimination and lack of effective separation of QR Ltd's above and below rail coal businesses. The concerns relate to the ability of a vertically integrated monopoly track provider to discriminate against above rail competitors through margin squeeze, targeted network investment, discriminatory train control decisions, restricting access to associated facilities and delay and inflexibility in dealing with competitors' access applications (e.g., Asciano, sub. no. 49:2).

Asciano reiterated its view that QR Network's audit regime was limited and ineffective. The audit regime had neither the coverage nor the independence to ensure compliance with the undertaking. Asciano recommended that the undertaking be amended such that:

- (a) the audit is conducted annually;
- (b) the audit is conducted by a suitably qualified external auditor approved by the Authority and the auditor be changed every three years; and
- (c) the coverage of the audit is extended to cover, amongst other things, decisions relating to negotiation of access, capacity allocation, train control functions, network investment decisions, accuracy of KPIs, and access to associated facilities.

In particular, the focus of every audit should be informed through discussion with the train operators.

QR Network's 2010 DAU

In its 2010 DAU, QR Network accepted the Authority's December 2009 draft decision. Moreover, QR Network introduced some new amendments, namely:

- (a) criteria relating to the independence of the auditor;
- (b) the option for the Authority to replace the auditor if a single auditor has undertaken the previous five audits;
- (c) ability for the Authority to initiate an audit on decisions made in accordance with the undertaking where it has reasonable grounds to do so;
- (d) audits to be extended to QR Network's reporting obligations under Part 9 of the DAU.

Stakeholders' Comments

QRC highlighted the importance of public audits for ongoing monitoring and increased transparency for all participants. QRC stated that the compliance framework should include:

- (a) auditing QR Network's compliance with its ring-fencing obligations, with the audits conducted by an independent auditor appointed, managed and paid for by the Authority. The audits should apply to the entire QR Group and not just QR Network;
- (b) obliging QR Network to comply with the information requests of the auditor in the timeframes specified by the auditor;
- (c) auditing QR Network's investment committee decisions to ensure that investment decisions do not favour QR's related entities; and

- (d) obligating QR Network to make publicly available audit results with an agreed timetable for the implementation of any recommendations from the auditor (QRC, sub. no. 75:14).

Asciano stated that an effective enforcement regime should include strong audit provisions and information transparency. Asciano maintained that QR Network's 2010 DAU is an improvement over its previous undertakings.

Asciano agreed that the Authority should be able to require an audit of QR Network's access undertaking where there has been a complaint about QR Network's behaviour, or a breach has been reported by QR Network or where the Authority reasonably believes an audit is necessary.

Further, QR Network should be required to implement the recommendations of the auditor to ensure that it remains compliant with its approved access undertaking (Asciano, sub. no. 78:9).

Authority's Analysis and Decision

In response to stakeholders' concerns, the Authority is proposing to strengthen the audit provisions in QR Network's 2010 DAU. It is also proposing to strengthen the ring fencing obligations as well as the Authority's administration of Part 5 of the QCA Act.

The Authority notes Asciano's comments and accepts that robust audit provisions are required to deal with a privatised vertically integrated business. QR Network's 2010 DAU only partially addresses stakeholders' concerns.

Therefore, to strengthen the audit process, the Authority proposes that the audits be conducted by an external auditor approved by the Authority annually.

The Authority proposes to extend the coverage of the audits. Under current arrangements, audits are carried out annually which review:

- (a) the financial statement (audited by the Queensland Audit Office);
- (b) the accuracy of KPIs and the information regarding whether QR Network has met its timeframes in relation to management of access applications (through the annual performance report); and
- (c) decision making where QR Network's decisions are likely to adversely affect a third party.

In order to increase transparency and accountability over a wider range of matters, the Authority considers the following items should be included in the annual audit process:

- (a) cost shifting;
- (b) margin squeezing (with special reference to non-reference train services);
- (c) access to associated facilities;
- (d) variations to network or system rules;
- (e) the impact of live run variations from train plan;
- (f) capacity allocation;
- (g) negotiation frameworks; and

- (h) investment decisions undertaken in order to enhance existing capacity requirements.

The focus of the audits could also be informed through informal discussions between the Authority and the above rail operators.

The Authority believes that it should be able to require an audit of QR Network's compliance with the provisions of the undertaking where:

- (a) a complaint has been received against QR Network's behaviour; or
- (b) the Authority has received a breach report in relation to the access undertaking; or
- (c) the Authority reasonably believes that an audit is otherwise necessary.

The Authority notes that it will not be worthwhile to have these matters included for auditing unless the audit results provide meaningful information that can be used to gain an understanding of QR Network's performance.

Therefore, the Authority proposes that QR Network should be required to implement the recommendations of the auditor unless it is able to convince the Authority otherwise. This will ensure that the audits will be beneficial to QR Network, in terms of providing hard evidence that QR Network treats parties fairly and consistently, and beneficial to stakeholders so that they can have confidence in QR Network and the regulatory regime.

To ensure the information audited covers all of the areas of interest (for the Authority, QR Network and stakeholders), the Authority is proposing a formal and active role in developing and approving the audit plans in consultation with QR Network and stakeholders (this was not the case under the existing provisions where the Authority had no formal role in the development of the audit plans).

The Authority is also currently of the view that the auditor of QR Network's compliance with the provisions of the undertaking should be independent of QR Network's financial auditor. However, the Authority will consider this matter further when QR Network first proposes the auditor, and annually thereafter.

Decision 3.6:

The Authority requires QR Network to amend clause 10.3(a) and (b) to be worded as follows:

- (a) QR Network will annually appoint the auditor subject to the QCA's prior approval of the auditor. Where the QCA does not approve the appointment of a particular auditor, QR Network must nominate an alternative auditor or replacement auditor as soon as practicable.**
- (b) The auditor must:**
 - (i) be independent of QR Network and other QR Parties; and**
 - (ii) be appropriately qualified and experienced.**

The Authority also requires QR Network to insert a new clause 10.3(k) as follows:

- (k) QR Network must use reasonable endeavours to implement any recommendations made by the Auditor in the audit report or any other letters or reports provided under subparagraph 10.3(j) (except to the extent the non-**
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implementation is approved by the QCA) as soon as reasonably practicable after the documents are provided by the Auditor.

Decision 3.7:

The Authority requires QR Network to amend clause 3.7(a) to be worded as follows:

- (a) An audit of:**
- (i) QR Network’s compliance with its obligations under Clauses 3.4, 3.5 and 3.6; and**
 - (ii) one or more of the following (to the extent that the Authority specifically requests that the Auditor considers such matters);**
 - (A) QR Network engaging in cost shifting between regulated and non-regulated activities;**
 - (B) QR Network engaging in margin squeezing (with special reference to non-reference train services);**
 - (C) QR Network’s refusal to provide access to associated facilities or discrimination between Related Operators and Third Party Railway Operators in respect of such access;**
 - (D) discrimination between Related Operators and Third Party Railway Operators in decisions regarding live run variations from train plans;**
 - (E) QR Network’s compliance with Capacity allocation in this Undertaking;**
 - (F) QR Network’s compliance with the negotiation framework in this Undertaking;**
 - (G) QR Network’s compliance with investment obligations in this Undertaking;**
 - (H) conduct of QR Network in respect of which the QCA has received a complaint from an Access Seeker, Access Holder or Customer, or a breach report in relation to this Undertaking or**
 - (I) other issues for which the QCA reasonably believes that an audit is necessary,**
- will be conducted annually and, subject to Clause 3.7 in accordance with Clause 10.3.**
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3.3 Costing manual

Background

QR Ltd’s 2008 undertaking requires QR Ltd to produce regulatory financial statements each year, using the methodology and format set out in a costing manual approved by the Authority. The purpose of the costing manual is to establish the methodology by which QR’s below-rail costs will be separated from its other costs and published in financial statements separately for the central Queensland coal region and the rest of the network.

In its 2009 DAU, QR Network did not propose to amend the requirements relating to the preparation of financial statement in accordance with an approved costing manual.

In its December 2009 draft decision, the Authority believed that it was reasonable for QR Network’s regulatory financial statements to be extended to report on its debt and equity

funding arrangements. The Authority also noted that it was apparent that the costing manual should be reviewed and updated given the significant changes to the structure of QR Ltd, in particular the way in which services are provided to QR Network, and to QR Network's accounting systems where costs can increasingly be identified rather than allocated.

QR Network's 2010 DAU

In its 2010 DAU, QR Network did not accept the Authority's December 2009 draft decision. In particular, QR Network did not believe that the Authority had demonstrated the purpose or reasoning for its decision to require a financial statement given the Authority's decision making criteria in s. 136(5)(a) and s. 138 (2)(b) of the QCA Act.

In addition, QR Network considered the requirement to prepare general purpose financial statements was excessive and unreasonable. It believes that there is no regulatory precedent to justify the imposition of a detailed regulatory account reporting.

Stakeholders' Comments

In its response to QR Network's 2010 DAU, Asciano refuted QR Network's claims in relation to the provision of more detailed financial statements, stating that:

This is factually incorrect as there is regulatory precedent for this form of highly detailed account reporting. In particular, regulated electricity infrastructure providers are required to prepare and maintain detailed regulatory and general purpose audited accounts. These obligations focus on maintaining audited general purpose financial statements, which are disaggregated and adjusted for regulatory factors in order to develop detailed regulatory accounts (Asciano, sub no. 78:11).

The QRC said that the undertaking should contain an explicit review process, including stakeholder consultation, for the development of QR Network's costing manual. The process should examine the derivation and use of cost allocators. The QRC said this was important as the cost allocators are inputs for cost components of the reference tariffs. QRC also recommended that the process of cost determination and allocation should be audited to verify both the methodology outlined in the costing manual and QR Network's compliance of the methodology in its cost allocation (QRC, sub. no. 55: 14).

Authority's Analysis and Decision

The Authority accepts that the costing manual is necessary to provide confidence in the integrity of the separation of costs between above-rail and below-rail activities and to be a reliable source for the evaluation of access charges. A review of the costing manual and a strong audit or a review procedure should be in place to maintain confidence in the cost allocation process. Indeed, the proposed amendments to s.137 of the QCA Act state that an undertaking must contain adequate requirements to ensure that a vertically integrated business can recover only those costs that are reasonably attributable to the provision of the service. The Authority considers that detailed financial statements and an updated costing manual are necessary to fulfil this statutory obligation.

The Authority notes QR Network is reluctant to produce financial statements because it believes that this is an excessive requirement which has not been fully justified by the Authority, is expensive and has no regulatory precedent.

First, on the issue of regulatory precedent, as Asciano has correctly pointed out, vertically integrated electricity businesses have in the past been required to produce detailed regulatory accounts. Indeed, the Authority required precisely that with respect to its regulation of the distribution business of the then vertically integrated Energex and Ergon Energy.

Second, the Authority believes that financial statements provide useful information to interested parties on QR Network's below-rail performance, including persons who may seek access to the service, current users of the network and also the Authority. The Authority does not consider this to be an excessive obligation.

QR Network argued that this obligation would result in a significant burden and would increase its operating costs by an estimated \$0.5 million per annum.

The Authority notes that, following the restructuring of QR Ltd prior to the privatisation process, QR Network and QR National will have separate Boards. The Authority believes that, in order for QR Network directors to be able to discharge their duties, it will be necessary for QR Network to have separate financial statements. However, there can be dispensation on audits for a wholly owned subsidiary on a guarantee from the parent company.

Moreover, QR Network has in the past provided regulatory statements that have been developed on the basis of costing principles included in the costing manual. The cost allocations and the associated regulatory statements have been audited to ensure they have been undertaken in accordance with the costing manual's principles.

The Authority considers that a requirement for detailed financial statements is necessary to provide the transparency regarding the provision of below-rail services in the CQCR that the vertically integrated privatised structure requires.

The Authority also intends to review the content of QR Network's costing manual following the commencement of the 2010 DAU to ensure that it appropriately reflects QR Network's new corporate structure. Since a process for such a review exists under the QCA Act, no amendment to the 2010 DAU will be necessary in order to allow for such a review.

Decision 3.8:

The Authority requires QR Network to amend clause 3.3.1(a) of the 2010 DAU so that it is worded as follows:

- (a) Unless otherwise approved by the QCA, QR Network will develop, on an annual basis:
 - (i) General purpose financial statements for QR Network in accordance with relevant legislation and applicable Australian accounting standards;
 - (ii) “Financial Statements” which include a supplementary set of financial statements separately identifying QR Network’s business in respect of the Rail Infrastructure regulated by this Undertaking from any other business conducted by QR Network (if any) and are otherwise developed in accordance with the methodology and format set out in the Costing Manual.

Decision 3.9:

The Authority considers it appropriate to review the Costing Manual after the completion of the Authority’s assessment of the 2010 DAU. As there is a process for doing this under the QCA Act, no amendments to the 2010 DAU is required.

Decision 3.10

The Authority requires QR Network to amend the definition of Costing Manual in Part 12 of the 2010 DAU in line with the drafting provided in Appendix 12.

3.4 Transfer of assets (review of rail infrastructure)*Background*

The previous declaration of rail infrastructure related to facilities managed by QR Ltd (including a subsidiary) that are necessary for operating a railway, including railway track and works built for the railway, and other infrastructure associated with a railway’s operations, including bridges, marshalling yards, overhead electric power supply systems and train operation control facilities. The declaration did not (and continues to not) extend to freight centres or depots, maintenance depots and workshops, office buildings or housing, rolling stock or other vehicles that operate on a railway.

The 2008 undertaking contained provisions which provided for the transfer of ownership of assets between two separate, but related, corporate entities (i.e. QR Ltd to QR Network). The undertaking provided for an access seeker to request the transfer of the assets, for this transfer to be determined on the basis of a set of criteria and for the Authority to have a binding arbitration role in the event of a dispute. As a result, when the Authority approved the 2008 undertaking, it was accompanied by an undertaking from the QR Ltd Chief Executive Officer that the ownership of any declared assets would be transferred, as may be required, from QR Ltd to QR Network.

QR Network’s 2009 DAU related to rail infrastructure that was owned solely by QR Network; it contained no similar transfer provisions. QR Network said that this approach was reasonable

because, as it is a legal entity that is separate from QR Ltd, the 2009 DAU should refer only to assets that it owns and not assets owned by a separate entity.

In its December 2009 draft decision, the Authority accepted that the majority of the declared facilities will be owned by QR Network. The exceptions were stations and platforms. Based on information provided by QR Network, it was apparent at the time of the release of the Authority's 2009 draft decision that:

- (a) private rail infrastructure was connected directly to infrastructure owned by QR Network, and not via infrastructure that is managed by a QR Ltd related party as had (sometimes) been the case in the past;
- (b) responsibility for managing marshalling yards had progressively been transferred to QR Network, although in some locations this function was performed under contract by QR Ltd; and
- (c) the Mayne Control Centre was transferred to QR Network as part of the organisational restructure in mid-2008.

However, there remained a possibility that some highly significant facilities could be created, or could continue to be owned, by a QR Network related party rather than QR Network itself. Therefore, the Authority retained the process for transfer of declared facilities from a QR Network related party to QR Network. Further, the Authority required that these arrangements should be made enforceable through a deed given by QR Network's ultimate holding company from time to time (see section 3.1, decision 3.1).

Stakeholders' Comments

QRC supported the Authority's proposed approach (QRC sub. no. 55:7).

Asciano argued that to ensure effective above-rail competition, the regulatory regime needs to ensure that QR Network's assets are held by QR Network's successor and are covered by the undertaking. Asciano also pointed to concerns relating to access to QR Network track within marshalling yards (e.g. Jilalan) that also cater for the provision of above-rail services (e.g. off-track inspections and provisioning).

Conversely, QR National was concerned that transfer provisions put QR National Coal and QR Freight at a competitive disadvantage compared to other operators. QR National was of the view that all operators should have access to their own provisioning and maintenance facilities in order to run their operations. QR National believes that there should be no provisions in QR Network's access undertaking that forcibly require QR National to transfer assets to QR Network. QR National questions whether the QCA has fully considered the interests of QR National as an operator of services (QR National, sub. no. 50:3).

QR Network's 2010 Proposal

QR Network accepted the Authority's December 2009 draft decision that required an undertaking from the QR Ltd Board to enable QR Network to comply with its obligations in relation to providing access to land (for the purpose of providing access to declared services), the supply of electric energy and ring fencing .

In its 2010 DAU, QR Network has reinstated 2008 undertaking provisions relating to the transfer of rail transport infrastructure owned by another QR related party with the following amendments:

- (a) it would only agree to transfer a rail infrastructure asset that satisfies the requirements for declaration under section 76(2) of the QCA Act;
- (b) it would accede to an access seeker's request for a transfer of assets only if it is in its opinion it was reasonably appropriate to do so;
- (c) the existing market shares of related operators should not be a factor in allocating ownership of rail transport infrastructure between QR Network and other QR parties;
- (d) all associated costs (including initial and ongoing incremental and other costs associated with transfer like taxes, duties and legal costs) would be included in the relevant system allowable revenue;
- (e) the rail transport infrastructure transferred to QR Network should also be included in the regulated asset base of QR Network.

QR Network also stated that the transactional and regulatory complexity associated with the transfer of rail infrastructure from a QR related party to QR Network may be more onerous than a negotiated or arbitrated arrangement. Also, the transfer may result in compensation or liabilities arising with third parties who had commercial arrangements with the transferred facility.

QR Network has also included a provision for a dispute-resolution process that allows an access seeker or holder to refer a dispute to the QCA. In determining any dispute, the QCA will have regard to the criteria in Division 5 of Part 5 of the QCA Act. To the extent that there is any discrepancy between division 5 of part 5 and the undertaking, the Act will prevail.

Stakeholders' Comments

Asciano said that, to facilitate competition in the above-rail operations, the Authority should assess a transfer request from a third party rather than QR Network. QR Network may not treat all access seekers/holders equally. The transfer provisions in clause 3.7.2 are complex and ineffective as they depend on QR Network's reasonable and subjective assessment. To facilitate increased competition, Asciano would like to see the following assets transferred from 'blue' to 'red' tracks (so that they are covered by the Undertaking):

- (a) Jilalan 4 road;
- (b) Jilalan road to access commissioning shed leased by Siemens;
- (c) two new Jilalan road provisioning roads passing signals 49A/B and 50A/B;
- (d) Moranbah freight siding – road to access the mainline freight centre; and
- (e) Callemondah road to access the commissioning shed/EDI shed (Asciano sub no. 78:12).

QR National reiterated its earlier concerns that there should be no provision in QR Network's access undertaking requiring QR National Coal to transfer assets to QR Network. It also said that, in the event that any of QR National's facilities fall within the category of rail transport facility, then its preferred approach would be for the Authority to require QR National to submit a separate undertaking for those facilities (QR National Coal sub 71:2).

Project Iron Boomerang and Syntech emphasised that it was important for future mine development that they can obtain unobstructed access to QR Network's rail-corridor land to locate their rail transport infrastructure (Project Iron Boomerang, sub. no. 72:2 and Syntech, sub. no. 80:1).

Authority's Analysis and Decision

The Authority notes that, in connection with QR Ltd's restructure and proposed IPO, the Government has altered the rail network declaration to ensure that there is clear separation between QR National Pty Ltd and Queensland Rail Ltd. Also, the CQCR will continue to be subject to third party access regulation under the QCA Act regardless of the owner or manager of the network. The previous declaration has been replaced with two separate declarations for the services provided by:

- (a) relevant rail infrastructure in the CQCR (plus associated branch lines which are owned or leased by the owner/lessee of the mainline or a related body corporate); and
- (b) rail infrastructure for which Queensland Rail Ltd is the railway manager.

The previous exclusion of the interstate track will continue to remain in place.

The key features of the revised declaration for the CQCR are that:

- (a) the declaration has changed from an ownership-based declaration to an asset-based declaration;
- (b) associated branch lines of the existing CQCR (including new interconnectors) will be included to the extent they are owned or leased by the owner/lessee of the mainline or a related body corporate, but the track to new coal basins would not be included; and
- (c) major new private infrastructure (e.g. the Surat Basin Railway or new infrastructure to the service the Gaililee Basin) will not immediately be covered by the declaration and the access seekers will have to rely on obtaining declaration under s 84 of the QCA Act to gain regulated access rights.

While QR Network's 2010 DAU proposes an arrangement whereby declared assets can be transferred to QR Network and be included in QR Network's asset base, the Authority is concerned that below-rail assets could reside outside QR Network and therefore, be beyond the scope of the undertaking (either because some existing below-rail assets were wrongly allocated or because new assets are intentionally allocated to a non-QR Network party in order to avoid being subject to the undertaking).

If this were the case, then negotiation of access to those facilities would become more complex, with significant adverse effects on the rights of third party access seekers if the successful completion of access negotiations is elongated or frustrated (even if they would still be subject to the declaration).

Therefore, the Authority maintains that the arrangements in the 2008 undertaking should continue and that a deed regarding compliance of the remainder of the QR Group should be given by QR Network's ultimate holding company. This approach remains a viable option as, under the restructuring proposal, QR Ltd would remain the corporate entity responsible for the assets and obligations of the central Queensland coal network and the above-rail freight businesses (the remainder of the network and the passenger business has been transferred to a new government-owned corporation).

While the Authority has yet to receive such an undertaking, the Authority accepts QR Network's 2010 DAU proposed arrangement whereby declared assets can be transferred to QR Network and be included in QR Network's regulated asset base with minor amendments.

The Authority also notes QR Freight's objections to the possible transfer assets to QR Network. The Authority maintains that the requirement to transfer assets from QR Freight is not

unreasonable as QR Ltd, as a parent company, will have a significant control over the relationship between its above- and below-rail entities. Therefore, the Authority believes that an undertaking from the QR Ltd Board will contain obligations regarding transfer of assets from QR Group to QR Network. The Authority believes that the alternative (i.e. a separate undertaking from QR Freight covering any declared assets it manages) may be particularly cumbersome as access seekers may be required to negotiate access agreements with two separate parties.

The proposed transfer provisions in QR Network's 2010 DAU also contain transfer provisions for assets in the Western System. Therefore, the Authority requires QR Network to make some minor amendments to its 2010 DAU.

These minor amendments relate to deleting clause 3.7.2 (b)(x) and part of 3.7.2(b)(viii) which facilitate the transfer of assets in the Western System and the inclusion of such assets in the asset base. After 30 June 2010, the Western System rail infrastructure is beyond the scope of QR Network's undertaking which will solely relate to the CQCR (the 2008 undertaking will continue to apply to the Western System and other rail transport infrastructure that is being retained in government ownership until the Authority has approved a replacement undertaking from Queensland Rail Ltd for the remainder of the rail network in Queensland).

The Authority accepts that QR Network's regulatory asset base should reflect the DORC valuation of the assets transferred. However, it does not accept that the access seeker should pay, or that QR Network should be compensated for, the transaction costs associated with the transfer of the assets. The intention is that QR Network should be a stand-alone provider of access to the declared facilities. The QR corporate group should not be compensated for remedying its failure to have arranged itself in a way that is compatible with this intention.

Throughout the Authority's assessment of the 2008, 2009 and 2010 DAUs, QR Network has maintained the view that it is a separate legal entity responsible for managing the rail network and that its access undertaking should be limited to matters within its control. However, it is also evident that QR Ltd has significant (if not total) control over the operations of its wholly owned subsidiary, QR Network. For example, it is evident that QR Network will not be making decisions in relation to expansions and the associated funding arrangements independently of QR Ltd. It does not seem appropriate that a QR Ltd entity should be compensated for any transactions costs (including taxes and duties) associated with the transfer of rail transport infrastructure when QR Ltd had a significant degree of discretion in how that infrastructure was allocated in the first instance. The Authority therefore proposes that clause 3.7.2(xi), that relates to QR Network being reimbursed for the costs associated with the transfer of assets deleted from the 2010 DAU.

The Authority disagrees with Asciano's proposal that a request for transfer of assets should be submitted to the Authority in the first instance. The Authority would like to preserve the arbitrate-negotiate model under the undertaking and provide an opportunity for QR Network and an access seeker to resolve matters between themselves before the Authority becomes involved.

Decision 3.10:

The Authority requires QR Network to delete Clause 3.7.2 (b)(x) and the words 'or that part of the Western System west of Rosewood' from 3.7.2(b)(viii) (using the numbering from the 2010 DAU) from the 2010 DAU as the Undertaking will only relate to the CQCR rail infrastructure and the deleted wording is specific to the Western System.

Consistent with that principle, all other references to the Western System should also be removed (Clause 6.4.2(b), 7.4(d), 7.5.4(c)(ii), 9.1(j)(ii), 11.2.2(b), 11.2.2(c), definition in Clause 12.1 of the Regulatory Asset Base, Supply Chain Group and definition in Clause 12.1 of Western System).

Decision 3.11:

The Authority requires QR Network to delete Clause 3.7.2 (b)(xi) from the 2010 DAU.

4. NEGOTIATION FRAMEWORK

Part 4 of QR Network's 2010 DAU outlines the proposed negotiation framework, including the process and conduct of negotiations and timeframes for actions. Schedules C and D of the 2010 undertaking outline the information access seekers and QR Network may be required to provide as part of the negotiation process.

In its December 2009 draft decision, the Authority proposed a number of minor amendments to improve the clarity and operational aspects of the negotiation framework. The majority of these changes have been included in the 2010 DAU. The 2010 DAU also includes some new matters, including the potential for QR Network to provide variations in the standard application forms to take account of different information requirements for different types of train services, operation of the capacity notification register and amendments to timelines for providing an Indicative Access Proposal (IAP).

A new proposal for a capacity-allocation framework for Significant Investments, and the definition of Significant Investment (which is an extension of 'Major Projects' provisions from the 2009 DAU), are now discussed in part 7 of QR Network's 2010 DAU.

Stakeholders raised concerns about the transparency of the queuing mechanism and the timeframes for assessing access applications. While transparency is discussed in section 4.5, the Authority does not separately address the timeframes issue in this chapter. In particular, the Authority believes that QR Network has clear obligations to meet its required timelines, which it has increasingly been doing, and its compliance with these obligations will be subject to the audit requirements to guard against any discrimination between access seekers. The Authority does not believe it is necessary to introduce a separate incentive mechanism to encourage QR Network to meet its timelines for assessing access applications.

There are also aspects of the December 2009 draft decision that the 2010 DAU does not reflect (i.e. clauses dealing with QR Network's failure to comply with its queuing mechanism and notifying customers on the capacity notification register in the event of a major project). The Authority has maintained its earlier position on these matters as it has not found QR Network's revised arguments for not incorporating these principles to be compelling.

4.1 Standard application forms variation

Background

The 2008 undertaking provided that, where an access application did not contain all of the required information but did provide a reasonable description of the proposed train service, then QR Network was required to prepare an IAP conditional upon assumptions relating to the missing information.

In the event that QR Network did not believe that an access application provided a reasonable description of the proposed train service, then QR Network was deemed not to have received that access application. QR Network's 2009 DAU proposed to amend this arrangement by providing for it to instead formally reject such an application.

QR Freight was particularly concerned that the proposed 2009 amendment placed an access seeker at QR Network's discretion, as QR Network had developed only one standard access application form which QR Freight did not believe was suitable for different types of train services (QR Freight, sub. no. 37:15).

The Authority agreed that it would be preferable for QR Network not to use one standard application form for different types of train services. However, the Authority believed that it

would be inappropriate for the undertaking to oblige QR Network to develop access application forms for all conceivable types of train services (e.g. test trains).

Therefore, the Authority's 2009 December draft decision required QR Network to include an obligation to have regard to the anticipated nature, volume and duration of the application when deciding whether to accept or reject an access application.

QR Network's 2010 DAU

QR Network has not only accepted the Authority's December 2009 draft decision but it has sought to extend this proposal in its 2010 DAU. Specifically, Clause 4.1(c)(i) places an obligation on QR Network to publish on its website the application forms for access (and the ability for it to publish forms which identify different informational requirements for different types of train services).

Stakeholders' Comments

QR National Coal stated that QR Network should also be obliged to provide varying access application processes for different types of train services, and not just different application forms. QR National Coal said the clause should be redrafted to allow flexibility in the process so that appropriate details can be provided through an access application (QR National, sub. no. 71: 3).

Authority's Analysis and Decision

The Authority supports QR Network's proposal regarding developing and publishing a range of access application forms that differ depending on the circumstances of the proposed train operations.

However, the Authority does not consider that it is necessary to go further and have the undertaking specify different application assessment processes. The existing processes in the undertaking are quite broad as they set out a request/respond framework between the applicant and QR Network. This arrangement should be flexible enough to facilitate a range of different types of train operations.

Moreover, the 2010 DAU includes the amendments specified in the Authority's December 2009 draft decision that gave further guidance on the factors that QR Network should take into account when considering an access application – i.e. that QR Network should have regard to the anticipated nature, volume and duration of the application when deciding whether to accept or reject an access application.

The Authority believes that the arrangements set out in the 2010 DAU should be sufficient to address QR National Coal's concerns.

Accordingly, the Authority accepts the proposed amendment that provides that QR Network may develop and publish a range of standard access application forms for different train services.

4.2 Capacity notification register and definition of available capacity

Background

QR Network's 2008 undertaking provided a mechanism to place an access seeker on the capacity resumption register when its access request could not be satisfied (clause 7.5.1).

In its 2009 DAU, QR Network replaced the capacity resumption register with a capacity notification register (CNR). QR Network proposed that, when capacity became available, all access seekers on the CNR would be notified and asked to submit an access application which would then be used for queuing purposes. Access seekers or access holders were required to re-confirm their place on the CNR every six months.

In its December 2009 draft decision, the Authority supported the establishment of the CNR and noted that the CNR would serve an important function for queuing purposes for capacity that can be provided only through future infrastructure enhancements.

Accordingly, the Authority required a definition of the CNR to be included in the undertaking and QR Network to notify access seekers of any call for expression of interest following the completion of a preliminary feasibility and commercial viability study relating to a major project.

The Authority also required QR Network to make some consequential amendments to the CNR arrangements to allow an access seeker to maintain its position in the queue when QR Network ceased negotiations because there was insufficient capacity to meet that access seeker's entire request. The Authority proposed that, rather than ceasing negotiations entirely, QR Network should continue to negotiate for the capacity that was available and place the access seeker on the CNR for the unfulfilled part of its capacity request.

The QRC supported the Authority's December 2009 draft decision to require QR Network to include those access seekers whose requests could not be met due to lack of available capacity on the CNR (QRC, sub. no. 82:17).

QR Network's 2010 DAU

QR Network's response to this part of the December 2009 draft decision was mixed. It rejected some aspects of the draft decision while it accepted, and even extended, other aspects.

In the 2010 DAU, QR Network accepted that it would notify customers of a major project (now termed a Significant Investment) but only if those customers are within a coal system where a major infrastructure enhancement is likely to progress – not all interested parties as proposed by the Authority.

In addition, QR Network added a further requirement for retaining a position on the CNR – i.e. that access seekers must confirm, in writing, that they have complementary port queuing rights for the same tonnage as the rail capacity sought. An access seeker is required to verify this information every six months in order to maintain its position on the CNR. QR Network said that this amendment was essential to prevent gaming by coal customers. QR Network's proposed amendment states that in order to remain on the CNR an access seeker must provide:

... evidence satisfactory to QR Network, in relation to the rights required to leave the QR Network rail network in order to unload at its destination (for instance, port capacity or capacity to unload at a power station) that are necessary to use the access rights that they are interested in seeking and are to be included in the capacity notification register (exit rights):

- *that the person has been allocated or is in the queue for exit rights; or*
- *if that person owns the facility in respect of which exit rights must be obtained, that the capacity of the facility is being expanded to create those exit rights or that there are exit rights that will become available (QR Network, sub. no. 68:36).*

Stakeholders' Comments

Asciano was concerned that the proposed drafting (clauses 4.7(a) and (b)) was based on the assumption that unloading can only be done at unloading facilities that are located outside the rail network. However, this is not always true as some unloading can be done on the network itself through unloading facilities that are owned by QR Network (e.g. Barney Point at Gladstone and Hay Point). Also, there may be domestic users like power stations and cement works where unloading is done from the red track. In such an instance, there is no requirement for an access seeker to provide QR Network with any evidence of its ability to leave QR Network's rail network. Therefore, Asciano believes that the drafting is ambiguous and should be corrected (Asciano sub no. 78:14).

While QR National and Asciano supported the need for access seekers to demonstrate an exit capacity from the network, they questioned the proposal that evidence should be provided every six months (QR National, sub. no. 71:4). Asciano recommended that clause 4.7(c)(ii) be deleted.

QRC recommended that, besides the requirement for an access seeker to demonstrate 'network exit capability', an access seeker should also demonstrate 'network entry capability'. QRC stated that such a requirement would not only demonstrate customer support but would also allow the customer to either lodge its own access application or seek the cooperation of the operator to provide information to the customer regarding the progress of the application (QRC, sub. no. 82:16).

Authority's Analysis and Decision

In its 2010 DAU, QR Network amended the Authority's decision that it should notify all access seekers of a call for expression of interest after completing a preliminary feasibility study relating to a major project (now termed a Significant Investment). QR Network said it did not see value in informing customers who might not be interested in using the capacity. For instance, the chances are that customers of the Moura system might not be interested in utilising capacity on the Newlands system.

The Authority accepts that a customer with resources only on the Moura system would not utilise the Newlands system. However, in recent years there has been an increase in cross-system traffic, such that train services that originate in one system have used infrastructure in another system (e.g. Goonyella to Blackwater traffic). Indeed, the growth in cross-system traffic has so increased that QR Network has introduced pricing arrangements for cross-system traffic. There is clear evidence that customers on one system are interested in using available capacity on other systems. This trend is likely to continue with the increasing interconnectedness of the various systems as a result of volume growth and limited port options.

Accordingly, the Authority does not support QR Network's proposed amendment to the notification provisions. The Authority therefore maintains its earlier position that requires QR Network to notify all access seekers on the CNR of any Significant Investment or infrastructure enhancements. This is important for providing equal opportunity for all access seekers to seek to obtain access to capacity enhancements.

With regard to the operation of the CNR, the Authority believes that the proposed amendments to the 2010 DAU (i.e. written confirmation of complementary port-queuing arrangements for the same tonnage as the rail capacity) are reasonable from a supply-chain perspective. These arrangements can help to maintain a reasonable balance between the access rights held for one part of the supply chain and the access rights held for the terminal or total system capacity. This will, in turn, promote efficient use of supply-chain capacity and is consistent with the Long Term Solution (LTS) framework.

On the basis of its own consideration and stakeholders comments, the Authority in principle accepts QR Network's proposed amendment to the operation of capacity notification register.

However, the Authority agrees with Asciano's comments that the drafting of clause 4.7 (a) and (c) is ambiguous as it does not recognise that unloading can occur from rail infrastructure owned by QR Network – although most unloading does occur from privately owned infrastructure (e.g. the dump station at DBCT). The Authority is proposing drafting changes to address this concern.

The Authority also sees merit in the QRC's suggestion that the undertaking should also include an obligation for access seekers to demonstrate 'network entry capability' or customer support. The proposed amendment would prevent an operator from contracting all available capacity on a section of a mainline in order to force mines/proposed mines to contract with that operator.

In conclusion, the Authority rejects QR Network's proposed amendment to the notification process for Significant Investments. However, the Authority accepts in principle QR Network's proposed amendment to the operation of CNR (i.e., written confirmation of complementary port-queuing arrangements for the same tonnage as the rail capacity). However, the Authority requires QR Network to amend clause 4.7 (a) and (c) with regards to the demonstration of exit and entry rights as follows:

Decision 4.1:

The Authority requires QR Network to amend clause 4.7(a) and (c) as follows:

4.7(a)provides evidence satisfactory to QR Network, that:

(iii) it either:

- (A) has been allocated or is in a queue for the rights required to ~~leave the QR Network rail network in order to~~ unload at its destination (for instance, port capacity, or capacity to unload at a power station, or the Access Rights sought involving a right to unload on the Rail Infrastructure or other QR Network owned infrastructure) that are necessary to use the Access Rights that they are interested in seeking and are to be included in the Capacity Notification Register ("Exit Rights");**
- (B) owns the facility in respect of which Exit Rights must be obtained;**
- (C) the capacity of the facility is being expanded to create those Exit Rights; or**
- (D) that the required Exit Rights will become available; and**

(iv) either has, or is in the process of negotiating:

- (A) the contractual rights required to provide the Train Services for the relevant Customer; or**
- (B) Title to the goods, products, or other matter to be transported by rail,**
- (C) as contemplated by the Access Rights that they are interested in seeking and are to be included in the Capacity Notification register ("Entry Rights"),**

4.7(c)(iii) in relation to Entry Rights, provide evidence satisfactory to QR Network that it either has, or is in the process of negotiating:

- (A) the contractual rights required to provide the Train Services for the**
-

relevant Customer; or

- (B) title to the goods, products, or other matters to be transported by rail. as contemplated by the Access Rights that they are interested in seeking and are to be included in the Capacity Notification register (“Entry Rights”) provided that such a notice can be given to more than one (1) month prior to the due date for that notice.**
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4.3 Indicative access proposal and time frames

To facilitate the timely conclusion of access negotiations, the 2008 undertaking included time frames in which QR Network must respond to an access application.

Background

In its 2009 DAU, QR Network proposed to extend the time frames for acknowledging an access application and for providing an IAP.

In its December 2009 draft decision, the Authority said it was reasonable to allow QR Network to extend the timeframes for acknowledging of an access application as QR Network was proposing to not just acknowledge the receipt of an access application but also to confirm whether or not there is sufficient information.

However, the Authority also wanted QR Network to seek an access seeker’s prior approval if the timelines had to be extended after day 20. Also, the timelines could only be extended to a maximum of 30 days. QR Network accepted the Authority’s December 2009 draft decision on this matter.

QR National was concerned that the proposed arrangements do not provide any incentives for QR Network to deal with access applications in a timely manner. QR National argued that there are no provisions in the 2009 DAU which detail what happens in circumstances where an access seeker objects to QR Network’s request for extension. QR National also recommended clearly documenting timeframes for lodging, extending and completing IAPs. (QR Freight, sub. no. 37:4).

Asciano also opposed QR Network’s extension of time limits and reiterated its earlier position (November 2008) where it stated that:

QR Network’s argument for increasing the time for approval of application is that it routinely fails to achieve the current requirements.... With respect to the proposal for written agreement by the access seeker to an extension of the period to produce the indicative access proposal, Asciano notes that this is somewhat an unhelpful provision giving the access seeker a Hobson’s choice. The alternatives are:

- *withdrawal of the application; or*
- *raising a dispute.*

Neither of these alternatives is palatable. Withdrawal of a third party application is always to QR Limited’s advantage as it represents a direct reduction of competition. (Asciano, sub. no. 33:16-17).

QR Network’s 2010 DAU

QR Network has proposed to provide greater flexibility to access seekers in providing information as part of access applications. The amendments relate to extending timeframes when substantial changes are made to access applications after the acknowledgment notice is issued but before the IAP is provided (clause 4.2(g) and 4.2 (h)).

If the changes alter the nature of access rights sought, then QR Network will issue a notice to the access seeker of QR Network's view and suspend the preparation of the IAP. Within five business days of the notice, the access seeker is required to confirm in writing that it wishes to continue with the original request. If the notice is not given, then QR Network will consider the original request and the revised application to form a new request for access. The access seeker will then be deemed to be in the queue five business days from the date the notice was issued by QR Network.

QR Network said that these amendments are similar to, and complement, its proposal in the 2009 DAU.

Stakeholders' Comments

Asciano reiterated its earlier concerns on QR Network extending timeframes to prepare an IAP given that it is only meant to be indicative. Also, where QR Network extends the period to issue an IAP, QR Network should be required to provide a statement of reasons explaining the extension based on set objective criteria. Asciano said it is important to ensure that all access seekers are being treated equally, if a related party of QR Network is a competing access seeker (Asciano, sub. no. 78:13).

QR National also reiterated its concerns that the proposed arrangements did not provide any incentive to QR Network to process access applications in a timely manner. It also sought improved arrangements when an access seeker rejected QR Network's request for extension of timeframes (QR National, sub. no. 71:4).

Authority's Analysis and Decision

The Authority believes that QR Network's proposed amendments seek to provide additional flexibility to access seekers. The proposed amendments allow an access seeker to substantially alter or provide additional information before an IAP has been issued. This allows an access seeker to maintain its position in the queue while providing additional details to QR Network (and to continue to hold that position provided the revisions do not substantially alter the nature of the access rights sought).

However, the Authority also sees merit in Asciano's suggestions and requires QR Network to amend new clause 4.3(a) to require QR Network to provide the access seeker with a written explanation of the reasons for an extension of the period for providing an IAP. To ensure that all access seekers are treated equally, QR Network must also insert a new clause 4.3(i) requiring it to notify the Authority of the reasons for extending the issue date of an IAP where a third party access seeker and a QR related party are concurrently seeking similar access rights.

Therefore, the Authority approves QR Network's proposal with amendments.

Decision 4.2:

The Authority requires QR Network to:

amend clause 4.3(a) by including at the end of that provision the following wording:

'.. provided that such notice must include the reasons for the extension.'

and

insert a new clause 4.3(i) which provides:

(i) If QR Network gives a Third party Access Seeker a notice under Clause 4.2(a),

but has not given a notice for the same extension period to a QR Party Access Seeker which is seeking substantially similar Access Rights, QR Network must notify the Authority of the reasons for the difference in treatment.

4.4 QR Network's failure to comply with the queuing mechanism

Where there is insufficient network capacity to meet all the requirements of existing access seekers, the 2008 undertaking required QR Network to create a queue of access seekers.

Background

The queuing mechanism was included in the 2006 undertaking to provide third-party access seekers with some protections to ensure that QR Network did not give preference to related parties when negotiating and executing access agreements in circumstances where capacity was constrained.

In its 2009 DAU, QR Network sought to amend clause 4.3(c)(iv) to include an additional provision which limited QR Network's liability in an event of its non-compliance with the queuing mechanism during the negotiation stage.

The Authority considered that an enforcement regime should remain available to allow potentially adversely affected parties to prevent execution of access agreements which do not comply with the queuing mechanism.

On this basis, the Authority required that the additional provisions seeking to limit the enforcement regime be deleted from the 2009 DAU.

Asciano, QRC and Rio Tinto supported the Authority's draft decision to reject QR Network's proposal that failure to comply with the queuing mechanism should not be a breach of the undertaking (Asciano, sub. no. 49:28, QRC, sub. no. 55: 7, Rio Tinto, sub no. 52: 1).

QR Network's 2010 DAU

In its 2010 DAU, QR Network did not accept the Authority's draft decision. QR Network stated that the proposed amendment already existed within the 2008 undertaking – separated into two clauses in parts 4 and 7. QR Network stated that the proposed amendment does not make any material difference to the already existing provisions but merely puts the two clauses together in 2009 DAU.

Stakeholders' Comments

QRC in its response to the 2010 DAU supported the Authority's December 2009 draft decision. It stated that it did not consider it appropriate for QR Network to excuse itself in advance of an anticipated failure to comply with the undertaking (QRC, sub. no. 82:13).

Asciano said it supported the Authority's decision and added that it has repeatedly argued that the queue needs to be transparent with the members in the queue clear on what position they are in (Asciano, sub. no. 78: 14).

Authority's Analysis and Decision

While the Authority accepts QR Network's arguments that the provision was in place since the 2006 undertaking, the Authority re-examined this arrangement as part of its December 2009 draft decision and concluded that the existing arrangements significantly weaken the effectiveness of the queuing mechanism by limiting the enforceability of the undertaking against QR Network.

After careful consideration and keeping in mind the stakeholders' comments, the Authority reaffirms its December 2009 draft decision and requires QR Network to amend clause 4.3(c)(iv) as below.

Decision 4.3:

The Authority requires QR Network to amend clause 4.3(c)(iv) as follows:

The indicative access proposal will set out:

- (iv) **advice in respect of the existence of other access seekers who have submitted an access application in respect of access which, if it were to be provided, would limit the ability of QR Network to provide access in accordance with the indicative access proposal and whether a queue has been formed ~~(provided that a failure to do so is neither a default under this undertaking nor does it invalidate or prejudice any access agreement executed by QR Network provided that QR network has acted in good faith;~~**
-

4.5 Transparency during negotiation

Background

In its 2009 DAU, QR Network proposed to amend Schedule C to allow access seekers to include in access applications details of the customer where access was applied for by a train operator on behalf of the customer (e.g. a mining company). This obligation did not include any information contained in the IAP that was commercially sensitive (QR Network, sub. no. 1:53).

In its December 2009 draft decision, the Authority rejected stakeholders' request for greater transparency in the queuing process. In particular, the Authority had rejected customers' (i.e. the coal mines) earlier requests that QR Network directly advise them of their positions in a queue for access rights. This decision was made on the basis that it would be unreasonable to require QR Network to do this as they do not have direct commercial relationships with the customers. Rather, the Authority adopted the position that QR Network should advise the access seekers (e.g. the train operators) and it was then a matter for the customers to get their train operators to pass this information on to them.

Stakeholders' Comments

In response to the Authority's draft decision and QR Network's 2010 DAU, stakeholders have requested the Authority to reconsider its decision or, preferably, to strengthen the provisions on this matter.

QRC reiterated its concerns about transparency around queuing and said that the draft decision did not provide for meaningful improvements in the transparency of queuing arrangements. QRC stated that:

A rule requiring QR Network to inform the owner of a loading facility of the existence of any access application relating to that loading facility would address this issue (as the owner of the loading facility could then lodge a 'competing application' and obtain information as an access seeker (QRC, sub no. 55:10).

In response to QR Network's 2010 DAU, stakeholders again argued for increased transparency in the queuing mechanism. Stakeholders argued that the existing provisions do not offer any protections against discrimination or facilitate new investments.

Asciano stated that it supported increased transparency of the queuing arrangements and that its customers have, for a number of years, also argued for increased transparency, in particular regarding their position in the queue (Asciano, sub. no. 78:14).

Anglo stated that the exiting arrangements are insufficient and increased transparency of the queuing mechanism is important for:

- (a) effective capacity planning and planning for new mine investments or expansions;
- (b) effective coal chain supply planning; and
- (c) ensuring non-discrimination between access seekers/holders and customers (i.e. mine).

Anglo stated that an access seeker should be informed of the number of parties in the queue, the volume of capacity sought and the likelihood and timing of the access becoming available. Also, access seekers should be notified when a new access seeker is placed in the queue or when the queue is changed (Anglo American, sub. no. 83:5).

The QRC stated that transparency in the queuing mechanism was important given QR Limited's vertically integrated structure and the possibility of discriminating in favour of its above-rail business. The QRC added that, inter alia, increased transparency is required to address:

- (a) the assessment of 'compression' risk⁴ faced by access seekers as a result of the proposed new provision in part 11; and
- (b) the effective exercise of the rights and provisions regarding queuing rules provided for by the undertaking.

In this regard QRC stated that:

There is simply no point in the undertaking having pages of provisions regarding queuing rules if neither access seekers nor the QCA are in a position to determine whether the rules are being followed (QRC, sub. no.. 82:15).

BMA added that:

The queue process must be transparent so that the access seeker and the customer can make a reasonable assessment of the likelihood of securing access, the likely timing and the key factors which influence that timing (BMA, sub. no. 74:4).

Authority's Analysis and Decision

Stakeholders have consistently argued that the queuing mechanism should be made more transparent. While it was initially argued that QR Network should advise customers about aspects of the queuing mechanism, this position has been revised in light of the Authority's draft decision.

Stakeholders have now argued that limited details of the queue should be made available to access seekers. These are:

⁴ Risk where a capacity expansion does not deliver all of the capacity initially forecast and where QR Network is proposing that the initial capacity allocation to access seekers be reduced (pro rata) in line with the assessed delivered capacity – see section 11.1 for a further discussion of this issue.

- (a) positions in the queue;
- (b) dates of access application;
- (c) status of the applications;
- (d) required capacity enhancements to satisfy each application;
- (e) indicative access dates; and
- (f) any changes in the order of the queue.

The Authority notes that the aim of the proposed amendment is to increase transparency in the queuing process without disclosing any confidential information of potential access seekers. Identification of an access seeker's relative position in a queue and supporting information regarding capacity enhancements (already known through the master planning process) would not constitute commercially sensitive information.

The Authority believes that providing this information is unlikely to be an onerous obligation on QR Network as it would simply be providing the information to the access seeker. Sharing of this information between the access seeker and the end customer could then be dealt with between those two parties. In the absence of this obligation, the customer could also lodge an application to ensure it has access to the information but this would have the adverse consequence of clogging the queue with multiple applications for the same capacity (albeit that such circumstances are specifically dealt with as 'Competing Applications' in Part 7 of the undertaking).

The request for additional information is consistent with other undertakings. A new provision has been included in the DBCT undertaking that requires DBCT Management to notify each access seeker in the queue after a queue is formed and after each change in the queue. The aim of this proposed new amendment is to increase transparency in the queuing process without disclosing any confidential information of a potential access seeker. In addition, the LTS also sets out that the queues for each element of the supply chain should be transparent. The Authority is of the view that greater transparency in the queuing arrangements would promote greater stakeholder confidence in the allocation of capacity to all seekers and end customers.

Given stakeholders' concerns, the Authority is proposing to strengthen the provisions regarding transparency in queuing mechanism. The Authority requires QR Network insert a new clause 4.1(g) as follows:

Decision 4.4:

The Authority requires QR Network to include a new Clause 4.1 (g) as follows:

- (g) If QR Network has established a queue in accordance with Clause 7.3.4, QR Network must notify each Access Seeker in the queue of:**
 - (i) the positions in the queue;**
 - (ii) the date of Access Applications;**
 - (iii) the status of the Access Applications under Part 4;**
 - (iv) to the extent known, required Infrastructure Enhancements to**
-

accommodate the Access Rights sought in the Access Application;

- (v) an indicative and non-binding estimate of the timeframe in which QR Network would be able to provide the Access Rights being sought to the Access Seeker; and**
 - (vi) any change in the order of the queue.**
-

4.6 QR should be obliged to negotiate access rights that can be met within three years

Background

In the 2009 DAU, QR Network proposed to change clause 4.5.1(b) after stakeholders had raised concerns that the interaction of part 4 and part 7 of the undertaking meant that the queue was in effect a queue for an access agreement rather than a queue for capacity. Prior to the amendment, the negotiation framework required QR Network to cease negotiations with any party who was not first in the queue. At that time, QR Network proposed to address the issue by:

- (a) providing for negotiation with all parties as long as the requested access rights could be provided within two years through identified infrastructure enhancements for mutually exclusive applications; and
- (b) executing an access agreement with an access seeker as long as it did not hamper the provision of access rights to other access seekers earlier in the queue.

QR Network's 2010 DAU retained the 2009 DAU amendments.

Stakeholders' Comments

QRC has questioned an existing provision in QR Network's undertaking which obliges QR Network to negotiate with an access seeker only if QR Network can provide requested access rights to the access seeker within two years (clause 4.5.1(b)(i)) (QRC, sub. no. 82:17).

QRC would like to see this limitation either deleted or at least extended as it believes that refusing to negotiate for the next available capacity adds to uncertainty and delays for mine development. QRC also recommended that:

In cases where there is available capacity, QR Network may reorder the queue in favour of an access seeker who is able to utilise the available capacity significantly earlier than an access seeker higher in the queue (QRC, sub. no. 82:17).

Authority's Analysis and Decision

The Authority accepts that there should be some limits on when an access seeker should be able to approach QR Network for rights to the network. In the past, the Authority has accepted that two years was a reasonable compromise between:

- (a) providing the access seeker and QR Network with sufficient time to finalise an access agreement, in particular in circumstances where a capacity expansion might be necessary; and
- (b) limiting the possibility of an access seeker locking up a significant proportion of available capacity (including capacity that can be delivered by infrastructure enhancements).

In this context, the Authority does not accept that removing the time limit entirely is reasonable, but that an extension can be justified given the greater complexity often now associated with expanding the network. The Authority, therefore, believes that an extension to three years is reasonable.

Accordingly, the Authority requires QR Network to amend clause 4.5.1(b)(i) so that QR Network will not be obliged to negotiate with an access seeker if QR Network cannot provide the requested capacity within three years (instead of two years).

Decision 4.5:

The Authority requires QR Network to amend Clause 4.5.1(b)(i) as follows:

If QR Network has established a queue in accordance with clause 7.3.4, QR Network may negotiate with any Access Seeker in that queue, but QR Network is only obliged to do so if:

At that time, QR Network can provide the requested Access Rights to the Access Seeker within three (3) ~~two (2)~~ years; and

.....

5. ACCESS AGREEMENTS

An access agreement sets out the agreed terms and conditions for access to the network. Part 5 of QR Network's 2010 DAU governs the development of access agreements and standard access agreements, with Schedule E summarising the principles to be included in an access agreement.

Standard access agreements are included in the undertaking to guide access negotiations. However, QR Network and an access seeker can develop an access agreement that differs from the standard access agreement.

In its 2010 DAU, QR Network accepted the Authority's December 2009 draft decision; in particular, to include the coal standard access agreements in the undertaking, provisions regarding liability from carriage of dangerous goods, the definition of consequential loss, provisions for developing new or renewed access agreements for train services and provisions for withdrawing standard access agreements.

The December 2009 draft decision also proposed a framework to facilitate the development of an alternate form of 'split contracts', that is, where separate contracts are developed for managing access rights and for managing the associated train operations. The 2010 DAU included most but not all of the Authority's proposals. The Authority requires consultation arrangements associated with developing the new contract style to be included in the 2010 DAU.

QR Network has also sought to amend aspects of the existing form of standard agreements, some of which were documented in its supporting submission (e.g. public liability insurance, consequential loss, security arrangements and provisions on conditional access rights) while others were not (e.g. measures to limit QR Network's liability to the operator and its customers).

The Authority proposes to accept the majority of QR Network's proposals with minor amendments. However, the Authority proposes to reject the changes to the security provisions in the operator standard access agreement as the Authority believes that the proposal is potentially discriminatory in that it would potentially disadvantage a third party train operator. The new provisions on conditional access rights are discussed in chapter 11 of this decision.

5.1 New amendments to Standard Access Agreements (SAAs)

The 2008 undertaking includes two standard access agreements for coal carrying train services, namely:

- (a) *operator standard access agreement* – where the operator of a train contracts directly with QR Network to acquire access rights;
- (b) *access holder agreement* – where the end customer (i.e. the coal mine) contracts directly with QR Network to acquire access rights, and then sub-contracts with a train operator to haul its coal.

QR Network's 2010 DAU Proposal

QR Network's 2010 DAU has sought to amend the operator standard access agreement to reflect a change in the policy position on matters relating to:

- (a) consequential loss;
- (b) public liability insurance coverage;

- (c) security arrangements;
- (d) reduction of access rights where there is insufficient capacity created;
- (e) liability and negligence;
- (f) relationship with the operator and its customers; and
- (g) other minor issues in schedules.

These matters are discussed below in detail.

Consequential Loss

QR Network has proposed to amend the consequential loss provisions within the standard access (operator) agreement. The proposed amendments require an operator to acquire a waiver from its customer so that the customer can no longer claim for consequential losses against QR Network.

QR Network first raised this issue during its corporate restructure in 2008. QR Network in its 2010 DAU said that:

In clause 3 of the operator agreement QR Network provides an option for an operator to acquire a waiver of consequential loss from their customer so that the customer has no claim for consequential loss against QR Network (QR Network, sub. no. 70:20).

These proposed amendments to the operator standard access agreement provide for the exclusion to occur through two different avenues, being either:

- (a) Access Interface Deed (AID) option (clause 3.4) – requires the operator to procure, execute and deliver an AID contained in schedule 13 of the operator standard access agreement. This AID ensures that neither party is liable to the other for consequential loss. The signed AID should be returned to QR Network within a month of the signing of the access agreement, failing which the access agreement will terminate; or
- (b) Section 55 option (clause 3.5) – requires that the rail haulage agreement includes a provision that states that the railway manager will not be liable to the customer for any consequential loss (which seeks to meet the requirements under section 55 of the *Property Law Act 1974 (Qld)* regarding contracts for the benefit of third parties).

Under both avenues, QR Network is indemnified against consequential loss (as defined in the standard access agreement and undertaking) arising as a result of:

- (a) the performance, non-performance, or breach of the Access Agreement or any other obligation;
- (b) the standard of or any failure of or defect in the infrastructure;
- (c) negligence;
- (d) breach of warranty or representation; or
- (e) any other act, omission or circumstance whatsoever.

QR Network said that this change places the customer in the same position as it would be in had it signed an access holder agreement.

Stakeholders' Comments

Stakeholders provided mixed comments on QR Network's proposed amendment to the consequential loss provision in the operator standard agreement.

Asciano was concerned:

- (a) about the possibility of multiple indemnity provisions within a suite of haulage and access agreements on the basis that the proposed amendment could lead to gaps in the indemnities granted between the parties;
- (b) that amending the consequential loss provisions in the standard access agreements, rather than in the undertaking, may lead to inconsistent application of the provisions;
- (c) that QR Network might be interjecting itself in a commercial agreement between an operator and its customer;
- (d) that the proposed amendments were unnecessary as QR Network agrees to an access agreement only after a haulage agreement is in place. Therefore, QR Network always has the option of refusing to enter into an access agreement which does not have the required consequential loss indemnity (Asciano, sub. no. 78:28).

While supporting the proposed amendment, Xstrata said that there needed to be a better balance in the relative rights of QR Network and the customer. Xstrata argued that:

... if QCA is minded to accept the proposal as put by QR Network, it must be combined with QR Network also (through AID or otherwise), providing the customer with a contractual right to recover damages from QR Network for at least the customer's direct losses caused by QR Network's breach of the access agreement. Under this approach, it is then reasonable that any such liability of QR Network to the customer, when combined with any claims the operator might make, would be subject to the standard access agreement specified caps on the liability of QR Network...(Xstrata, sub. no. 77:29).

Authority's Analysis and Decision

The Authority accepts that QR Network's proposed amendment seeks to bring the terms of the operator agreement in line with that of the existing standard access holder agreement; i.e. QR Network is not liable for consequential loss suffered by coal mines. The Authority accepts that it is reasonable that there is consistency between the terms and conditions of an operator standard access agreement and an access holder standard access agreement.

This matter was first identified by QR Network during its 2008 DAU. Both the access holder standard access agreement and the operator standard access agreement seek to limit QR Ltd's liability for negligence and default to direct costs and exclude liability for consequential losses. The access holder agreement specifically limits QR Network's liability from any claims for consequential loss from either the end customer or the train operator. However, the operator agreement specifically limits QR Network's liability from any claims for consequential loss from the train operator but does not include clauses that refer to the end customer.

Up until the 2008 restructure, where QR National was the only train operator, QR Network had been protected from any claims for consequential loss from end customers through limitation of liability included in QR National's haulage agreement with the end customer as both QR Network and QR National were part of the same legal entity (QR Ltd). This benefit was lost following QR Ltd's 2008 corporate restructure as QR Network became a separate legal entity.

In its September 2008 decision on the 2008 DAU, the Authority agreed in principle with QR Network's proposed amendment. However, it considered that the terms of the operator standard

agreement should not be changed half way through the undertaking. The Authority was concerned that third parties might be exposed if they had largely concluded negotiations on haulage agreements and, in doing so, had relied on the terms in the approved 2006 undertaking, including the approved standard access agreements.

The Authority does not consider that Asciano's concerns regarding multiple indemnities and gaps in indemnities granted between different parties are justified. The proposed operator standard access agreement indemnity provisions do not apply to existing access agreements. As any new access agreement would include these amended provisions, it is unlikely that there will be gaps in indemnity between different parties as operators should have been aware about the possibility of this proposed change since 2008.

The Authority also does not accept that a similar provision should be included in the main part of the undertaking itself. While the Authority accepts that such a clause may be reasonable for coal traffics, it is not convinced that this arrangement should be generalised to rail freight traffics where such an indemnity arrangement may place rail at a competitive disadvantage relative to road transport.

However, the Authority considers that Xstrata raises the valid concern that QR Network's proposed amendments only serve to create a position that benefits QR Network (in relation to exclusion of consequential loss) but not the customer (in relation to the customer's ability to recover direct losses from QR Network where it would be able to do so if it was the access holder itself).

In particular, the Authority accepts Xstrata's argument that, if the customer was itself the access holder, it would also have contractual rights to claim against QR Network (albeit subject to certain caps and limitations) that it would not have under QR Network's proposed new operator standard access agreement.

The Authority notes that amendments proposed by QR Network are consistent with those of the 2008 restructure decision in respect of access holder agreement. Consequently, the Authority accepts the concept that the consequential loss arrangements should reflect those in the access holder agreements, subject to QR Network also altering its amendments to ensure that this is the case not only in terms of liability for consequential loss, but also in terms of a customer's ability to make claims against QR Network for loss or damage that is not consequential loss. In proposing this, the Authority seeks to ensure that there is symmetry in the treatment of liability for direct loss between the operator and the customer (decision 5.1). To put the amendments to the AID agreement into effect, the Authority also requires QR Network to make consequential amendments to clause 3 of the operator standard access agreement that relates to the management of QR Network's liability to its customers (decision 5.2).

The Authority also considers that QR Network's proposal is unnecessarily complicated – particularly to the extent it relies on the third party enforcements rights and the Property Law Act. The Authority considers that, to the extent QR Network wants a direct arrangement regulating liability between the train operator, the customer and QR Network, this should simply occur pursuant to an AID to which they are all a party. Therefore, the Authority requires QR Network to delete reference to the section 55 option as it complicates the matter for no material gain (decision 5.3).

Decision 5.1:

The Authority requires QR Network to amend the Access Interface Deed (which forms a schedule to the Standard Operator Access Agreement) in line with the detailed drafting provided in Appendix 5.

Decision 5.2:

The Authority also requires QR Network to amend Clause 3 of the Standard Operator Access Agreement that deals with the management of QR Network's liability to the customer. In particular the Authority requires QR Network to amend clauses 3.1, 3.2 and 3.4 as follows:

3.1 Definitions

For the purposes of this Clause 3, the following terms have the following meaning:

“Access Interface Deed” has the meaning given to the term in Clause 3.2(b)(i);

“Customer” means the person or entity to which the Operator provides rail haulage services for which purpose the Operator requires the Access Rights under this agreement;

3.2 Access Agreement conditional on Access Interface Deed

This Agreement is subject to and conditional on the Customer executing and delivering to QR Network a deed in the form contained in Schedule 13 or in such other form as is agreed by the Customer and QR Network (“Access Interface Deed”)

3.4 Access Interface Deed

In order to satisfy the condition in clause 3.2

- (a) the Operator must use its reasonable endeavours to procure the Customer to execute and deliver the Access Interface Deed to QR Network;
- (b) as soon as practical after receiving the Access Interface Deed duly executed by the Customer, QR Network will also execute the Access Interface Deed; and
 - (i) provide a copy of the duly executed Access Interface Deed to the Customer; and
 - (ii) notify the Operator in writing that the Access Interface Deed has been executed by both the Customer and QR Network; and
- (c) if the Customer has not executed and delivered to QR Network the Access Interface Deed prior to the date which is one month after the date of this Agreement, this Agreement shall terminate and cease to be of effect on that date.

Decision 5.3:

The Authority requires QR Network to delete the Clauses of the Standard Operator Access Agreement relating to its proposed Section 55 option.

Security Arrangements

In its 2010 DAU, QR Network has proposed to amend the security requirements which QR Network may seek for coal-carrying train services in the operator standard access agreements. This amendment seeks to limit QR Network's exposure to the changes in the take-or-pay regime that occurred during the term of the 2006 undertaking. In particular, the introduction of the revenue cap in 2007 resulted in take-or-pay liabilities going from being assessed on a quarterly basis to an annual basis. QR Network argued that this has resulted in them bearing a greater exposure to counterparty default risk.

QR Network stated that:

It may continue to seek three months security from all access seekers against take or pay liabilities (the current mechanism in the standard access agreement). Where a customer's accrued liability (i.e. the take or pay amounts which could become payable) exceeds 66 percent of the original security amount, QR Network will seek an additional three month security. This additional amount will be refunded at the end of the annual billing cycle when all outstanding take or pay amounts are paid or where take or pay liability falls below 25 percent of the original security amount. (QR Network, sub. no. 70: 22).

Stakeholders' Comments

Stakeholders strongly opposed QR Network's proposed amendment.

Asciano was particularly concerned that the amendment was discriminatory as QR Network was not required to place a similar security requirement on its related above-rail operator, thus explicitly advantaging its associated above-rail operator against all other third party operators.

Asciano also had concerns with the proposed refunding arrangements of the additional security deposit. Asciano believes that these arrangements put an operator at a disadvantage compared to QR Network's above-rail operator. These conditions effectively limit the volume of coal transported or encourage sub-optimal cash flow management.

Also, Asciano said these arrangements are unnecessary because, if an operator cannot meet its financial liability to QR Network for any outstanding access charges, the mine or the end customer has the option to contract another operator willing to pay the associated access charges. Further, if the security arrangements are to protect QR Network in the event a mining company defaulting, then the risk is with the train operator as it has a take-or-pay contract with QR Network and no customer and it is a risk that should be addressed as part of the haulage agreement – i.e. between the train operator and the end customer.

Asciano also noted that these arrangements do not exist in any other regulatory regimes (Asciano, sub. no. 78: 30).

QR National Coal is of the view that QR Network has proposed a blanket clause on access seekers to provide security. In this regard it said that:

Security is structured so that it is required at the discretion of QR Network after its own assessment of the creditworthiness of the access seeker. It would be more relevant and appropriate for a specific level of credit worthiness to be stated so that there is certainty as to whether security will/will not be required (QR National, sub no.70:10).

Xstrata said that the review of security requirements as currently proposed takes into consideration the anticipated take-or-pay charges even though these charges may not be payable. Xstrata also said that it is at QR Network's discretion to increase or decrease the amount of security and added that it would like to better understand the derivation of the 66%

threshold limit as QR Network has not provided any justification in its submission (Xstrata, sub. no. 77:35).

Authority's Analysis and Decision

The Authority accepts that QR Network faces counterparty risk and that it is reasonable for an access agreement to include security arrangements to manage counterparty risk. However, the Authority is not convinced the proposed amendment as currently drafted is reasonable as:

- (a) there is no argument or justification for the derivation of the 66% threshold;
- (b) the proposed clause seeks to cover QR Network's counterparty risk against an end customer by placing a security requirement on an operator;
- (c) QR Network may choose to not place this security requirement in its agreement with its related above-rail operator; and
- (d) the security is structured so that it is required at the discretion of QR Network and based on QR Network's assessment of an operator's creditworthiness rather than a specified level of creditworthiness.

The Authority accepts that the security arrangements can be included in an operator standard access agreement if QR Network's objective is to cover its exposure to default risk by an operator. The Authority also agrees that QR Network is entitled to its own reasonable assessment of a customer's creditworthiness.

The Authority believes that QR Network needs to make a compelling argument to justify any additional security arrangement especially given that these arrangements may not be requested of related parties. In addition, any requirement for additional security should be based on an objective test and independent evidence of a downgrading of an access holder's credit rating.

The Authority rejects, and requires QR Network to delete, its proposed amendment to the 2010 DAU regarding the security arrangements in the operator standard access agreement (decision 5.3).

Public Liability Insurance Coverage

QR Network has proposed to increase the amount of public liability insurance coverage to \$350 million, which is up from the \$250 million in the current agreements and which was first approved as part of the 2001 undertaking. QR Network said that the proposed \$350 million threshold was determined in consultation with its re-insurers and represents a CPI indexation of the initially approved (\$250 million) amount. QR Network added that the proposed new threshold also represents the required insurance levels given the interaction of passenger service and coal-carrying train service in the central Queensland coal region.

Stakeholders' Comments

Xstrata questioned the reasoning behind the increment to the public liability insurance amount (Xstrata, sub. no 77:37). Asciano and other stakeholders did not comment on this aspect of the standard access agreements.

Authority's Analysis and Decision

An increase from \$250 million to \$350 million over nine years is an average annual increase of 3.5%. While this is slightly higher than consumer price inflation, it is less than wage inflation. The Authority also accepts that this level of public liability insurance coverage is not

unreasonable given public liability insurance requirements elsewhere and given the interaction with passenger services.

Accordingly, the Authority proposes to accept QR Network's proposed increase to the public liability insurance amount.

Reduction of Access Rights under the Resumption Provisions

Capacity resumption provisions allow QR Network to resume some or all of an existing access holder's capacity under certain circumstances. It is typically used in circumstances where an access holder has consistently under-utilised its allocated capacity. The Authority, in its December 2009 draft decision accepted QR Network's proposal for tightening of resumption triggers, with minor amendment, as follows:

- (a) for cyclic traffic, the resumption trigger is 90% utilisation over the four consecutive quarter; or
- (b) for timetabled traffic, the trigger is seven or more not necessarily consecutive train paths out of 12.

Accordingly, in the 2010 DAU, QR Network amended the resumption provisions in the operator standard access agreement consistent with that of the Authority's December 2009 draft decision.

Stakeholders' Comments

Asciano argued that the arrangements in the standard access agreements for capacity resumption lacked detail as they no longer included timelines within which the access holder must respond to a QR Network request about why the access the rights were not utilised in the past and whether the capacity is likely to be utilised in the future (Asciano, sub. no. 78:30).

Authority's Analysis and Decision

The Authority's approach to resumption of capacity is addressed in section 7.5 of this decision. The Authority has accepted new arguments by stakeholders that the initial trigger should return to 85% and not the 90% contained in the 2010 DAU. The standard access agreements need to be amended to reflect that change.

The key difference between the proposed 2010 standard access agreements and previous agreements is that the proposed new agreements no longer include a set timeframe within which the access holder has to respond to a resumption notice.

The Authority agrees with Asciano's concerns that there should be a set time period during which an access holder has to respond to QR Network's resumption notice. The Authority believes that reinserting a 21-day response period included in previous undertakings would provide greater certainty to QR Network and the access holder about the length of time required to make a response and that access rights would not be resumed prior to the expiry of this 21-day period.

The Authority believes that this is a minor amendment and does not alter the operational aspects of the resumption provisions.

The Authority therefore requires QR Network to amend clause 3.2 (b) (i) in the standard access agreement as provided below.

Decision 5.4:

The Authority requires QR Network to delete Clauses 2.4 (h)-(i) of Schedule B in the Operator and Access Holder Standard Access Agreements which detail the increased security requirements proposed by QR Network.

Decision 5.5:

The Authority also requires QR Network to amend Clause 3.2(a) of the Operator and Access Holder Standard Access Agreement to alter the resumption threshold from 90% to 85% in line with the Authority's decision under section 7.7 as follows:

- (a) **the Operator for any reason other than the occurrence of a Force Majeure Event or the failure of QR Network to make the Access Rights available, does not operate, over any four (4) consecutive Quarters, at least ninetyeighty five (9085%) of Train Services allowed under its train service description for that period, then QR Network may within forty (40) Business Days, give the Operator written notice ("Resumption Notice") of:**

Decision 5.6:

The Authority requires QR Network to amend clause 3.2(b)(i) in the Operator and Access Holder Standard Access agreements as follows:

- (b) **If a Resumption Notice is given to the Operator and:**
- (i) **the Operator has not demonstrated, to QR Network's reasonable satisfaction, within 21 days of receiving the Resumption Notice, a sustained requirement for the Access Rights that were not utilised; and**

Liability for Infrastructure Standards and Negligence

In its 2010 DAU, consistent with the standard access agreement provisions in previous undertakings, QR Network has limited its liability to the operator and operator's customer with respect to any loss or damage arising in connection with the standard of the infrastructure or any failure of, or defect in, the infrastructure except that such loss or damage results directly from the failure of QR Network to perform its obligations with respect to maintenance of the nominated network (under clause 6.2(a)).

The maintenance obligations are limited to carrying out maintenance work so that the infrastructure is consistent with the rolling stock interface standards and that the operator can operate train services in accordance with their scheduled times.

Stakeholders' Comments

Asciano stated that the new clause (14.4) is too broad and limits QR Network's liability towards the operator and operator's customer to the extent that a loss results from the failure of QR Network in its obligations under clause 6.2 (a). Asciano added that the clause would limit QR Network's liability to a breach of the agreement only in case of negligence (Asciano, sub. no.78:30).

Authority's Analysis and Decision

The limitation of liability in the proposed clause limits QR Network's liability to loss directly resulting from a breach of the maintenance obligations as set out in clause 6.2(a) of the standard access agreement. Clause 6.2(a) is limited to carrying out maintenance work so that the infrastructure is consistent with rolling stock interface standards and the operator can operate train services in accordance with their scheduled times. The Authority believes that this limitation is quite narrow and means that QR Network will not be liable for negligence that is not a breach of the obligations in the SAA (and is not liable for breaches other than breaches of clause 6.2(a)). QR Network has not provided any supporting arguments as to why this amendment is necessary or desirable.

The arrangements in the undertaking and the access agreements already provide QR Network with a significant degree of protection from the adverse effects of its actions or inactions. Stakeholders have consistently argued that the Authority should strengthen, not weaken, QR Network's liability in these circumstances. In the absence of any good reason for this amendment, the Authority requires QR Network to amend clause 14.4 of the standard access agreements such that there should be no limitation for breach or negligence.

Decision 5.7:

The Authority requires QR Network to amend clause 14.4 of the Operator Standard Access Agreement as follows:

Notwithstanding any other provision of this Agreement, QR Network will not be liable to the Operator or the Operator's Customer and the Operator and the Operator's Customers will not have or make any Claim against QR Network in respect of any loss of or damage to real or personal property, including property of the Operator or the Operator's Customer, or personal injury to or death of any person or any other damage, expense, injury, cost or loss whatsoever arising out of or in connection with the standard of the Infrastructure or any failure of or defect in the Infrastructure except to the extent that such loss, damage, injury, cost or expense results directly from the failure of QR Network to perform its obligations under Clause 6.2(a) or QR Network's negligence in performing those obligations.

Relation with Operator's Customer

QR Network has included new drafting in the operator access agreement (clause 14.10) that indemnifies QR Network, its directors and staff against any liability or loss to the operator's customers and that the operator will indemnify QR Network against any such liability. Further, the operator is rendered liable for all conduct of its customer and any act or omission of the operator's customer will be deemed an act or omission by the operator under the agreement.

Stakeholders' Comments

Asciano objected to this amendment and argued that:

Such a clause may not create a risk or indemnity issue for a QR Network related operator as at a corporate level the indemnity issues would effectively cancel each other out, however this clause will create issues for operators who are not related to QR Network. Asciano's primary concern is that all operators be treated equally, particularly if a related party of QR Network is also an operator (Asciano, sub. no. 78:30).

Asciano in its submission said that the proposed amendment is too broad and transfers all risks and liability of the customer to the operator. Asciano is also not clear on the nature of the problem that QR Network is attempting to address through the proposed amendment.

Authority's Analysis and Decision

The Authority notes that the new provision covers consequential loss in a similar way to the consequential loss provisions stated elsewhere in the standard access agreement. However, clause 14.10 also covers other types of loss or damage that would not be considered to be consequential loss. QR Network has not provided any supporting arguments as to why this amendment is necessary or desirable.

As indicated in the preceding section, the arrangements in the undertaking and the access agreements already provide QR Network with a significant degree of protection from the adverse effects of its actions or inactions and stakeholders have consistently argued that the Authority should strengthen, not weaken, QR Network's liability in these circumstances. In the absence of any good reason for this amendment, the Authority requires QR Network to delete the proposed amendments to clause 14.10 of the standard access agreements.

Decision 5.8:

The Authority requires QR Network to delete Clause 14.10 of the Operator Standard Access Agreement.

5.2 Development of new or alternate form of access agreements

Background

Prior to the submission of the 2009 DAU, the coal industry indicated to QR Network a need for an alternate form of access agreements where an end user (e.g. a mine) can control capacity under the access agreement without being responsible for the operational aspects of running a train service (as would be the case if the end user contracted using the current access holder standard access agreement). This would involve two separate contracts with QR Network, one with the access holder for capacity issues and the other with the train operator for operational matters. The submitted 2009 DAU did not provide for the development of either of the proposed new agreements.

The Authority's December 2009 draft decision required QR Network to submit new forms of access agreements within nine months of the approval of the 2009 DAU. The Authority outlined a process for developing the proposed agreements in consultation with the coal master planning forum.

In response to the Authority's December 2009 draft decision, the ARTC noted general industry support for the new form of capacity contracts. ARTC stated that it had proposed a similar approach in its Hunter Valley access undertaking (HVAU). The operator holder agreement was linked with the access holder agreement but more than one operator holder agreement could be linked to the access holder agreement (ARTC, sub. no. 48:8).

The QRC said the standard access agreements should be concurrently assessed with the access undertaking to ensure that amendments to the undertaking are captured in the access agreements (QRC, sub. no. 55:9).

Asciano supported the Authority's draft decision requiring QR Network go through a consultation process with the industry (Asciano, sub. no. 49:27).

Rio Tinto encouraged the Authority to retain the obligation in its final decision to allow mining companies to be the access holders (Rio Tinto, sub. no. 52:1).

QR National supported an open and transparent process and endorsed the proposed mechanism contained in the Authority's December 2009 draft decision (QR National, sub. no. 50:3).

QR Network's 2010 DAU Proposal

QR Network said that its 2010 DAU incorporated the intent of the Authority's proposed drafting into the framework for developing standard access agreement for the 2010 DAU (QR Network, sub. no. 70:14). QR Network said that there was no need to create a new process and that its proposed approach would enhance the consultation and approval process.

Stakeholders' Comments

The QRC said that the nine-month timeframe provided for the development of the new form of standard access agreements is too long. The QRC said that it would result in the agreements being approved by mid-2011, i.e. more than three years from when these agreements were initially requested. In this regard, QRC suggested that:

- *the date for submission of the agreements should not float with the final approval date for UT3.*
- *it is reasonable to expect that QR could prepare and submit these documents for approval by October 2010. This will result in the final approval in December 2010 or, if the initial submission is rejected, by March 2011 (QRC, sub. no. 82:15).*

Xstrata supported the QRC's position saying that a three to six-month consultation period would be sufficient as the issue was first raised in 2008.

QR National in its submission endorsed the development of the proposed agreements and the consultation process through the mechanisms contained within the 2010 DAU (QR National, sub. no. 71:5).

Authority's Analysis and Decision

The Authority notes strong stakeholder support for an early finalisation of the new form of capacity contracts. The Authority understands that, to date, no formal consultation has taken place and that there is still no consensus between the end users and QR Network with regards to the actual form that these new agreements would take.

The Authority reiterates that the timely resolution of these matters will be particularly important for encouraging greater competition in the provision of train services. It is therefore in the interests of new entrant train operators and end customers.

The early finalisation of the new form of access agreements is justified, given that commercial negotiations are already underway between QR Network and end users for stage one of the proposed Wiggins Island Coal Export Terminal (WICET). Likewise, the Goonyella to Abott Point expansion (GAPE) access seekers have already entered into access agreements. These proposed infrastructure expansions require customers to endorse or agree to financing terms and conditions to underwrite those investments. The Authority believes that it is unreasonable for end customers to bear an increasingly significant burden to underwrite new investments in the absence of a contracting arrangement that lets users efficiently and effectively acquire rights to the capacity that they have underwritten.

Accordingly, the Authority accepts stakeholders' arguments for a faster resolution of the new form of capacity contracts, and proposes that the consultation period be reduced from nine to six months. That is, the Authority now requires QR Network to amend the 2010 DAU to include an obligation requiring QR Network to consult with all industry stakeholders and submit to the Authority, within six months of the approval of the undertaking, the following:

- (a) a draft standard access agreement which allows an end customer to hold capacity directly without the obligations for the above rail operational issues;
- (b) a draft access agreement which can be entered by a rail operator which it can use to utilise access or capacity rights held directly by the end customers; and
- (c) any consequential amendments to the approved access undertaking that are necessary to implement the new agreements

Decision 5.9:

The Authority requires QR Network to amend clause 5.2 (n) of the 2010 DAU by replacing the reference to 'nine (9) months after the Approval Date' with 'six (6) months after the Approval Date'.

5.3 Other Consequential Amendments

Consequential Amendments

The standard access agreements include a number of provisions and definitions which need to be amended to be consistent with the changes the Authority has proposed to the 2010 DAU, and to correct for drafting errors in the 2010 DAU. The Authority therefore requires that QR Network amend the standard access agreements to:

- (a) correct the cross-reference in 2(c) of the operator standard access agreement from '2.3(e)' to '2.4(e)';
- (b) amend the definition of Authority as follows:

“Authority” means the Crown, a minister of the Crown, a federal, state or local government department, a corporation or authority constituted for a public purpose, a holder of an office for a public purpose, a local authority, a court, a tribunal and any officer or agent of the foregoing acting as such that lawfully exercise jurisdiction over QR Network (but excluding ~~QR Limited ACN 124 649 967 any holding company of QR Network~~);
- (c) correct the definition of Interface Risk Management Plan as follows:

“Interface Risk Management Plan” means an interface risk management plan identifying the Interface Risks associated with the Operator’s proposed operations and outlining both the control mechanisms agreed between QR Network and an Operator to ensure those Interface Risks are managed to an acceptable level, and the parties responsible for implementing those controls and ensuring they remain effective and, once agreed or determined in accordance with Clause 11, that interface risk management plan ~~is~~ included in Part 2 of Schedule 9;
- (d) amend the definition of Reduction Factor and Relinquishment Fee to reflect the changes to clause 7.3.6 of the 2010 DAU (as per decision 7.6);

- (e) amend the definition of Train Control so the references to ‘Rail Infrastructure’ are changed to ‘Infrastructure’;
- (f) delete the consequential references to clauses 2.4(h)-(j) (such as in clause 2.6(b)), as per decision 5.4;
- (g) amend clause 3.3 to reflect the changes to clause 7.3.6 of the 2010 DAU (as per decision 7.7);
- (h) amend clause 3.6 to reflect the Authority’s amendments to clause 11.3 and 11.4 of the 2010 DAU (as per decisions 11.5 and 11.6);
- (i) delete all the changes to Schedule 6 other than necessary changes to Department names and website references (as per decision 8.1 regarding amendments to Schedule H of the 2010 DAU); and
- (j) amend the definition of System Rules in Schedule 10 as follows (in order to recognise that the Authority can make system rules):

“System Rules” means the rules made ~~by QR Network~~ and referred to as such, in accordance with QR Network’s Access Undertaking.

Decision 5.10:

The Authority requires that QR Network amend the standard access agreements to be consistent with changes the Authority has proposed to the 2010 DAU, and to correct drafting errors, by making the changes listed in (a) to (j) above.

6. PRICING PRINCIPLES

Part 6 of QR Network's 2010 DAU sets out the principles for developing access charges.

Access conditions, or measures to address QR Network's concerns about additional risks associated with investing in significant infrastructure, was the major contentious pricing issue with the 2010 DAU.

Stakeholders' main concern was that the 2010 DAU provided QR Network with the opportunity to insist on access conditions that gave it returns in excess of an approved revenue cap – which, they said, was a breach of the undertaking's pricing principles.

The Authority shares stakeholders' concerns in this regard. Chapter 1 of this decision sets out the Authority's decisions in relation to establishing a framework for future investment in central Queensland's coal rail network. That framework includes requirements that access conditions can be negotiated but within a limited negotiation time period, can be disputed by access seekers at any time, must ultimately be approved by the Authority even if they are agreed with access seekers and that they address the particular costs and risks faced by QR Network in a particular investment, and no more.

This chapter sets out the Authority's decisions on how that framework will be established including details on the negotiation process, how claims for access conditions must be justified and the criteria the Authority must address when assessing access conditions.

The Authority has also provided more guidance on how QR Network must negotiate returns of capital underwriting or user funding on mainline infrastructure.

Apart from access conditions, the 2010 DAU largely incorporated the decisions in the Authority's December 2009 draft decision. As stakeholders have largely accepted those amendments, they are not discussed further in this chapter – the only exception to this being the decision making framework for the Authority's approval for QR Network to depart from the pricing principles.

Schedule F of the 2010 DAU sets out the reference tariffs and rules for setting coal tariffs. The Authority made a draft decision on Schedule F of the 2010 DAU in June 2010. That decision should be read as forming part of this final decision on the 2010 DAU.

6.1 Introduction

Part 5 of the QCA Act emphasises the efficient provision of services with the effect of promoting competition in upstream and downstream markets. To assist in this, the criteria for approving an access undertaking requires the Authority to have regard to the interests of the various parties as well as a number of pricing principles, namely that prices for a declared service should:

- (a) generate sufficient revenue to cover the efficient costs of providing the service, including a return on investment commensurate with the commercial and regulatory risks;
- (b) allow for multi-part tariffs and price discrimination where it aids efficiency;
- (c) not allow a vertically integrated access provider to discriminate in favour of its downstream operations (unless it is justified by higher costs); and
- (d) provide incentives to reduce costs and improve productivity.

The 2009 DAU included pricing principles that largely were consistent with previous undertakings. However, QR Network had made a number of amendments to remove what it believed were redundant clauses and to provide greater clarity for developing and setting tariffs for QR Network's below-rail infrastructure.

As the Authority did not agree that all of the deleted or amended clauses were redundant or provided greater clarity, the Authority's December 2009 draft decision required QR Network to reinstate:

- (a) a restriction on establishing prices which prevent or hinder access by a non-QR Party. QR Network has complied with this decision; and
- (b) a reference to private infrastructure in clause 6.4.2(b) to clarify how it would be interpreted. QR Network has included changes in the 2010 DAU which have the same effect as the wording proposed by the Authority in its draft decision.

This decision does not discuss these aspects of the 2010 DAU further as they are consistent with the Authority's December 2009 decision and stakeholders have not commented on them in either their February 2010 or May 2010 submissions.

A further matter relates to QR Network's proposal to be able to depart from the general pricing principles to promote efficient investment in the supply chain. The 2010 DAU is consistent with the Authority's December 2009 decision, but stakeholders have again expressed concerns about this proposed new flexibility.

The main outstanding issue relates to access conditions where, in its 2010 DAU, QR Network has sought greater scope to be allowed to seek additional protections and inducements for new investments. These new proposals go beyond what QR Network sought in its 2009 undertaking and beyond what the Authority had proposed in its December 2009 draft decision.

June 2010 Draft Decision on Pricing

The Authority's June 2010 draft decision addressed QR Network's proposed changes to the tariff-setting rules in schedule F of the 2010 DAU, and included central Queensland coal tariffs for the four years from 2009-10 to 2012-13.

QR Network's June 2010 DAAU to the 2008 undertaking included an amended schedule F which was consistent with the Authority's proposals in the June 2010 draft decision. However, it only included the Authority's proposed tariffs for 2009-10 and 2010-11, as the amended undertaking terminates on 30 June 2011 (or, for the CQCR, on the approval of the 2010 undertaking). The only material change to the pricing amendments related to the electric infrastructure tariff (AT₅) on the Goonyella system. QR Network's proposed rate was higher than the one proposed by the Authority in its June 2010 draft decision by around 10%. The Authority considered this change to the tariffs was reasonable, as the Authority's AT₅ estimate had not taken into account the most recent change in Powerlink's electric connection charges. The Authority therefore on 28 June 2010 approved QR Network's June 2010 DAAU.

The Authority has considered submissions received on pricing since the June 2010 draft decision. Nothing in those submissions, or in the Authority's consideration of the other non-pricing issues considered in this final decision, has caused the Authority to change its position from the June 2010 draft decision.

The Authority's June 2010 draft decision on the 2010 DAU should, therefore, be read as part of this decision, in particular the CQCR reference tariffs for 2009-10 to 2012-13. The Authority's

proposed Reference Tariffs, and revenue caps, including the adjustment to the Goonyella AT5 tariff, are provided in Appendix 6.

6.2 Departures from Pricing Principles

QR Network's past access undertakings have included pricing principles that cover a range of matters including capping the amount of revenue QR Network can earn, prohibiting

cross-subsidisation of train services and restricting the circumstances where QR Network can price discriminate between train services.

In the 2009 DAU, QR Network proposed that, in certain circumstances, it be allowed to establish a new reference tariff, or vary an existing reference tariff, that departed from the pricing principles. Such an access charge would be permitted if the departure from the usual requirements was 'for the primary purpose of promoting efficient investment by either QR Network or another person in the relevant transport supply chain' (QR Network, sub no. 25: 36).

Stakeholders' submissions, and the QRC's submission in particular, highlighted concerns that QR Network had proposed no real guidelines or assessment criteria on how any such departure would be handled.

The Authority proposed in its December 2009 draft decision to approve the scope for introducing non-conforming prices. It noted that QR Network's proposal only related to a limited set of circumstances: that is, promoting efficient investment in the coal supply chain. Also, it was noted that QR Network had limited discretion in the matter as it required a departure to be first approved by the Authority. Moreover, the Authority indicated that it was unlikely to approve departures from pricing principles where the benefits or costs of the proposals were captured by an above-rail operator or where there was an adverse effect on competition.

As the proposals for departing from pricing principles in QR Network's 2010 DAU are the same as those included in the 2009 DAU, stakeholders reiterated their earlier concerns. In particular, the QRC stated that:

Removing fundamental protections provided by the undertaking's pricing principles and providing a process rather than a strict set of guidelines exposes the QCA and industry to unnecessary regulatory risk (as this process could limit the ability of the regulator in making important pricing decisions) (QRC, sub. no. 55: 11).

Asciano supported the Authority's position, although it noted that QR Network should not be allowed to over-recover its investment (Asciano, sub. no. 49: 26).

The Authority considers that stakeholders have largely reiterated their earlier concerns and have not presented new reasons why the Authority should change its position as set out in the December 2009 draft decision.

The Authority considers that the circumstances in which QR Network will be able to make any such application are likely to be very limited and that the proposals will have to be consistent with the pricing principles contained in the QCA Act and the anti-discrimination clauses contained in the undertaking and in the QCA Act. The Authority considers that these arrangements sufficiently proscribe the circumstances in which QR Network could seek, and the Authority could approve, a departure from the undertaking's pricing principles. The Authority therefore considers that additional guidelines or assessment criteria are not necessary.

6.3 Introduction to Access Conditions

Through the regulated WACC, QR Network is provided with a rate of return that is commensurate with the systematic risk associated with the covariability of its returns relative to the market. The associated return on equity should be sufficient to reward equity holders for the risk associated with investing in a coal rail network.

In addition, QR Network has sought to manage other cash flow risks either through insurance premiums for insurable risks or through accelerated depreciation or access conditions to manage uninsurable risks such as asset stranding risks; i.e it could be left with undepreciated infrastructure that has years of remaining life, but for which there is no paying customer.

To offset this asset stranding risk, the Authority approved provisions in past undertakings that allowed QR Network to impose 'access conditions' in access agreements. In general, the Authority has limited the use of access conditions to user-specific circumstances (e.g. mine spurs) on the basis that the low-cost nature of Bowen Basin coal and the broad portfolio of reserves provides a natural protection against asset stranding risks for the shared network.

The rules in the 2008 undertaking permit QR Network to set access conditions for spur lines, where the use of the asset depends on a single user but not for mainlines where the diversity of customers provides sufficient protection from asset stranding.

In its 2009 DAU QR Network sought to expand the use of access conditions into areas that were prohibited in the 2008 undertaking. QR Network proposed that it could impose access conditions for sections of mainline track, where the conditions applied to the funding of a 'major project'. This was an exception to the general rule which prevented QR Network from setting access conditions for mainline track infrastructure.

QR Network also proposed that it would be reasonable to amend the access conditions imposed on the first user of a spur line, when a subsequent party started using some or all of that line.

In its December 2009 draft decision, the Authority accepted that it was appropriate for QR Network to impose access conditions for new infrastructure associated with a major project involving the development of a new corridor. The Authority considered that such conditions would address the asset stranding concerns identified by QR Network.

For example, the Authority accepted that access conditions on an asset such as the GAPE project would protect QR Network from the risk that users would demand that the network be over-constructed to meet a brief peak in demand. This would be in addition to the effect of the take-or-pay provisions which ensured users faced the consequences of contracting for more capacity than they needed.

The Authority did not propose to accept that access conditions could be used for an expansion of an existing mainline. The Authority was particularly concerned that QR Network would aggregate a series of infrastructure expansions of existing mainline infrastructure into a single project, in order to meet the major projects criterion and be allowed to seek access conditions, even though the projects did not exhibit the asset stranding risks that were of most concern to QR Network.

The Authority also proposed a number of other amendments for the use of access conditions in other circumstances (e.g. a spur line to a mine) including to:

- (a) allow QR Network to deem that access conditions imposed on subsequent users were reasonable, with an amendment to clarify that the division of responsibility must be equitable;

- (b) specify that access conditions are ‘deemed’ rather than ‘presumed’ not to be reasonably required on mainline track sections; and
- (c) strengthen the clause that precluded QR Network from making a double recovery of revenue from access conditions and access charges (i.e. the term of any rebate must be no longer than the endorsed life of the related asset).

In the 2010 DAU, QR Network accepted some of the Authority’s proposals (e.g. to ‘deem’ that access conditions were not reasonably required on mainline track sections) and rejected others (e.g. linking the term of a rebate to the life of the related asset).

However, more significantly, QR Network has proposed a revised framework for negotiating access to infrastructure enhancements. As discussed in chapter 1 of this decision, QR Network has proposed an arrangement where for:

- (a) *network extensions* – the pre-existing arrangements of ‘deemed reasonable’ would remain in place;
- (b) *network expansions*:
 - (i) incremental (less than \$300 million) – QR Network has undertaken to fund all such expansions provided it is in its commercial interests and with access conditions being “deemed unreasonable”; and
 - (ii) significant investments (greater than \$300 million) – QR Network would negotiate access conditions with access seekers (or their customers) and, in the absence of any agreement, access seekers (or their customers) could choose to fund the expansion themselves.

QR Network’s submissions in support of these arrangements have been brief. QR Network has variously argued that it did:

... not support the principle that it should have an obligation to place its own capital at risk by being compelled to invest at the approved regulatory cost of capital (QR Network, sub. no. 70: 30).

and that it should be able to seek access conditions for mainline investments [and not just major investments in new corridors as proposed in the Authority’s December 2009 draft decision] as:

there may be circumstances where the level of asymmetric risk associated with shared infrastructure enhancements would require QR Network to seek an access condition to mitigate that financial risk (QR Network, sub. no. 56: 34).

Stakeholders raised a number of detailed concerns in relation to QR Network’s revised proposals in relation to access conditions. These concerns tended to focus on resolving problems with the existing arrangements, and introducing new measures to further curb what they viewed was the inappropriate use of access conditions.

Stakeholders were particularly concerned that QR Network could use its monopoly power to require access conditions outside the restrictions of the undertaking, and therefore achieve returns above those permitted by the Authority. These concerns were often raised in the context of the contracts for the GAPE project.

As a result, stakeholders argued that QR Network should be limited to imposing access conditions that are reasonable and that it should be required to follow a process for imposing access conditions, including oversight by the Authority.

The Authority's consideration of these issues is set out in the remainder of this chapter which discuss the various aspects of access conditions including:

- (a) establishing the circumstances in which QR Network may impose access conditions, and requiring that they be reasonable (section 6.4);
- (b) ensuring access conditions be subject to review by the Authority (section 6.5);
- (c) specifying how capital contributions, including rebates and other returns of capital, will be assessed, so that QR Network receives no net revenue, except where that revenue reflects the assumption of a genuine risk (section 6.6); and
- (d) clarifying how access conditions will be treated for subsequent parties (section 6.7).

The following discussion focuses on the detailed issues associated with access conditions and it should be read in context of the Authority's discussion of the proposed investment framework in chapter 1 of this decision.

6.4 Permitted Applications of Access Conditions

Background

QR Network proposed in the 2009 DAU to extend the use of access conditions to 'major projects', which were to be substantial new infrastructure investments which had multiple users, but where the large scale and expense increased the investment risk.

The Authority said in its December 2009 draft decision, that it would approve QR Network's proposal, subject to changing the definition of 'major project' to involve the development of new rail corridors and exclude expansion of existing mainlines. The Authority adopted this approach on the basis that it was evident from:

- (a) QR Network's submissions that it was most concerned about the asset stranding risks associated with expensive new corridors; and
- (b) stakeholders were most concerned that QR Network would aggregate a series of minor mainline projects in order to meet the \$300 million threshold of a major project.

QR Network's 2010 DAU

In the 2010 DAU, QR Network largely included the access condition rules in clause 6.5.2 as proposed in the Authority's December 2009 draft decision. Significantly, however, QR Network did not accept the Authority's proposed threshold test for 'major project' (now redefined as a 'significant investment'). That is, QR Network has again proposed that it be able to seek access conditions for significant investments, irrespective of whether they are new corridors or expansions of existing mainlines.

Stakeholders' Comments

Anglo argued the wording of the access conditions clauses in the 2010 DAU was deficient. It said that the access conditions clauses, combined with the rules on significant investments, had the effect of removing access seekers' and users' right to challenge the reasonableness of an access condition for a significant investment. Further, it submitted the definition of 'access condition' did not contain any limit on the financial risks which could be recovered, so 'Access Conditions in respect of Significant Investments may be far broader than protecting QR Network from the risk of asset stranding'.

Anglo said the list of circumstances where access conditions are deemed to be reasonable should not include significant investments (i.e. clause 6.5.2(b)(iii) should be deleted) and the phrase 'and subject to Clause 6.5.2(b)' should be deleted from clause 6.5.2(c). It also proposed deleting the phrase 'except where the Infrastructure Enhancement is part of a Significant Investment' from the list of circumstances where access conditions are deemed to be unreasonable in clause 6.5.2(c)(ii) (Anglo, sub. no. 83: 12-14).

In contrast, Xstrata proposed that access conditions not apply for single users, and instead proposed that they would only be imposed for significant investments and subsequent users.

Authority's Analysis and Decision

QR Network's 2010 DAU retains the basic framework for access conditions from the 2009 DAU whereby access conditions were permitted for single-mine spur lines but not for mainlines other than for significant investments.

The Authority rejects Anglo's view that they should only apply to single user infrastructure and not for significant investments. The Authority also rejects Xstrata's polar opposite view they should only apply to significant investments and not for single user infrastructure.

The role of access conditions is to enable QR Network to supplement the standard terms and conditions of access with additional requirements to address particular costs or risks associated with a particular investment. The Authority accepts, therefore, that access conditions will be relevant for single mine spurs and for significant investments, but their application will depend on the circumstances.

The Authority maintains its view that the existing circumstances where access conditions are permitted, for single-mine spur lines, are clear cases where an access condition to protect against asset stranding is appropriate. The existing regime for those access conditions is reasonably well understood, and serves to protect QR Network from asset stranding, without providing any revenue 'uplift'.

The Authority also maintains its in-principle support for the use of access conditions for significant infrastructure. The Authority does not agree with QR Network's definition of the split between incremental investments and significant infrastructure and, therefore, when access conditions are reasonable.

The Authority accepts that proposal that QR Network can seek access conditions not just on new corridors but also on mainline expansions. The Authority has done this on the basis that QR Network will need to be able to demonstrate that the access conditions are reasonably required to address the particular risks and costs of a particular investment. The Authority anticipates that it will be harder for QR Network to meet this test in regard to mainline expansions than it might for new corridors for the reasons set out above.

The Authority also believes that the scope of projects that QR Network will be obliged to fund should be expanded to include:

- (a) replacement capital expenditure;
- (b) expenditure to upgrade the network to meet capacity shortfalls due to changes in system operating assumptions or due to an incorrect forecast of capacity resulting from an infrastructure enhancement;
- (c) expenditure on significant investments needed to meet the requirements of users that are unable to fund an expansion, but that QR Network not be obliged to fund this investment

where it is beyond the limits of \$300 million in a regulatory period or more than 30% of the forecast cost of a network expansion.

The Authority also does not agree with the proposed drafting of how access conditions will apply to significant infrastructure. In particular, the Authority accepts Anglo's arguments that the current drafting is deficient in that it has the effect of deeming that any access condition QR Network may require is reasonable, if it applies to a significant investment.

The Authority accepts that the drafting needs to be tightened to ensure that in the event access conditions might be reasonably required for significant infrastructure, the resultant access conditions need to be reasonable to address the associated risks of a particular investment.

The Authority therefore requires that QR Network amend clauses 6.5.2(b)(iii) and 6.5.2(c)(ii) as set out in decision 6.1.

Decision 6.1:

The Authority requires that QR Network provide for access conditions for significant projects to be subject to negotiation with users, and approval by the Authority, by making the following amendments to clauses 6.5.2(b)(iii) and 6.5.2(c)(ii):

6.5.2 ...

(b) For the purposes of Clause 6.5.2(a), Access Conditions are deemed to be reasonably required:

(i) ...

(iii) where QR Network demonstrates it cannot provide the Access sought unless it invests in a Significant Investment, and the OCA approves the Access Conditions through the process set out in Clause 6.5.4.

...

(c) For the purposes of Clause 6.5.2(a) and subject to Clause 6.5.2(b), Access Conditions are deemed not to be reasonably required where QR Network is to construct Infrastructure Enhancements:

(i) ...

(ii) that are for the purpose of increasing Capacity for the operation of Reference Train Services and that will form part of the Central Queensland Coal Region Mainline except where the Infrastructure Enhancement is part of a Significant Investment and the QCA approves the Access Conditions through the process set out in Clause 6.5.4.

6.5 Approved Form of Access Conditions

The pricing principles in s.168A of the QCA Act specify that the price of access to a declared service should:

generate expected revenue for the service that is at least enough to meet the efficient costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved

The pricing limits approved by the Authority in the 2001 undertaking and all subsequent undertakings further specify that QR Network's access charges for a combination of train

services 'will not exceed the level that will recover the expected Stand Alone Cost of providing Access for that combination of Train Services' (clause 6.2.3).

The pricing principles go on to specify that the maximum allowable revenue will provide for QR Network to set access charges that recover capital expenditure, efficient costs, tax expense and depreciation, plus a return on assets agreed by QR Network and the Authority, with all future payments to be discounted at that agreed rate of return on assets (clause 6.2.4).

QR Network's access conditions for single-user spurs have largely been consistent with these principles as reference tariffs in the CQCR have provided for QR Network to recover its maximum allowable revenue. The single-user access conditions can vary, but the agreements have typically involved QR Network:

- (a) receiving an up-front payment or similar financial instrument equal to the value of the asset; and
- (b) refunding that amount to the user over the economic life of the asset, including annual interest at the regulated WACC.

If the asset ceases to be used before its economic life has expired, QR Network will retain the un-refunded portion of the up-front payment thereby protecting QR Network from asset stranding risk.

QR Network's 2010 DAU

QR Network's proposed definition of Access Conditions in part 12 of the 2010 DAU specifies that the conditions can include:

- (a) an up-front contribution;
- (b) a payment of an Access Facilitation Charge (defined as an ongoing extra charge which does not vary with usage);
- (c) a prepayment of all or part of an Access Facilitation Charge;
- (d) a varied or additional take-or-pay arrangement;
- (e) a bank guarantee; or
- (f) the forfeiting of any right to relinquish access rights.

QR Network has indicated that for significant infrastructure enhancements it was prepared to fund it would negotiate the exact terms of the access conditions with access seekers or their customers in line with its proposed new investment provisions in part 7 of the 2010 DAU.

QR Network said it would provide access seekers with information on the anticipated costs and project timetable, the access conditions QR Network was seeking, and the period over which it would negotiate with applicants on those access conditions and other matters. During the negotiations, applicants would have the option of accepting the proposed access conditions or funding the infrastructure themselves (QR Network, sub. no. 70: 34-36).

QR Network said the 'conditions negotiation period' should allow enough time for users and QR Network to reach an acceptable agreement, but leave enough time for users to arrange funding if the negotiations were not successful (QR Network, June 2010: 4).

In response to the Authority's July 2010 proposed investment framework, QR Network indicated it was concerned regulatory intervention could change the dynamics of the negotiations, with parties seeking to game the process, and relying on arbitration rather than engaging in constructive negotiation. It also said asset stranding was the 'most significant commercial risk faced by the developer of major network infrastructure' (QR Network, sub. no. 96: 5).

QR Network welcomed the Authority's proposal that it could seek compensation for asset stranding risk via a cash flow allowance (as part of an access condition negotiation). However, QR Network was concerned that it might be too difficult to substantiate any such allowance. QR Network suggested that the methodology to determine the 'allowance' should be agreed upfront to provide QR Network with some comfort that it would be compensated for stranding risk (QR Network, sub. no 96: 8).

Stakeholders' Comments

Stakeholders said access conditions should be subject to approval by the Authority, and only permitted where they reflected risks assumed by QR Network, or were necessary to secure finance for an investment.

Xstrata said QR Network's proposal was based on the premise that any agreement for access involving a significant investment would be subject to commercial negotiation, and that therefore the access condition rules in clause 6.5.2 of the undertaking did not restrict QR Network's ability to acquire a revenue uplift. Xstrata said QR Network has sought to use this approach to enhance its monopoly position, by requiring customers to agree to confidentiality, and to 'accept the commercial principle that a margin uplift is justified', before negotiations could begin.

Xstrata said these revenue, or WACC, uplifts and other access conditions breached the pricing principles in the in the 2010 DAU as they:

- (a) differentiated between access seekers for reasons other than cost or risk to QR Network (clause 6.1.1); and
- (b) set access charges which exceeded the stand-alone cost of providing a train service or combination of train services, including the rate of return approved or determined by the Authority (clauses 6.2.2, 6.2.3 and 6.2.4) (Xstrata, sub. no. 77: 6-8).

As a result, Xstrata said it did not believe QR Network's negotiation approach was consistent with the rules in either the 2008 undertaking or 2010 DAU. Accordingly, it considered that the Authority 'should take steps to ensure that the matter is put beyond doubt' in the new undertaking, by:

- (a) amending clause 6.5.2 to ensure that any WACC uplift would be governed by the pricing principles in part 6 of the undertaking; and
- (b) adding a new clause which provided for the Authority to make a binding ruling on financing terms, that would need to be consistent with the financing risks faced by QR Network. All parties could make a submission on the terms, and receive a copy of the binding ruling (Xstrata, sub. no. 77: 6-8).

The QRC wanted to avoid the situation that, it said, arose on the GAPE project, whereby QR Network demanded a return above the regulated rate of return and 'coal producers had no practical alternative' but to accept QR Network's demands.

The QRC added that the right to impose access conditions should not be entirely at QR Network's discretion, and the Authority should have a role in approving appropriate access conditions, including:

- (a) requiring QR Network to seek the Authority's approval as soon as possible, within a specified timeframe;
- (b) establishing a process, including consultation with stakeholders, for approving 'Access Conditions to the extent necessary to ensure the financeability of any Significant Investment';
- (c) imposing a reverse onus of proof on QR Network to demonstrate that it would be unreasonable to require QR Network to proceed with the investment without the access conditions; and
- (d) allowing access conditions to include mechanisms such as accelerated depreciation, longer-term agreements, security, front-ending of charges, short-term funding by users, longer-term funding and, 'as a last resort', a higher WACC for the project (QRC, sub. no. 81: 5-6 and 9-11).

Macarthur Coal said the undertaking should include a binding process for determining the rate of return and other access conditions that QR Network is entitled to receive from an expansion (Macarthur Coal, sub. no. 95: 3).

Authority's Analysis and Decision

When the Authority proposed, in its December 2009 draft decision, to approve access conditions for major projects, it was with a view that the access conditions would be similar to those commonly used in central Queensland, whereby QR Network would receive no net revenue from the access conditions.

In this context, it is noted that QR Network has asked that it be allowed to negotiate commercial agreements which compensate it for assuming 'commercial and regulatory risks' (QR Network, sub. no. 70: 32-33). The Authority does not believe such a position is unreasonable.

However, stakeholders (e.g. the QRC, Xstrata, Anglo and BMA) have re-emphasised their concerns that QR Network should not be able to use access conditions to earn above-WACC returns. These concerns were largely raised in the context of the contracts for the GAPE project that, according to customers, included access conditions which gave it returns above those approved by the Authority.

The Authority notes QR Network has not argued in its submissions to the Authority that it wants to use access conditions to achieve WACC uplift, other than as compensation for risks borne. Moreover, QR Network has not sought to amend the pricing principles in the 2010 DAU that prevent QR Network from recovering more than the stand-alone cost of providing access to a train service or combination of train services. These principles are fundamental to preventing QR Network from making monopoly returns, so any access conditions proposed or imposed by QR Network will need to comply with those pricing principles.

However, the Authority does not accept QR Network's argument that access conditions should be left simply to a set of un-guided negotiations with access seekers and customers. As there is an evident imbalance in the negotiating positions of QR Network and access seekers and customers, there can be no confidence that the negotiated access conditions would meet a requirement that they are reasonable to address the particular risks of a particular investment. Under these arrangements, negotiated access conditions could also reflect the more powerful

negotiating position held by QR Network. QR Network would, therefore, run the risk of breaching its pricing principles in relation to revenue limits and charging tariffs in excess of stand-alone costs.

In order to meet QR Network's stated objectives, but to address stakeholders' concerns, the Authority considers that access conditions:

- (a) need to be directly related to addressing additional costs or risks borne by QR Network in a particular investment;
- (b) need to be negotiated within the structures of the negotiation arrangements set out in the undertaking; and
- (c) for significant investments must ultimately be approved by the Authority and for other investments (e.g. spurs) can be arbitrated by the Authority.

These matters are addressed in more detail below.

Scope of access conditions

The Authority considers that there should be clear boundaries on what QR Network may seek to include in access conditions. These boundaries relate to the types of access conditions that QR Network may propose, and how it must calculate and justify them. Such boundaries will remove some of the barriers to raising disputes, and make the arbitration process faster, by making it clear when, how and why disputes can be raised.

The Authority considers that the maintenance and operating cost allowances and WACC settings it has approved from time to time, including those in the June 2010 extension DAAU, have allowed QR Network to recover efficient costs, and make a reasonable return on investment. They represent, for each coal rail system in central Queensland, a stand-alone cost of providing the services that run on that system, and therefore a ceiling on the access charges and revenue QR Network can recover for operating those services.

QR Network should not need to, or be able to, increase its return on assets beyond that approved by the Authority, unless this can be justified on the basis of additional cost or risk. As indicated above, to do otherwise would be a breach of the pricing principles in the QCA Act and in the undertaking itself.

The WACC approved by the Authority for QR Network has been developed using the CAPM to estimate the return on equity investment. Therefore, it reflects the covariance between returns earned for operating coal rail infrastructure in Queensland, and returns on the Australian equity market. As such, it can be expected to apply to any central Queensland coal rail infrastructure, including new lines that supplement the existing network, whether it be built by QR Network, a group of its customers, or a third party.

The only exceptions to the use of the approved WACC would be if a change in overall market conditions justified varying the time-variant elements of the WACC such as the risk-free rate and the debt margin. The Authority anticipates that these changes are likely to occur and it may therefore be reasonable for QR Network to seek adjustments to these WACC parameters.

The Authority also contemplates that there may be circumstances where an investment is so significant that funding it would affect QR Network's credit rating. In these circumstances it may be appropriate to contemplate amending the debt/equity ratio and the debt margin for factors other than market-based time-variant factors.

The Authority does not contemplate that there would be circumstances that would be so significant to justify altering other WACC parameters, largely cost of equity parameters, such as beta, gamma and the market risk premium.

If QR Network considered any of these exceptions applied, it could apply to the Authority to approve an uplift or reduction of the regulated WACC. Users would have the option of accepting that changed rate of return, or pursuing user funding instead.

In addition to WACC-related matters, the Authority recognises there may be specific, cash flow (i.e. non-covariant) risks for which the infrastructure owner should be compensated. These might include demand risk, asset stranding risk and construction risk.

The Authority therefore considers it is reasonable for QR Network to propose access conditions that offset such risks. QR Network may address these extra risks through special access conditions such as changing the depreciation period or profile, the take-or-pay arrangements or the term of the contracts. But if such arrangements do not sufficiently offset the risks, QR Network can propose changes to the cash flows to which the regulated WACC is applied.

For example, QR Network might consider there was a chance that some of the customers for a section of track would become insolvent during the 20-year term of an agreement, and it would be unable to find replacement customers. The tariffs for users of that track might then be calculated including a forecast cash flow that reflected the risk of not having a customer, which would be discounted at the regulated WACC when assessing the net present value in order to determine the revenue cap.

In such a case, QR Network would need to identify the specific risk for which it was seeking compensation, and explain how it had calculated the amount of compensation it was seeking. The Authority would anticipate that the amount be determined in a manner consistent with an actuarial report, including an assessment of the value or cost of possible outcomes, and the probability of those outcomes.

Negotiation and Approval Process

The Authority has in the past taken a light-handed approach to regulation of access conditions, as they have in general been applied in circumstances where they were reasonable, and in a form which did not breach the pricing limits in the undertaking.

Access seekers have had the right to raise disputes over access conditions, but have not done so. The Authority accepts that this lack of disputes does not mean access seekers have lacked concerns with some access conditions that have been proposed by QR Network. Stakeholders have indicated they have been reluctant to raise disputes because of a concern it would cause delays in securing rail capacity.

The Authority notes:

- (a) stakeholders' requests that it take a more active role in approving access conditions, particularly where they may involve QR Network seeking to recover revenue that exceeds the approved access charges; and
- (b) QR Network's concern that regulatory intervention will disrupt the negotiation process.

Given these contrasting positions, the Authority considers that regulatory oversight is necessary to prevent QR Network from using its monopoly powers, including the threat of delay, to coerce access seekers into agreeing to unreasonable access conditions.

The Authority requires that QR Network follow a process for proposing such conditions which balances the goal of enabling commercial negotiation against the need for oversight by the Authority. QR Network will need to make a proposal for any access conditions, including cash flow adjustments, through a structured negotiation process which minimises delays in building new infrastructure.

At the start of the access negotiation process, QR Network must provide access seekers, their customers and the Authority, with a detailed analysis of its proposed access conditions, setting out:

- (a) the additional risks it is seeking to offset;
- (b) the special access conditions it is seeking (including additional returns);
- (c) the probabilities and magnitude of the risks; and
- (d) all assumptions made in determining those amounts, and how they were applied.

QR Network and the users will then have 60 days, plus any extensions of time approved by the Authority, to negotiate an agreed package of special access conditions (including cash flow adjustments).

The purpose of the 60-day timetable is to limit QR Network's ability to use delay as a negotiating tactic. However, for that to be effective, it will not be appropriate for QR Network to have complete control the timing of the start of the negotiating period. In particular, the Authority is concerned that QR Network might begin preliminary discussions of access conditions before it has provided access seekers or their customers with the necessary information to assess the terms or risks.

Ideally, the 60-day timetable would begin when QR Network provides users and the Authority with its detailed analysis of the terms and risks. However, if an access seeker or its customer considers that QR Network has begun discussing access conditions before it has provided that analysis, the access holder or customer may notify the Authority that this has happened. The Authority may then, if it believes that QR Network has begun discussions, issue QR Network with a notice requiring it to suspend those negotiations, and provide the analysis within 10 business days.

No extensions of time will be granted if they will take the negotiation period beyond 120 days after the Authority considers it to have commenced, unless a majority of affected access seekers requests such an extension. Access seekers and their customers may, at any time, decide to refer the matter to the Authority for arbitration or to fund the expansion themselves. However, the Authority reserves the right to reject a dispute raised by one or more access holders or customers before the negotiating period has expired, if it considers the dispute is vexatious, or the referring party has not negotiated in good faith, and require them to continue negotiating with QR Network.

If the parties are unable to come to terms within the negotiation period, the Authority will arbitrate the matter. The Authority will consider whether the proposed access conditions are reasonable, based on the information provided to the Authority and access seekers by QR Network. If QR Network has failed to provide detailed information supporting the conditions, this will be grounds for the Authority to refuse to approve the access conditions.

The Authority wants to retain the right to approve access conditions even if the parties are able to agree the terms of access conditions. While the Authority has concerns about the balance of the bargaining position of QR Network and access seekers, it is particularly concerned about the

rights of parties they may not have been involved in the negotiations. As a result, the Authority will consider an otherwise agreed set of access conditions on the basis of:

- (a) the public interest;
- (b) the interests of parties who are not parties to the agreement;
- (c) whether QR Network provided the required information to users regarding risk and return; or
- (d) whether the access conditions would contravene a provision of the QCA Act or the undertaking.

The Authority notes that this review and approval process for agreed access conditions will not apply to access conditions for extensions of the network for single-user spurs. The access seeker or customer will retain the right to raise a dispute if it considers the access conditions for a spur are unreasonable. A mine developer also has the option in such cases to build its own spur, and the undertaking includes protections from discrimination against the customer if it chooses to do so (clause 6.4.2(b)).

Decision 6.2:

The Authority requires that QR Network establish a formal procedure for negotiating access conditions, by adding Clauses 6.5.4 and 6.5.5 to the 2010 DAU as set out in Appendix 1.

6.6 Mechanisms to Return Users' Capital Underwriting and Funding

Background

The 2008 undertaking specifies that if an access condition results in QR Network earning revenue above the approved access charge, it will either rebate the extra revenue to the party who agreed to pay the additional revenue, or exclude the relevant infrastructure enhancements and their related charges from the cost base when determining the ongoing access charge (clause 6.5.2(f)). Clause 6.5.2(d) of the 2009 DAU was substantially the same as clause 6.5.2(f) of the 2008 undertaking.

In its December 2009 draft decision, the Authority responded to stakeholders' concerns by reaffirming its position that it would be inappropriate for QR Network to use access conditions to gain revenue that was materially beyond what was permitted through the reference tariff.

The Authority was concerned that QR Network had required access conditions for some western system infrastructure, which had rebate terms that were longer than the likely approved lives of the assets. The Authority considered that, although the present value of the rebate and access charge payments might be the same, QR Network would secure a benefit by recovering the value of the asset faster than it rebated the amount it had received from the access holder. Moreover, if the customer that had made the capital contribution ceased to use the asset and no longer received a rebate on its reference tariff, QR Network might obtain a material benefit if the asset continued to be used by a subsequent access holder.

Therefore, the Authority required that QR Network amend clause 6.5.2(d)(i) of the 2009 DAU by appending the phrase: 'with the rebate being payable over no longer period of time than the

asset lives of the relevant Infrastructure Enhancements (as endorsed by the QCA, from time to time, for the purposes of calculating the Regulatory Asset Base)'.

QR Network's 2010 DAU

QR Network rejected the Authority's decision and left clause 6.5.2(d)(i) unchanged in the 2010 DAU. It argued the drafting in the 2009 DAU already addressed the Authority's concerns.

QR Network said the negotiated term of the western system rebates reflected the lack of approved reference tariffs and asset lives for the western system. It argued the rebate was a return of depreciation and 'the non-diversifiable component of the return' on the infrastructure enhancements included in the access charge, not a rebate of the value of the contributed asset, so it was not appropriate to relate the rebate to that contributed value (QR Network, sub. no. 56: 34).

QR Network added that a user funding a significant expansion would receive a rebate equal to the capital return component of the tariffs, less a risk adjustment which reflected the additional risk to QR Network's operation and maintenance costs arising from the significant expansion (QR Network, June 2010: 5).

Stakeholders' Comments

Stakeholders were concerned about how they could be certain QR Network would be able to return any up-front contribution or capital underwriting it received, including user funding. They said that security over this return to user funders was consistent with QR Network's requests for guarantees that it would receive the full contribution a user agreed to provide for construction of an asset.

Xstrata argued the 2010 DAU should be changed to specify that rebates should apply if an asset was funded or owned by an access holder, either alone or with other parties. It said that if the user had constructed an expansion, the rebate should also include a 'reasonable commercial margin reflective of the risk assumed by the Access Holder in building the asset' (Xstrata, sub. no. 88: 56).

Xstrata also said that, before the commencement of the project, a user should demonstrate its creditworthiness to ensure:

- (a) the availability of capital draw downs; or
- (b) security for capital draw down amounts will be provided.

Xstrata proposed that a user be able to terminate the funding arrangement if QR Network defaulted, including defined events of default relating to QR Network's solvency. QR Network would be required to repay funds advanced to it by the user, prior to its default (Xstrata, sub. no. 97: 5).

BMA agreed with the Authority's proposal that funding users should be given security over the cash flows generated under the access agreements which contract the capacity created by the expansion (see chapter 1). However, BMA asked the Authority to consider additional security arrangements to provide greater protection to funding users against QR Network's default and/or insolvency. For example, BMA said:

...QR Network should be required to grant security over its fixed assets in appropriate circumstances and to establish suitable security arrangements for the construction period of the expansion (such as the use of "controlled accounts" to disburse funding, "step-in" rights to complete construction, security over insurance proceeds and appropriate performance guarantees) (BMA, sub. no. 93: 3).

The QRC addressed the issue of security in the context of the Authority's arbitration guidelines. The QRC submitted that one of the Authority's specific responsibilities should be to publish an arbitration guideline to inform interested parties about the principles that are likely to guide the Authority when considering a binding arbitration with respect to:

- (a) the scope of the project and project timelines; and
- (b) a user funding agreement including: security requirements, and any variations from the Authority's approved standard user funding agreement (QRC, sub. no. 98: 7).

Authority's Analysis and Decision

The Authority accepts that access conditions, such as capital underwriting for rail infrastructure and a return of that underwriting through, for example, rebates, are a reasonable mechanism to address QR Network's concerns regarding asset stranding risks. However, the Authority maintains its concerns, expressed in its December 2009 draft decision, that these arrangements should not provide for QR Network to earn an uplift to its revenues.

This concern has been heightened given the prominence that user funding for network expansions has gained since the Authority released that draft decision. The Authority does not accept QR Network's argument that the drafting of the 2010 DAU is sufficient protection, in particular given past practices in relation to rebate arrangements on the western system.

The Authority therefore considers it prudent to retain the restriction on the term of rebates that it proposed in the December 2009 draft decision – that is, capital underwriting should be rebated over a period no greater than the approved life of the asset, or any lesser period over which QR Network may contract to recover the value of the asset.

Further, the Authority considers it is necessary to provide more specific measures in the undertaking governing the return of capital, now that user funding of network expansions is likely to become more common. In addition, arrangements for users funding expansions, and QR Network's return of that capital to the contributors, are also likely to become more complex. In particular, the complexity will increase where multiple users have funded an investment, where QR Network has obtained a revenue uplift for bearing additional costs or risks and where there are subsequent investments in, and users of, the network.

Given this greater complexity, the Authority is not confident that rebate arrangements – developed to address asset stranding risks for single-mine spur lines – will necessarily remain appropriate for significant investments with multiple users over time. The Authority would be particularly concerned if an access holder stopped using the infrastructure at the end of a long-term contract, but there was no mechanism for QR Network to return to that access holder its remaining contribution in cases where QR Network continued to earn access revenues from subsequent users of the network.

A simpler arrangement may be required to ensure the appropriate amount of capital is returned to the appropriate users. This may, for instance, require clearly separating the funding arrangement (i.e. user funding and associated return of that capital over time) from pricing (i.e. reference tariffs) for the use of the assets.

An exception would be where the reference tariffs from the infrastructure are not sufficient to cover both the return of the funder's capital, and the approved operating and maintenance costs. In that case, QR Network will only be obliged to return the amount it has received from reference tariffs, net of the approved operating and maintenance costs.

The Authority therefore requires that QR Network specify in the 2010 DAU that for significant expansions of mainline infrastructure, QR Network may return users' capital underwriting or user funding by some mechanism other than a rebate, (although it will not be required to refund more than its relevant reference tariff revenue, net of operating and maintenance costs) by adding clause 6.5.2(d)(ii)(A). The Authority also requires that QR Network specify that it will return to a user any remaining capital underwriting or user funding in relation to a mainline investment, where that investment continues to generate revenue for QR Network after the user's access agreement has expired, by adding clause 6.5.2(d)(ii)(B). Both new clauses are set out in decision 6.3.

Similarly, QR Network should return to users any financial benefits such as tax reductions or other cash flows that accrue to it as legal owner of the infrastructure, where the financial risks relating to that infrastructure are borne by another party. This should apply where the financial risk is transferred through an up-front contribution like that QR Network has used in the past, or through a user or third-party funding arrangement. The Authority therefore requires that QR Network include a provision in the 2010 DAU to this effect, by adding clause 6.5.2(d)(iii) as set out in decision 6.3.

The Authority notes stakeholders' concerns about their security over any returns of capital or capital underwriting QR Network may contract to make over time. Security is also an issue for QR Network, which is reasonable in seeking assurances it will receive funding a user has contracted to provide to complete a project.

As previously discussed, QR Network's risks are largely covered once a single-user spur has been completed, as it has received an up-front payment and it will retain the balance of that up-front amount if the access holder ceases to use the spur before QR Network has recovered the value of the asset through its reference tariffs.

For significant investments in mainline infrastructure, the issues relating to security for both QR Network and the users of that infrastructure will need to be resolved in the user funding agreement (with the requirement for QR Network to develop a Standard User Funding Agreement discussed in more detail in Chapter 1 of this decision).

In conclusion, therefore, the Authority notes that irrespective of how the arrangements for funding and the return of capital are eventually determined, those arrangements must be governed by the principles that they be effective in addressing a defined risk or cost to QR Network and that QR Network should not be able to use them as a mechanism for achieving a revenue uplift over and above the approved revenue cap.

Decision 6.3:

The Authority requires that QR Network specify how it will treat additional access-related revenue for mainline infrastructure, ensure tax benefits are passed on to the party taking the financial risk, and restrict the term over which capital underwriting amounts are returned to the underwriter, by making the following amendments to clause 6.5.2(d):

6.5.2 ...

(d) If an Access Condition results in QR Network earning revenue from the Access Seeker's Access that is in addition to the ongoing Access Charge (for example, an upfront contribution or Access Facilitation Charge), QR Network will:

(i) where the Access Condition relates to a Customer Specific Branch Line:

(A) negotiate an agreement separate from the Access Agreement with the party who agreed to pay such additional revenue (or their nominee Access Seeker) which will provide for payment of a rebate to that party or their nominee, where the rebate is equivalent to the amount provided in the Access Charge for a cost component to the extent that this component is separately funded through the additional revenue (for example, depreciation and the non-diversifiable component of the return on any relevant Infrastructure Enhancements) with the rebate being payable over no longer period of time than the asset lives of the relevant Infrastructure Enhancements (as endorsed by the QCA, from time to time, for the purposes of calculating the Regulatory Asset Base); or

(B) exclude the cost components separately funded through the additional revenue (for example, the value of any relevant Infrastructure Enhancements to the extent supported by the additional revenue) from the cost base (including the asset base) used to determine the ongoing Access Charge); or

(ii) where the Access Conditions relate to an Expansion, negotiate an agreement of the type described in paragraph (i)(A) above, or some equivalent agreement, that has the effect of returning to the Access Seeker (or their nominee Access Seeker) their contribution to the Access Condition:

(A) over no longer period of time than QR Network can reasonably be expected to recover the value of the relevant Infrastructure Enhancements through the ongoing Access Charge; and

(B) the balance of their contribution to the Access Condition, where that Access Seeker's Access Agreement expires before the full amount has been returned, and QR Network continues to earn Access Charges from other Access Holders for the use of the relevant Rail Infrastructure,

provided that, where the Access Charges from the relevant Rail Infrastructure are not sufficient to cover both the return to the User funder (or contributor to an Access Condition), and the approved operating and maintenance costs, QR Network will only be obliged to return the amount it has received from Reference Tariffs, net of the approved operating and maintenance costs (with Access Holders that

continue to use the relevant Rail Infrastructure receiving priority over Access Holders that have ceased using it, where Access Charges are not sufficient to cover all returns of capital); and

(iii) include in the agreements described in paragraph (i) or (ii) above (as applicable) an obligation on QR Network to transfer to an Access Seeker (or their nominee Access Seeker or Customer) any tax or other financial benefits accruing to QR Network as legal owner of the Rail Infrastructure covered by the Access Condition, where the risks have been transferred to the Access Seeker (or their nominee Access Seeker or Customer) as a result of the Access Condition.

6.7 Access Conditions for Subsequent Parties

Background

The 2008 undertaking specifies that where an access holder has agreed to an access condition in relation to constructing rail infrastructure, and another access seeker subsequently seeks to use that track, QR Network will either:

- (a) include the revenue from the subsequent user in the first user's rebate; or
- (b) renegotiate the first user's access conditions so they are shared with the subsequent user (clause 6.5.2(g)).

QR Network included a similar arrangement in the 2009 DAU (clause 6.5.2(e)), such that where QR Network needed to impose access conditions on a subsequent party, then those access conditions should be deemed to be reasonably required (QR Network, sub. no. 1: 75).

While the arrangements in the 2008 undertaking and the 2009 DAU were similar, the Authority was concerned that the proposed arrangement in the 2009 DAU had the effect of deeming that whatever access conditions QR Network imposed on the subsequent user were reasonable. In contrast, the Authority said that the reasonableness of access conditions should be determined by how the responsibility was shared between the first and second user. The Authority therefore proposed that QR Network specify in clause 6.5.2(b)(ii) of the undertaking that the division of responsibility be 'equitable'.

QR Network's 2010 DAU

QR Network's 2010 DAU was consistent with the Authority's draft decision in that it included the requirement for an 'equitable' division of access conditions proposed by the Authority in its December 2009 draft decision (clause 6.5.2(b)(ii)).

In submitting the 2010 DAU, QR Network questioned what matters could and should be considered when assessing what was equitable (QR Network, sub no. 56: 36). QR Network did not provide any specific solutions to its concerns.

Nevertheless, QR Network did subsequently indicate that a user funder could transfer its rights and obligations:

- (a) to another a user funder during the execution (construction) period; or
- (b) to a third party following completion of execution (QR Network, June 2010: 5).

Stakeholders' Comments

Asciano was concerned about how a decision would be made as to whether the sharing of responsibility was equitable.

Asciano's primary concern in relation to QR Network's subjective decision-making is that all access seekers be treated equally, particularly if a related party of QR Network is also an access seeker (Asciano, sub. no. 78: 15).

Xstrata said the sharing of access conditions for subsequent parties should be specified in more detail in the undertaking. It proposed QR Network be required to pass on to the original party to the access conditions any payments it received from a subsequent user of the infrastructure, that related to enhancements 'funded directly or indirectly' by the original party (Xstrata, sub. no. 88: 57).

BMA said that expansions could be delayed, or not occur, because some expansions were more capital intensive than others, and users might wait until another user funded that expansion, before seeking cheaper capacity that was built later. BMA was concerned that QR Network might also seek only to fund expansions with low capital intensity, and force users to fund the more expensive capacity. BMA proposed that subsequent expanding parties, whether they be QR Network or users, be required to make a capital payment to previous parties sufficient that the capital cost in dollars per tonne of capacity created was the same for all users, regardless of which expansion provided their capacity (BMA, sub. no. 93: 1-2).

Authority's Analysis and Decision

Access conditions are most straightforward when imposed on the sole user of a spur serving a single mine. The issues immediately become less clear cut if the conditions are subsequently split between two or more users.

Any division will have to take into account the up-front payment and other underwriting provided by the original user, the proportion of the capacity being used by the subsequent user, the risks assumed by the original user in underwriting new capacity, the risks the users pose for QR Network, and a variety of other factors. It was with this complexity in mind that the Authority proposed in its December 2009 draft decision that the division should be 'equitable', rather than specifying how that should be done.

The Authority notes the concern raised by Asciano and QR Network about how it will decide what is equitable. The Authority considers that, for a single-user spur, 'equitable' is sufficient guidance. If a new access seeker, the existing access holder or QR Network were unable to negotiate a satisfactory outcome, they can refer a dispute to arbitration, on the basis that the division was not equitable. The Authority would then arbitrate based on the particular circumstances that applied. The undertaking also restricts QR Network from discriminating between access holders, except on the basis of risk or cost.

However, as discussed in relation to rebates in section 6.6, access conditions on the mainline are more complex than for single-user spurs, as it is much more difficult to determine which infrastructure is required for access by a particular user or group of users. Any user funding further adds to the complexity.

The Authority notes that for any mainline access conditions, including user funding, the Authority will have considered the interests of subsequent users, as provided under the proposed clause 6.5.4 (see section 6.5). Therefore, in the event of a dispute over the subsequent division of such access conditions, the Authority would first be guided by any terms that were included in the access conditions agreement approved by the Authority to specify how the division would be made. In any event, QR Network would need to seek approval from the Authority for any

subsequent allocation of an access condition which required approval by the Authority when it was first introduced.

If the original access conditions agreement did not provide sufficient guidance, either in the event of a dispute or of an approval process for subsequent sharing, the Authority would consider whether the proposed division was reasonable and equitable, as is already specified by QR Network in the 2010 DAU.

The 2010 DAU also carries over the specification in the 2008 undertaking that QR Network must either add revenue from the subsequent user to the first user's rebate or renegotiate the first user's access conditions so they are shared with the subsequent user (clause 6.5.2(e)). The Authority considers that these two mechanisms are sufficient to provide an equitable allocation to subsequent users for mainline access conditions as well as single-spur access conditions.

Xstrata and BMA have both raised concerns about how the risks and costs assumed by the original users will be equitably shared with subsequent users, particularly in cases where users have funded the infrastructure.

The Authority considers that separating pricing from funding of significant investments addresses some of these concerns. All users will be charged tariffs based on the infrastructure and operating and maintenance activities required to provide access for their train services. Any user-funded infrastructure will need to be covered by separate user-funding agreements, which will include arrangements to return to the users their share of the capital contributions (see section 6.6). And any subsequent user will be required to pay a reasonable and equitable share of any access conditions that were imposed on the previous users, as with single-user spurs.

BMA's concerns about users timing their access requests to take advantage of expansion investments which have a lower capital cost per tonne of capacity are also addressed by the rebate arrangements. Any subsequent user will have to take on an equitable share of the costs and rebates, which reflects the risks assumed by all the parties.

BMA's concern about QR Network choosing only those investments with a low capital cost per tonne of capacity is harder to resolve given that QR Network cannot be compelled to invest. Indeed, given QR Network's representations on this matter to date, it might be best to assume QR Network would not fund expansions beyond its commitment of \$300 million. So, if it chose to fund only low capital cost expansions then this would be a positive outcome, and anything more would be an unexpected additional benefit.

6.8 Pricing for Significant Investments

The coal reference tariffs approved by the Authority are based on costs, including operating and maintenance expenses, as well as allowances for depreciation and WACC on the asset base. This is consistent with the pricing principles, including the definition of the revenue limit in clause 6.2.4 of the 2008 undertaking.

QR Network retained these principles in clause 6.2.4 of the 2009 DAU although it proposed, and the Authority approved, changing the references to a 'revenue limit' so that they refer to the 'maximum allowable revenue'.

The Authority's December 2009 draft decision required QR Network to change a reference to the treatment of private infrastructure when setting tariffs, to clarify that mines using private infrastructure will receive equal treatment when assessing tariffs (clause 6.2.4(b)).

QR Network's 2010 DAU

In the 2010 DAU, QR Network has retained the definition of maximum allowable revenue in clause 6.2.4, exactly as approved by the Authority in its December 2009 draft decision. It also included amendments to clause 6.4.2(b) on the treatment of private infrastructure that are consistent with the Authority's proposed changes.

QR Network has not specified any changes to the pricing principles to address the changes it has proposed to the capacity and investment framework (see chapter 1).

However, QR Network confirmed customers will not be 'commercially disadvantaged' where they elect to privately own an extension, rather than having the extension owned by QR Network. 'Clause 6.4.2(b) requires the recognition of the private infrastructure costs in determining the access charge payable by train services operating on the private extension' (QR Network sub. no. 70: 34).

Stakeholders' Comments

Stakeholders raised concerns about the interplay between access conditions and user funding, and how that will affect the reference tariffs.

The QRC did not support the universal application of the current uniform pricing approach for approved expansion projects. The QRC said that while the incremental cost and stand-alone cost test may be appropriate in a number of circumstances, the undertaking also includes other criteria, such as:

- (a) contribution to common costs,
- (b) system premiums; and
- (c) the new system pricing approaches.

The QRC considers that there needs to be sufficient flexibility to ensure the particular nature of an expansion project is able to be taken into account when determining the pricing rules – as is the current regulatory practice (within draft amending access undertakings) (QRC, sub. no. 98: 10).

Rio Tinto asked the Authority to clarify how major expansions of the network would be priced, depending on whether they were funded by users, QR Network or both parties. It asked whether average pricing, differential pricing, or a hybrid form of pricing should be adopted (Rio Tinto, sub. no 99: 1-2).

Anglo said the arrangements are not entirely clear for users who choose not to fund an expansion, but then subsequently seek access. For example, Anglo says that one of the principles in the investment framework (based on a now superseded draft) envisages that the user may pay a premium in its access charge (that is, a higher access charge), whereas other principles seem to envisage uniform tariffs with the capital-related portion of tariffs being paid to users who funded the expansion (Anglo, sub. no. 100: 3).

Asciano said 'users who chose not to participate in user funding should not be required to pay price premiums which have no basis in costs', including efficient capital costs. Premiums for non-funders which had no basis in costs were unlikely to result in economically efficient outcomes, and might be viewed as punitive or distortionary. However, it would be acceptable to have a price premium if it reflected different costs structures for different users (Asciano, sub. no. 92: 6-7).

QR Network said that to the extent that the regulatory endorsed terms and conditions of access are sufficient to promote investment in the network, there should be no requirement for a non-funding user to pay funding users an additional premium on top of the access charge (QR Network, sub. no. 96: 9).

Authority's Analysis and Decision

Access conditions and user funding are necessary parts of the undertaking to provide mechanisms:

- (a) to address QR Network's concerns about particular risks or costs of particular investments; or
- (b) that allow the network to be expanded in circumstances where QR Network has indicated, for whatever reason, it is unwilling or unable to fund the investments.

While all aspects of an undertaking or an access agreement are related, the Authority does not accept that there need to be separate pricing (and access allocation) rules depending on the nature of the access conditions and who funds the investment. The equitable treatment of funding users, non-funding and subsequent users should be managed in the user funding arrangements. Intertwining funding and pricing arrangements will only serve to further complicate and already complex access undertaking.

In this context, it is relevant to note that QR Network has not proposed any changes to the undertaking's pricing principles, and the Authority also sees no reason to make any changes. The pricing principles therefore apply to capacity expansions or extensions of QR Network's tracks, whatever their cost or scale. Moreover, in contrast to its draft investment expansion framework, the Authority is not proposing that a premium apply for user funded investments. The Authority has formed the view that consistent pricing arrangements should apply irrespective of who funds the investment.

Indeed, pricing will continue to be determined in accordance with the principles in the undertaking, which prevent cross-subsidisation, and restrict QR Network from earning monopoly rents. In other words, prices will continue to be set based on a uniform tariff that sits between incremental and standalone costs, and in accordance with the common cost allocation rules.

Any allowances, rebates or other payments related to the funding of infrastructure will be treated separately to the pricing and allocation of access to the capacity created by an infrastructure enhancement.

In this context, the Authority notes that the existing tariffs do not include forecasts of the costs of major projects such as GAPE- and WICET-related infrastructure. Reference tariffs will need to be developed and approved prior to the commissioning of those projects. The approach that has been developed for the DBCT stage 7x expansion could provide a suitable framework for these major network investments as well. This would involve the Authority approving the initial tariffs and revenue cap based on forecast costs, but with the tariffs and revenue cap subsequently being revised to reflect actual costs.

6.9 Treatment of Cross-System Traffics

The June 2010 extension DAAU included rules setting out how each of the AT₁ to AT₅ tariff components would be calculated for train services which travelled between two different coal systems. The Authority approved the rules proposed by QR Network on the basis that they had the same effect as those specified by the Authority in its December 2009 draft decision.

Accordingly, the 2008 undertaking, as amended in June 2010, now specifies that an access holder would pay:

- (a) the higher of each of the AT₃ and AT₄ allocative tariffs for the two systems through which the cross-system service travelled; and
- (b) each system's AT₅ tariff for the distance travelled through that system.

The QRC had previously opposed that treatment of the AT₃ and AT₄ tariffs, preferring that the tariffs each be set at the relevant AT₃ or AT₄ tariff for the distance a cross-system service travelled through each system (QRC, sub. no 38: 44-45 and sub. no. 84: 6).

The Authority formed a view in its December 2009 draft decision that the QRC's alternative approach to the AT₃ and AT₄ tariffs was also sensible, but tended to mute the disincentive to travel on the more highly utilised system. The Authority therefore found that the use of the higher tariffs was reasonable, as it provided appropriate pricing signals for the use of capacity-constrained systems. The Authority did not alter its view in its June 2010 draft decision as no new arguments were presented.

The QRC has now raised a concern that the treatment of AT₃ and AT₄ is inconsistent with the treatment of the AT₅ tariff for cross-system services. The QRC said that, since each system was fully utilised, there was no need to protect the Goonyella system from additional traffic via a pricing mechanism, and the economic signal to avoid the lower-cost system was not necessary to encourage efficient use of and investment in infrastructure. Further, the higher AT₅ in the Blackwater system gave a 'strong incentive' for cross-system travel. The QRC asked that the Authority change the treatment of AT₃ and AT₄ to be the relevant tariff for the distance the cross-system service travelled through each system (QRC, sub. no. 85: 5-6).

The Authority accepts that the treatment of the AT₃ and AT₄ tariffs and the AT₅ tariffs in the 2010 DAU is different. However, the Authority also accepts the QRC's argument that, in the current environment, the pricing signals are less important than the availability of port capacity in determining how new mines arrange their rail transport.

The Authority notes that, based on tariffs for 2009-10, including revenue-cap adjustments, the QRC's preferred treatment of the AT₃ tariff gives a moderate signal to favour using the Blackwater system over using the Goonyella system (i.e. the Goonyella AT₃ is slightly higher), while the AT₄ tariff gives a moderate signal to use Goonyella. However, the AT₅ tariff provides some incentive to use the Goonyella system, as the Blackwater electric tariff is more than double that for Goonyella.

The Authority does not consider that the submission from the QRC provides a compelling reason for altering the treatment of the AT₃ and AT₄ tariffs. At the same time, the Authority understands that that the QRC does not support altering the treatment of the AT₅ tariff to be consistent with the current treatment of the AT₃ and AT₄ tariffs.

The Authority also notes that the pricing signal from the differential in the AT₅ tariffs between Blackwater and Goonyella reflects the timing of investment in the two networks' electric infrastructure, and is likely to narrow substantially or even reverse as QR Network begins to replace ageing equipment in the Goonyella system. This means that the pricing signal from the AT₅ tariff will in time have a much less pronounced effect.

The Authority therefore finds that it should not change the treatment of the AT₅ tariff to match that for the AT₃ and AT₄ tariffs at this time. The Authority considers this a reasonable outcome, which balances the interests of users of single-system and cross-system services. The Authority will review this treatment of cross-system tariffs when it assesses the tariff structure for the next

undertaking period, at which time it will be clearer how the differential between the electric tariffs in the different systems has developed.

7. CAPACITY MANAGEMENT

The undertaking's capacity management principles are divided between issues relating to transfer, relinquishment and resumption of capacity, which are covered in Part 7, and scheduling issues, which are governed by the network management principles in Schedule G.

QR Network's 2010 DAU incorporated many of the amendments proposed in the Authority's December 2009 draft decision – e.g. capacity relinquishment and transfer arrangements, queuing and the renewal of access rights.

In addition, the 2010 DAU introduced a number of new amendments in relation to managing competing access applications, calculating relinquishment fees handling customer-initiated transfers and establishing and amending system rules.

The Authority is satisfied that some of the new amendments are appropriate, for instance the new arrangements for calculating relinquishment fees ensure that there are equitable charges for transfers within the same coal system.

However, given stakeholders' concerns, the Authority proposes to restore the 85% resumption threshold from the 2008 undertaking provisions. The Authority has also amended the compensation arrangements for QR Network in relation to introducing and amending system rules. In doing so, the Authority accepts that QR Network should not be adversely affected by introducing operating rules for the benefit of the coal supply chain. However, the Authority believes that more work needs to be undertaken to ensure that the compensation arrangements work equitably and cannot be misused for the benefit of a QR Network related party.

7.1 Introduction

The 2009 DAU largely retained the basic principles in part 7 and schedule G of the 2008 undertaking. However, QR Network proposed to amend the network management principles to change the way rail and port scheduling interacted and to change the way the capacity management principles dealt with the transfer and resumption of train service entitlements.

In its December 2009 draft decision, the Authority largely approved QR Network's proposed changes to part 7 and schedule G, and proposed several further amendments.

QR Network's 2010 DAU encompassed many of the matters set out in the Authority's December 2009 draft decision, including:

- (a) changing the traffic-management decision-making matrix and the contested-train path decision making process;
- (b) adding a definition of system paths and amending the definition of 'intermediate train plan'; and
- (c) incorporating definitions of relinquishment fees and the reduction factor from chapter 11 into the main body of part 7.

As QR Network has adopted the Authority's proposals and stakeholders did not comment, these matters are not discussed further in this decision.

However, QR Network has amended aspects of the Authority's December 2009 draft decision and introduced new amendments to part 7 and schedule G, including:

- (a) proposing an arrangement whereby it can vary, or refuse to implement, system rules if it is not satisfied that it will be able to recover through the reference tariffs any compensation it might have to pay (section 7.2);
- (b) specifying that all coal-carrying traffic in the CQCR will be cyclic traffic (section 7.3);
- (c) modifying the definition of the reduction factor as it applies to transfers of access rights within the same system;
- (d) modifying the definition of competing access applications; and
- (e) amending the customer initiated transfer provisions.

The Authority has reviewed the 2010 DAU in the context of the proposed privatisation of the coal network and the added risks for discrimination between related and third-party train operators. The Authority has proposed a number of amendments to the 2010 DAU to address these concerns, including reinstating a clause in the contested train path decision-making process which specifies how QR Network will ensure it is not making discriminatory train-scheduling decisions (section 7.4).

7.2 System Rules

Background

The undertaking's network management principles apply across the entirety of QR Network's network, irrespective of the individual circumstances of particular systems or sections of track. For example, the Goonyella system which serves DBCT operates to a cargo-assembly rather than an even-railings mode of operation.

The 2009 DAU sought to address this issue by allowing QR Network to introduce system rules that could modify and supplement the network management principles to tailor the operations of each system to suit the priorities of that system (QR Network, sub. no. 4: 5). If sufficient access holders or access seekers objected to the proposed system rules, they could challenge them through the dispute-resolution procedures in the undertaking.

In its December 2009 draft decision, the Authority accepted that system rules were desirable but was concerned that QR Network had not yet published the details of its proposed rules even though considerable time had passed since QR Network first canvassed their possibility. The Authority was also keen to ensure that the rules were developed in a fair and transparent manner, and that the concerns of all access holders, access seekers and other stakeholders were properly addressed.

Therefore, the Authority required QR Network to amend the 2009 DAU to provide for a detailed process, including consulting with stakeholders and review by the Authority, for putting in place initial rules for each system. These rules were to be submitted to the Authority within nine months of the undertaking's approval.

The Authority also required QR Network to change its mechanism for amending system rules: to clarify that consultation would include access holders, access seekers, and their customers; to clearly state the Authority would resolve disputes; and to set out what would happen if the amendments were not approved. The Authority provided drafting for the clauses required to give effect to its proposals for both the initial system rules and the amendment process.

The Authority's proposals were similar to the arrangements at the Dalrymple Bay Coal Terminal (DBCT) for the approval and amendment of terminal regulations.

QR Network's 2010 DAU

QR Network has not accepted all aspects of the Authority's December 2009 draft decision.

The 2010 DAU includes a process for developing system rules, with a requirement that QR Network must submit to the Authority for approval draft rules for the Goonyella system, and not the entirety of the CQCR as proposed by the Authority. These rules would be submitted within nine months of the undertaking's approval date. The 2010 DAU also:

- (a) provides for QR Network to vary, or refuse to implement, the system rules if it is 'not reasonably satisfied that the amount of any compensation' it might have to pay will be recovered through the reference tariffs;
- (b) applies the nine-month deadline only to the Goonyella system, but specifies that QR Network will need to follow the same consultation process for initial system rules in other systems;
- (c) specifies that an access holder can raise a dispute if amendments to the rules would 'fundamentally frustrate the operation' of train services over a sustained period of time, or would cause a net cost of more than 1% of annual access charges;
- (d) requires QR Network to notify stakeholders (i.e. access holders, access seekers, customers, affected infrastructure service providers and the Authority) if it intends to amend the rules; and
- (e) obliges QR Network to consult with stakeholders (but not the Authority) when preparing or amending the system rules.

Stakeholders' Comments

Asciano and Anglo American said QR Network's proposed compensation provisions would allow it to unilaterally vary or refuse to implement system rules, if it was not satisfied with the compensation.

Asciano was concerned that QR Network's proposed clause 7.1, and its amendments to appendix 1 of schedule G, did not necessarily reflect the changes sought by the Authority in its December 2009 draft decision. It said the provisions in the 2010 DAU should be amended to be consistent with the draft decision.

Asciano said that, if the Authority's position is not adopted, QR Network should not have a broad discretion to vary, reverse or refuse to proceed with amendments to the system rules if such actions resulted in a material benefit to a related party (Asciano, sub. no. 78: 16 and 26-27).

Anglo American said the compensation clause (7.1(f)) should be removed from the initial system rules process. It did not believe this would impact on QR Network significantly, as any issues which might lead to compensation could be managed within the consultation process. Anglo considered QR Network should clarify what type of compensation it was referring to, as it understood the system rules would deal with day-to-day matters such as train scheduling. It also said any variation to the system rules should be approved by the Authority (Anglo American, sub. no. 83: 1 and 7-8).

QR National supported the development of system rules as a 'key mechanism' for maximising throughput in coal supply chains. It said operators must have a role in developing and changing system rules, particularly because they may not reflect the existing commercial terms in access agreements or existing above-rail contracts. Existing access agreements did not include system

rules in the definition of system-wide requirements, and an amendment to those requirements could trigger a claim for compensation. QR National said the provisions relating to system rules should be clearer on these issues (QR National, sub. no. 71: 5).

The QRC supported the Authority's proposals for system rules and dispute resolution (QRC, sub. no. 55: 7).

Authority's Analysis and Draft Decision

The Authority understands that QR Network will use system rules to establish operating rules that match the priorities of each system's ports and mines. That is a desirable goal, and is consistent with the long-term solution and other coal-supply-chain measures considered elsewhere in this decision (see chapter 11).

The Authority and stakeholders remain unclear on the likely content and effect of the system rules. QR Network has given various indications of what might be in the rules. However, two years after QR Network first proposed the idea, it is yet to provide the Authority and stakeholders with an example of what form they will actually take.

While QR Network has proposed a process for developing system rules that is largely consistent with the Authority's December 2009 draft decision, it has introduced a materiality threshold for raising disputes about the system rules and introduced the proviso that it could unilaterally change the rules if it is not satisfied that the amount of any compensation it might have to pay will be recovered through the reference tariffs.

In its December 2009 draft decision, the Authority argued that there needed to be a clear process for implementing system rules as they could alter an access holder's rights under an access agreement – in particular in relation to train service entitlements. QR Network refuted this suggestion in its February 2010 submission when it said that:

For the avoidance of doubt QR Network confirms that it will not be able to use the System Rules as a mechanism to alter a customer's Train Service Entitlement as the System Rules fall within the Network Management Principles that form part of the System-wide requirements within the Customer's Access Agreement. QR Network will not be able to alter these System-wide Requirements without consulting affected parties (QR Network, sub. no. 56: 62).

The Authority accepts that the system rules may not be able to alter a train service entitlement. However, it is clear that system rules may alter an access holder's rights under an access agreement, and therefore affect what a customer receives, by making changes to the system-wide requirements⁵.

QR Network has reflected this link to the system-wide requirements in the 2010 DAU by changing the restrictions on when an affected person can raise a dispute over an amendment to a system rule. QR Network had proposed in the 2009 DAU that a dispute could be raised if the rule 'would not operate equitably' or if it was 'inconsistent with the terms of an access agreement'.

In the 2010 DAU, QR Network has removed the reference to a change being inconsistent with the terms of an access agreement, and instead proposed to specify that an access holder can appeal if system rule amendments would:

- (a) fundamentally frustrate the operation of train services over a sustained period; or

⁵ The 'system-wide requirements' are defined in the access agreements to include the network management principles, possession protocols, interface coordination plan and rollingstock interface standards, as well as safety and emergency procedures.

- (b) cause a net cost equivalent to 1% or more of annual access charges.

These conditions are the same as those in the standard access agreements for raising disputes over amendments to system-wide requirements (see standard access agreements, clause 5.1(c)).

The Authority accepts that there may be winners and losers from the introduction of, and changes to, the system rules, and that it is reasonable that there be a materiality threshold for raising disputes.

However, the Authority is concerned that:

- (a) several such changes may harm or benefit one or more access holders, access seekers or end users such that the cumulative effect of changes made over time is not equitable, or exceeds those materiality thresholds; or
- (b) an access holder, access seeker or end user that was harmed or favoured by one or more changes to the system rules may raise a dispute over a subsequent change, when the cumulative effect of all changes is equitable or falls below those materiality thresholds.

In addition, the materiality conditions proposed by QR Network apply only to access holders. QR Network's proposal does not apply to end users, even where they may ultimately be affected by the change, either by receiving or paying compensation, or through changes to the rights under an access agreement of an operator they have contracted with to provide haulage services. Access holders which are operators will have entered rail haulage agreements based on an understanding of their rights under the access agreement they have with QR Network, and it seems undesirable for system rules to be developed or changed which would potentially leave haulage providers unable to comply with their contractual obligations to end users.

So, while the Authority understands why QR Network has proposed a materiality threshold, it does not consider the proposal in the 2010 DAU has been fully developed. It considers the grounds for dispute should be based on an amendment being 'materially inconsistent with the terms of an access agreement'.

The Authority therefore requires that QR Network amend the conditions for raising disputes to be the same as those proposed by the Authority in its December 2009 draft decision which, in turn, are largely consistent with QR Network's proposal in the 2009 DAU (see decision 7.1).

The Authority makes this decision with the expectation that raising disputes would be a last resort, and that the system rules would be developed with give and take among the various participants in the supply chain, as all should benefit in the longer term from a more efficient system.

The Authority considers that the same should apply to compensation, which should only be an issue if the supply-chain participants are unable to negotiate a compromise which avoids having one or more access holders or customers bearing a disproportionate share of the costs.

The Authority does not have any, in principle, objections to the inclusion of arrangements to ensure the QR Network is left no worse off in the event it is required to pay compensation as a result of implementing, or amending, system rules. That is, the Authority accepts that there might be an efficient set of system rules which justifies compensating an access holder or end user. Moreover, as QR Network is a regulated business, it is unlikely to receive long-term benefits from these arrangements. Accordingly, it is reasonable for QR Network to be able to recover through the reference tariffs any compensation it might have to pay.

However, as with the materiality conditions, the Authority is concerned QR Network has not fully considered the way it has sought to implement the compensation provision.

The Authority considers that, whether or not compensation was appropriate, it would be unreasonable for QR Network to be able to amend the system rules without restriction simply on the basis that QR Network did not consider it was receiving sufficient compensation to cover payments it was required to make to access holders.

The Authority is particularly concerned that such compensation could be used to favour a related party, as the majority of existing contracts which might be affected by system rules are with a related party of QR Network.

Therefore, while the Authority does not have any objections to including compensation arrangements for system rules within the undertaking, it believes it is premature to do so now. Rather, the compensation rules should be included as part of the package of arrangements for introducing system rules.

The Authority considers that the changes to the reference tariffs that were required to provide compensation would need to be proposed through a DAAU in any case.

The Authority therefore requires QR Network to remove the compensation provisions from the system rules process set out in the 2010 DAU (see decision 7.2).

The appropriate vehicle for proposing compensation provisions would be the DAAU in which QR Network could propose any tariff changes related to the proposed initial or varied system rules. This could be done in conjunction with QR Network's submission to the Authority proposing initial system rules, which could also specify a more fully developed materiality threshold for raising disputes. The Authority could then assess any compensation claim, and materiality threshold, with full knowledge of the proposed system rules to which they related.

QR Network has proposed that the nine-month deadline for submitting initial system rules to the Authority apply only to the Goonyella system, although QR Network would have the same obligation to consult and seek the Authority's approval regarding the introduction of the initial system rules in all systems.

The Authority notes that system rules are most likely to apply where customers and transport and infrastructure providers have agreed to alter the operating arrangements to better coordinate the supply chain. This process has progressed in the Goonyella system, but is still at an earlier stage elsewhere in the CQCR.

The Authority therefore considers it is reasonable for the nine-month deadline to apply only to Goonyella, as long as there is a process in place for all systems that protects the rights of stakeholders if and when system rules are introduced. Further, once system rules are in place for Goonyella, the Authority and stakeholders will have a better indication of the form the rules are likely to take in other systems.

QR Network has specified in its system rules provisions in the 2010 DAU that:

- (a) when developing initial system rules – it will consult with access holders, access seekers and 'any affected infrastructure service providers' (clause 7.1(b)); and
- (b) when amending system rules – it will:
 - (i) notify access holders, access seekers, and their customers; infrastructure service providers such as ports that form part of the supply chain; other service providers such as maintenance and construction contractors; and the Authority; and

- (ii) consult with all those stakeholders, except for the Authority (clause (d) of schedule G, appendix 1).

The Authority accepts QR National's concern that operators should have a role in developing and changing the system rules. Train operators should specifically be included in the list of stakeholders to be consulted as train operators will not always be access holders or access seekers in particular in the future with the introduction of the new form of split access contracts (see decision 7.3).

Decision 7.1:

The Authority requires QR Network to remove the materiality threshold it has proposed for raising disputes over amendments to system rules, by making the following amendments to clause (e), Appendix 1 of Schedule G in the 2010 DAU:

- (e) If an Affected Person considers that the Proposed Amendments:

- (i) would not, as a whole, operate equitably amongst Access Holders and Access Seekers (should they become Access Holders) and their Customers; or
- (ii) are materially inconsistent with the terms of an access agreement where the Affected Person is an Access Holder:
- ~~• would materially impact on the operation of Train Services by or for the Affected Person to such an extent as to fundamentally frustrate the operation of those Train Services in accordance with the Affected Person's Access Agreement over a sustained period of time; or~~
 - ~~• would cause the Affected Person to suffer a net material adverse financial impact (that is, a net cost) equivalent to 1% or greater of the annual Access Charges payable by the Affected Person under its Access Agreement directly as a result of the making of the Proposed Amendments,~~

then the Affected Person should provide a written submission to QR Network, within thirty (30) days after being given a notice in accordance with paragraph (d) of this Appendix 1, identifying why the Affected Person considers the making of the Proposed Amendments would have any of the effects referred to in subparagraphs (e)(i) or (ii) of this Appendix 1.

Decision 7.2:

The Authority requires that QR Network remove provisions for compensation from its proposed rules for initial system rules and for amendments to system rules, by deleting from the 2010 DAU:

- (b) clause 7.1(f) (and the cross-reference to it in clause 7.1(e); and
- (c) clause (h), Appendix 1 of Schedule G.

Decision 7.3:

The Authority requires QR Network to add train operators to the groups it will consult about system rules, by amending the lists in clause (d)(i), Appendix 1 of Schedule G and in clause 7.1(b) of the 2010 DAU to include 'Railway Operators'.

7.3 Cyclic Traffic

Prior to its submission of the 2009 DAU, QR Network had said that it wanted to define all coal train services in central Queensland as cyclic traffic, which guarantees a certain number of train paths in a set period. QR Network submitted that timetabled services, which guarantee a path at a fixed time on a particular day, consume a disproportionate share of network capacity (QR Network, sub. no 4: 6-7).

As QR Network did not seek to progress this matter in its 2009 DAU, the Authority did not specifically address this issue as part of its December 2009 draft decision – even though stakeholders had provided comments in their initial submissions. In particular, the ARTC and the QRC said the undertaking needed to provide an option of timetabled services, while Asciano and QR Freight (QR National) supported a cyclic-only restriction (ARTC, sub. no. 32: 9; Asciano, sub. no. 33: 27; QRC, sub. no. 38: 35-36; QR Freight, sub. no. 37: 19-20).

QR Network's 2010 DAU

QR Network included a requirement in part 7 of the 2010 DAU that all coal-carrying train services in the central Queensland coal region be Cyclic Traffic (clause 7.2(a)). QR Network said it had omitted to include the cyclic-only restriction in the 2009 DAU, and had now corrected that omission (QR Network, sub. no. 69: 20).

Authority's Analysis and Decision

The Authority acknowledges that timetabled traffics may raise issues when combined with cyclic traffics. However, it notes that cyclic coal traffics already cope with timetabled passenger and freight traffics in parts of central Queensland.

Cyclic traffics are already specified in clause 1.2 of schedule F, part B in the 2010 DAU (and in the 2008 undertaking) as the reference train in the CQCR. QR Network would therefore be able to levy an extra charge on a timetabled coal service, as it would be a non-reference train.

The Authority considers that provision in schedule F is sufficient. The Authority reached the same conclusion in the 2006 draft access undertaking, saying that the change to define coal traffic as cyclic was 'unnecessary, and would reduce the operational options available for current or potential train operators' (QCA, July 2005: 169).

QR Network has not made a convincing argument for the Authority to change its position from the 2005 draft decision. It therefore requires QR Network to remove the specification in part 7 that all central Queensland coal trains must be cyclic, as set out in decision 7.4.

Decision 7.4:

The Authority requires that QR Network remove the requirement that all central Queensland coal traffics must be cyclic, by deleting clause 7.2(a) from the 2010 DAU (and renumbering the remaining paragraphs of Clause 7.2 accordingly).

7.4 Contested Train Path Decision-making Process

The network management principles in QR Network's 2008 undertaking include a set of rules for determining which access holder receives a contested train path where multiple access holders are vying to have the same path designated in the intermediate (weekly or fortnightly)

train plan. The contested train path decision-making process applies for resolving conflicts over the scheduling of cyclic traffics only.

The Authority's December 2009 draft decision approved changes which further specified how those paths would be allocated, including allowing an access holder some flexibility in switching train paths between different train services (e.g. mines). The rules also specify that a service more behind on its entitlements will be favoured when allocating train paths.

QR Network said in the 2010 DAU that it was concerned that an operator which used the contested train path decision-making process to switch paths between services could then claim that the service from which it chose to switch a train path should be favoured when allocating future train paths, on the basis that it was behind in its allocation. QR Network proposed an amendment to clarify that this should not happen (clause (c)(ii) of schedule G, appendix 2).

This is reasonable, as an operator which chooses to make a short-term transfer of its entitlements to another service should not then be able to use that transfer as the basis for securing favourable treatment in future.

However, the 2009 and 2010 DAUs both proposed to remove from the 2008 undertaking a limitation on QR Network making discriminatory train-scheduling decisions.

This clarifying provision applied only when none of the other rules in the decision-making process assisted QR Network in making a decision, and QR Network was left to unilaterally determine which access holder was allocated the contested path. QR Network did not provide in its documents accompanying the 2009 or 2010 DAUs any justification for removing the passage.

Given stakeholders' requests that QR Network face tighter restrictions on its ability to favour related parties, the Authority considers it is prudent to reinstate the clarifying passage at the end of the contested train path decision-making process. The proposed amendment to clause (d) of schedule G, appendix 2, is set out in decision 7.5.

Decision 7.5:

The Authority requires that QR Network further specify how it will ensure it does not make discriminatory train scheduling decisions, by making the following change to clause (d), Appendix 2 of Schedule G (the Contested Train Path Decision-making Process):

- (d) **finally, where the above considerations do not assist QR Network in making a decision regarding which requested Train Service is scheduled, QR Network will unilaterally determine which Train Service/s is scheduled, and will keep a record of that decision and the reasoning behind that decision. QR Network will ensure that, over time, no Access Holder is favoured over another and, where possible, if one Access Holder is favoured this time, taking into account the Train Service Entitlement held by an Access Holder, next time they are not favoured. In other words, if one Access Holder has an entitlement to 10 services per week, and another Access Holder has an entitlement to 20 services per week, then it could not be said that favouritism was shown to the second Access Holder if they received priority over the first Access Holder on two out of three consecutive occasions.**
-

7.5 Capacity Resumption

Background

Capacity resumption provisions allow QR Network to resume some or all of an existing access holder's capacity under circumstances where the access holder has consistently under-utilised its allocated capacity.

The 2008 undertaking provides for QR Network to resume capacity from an access holder if the access holder

- (a) does not operate a train service seven or more times out of any 12 scheduled consecutive occasions; and
- (b) fails to demonstrate to QR Network's reasonable satisfaction a sustained requirement for train paths that have not been utilised.

QR Network in its 2009 DAU proposed to tighten the capacity resumption triggers as follows:

- (a) for cyclic traffic, the resumption trigger was 90% utilisation for each of the four consecutive quarters; or
- (b) for timetabled traffic, the resumption trigger was seven or more train paths out of 12 (clause 7.3.6) (QR Network, sub. no. 27: 79).

In its December 2009 draft decision, the Authority noted that stakeholders wanted the proposed new resumption arrangements clarified. Therefore, to address stakeholders concern, the Authority required QR Network to amend clause 7.3.6 such that the resumption trigger of 90% for cyclic traffic be applied over a year rather than in each of four consecutive quarters. In response to the draft decision, stakeholders expressed some concerns over the actual resumption threshold.

The QRC stated that further consideration should be given to the actual resumption threshold and suggested that an 85% trigger would be appropriate (QRC, sub. no. 55:11).

Anglo American said that the capacity resumption test in the 2008 undertaking should be retained as it saw no justification in lowering the resumption threshold as QR Network's risks are virtually eliminated by 100% take or pay and revenue cap provisions (Anglo American, sub. no. 47:20).

ARTC said that the Authority needs to satisfy itself that the resumption provisions are appropriate. The Hunter Valley access undertaking has an 80% resumption threshold over a rolling six month period, with a show cause provision. ARTC's original provision included a 90% resumption threshold with no show cause provision (ARTC, sub. no. 48:10).

However, Asciano supported Authority's proposed amendment in the December 2009 draft decision (Asciano, sub. no. 49:21).

QR Network's 2010 DAU

In its 2010 DAU submission QR Network said it accepted the Authority's proposed amendments to resumption provisions.

Stakeholders' Comments

In response to QR Network's 2010 DAU, all stakeholders expressed concerns with the tightening of the resumption threshold.

QRC maintained its view that the capacity resumption threshold should be 85% over a twelve month period. QRC said that 90% trigger can be easily triggered as the coal supply chain has been unable to deliver 90% of the contracted tonnages (QRC, sub. no. 82:20).

Anglo American remained of the view that a tighter resumption trigger is not appropriate as QR Network takes almost no volume risk because of 100% take or pay provisions and the revenue cap mechanisms (Anglo American, sub. no. 83:14).

Xstrata was concerned that the proposed amendment leaves industry exposed to the risk of resumption, particularly at a time when QR Network is seeking a higher WACC for investment in infrastructure expansion (Xstrata, sub. no. 77:15).

Authority's Analysis and Decision

In its 2009 December draft decision, the Authority did not find QR Network's arguments for tightening the resumption triggers compelling as all new contracts are 100% take or pay. As a result, the financial penalty for not using contracted capacity lay with the access holder and/or the customer and not QR Network or other access holders or customers. However, in the absence of any stakeholders' comments opposing the new resumption provisions, the Authority proposed approving QR Network's strengthened resumption triggers with only minor clarifying amendments.

Since then, stakeholders have expressed concerns with the tightening of the resumption threshold and urged the Authority to re-consider its decision on this matter.

The Authority believes that the two main considerations behind any resumption provisions should be efficient use of network by reducing capacity hoarding and reduced financial risks for QR Network.

The Authority believes that, over the years, the financial risk exposure that QR Network is faced with has significantly reduced through various provisions in the undertaking (e.g. 100% take or pay arrangements and revenue cap). In the future, these arrangements will be further strengthened through the use of accelerated depreciation and the relaxation of the limitations on access conditions (e.g. up-front capital contribution) for significant expansions. As a result, there is a reduced imperative for strong resumption clauses to manage QR Network's financial risks.

In contrast strong resumption rights would be a useful tool in improving supply chain by providing an effective mechanism to align coal supply chain contracts. For example, an effective resumption regime would complement other provisions in the 2010 DAU that ensures that access seekers have entry and exit rights to QR Network's rail network before capacity can be allocated. Both of these arrangements would be effective in limiting the ability of access holders to hoard capacity rights.

Despite this, the Authority accepts the QRC's concerns that the 90% resumption trigger can be easily triggered given the existing supply-chain bottlenecks. For example, over the first half of 2010, DBCT has handled, on an annualised basis, around 62 mtpa, well below the rated capacity and contractual commitments of 85 mtpa. While this is not evidence of the contract position on the rail network, it clearly indicates that a user may well be railing well below their contractual commitments and with no foreseeable ability to use its rights given the bottlenecks elsewhere in

the supply chain. The Authority, therefore, considers that changing the resumption threshold to 85% seems reasonable.

Accordingly, the Authority agrees with stakeholders and requires QR Network to amend the resumptions provision in its 2010 DAU such that the resumption threshold is now 85% for cyclic traffic applies over the year as compared to the 90% as proposed by the Authority in its December 2009 draft decision.

Decision 7.6:

The Authority requires QR Network to amend clause 7.3.5(a) as follows:

(a) where an Access Holder (or another Railway Operator(s) appointed by the Access Holder), for any reason other than the occurrence of a force majeure event or the failure of QR Network to make the Access Holder's access rights available, does not:

(i) for Cyclic Traffic, operate, over any four (4) consecutive Quarters, at least eighty five percent (85%) of the total train services allowed under the Access Holder's Train Service Entitlement for that period; or

(with 7.3.5 (a)(ii) remaining unchanged).

7.6 Transfer/Relinquishment of Access Rights and the Reduction Factor

Rail capacity is a key strategic asset for access holders and their customers, such as coal mines, in an environment where transport entitlements can be a significant limitation on production growth.

The capacity relinquishment and transfer facility allows an access holder to negotiate its capacity entitlement with QR Network, including allowing it to reduce take-or-pay obligations in circumstances where it is not able to meet its contracted haulage levels.

The 2008 undertaking included arrangements that set out how an access holder may:

- (a) relinquish access rights upon the payment of a relinquishment fee, which may be reduced if QR Network enters into an access agreement with another access holder; and
- (b) transfer all, or part, of its access rights to an access seeker on payment of a transfer fee that is designed to ensure that QR Network is not financially disadvantaged as a result of the transfer.

The 2008 undertaking sets out different mechanisms for determining the transfer fee under different situations, which broadly encompass transfers:

- (a) with the same origin and destination; and
- (b) with different origins and destinations.

Background

In its 2009 DAU, QR Network proposed to retain many of the 2008 undertaking's arrangements in relation to relinquishing and transferring access rights.

However, QR Network made some amendments designed to make the arrangements simpler and more flexible, as it said that the existing arrangements had proven confusing for all stakeholders. In particular, QR Network proposed to:

- (a) simplify the relinquishment and transfer provisions by combining both processes into one;
- (b) remove transfer fees for short-term transfers (under two years) relating to coal-carrying train services operating within the same coal system; and
- (c) remove the worked example of the transfer-fee calculation from the undertaking (Schedule M) but provide the same information on its website.

QR Network also proposed to further simplify capacity transfer provisions through its proposed system rules.

While stakeholders generally supported the amendments, concerns persisted about the lack of clarity on the new combined relinquishment and transfer provisions and the complexity of the fee calculation.

In terms of the relinquishment fee, the QRC wanted clearer drafting to ensure that the relinquishment notice is non-binding and should not take effect until the date the fee is paid. The QRC also said that, to encourage relinquishment, the arrangements should ensure that an access holder provides notice as soon as possible of an intention to relinquish rather than withholding this information from QR Network.

In addition, the QRC did not consider that the calculation of the relinquishment fee based on future access charges was appropriate as it was concerned that QR Network would seek to calculate the maximum fees possible based on take-or-pay obligations that would be dependent on future events and assumptions determined by QR Network.

Xstrata added that there should be no relinquishment fees in certain circumstances (where an access holder wished to relinquish its rights to another access seeker) or that their calculation should be simplified, as this would free up capacity which could be better utilised by another access seeker.

Stakeholders were also concerned that the capacity-transfer drafting was too complex and unclear, in particular the implications for take-or-pay obligations.

Asciano was concerned about the operation of the short-term transfers as system rules have yet to be drafted and, therefore, it was hard to comment on how these provisions would affect an operator's train service entitlements.

QR Freight also wanted the short-term transfers arrangements clarified in the context of the system rules, and queried whether short-term transfers between different coal systems would be subject to transfer fees, given that the provisions dealt with transfers within the same system.

In its December 2009 draft decision, the Authority accepted stakeholders' concerns on the complexity of the fee calculations. While the Authority did not propose to amend the principles, it did seek to clarify the relinquishment and transfer-fee calculations (i.e. by differentiating between the capacity transfer and relinquishment provisions) and, for ease of understanding, required QR Network to move the (then) chapter 11 definitions to be alongside the relinquishment and transfer provisions in chapter 7.

The Authority supported QR Network's amendments to simplify arrangements for short-term transfers (i.e. removing fees for transfers of less than two years), but it required QR Network to

clarify how this arrangements would work operationally in the context of system rules and how an access holder's take-or-pay obligations would be affected by a short-term transfer that was not within the same coal system.

In its February 2010 response to the Authority's December 2009 draft decision, QR Network sought to clarify aspects of the Authority's and stakeholders' questions but it also raised concerns of its own.

QR Network did not accept that capacity transfers and relinquishments should be explicitly differentiated as any transfer of rights is effectively a relinquishment of those rights.

QR Network also thought that stakeholders should be aware that its proposed transfer arrangements would only apply to access agreements negotiated under the 2010 DAU – it did not believe it would be appropriate to provide existing access holders (i.e. those with pre-2010 undertaking access agreements) with the benefit of these changes without those access holders also being exposed to complementary risks in the 2010 DAU. Similarly, it said it would not be appropriate to calculate a transfer fee under a 2001 access agreement using the proposed reduction factor in the 2009 DAU as, in most instances, a fee would not be payable due to the disparity in the various take-or-pay arrangements.

QR Network said that the short-term transfer arrangements were not dependent on the development of the system rules. QR Network said that the scheduling and the contested train path decision-making processes operate independently from the capacity transfer processes. For example, an access holder can assign an underutilised path to an alternate origin-destination path but this does not avoid the take-or-pay obligation for the original origin-destination path. In order to avoid the take-or-pay obligations, the access holder would have to execute a formal 'transfer' of those access rights.

QR Network did accept that the system rules may include alternate short-term capacity arrangements as a result of negotiations for the long-term solution, but that these were still the subject of commercial negotiations and should not, therefore, be pre-empted.

QR Network also noted that transfer fees would remain payable in all circumstances for transfers between coal systems and proposed to redraft this provision in the DAU for clarity upon resubmission.

Other stakeholders took the opportunity to reiterate their support for the removal of transfer fees for short-term transfers (Rio Tinto, sub. no.52: 1, ARTC, sub. no.48: 11).

QR Network's 2010 Proposal

QR Network's 2010 DAU largely reflected its earlier 2009 DAU, but with the addition of chapter 11 definitions.

QR Network modified the definition of the reduction factor as it applies to transfer of access rights *within the same system*. QR Network said this was necessary to prevent transfer fees calculated under the 2006 and 2008 undertakings (and associated access agreements) from materially exceeding the difference in the present value of the take-or-pay arrangements between the original and the new service – the outcome of which is a legacy from the old price cap and take-or-pay arrangements that did not ensure that the relinquishment fee was reduced by enough when the transferee (the access seeker/holder that was getting the transferred access rights) had a longer haul length.

QR Network said that the resultant transfer fee reflects the difference between the present value of take-or-pay between the new and the original entitlements.

The existing formula, which is the ratio of the train kilometres travelled on the new and original train services, would still apply to determine any reduction in the relinquishment fee if access rights are transferred to a new access holder that operates *within a different system*.

While stakeholders did not comment on QR Network's amendment to the reduction factor, they did comment on the short-term transfer provisions.

The QRC strongly supported the relaxation of transfer fees for transfers of less than two years. However, it said that QR Network's proposed drafting was unclear on whether the arrangements would apply under *all* access agreements or just new access agreements.

On this, the QRC said that the relaxation should apply to all access agreements in order to support an efficient transfer mechanism – and suggested that, rather than amending existing access agreements, this could be implemented by including an obligation in the undertaking that QR Network will not collect transfer fees in these circumstances even though it may be entitled to under the terms of the access agreement. The QRC noted that the revenue cap provisions would also need to be amended to give effect to this to ensure that QR Network is not deemed to have collected this revenue.

The QRC also supported the Authority's December 2009 draft decision requiring QR Network to clarify short-term transfers in the context of system rules (QRC, sub. no. 55:22).

Xstrata believed that, if QR Network was going to calculate the relinquishment fee based on assumptions about future events, then the undertaking should include requirements that the assumptions be reasonable and that QR Network give reasons for arriving at any assumptions made if requested (Xstrata, sub no.54: 33).

Authority's Analysis and Decision

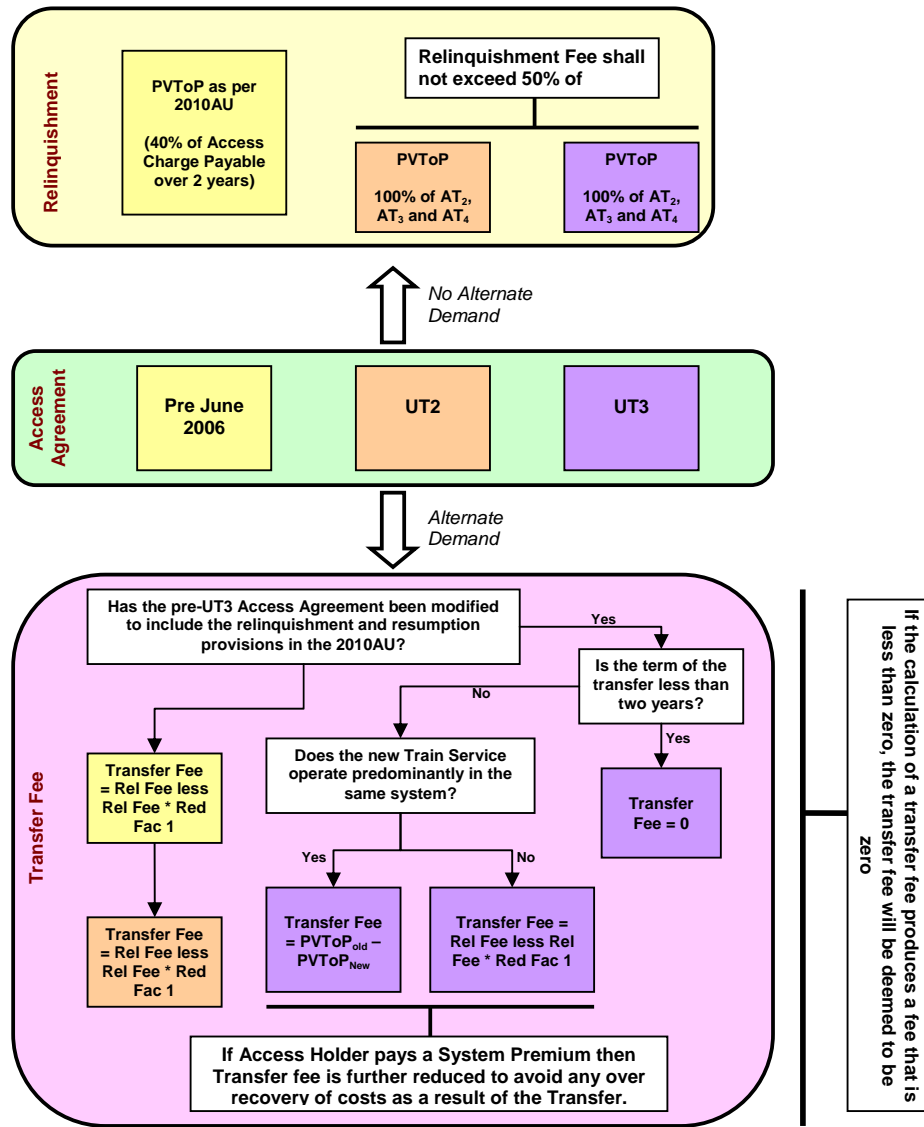
The Authority has considered QR Network's proposal, taking into account the comments made by stakeholders, and notes that QR Network has amended parts of its 2010 DAU, or provided comments in response to the Authority's December 2009 draft decision, that take into account stakeholder concerns and comments and the Authority's proposed arrangements as set out in that draft decision, including:

- (a) incorporating definitions of relinquishment fees and the reduction factor into the main body of chapter 7;
- (b) clarifying that transfer fees *would be payable* for transfers between different coal systems; and
- (c) clarifying that the short-term transfer arrangements will operate independently of the yet to be developed system rules.

Both stakeholders and the Authority have found that that QR Network's drafting of the transfer and relinquishment fees rules are unclear. It is, therefore, challenging to understand what fees are payable by an access holder seeking to relinquish or transfer capacity.

Subsequent to the release of the December 2009 draft decision, QR Network provided a flow diagram to accompany its drafting. This sets out the process for determining the level of capacity relinquishment or transfer fees payable by an access holder seeking to relinquish or transfer access rights (see **Figure 7.1**).

Figure 7.1: Flowchart of Capacity Transfer and Relinquishment Fee Determination



Flow Chart Terminology

PVToP – the present value of the take-or-pay owing by the access holder over the remainder of the access agreement.

PVToP_{OLD} – the present value of the take-or-pay amount that would be owing by the access holder over the remainder of the period of the access agreement.

PVToP_{NEW} – the present value of the take-or-pay amount that would be incurred by the access seeker/transferee over the remainder of the period of the access holder’s access agreement (but under the terms of the transferee’s access agreement).

Rel Fee – the relinquishment fee as calculated in the ‘relinquishment’ box relevant to the respective access agreement (UT1/UT2/UT3).

Red Fac 1 – the reduction factor.

The Authority has reviewed QR Network's flowchart, in conjunction with the drafting, and is satisfied that the provisions lead to the correct calculation of the capacity transfer and relinquishment fees based on when, and under what arrangements, the access agreement was entered into. For example, QR Network has correctly identified the weaker take-or-pay obligations under the pre-2006 access agreements and has included the new arrangement in relation to relaxing transfer fees on transfers of less than two years.

While the Authority accepts that QR Network's drafting is one way to describe the decision tree process outlined in the flowchart, it remains of the view that its alternate drafting, as set out in its December 2009 draft decision and again (with minor amendments) in appendix 7, is clearer than the drafting in the 2010 DAU.

The Authority also considers that worked examples would assist interested parties in better understanding how the fees are determined. This, read in conjunction with the provisions in the undertaking and the flowchart provided above, would provide stakeholders with a greater level of information. The Authority notes that it was QR Network's preference to include worked examples on its website (rather than in the undertaking itself) and the Authority considers this appropriate.

Accordingly, the Authority requires QR Network to replace its capacity relinquishment and transfer provisions with the drafting provided in appendix 7 and provide worked examples that detail the calculations of the capacity-transfer and relinquishment fees on its website.

The Authority believes that QR Network's proposed amendments to the reduction factor, as it relates to transfers within the same system, is reasonable. The Authority agrees that the transfer fee in this instance should equal the difference between the net present values of the take-or-pay obligations in the old and the new services – and that the previous definition would have resulted in an inequitable outcome.

The Authority has considered stakeholders' comments in relation to short-term transfers and, in particular, agrees in principle that it would be beneficial, and promote whole-of-coal-chain supply objectives, if fees for short-term transfers were relaxed under *all* access agreements.

However, the Authority is reluctant to include this as a direct obligation in the undertaking as, on its own, it would be insufficient to give effect to the overall objective. This is because achieving the desired outcome would require an amendment to existing access agreements and may also require amendments to haulage agreements. The undertaking does not have the ability to require these agreements to be renegotiated.

In particular, the Authority would not want to see a situation where transfer fees are not collected from train operators but this benefit is not passed on to the end customers – who would then have to pay twice as the uncollected fees would contribute to an under-recovery of the revenue cap which would be recouped from all access holders.

Therefore, the Authority considers that an alternative mechanism, based on commercial negotiations between QR Network, access holders and end customers, is needed to achieve the desired outcome and ensure that QR Network and end customers are not penalised.

Once these negotiations have occurred, and provided that there was evidence that QR Network has not charged fees for short-term transfers and the end customer could verify that they too were not required to pay the transfer fees, the Authority would consider it appropriate to take this into account in determining QR Network's actual revenues for revenue cap purposes – that is, that the Authority would consider it appropriate, in this instance, to determine QR Network's revenues based on what it actually collected rather than what it was 'entitled' to collect under the access agreements.

The Authority notes that other factors were raised by stakeholders as concerns or for clarification and which the Authority will deal with below, including:

- (a) whether or not the notice of intention for relinquishment is non-binding until the relinquishment fee is paid (QRC);
- (b) whether the relaxation of short-term transfer fees applies to transfers between different coal systems (Asciano, QR Freight); and
- (c) calculating the relinquishment fees based on future events using QR Network's assumptions (QRC).

In relation to the first two matters, the Authority notes that there is nothing in the drafting of the 2010 DAU provisions that would lead it to believe that: (a) the notice of intention to relinquish is binding (prior to the payment of the fees); and (b) that the relaxation of fees for short-term transfers would not be applicable to transfers between different systems.

The notice-of-intention provisions require stakeholders to provide certain information on the access rights to be transferred, including the date for relinquishment and the details of a nominated transferee (if applicable). There is no requirement to provide a guarantee that would bind the access holder – however, the provisions do require the fee to be paid before QR Network will initiate any relinquishment or transfer of the access rights.

Likewise, with the relaxation of short-term transfer fees, there is no requirement that the train services be operating within the same coal system for the provisions to apply – the provisions only require that the train services are coal-carrying train services that operate in the CQCR.

With regard to the last matter, the arrangements do provide for QR Network to make assumptions in relation to *non-price* matters, such as reference train assumptions, when calculating the fee – but not in relation to price matters, including what future reference tariffs might be. The Authority does not have any particular concerns about QR Network's arrangements in relation to this – to the extent that QR Network uses non-price assumptions that are reasonable and can be justified, and provides these assumptions to the access holder with the calculation of the relinquishment fee.

The drafting is less clear in relation to what assumption will be applied to determine the forecast inflation in determining the relinquishment fee and, in particular, whether QR Network intends to apply its own estimation of forecast inflation or forecast inflation of 2.5% (RBA mid-point estimate) – which the Authority would consider to be more appropriate.

Accordingly, the Authority has clarified this in its drafting so the assumed escalation rate will be 2.5% for the purpose of escalating reference tariffs in order to calculate the relinquishment fee.

Decision 7.7:

The Authority requires QR Network to:

- (a) publish worked examples of the relinquishment and transfer fee calculations on its website; and**
 - (b) replace the drafting of the capacity relinquishment and transfer provisions with its drafting (in appendix 7), including that QR Network will assume a forecast inflation rate of 2.5% for the purpose of calculating future take-or-pay obligations for determining the level of relinquishment or transfer fee payable.**
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7.7 Competing Applications

Background

Under the 2008 undertaking, an access seeker can be a train operator on behalf of a customer (e.g. a coal mine) or it can be an end customer itself. Until recently, all capacity has been held by an operator on behalf of the customer and this has not been an issue as there was only one operator in the above-rail market. However, coal mines are becoming increasingly interested in holding capacity in their own right.

QR Network's 2009 DAU included arrangements for managing access applications for the same scarce capacity. The proposed definition of a competing application referred to an access application lodged by a train operator.

The Authority said in its December 2009 draft decision that for the sake of clarity, the definition of a competing application should be amended to also cover access applications lodged by an end customer (i.e. a mine).

QR Network's 2010 Proposal

In its 2010 DAU QR Network accepted the Authority's draft decision, with amendments, and introduced some new provisions.

QR Network has proposed that a customer's application have priority over an access application submitted for the same capacity by a train operator. Amendments have been made to enable negotiation of access with the customer in the first instance where a competing application has also been received from a train operator as well. QR Network will only negotiate access with the operator at the direction of the customer or where access rights were not finalised with the customer during the negotiation period (clause 7.3.2 (c))(QR Network, sub. no. 70: 21).

Stakeholders' Comment

While stakeholders did not comment directly on QR Network's proposal, the QRC proposed a minor amendment to the definition of a competing application. The term 'mutually exclusive access rights' in the definition of a competing application should be deleted as a competing application may not be mutually exclusive as per the definition in the undertaking (QRC, sub. no. 82:20). In particular, the QRC noted that the issue is not that there is insufficient capacity to cater for two separate access applications, but that two separate applicants (i.e. one from the train operator and one from the end customer) are seeking capacity for the same train service entitlement.

Authority's Analysis and Decision

In the December 2009 draft decision, the Authority required QR Network to amend the definition of a competing application to provide for an access application lodged by an end customer to also be classified as a competing application. In its 2010 DAU, QR Network retained the intent of the Authority's December 2009 draft decision. However, QR Network now defines competing applications with reference to mutually exclusive access rights. Ordinarily, the term "mutually exclusive" refers to a situation where the same capacity cannot be allocated to two different access seekers at the same time.

However, the 2010 DAU describes mutually exclusive access rights as follows:

Access application received by QR Network are for mutually exclusive access rights, if QR Network granted access rights to one or more of the access applications, it would not then be able to grant access to the other access applications. That is, the relevant access seekers are effectively competing for access where there is insufficient capacity to satisfy all of the access application. For example, access seekers seeking access to the last remaining train path on particular rail infrastructure or seeking access to capacity to be created by infrastructure enhancements but where the total capacity sought exceeds that to be provided by the infrastructure enhancements (QR Network, sub. no. 70:59).

This effectively means that a competing application would refer to cases where there is insufficient capacity to satisfy all access applications or where infrastructure enhancements are required to meet access requests.

The Authority supports QR Network's new proposal for competing application as it allows QR Network to prioritise a customer's application over an access application submitted for the same capacity by an operator.

The Authority notes QRC's comments and agrees that not all competing applications will be mutually exclusive (in the way defined by QR Network) and therefore the reference to the term mutually should be deleted from the definition of competing applications. Accordingly, the Authority approves QR Network's amendment to clause 7.3.2 (c) but requires QR Network to amend the definition of a competition application to delete reference to the term 'mutually exclusive access rights'.

Decision 7.8:

The Authority requires QR Network to amend the definition of a competing application in Part 12 as follows:

Competing Application means the Access Applications of two or more Access Seekers that are seeking Access Rights relating to the same traffic task, including for example:

- (a) where two Access Seekers are competing in order to provide Train Services under a rail haulage agreement with the same Customer for the same Train Service; or**
 - (b) where an Access Seeker is seeking Access Rights in order to provide Train Service/s under a rail haulage agreement with a Customer and that Customer is also an Access Seeker for the same Train Service.**
-

7.8 Customer initiated transfers

The 2008 access undertaking provides for an access holder to transfer all or part of its access rights to an access seeker. This arrangement is subject to the restriction that transfers do not financially disadvantage QR Network.

QR Network's 2010 Proposal

In its 2010 DAU, QR Network proposed to amend customer-initiated-transfer provisions to ensure that a customer cannot avoid paying any adjustment charges associated with the transfer capacity access rights; that is, QR Network will only consent to a transfer where the access seeker has agreed to meet the adjustment charges (clause 7.3.7 (b)(iv-v)) (QR Network, sub. no. 70:24).

QR Network has also sought to introduce a new caveat within the customer-initiated-transfer provisions. In general, QR Network will allow an end customer to transfer access rights and to retain the pre-existing obligations in relation to relinquishment fees and take-or-pay obligations. However, this will not be the case where an end customer transfers all or some of the capacity to an access seeker which will be held under the new form of capacity access agreement. QR Network has not provided a reason why this caveat is necessary.

Stakeholders' Comments

The QRC was concerned that QR Network's proposed new caveat would discourage end customers from adopting the new form of capacity agreements, in particular the QRC stated that:

Its members are deeply concerned at QR's proposed new caveat within this clause, being 'unless it is a capacity access agreement'. The effect of this would be to provide a strong disincentive against customers moving to this form of agreement, and largely frustrate the ability of customers to move to the new form of agreement (QRC, sub. no. 82:22).

QRC also said that, for the customer-initiated transfer to be effective, the end customer should be aware of the actual access rights held on its behalf by an operator.

Authority's Analysis and Decision

The Authority notes QRC's concerns that customer-initiated transfers may not be effective in the absence of the appropriate exchange of access information between an access seeker/holder and the end customer as, in most instances, the end customer is not aware of the access rights that are held on its behalf by the operator.

To ensure that a customer is aware of the access rights that are held on its behalf by the operator, the Authority has required the following amendments to the 2010 DAU:

- (a) increased transparency in the queuing mechanism (clause 4.1(g)); and
- (b) requiring an operator to demonstrate, through written approval from the end customer, that it has or will have a contract to haul coal for a customer (referred to as 'entry rights') (clause 4.7 (c)).

QR Network's proposed changes to customer-initiated transfer provisions restrict a customer's ability to transfer access rights if the capacity is held under the new form of capacity access agreement. The Authority believes that such a requirement is unnecessary as other elements in the transfer arrangements already protect QR Network's commercial interests. Further, one of the important considerations behind the development of the new form of access agreements has been increased competition in the above-rail market. QR Network's proposed amendment restricts capacity transfers if capacity is held under the new form of agreement. It thereby acts as a deterrent to the uptake of the new split form of agreements and will potentially have an adverse impact on competition in the above-rail market.

As the capacity transfer arrangements already protect QR Network's interests by ensuring that customers cannot avoid paying adjustment charges, and as QR Network has provided no good reason for this restriction, the Authority in turn sees no good reason to retain the restriction.

Accordingly, the Authority requires QR Network to amend the provisions in relation to customer-initiated transfers so that access holders can transfer capacity to access seekers relying on the new split form of access agreement. To put affect to this, QR Network should remove its proposed caveat 'unless it is a capacity access agreement' from clause 7.3.7 (a)(ii).

However, the Authority accepts QR Network's proposed amendment that requires the new access seeker to pay all its associated adjustment charges (i.e. take-or-pay and relinquishment fee) before the actual transfer can take place.

Consequential Amendment to Price-setting Rules

The Authority notes that QR Network's proposed price-setting rules in schedule F of the 2010 DAU also included references to capacity access agreements. These proposed changes had the effect of excluding capacity access agreements from several aspects of the take-or-pay provisions.

The Authority is concerned that QR Network's proposal means take or pay for capacity access agreements could only be calculated under the 2010 DAU terms, and not under the terms set out in the access agreements from which access holders were transferring their rights.

Consistent with its proposed treatment of capacity access agreements in clause 7.3.7 (a)(ii), the take-or-pay rules in schedule F should be amended so they do not preclude the take-or-pay for capacity access agreements from being calculated in accordance with the terms of the capacity access holder's previous access agreement.

Decision 7.9:

The Authority requires QR Network to amend clause 7.3.7(a)(ii) as follows:

the terms of the Old Access Agreement relating to Take or Pay and Relinquishment Fees will apply to the New Access Agreement ~~(unless it is a Capacity Access Agreement)~~

The Authority also requires QR Network to remove its proposed amendments to Schedule F, Part B clauses 2.2 and 3.2.3(b) which have the effect of requiring Capacity Access Agreements to be subject only to 2010 DAU take-or-pay terms.

7.9 Definition of capacity analysis and available capacity

Background

Capacity analysis is important for determining whether or not available capacity exists. Capacity analysis assists access seekers with their forward planning, particularly in relation to an access seeker's business initiatives and the acquisition of rolling stock, thereby expediting the negotiation process.

QR Network amended the definition of capacity analysis in its 2009 DAU to include:

- (a) infrastructure enhancements required to provide additional capacity to accommodate the requested access rights; and
- (b) sufficient available capacity.

In an earlier principles paper, QR Network had proposed that available capacity include capacity that would be provided through planned infrastructure enhancements. However, this was not included in the drafting of the 2009 DAU where the term “available capacity” was defined as:

Capacity that is not Committed Capacity and includes Capacity that will cease being Committed Capacity prior to the time in respect of which Capacity is being assessed (QR Network, sub. no. 27:124).

After considering stakeholders comments and QR Network’s 2009 submission, the Authority in its 2009 December draft decision, required QR Network to amend the definition of available capacity to explicitly include capacity that is likely to become available from infrastructure enhancements.

QR Network’s 2010 Proposal

In response to the Authority’s 2009 draft decision, QR Network said it accepted the Authority’s proposed definition of available capacity with minor amendments, namely that:

Available Capacity means Capacity excluding all Committed Capacity except Committed Capacity that will cease being Committed Capacity prior to the time in respect of which that Capacity is being assessed (QR Network, sub. no. 67:114).

QR Network also sought to define Capacity as the aggregate of all existing and all planned capacity, where:

- (a) *existing capacity* – is defined as the existing capability of rail infrastructure (in the absence of any infrastructure enhancement) to accommodate train services; and
- (b) *planned capacity* – is defined as an increase in existing capacity that is expected to result from infrastructure enhancements that QR Network is committed to construct (QR Network, sub. no. 67:115).

Stakeholders’ Comments

In response to QR Network’s 2010 DAU, QRC noted that the definition of available capacity as proposed by QR Network is limited as it includes only existing capacity and capacity that QR Network is committed to construct (planned capacity). Therefore, the 2010 DAU definition of the term available capacity is narrower than the one proposed by the Authority in its December 2009 draft decision. This means that capacity that is conditionally offered under IAPs would relate to infrastructure enhancements to which QR Network is not currently committed and is therefore not available capacity. In this context QRC also raised some concerns on some of the negotiation provisions in part 4 of the undertaking (QRC, sub. no. 82:17).

Authority’s Analysis and Decision

The Authority has reviewed the QRC’s concerns in relation to the definition of available capacity but does not accept that it needs to be amended.

The Authority accepts the QRC’s concerns that, given the current demand for capacity, there is unlikely to be any available capacity (as defined by QR Network) for new access seekers as:

- (a) the capacity of the existing network is likely to be contracted to existing access holders; and
- (b) planned capacity is also likely to be under contract as QR Network generally only commits to expand capacity if it has contractual commitments from access seekers.

However, in the event that there is no available capacity, part 4 of the 2010 DAU requires QR Network to issue an indicative access proposal based on a capacity analysis of what additional infrastructure enhancements need to be undertaken in order to meet the access seeker's capacity requirements.

The Authority notes the concerns raised by the QRC are reasonable as some of the provisions relating to the negotiation framework would be difficult to implement in the absence of some amendments to part 4 of the 2010 DAU.

Therefore, the Authority requires QR Network to make the following amendments to clauses 4.5.1 and 4.7.

Decision 7.10:

The Authority requires that QR Network revise elements of the negotiation framework to make it consistent with the revised definition of Available Capacity. In particular, the Authority requires QR Network to make the following amendments to Clauses 4.5.1(e) and (f) and 4.7(b):

4.5.1 ...

- (e) An Access Seeker's Negotiation Period ceases on:**
- (i) the execution of an Access Agreement in respect of the Access sought by the Access Seeker;**
 - (ii) QR Network receiving written notification by the Access Seeker that it no longer wishes to proceed with its Access Application;**
 - (iii) QR Network issuing a Negotiation Cessation Notice to the Access Seeker pursuant to Clause 4.6(a);**
 - (iv) the expiration of nine (9) months from the commencement of the Negotiation Period unless:**
 - (A) both parties agree to extend the Negotiation Period, in which case the Negotiation Period will continue until the expiration of the agreed extended period, provided that agreement to extend the Negotiation Period is not unreasonably withheld by either party; or**
 - (B) a Dispute arises between the parties that either party has sought to resolve in accordance with Clause 10.1, in which case the Negotiation Period will continue until the resolution of the Dispute and for any further time agreed by the parties or determined during the Dispute resolution process; or**
 - (v) ~~the Available Capacity being reduced (for example, due to another Access Seeker finalising an Access Agreement), such that QR Network is no longer being able to offer Access to the Access Seeker under the terms of the Indicative Access Proposal either because of:~~**
 - (A) Available Capacity being reduced; or**
-

(B) Infrastructure Enhancements subsequently committed to by QR Network adversely impacting QR Network's ability to develop Infrastructure Enhancements contemplated in the Indicative Access Proposal,

except to the extent that:

(C) Clause 4.5.1(f) applies; and

(D) the Access Seeker has indicated that it is willing to continue negotiations on the basis of the revised Indicative Access Proposal prepared in accordance with Clause 4.5.1(f).

(f) If:

(i) ~~the Available Capacity has been reduced (for example, due to another Access Seeker finalising an Access Agreement) such that QR Network canis~~ no longer able to offer all of the Access to sought by an Access Seeker under the terms of the relevant Indicative Access Proposal because of either a reduction in Available Capacity or Infrastructure Enhancements subsequently committed to by QR Network adversely impacting QR Network's ability to develop Infrastructure Enhancements contemplated in the Indicative Access Proposal; and

(ii) either the remaining Available Capacity can satisfy part of the Access Rights sought by the Access Seeker or the contemplated Infrastructure Enhancements can be altered to provide all or part of the Access Rights sought,

QR Network will notify the Access Seeker of that event and the portion of the Access Rights being sought which can be provided; ~~remaining Available Capacity~~ and:

(iii) if requested by the Access Seeker within 2 weeks after the Access Seeker is given such a notice, prepare and issue to the Access Seeker a revised Indicative Access Proposal in accordance with Clause 4.3 in relation to that portion of the Access Rights that can be provided ~~the remaining Available Capacity;~~ and

(iv) if, within 2 weeks after being given the revised Indicative Access Proposal, the Access Seeker notifies QR Network that it intends to continue to negotiate for Access Rights in accordance with this Undertaking on the basis of the revised Indicative Access Proposal, the negotiation process outlined in this Part 4 will recommence from that point (but without affecting the Access Seeker's position in any queue established by QR Network in accordance with Clause 7.3.4).

...

4.7

(d) If there is Available Capacity or proposed Infrastructure Enhancements which, if

committed to by QR Network, would create Available Capacity, then QR Network will notify each person indicated in the Capacity Notification Register as being interested in seeking Access Rights applicable to such existing or potential Available Capacity (as applicable), of the nature and extent of that existing or potential Available Capacity.

8. INTERFACE CONSIDERATIONS

Part 8 of QR Network's 2010 DAU establishes interface standard and key non-price parameters such as safety, technical, operational and environmental standards within which QR Network will allow third-party operators to access QR Network's below-rail services.

The 2010 DAU includes the majority of the matters identified in the Authority's December 2009 draft decision. The 2010 DAU also includes some new matters including allowing access holders and seekers to construct the infrastructure that connects private rail infrastructure to QR Network's rail infrastructure. This is in line with QR Network's proposal to allow access holders and seekers to build (and own) extensions.

QR Network has also proposed a number of amendments to schedule H – The Environmental Risk Management Plan.

The Authority has approved some changes proposed by QR Network. However, it considers that amendments are required to: remove unsupported changes to schedule H clarify the process for connecting private infrastructure to QR Network's rail infrastructure, and set out a process for the development of a standard rail connection agreement.

8.1 Introduction

Part 8 of QR Network's 2010 DAU includes reference to Interface Risk Management Plans (IRMP) that are designed to protect QR Network's operations and infrastructure from harm by ensuring all train operators comply with a minimum acceptable standard. In its December 2009 draft decision, the Authority proposed that QR Network amend its 2009 DAU to reflect any consequential amendments that may arise from the new form of standard access agreements. With regard to the IRMP, the Authority considered that the consequential amendments should include an amendment to the responsibilities of access seekers/holders and train operator.

In response to the Authority's draft decision, QR Network argued that the alternate form of agreement had yet to be settled and amending the undertaking now may have the effect of preempting the content of the new form of agreement. QR Network committed to include consequential changes to part 8 of the undertaking as part of the DAAU process that seeks the Authority's approval for the alternate form of agreement (QR Network, Sub. no. 56: 75). The Authority accepts QR Network's proposed approach.

Part 8 also includes reference to a number of schedules that set out the framework for managing interface risks. In its December 2009 draft decision, the Authority required QR Network to:

- (a) publish a sample IRMP on its website; and
- (b) correctly align all references to the operating plan.

QR Network incorporated both of these requirements into the 2010 DAU.

This decision does not discuss these aspects of the 2010 DAU further as they are consistent with the Authority's December 2009 draft decision and stakeholders have not commented on them in either their February 2010 or May 2010 submissions.

QR Network has, however, proposed additional amendments to other aspects of part 8 namely:

- (a) including additional environmental issues that must be addressed by an access holder or seeker in the Environmental Investigation and Risk Management Report (EIRMR); and

- (b) adding a clause to allow access seekers or holders to construct the infrastructure that connects QR Network's existing rail infrastructure to privately owned infrastructure.

Stakeholders have also proposed amendments to the access undertaking's arrangements relating to the ability of industry to own and connect private infrastructure to QR Network's rail infrastructure. These proposed amendments are discussed further below.

8.2 Amendments to Schedule H

As part of the negotiation process, or as set out in an access agreement, the access holder or seeker will commission a suitable person to perform an EIRMR that is meant to identify:

- (a) the possible risk of environmental harm that may arise from using the below-rail network; and
- (b) the manner in which the access seeker or holder proposes to address the potential risks of environmental harm, as well as the roles and responsibilities for the access seeker and QR Network (including financial responsibilities) for the control measures proposed.

Schedule H contains a minimum list of environmental issues to be addressed in an EIRMR including:

- (a) water quality management;
- (b) air pollution management;
- (c) contaminated land management;
- (d) nature conservation;
- (e) management of hazardous substances and dangerous goods;
- (f) waste management;
- (g) environmental noise management;
- (h) environmental monitoring; and
- (i) education, awareness and training and complaint handling (QR Network, sub. no. 65: 237-240).

QR Network's 2010 DAU

QR Network has proposed to amend each of the environmental issues in schedule H, with the exception of contaminated land management, management of hazardous substances and dangerous goods and waste management. QR Network did not explain why the amendments were necessary.

Stakeholders' Comments

QR National Coal was concerned about a number of the proposed schedule H amendments, namely that:

- (a) it cannot have obligations placed upon it in relation to coal-dust management that are outside of its control;

- (b) the obligation of identifying the presence of endangered, rare, vulnerable or threatened species within 100 meters of the proposed operational route must sit with QR Network as the owner and manager of the railway corridor;
- (c) the railway infrastructure manager should be responsible for addressing noise impacts of operations on the railway corridor for which it is the owner, manager and controller;
- (d) amendments to environmental monitoring to include baseline monitoring puts undue risk on access seekers;
- (e) amendments to the methodology for cleaning up contamination from incidents involving the rail infrastructure are not comprehensive; and
- (f) since railway transport operators have their own complaint management processes, amendments to this clause are not appropriate (QR National Coal, sub. no. 71:6-7).

Asciano agreed with QR National Coal, and believes that the requirement to identify the presence of endangered wildlife near the relevant infrastructure is the responsibility of the infrastructure provider. Otherwise, multiple operators would be required to perform a task that could be undertaken by the infrastructure provider in a more consistent fashion and at the lowest cost (Asciano, sub. no. 78:26).

Asciano also agreed with QR National Coal regarding the proposed amendment to noise management. Similar to its argument with respect to the identification of endangered wildlife, Asciano submitted that the assessment of noise levels should be undertaken by the infrastructure provider as it can be done at the lowest cost and more consistently undertaken than if it was done by multiple operators (Asciano, sub. no. 78:27).

Authority's Analysis and Decision

QR Network's accompanying submission did not provide a discussion or formal justification for the proposed amendments. However, QR Network informally advised the Authority that it considered the changes were minor variations to the EIRMR relating to non-material policy changes that had arisen since the Authority approved the 2008 access undertaking.

Without the benefit of a thorough justification for the amendments, and allowing for concerns raised by QR National Coal and Asciano, it is difficult for the Authority to determine whether the amendments are required and whether or not they are the result of non-material policy changes. Accordingly, the Authority requires QR Network to remove all amendments in Schedule H of its 2010 DAU (other than necessary amendments to Department names and website references). If they are non-material as advised by QR Network, their removal should not be a matter of significant concern. The Authority would, of course, consider amendments to this schedule at a later date provided QR Network has given sufficient justification for the changes.

Decision 8.1:

QR Network will remove all proposed amendments in Schedule H (other than necessary amendments to Department names and website references).

8.3 Connecting Infrastructure

The 2008 undertaking defines connecting infrastructure as infrastructure that is required to connect QR Network's rail infrastructure to private infrastructure; where private infrastructure was defined as all infrastructure for which QR Network is not the railway manager.

QR Network reserved the right to design, project manage, construct, commission, maintain, upgrade and manage connecting infrastructure if:

- (a) QR Network constructs the connecting infrastructure to a reasonable standard;
- (b) access seekers or holders are given a reasonable period of time to comment on design and construction matters; and
- (c) access seekers or holders may provide comments on any matters that would result in unreasonable costs or delays.

Under this framework, the access seeker or holder is required to meet QR Network's reasonable costs. If parties disagree on any aspect, then remedy can be sought through the dispute resolution regime (Clause 10.1).

QR Network's 2010 DAU

The 2010 DAU maintains the same definitions of connecting infrastructure and private infrastructure as in the 2008 access undertaking.

However, QR Network has amended this section to allow access seekers or holders to construct connecting infrastructure in line with proposed changes to the treatment of privately owned rail infrastructure, namely extensions. With the proposed changes, QR Network must do all things reasonably necessary to ensure that the connecting infrastructure is physically connected to QR Network's rail infrastructure, if:

- (a) the connecting infrastructure meets QR Network's technical specifications;
- (b) the connecting infrastructure has been constructed to a reasonable standard; and
- (c) the access seeker or holder has agreed to pay or reimburse QR Network's reasonable costs and expenses in connection with the connecting infrastructure (QR Network, sub. no. 68: 86).

QR Network must also facilitate the movement of trains between the connecting infrastructure, and QR Network's rail infrastructure.

Where an access seeker (or holder) and QR Network cannot agree on whether the connecting infrastructure meets the relevant technical specifications or whether the infrastructure has been built to a reasonable standard bearing in mind the nature of the traffic and the current or planned service standards for QR Network's rail infrastructure, either party may seek to resolve the issue through dispute resolution (QR Network sub. no. 68:86).

Stakeholders' Comments

Asciano indicated it had several concerns with QR Network's proposed drafting.

First, the amendments require an access seeker or holder to pay QR Network's reasonable cost of connection, yet QR Network's costs may be neither transparent nor efficient. Asciano noted that, ideally, both parties should pay for their respective costs of connection but, failing this, QR

Network's connection costs should be on an 'open book' basis with the access seeker or holder paying these costs. Asciano also noted that these costs should be auditable.

Second, as some of QR Network's connection costs could be on-going costs, the payment of connection costs should be limited to the initial capital cost of the connection and that any on-going connection costs should be included in the broader cost base for reference tariffs (Asciano, sub. no. 78:16).

Third, Asciano indicated that clause 8.3(e) allows an access seeker or holder to seek to resolve disputes relating to specifications and construction standards by using the dispute-resolution provisions. Asciano believes that this clause should be considered redundant as all access seekers and holders should be able to use the dispute-resolution provision for all disputes. Asciano is concerned that, if the intent of this drafting is to limit the scope of dispute-resolution in relation to infrastructure connection, then broader issues in relation to the regime being effective may arise. Asciano also said that:

...it should be noted that the Competition Principles Agreement, clause 6.4 g) requires that a state access regime should incorporate an independent dispute resolution process. Asciano is concerned that the 2010 DAU may not be allowing such a dispute resolution process to apply to all sections of the 2010 DAU (Asciano, sub. no. 78:16-17).

Xstrata noted that, to facilitate the connection of private rail infrastructure to its rail infrastructure, QR Network should, *inter alia*, be obliged to:

..provide access to QR Network's train control management system to enable the blending of services in the day of operations environment. Such access must be provided on efficient terms with a dispute resolution process (Xstrata, sub. no. 77:13).

Authority's Analysis and Decision

The Authority notes Asciano's comments regarding the costs of connection.

In line with QR Network's proposal to allow access seekers and holders to build an 'extension' to the network, QR Network has amended its undertaking to require it to physically connect connecting infrastructure constructed by another party. However, QR Network will only be required to do this if the access holder or seeker agrees to pay, or reimburse, QR Network (on demand, or from time to time), all the reasonable costs and expenses incurred by QR Network in relation to the connecting infrastructure.

Based on the drafting of the 2010 DAU, it is not clear what is included within the scope of the "reasonable costs and expenses". For instance, under QR Network's proposed clause 8.3(d), it appears that QR Network waives its rights to design, project manage, construct, commission, maintain, upgrade and in any other way, manage the connecting infrastructure. Yet QR Network will be obliged to:

- (a) ensure the connecting infrastructure is connected to the rail infrastructure; and
- (b) facilitate the movement of trains between the connecting infrastructure and rail infrastructure.

The Authority would expect that the costs of connection (for QR Network) would include an initial cost associated with the connection of the private infrastructure to the system and an on-going cost that would reflect operations and maintenance of the connection.

The Authority considers that clause 8.3 should be amended to clearly identify that there will be an initial upfront cost of connection payable by the access seeker or holder. In addition, to the extent there are 'on-going' costs associated with operating and maintaining the connection

assets, these costs should be treated in the same manner as operating and maintenance costs for all other assets included within the regulated rate base. Thus, the operating and maintenance costs associated with connection infrastructure will be included within the cost base for reference tariffs as suggested by Asciano.

The Authority has also amended clause 8.3(c) to ensure that connecting infrastructure is designed and built to meet existing standards. The Authority has therefore deleted references to planned standards as this creates too much uncertainty as to what standards are most appropriate.

The Authority has also amended the definition of Rail Infrastructure so that it is consistent with the changes to the declaration of the CQCR. Previously, the declaration was drafted in terms of rail transport infrastructure managed by QR. However, the declaration is now drafted by reference to the assets used to provide the declared service as opposed to the owner or manager of the declared service (or a related party). Accordingly, the definition of Rail Infrastructure is now drafted by reference to the relevant provision of the QCA Act.

The Authority agrees with Asciano that the clause relating to the access seeker or holder seeking to resolve disputes relating to specifications and construction standards is redundant. QR Network's drafting seems to imply that dispute resolution does not apply to:

- (a) the payment or reimbursement of QR Network's costs incurred in facilitating the interconnection of its infrastructure with the infrastructure built by users; and
- (b) whether QR Network has done all things reasonably necessary to ensure a physical connection in a timely manner.

It is the Authority's view that the dispute-resolution process is available for all disputes within the undertaking. The undertaking should not limit the scope of dispute resolution.

The Authority notes Xstrata's submission regarding access to QR Network's train control management system to enable the blending of services in the day of operations environment as well as its suggested amendments to clause 8.3. The Authority believes that Xstrata's proposed drafting:

- (a) provides more certainty to parties investing in private infrastructure without imposing additional burden on QR Network;
- (b) clarifies that there is an automatic right to connect private infrastructure, provided specific pre-requisites are met;
- (c) provides for the owner of private infrastructure to require QR Network to offer train control and planning services for the private infrastructure on an integrated basis with QR Network's network; and
- (d) addresses Asciano's concerns regarding the scope of access disputes.

It is for these reasons the Authority requires QR Network to delete clauses 8.3(d) and (e). QR Network will also be required to insert new clauses 8.3(a) and 8.3 (b) as drafted in appendix 8.

Decision 8.2:

QR Network will be required to delete clauses 8.3(d) and 8.3(e).

QR Network will be required to amend clause 8.3 to reflect new clauses 8.3(a) and 8.3(b) as drafted in Appendix 8.

QR Network will be required to amend the definitions of Rail Infrastructure and Declared Service in Clause 12.1 of the 2010 DAU, as drafted in Appendix 12.

8.4 Rail Connection Agreement

The current undertaking defines a rail connection agreement to be:

...an agreement by which QR Network agrees to the connection of the Rail Infrastructure to Private Infrastructure (QR Network, sub. no. 67:130).

In QR Network's 2010 DAU, QR Network has offered to make an indicative rail connection agreement available so that access seekers can better assess the commercial aspects of developing privately owned extensions (QR Network, sub. no. 70: 33).

Stakeholders' Comments

In its submission, Anglo American proposed the development and Authority approval of a standard rail connection agreement in order to ensure that QR Network does not undermine the ability of users to connect private infrastructure to QR Network's existing rail infrastructure. Anglo American said that such an agreement would provide greater certainty for users that wish to invest in their own infrastructure (Anglo American, sub. no. 83:7).

Xstrata identified a number of greenfield projects that will need to connect directly to the rail network. Xstrata said that the undertaking should facilitate connection by obliging QR Network to:

- (a) take all reasonable steps to facilitate the connection of third-party railway infrastructure with the rail network within a reasonable time frame;
- (b) not discriminate in any dealings with a third-party railway infrastructure provider wanting to connect to the rail network (compared to its dealings with itself regarding the expansion of the rail infrastructure); and
- (c) provide for QR Network to be nominated as the "Railway Manager of Last Resort" to recognise the provision of such a service must be provided on efficient terms and conditions with a dispute resolution process.

Xstrata has proposed that some of these issues could be resolved by an Expansion Protocol Deed.

Similarly, the QRC argued that, in order for industry to have a genuine ability to construct, and possibly own rail infrastructure that interconnects with the existing rail network, there must be a process in place that addresses QR Network's ability to frustrate the process. The QRC said that the following non-contestable services should be included in the access undertaking to enable a truly level playing field for the interconnection of rail infrastructure to the existing network:

- (a) access to information – including access to all network standards, current versions of drawings and any other relevant information in relation to the existing network;
- (b) participation in engineering strategies – including, inter alia, maintenance-regime processes and strategies, performance strategies and measures, network integration and coordination services, and identification of issues related to coordination with other rail infrastructure projects;
- (c) railway operations – including agreement on appropriateness of system assumptions for proposed train service specifications, administration and coordination of possessions, agreements for utilisation of existing operational land and possible rail infrastructure assets, and compliance checking of statutory and regulatory obligations; and
- (d) safety services that are non-contestable and are associated with protecting the integrity and safety of the coal network (QRC, sub. no. 82:23-24).

Authority's Analysis and Decision

The Authority considers that, in light of QR Network's proposed allowance of customer owned extensions to the system, it would be prudent to encourage further consultation on the structure and content of a standard rail connection agreement. The Authority believes that, given industry's comments regarding the increased likelihood of the take-up of rail connection agreements, it would not be sufficient at this time for QR Network to simply provide an indicative agreement upon request.

The Authority endorses Anglo American's view that a standard rail connection agreement should be developed.

It is the Authority's view that, as a first step, consultation should take place regarding the principles to be included within the standard rail connection agreement. The list of non-contestable services submitted by the QRC should be considered for inclusion in a standard rail connection agreement. It is the Authority's view that the result of such a discussion would be a list and description of principles that would form the basis of a rail connection agreement, similar in form to schedule E which outlines the principles underlying standard access agreements.

Given the set of principles, QR Network should be required to draft a standard rail connection agreement and that that agreement be submitted to the Authority for approval. If the Authority does not agree with QR Network's proposed agreement, the Authority will have the ability to prepare a standard rail connection agreement.

The development of the standard rail connection agreement will follow a similar process to that contemplated by the Authority for the development of the new form standard access agreements as outlined in 5.6. Future rail connection agreements would then have to be consistent with any such standard rail connection agreement, except to the extent otherwise agreed by QR Network and the relevant Private Infrastructure owner.

Decision 8.3:

QR Network is required to insert a new clause 8.4 reflecting the drafting in Appendix 8 and insert the related definitions in Part 12 of the 2010 DAU as worded in Appendix 12.

9. REPORTING, INFORMATION PROVISION AND COMPLIANCE

Part 9 of QR Network's 2010 DAU obliges QR Network to report on its performance and compliance with the undertaking in a timely manner. This allows the Authority to periodically review QR Network's performance and provides interested parties with information on QR Network's operations, performance and compliance with the undertaking.

In its 2010 DAU, QR Network proposed changes that incorporate many of the comments made by stakeholders and the Authority in its December 2009 draft decision. For example, QR Network expanded the level of information it will publish, including in relation to its key performance indicators (in the quarterly report) and the scope of the maintenance activities undertaken each year (in the maintenance cost report) and amended its DAU so that it will provide responsibility statements with its regulatory reports and information to demonstrate its commitment to treat all parties (both QR and non-QR) fairly.

The Authority is satisfied that QR Network's proposal will improve the level of performance reporting. However, the Authority requires some amendments to elements of the public and regulatory reporting arrangements to further improve the transparency and usefulness of the reports.

9.1 Public Reporting

Public reporting is important in ensuring the transparency and accountability of QR Network's operations, and underpins the integrity of the access regime.

Part 9 of the undertaking requires QR Network to publicly report on a quarterly and annual basis. The quarterly report provides information on key performance indicators that reflect how efficiently QR Network manages its below-rail network. The annual report provides information on QR Network's financial position and performance.

Part 9 of the undertaking also requires annual auditing of elements of QR Network's reporting requirements, including the quarterly and the annual performance report. These matters are not discussed below, but are discussed together with other audit requirements and arrangements in the undertaking in chapter 3.

Quarterly Report

Background

In its 2009 DAU, QR Network proposed to retain many of the 2008 undertaking's principle performance measures, including reporting on the reliability of train services, transit times, availability of network services and the percentage of track under speed restrictions. At the same time, QR Network proposed to:

- (a) *change the way it measured train reliability* – by reporting 'on-time' and 'not on-time' measures to describe whether or not a train arrives at its destination within a certain threshold (previously 'healthy' and 'unhealthy' measures were used). QR Network considered this a simpler arrangement that better reflected its own internal reporting arrangements;
- (b) *report additional performance variables* – including information on actual volumes railed on the network over the subject quarter, the track quality index and the below-rail transit time average (BRTT). The BRTT measures the time taken by a train service to complete a given journey, inclusive of any delays caused by QR Network;

- (c) *provide more detailed information on existing indicators* – including providing quarterly information for coal train services by individual coal systems in the CQCR (previously coal and mineral train services were combined on an aggregate CQCR basis); and
- (d) *remove some indicators from the quarterly report* – including the information on billing performance and complaints, which QR Network proposed to include as part of the annual performance report instead.

Stakeholders raised some concerns in relation to the transparency of the BRTT calculation and the methodology used to calculate it (QR Freight), whether or not supply chain performance indicators should be included in performance reporting (QR Freight) and whether the on-time thresholds for passenger and general freight trains were unduly broad and should be revised (Asciano).

In its December 2009 draft decision, the Authority considered that, overall, the proposed public reporting requirements in the 2009 DAU were more informative than the arrangements under the 2008 undertaking and, in particular, that reporting performance on an individual coal systems basis would improve transparency and improve stakeholders' ability to identify performance issues facing each system. The Authority also considered that it was appropriate to simplify the old train reliability indicators, which were complemented by reporting the average delay per 100 kilometres that is disaggregated by the cause of the delay.

The Authority accepted stakeholders' arguments in relation to the BRTT and required QR Network to publish the BRTT and the methodology used to derive it.

The Authority did not require QR Network to amend the 2009 DAU to include supply-chain indicators or to lower the on-time thresholds for passenger and freight train services. The Authority believed at that time that it was too early to incorporate whole-of-coal-chain performance indicators into QR Network's reporting arrangements but agreed that it would be necessary once arrangements are finalised by the DBCT long-term-solution (LTS) working group. The Authority was also not convinced by Asciano's arguments to lower the on-time thresholds, but noted it was willing to revisit the issue if relevant supporting evidence was presented.

In response to the Authority's December 2009 draft decision, Asciano proposed that the existing information in the quarterly reports be disaggregated by above-rail operator and by geographic area (track performance). This would enable discrimination against an above-rail competitor to be detected. For example, at the moment, the reports are in aggregate so discrimination against an above-rail competitor, through poor train control decision or network under-investment or under-maintenance, cannot be detected.

Asciano accepted that this information should not be published (i.e. publicly available) but could be provided directly to the Authority and the relevant individual operators (Asciano, sub no. 49: 15).

QR Network's 2010 DAU

In its 2010 DAU, QR Network has sought to address the Authority's and stakeholders' concerns by providing for:

- (a) information on the methodology and derivation of the BRTT within each coal system to be set out in the quarterly report; and
- (b) a supplementary quarterly report to be prepared that presents the information included in the public report by each train operator. This report will be provided to the Authority and individual reports to the train operator.

QR Network also included additional indicators that, while not raised previously in submissions, had since been requested by stakeholders, including the aggregate train paths used and the aggregate train paths contracted within each coal system. QR Network considered this would allow stakeholders to determine the proportion of contracted train paths that are actually being met.

QR Network believed its proposal to report performance indicators by coal system 'already meets stakeholder demand for reporting to be segmented by geographic location' and that it believes 'any further disaggregation to report by specific train section would be an excessively onerous obligation that may not necessarily achieve its intended objective'. On this, QR Network noted that there could be valid reasons why a specific track section would have differing performance to other parts of the network (QR Network, sub no. 70: 27-28).

Asciano welcomed QR Network's adoption of operator-specific performance reports, but remained concerned that QR Network rejected its proposal on geographically disaggregated reports.

Asciano considered that it would be appropriate if, rather than requiring QR Network to provide geographically disaggregated information throughout the year, that QR Network be required to produce this 'if requested by the Authority as a result of a reasonable complaint' (Asciano, sub no.78: 9). This approach was also supported by the QRC, in particular if certain sections of the network were considered to be at risk or appeared to be underperforming for no apparent reason (QRC sub no.82: 26).

In addition, Asciano and the QRC proposed that a number of key performance indicators be added or re-instated, including information for each system on:

- (a) *train reliability* – re-inserting the measure in relation to trains that do not reach their destination on time, that reports what proportion of the not on-time trains were delayed due to above-rail operators;
- (b) *track quality* – reporting on the percentage of each system subject to temporary and permanent speed restrictions (by mainline and branchline), the impact of speed restrictions on sectional running times and the total number of train services affected by speed restrictions;
- (c) *track availability* – including measures that report the contracted, scheduled and used train paths and the paths used for planned and unplanned maintenance; and
- (d) *train cancellations* – reporting on the number and percentage of train services scheduled that are cancelled due to an access holder (which would include cancellations attributable to its nominated railway operator), mine or QR Network.

Of these, the QRC indicated that the track availability indicators would be the most beneficial for network users.

The Authority has considered QR Network's proposal, taking into account the comments made by stakeholders. The Authority notes that QR Network has amended its 2010 DAU to take into account many stakeholder concerns and comments and the Authority's proposed arrangements as set out in its December 2009 draft decision, including reporting on the methodology and derivation of the BRTT, committing to provide operators with separate reports specific to their own performance, providing information on the amount of contracted and scheduled train paths in each coal system and reporting on the number of train services cancelled due to an access holder (or its nominated train operator).

However, the Authority also considers that there is merit in stakeholders' suggestions to further improve the transparency and usefulness of the quarterly report, in particular, the measures around track availability and train reliability.

The Authority accepts stakeholders' proposal that additional information on train paths and track availability be included in the quarterly report. This information will indicate how closely QR Network is meeting its contracted train path commitments and how a particular system is performing in terms of delivering capacity.

Accordingly, the Authority requires QR Network to report, for each coal system, on the aggregate number of train paths available to coal-carrying train services – that is, the amount of train paths practically available for coal-carrying train services once the theoretical capacity of a system is reduced for known factors including the operating paradigm, the traffic utilising the system and the planned maintenance activities. This, along with the contracted train paths and the used train paths, will provide a more robust measure of each system's performance in relation to its practical capacity.

The Authority notes that stakeholders also requested that a range of other performance measures in relation to track availability be incorporated into the quarterly report, among which include:

- (a) the aggregate number of train paths scheduled (of the total number of available train paths);
- (b) the aggregate number of paths put aside for planned and unplanned maintenance activities; and
- (c) the percentage of available paths not used.

These indicators will provide further information to stakeholders on system performance, particularly in relation to track availability – where stakeholders will be able to use a suite of measures to gain an overall understanding of how close a system is operating relative to its practical capacity and the factors affecting this.

Accordingly, the Authority requires QR Network to include indicators on the above-mentioned items – in a format to be agreed with the Authority.

With regard to train reliability, the Authority requires QR Network to disaggregate the train reliability indicator so that, if a train service does not reach its destination on time, QR Network must report whether it was not on-time due to a QR Network cause or an access-holder cause or whether it was not attributable to either. This is not a new measure, but rather is a requirement of the 2008 undertaking that can be re-inserted to provide useful information on train reliability and the reasons for train services not reaching their destination on-time (and is something which QR Network is required to track under the Standard Access Agreements in any case).

The Authority agrees with QR Network that it would be too onerous to require QR Network to report on particular geographic sections of the network on a regular basis. However, the Authority considers it reasonable to require that such information be provided in the event that it had received a complaint in relation to a particular section of track from an access holder, i.e. in relation to the performance or QR Network's treatment of an access holder on a particular section of track.

In chapter 2, the Authority discussed its views on the importance of strengthening the non-discriminatory provisions in the 2010 DAU (consistent with the proposed legislative amendments in to the QCA Act). The Authority considers that having the ability to review QR Network's management of certain parts of the below-rail network is one way for it to monitor

and assess QR Network's behaviour in relation to this. However, the Authority does not consider that this requires special provisions in the access undertaking. As it stands, clause 9.5 of the 2010 DAU provides the Authority with the right to require QR Network to provide it with information it reasonably requires for the purpose of performing its obligations in accordance with the undertaking or an access agreement developed pursuant to the undertaking.

Accordingly, the Authority considers it reasonable to use these provisions to gain particular performance information on a specific line section if it believed it reasonable to do so, including subsequent to it receiving a complaint from an access holder.

Because a range of new indicators is being incorporated into the quarterly report, the Authority considers it appropriate for some flexibility to be included in the reporting arrangements to provide for the revision of these indicators if necessary throughout the regulatory period. This is consistent with the arrangements for other reports QR Network is required to produce (e.g. the public maintenance cost report). Consequently, the 2010 DAU will provide for the format of the quarterly report, including the indicators, to be agreed with the Authority from time to time.

Decision 9.1:

The Authority accepts QR Network proposed amendments to:

- (a) include new performance indicators in the quarterly report relating to number of train paths used and contracted during the subject quarter; and**
- (b) provide a supplementary quarterly report to train operators that details QR Network's performance as it relates to them.**

However, the Authority also requires QR Network to amend the quarterly reporting arrangement in the 2010 DAU (in line with the drafting provided in Appendix 9) to:

- (a) include performance indicators relating to track availability that measure, for each coal system, the:**
 - (i) aggregate number of train paths available for coal-carrying train services;**
 - (ii) aggregate number of coal train paths scheduled;**
 - (iii) aggregate number of train paths used for planned maintenance;**
 - (iv) aggregate number of train paths used for unplanned maintenance; and**
 - (v) percentage of train paths available but not used;**
 - (b) disaggregate the cause for train services that do not reach their destination on-time to: a QR Network cause, an access holder cause or an unallocated cause; and**
 - (c) include a provision for the format of the quarterly report, including the indicators, to be approved by the Authority from time to time.**
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Annual Reports

Background

In its 2009 DAU, QR Network retained many of the 2008 undertaking annual reporting arrangements that required it to produce public reports on its financial performance, regulatory asset base, maintenance expenditure and compliance with obligations in the undertaking (e.g. in relation to access requests and complaints).

In particular, QR Network proposed:

- (a) *no change to its maintenance cost reporting arrangements* – where it reports actual and forecast maintenance expenditure at an aggregate level for each system (including a commentary explaining any significant variations); and
- (b) *changes to its performance report, to:*
 - (i) remove indicators relating to the average delay in providing access seekers with preliminary information, as this information is now available on its website and so it should no longer be required to provide it;
 - (ii) include indicators relating to billing performance and complaints from an access holder, which were previously reported in the quarterly reports.

In response to suggestions by the QRC, the Authority's December 2009 draft decision required QR Network to report not on maintenance costs but on the quantum of the works undertaken. The QRC had been concerned about the relationship between network condition and the under-achievement of contracted volumes and believed that a revised indicator would provide interested parties with a better understanding of the state of the network and what factors may have been at play.

QR Network's 2010 DAU

QR Network's 2010 DAU closely reflected its proposed arrangements in the 2009 DAU, including its obligations in relation to the financial report and the information contained in the performance and regulatory asset base roll-forward reports.

However, QR Network did make amendments to expand the level of information published in the maintenance cost report and to provide access holder specific performance information (to the Authority).

With regard to the maintenance cost report, QR Network maintained its obligation to report on costs and, in addition, proposed that the same level of information be provided in relation to maintenance activities (or scope) – that is, that it report on the actual maintenance scope compared with the forecast included for the purpose of determining reference tariffs and provide an explanation for any significant variation between the two.

QR Network proposed to report maintenance scope information separately for each coal system (and will report the cost information on the same basis).

Similar to its additions to the quarterly reporting arrangements, QR Network has proposed to provide additional information on its annual performance measures to demonstrate its commitment to treat all parties (QR and non-QR) fairly. The information in the annual reports relates to negotiations with access seekers for access, and includes the timeframes taken by QR Network to provide the necessary information.

In this regard, QR Network proposed that information in the performance report be disaggregated into two classes of access holders/seekers – i.e. access holders/seekers that are QR parties and access holders/seekers who are third parties, and that this information be provided to the Authority, but not made public.

The QRC suggested that further information on ballast maintenance be provided in the public maintenance cost report to address related concerns about the condition of the network and for monitoring purposes. In particular, the QRC said that QR Network should report information broken down by activities such as ballast cleaning, stone blowing, shoulder cleaning and resurfacing (QRC sub no.82: 26).

The Authority has considered QR Network's proposal, taking into account the comments made by stakeholders. In doing so, the Authority notes that QR Network has amended its 2010 DAU to take into account many stakeholder concerns and comments and the Authority's proposed arrangements as set out in its December 2009 draft decision, including publishing information on maintenance activities undertaking (scope) in its annual maintenance cost report.

However, the Authority also considers that there is merit in some of the suggestions made by stakeholders that can further improve the transparency and usefulness of the public reports, in particular, the reporting of annual maintenance costs.

Stakeholders have suggested that information on ballast maintenance activities be provided as part of the public maintenance cost report. The Authority can understand stakeholders' concerns on this given that ballast fouling has, and continues to be, an issue faced by QR Network. Therefore, the Authority agrees that QR Network should inform stakeholders on the status of the network's condition in relation to ballast fouling and the work undertaken to rectify the issue.

While QR Network has committed to providing information on the scope of maintenance activities (as well as costs) by individual coal system, QR Network has not provided any indication on the type or level of information it anticipates to provide – rather, the 2010 DAU provides for the format to be 'agreed with the Authority from time to time'.

In addition, in its December 2009 draft decision, the Authority left it to QR Network to take the first step in developing a sample template of the type of information it intended to publish given that it is best placed to decide what information can usefully be published to allow interested parties to gain an understanding of its operations, whilst preserving information it genuinely believes to be commercially sensitive in nature.

Accordingly, to facilitate the process of QR Network and the Authority agreeing the format of the maintenance cost report, the Authority requires QR Network to provide a sample template of the information it intends publish as part of its annual maintenance cost report so that the format can be agreed as part of QR Network's resubmitted DAU or shortly thereafter – i.e. within two months of the 2010 access undertaking being approved. In this respect, the Authority notes that it will be looking for QR Network to provide as much information as possible within its commercial constraints, particularly in relation to ballast activities.

To ensure that the information provided meets the expectations of stakeholders and the Authority, the Authority also requires QR Network to provide for the format to be specified by the Authority in the event that no agreement is able to be reached between QR Network and the Authority.

Decision 9.2:

The Authority accepts QR Network proposed amendments to:

- (a) include reporting on the scope of maintenance activities in its annual public maintenance cost report; and**
- (b) provide additional performance information, that is disaggregated into access holder/seeker classes, to the Authority.**

However, the Authority requires QR Network to amend the annual reporting requirements in the 2010 DAU (in line with the drafting provided in Appendix 9) so that:

- (a) the public maintenance cost report is to be in a format agreed between QR Network and the Authority or, failing agreement, determined by the Authority from time to time, and**
 - (b) it is required to submit a proposed template of the public maintenance cost report to the Authority within two months of the 2010 access undertaking being approved.**
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Maintenance Cost Index and Derailments

QR Network proposed that a maintenance cost index (MCI) be developed and applied to its maintenance costs to reflect movements in its central Queensland maintenance costs.

In its December 2009 draft decision, the Authority required QR Network to publish information on the changes in the MCI, at the same time as it releases its report on maintenance costs. This information would show stakeholders the indices that make up the MCI and provide an explanation of significant variations between increases in the MCI and increases in actual maintenance costs in the CQCR.

The Authority also required QR Network to report on the effect on its maintenance costs of action taken to restore the network after derailments.

QR Network's 2010 DAU

In its 2010 DAU, QR Network proposed to publish information on the MCI for the subject year, including its sub-indices, at the same time as it publishes its maintenance cost report.

QR Network also proposed to report on the effect of derailments on the completion of planned maintenance work and any action taken to restore the network after derailments. The information would be provided for derailments with a repair cost of more than \$200,000.

Stakeholders did not comment on this matter.

For the most part, the Authority is satisfied with the provisions that QR Network has incorporated into the 2010 DAU, subject to some minor amendments to the threshold proposed for reporting of derailments and the information provided in relation to maintenance costs and the MCI.

The Authority accepts QR Network's proposal that the reporting on derailments be subject to a materiality threshold so that it is not required to prepare detailed reports on minor derailments.

However, the Authority considers that QR Network's proposed threshold for reporting of derailments should be lowered from \$200,000 to \$100,000. It is evident from information QR Network provided to the Authority that most track derailments (on average five or six a year) would be covered if the threshold was \$100,000 and other more minor derailments in yards and on sidings would not. Therefore, the Authority considers that a lower threshold of \$100,000 is more appropriate.

In addition, QR Network has not proposed to report on the relationship between the MCI and actual maintenance cost movements. The Authority believes this is important for transparency so that stakeholders are aware of the factors causing (higher or lower than expected) increases in maintenance on the network.

Accordingly, the Authority reaffirms its position on this, and requires that the relevant provisions be amended (cl. 9.2.3 (b)) so QR Network will provide more detailed information to explain significant variations between increases in the MCI and increases in actual maintenance costs.

Decision 9.3:

The Authority accepts QR Network's proposed amendments to:

- (a) publish information on the MCI, and the sub-indices it is comprised of, at the same time as it publishes its public maintenance cost report each year; and**
- (b) provide information on the effect of derailments on the completion of planned maintenance work.**

However, the Authority requires QR Network to make amendments to the 2010 DAU (in line with the drafting provided in Appendix 9) to:

- (a) lower the threshold for reporting on derailments from \$200,000 to \$100,000; and**
 - (b) require that it reports on the variance between changes in the MCI and total actual maintenance costs in the CQCR.**
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9.2 Regulatory Reporting

QR Network's regulatory reporting requirements are designed to assist the Authority in carrying out its functions. QR Network provides detailed information in these reports so that the Authority can monitor and assess QR Network's compliance with the undertaking.

The requirements in the undertaking clarify the information that QR Network will provide, specify the timeframes for providing the information and outline a mechanism for informing the Authority of any non-compliance. In its 2008 undertaking, QR Network was required to provide a responsibility statement with certain regulatory reports that was signed by QR Network's Executive General Manager and supports the veracity of the information provided.

Background

In its 2009 DAU, QR Network retained many of the 2008 undertaking regulatory reporting arrangements, including requirements:

- (a) to produce annual reports on operational data, capital expenditure and its regulatory asset base and maintenance costs for the subject year;**

- (b) for a QR Network compliance officer to be responsible for notifying the Authority of any breaches of the undertaking and taking all necessary steps to ensure that QR Network meets its reporting obligations; and
- (c) to allow the Authority to request any additional information from QR Network that it reasonably requires to perform its functions.

However, unlike current arrangements, QR Network did not propose a list of maintenance expenditure items that it would report, but proposed that it would include this in the final undertaking.

QR Network also proposed that it no longer be required to provide a responsibility statement with its regulatory reports as it was not aware that the provision had improved transparency and accountability of the relevant information.

The QRC argued that the reporting of accurate information is critical to the integrity of the regulatory regime and, therefore, that the requirement to provide a responsibility statement with such information be re-instated.

Asciano considered that the reports in relation to breaches of the undertaking should be publicly reported. This was among a range of amendments Asciano proposed to address its concerns in relation to detecting any discriminatory behaviour towards above-rail competitors.

In its December 2009 draft decision, the Authority agreed with the QRC and required QR Network to re-instate provisions that obliged it to provide a responsibility statement with information provided to the Authority.

QR Network's 2010 DAU

In its 2010 DAU, QR Network added to its maintenance reporting arrangements the list of items it intended to provide information on, including six categories of maintenance activities such as mechanised, general track, structures and facilities and electrical overhead maintenance. QR Network proposed to provide information on the actual versus forecast cost and scope for each of the activities and an explanation of significant variations between the two.

QR Network also re-instated the provisions requiring it to provide a responsibility statement to the Authority, signed by QR Network's Executive General Manager, with its maintenance cost, operational data, capital expenditure and roll-forward reports.

In addition, QR Network added requirements in relation to reporting breaches so that, if there is a breach of the undertaking that directly and adversely affects the interests of an access seeker or access holder, it will not only provide the Authority with information on the nature of the breach, but also the relevant access seeker or access holder.

While QR Network had re-inserted the provision in relation to providing a responsibility statement, the QRC remained concerned that the arrangements were insufficient. In particular, the QRC said that the current arrangements limit the scope of matters that require a responsibility statement (i.e. not covered are breach reports and investment decisions made by QR Network) and there is no proposed role for the independent QR Network board members to ensure that compliance is given suitable priority within the organisation.

On this basis, the QRC said that greater emphasis should be placed on compliance by means of a general requirement that certain information provided to the Authority be co-signed by an independent director of QR Network to be true and accurate (QRC, sub no.82: 27).

In its submission, Asciano re-stated its position with regard to publicly reporting breaches and argued that the 2010 DAU should be amended to give effect to this (Asciano, sub no.78: 4).

The Authority has considered QR Network's proposal, taking into account the comments made by stakeholders. The Authority notes that QR Network has amended its 2010 DAU to take into account many stakeholder concerns and comments and the Authority's proposed arrangements as set out in its December 2009 draft decision, including re-inserting the requirement to provide a responsibility statement with information it submits to the Authority and including additional requirements to inform access seekers/holders of breaches of the undertaking if the breach adversely affects them.

With regard to maintenance reporting, the Authority notes that the list QR Network has included in the 2010 DAU contains high-level cost categories. The Authority requires that, in line with arrangements in the 2008 undertaking, QR Network provide more detailed information on its costs and activities, including various sub-items that make up each category.

The Authority notes that, similar to the provisions for the public reporting of maintenance, the 2010 DAU includes requirements for it and QR Network to agree to the format of information to be provided in the maintenance cost report. In this instance, however, the Authority is satisfied to discuss and agree to an appropriate format with QR Network within two months of the 2010 access undertaking being approved and prior to it submitting its maintenance cost report to the Authority.

Consistent with its requirements in relation to the public maintenance cost report, the Authority also requires that QR Network provide that, in the absence of any agreement being reached on the format, it will provide information in a format specified by the Authority.

The Authority notes Asciano's request that breaches of the undertaking be reported publicly. However, the Authority considers that QR Network's proposal is appropriate and will provide more meaningful information to relevant parties, and will better encourage a culture of compliance and reporting of breaches, than including provisions to publicly report all breaches.

On this, the regular monthly breach reports inform the Authority of breaches with respect to timeframes (e.g. for providing information to access seekers and in QR Network's negotiations with access seekers). QR Network has proposed to provide additional information on these breaches to the Authority that disaggregates the information into QR and non-QR parties. As such, the Authority will continue to monitor the breaches having particular regard to ensuring that QR Network treats both QR and non-QR parties consistently.

In line with QR Network's proposal, the Authority considers it more appropriate that access seekers/holders are informed of breaches, including any action taken to remedy the breach, if the breach directly affects them.

The Authority believes there is merit in the QRC's suggestion that an independent director of QR Network be required to co-sign the responsibility statements that QR Network provides with certain regulatory reports. This increases the level of accountability for the information provided and gives the Authority, and stakeholders, increased confidence that QR Network's information is reliable and accurate.

Accordingly, the Authority requires QR Network to make the necessary amendments to the DAU so that the responsibility statement is signed by the QR Network Executive General Manager and an independent director of QR Network (cl. 9.6(c)).

Decision 9.4:

The Authority accepts QR Network's proposed amendments to:

- (a) re-instate the provisions requiring it to provide a responsibility statement with certain information submitted to the Authority; and**
- (b) inform access seekers/holders of breaches of the undertaking if the breach directly and adversely affects that access seeker / holder.**

However, the Authority requires QR Network to amend the regulatory reporting requirements in the 2010 DAU (in line with the drafting provided in Appendix 9) so that:

- (a) the regulatory maintenance cost report is to be in a format agreed between QR Network and the Authority or, failing agreement, determined by the Authority from time to time;**
 - (b) it is required to submit a proposed template of the maintenance cost report to the Authority within two months of the 2010 undertaking being approved; and**
 - (c) the responsibility statement is signed by the QR Network Executive General Manager and an independent director of QR Network.**
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10. REGULATORY ASSET BASE FOR CQCR

Schedule A, formerly schedule FB, sets out the arrangements for the planning and approval of capital expenditure.

In its 2010 DAU, QR Network has largely agreed with the Authority's draft decisions to:

- (a) maintain the current practice of rolling over the carry-over account at the approved discount rate;*
- (b) retain references to the network asset management plan;*
- (c) retain asset replacement expenditure within the master plan; and*
- (d) have a formalised plan of stakeholder consultation for the master plan.*

This decision does not discuss these aspects of the 2010 DAU further as they are consistent with the Authority's December 2009 draft decision and stakeholders have not commented on them in either their February 2010 or May 2010 submissions.

The Authority has proposed a framework to encourage the efficient maintenance of the network which provides both the prospect of a reduction in the value of the asset base if the condition of the network deteriorates and for an increase in the maintenance allowance if the approved allowance proves to be insufficient and QR Network can demonstrate that it has undertaken maintenance in an efficient manner.

10.1 Maintenance obligations of the regulatory asset base

Stakeholders' Comments

In response to the 2010 DAU, one of the key concerns expressed by the users of the network was whether or not a privately owned QR Network would adequately maintain the rail infrastructure. In particular, the QRC was concerned that:

- (a) QR Network has an incentive to cut back on maintenance work because its allowable revenues include an allowance for maintenance costs that QR Network will receive regardless of whether it completes the proposed maintenance work;
- (b) there is a risk that industry will pay twice for the same maintenance activity if QR Network fails to maintain the network and requests additional maintenance funding in a subsequent undertaking; and
- (c) as QR Network operates under a revenue cap, its revenues are protected regardless of whether decreased maintenance on the network results in a loss of system throughput.

Given these concerns, the QRC argued that the undertaking should be structured to provide appropriate incentives to ensure that adequate maintenance of the network is undertaken at an efficient cost. The QRC noted that, at present, the only risk that QR Network faces with respect to maintenance expenses is the risk that the Authority will identify an 'efficiency gap' between the total actual costs incurred and the QCA's determined level of total efficient costs for maintenance activities (QRC, sub. no. 75:11).

To address industry concerns regarding QR Network's maintenance practices, the QRC proposed that the undertaking should include eight separate elements:

- (a) an obligation to maintain the network

The QRC said that control and accountability for infrastructure must reside with QR Network as the railway manager of the Queensland coal network. QRC said that this responsibility must be clearly defined within the access undertaking and that it must explicitly oblige QR Network to maintain the rail network to a defined standard, that is:

...at least to a 'fit for purpose' standard to meet contracted below-rail train paths (QRC, sub. no. 75:12).

The QRC noted that other regulatory regimes include maintenance obligations on regulated railways. For example, the ARTC is obliged “to maintain the Network in a condition which is fit for use by an Operator” (QRC, sub. no. 75:12).

(b) annual network maintenance master planning process

The QRC said that the access undertaking should require QR Network to develop a transparent ‘network maintenance master plan’ to:

- *inform the CRIMP and any whole of coal chain system plan of future impacts on system performance due to maintenance activities/operations;*
- *provide a sound basis for assessing efficient maintenance costs included within reference tariffs;*
- *provide participants in the coal chain with the opportunity to consider issues such as trade-offs between maintenance and capital expenditure, or options for minimising the impact of maintenance activities to create additional capacity;*
- *ensure that QR is seeking to implement and achieve reasonable efficiencies within its maintenance operations;*
- *ensure there is sufficient data regarding the condition of network assets, so the evaluation of investment in asset renewal or maintenance is being undertaken appropriately. QR Network’s asset renewal program must be closely integrated with its network maintenance plans.*

The QRC proposed that this process should be transparent and that QR Network should be obliged to consult with industry during its development. The QRC proposed that this process could be reflected within QR Network’s network asset management plan (QRC, sub. no. 75:13).

(c) an allowance is built into the reference tariffs to reflect the reasonable cost of undertaking the expected future scope of maintenance activities

The QRC noted the Authority’s draft findings regarding the current condition of assets in respect of ballast fouling and said it was concerned that a revenue cap based on efficient costs, may induce QR Network to reduce its scope of maintenance activities to match its maintenance budget, which would leave existing issues un-remedied.

(d) write down of assets to reflect current condition

QRC’s preferred approach was to allow QR Network a maintenance budget reflective of the efficient cost to maintain the network assets starting from its current position. Asset values should then be written down where the maintenance budget is greater than the efficient cost due to past maintenance practices (QRC, sub. no. 75:13).

QRC said that it did not have adequate information on the current condition of the network in order to comment on the extent of any adjustment. Additionally, QRC suggested that a process be established within the access undertaking to carry out further assessments. QRC envisions that such an independent assessment on the current status of the system would include an

assessment of how QR Network's asset renewal and maintenance practices have impacted on the condition of the network.

QRC requested that the initial independent review should commence immediately and the access undertaking should reflect an obligation for QR Network to provide the Authority with all information and assistance to complete this process (QRC, sub. no. 75:14).

(e) a maintenance scope 'under/overs' mechanism

QRC wanted the undertaking to include a mechanism designed to ensure that QR Network recovered the cost of the actual quantity of maintenance completed during the regulatory period. QRC said it was essential that a scope carryover mechanism be established for major maintenance tasks similar to that provided for capital expenditure variations. The QRC noted that this type of mechanism will remove uncertainty surrounding changes to maintenance plans for major maintenance tasks by:

- (i) enabling operational decisions that move maintenance resources within systems to be reflected within reference tariffs;
- (ii) ensuring QR Network is not paid twice for maintenance that is deferred to a subsequent regulatory period; and
- (iii) ensuring that QR Network does not face a financial disincentive to complete maintenance in excess of the quantity expected if this is found to be necessary (QRC, sub. no. 75:14).

(f) including maintenance incentives within the proposed incentive framework

QRC said that the proposed incentive framework should also include incentives related to maintenance activities where they impact on QR Network's performance.

(g) a defined process to independently assess the condition of the network

The QRC said that an independent assessment of the condition of the network should occur immediately and within six months of the expiry of the undertaking (QRC, sub. no. 75:15).

(h) a requirement that access agreements do not excuse QR Network from maintenance obligations

The QRC said that, as QR Network's contracted train paths within access agreements should have taken into account QR Network's maintenance practices, then maintenance activities should not impact on the delivery of contracted train paths (QRC, sub. no. 75:15).

Authority's Analysis and Decision

The Authority shares the QRC's concerns that an inadequately maintained network will have a significant detrimental impact on users of that network. Indeed, the Authority accepts that a revenue cap mechanism incentivises QR Network to cut costs in order to increase shareholder returns. Nevertheless, the Authority also accepts that, being vertically integrated, QR National is the major operator of trains on the network and, therefore, QR Network has a significant incentive to ensure that the network is, at least, properly maintained for the operation of its train services.

However, the Authority considers that these incentives will not be sufficient to ensure that QR Network may not seek to gain now by deferring maintenance in the short term with a view to increasing future maintenance tasks which will, as suggested by the QRC, result in users of the

network paying twice for the maintenance tasks. As set out in the June draft decision, this is already a concern that the Authority has with respect to ballast fouling.

Therefore, while the Authority accepts that significant incentives already exist for QR Network to adequately maintain the network, the Authority is proposing a series of additional measures to oblige and incentivise QR Network to efficiently maintain the network.

The Authority notes that the QRC proposed the comprehensive list of maintenance related matters (e.g. a maintenance master plan) to be included within the undertaking. The Authority has accepted some, but not all, of these proposals. The Authority's approach has been to focus on incentives based on outcomes supported by greater transparency of the costs of undertaking maintenance activities. The Authority believes it is premature to take the extra step of requiring QR Network to publish a maintenance cost master plan.

The Authority agrees with QRC's proposal to include an obligation on QR Network to maintain its network to at least a 'fit for purpose' standard. Indeed, a similar requirement exists in the ARTC Hunter Valley undertaking where the ARTC agrees:

...at all times during the term to maintain the Network (but only in so far as the Network is relevant to each of the Access Holder's Train Paths) in a condition which is fit for use by the Operator to provide rail transport services⁶.

The Authority considers that a similar obligation should be included in the 2010 DAU.

This obligation will complement the requirement that already exists in Schedule E (Principles for inclusion in Standard Access Agreement) of the undertaking and which is replicated in the standard access agreements that specifies that:

QR Network will carry out maintenance work on the nominated network such that, subject to any agreed criteria and the Network Management Principles, the infrastructure is consistent with the agreed Rollingstock Interface Standards and the Access Holder can operate Train Services in accordance with its Train Service Entitlements.

QR Network will also be required to regularly report on various aspects of its maintenance activities including on the scope and cost of maintenance and movements in costs relative to the maintenance cost index, and speed restrictions. Specifically, as discussed in chapter 9, QR Network will be responsible for public and regulatory reporting with respect to its maintenance costs and practices (see Table 10.1 below).

⁶ Clause 6.1 of the ARTC Operator Sub-Agreement for Indicative Services in the Hunter Valley, 8 July 2008

Table 10.1: QR Network's reporting obligations with respect to maintenance

<i>Report</i>	<i>Reporting requirement</i>
Quarterly Report	Speed restrictions (being the average % and the average number of km of track under temporary speed restrictions by coal system)
	The most recent measure of track quality for the network measured by a quality index (includes gauge, top, twist and versine)
Annual Report	Scope and cost of maintenance activities for each coal system
	Maintenance cost index (MCI) and significant variations (where they exist) between the MCI and the actual maintenance cost movements
	Information on the effect of derailments on the completion of planned maintenance work.
Regulatory Reporting (for the Authority only)	Maintenance cost report including: (1) mechanised maintenance, (2) general track maintenance, (3) structures and facilities maintenance, (4) trackside systems maintenance, (5) electrical overhead maintenance, and (6) telecommunication maintenance.

Moreover, while it is understood that QR Network already liaises with other participants in the coal chain on the timing of its track possessions for maintenance activities, the Authority considers this should be formally included as an obligation on QR Network in Part 11 of the 2010 DAU.

This arrangement is supported by arrangements to develop an incentive mechanism based on QR Network's involvement in activities which improves the performance of the coal supply chain.

The Authority considers that these measures should be supported by a separate incentive mechanism that is more directly targeted towards the maintenance of the network.

In its June 2010 draft decision, the Authority deducted \$107 million from the value of the regulated asset base, effectively 'writing down' the assets to reflect an effective deterioration of the system. This is not dissimilar to a one-off implementation of the QRC's proposal. The Authority also noted in its draft decision that, in order to address the more general concerns stakeholders have about ensuring the network is being effectively maintained, it would also introduce into the 2010 DAU a more general provision for future declines in network condition, beyond that associated with normal wear and aging, to be deducted from the asset base as well.

It is in this context that the Authority will now require a condition-based assessment of the below-rail assets in the CQCR to be undertaken six months prior to the end of the regulatory period in order to assess whether QR Network's maintenance practices over the term of the undertaking have been both prudent and effective. In order to provide an appropriate base starting point for this assessment, the Authority will require an additional condition-based assessment prior to December 2010.

If there is evidence that the condition of the below-rail network has deteriorated at a rate greater than a rate that would be expected under accepted good operating practice, the Authority will reduce the value of assets in the RAB by the estimated value of the deterioration of the assets

Each year, QR Network rolls the value of the asset base forward by applying a number of principles, including an adjustment of the value of assets up (clause 1.3 of schedule A in the 2010 DAU, schedule FB previously) or down (1.4). Under current practice, the Authority will not require the value of the assets contained in the RAB be reduced unless:

- (a) the Authority made its decision to accept the expenditure in the regulatory asset base on the basis of information provided by QR Network that QR Network knew, or should have known, was false or misleading at the time it provided the information;
- (b) circumstances arise in the future where demand has declined to such an extent that regulated prices on an un-optimised asset base would result in a further decline in demand; or
- (c) it becomes clear that there is a possibility of actual (not hypothetical) bypass.

QR Network will be required to amend this clause to include a provision for the value of the asset base to be reduced in the event that a condition based assessment identifies that asset values have deteriorated due to QR Network's maintenance, operating or asset renewal policies.

For the condition-based assessment, QR Network will suggest three qualified consultants to the Authority from which the Authority will choose one. The condition-based assessment will take place in a timely manner and the cost of the assessments will be paid for by QR Network. QR Network will ultimately recoup the cost of the assessment through the QCA levy.

At the same time, QR Network will be given the opportunity to seek approval for additional maintenance costs from the Authority under circumstances where QR Network has been undertaking system maintenance in a prudent and cost efficient manner, but where the approved maintenance allowance has proven to be insufficient. In applying to the Authority for maintenance costs over and above its approved maintenance cost allowance, QR Network must provide sufficient evidence that its current maintenance practice:

- (a) is prudently incurred;
- (b) is in line with its annual maintenance plan;
- (c) is in line with good operating practice;
- (d) aims to maintain the infrastructure to a fit for purpose standard; and
- (e) has not resulted in excessive track closures (that has the side effect of unduly reducing network capacity).

Should QR Network be minded to seek approval for additional maintenance costs from the Authority, it may submit a review event under schedule F, part A, clause 2.2. However, this is not designed to be a full cost-plus provision for maintenance costs. The Authority has already agreed to the use of a maintenance cost index to escalate maintenance costs and so ensure the amount provided remains relevant. In addition, QR Network will gain the benefit of any maintenance efficiencies over those assumed or other maintenance cost under-expenditure. Therefore, the Authority proposes that application under schedule F for additional maintenance costs be subject to a materiality test consistent with the materiality tests that apply to other review events or endorsed variations. For example:

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- (a) a change in QR Network's maintenance practices, which is reasonably requested by an access holder or customer that causes, or will cause, changes to reference tariffs in part B of schedule F, the AT3, AT4 and/or AT5 components of the relevant reference tariff that are greater than 2.5%; or
 - (b) a change in law or a change in relevant taxes occur, that causes or will cause, changes in the costs reflected in reference tariffs in part B of schedule F, the AT3, AT4 and/or AT5 components of the relevant reference tariff that are greater than 2.5%.
-

Decision 10.1:

The Authority requires that QR Network:

- **Insert a new clause 1.4(d) in Schedule A which states "an End of Period Assessment conducted in accordance with clause 5 of this Schedule determines that the Rail Infrastructure has deteriorated by more than would have been the case had good operating practice and prudent and effective maintenance and asset replacement policies and practices been pursued."**

Delete the following words from Clause 1.4 (which are no longer necessary as they relate to the Western System): "For clarity, a reduction or cessation in the utilisation of a section of QR Network's Rail Infrastructure within an Individual Coal System or a part of the Western System west of Rosewood will not result in a reduction in any asset values in the Regulatory Asset Base for that Individual Coal System or that part of the Western System west of Rosewood, unless it triggers the criteria above."

- **Insert a new clause 5 of Schedule A as follows:**

Condition Based Assessments

- (a) **QR Network must procure, at the cost of QR Network, a condition based assessment of the Rail Infrastructure in the Central Queensland Coal Region in accordance with this Clause 5 within 3 months of the Approval Date (the Initial Assessment) and 6 months prior to the Terminating Date (the End of Period Assessment);**
 - (b) **If the End of Period Assessment finds that the condition of the Rail Infrastructure in the Central Queensland Coal Region has deteriorated between the Initial Assessment and End of Period Assessment by more than would have been the case had good operating practice and prudent and effective maintenance and asset replacement policies and practices been pursued, the Authority will be entitled to reduce the Regulatory Asset Base to reflect the additional deterioration;**
 - (c) **QR Network will nominate three independent qualified consultants from which the QCA will select the independent consultant (the Assessor) which must be appointed to conduct both the Initial Assessment and the End of Period Assessment;**
 - (d) **the Assessor will have a duty of care to the QCA in the conduct of the Initial Assessment and the End of Period Assessment and, in the event of a conflict between the Assessor's obligations to QR Network and its duty of care to the QCA, the Assessor's duty of care to the QCA will take precedence;**
 - (e) **Prior to commencing an Initial Assessment or End of Period Assessment, the**
-

Assessor must agree an assessment plan with QR Network, document that assessment plan and obtain the QCA's approval of that assessment plan;

- (f) The assessment plan will:**
- (i) consist of a proposed work program for the execution of the Initial Assessment or End of Period Assessment (as applicable) including the costs which shall be payable by QR Network; and**
 - (ii) provide for the establishment of an assessment liaison group, comprising the Assessor, QR Network and the QCA, during the course of the Initial Assessment and the End of Period Assessment (as applicable) to provide a forum for the resolution of any issues that arise;**
 - (iii) propose a methodology for assessing track condition to be agreed between QR Network and the Authority and in the absence of agreement determined by the Authority**
- (g) QR Network will provide the Assessor with:**
- (i) any relevant information; and**
 - (ii) access to land or sites,**
- as reasonably required by the Assessor for the purposes of conducting an Initial Assessment or the End of Period Assessment.**
- (h) to the extent QR Network is requested to provide confidential information to the Assessor, the Assessor will be required to enter into a confidentiality deed with QR Network in relation to any information provided by QR Network, to the effect that it must keep the information confidential and only use that information for the purpose of conducting the Initial Assessment and the End of Period Assessment and completing the assessment report.**
- (i) The Assessor must provide to QR Network and the QCA a report on the findings of the Initial Assessment or the End of Period Assessment (as applicable), with the report of the End of Period Assessment including:**
- (i) identifying the extent to which the Rail Infrastructure in the Central Queensland Coal Region has deteriorated by more than would have been the case had good operating practice and prudent and effective maintenance and asset replacement policies and practices been pursued; and**
 - (ii) to the extent such greater deterioration is identified, the value of that deterioration.**

Insert a new 11.1.4(f) as follows:

QR Network will use reasonable endeavours to liaise with other participants in any impacted coal supply chain (including via any relevant Supply Chain Group) regarding the most efficient timing of track possessions for scheduled maintenance activities.

- Insert a new clause 1.5 in Schedule A which states:**

QR Network must, at all times during the Term, maintain the Rail Infrastructure in a

condition which it fit for the purpose of provision of contracted Train Service Entitlements to Access Holders.

- **Amend the definition of Review Event in Part 12 of the 2010 DAU to:**
 - (a) **insert the following as a new paragraph (a) in the definition: where QR Network's maintenance costs have been prudently and efficiently incurred, but are greater than its maintenance cost allowance, which has caused, or will cause, a change in the costs reflected in the AT3, AT4 and/or AT5 components of a Reference Tariff specified in Part B of Schedule F, of greater than two and a half percentage points (2.5%); and**
 - (b) **renumber the other paragraphs of the definition accordingly, and for the new paragraph (b) (previously (a)) reword it (to reflect the fact that the undertaking will no longer cover the Western System):**

deleting the words 'for Reference Tariffs specified in Part B of Schedule F' and the 'and' at the end of (b)(i); and

removing (b)(ii).
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10.2 Acceptance of capital expenditure into the regulatory asset base

Background

Part 2 of schedule A of the 2009 DAU outlines the general capital expenditure approval process. It sets out processes for the Authority's approval of the scope, standard and costs of works, whether in real time as the project is under way or once the project has been commissioned.

In its December 2009 draft decision, the Authority noted that it was difficult to benchmark the efficiency of cost of partly completed projects. As a result, the Authority proposed to amend the 2009 DAU to limit ex-post assessments of capital expenditure to circumstances where either:

- (a) the project has been cancelled and QR Network is seeking approval for preliminary costs that were prudently incurred; or
- (b) the project has been commissioned.

QR Network's 2010 DAU

While the 2010 DAU fully complies with this aspect of the Authority's draft decision, Asciano was concerned with this approach. In particular, it questioned why the users should pay for discontinued capital projects as these projects are not used by the access seekers or holders and add no value to the operations of access seekers and holders. Asciano submitted that it would prefer the costs of these projects to be borne by QR Network as it is QR Network's decision making which led to the projects being initiated and then discontinued (Asciano, sub. no. 78:23).

Authority's Analysis and Decision

The Authority does not accept Asciano's proposed approach to the treatment of capital expenditure on discontinued projects. The Authority believes that, provided that QR Network has acted prudently in deciding to commence and discontinue a capital project, it should expect

that its efficient costs should be recognised and included in the regulatory asset base. This is particularly the case if QR Network had commenced a capital project following customer support and discontinued a project at the request of the same customers, for example, due to a down turn in the market.

The Authority would, however, question the prudence of expenditure if QR Network steadfastly continued with a project well beyond a point where the initial rationale for the project no longer existed.

Accordingly, the Authority confirms its position in the December 2009 draft decision and accepts this aspect of QR Network's 2010 DAU.

10.3 Procurement strategy and policy

Background

In its 2009 DAU, QR Network proposed to replace the requirement to submit a generic procurement policy to assist in assessing the efficiency of capital costs with a project-specific procurement policy.

In its December 2009 draft decision, the Authority accepted this approach but noted that, if QR Network chose to seek pre-approval for a project-specific procurement strategy, then this must be well documented and be provided well in advance of when QR Network requires approval (6 months). In order to facilitate this assessment, the Authority noted that the assessment framework in the undertaking must demonstrate that the proposed procurement strategy will:

- (a) provide value for money;
- (b) ensure that all decisions associated with awarding and managing a contract are made with reference to pre-defined assessment criteria; and
- (c) ensure that QR Network's decisions are recorded so compliance with the strategy can be audited.

The Authority proposed amendments to schedule A of the 2009 DAU to achieve these objectives.

QR Network's 2010 DAU

QR Network amended schedule A of its 2010 DAU to comply with the objectives of the Authority's draft decision. QR Network also proposed that all costs incurred in complying with providing a procurement strategy to the Authority for pre-approval must be accepted by the Authority for inclusion into the regulatory asset base (QR Network, sub. no. 66:153).

Stakeholders' Comments

Asciano queried whether all costs incurred in complying with the procurement strategy should be included in the RAB. Asciano believed that some of the incurred costs would be operating costs and whether they are included in the RAB should be:

...determined by accounting capitalisation policies and other similar guidelines rather than by a blanket provision in the Access Undertaking (Asciano, sub. no. 78:23).

Authority's Analysis and Decision

Although QR Network did not explicitly use the Authority's proposed drafting, the Authority accepts that QR Network's proposed procurement strategy, as detailed in 3.1.3 of Schedule A, meets the Authority's objectives.

The Authority also accepts that QR Network should be able to recover all reasonably incurred out of pocket expenses associated with developing and implementing a procurement strategy. It is not anticipated that the costs associated with developing a procurement strategy would add significantly to the costs of the project. Where this approach has been adopted elsewhere (i.e. DBCT), the procurement policy was based on existing internal contracting procedures of the principal and the contractors.

Moreover the majority of the costs will relate to external contractor and auditor costs which are readily identifiable as being directly related to the procurement policy associated with a particular project. However, some costs will be QR Network's own costs and for those costs to be recognised QR Network will need to ensure that they are identified and accounted for separately from its general operating costs which have already been provided for elsewhere in the cost build-up for reference tariffs.

However, the Authority does not believe that QR Network's internal management costs should be capitalised in this way as they have already been adequately provided for within the existing operating cost provisions.

In addition to the drafting included in the December 2009 draft decision, QR Network included in clause 3.1.3(e) the requirement that the Authority approve the procurement strategy within 20 business days of receiving all necessary information. The Authority does not believe that its assessment should be fettered in this way and requires the time limit to be deleted.

Decision 10.2:

- **QR Network will be required to amend Schedule A clause 3.1.3(e) as follows:**

The QCA will give QR Network a notice in writing ~~within 20 business Days of the QCA receiving all the information it requires to assess the procurement strategy:~~ regarding:

- **QR Network will be required to amend Schedule A clause 3.1.3(j) to the following:**

The QCA will accept for inclusion into the Regulatory Asset Base all costs, paid for by or incurred by QR Network, that QR Network can demonstrate were prudently incurred and solely and directly related to complying ~~All costs paid by or incurred by QR Network in connection with compliance with the Clause 3.1.3 (including clauses 3.1.3 (h) and (i)) must be accepted by the QCA for inclusion into the Regulator Asset Base.~~

10.4 Feasibility studies

Background

While the 2008 undertaking does not explicitly require QR Network to provide users with concept, pre-feasibility or feasibility studies, it does require QR Network to provide the CRIMP Forum sufficiently detailed information on:

...the rationale for the choice of project, including the consideration of alternative solutions. QR Network should present both a preliminary analysis of the other track solutions considered by QR Network, as well as an indicative assessment of alternative supply chain solutions arising from discussions with other (present and prospective) logistics providers in the coal supply chain (note that this may involve capacity solutions which QR Network cannot deliver, but which may present a better system solution) (QR Network, 2008 Access Undertaking, Schedule FB, p.252).

QR Network has in practice been undertaking concept, pre-feasibility and feasibility studies and has included information from these studies within its CRIMP to help inform industry of the expansion path options, the rail and port infrastructure costs and economic options of a proposed project. Additionally, QR Network has stated that these studies need to occur early enough in the process to ensure that the scope, cost estimates and estimates of access pricing can be provided to help support the users' business cases and underwriting requirements (QR Network, 2009 CRIMP: 24).

QR Network's 2010 DAU

In its 2010 DAU, QR Network has provided for stakeholders to be asked to pay or underwrite the cost of a feasibility study. QR Network may require a stakeholder to fund or underwrite the cost of a prefeasibility study for a significant investment, where that stakeholder has responded to a request for expressions of interest for new capacity. QR Network does not contemplate stakeholder funding of feasibility studies for the other categories of investments, such as expansion projects that are not significant investments or extensions (QR Network, sub. no. 67:72).

QR Network has proposed that it will commence a prefeasibility study for the significant investment once interested parties (for the investment) have been identified, and those interested parties have, if required by QR Network, agreed to fund or underwrite the costs of the study (QR Network, sub. no. 67:72).

Stakeholders' Comments

The QRC argued that industry participants should have a right to conduct, fund and control feasibility studies and that this should be formalised through a new standard agreement called a Feasibility Study Facilitation Agreement.

The QRC stated that the facilitation agreement would provide industry participants with access to certain information and services (i.e. non-contestable services relating to connecting infrastructure). It would also set out the funding mechanism, priority rights, scope, control of the study and access to outputs.

The QRC proposed that industry participants, rather than QR Network, should have the first option to decide whether or not to fund and control a feasibility study (see Figure 10.1). The QRC said that, if industry agreed to fund and control a feasibility study, then industry participants would:

- (a) enter into an industry funding agreement;
- (b) enter into a feasibility facilitation agreement with QR Network; and
- (c) undertake the feasibility study.

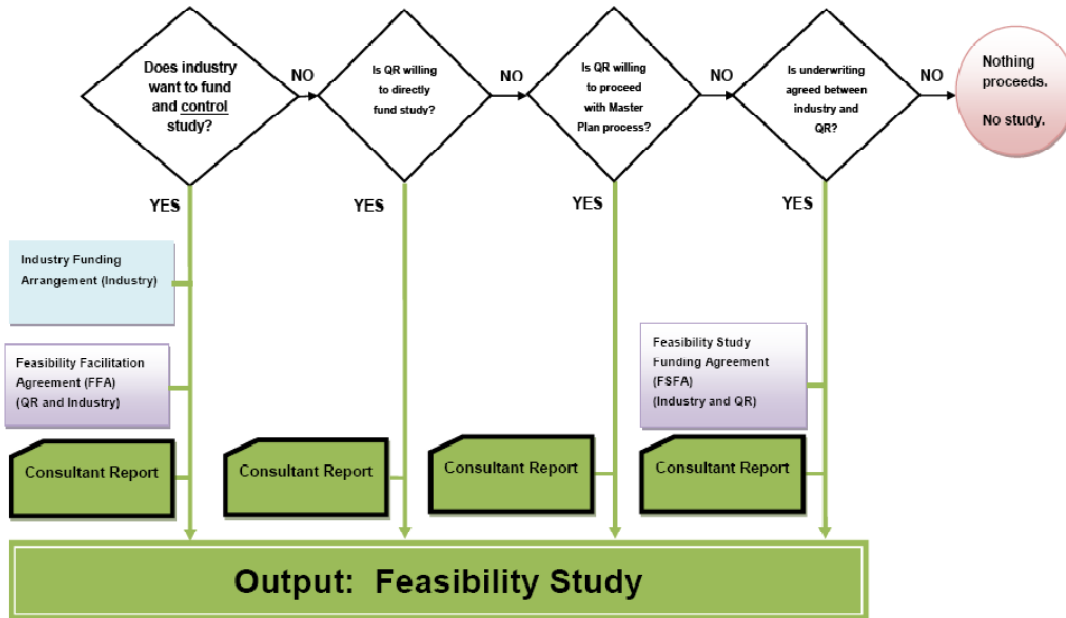
If industry chooses not to fund and control the study, then QR Network would be given the option to fund and control the study as per the current process, that is:

- (a) without any form of industry underwriting;

- (b) with prior customer vote approval to include within the regulatory asset base; or
- (c) with other forms of underwriting by industry.

QRC stated that the outputs of feasibility studies would be available to QR Network in all cases but, where the studies were funded or underwritten by industry, the output of the study should also be available to industry. In addition, the QRC noted that the parties to the feasibility study contract should be entitled to rely on the output of the studies to ultimately develop the project, whether that be industry or QR Network (QRC, sub. no. 82:32).

Figure 1: QRC’s representation of industry’s preferred approach to feasibility studies



While Xstrata supported the QRC’s feasibility study model, it suggested that a Standard Expansion Deed (SED) should be developed to address industry’s concerns surrounding the funding and control of feasibility studies. The SED would be developed to clarify the terms and conditions applicable to industry and the obligations of QR Network should industry choose to self fund, design, procure, construct and own a project (see Chapter 1 of this decision). Xstrata also proposed that the SED would:

- (a) provide full and open access to all feasibility studies approved under the CRIMP process, and undertaken to date, to support the infrastructure investment which industry has, among other things, agreed to fund; and
- (b) provide full and open access to any feasibility study funded or underwritten by industry (Xstrata, sub. no. 77:11).

Authority’s Analysis and Decision

Arrangements for the funding of investments are discussed elsewhere in this decision. The principles set out there provide for users to be able to choose to fund all or part of the expansion themselves, even if QR Network is willing to do so.

Feasibility studies are just one element of the capital expenditure associated with a new project. While this might suggest that the party that is funding the project should also be the party that funds the feasibility study, the Authority accepts that there is a greater risk that a project will not

go ahead at the feasibility study stage. If this is the case, then QR Network would have incurred the costs of the feasibility study but it would not have any new access holders or customers to levy reference tariffs to recoup the study's costs. The Authority accepts that it is not unreasonable for access seekers to underwrite feasibility studies to ensure that they bear some of the financial consequences for their access requests. In the absence of this, they could over estimate their requirements for new capacity, cause QR Network to incur significant costs to assess their access requirements but then ultimately withdraw, or significantly reduce, their capacity requirements with the effect that other users have to bear the costs of the feasibility studies.

The Authority therefore sees merit in an arrangement whereby QR Network can request new access seekers or customer to fund, or to under-write, feasibility studies in circumstances where they are not funding the remainder of the project. This will place some onus on the expanding users to make reasonable requests for additional access.

While the Authority does agree with the proposal for access seekers to fund a feasibility study, the Authority does not accept that QR Network should be obliged to accept a feasibility study that was controlled and conducted by access seekers. There are no restrictions in place that would restrict access seekers from controlling, conducting or funding a feasibility study, for their own information or validation of a potential expansion.

The Authority also believes that, once a project has been commissioned, the arrangements for funding the feasibility study should fall into line with the broader project funding arrangements, that is:

- (a) the Authority's assessment of the prudence of the feasibility study costs and their inclusion in the regulatory asset base for tariff setting purposes should all occur in the same way that the Authority would assess the capital expenditure on the remainder of the project;
- (b) any under-writing arrangements should fall away and users who have funded the feasibility studies should be repaid through the same arrangements as applies to user funding of the entirety of the project; and
- (c) for the purposes of the user funding provisions, users who have funded the feasibility studies should be treated as having provided user funding for the aggregate of the funds provided for capital costs of the infrastructure enhancement and those provided for any previous feasibility study in respect of the infrastructure enhancements.

Consistent with user funding of the remainder of the project, user funding of feasibility studies will require the development of a user funding agreement. As discussed in chapter 1, the Authority has provided for a process for developing a standard user funding agreement within three months from approval of the undertaking.

Decision 10.3:

The Authority requires QR Network to make the amendments in Appendix 1 relating to the investment framework amendments (which include provisions regarding the treatment of feasibility studies).

11. COORDINATION AND PLANNING

The 2010 DAU includes a new part 11 on coordination and master planning that sets out how QR Network will plan and operate its coal network in conjunction with other service providers and participants in the coal supply chains. QR Network's obligations relating to the approval of capital expenditure remain in schedule A.

QR Network has proposed that it will develop its own master plan of the rail network and will participate in developing a master plan for a supply chain and that its rail network master plan will contain details of its proposed capacity expansion projects and will explain the reasons for any differences between the rail and a supply chain master plan (if any exist).

While stakeholders would prefer a greater commitment from QR Network to adopt an agreed and coordinated expansion path for coal supply chains, the Authority considers that QR Network's proposals do not preclude it from making such a commitment. It is just that details of these arrangements are better placed within an agreed framework that sits outside the regulatory regime for a single infrastructure service provider – such as the Long Term Solution Implementation Memorandum (LTSIM) for the DBCT supply chain.

Nevertheless, the Authority believes that QR Network's obligations to work with supply chain groups should be clarified further and so it has proposed some amendments to bring QR Network's undertaking more into line with the DBCT DAU and the LTSIM for the DBCT supply chain. Moreover, QR Network's proposal to limit its obligations, only where they are consistent with its own commercial objectives, is too broad ranging and should be replaced with an obligation to cooperate with other coal chain participants on a reasonable endeavours basis – in line with its commitments in the LTSIM.

QR Network proposed to reduce, on a pro-rata basis, the capacity rights of new or expanding users if an expansion project delivers less capacity than initially forecast. While some stakeholders did not support QR Network's proposal, the Authority believes that the proposal has some merit, in particular as it seeks to address directly a major issue of how to align system capacity. In doing so, QR Network retains the option to refine the operation of the mechanism over time.

11.1 The Long Term Solution Implementation Memorandum

Over the past year, the participants in the Dalrymple Bay coal supply chain have been discussing approaches to improve the performance of that chain. Participants have been particularly keen to ensure that contractual commitments are met.

This has been in response to concerns about the performance of individual elements of the supply chain as well as an attempt to better coordinate of the operation and expansion of the supply chain. Given the interaction of the various elements of the DBCT Coal chain, it is recognised that the capacity of the supply chain is likely to be less than the stand alone capacity of the terminal and the below-rail network. As capacity contracts have been based on the capabilities on individual facilities, there may be a mismatch between the aggregate contracted demand and the capacity of the supply chain. There may also be a mismatch in the capacity contracted between an end user and each of the various elements of the supply chain (e.g. below-rail, above-rail and terminal). For example, an end user may hold rail and terminal contracts for different levels of capacity.

These issues have affected the operation of each of the coal supply chains in central Queensland but have been particularly evident in the supply chain to the terminal at Dalrymple Bay.

In order to address these concerns, on 1 April 2010, all participants on the Dalrymple Bay Coal Terminal Coal Chain, including QR Network, agreed to the Long Term Solution Implementation Memorandum (LTSIM).

A key goal of the LTSIM is to develop a framework that:

- (a) aligns planning and contracting of rail and terminal capacity on the DBCT Coal Chain; and
- (b) ensures that system capacity is expanded in a timely and coordinated manner.

It is anticipated that this would result in coal producers realising contracted volumes and system capacity being expanded in an efficient and timely manner to meet future demand while protecting the legitimate business interests of the coal chain's service providers.

The Authority understands that, in time, there is a prospect that the LTSIM principles may be extended to other coal supply chains in central Queensland.

The Authority recognises that a key feature of the LTSIM is that it has been developed and agreed by coal chain participants with a view to aligning contractual commitments. While access undertakings can be used to formalise these arrangements, the Authority accepts that:

- (a) an undertaking cannot fully encompass all elements of the LTS as it is only able to impose obligations on the providers of the declared service, in this case the rail network;
- (b) the LTS is a work in progress with the LTSIM providing objectives to be pursued without being prescriptive about how they should be achieved, so the regulatory framework needs to be flexible, rather than locking in a framework that may restrict the management and operation of the supply chain; and
- (c) the LTS currently only applies to the DBCT Coal Chain.

It is in this context that the Authority has considered QR Network's incorporation of LTS principles in its 2010 DAU.

11.2 Whole of Coal Chain Initiatives

Background

QR Network's 2009 DAU included a number of proposals to address supply chain initiatives, namely:

- (a) *schedule A: maintenance of regulatory asset base* – to ensure that capacity increases were considered on a forward looking basis for the system as a whole, rather than the minimum capital expenditure increment required for an additional train service on the CQCR;
- (b) *chapter 7 and schedule G: network management principles* – to optimise supply chain performance by more closely linking train scheduling and real time train management with port scheduling;
- (c) *chapter 6: pricing principles* – to allow the pricing principles to be breached when QR Network could demonstrate that arrangements would promote efficient investment in the supply chain; and
- (d) *chapter 9: reporting* – to align some of QR Network's reporting arrangements with other participants in the supply chain.

The Authority accepted all of the proposed amendments in its December 2009 draft decision. While some stakeholders wanted a stronger obligation placed upon QR Network to participate in supply chain initiatives, the Authority was reticent to go beyond QR Network's proposals given that the details of the DBCT LTSIM were not finalised at that time. For instance, the Authority said it was premature to include additional whole-of-coal chain performance indicators into the undertaking but that this could be done once the LTS deliberations were finalised.

QR Network's 2010 DAU

On 29 January 2010, QR Network released an exposure draft of a new part 11 of its undertaking that addressed issues related to supply chain coordination and planning. In doing so, QR Network said it wanted to include in the undertaking supply chain principles over and above those outlined in its 2009 DAU. These principles were ultimately included in the 2010 DAU and include principles relating to QR Network's:

- (a) participation in supply chain planning;
- (b) reconciliation between its master plan and a system master plan;
- (c) input into developing system operating assumptions; and
- (d) alignment of contracted rail capacity with other infrastructure providers.

Each of these matters is discussed in turn below.

In support of its proposals, QR Network noted that, in its view, the intent of the LTS is to work towards an agreed framework that is binding on the participants. QR Network said that it included the principles which it believed reflected the intent of the principles which can be applied more broadly across the CQCR (QR Network, sub. no. 70:23).

Stakeholders' Comments

Xstrata said it was unfortunate that QR Network's proposed coal chain principles in the 2010 DAU were minimalist and non-binding, given efforts to progress the reforms that were otherwise widely agreed by the rest of the industry involved in the process (Xstrata, sub. no. 77:16).

Xstrata said that QR Network's proposed process met some of the key capacity and contract management principles. However, Xstrata said that QR Network's proposed process is fundamentally flawed as it does not oblige QR Network to coordinate or align contracts for access rights where QR Network deems it not to be in its commercial interest (Xstrata, sub. no. 54:6).

Rio Tinto said that the failure to fully realise the potential of Queensland's export coal infrastructure was a serious issue. Rio Tinto was, therefore, disappointed with the limited steps the Authority has taken to properly enforce the participation and conduct of QR Network in whole of coal chain master planning, integrated operational planning and execution. Rio Tinto said that, while the inclusion of part 11 in the 2010 DAU was a step in the right direction, it believed that more effort is required (Rio Tinto, sub. no. 73:3-4).

Rio Tinto said that industry stakeholders had sought to amend the DBCT Management access undertaking to:

- *impose an obligation on the regulated business to participate in a whole of coal chain integrated planning and operational execution for the Goonyella system;*

- require the regulated business to promptly bring forward a draft amending access undertaking, where the whole of coal chain process delivers agreed outcomes which require amendments to the undertaking to be effective; and
- oblige the regulated business to adopt and comply with a System Master Plan, which would guide the priority and timing of future investment across the port, below – and above-rail and mine participants (Rio Tinto, sub. no. 73:4).

Rio Tinto said the Authority needed to strengthen the obligations on QR Network to:

- (a) participate in supply chain initiatives; and
- (b) enforce the implementation of changes to the undertaking as are necessary to facilitate improvements in supply chain efficiency.

Authority's Analysis and Decision

In considering QR Network's proposed new supply chain principles, the Authority has had regard for the need to promote the economically efficient operation of, use of and investment in, the infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets. The Authority was also mindful that a balance must be struck between optimising supply chain efficiency and the legitimate business interests of the service provider.

Given the execution of the LTSIM, the Authority understands that industry and service providers on the DBCT supply chain have agreed to implement supply chain principles. The Authority is also mindful that participants reached agreement with DBCT Management on including certain supply chain principles in its DAU that is also currently under consideration.

While the LTS is specific to the DBCT coal chain, it is reasonable to consider that the principles and the implementation plan developed by industry, in coordination with services providers, could also be applied to the operation of other Queensland coal supply chains. The signatories⁷ to the LTSIM include the majority of coal producers in central Queensland as well as both above-rail operators, the owner of DBCT and QR Network.

Accordingly, the Authority maintains its view from its December 2009 draft decision that, where possible, the undertaking should facilitate the coordination of the coal chain where participants have reached agreement on implementation (and achieve a level of consistency with regulatory arrangements applying to other infrastructure providers within such coal chains).

Nevertheless, the Authority believes that the QR Network undertaking could include stronger commitments to coordinating the operation and development of the coal supply chains given the progress made by coal chain participants in respect of the LTS.

In particular, the Authority believes that the undertaking should require QR Network to coordinate its maintenance activities, in particular track closures for maintenance, with other service providers and participants in the coal supply chains. The Authority does not believe that this is an onerous requirement as it understands that this is already QR Network's current practice.

⁷ North Queensland Bulk Ports Corporation Limited, DBCT Management Pty Ltd, Dalrymple Bay Coal Terminal Pty Ltd, Anglo Coal Australian Pty Ltd, BHP Mitsui Coal Pty Ltd, Vale Australia Holdings Pty Ltd, Isaac Plains Coal Management Pty Ltd, Macarthur Coal Limited, Peabody Energy Australia Pty Limited, Rio Tinto Coal Australia Pty Ltd, Xstrata Coal Queensland Pty Limited, QR Network Pty Ltd, QR National and Pacific National Pty Ltd.

Decision 11.1:

The Authority requires QR Network to insert a new clause 11.1.1(b) requiring it to coordinate its maintenance activities with other participants in the coal supply chains, in particular other service providers, as set out in Appendix 11.

11.3 Supply Chain Assumptions*Background*

Supply chain operating assumptions were not addressed in the 2009 DAU or in the Authority's December 2009 draft decision. Rather, the Authority sought to address QR Network's participation in system master planning at a broad level.

The LTS states that system operating assumptions will:

- (a) be used in a system wide model to support the system master plan;
- (b) be used to determine system capacity;
- (c) be updated on an annual basis, or as required based on material events; and
- (d) reflect factors that influence a user's consumption of system capacity.

In response to the Authority's December 2009 draft decision, Xstrata said that, to be effective, QR Network must integrate the LTS principles into the undertaking to explicitly require that the same set of assumptions be used in the rail network and port access regimes. Xstrata stated that QR Network's part 11 is non-binding and does not prevent QR Network from contracting capacity based upon its own system assumptions.

Where there are differences between the access regimes, Xstrata said there should be a trigger for QR Network to initiate a dispute resolution process to obtain an Authority determination on the system assumptions that QR Network must apply to the rail access regime (Xstrata, sub. no. 54:7).

Where participants in the LTS are not able to agree on the system operating assumptions, the Authority understands that the LTSIM contemplates a dispute resolution mechanism. The intention is to use best endeavours to resolve any issues at the coal chain level in the first instance and, where resolution is not reached, the matter would be referred to the Authority as a last resort for a binding arbitration.

QR Network's 2010 DAU

QR Network said that it has become clear through the LTS and master planning processes that consistent supply chain assumptions, where possible to define, are a crucial input into supply chain planning. Additionally it noted that:

The agreement among service providers on the relevant system operating assumptions for a system have an important role in ensuring individual capacity assumptions across different elements of the supply chain are not materially misaligned. These provide transparency about the factors requiring improvement within a supply chain in order to increase throughput or robustness (QR Network, sub. no. 70:24).

QR Network said that, in the past, it has sought assumptions from coal chain participants relating to port and above-rail operators to include within its master planning process, but this has met with limited success (QR Network, sub. no. 70:24).

QR Network said it would develop supply chain operating assumptions for each individual coal system and that these will be used for capacity modelling as part of developing its master plan (clauses 11.1.3(a) & 11.2.2(d)).

QR Network also said it would cooperate with a ‘supply chain group’ – which QR Network defined as a group:

- (a) established to coordinate some or all of the aspects of the planning or operation of a coal supply chain; and
- (b) that QR Network considered had sufficient support of participants on the coal supply chain to effectively perform a coordinating role (QR Network, sub. no. 67:136).

Where a supply chain group sought to develop supply chain assumptions, QR Network said it would:

- (a) participate in developing the supply chain operating assumptions;
- (b) notify a supply chain group of its own assessment of the supply chain operating assumptions applicable to the relevant coal supply chain;
- (c) consider submissions from supply chain groups on the reasonableness of its supply chain operating assumptions; and
- (d) respond to any submission from supply chain group as soon as reasonably practical (QR Network, sub. no. 68:103).

Where a participant in a supply chain group is not satisfied with:

- (a) the reasonableness of QR Network’s supply chain operating assumptions; or
- (b) QR Network’s response to the supply chain group’s submissions on the operating assumptions;

that participant can refer the matter to the Authority for determination in accordance with the dispute resolution procedure in 10.1.4 (QR Network, sub. no. 68:103).

To give effect to these arrangements, QR Network has proposed to amend clause 3.3(d)(ii)(L) that would allow QR Network to provide supply chain infrastructure providers with third party information where this will enhance the development of supply chain operating assumptions. This provision is subject to customer approval and is also on a confidential basis (QR Network, sub. no. 70:25). This matter is addressed in chapter 3.

Stakeholders’ Submissions

Stakeholders’ submissions identified two main concerns with QR Network’s proposals on coal chain operating assumptions, namely that:

- (a) they wanted a more consultative process for determining the operating assumptions rather than it being a decision made by QR Network; and

- (b) their preference was for the supply chain group to resolve any disputes rather than it being referred to the Authority for arbitration.

In terms of which party should develop the system operating assumptions, Xstrata noted that the undertaking must require QR Network to cooperate with other infrastructure providers in each supply chain to develop a standard set of underlying system assumptions. These system assumptions allow contracting parties to understand all the coal chain assumptions underpinning the purchase of access rights to the network (Xstrata, sub. no. 77:16).

Xstrata also submitted that QR Network should be required to participate in supply chain planning groups. Xstrata said that the role of the supply chain planning groups would be to bring all participants together to undertake coal chain planning activities including to agree to system assumptions as the basis for contracting coal chain capacity by each of the infrastructure providers (Xstrata, sub. no. 77:18).

Asciano was concerned that QR Network has drafted the supply chain operating assumptions clause as though the supply chain group must justify to QR Network why this broader group's assumptions are preferable to QR Network's assumptions. Asciano believes that a supply chain process where participants work together is preferable to a process where participants have to justify their assumptions via a formal submission process to another participant, especially a participant that is a monopoly service provider (Asciano, sub. no. 78:20).

Asciano said that the supply chain group should set out the assumptions, and if these differ from QR Network's assumptions, then the rationale for the difference should be explained. In this instance, participants would then be able to make their own commercial decisions on how to proceed (Asciano, sub. no. 78:20).

Lastly, QR National Coal said that a consultative approach to developing the supply chain operating assumptions would be more appropriate and more likely to gain system wide acceptance as the assumptions represent information relating to all parts of the supply chain (QR National Coal, sub. no. 71:8).

Asciano noted that QR Network has proposed a new clause to deal specifically with dispute resolution principles relating to supply chain operating assumptions. Asciano was concerned that this clause introduced different dispute resolution principles for different disputes (Asciano, sub. no. 78:18).

Asciano argued that supply chain group disputes are best dealt with in the supply chain protocols rather than under the QR Network access undertaking. Asciano was concerned that, in the event that the assumptions of the supply chain group and QR Network do not align, then the dispute resolution could be pursued with the Authority. However, Asciano did not believe that the Authority should be involved in planning decisions as it is a competition and access body and not a planning body. Asciano noted that in the Hunter Valley Coal Chain, the Australian Competition and Consumer Commission (ACCC) does not directly intervene in discussions between the ARTC and the Hunter Valley Coal Chain Coordinator. Accordingly, Asciano recommends that clause 10.1.4(h) be removed (Asciano, sub. no. 78:18).

Authority's Analysis and Decision

The Authority accepts that supply chain operating assumptions are the basis for the development of a system wide model and a system master plan. Importantly, the assumptions will also be used to determine system capacity, expansion paths and, ultimately, contract commitments. However, the Authority believes that criticism of QR Network's approach to determining the operating assumptions is not well founded.

From the Authority's perspective, the criticism levelled at QR Network is based on the premise that the framework set out in clause 11.1 of the 2010 DAU will act to the exclusion of an agreed and cooperative framework developed within a coal supply chain group.

That is not the Authority's interpretation of clause 11.1 and it is not the Authority's understanding of QR Network's intentions. Rather, the Authority's view is that clause 11.1 is intended to, and will, operate in tandem with any agreed framework developed by a coal supply chain group.

To the extent there is a supply chain group for a particular coal system, then QR Network will have committed itself to contributing to coordinating the performance of that supply chain and to developing a supply chain master plan, including cooperating in developing system operating assumptions and a system master plan; noting any material differences between its master plan and the system master plan and compressing conditional access rights where capacity delivered from infrastructure enhancements is less than forecast.

However, to the extent that a supply chain group does not exist, or QR Network does not accept a group's operating assumptions, QR Network will be obliged to comply with the requirements of part 11 which, require it to determine the supply chain operating assumptions in consultation with stakeholders and has provided for an arbitrated decision by the Authority in the event of a dispute. The effect of any differences will be detailed as part of QR Network's master plan.

QR Network is seeking to reserve the right to form its own view on the operating assumptions as an input into its own decision making processes relating to capital expenditure. The Authority would anticipate that other stakeholders would adopt a similar approach if, for any reason, they disagreed with any of the operating assumptions. For instance, it would not be unreasonable for a coal company to seek to contract for additional capacity if it believed that the operating assumptions were incorrect and would result in insufficient new capacity being developed.

While the Authority believes it is reasonable for participants in the same supply chain to cooperate to maximise the efficiency of the coal chain for all participants, it is also reasonable for those same participants to be free to act in their own best interests.

The commitments made by QR Network are not dissimilar to the commitments made by DBCT Management in its DAU. In particular, that:

- (a) DBCT Management will determine terminal and system capacity after taking advice from an expert and consulting with stakeholders and after having regard for system operating assumptions (to the extent that such information is available to DBCT Management); and
- (b) stakeholders can dispute the determination if:
 - (i) it has been determined in bad faith, breaches the undertaking or an access agreement; and
 - (ii) access seekers with a combined actual contract tonnage for the current financial year of greater than 50% object to the determination.

The Authority believes that the 2010 DAU could contain stronger obligations on QR Network to participate in supply chain group activities and to develop and to update operating assumptions.

Although QR Network has discussed its process for initially determining system operating assumptions, it does not state when this will occur. The Authority considers that this should occur no later than six months after the approval date.

Also, the 2010 DAU does not contemplate how or when the assumptions will be updated to account for system changes. The Authority understands that the LTSIM calls for system operating assumptions to be updated on an annual basis in conjunction with the annual system master plan unless a material change or event occurs necessitating an interim review.

The Authority recognises that the assumptions are subject to refinement and change based on new information, particularly after new users begin railing on the supply chain or after the development of new terminal capacity. The Authority considers that a mechanism similar to that contemplated in the LTSIM should be included in the 2010 DAU that would allow for updating the system operating assumptions no less than once per year and on a more frequent basis, should a material change or event occur. The process for updating the assumptions should be similar to the processes adopted for their initial determination.

The Authority does not accept Asciano's argument that the Authority should not have a role in arbitrating disputes on matters relating to determining QR Network's supply chain operating assumptions. The Authority accepts that a supply chain group should be able to resolve its own disputes in relation to system operating assumptions – indeed; this is specifically catered for as part of the LTS for the DBCT coal chain. Moreover, the LTSIM specifically provides for dispute resolution by the Authority in relation to system operating assumptions. The Authority considers that this is reasonable as it provides for a solution to be determined where there is no general agreement amongst participants and, in particular, in circumstances where one or more participants might have a vested interest in frustrating the implementation of a solution.

The Authority also does not accept Asciano's argument that QR Network has introduced an alternate arbitration process for resolving disputes on system operating assumptions. Rather, the Authority believes that the amendments provide additional guidance on how disputes on supply chain operating assumptions should be resolved. Indeed, in making this amendment QR Network has simply sought to fulfil its obligations under the LTSIM.

Decision 11.2:

The Authority requires QR Network to amend Clause 11.2.2(a)(iv), 11.1.3(a) and (c) as per the detailed drafting provided in Appendix 11.

11.4 System Master Plan and Coal Rail Infrastructure Master Plan

When it submitted the 2009 DAU, QR Network noted that the results of the O'Donnell review for a coal master planning process had yet to be confirmed. However, QR Network said it had amended aspects of the master planning process to address issues which had arisen at that time and that QR Network's process could exist with the framework ultimately agreed for the DBCT supply chain.

QR Network indicated it would participate in any whole-of-supply-chain planning group established if it considered the group had sufficient participants to effectively develop and implement a whole of supply chain master plan. QR Network also stated that its participation would not limit QR Network's rights and obligations in preparing and implementing the Coal System Master Plan.

In its December 2009 draft decision, the Authority formed the view that, in the event that a system planning group is formed, QR Network must be a participant.

The Authority also proposed that, to the extent that a system planning group makes rules, guidelines, directions or findings, and QR Network has participated in the system planning group's deliberations, then QR Network will guide its operation according to those results. If QR Network chooses not to follow guidance provided from the groups, QR Network will be required to provide reasons why it is not following this guidance. The Authority proposed that these explanations be included in the documents QR Network provides to customers as part of the voting process via a current coal system master plan.

The Authority understands that the LTSIM describes the structure of the master planning process as follows:

- (a) there is a hierarchy of system wide planning instruments, whereby the DBCT coal chain system coordinator will:
 - (i) develop a common set of assumptions (system operating assumptions);
 - (ii) develop a system wide model to inform system capacity assessments; and
 - (iii) prepare a system master plan to identify and evaluate options for increasing coal chain capacity;
- (b) update the system operating assumptions and the system master plan annually or where a material change or event compels a review; and
- (c) in developing the system master plan, the central coordinator will consult with coal chain participants including the terminal owner and QR Network who will develop their master plans in parallel.

The Authority also understands that a service provider's and the central coordinator's master plans will identify, and seek to reconcile, any differences between their assessments of either a facility's or the system's capacity.

QR Network's 2010 DAU

QR Network complied with the Authority's draft decision 10.8 by including in its 2010 DAU obligations for it to:

- (a) participate in any supply chain group that seeks to develop a supply chain master plan for a relevant supply chain; and
- (b) align the coal rail infrastructure master plan (CRIMP) with the system master plan to the extent that QR Network considers it 'reasonable to do so' and, where there are differences between these master plans, QR Network will provide reasons for those differences in its CRIMP.

QR Network has also included in the 2010 DAU a mechanism that considers the issue of a system master plan as well as its CRIMP. QR Network agreed to provide customers with a CRIMP document that uses its supply chain assumptions, which may, or may not, be the same as those used in a system master plan (QR Network, sub. no. 70:24).

Stakeholders' Comments

Xstrata noted that part 11 of the 2010 DAU partially addressed the need to develop coal supply chain coordination principles for the CQCR. However, Xstrata believes it is partially flawed as it does not provide an absolute obligation for QR Network to coordinate or align contracts for access rights where QR Network deems it not to be in its commercial interests.

Accordingly, Xstrata said that:

- (a) investment in network infrastructure should be guided by the system master plan where it has been established, otherwise by the CRIMP; and
- (b) the proposed master planning process should be amended to strengthen QR Network's obligations to coordinate and develop the CRIMP in alignment with any system master plan (Xstrata, sub. no. 77:16-17).

Rio Tinto said that, in relation to the DBCT DAU, stakeholders are seeking to require DBCT Management:

... to adopt and comply with a System Master Plan, which would guide the priority and timing of future investment across the port, below- and above-rail and mine participants.

Rio Tinto therefore urged the Authority to revisit its draft decisions on master planning and whole-of-supply-chain initiatives and to strengthen the obligations on QR Network to participate in coal chain initiatives and 'enforce' the implementation of changes to the undertaking as are necessary to facilitate improvements in supply chain efficiency (Rio Tinto, sub. no. 73:4).

The QRC argued that, rather than only requiring QR Network to update the CRIMP 'if that plan has substantially changed', the requirement to update the CRIMP should be based on whether the supply chain operating assumptions or other factors relevant to the development of a CRIMP would be expected to result in a material change to the CRIMP (QRC, sub. no. 82:28).

The QRC also proposed to include a requirement for QR Network to:

...ensure that the Coal Rail Infrastructure Master Plan is based on and is consistent with the Supply Chain Operating Assumptions, including any Supply Chain Operating Assumptions determined pursuant to 11.1.3(c) (QRC, sub. no. 82:28).

The QRC noted that this drafting provides clarity and comfort to industry that the supply chain operating assumptions will be carried forward into the CRIMP and that the dispute resolution process referred to in clause 11.1.3(c) (supply chain operating assumptions) has a meaningful purpose.

Authority's Analysis and Decision

The Authority considers that the 2010 DAU contains sufficiently strong obligations on QR Network to participate in the master planning processes of supply chain group.

However, the Authority accepts that there could be greater transparency in explaining the reasons for any material difference between QR Network's CRIMP and a supply chain master plan. In particular, the Authority considers that QR Network should provide additional clarity by clearly identifying in its CRIMP the reasons why QR Network:

- (a) intends to invest other than in accordance with the system master plan (where one exists); and

- (b) does not agree with a system master plan (where one exists).

The Authority notes that QR Network has amended its undertaking to include the requirement that the CRIMP be based on supply chain operating assumptions. The Authority accepts that this is a significant commitment to improving the development of the supply chain as a whole as it ensures that the focus of the CRIMP is on the operation of the supply chain and not just on the operation of the rail network. This commitment will apply irrespective of whether or not a supply chain group is developing a separate supply chain master plan.

Notwithstanding this, in the interest of working towards alignment, the Authority considers that QR Network must clearly explain in its CRIMP the reasons for, and the potential impacts of, any differences between the assumptions used in the system master plan and the CRIMP.

The Authority does not accept the argument that QR Network should be obliged to adopt the supply chain group's system operating assumptions in its master plan, as this would impinge on QR Network's responsibility to operate and develop its network. An obligation on QR Network to provide transparency around its obligations should be sufficient.

The Authority would be minded to reconsider how this issue should be dealt with in subsequent access undertakings once it has become more evident how the master planning process under the undertaking and the LTS will interact.

Decision 11.3:

The Authority requires QR Network to make a number of amendments to part 11 of the 2010 DAU (as set out in Appendix 11), including:

- (a) inserting Clause 11.2.2(a)(v) which requires QR Network to include in its master plan reasons why it may invest other than in accordance with a supply chain master plan and explain the reasons for the difference; and**
 - (b) inserting Clause 11.2.2(a)(ii) which requires QR Network to include in its master plan reasons why it may not agree with a system master plan.**
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11.5 Master Plan and Stakeholder Consultation

Background

In its 2009 DAU, QR Network proposed to remove the requirement to provide the Master Planning forum with an updated Master Plan in June of each year as it was engaging with customers on an on-going basis. Also, QR Network indicated that customers have sought a number of long term system wide expansion paths which do not fall within the short term considerations of projects under the current planning framework. Rather, QR Network proposed that the master plan should be published when QR Network considers that its forward expansions plans are substantially different to the information contained in the most recently published master plan.

In its December 2009 draft decision, the Authority noted that stakeholders were concerned with the current planning process regarding the transparency of the process and the apparent absence of a truly consultative planning process. In addition, the Authority also noted there are stakeholder concerns that the master plan is not being used as a 'planning' tool, but as a tool to acquire customer approval of infrastructure spending.

The Authority did not object to QR Network's proposal not to provide a master plan annually, but rather when substantial changes were being proposed. The Authority considered that this proposal would allow for the master plan to focus on the long term development of the network – a feature which had been deficient in recent master plans.

The Authority also proposed that QR Network be required to make reference to the master plan when seeking approval of expansionary capital expenditure by way of customer vote, thus the master plan would need to remain current and provide an overview of how all planned expenditure would be designed and constructed to meet future demand. It would also need to provide sufficient details on scope, standard and preliminary costs.

The Authority also proposed that QR Network continue to be required to formally consult with stakeholders on all planning activities, regardless of whether the master plan is submitted each year.

QR Network's 2010 DAU

QR Network amended its 2010 DAU to comply with the Authority's decision 10.7. Specifically, the 2010 DAU:

- (a) requires QR Network to clearly define the details of stakeholder consultation by distributing to each stakeholder in the Coal System Master Planning forum a program that outlines the consultation QR Network will undertake over the forthcoming year. This will include any processes envisioned that will require customer acceptance of the scope of capital expenditure. QR Network proposed that this program will be put in place prior to 1 July in each year (clause 11.2.1(e));
- (b) requires QR Network to provide a master plan to the coal system master planning group where that plan has substantially changed since the issue of the previous plan (clause 11.2.1(f));
- (c) limits QR Network from seeking customer approval of the scope of a project if the project is to occur in less than six months (sch. A 3.2.2(b)); and
- (d) refers to the system master plan as the source document provided to the customer group for the purpose of a customer vote on the scope of capital expenditure (QR Network, sub. no. 65:149).

Stakeholders' Comments

Stakeholders recommended both high level structural changes to the CRIMP forum and minor improvements to existing clauses. Xstrata and Asciano both said the CRIMP process is broken and ineffective, whereas the QRC suggested improvements to the existing process.

Xstrata questioned the effectiveness of the CRIMP process to manage industry's expectations for coordinated and timely coal chain investment processes. These concerns were magnified by QR Network's ability to simply remove customer approved projects from the CRIMP and 're-badge' them as significant infrastructure enhancements requiring a WACC uplift (Xstrata, sub. no. 77:20).

Xstrata proposed amendments relating to QR Network providing appropriate and timely information to stakeholders, giving stakeholders more of a say in project development and allowing industry to undertake the planning process for projects QR Network is not willing to pursue. Specifically, Xstrata proposed that the undertaking should:

- (a) require QR Network to provide more information on the investment projects for customer vote, the coal chain alignment and the level of capacity the project should create;
- (b) require feasibility studies to adhere to clear deliverables and be provided in a timely manner;
- (c) establish an industry control group that would have more of a say in each stage of a project's development;
- (d) allow industry to contract out key elements of the CRIMP process where QR Network is unwilling to undertake the associated project within the regulatory process; and
- (e) allow industry to have access to feasibility studies and other planning work QR Network has already undertaken for projects that QR Network is unwilling to pursue.

Asciano said that, as currently proposed, the QR Network master planning forum is largely irrelevant because the forum has no power to influence planning outcomes. As such, the current process appears to be a mechanism whereby QR Network can demonstrate it has engaged in consultation with stakeholders, even though there is no obligation placed upon them to incorporate stakeholder input into their plan (Asciano sub. no. 78:21).

As a result, Asciano said that the master planning section of the undertaking should be redrafted to:

- (a) require QR Network to prepare and to distribute a rail infrastructure master plan;
- (b) require that certain content be in the plan (such as is already included in the plan); and
- (c) allow an independent review of the model underpinning the plan.

The QRC welcomed QR Network's amendments to this clause, but proposed further amendments to ensure that the undertaking did not preclude representatives of industry groups such as the Gladstone Coal Exporters Executive or a supply chain group from attending the CRIMP forum. QRC stated that there is a risk that, by being too prescriptive, the access undertaking may unnecessarily prevent attendance by relevant industry groups. The QRC added that as the CRIMP forum does not have decision making authority, there is no need to specify that the QCA and the QRC attend as an 'observer only' (QRC, sub. no. 82:28).

Authority's Analysis and Decision

In its December 2009 draft decision, the Authority accepted that the CRIMP only needed to be developed where QR Network's expansion plans had materially changed from the previous CRIMP. As set out above (section 11.4), the Authority accepted the arguments that the Supply Chain Operating Assumptions should be updated in the event of a material event or changes in circumstances. The Authority believes that this principle should be extended into the development of an updated CRIMP as well. That is, QR Network should be obliged to update the CRIMP where it would materially change as the result of a change in Supply Chain Operating Assumptions or any other factor.

Both Asciano and Xstrata questioned the effectiveness of the master planning forum as QR Network has no obligation to incorporate stakeholder input into the plan. Xstrata proposed that an industry control group be established to ensure that industry was more involved at each stage of a project's development

The Authority notes that the 2010 DAU incorporates the more formalised industry consultation process proposed by the Authority in its December 2009 draft decision. The 2010 DAU also

retains the right for customers to appoint a consultant to review QR Network's capacity modelling.

In addition, it is evident from the most recent draft of the CRIMP that a number of supply chain groups have already been formed for supply chains in addition to that servicing DBCT. This will trigger the additional reporting and consultation obligations QR Network has included in the 2010 DAU in respect of developing supply chain operating assumptions and in relation to aligning the CRIMP with a system master plan. The challenge, therefore, is to make these groups effective enough to ensure there is sufficient transparency in QR Network's planning decisions.

In these circumstances, the Authority is reticent to impose further obligations on to QR Network in terms of the way it interprets information received through the master planning forum as, ultimately, QR Network has responsibility for operating and developing the network.

The Authority accepts the QRC's comments that the 2010 DAU should not be so prescriptive as to exclude representatives from supply chain groups and that it is not necessary to state that the Authority and the QRC only have observer status.

Decision 11.4:

The Authority requires QR Network to amend clauses 11.2.1(c)(v), 11.2.1(c)(vi), 11.2.1(c)(vii), 11.2.1(e)(i) and 11.2.1(e)(ii) as set out in Appendix 11 to:

- (a) remove wording that states the Authority and the QRC only have observer status;**
 - (b) allow other currently non-listed interested parties to be part of the coal rail infrastructure master planning forum; and**
 - (c) correct the name of the coal rail infrastructure master planning forum.**
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11.6 Contracting for Capacity in Coal Supply Chains

Background

QR Network did not specifically address the matter of contracting for capacity in coal supply chains in its 2009 DAU. This proposal was first addressed by QR Network in its January 2010 exposure draft on coordination and planning.

In response to the Authority's December 2009 draft decision, ARTC said that achieving contractual alignment does not necessarily mean that contractual arrangements need to be uniform across agreements with different service providers. ARTC noted that having uniformity across all service provider agreements may unnecessarily constrain flexibility in the provision of access. ARTC also noted that, in developing its Hunter Valley capacity allocation, management and investment arrangements, it has sought a 'working alignment' and consistent access arrangements between service providers, rather than uniform agreements (ARTC, sub. no. 48:1-2).

ARTC said that the benefits of alignment to service providers are small compared to benefits that accrue to users. Further, ARTC explained that contractual alignment, and supply chain benefits as a whole, may constrain the extent to which an individual service provider can optimise the use of, and investments in, its own infrastructure (ARTC, sub. no. 48:3).

Xstrata submitted that QR Network's proposed approach to capacity contracting places no obligation on QR Network to efficiently manage the capacity generated by an expansion. For example, when an expansion project does not deliver its forecast capacity, it will simply result in a pro-rata reduction without reference to liability, loss or the responsibilities of all supply chain participants. Xstrata said that, where capacity loss can be directly attributable to the actions of parties, then those parties must be held accountable for those actions (Xstrata, sub. no. 54:6).

Xstrata also noted that QR Network has not addressed the basic principles underpinning contractual alignment of the supply chain, including that QR Network must:

- (a) contract for capacity with reference to a common view on deliverable system capacity;
- (b) coordinate and develop the CRIMP process aligned with any system master plan to optimise investment decisions and ensure any investment creates deliverable system capacity;
- (c) ensure that growth tonnes can be accommodated, but not at the expense of existing contracted capacity; and
- (d) optimise operational performance of the coal chains by ensuring parties (infrastructure parties or coal producers) bear the true cost of any under-performance (Xstrata, sub. no. 54:6).

QR Network's 2010 DAU

QR Network incorporated its January 2010 exposure draft proposals as part 11 of its 2010 DAU that could be applied to all coal supply chains. QR Network noted that this mechanism did not presuppose the outcome of the DBCC LTS discussion on capacity contracting. QR Network said that, where there are clear outcomes from the LTS process that can be applied to specific contracts (where DBCT is the destination), the specific conditions will be reflected in the terms of the access agreement negotiated with each customer (QR Network, sub. no. 70:25).

QR Network proposed to use reasonable endeavours to grant access rights to an access seeker in respect of coal carrying train services only where QR Network has formed a view that the access seeker had secured, or was likely to secure, the rights to leave the rail network. This proposal applies to all coal supply chains.

Under QR Network's proposal, it would have a discretion to contact for access such that access rights were be conditional pending completion of an infrastructure enhancement. QR Network said that, after commissioning of the last relevant piece of infrastructure, it would assess the capacity increase created by the infrastructure enhancement. However, QR Network added that it may defer any such capacity assessment until such time as it considers that the infrastructure is fully operational and demand conditions allow for a reasonable assessment to be undertaken.

In the event that the change in capacity is:

- (a) less than the planned capacity of the infrastructure enhancement; and
- (b) not sufficient to provide conditional access rights to meet the requests of conditional access holders;

then QR Network proposed that the conditional access rights for each of the conditional access holders will be reduced on a pro-rata basis. In these circumstances, QR Network said it would notify each conditional access holder of:

- (a) the assessment that had been undertaken; and
- (b) the reduction in conditional access rights and the basis for that calculation.

QR Network also proposed that conditional access holders together be given the first position in the queue for new planned capacity, but only for capacity equal to their access rights reduction (QR Network, sub. no. 67:108).

QR Network has also included a clause that notes that clause 11.3 is in addition to and is not intended to limit or restrict parts 4 (negotiation framework) or 7 (capacity management). For the avoidance of doubt, QR Network says that, if it cannot comply with its obligations in its proposed 11.3 and its obligations under parts 4 and 7, then parts 4 and 7 will prevail (QR Network, sub. no. 67:109).

Stakeholders' Comments

Stakeholders hold the view that the application of this clause might discriminate between expanding and non-expanding users. Stakeholders have largely requested the Authority to reject QR Network's proposal. However, if the Authority is minded to accept this proposal, stakeholders requested it be modified to, among other things, protect conditional access holders. Four main themes emerged from stakeholders' comments, each of which is dealt with in turn below.

Impact on New or Expanding Users

BMA did not support, and requested the Authority to reject, the conditional access rights framework proposed in the 2010 DAU. BMA was particularly concerned about scaling back access rights in circumstances where the change in capacity does not meet or exceed planned capacity (BMA, sub. no. 74:5).

BMA said that new entrants and expanding miners rely on access rights when making mine production decisions, expansion plans and investment decisions. Producers will enter into long term take-or-pay contracts with their customers and service providers (including port and rail providers) taking into account the production arising from the new or expanding mine. BMA said clause 11.3 would result in the determination of conditional access rights after the producer has committed to investment in the mine and committed to the long term take-or-pay contracts (creating binding obligations on the producer). BMA said that these long term supply contracts are usually for large volumes of coal, and the resulting exposure, in the event the planned capacity is not delivered, is not insignificant (BMA, sub. no. 74:6).

BMA added that clause 11.3 would place an onerous burden on expanding miners as they will bear all of the risk of capacity not being delivered, for example:

...it is possible that under the 2010 DAU Conditional Access Rights Regime a new miner could be granted only 50% (or less) of its contracted capacity if the change in capacity does not meet planned capacity forecasts. Such an outcome jeopardises the viability of new projects (BMA, sub. no. 74:6).

BMA said that the uncertainty in delivering access rights may discourage new investment in Queensland as the conditional access rights regime imposes an additional burden on expanding miners who already bear the existing risk of expansion timing falling short of demand as is already occurring. BMA said that, if the Authority is minded to approve the conditional rights model, then any shortfall in planned capacity should be shared equally amongst all users, rather than on expanding users (BMA, sub. no. 74:6).

Vale was also concerned that clause 11.3 could result in new or expanding producers having their proposed capacity reduced even if an infrastructure enhancement is not the cause of the

reduced capacity. Vale said this could preclude new entry, given the risk associated with small mines becoming ‘unviable’ once capacity rights are scaled back (Vale, sub. no. 79:2).

Anglo American said that clause 11.3 was inappropriate in respect of all infrastructure enhancements, and is particularly inappropriate for infrastructure enhancements where access holders or customers have funded or under-written the expansion costs. In the case of user funded expansions, Anglo American said this approach was inappropriate as customers would have funded an expansion on the basis that they would receive particular capacity, but those customers would have paid for capacity they would not receive if this capacity is reduced on a pro-rata basis (Anglo American, sub. no. 83:15).

The QRC said its members had differing views on the appropriateness of clause 11.3. One view was that clause 11.3 protects existing users of the infrastructure from the effect of QR Network’s poor decision making. For instance, if there is already insufficient capacity to meet contracted demand, an expansion will first deliver existing customers capacity to meet that demand and expanding or new customers will bear the risk that the increased capacity will still be insufficient to meet contracted demand and it will only be their contract volumes that will be reduced.

Conversely, other QRC members hold the view that access seekers are not in a strong position to assess QR Network’s decision making and do not control the approval of new capacity enhancement projects as existing users are also involved in the customer vote process (QRC, sub. no.82:28).

However, QRC members did agree that, if the Authority was to accept clause 11.3, then:

- (a) amendments to the current draft are required to clarify the process;
- (b) the amendments should provide some protection to conditional access holders; and
- (c) QR Network should be provided with incentives to avoid putting customers in this position.

Suggested Modifications to QR Network’s Proposal

Xstrata said that clause 11.3 provides no incentives for QR Network to effectively manage the capacity generated through a project. As a remedy, Xstrata proposed that, where QR Network miscalculates an expansion project’s delivered final capacity, QR Network must:

- (a) immediately initiate the infrastructure projects required to deliver the capacity shortfall as soon as possible. Expansion customers will be given project control rights to ensure the project is delivered in a timely manner; and
- (b) adjust its reference tariffs assuming all of the capacity has been delivered – that is, QR Network’s revenue cap will be reduced in line with the undelivered capacity which would continue until such time as QR Network has delivered infrastructure enhancements to correct its capacity shortfall (Xstrata, sub. no. 77:18).

QRC also proposed a number of amendments to protect the interests of conditional access holders, namely that:

- (a) references to ‘change in capacity’ should be replaced with ‘change in existing capacity’ because the current definition of capacity includes both planned and existing capacity;
- (b) capacity should be measured as the system capacity after completing the project (i.e. the existing capacity at that time), less the existing capacity the system would have had if

assessed in the absence of the completed infrastructure enhancement (using consistent supply chain operating assumptions). QRC said that this is not the same as assessing the increase in system capacity as changes in the system operating assumptions may have consumed capacity during the construction phase;

- (c) conditional access holders should not have their access rights reduced where a change in system operating assumptions reduces existing capacity (QRC, sub. no. 82:29);
- (d) timelines should be established for carrying out the assessment of the change in capacity to provide the conditional access seeker with some certainty. In the absence of a demonstrable shortfall in capacity during the timeframe, there should be a presumption that the expected capacity has been provided and the conditional access holder should then have certainty of its access rights (QRC, sub. no. 82:30);
- (e) the process to scale back conditional access rights needs to be clarified, specifically:
 - (i) the capacity assessment should result in a portion of the conditional access rights becoming 'unconditional' while the balance of conditional access rights will continue to be conditional (rather than cancelling the conditional access rights that were not satisfied). In this instance, the conditional access holder should have the option of cancelling the remainder of the conditional access rights (without penalty), or retain the rights;
 - (ii) the holders of unfulfilled conditional access rights should not have to return to a queue, or be subject to queue re-ordering. Instead, these conditional access holders should receive access to the next increment of relevant capacity that becomes available in the system;
 - (iii) all conditional access rights must be conditional upon:
 - (C) the capacity delivered by the enhancement which is expected to be relevant to those rights; and
 - (D) QR Network 'making good' on its obligations to prior holders of conditional access rights to the extent of shortfalls on previous enhancements (QRC, sub. no. 82:30).

Access Agreements

The QRC proposed three amendments to access agreements to give effect to clause 11.3.

First, the QRC said that the access agreements should document the areas in which a coal producer and its above-rail operator could impact on system capacity. The QRC said that the access agreements should set out the agreed performance requirements of the coal producer and the above-rail operator and would be negotiable for individual agreements. The access agreements should also provide for QR Network to adjust access rights where an access holder departs from the contracted performance indicators and, in doing so, impacts on system capacity.

The intent of this amendment is to ensure that no access holder can impact negatively on QR Network's ability to meet its commitments to other access holders by departing from the contracted performance standards (QRC, sub. no. 82:31).

Second, the QRC proposed to delete clause 11.3(d); which states that QR Network is not required to comply with granting of conditional access rights to conditional access holder in the event that granting conditional access rights is inconsistent with any access agreement for a conditional access holder. The QRC said that it could see no reason why QR Network would

need to retain such a right, other than with access agreements signed prior to the effective date of the undertaking (QRC, sub. no. 82:31).

Third, the QRC said that the standard access agreements should require QR Network to provide further capacity to satisfy all unfulfilled conditional access rights immediately upon becoming aware that an enhancement has not delivered the expected capacity increase. This ‘catch-up’ expansion should be part of QR Network’s obligation to invest and access conditions should not be sought even if they were sought on the original project.

Clause 11.3(e)

The QRC said that the purpose and effect of clause 11.3(e) is unclear and potentially inconsistent with clause 11.3(b) (granting of conditional access rights upon completion):

This clause 11.3 is in addition to and is not intended to limit or restrict either Part 4 or Part 7. For the avoidance of doubt, if QR Network cannot comply with both its obligations with this clause 11.3 and its obligations in accordance with Part 4 and Part 7, then QR Network’s obligations in accordance with Part 4 and Part 7 prevail to the extent of the inconsistency (QR Network, sub. no. 67:108).

The QRC noted that this clause should not be required if it is accepted that conditional access holders do not return to the queue after an access rights reduction (QRC, sub. no. 82:30).

Authority’s Analysis and Decision

Stakeholders’ objections to QR Network’s proposed compression rules highlights the complexities associated with developing network expansions and being able to accurately forecast the resultant capacity increases. These difficulties are heightened in a multi-user supply chain where so many factors that affect the capacity of the supply chain are beyond the control of a single entity. Stakeholders’ comments also highlight the difficulties associated with developing a set of rules to satisfy a range of competing, albeit all legitimate, interests.

In many respects, the comments also highlight the difficulties resulting from expanding the supply chain with a “just-in-time” mentality and where the delivered capacity is invariably fully contracted. While compression rules may provide a short term solution, ultimately they are not a viable long term solution. Development of supply chain master plans may reduce the likelihood that insufficient capacity will be delivered in the future but in the event this is not fully effective, the solution must involve creating more capacity by either additional investments or through a better coordination of the existing facility.

The Authority understands that QR Network was surprised by the objections to its proposed compression rules. In a large part, this was because it said it did not receive any objections to this proposal when it was included in its January 2010 exposure draft. Also, similar arrangements are already embodied in the LTS and in the DBCT DAU.

Given this, QR Network has informally indicated to the Authority that it is agreeable to removing clause 11.3 from the 2010 DAU and it is willing to again consult with stakeholders on an appropriate framework for managing shortfalls in capacity.

Despite this, the Authority believes that the proposal has some merit and, rather than removing this clause entirely, the Authority believes the clause should be retained with appropriate modifications because:

- (a) it seeks to formally address a major issue in the coal supply chains that would otherwise just be set aside or managed in an ad hoc fashion;

- (b) this framework was contemplated in the LTSIM, agreed to by parties on the DBCT coal chain;
- (c) this framework is included in the DBCT DAU and users of the terminal have already indicated their acceptance of this framework for the terminal; and
- (d) the clause can be amended now to address many of stakeholders' concerns, leaving QR Network with the option to further develop its proposal in consultation with stakeholders.

The Authority notes BMA's proposal that, if the Authority was minded to approve the conditional rights model, any shortfall in planned capacity should be shared equally amongst all users, rather than placing all of the risk onto new or expanding users.

The QRC expressed a variation of this view noting that capacity shortfalls can occur for a number of reasons. The QRC suggested that only new and expanding users should bear the effects of a capacity shortfall where it was due to a capacity expansion delivering less than initially forecast and that they should not bear the full impact of other effects such as a change in system operating assumptions.

The Authority also believes that Xstrata has reasonably suggested that the initial response to an identified shortfall in capacity should be measures to rectify the capacity shortfall. However, the Authority is not convinced that an additional network expansion would always be the most efficient response and that other alternatives across the supply chain should also be considered as possible responses. Alternatives might include changing the operating or maintenance practices of the network or undertaking additional investment elsewhere in the supply chain. It would be anticipated that the annual system master planning processes would identify the most efficient option to resolving capacity short-falls. That said, the Authority considers that QR Network should be obliged to undertake whatever measures are necessary, including constructing additional capacity, to meet any capacity shortfall.

The Authority believes that it is reasonable that existing participants in the coal supply chain should expect some certainty in receiving their contracted service levels. However, access seekers too need some certainty that their access rights will be protected. Therefore, the Authority considers that, once QR Network has completed its post commissioning assessment, the conditional rights of the access seekers should be confirmed. To the extent that there is insufficient capacity to fulfil all conditional access rights, the proportion of access rights that can be met should be confirmed. There should be no subsequent differentiation between the rights of the pre-existing access holders and of the new access holders.

In this regard, the Authority accepts the QRC's argument that any capacity shortfall caused by changed supply chain operating assumptions should be met by all access holders (pre-existing and new).

The Authority also accepts that the BMA argument has merit on both equity and practical grounds. However, consistency across the LTSIM, the DBCT and the QR Network access undertakings provides a significant opportunity to improve supply chain coordination. As the LTSIM and the DBCT undertaking have very significant support, the Authority is reluctant to impose an alternate view.

As a result, the Authority considers that capacity on the network should be managed according to the following principles:

- (a) QR Network must regularly assess the capacity of the rail infrastructure in the CQCR, in line with its regular assessments of system operating assumptions, and the capacity of the rail infrastructure and infrastructure enhancements in response to access applications;

- (b) if QR Network ever determines that available capacity (i.e. existing capacity plus planned capacity less committed capacity) is less than zero, it must undertake infrastructure enhancements (or any other alternative and more efficient remedy) to ensure that it has sufficient capacity to meet its existing capacity commitments;
- (c) access holders that do not receive their contract entitlements will be placed at the head of the queue for access rights (based on the date of their access application) and their position in that queue will be managed in accordance with the general queue management rules;
- (d) if, after the commissioning of an infrastructure enhancement, QR Network no longer believes that the increased system capacity is sufficient to meet its capacity commitments (i.e. initial contracts plus conditional access holders):
 - (i) conditional access holders will have their access rights reduced to the extent that the shortfall in capacity was a result of an incorrect estimate of forecast expansion capacity (based on consistent system operating assumptions);
 - (ii) all access holders will have their access rights reduced to the extent that the decline in anticipated capacity is a result of a change in system operating assumptions; and
 - (iii) QR Network will address the matter in accordance with (b) and (c) above;
- (e) if, after the commissioning of an infrastructure enhancement, QR Network determines that it has sufficient capacity to meet its capacity commitments but this assessment subsequently proves incorrect, all access holders will have their capacity entitlements reduced and QR Network will address the matter in accordance with (b) and (c) above.

The Authority does not accept the QRC's proposal that access seekers with unfulfilled capacity rights should not be returned to a queue of access seekers. The Authority is concerned that confusion might arise if there is more than one mechanism for managing new or renewed access rights. These access seekers would be returned to the queue but should maintain their position in the queue based on the date when QR Network provided them with their indicative access proposal. This arrangement should place these access seekers towards the head of the queue, above subsequent access seekers, but below those access seekers who are applying to renew their existing access rights.

Decision 11.5:

The Authority requires QR Network to amend clause 11.3, as set out in Appendix 11, to ensure that:

- (a) **conditional access rights will only be reduced where the shortfall in capacity is due to a capacity expansion delivering less capacity than originally anticipated and not due to a change in system operating assumptions and to require QR Network to undertake development of required infrastructure enhancement as soon as practicable to remedy any such shortfall; and**
 - (b) **after compression of the access rights has occurred, each access holder will, for the conditional access rights they have not been able to obtain due to the shortfall, be placed in a queue based on the date of their original access application.**
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11.7 No Fetter

Background

QR Network has included drafting in its 2010 DAU that it will not be obliged to comply with clauses 11.1 and 11.3 of the undertaking in relation to participating in coal chain coordination activities, developing supply chain operating assumptions and master plan and in managing access rights consistent with coal chain principles.

QR Network notes that it will only be obliged to comply with these provisions if compliance:

- (a) is consistent with QR Network's commercial objectives; and
- (b) does not inhibit, restrict, fetter or adversely impact QR Network's ability to:
 - (i) exercise any discretion, power function or right; or
 - (ii) comply with any obligation or to do anything,

in accordance with its 2010 DAU or an access agreement.

QR Network also notes that, for the avoidance of doubt, QR Network's compliance with clauses 11.1 and 11.3, does not limit QR Network's rights or obligations with respect to clause 11.2 regarding the master planning process and the content of the master plan.

QR Network's reason for wanting to maintain its commercial discretion within its undertaking is that, at this time, there are no formal agreements in place between participants of the supply chain groups regarding obligations described under clauses 11.1 and 11.3 (QR Network, sub. no. 70:26).

Stakeholders' Comments

The QRC said the 'no fetter' clause appears to have the effect of relieving QR Network of its obligations under clause 11.1 and 11.3. QRC said this could mean, for example, that QR Network may choose, on the basis of its commercial objectives, to:

- (a) ignore the outcome of the dispute resolution regarding supply chain operating assumptions when preparing a CRIMP, or when contracting;
- (b) set aside its reasonable endeavours obligation regarding contracting with parties who have network exit capability; or
- (c) not perform any of the steps in clause 11.3, including not:
 - (i) assessing the change in capacity;
 - (ii) reducing access rights; or
 - (iii) giving the first position in the queue to a conditional access holder whose rights are reduced.

Accordingly, QRC proposed to delete this clause as QR Network has retained adequate provisions and discretions that include the reasonable endeavours obligation (QRC, sub. no. 82:31).

Xstrata said that the ‘no fetter’ clause only requires QR Network provide a best endeavours guarantee. Xstrata argued that such an overarching caveat effectively leaves industry in a position where it has to ‘hope’ that coal supply chain coordination is consistent with QR Network’s commercial objectives. Xstrata was also concerned that QR Network might seek an above regulatory return or margins in return for its involvement in any coal supply coordination process (Xstrata; sub. no. 77:18).

While Asciano largely agreed with the QRC’s and Xstrata’s submissions, it queried whether an access undertaking is genuinely effective if the access provider has the option of unilaterally deciding whether to comply with certain parts of the access undertaking. Asciano said that the access undertaking should not be drafted such that some sections or parts only have to be complied with when the access provider decides it is in its own interest to comply. Asciano concluded that this clause should be removed from the undertaking (Asciano, sub. no. 78:22).

Authority’s Analysis and Decision

The Authority notes QR Network’s concern that the clauses pertaining to supply chain coordination and contractual alignment do not fall under formal agreements between the participants. The Authority also accepts that QR Network should be able to retain its commercial discretion when participating in coal supply chain group activities.

This issue is not dissimilar to the Hunter Valley access undertaking, where the ARTC was concerned that pursuing system alignment may conflict with its legitimate business interests. Specifically, the ARTC submitted to the ACCC that:

..., the benefits of alignment to service providers are small compared to those of the producers, and ARTC cannot act outside its own reasonable commercial interests in pursuit of alignment.

In considering this matter, the ACCC accepted that the undertaking needs to balance the objective of greater alignment and the ARTC’s legitimate business interests. In this respect, the ACCC referred to a key pricing principle that provides for regulated prices to:

- (a) be set to generate expected revenue for a regulated service that is at least sufficient to meet the efficient costs of providing the regulated service; and
- (b) provide a return on investment commensurate with the regulatory and commercial risks involved (ACCC, draft determination, p 53-54).

These principles are not dissimilar to the pricing principles in the QCA Act and in the 2010 DAU. Moreover, in its June 2010 draft decision, the Authority discussed performance incentives for QR Network. Indeed, the Authority accepted that a mechanism should be introduced into schedule F of the undertaking that incentivises QR Network to improve its performance, and that of the whole coal supply chain.

Once this mechanism is in place, QR Network will have some incentive to actively pursue supply chain efficiencies, but until then QR Network may receive little benefit in pursuing greater supply chain alignment.

Therefore, the Authority accepts that, at this time, QR Network should not have stricter obligations on it to comply with supply chain obligations than is currently contemplated in the LTSIM. Nevertheless, the Authority considers that the proposed no fetter clause goes too far by providing QR Network with too much discretion – this is particularly clear in relation to clause 11.1.

For the most part, clause 11.1 obliges QR Network to participate in supply chain activities in relation to finalising supply chain operating assumptions and the supply chain master plan.

However, it is not clear how QR Network could fulfil its obligations in the master planning process (clause 11.2) if it has not already actively participated in the activities of the supply chain group. Moreover, the Authority does not believe it is reasonable to provide for an arbitration process in relation to settling QR Network's supply chain assumptions if QR Network is able to walk away from the arbitration determination on the basis that, in QR Network's opinion, it may be inconsistent with its commercial objectives.

As a result, the Authority considers that the no fetter clause 11.4 should not apply to clause 11.1 of the 2010 DAU. However, the Authority accepts that the requirements on QR Network in 11.1 should be subject to a reasonable endeavours obligation.

Moreover, the no fetter clause (11.4) would also limit, for example, QR Network's obligations to reducing conditional access rights (clause 11.3) to circumstances where it is consistent with QR Network's commercial objectives.

In similar circumstances, DBCT Management's 2010 DAU provides DBCT Management with an entitlement, and not a strict obligation, to reduce capacity of access seekers if the estimated expansion of the terminal capacity is not achieved.

Neither of the proposals by QR Network or DBCT Management are entirely satisfactory as they do not impose strict obligations on the access providers and therefore they do not provide certainty to access seekers on how capacity shortfalls will be managed. However, at this early stage in the development of coal chain cooperative arrangements, the Authority is wary of requiring a stronger obligation, on either DBCT Management or QR Network, to give effect to this principle. These are matters which should, in the first instance, be resolved within the relevant supply chain groups.

While the Authority has considered proposing amendments to make the QR Network 2010 DAU the same as the DBCT Management 210 DAU, it is not evident that doing so would result in a material improvement in the QR Network undertaking.

The Authority, therefore, proposes that the no fetter clause continue to apply to clause 11.3 of the 2010 DAU.

However, the Authority is concerned that there remains the possibility that QR Network may activate its entitlement in relation to compressing conditional access rights in an ad hoc manner. The Authority therefore requires that, if QR Network does not exercise its rights under clause 11.3, it must provide the Authority and coal chain participants the reasons why it has chosen this course of action.

Decision 11.6:

The Authority requires QR Network to make the following amendments (as set out in Appendix 11):

- (a) amend clause 11.1.1 and 11.1.2 such that QR Network's obligations in those clauses are subject to a reasonable endeavours requirement;**
 - (b) amend clause 11.4 such that it will only apply to section 11.3 (contracting for capacity in coal supply chains); and**
 - (c) insert clause 11.3(f) requiring QR Network to publish the reasons why it has not complied with the requirements of clause 11.3.**
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11.8 Process Going Forward

In its 2010 DAU, QR Network proposed that, to reflect outcomes from finalising the LTS, it may be required to alter its standard access agreements or submit a DAAU in order to implement its obligations. QR Network noted that this mirrored clause 1.4 of the DBCT draft access undertaking which states that a new DAAU may be submitted to the Authority:

- (a) to address any issues caused by allocating new access to the terminal by reference to system capacity since it is a material departure from past practice;
- (b) if any stakeholder is materially prejudiced by the allocation of new access by reference to system capacity; or
- (c) if the LTS Process results in an LTS Outcome, in which case the DAAU will incorporate the detail of all relevant amendments that are reasonably required to implement the LTS Outcome.

Further, QR Network noted that it believed that it would be in the interest of all participants if the Authority considered the QR Network and DBCT access undertakings concurrently after finalisation of the LTS to ensure alignment (QR Network, sub. no. 70:23).

QR Network also stated that specific changes arising from the LTS will more easily be reflected in future contracts and should only be applicable for tonnages above 85mtpa at DBCT (QR Network, sub. no. 70:24).

Stakeholders' Comments

The QRC suggested that, following the completion of the LTS, if all affected stakeholders agree, the undertaking should require QR Network to promptly submit a DAAU to the Authority for approval. This DAAU would include all of the relevant amendments to the undertaking that are reasonably required to implement the agreed position (QRC, sub. no. 82:32).

Authority's Analysis and Decision

The Authority agrees that, when the LTS is finalised, it would be in the interest of all participants for QR Network to submit a DAAU to take account of its new or revised obligations. While QR Network has indicated it is agreeable to such an arrangement, the 2010 DAU did not include a clause requiring it to do so. The Authority considers that the 2010 DAU should incorporate a clause, similar in effect to DBCT's clause 1.4(c). The incorporation of such a clause would:

- (a) allow the Authority to consider amendments to QR Network's and DBCT's undertakings (with respect to the LTS) concurrently;
- (b) allow QR Network to submit a DAAU to the Authority to address any issues caused by the new capacity allocation methodology, such as any stakeholder being materially prejudiced by the allocation of new access based on system capacity; and
- (c) ensure that stakeholders will be treated consistently (with respect to LTS provisions) across both undertakings.

The Authority also considers that, if supply chain groups elsewhere in the CQCR develop more formal coal supply chain coordination agreements, such as the LTSIM, QR Network should also be required to amend its undertaking to give effect to these agreements.

For these reasons, QR Network will be required to amend its undertaking to incorporate a clause obliging QR Network to submit a DAAU to the Authority for approval in instances where:

- (a) issues have arisen that have materially impacted coal chain stakeholders; or
- (b) an LTS outcome will necessitate an amendment such that all relevant amendments which are reasonably required to implement the LTS are incorporated.

QR Network will also be required to amend its undertaking to incorporate a clause obliging QR Network to submit a DAAU to give effect to supply chain efficiency agreements that have been agreed to by all participants of other coal supply chains in the CQCR.

Decision 11.7:

The Authority requires QR Network to make the following amendments::

- (a) **insert the new clause 11.1.5 which describes the process QR Network will be required to follow for a review of its undertaking following an LTS Outcome on the DBCT Coal Chain, or an arrangement akin to an LTS Outcome reached on an alternate coal chain; and**
 - (b) **include the related definitions as set out in clause 12.1.**
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APPENDIX 1 – PROPOSED INVESTMENT FRAMEWORK

Part 4: Clause 4.2(e) is replaced with the following:

- (e) If a request for Access is received by QR Network which is, in whole or part, for Access Rights which cannot be provided in the absence of an Extension:
- (i) to the extent QR Network is required to undertake and fund the required Extension in accordance with Clause 7.5.4, it must continue to apply the negotiation framework in this Part 4 of the Undertaking;
 - (ii) to the extent the Extension required is a Customer Specific Branch Line and:
 - (A) QR Network is willing to fund the Customer Specific Branch Line in accordance with Clause 7.5.3, QR Network must continue to apply the negotiation framework in this Part 4 of the Undertaking unless and until the Access Seeker indicates it will wholly fund the development of the Customer Specific Branch Line; or
 - (B) QR Network is not willing to fund the Customer Specific Branch Line, it must inform the Access Seeker and may cease negotiations with that Access Seeker until they (or their Customer) indicate they are willing to fund the development of the Customer Specific Branch Line ;
 - (iii) which could be accommodated in an Extension for which a Request for Proposal has been made in accordance with Clause 7.5.2(b) and for which the period for expressions of interest has not yet expired, provide the Access Seeker with a copy of the Request for Proposal and the opportunity to lodge an expression of interest; and
 - (iv) to the extent the required Extension does not fall within the categories in (i) to (iii) above:
 - (A) if QR Network reasonably believes (having regard to the Access Application, any existing queue, and any Access Seekers of the Committed Capacity Register) that there is demand for access rights which would utilise in excess of 70% of the Capacity to be created by the smallest efficient Expansion, it will make a Request for Proposals in accordance with Clause 7.5.2(b); or
 - (B) in circumstances where paragraph 4.3(e)(iv)(A) does not apply, QR Network must inform the Access Seeker and indicate the estimated scale of the smallest efficient Expansion, and may cease negotiations with that Access Seeker unless they (or their Customer) indicate they are willing to fund at least 70% of the projected costs of that Extension. If the Access Seeker or Customer indicates such a willingness to provide User Funding, QR Network will make a Request for Proposals in accordance with Clause 7.5.2(b).

If QR Network ceases negotiation with an Access Seeker pursuant to this Clause it must offer to include the Access Seeker or their Customer on the Capacity Notification Register if they meet the requirements of Clause 4.7(a).

Part 6: New Clauses 6.5.4 and 6.5.5 are inserted as follows:

6.5.4 Approval of Access Conditions

- (a) If QR Network:
- (i) intends to commence negotiating Access Conditions in respect of the provision of Access which requires a Significant Investment (or continue doing so where negotiations for the provision of Access were already underway at the Approval Date); or
 - (ii) intends to issue a Request for Proposal to potential Access Seekers and Customers in respect of the provision of Access which requires a Significant Investment in accordance with Clause 7.5.2(b).
- it must issue to all relevant Access Seekers, Customers and the QCA a report which details:
- (iii) the Access Conditions QR Network is seeking from any Access Seeker or Customer which is not entering a User Funding Agreement;
 - (iv) the additional risks QR Network is exposed to (the “Additional Risks”), which it is seeking to mitigate through the Access Conditions and how the Access Conditions mitigate those risks;
 - (v) why QR Network's exposure to the Additional Risks would not be:
 - (A) reasonably mitigated by an Access Agreement which permits QR Network to charge Access Charge(s) calculated in accordance with a Reference Tariff based on the Approved WACC and 100% take or pay commitments;
or
 - (B) more efficiently mitigated through insurance or other financial instruments;
 - (vi) QR Network's assessment of the magnitude of the Additional Risks and the probabilities of the Additional Risks occurring; and
 - (vii) to the extent that the Access Conditions being sought include Access Charges being calculated based on:
 - (A) adjustments to cash flows, evidence that there are risks not mitigated by the other Access Conditions being sought, and that the adjustments are reflective of the possible outcomes and probabilities of the outcomes as a consequence of such risks; and/or
 - (B) a Varied WACC, evidence that there is either a materially different risk-free rate or debt margin, or that that, as a result of QR Network funding this Significant Investment, QR Network has would have a materially different gearing ratio or credit rating, from that which was assessed at the time the Approved WACC was determined by the QCA;
 - (viii) why QR Network considers that the proposed Access Conditions would not be contrary to the public interest, including the public interest in having competition in markets; and
 - (ix) confirmation that QR Network considers the proposed Access Conditions would not contravene a provision of the Undertaking or the Act.
- (b) If the Authority has reason to believe that QR Network has commenced negotiating Access Conditions in respect of the provision of Access which requires a Significant Investment prior to providing a report as required by Clause 6.5.4(a) or has provided a request in accordance with Clause 7.5.2(b), it may require QR Network to:

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- (i) produce a report in accordance with Clause 6.5.4(a) within 10 Business Days; and
 - (ii) cease negotiating Access Conditions in respect of the Significant Investment until such a report has been provided.
- (c) QR Network and the Access Seekers may, after QR Network has provided the report required by Clause 6.5.4(a), negotiate for 60 days on the terms of those Access Conditions, provided that:
- (i) either QR Network or any Access Seeker or Customer may apply to the QCA for an extension to the negotiation period (subject to the period not being extended to more than 120 days unless a majority of Access Seekers or their relevant Customers request such an extension); and
 - (ii) Access Seekers or their Customers may refer the proposed Access Conditions to the QCA for arbitration at any time during the negotiation period (although the QCA may decline to arbitrate until the negotiation period has expired where it considers a prior referral is vexatious or the referring party has not engaged in the negotiation of Access Conditions in good faith);
 - (iii) Access Seekers or their Customers may choose to cease negotiating Access Conditions and enter a User Funding Agreement in respect of the proportion of the projected costs of the Significant Investment that the Access Rights they are seeking represent of the Planned Capacity to be created by the Significant Investment.
- (d) Following receipt of the report required by Clause 6.5.4(a), the QCA will invite and consider comments from stakeholders regarding the proposed Access Conditions;
- (e) to the extent that all Access Seekers agree to the Access Conditions sought by QR Network during the period in Clause 6.5.4(c), the QCA will approve the proposed Access Conditions unless the QCA is satisfied:
- (i) it would be contrary to the public interest, including the public interest in having competition in markets;
 - (ii) it is reasonably expected to disadvantage future Access Seekers, existing Access Holders, Customers or other stakeholders which will not be parties to the Access Agreements containing the Access Conditions;
 - (iii) QR Network has failed to provide Access Seekers with the report required by Clause 6.5.4(a); or
 - (iv) it would contravene a provision of the Undertaking or the Act.
- (f) to the extent that only some or none of the Access Seekers agree to the Access Conditions sought by QR Network during the period in Clause 6.5.4(c), the QCA may approve the proposed Access Conditions if it is satisfied that:
- (i) the Access Conditions are reasonably required in order to mitigate QR Network's exposure to the financial risks associated with providing Access;
 - (ii) QR Network's exposure to the Additional Risks would not be:
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- (A) reasonably mitigated by an Access Agreement which permits QR Network to charge Access Charge calculated in accordance with a Reference Tariff based on the Approved WACC and 100% take or pay commitments; or
- (B) more efficiently mitigated through insurance or other financial instruments;
- (iii) to the extent a proposed Access Condition includes Access Charges being based on adjustments to cash flows, there are risks not mitigated by the other Access Conditions being sought, and that the adjustments are reflective of the possible outcomes and probabilities of the outcomes as a consequence of such risks;
- (iv) to the extent a proposed Access Condition includes Access Charges being based on a Varied WACC, that Varied WACC is justified by a material difference in:
- (C) the risk-free rate;
- (D) debt margin; and/or
- (E) QR Network's gearing ratio or QR Network's credit rating which would occur as a result of QR Network funding the Significant Investment,
from that assessed at the time the Approved WACC was determined by the QCA;
- (v) the proposed Access Conditions would not be contrary to the public interest, including the public interest in having competition in markets;
- (vi) the proposed Access Conditions would not be reasonably expected to disadvantage future Access Seekers, existing Access Holders, Customers or other stakeholders which will not be parties to the Access Agreements containing the Access Conditions;
- (vii) QR Network has provided Access Seekers with the report required by Clause 6.5.4(a); and
- (viii) the proposed Access Conditions would not contravene a provision of the Undertaking or the Act;
- (g) To the extent that the QCA refuses to approve some or all of the Access Conditions sought by QR Network:
- (i) the QCA must publish its decision regarding the Access Conditions it approves (which may include Access Conditions not initially sought by QR Network); and
- (ii) QR Network must, within 30 days of the QCA's decision, elect to either:
- (F) proceed to negotiate Access with Access Seekers for which the Access Seeker or their Customer are not Funding Users on the basis of those Access Conditions which have been approved by the QCA; or
- (G) cease to negotiate Access and not undertake the Significant Investment unless all of the costs of the relevant Infrastructure Enhancements will be funded by way of Access Seekers entering User-Funding Agreements, except for funding QR Network is required to provide in accordance with Clause 7.5.5(f).

6.5.5 Prohibited Access Conditions

QR Network may not seek to impose, and the QCA will not approve pursuant to Clause 6.5.4, any Access Condition that:

- (h) restricts Access Seekers or their Customers from raising disputes with the QCA or disclosing proposed Access Conditions or other contract terms to the QCA;
- (i) requires Access Seekers, Access Holders, or their Customers to disclose information that is confidential to one or more of them, to any other Access Holder, Access Seeker, or their Customer in circumstances other than those permitted by this Undertaking; or
- (j) results in QR Network earning an Access Charge based on a Varied WACC or otherwise earning above the return provided by Reference Tariffs based on the Approved WACC, other than as approved by the QCA pursuant to Clause 6.5.4.

Part 7: Delete clauses 7.5.1 – 7.5.5 in the 2010 DAU and replace with the following:

7.5 Network Investment

7.5.1 General Extension Principles

- (a) Extensions which are undertaken by QR Network (including User Funded Extensions) must be designed to create sufficient Capacity to accommodate provision of all Access Rights being sought by Access Seekers which have submitted an expression of interest during the period described in clause 7.5.2(b)(ii) (or for which a relevant Customer has submitted such an expression of interest) except where there is a Funding Shortfall.
- (b) Where an Extension (including a User Funded Extension) produces Available Capacity, negotiation for Access Rights in respect of that Available Capacity occurs in accordance with the provisions of this Undertaking (including the negotiation framework in Part 4 and the queuing mechanism in clause 7.3.4) without preference being given to any Funding User.
- (c) QR Network shall construct all Extensions other than Customer Specific Branch Lines undertaken and funded by an Access Seeker or their Customer.
- (d) QR Network shall expeditiously construct all Extensions it is required to develop in accordance with this Undertaking, subject to Funding Users' rights pursuant to Clause 7.5.5(1).

7.5.2 Extension Process

- (a) Where QR Network:
 - (i) believes an Extension is reasonably required to meet demand for Access Rights within a coal supply chain;
 - (ii) is requested to do so by the owner or operator of an expanding or new unloading facility that services users of the Rail Infrastructure;
 - (iii) is requested to do so by a supply chain group;
 - (iv) has received Access Applications which would utilise in excess of 70% of the Planned Capacity to be created by an Extension; or
 - (v) has received Access Applications for less than 70% of the Planned Capacity to be created by an Extension, but the Access Seekers or their Customers are willing in aggregate to meet at least 70% of the projected costs of developing the Extension; or

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- (vi) is required to do so pursuant to Clause 4.2(e),
- it will make a request in accordance with Clause 7.5.2(b) (a Request for Proposals).
- (b) Where Clause 7.5.2(a) applies, QR Network must:
- (i) inform all Access Holders, Access Seekers or Customers which it has reason to believe may have an interest in utilising Planned Capacity arising from the proposed Extension, including all parties on the Committed Capacity Register; and
 - (ii) give all such parties a reasonable time (being no less than three (3) months) to submit an expression of interest (which must meet the usual requirements for an Access Application) in relation to obtaining Access Rights in connection with such an Extension and indicate whether they wish to enter a User Funding Agreement or would be willing to do so if QR Network chooses not to fund the Extension.
- (c) The information given in accordance with paragraph (b) must include:
- (i) timetables and deadlines for Access Applications, feasibility studies, and development of the Extension;
 - (ii) confirmation as to whether QR Network requires that Access Seekers or Customers submitting an expression of interest agree to fund a feasibility study (with costs shared in proportion to the Capacity sought); and
 - (iii) any additional information requirements to those usually required in Access Applications.
- (d) Where the need for an Extension is reasonably anticipated, QR Network must undertake the necessary scoping and planning studies. If QR Network unreasonably delays the necessary studies, Access Seekers may refer the issue to the Dispute resolution process set out in Clause 10.1, and in any arbitration the QCA has the power to require QR Network to permit Access Seekers to undertake the necessary scoping and planning studies at their own costs, including provision to the Access Seekers of all reasonable assistance, including necessary information provision and site access
- (e) The costs of any necessary scoping and planning studies will be included in the Regulated Asset Base (assuming they meet the prudency requirements in Schedule A) irrespective of whether the Extension is completed through to the commissioning stage.

7.5.3 Customer Specific Branch Lines

- (a) QR Network may undertake investment in a Customer Specific Branch Line if QR Network is satisfied that it is commercially justified to do so and, if so, QR Network will own and operate that Customer Specific Branch Line.
- (b) Where QR Network has not agreed to undertake investment in a Customer Specific Branch Line and an Access Seeker (or their Customer) intends to undertake such investment, QR Network must permit such investment by the relevant Access Seeker (or their Customer) by:
 - (i) providing reasonable access to land for the relevant Access Seeker (or that Access Seeker's Customer – if any) who is proposing to construct the Customer Specific Branch Line to the extent that access to the land is incidental to and essential for construction and ongoing operation of the Customer Specific Branch Line, provided that:

- (A) the land is owned by QR Network, or QR Network has, through a lease, licence or other arrangement with the owners of the land or pursuant to the TIA, the authority to authorise access to that land; and
- (B) the access is not inconsistent with the terms of any lease, license or other arrangement to which QR Network is a party in respect of the land; and
- (ii) subject to Clause 8.3, entering into a Rail Connection Agreement with the relevant Access Seeker or Customer as applicable, in relation to the relevant Customer Specific Branch Line; and
- (iii) notifying the Access Seeker or Customer of the interface standards required by QR Network.

7.5.4 Incremental Investments

- (a) QR Network will undertake and fund all Extensions that:
 - (i) consist of replacement capital expenditure;
 - (ii) are needed to provide Conditional Access Holders with additional Access Rights equivalent to Access Rights Reductions which have occurred in accordance with Clause 11.3;
 - (iii) are needed to reduce a deficit between Capacity and Committed Capacity caused by a change in System Operating Assumptions; or
 - (iv) are required to create sufficient Available Capacity to provide Access Rights sought by an Access Seeker unless the Extension is:
 - (A) a Customer Specific Branch Line; or
 - (B) a Significant Investment, except to the extent that such an Extension is a User Funded Extension in accordance with Clause 7.5.5.
- (b) If QR Network refuses to undertake or fund an Extension on the basis it considers it is not an Extension of the type covered by Clause 7.5.4(a)(i) to (iv), an Access Seeker may refer the issue to the Dispute resolution process set out in Clause 10.1.
- (c) If QR Network refuses to fund all or part of an a Extension on the basis it is a Significant Investment it must:
 - (i) provide the QCA with a statement setting out the reasons for its decision ;or
 - (ii) where the refusal to fund is a consequence of a decision by its ultimate holding company, procurement its ultimate holding company provides a statement setting out the reasons for its decision,
 - (iii) which, in either case, the QCA must publish on its website.

7.5.5 User Funded Infrastructure

- (a) All Access Seekers (or their Customers) may choose to fund the costs of an Extension (other than Extensions that consist of replacement capital expenditure) even if QR Network is willing to do so.

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- (b) An Extension partly or wholly funded by Access Seekers (or their Customers) in accordance with this Clause 7.5.5 will be owned and operated by QR Network and constitute part of the Rail Infrastructure.
 - (c) If an Access Seeker (or their Customer) chooses to fund the costs of an Extension, they are required to fund a proportion of the projected capital costs of the Extension (including any relevant feasibility study) reflecting the proportion of the total Planned Capacity to be developed which would be required to provide the Access Rights the relevant Access Seeker is seeking. Ongoing operating and maintenance costs will be included in Reference Tariffs and are not required to be funded by Access Seekers (or their Customers).
 - (d) QR Network has the right to fund the development of additional Capacity as part of an Extension that is not required for the provision of Access Rights sought by Access Seekers (or their Customers) which chose to fund the costs of the Extension.
 - (e) QR Network will undertake the development of an Extension (including a Significant Investment) if Access Seekers (or their Customers) enter into User Funding Agreements which provides funding for all of the projected cost of an Extension which QR Network does not wish to fund, except for any funding which QR Network is obliged to fund in the circumstances set out in paragraph (f).
 - (f) Where an Access Seeker (or their Customer) is unable to fund the proportion of the projected costs of the Significant Investment which the Access Rights they are seeking bear to the total Capacity to be created by the Significant Investment by debt financing on reasonable terms from a reputable financial institution (the "Unfunded Portion"):
 - (i) QR Network is required to fund the Unfunded Portion of the costs of the Significant Investment on the basis of the Access Conditions approved by the QCA pursuant to Clause 6.5.4, subject to:
 - (A) not being required to fund more than 30% of any Significant Investment on this basis; and
 - (B) not being obliged to fund more than \$300 million in respect of Significant Investments on this basis during the Term; and
 - (ii) to the extent the amount of the Unfunded Portion is greater than that required to be funded by QR Network pursuant to Clause 7.5.5(f)(i), and QR Network is not willing to fund the difference:
 - (A) where QR Network's estimate of the cost of building the smallest efficient Extension is less than Committed Funding, QR Network will design the level of Planned Capacity to be created by the Extension to reflect the Committed Funding and the Capacity created will be first allocated to all of the Funding Users (in the proportions their funding bore to the total development cost) and any remaining Available Capacity will be allocated among the other Users who put forward an expression of interest but did not provide User Funding based on the formation of a queue in accordance with Clause 7.3.4; and
 - (B) where QR Network's estimate of the cost of building the smallest efficient Extension is more than Committed Funding (with the different being the Funding Shortfall), QR Network will advise the Funding User of the Funding Shortfall and the Funding Users will be given a reasonable
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opportunity to elect to fund the Funding Shortfall (in which case they will be given the first right of refusal of Planned Capacity proportionate to the additional funding provided). If the Funding Users in aggregate:

- (1) fail to provide sufficient additional funding to rectify the Funding Shortfall, then QR Network is not obliged to develop the Extension until other Users are willing to provide the Funding Shortfall (but may do so if it wishes to itself fund the Funding Shortfall); or
 - (2) do provide sufficient additional funding to rectify the Funding Shortfall, the Extension will be developed to reflect the smallest efficient Extension with Capacity created by the Extension being first allocated to all of the Funding Users (in the proportions their funding bore to the total development cost except to the extent a Funding User providing funding but did not exercise their right of first refusal) and any remaining Available Capacity will be allocated among the other Users who put forward an expression of interest but did not provide User Funding based on the formation of a queue in accordance with the principles in Clause 7.3.4.
- (g) Where an Access Seeker or their relevant Customer indicates it is unable to fund the proportion of the projected costs of the Significant Investment which the Access Rights they are seeking bear to the total Capacity to be created by the Significant Investment by debt financing on reasonable terms from a reputable financial institution, and QR Network disputes their inability to fund such costs via such debt financing:
- (i) QR Network may refer the issue to the Dispute resolution process set out in Clause 10.1; and
 - (ii) if the Dispute is arbitrated by the QCA in accordance with Clause 10.1, the relevant Access Seeker (or Customer) bears the onus of proving their inability to fund such costs via such debt financing.
- (h) Where Funding User intends to provide the funding required under its User Funding Agreement by way of debt financing:
- (i) QR Network remains entitled to provide its financiers with security over the Rail Infrastructure (including the funded Extension) and related cash flows; and
 - (ii) the Funding User is entitled to provide its financiers with security over the Funding User's rights under the User Funding Agreement and associated cash flows.
- (i) If an Access Seeker or their Customer is in dispute with QR Network regarding:
- (i) proposed terms of a User Funding Agreement; or
 - (ii) issues arising under an existing User Funding Agreement,
- either party to the proposed or existing User Funding Agreement may refer the issue to the Dispute resolution process set out in Clause 10.1.
- (j) If Capacity created by an Extension funded partly or wholly by Funding Users is subsequently utilised by an Access Holder which did not enter a User Funding Agreement (a "Non-Funding Access Holder") then:
- (i) to the extent the Capacity utilised by the Access Rights of all Non-Funding Access Holders is less than the proportion of the Capacity created by the Extension which

was funded by QR Network, QR Network will receive all Access Charges from the Non-Funding Access Holders;

- (ii) to the extent the Capacity utilised by the Access Rights of all Non-Funding Access Holders is more than the proportion of Capacity created by the Extension which was funded by QR Network, the Access Charge for the utilisation of that proportion of Capacity not funded by QR Network will be:
 - (A) received by QR Network who will be entitled to retain the portion of Access Charges which reflect the components of the relevant Reference Tariff based on the estimated maintenance and operating costs; and
 - (B) the Access Charges which constitute revenue above the components of the relevant Reference Tariffs based on the estimated maintenance and operating cost will be paid by QR Network to each of the Funding Users in proportion to the portion of funding they provided for the Extension (with this portion of the Access Charges not constituting Total Actual Revenue for the purposes of Schedule F).
- (k) QR Network must give Funding Users reasonable opportunities to collaborate in relation to all key matters affecting the cost and timing of any User-Funded Extension, including but not limited to the scope, cost, procurement strategy, construction and timing in respect of the Extension.
- (l) In relation to any User Funded Extension, a Funding User who believes that QR Network is unnecessarily delaying construction of such an Extension may refer the issue to the Dispute resolution process set out in Clause 10.1, and in any arbitration the QCA has the power to require QR Network to permit the Funding Users to undertake the development at the Funding User's expense.
- (m) Where a User-Funded Extension creates Available Capacity in excess of that need for an efficient expansion of the Rail Infrastructure, the costs of creating the Available Capacity may not be incorporated into the Regulatory Asset Base initially and instead may be carried forward for inclusion in the Regulatory Asset Base at a later date if it is classified as being Excluded Capital Expenditure in accordance with Clause 3.3.2 of Schedule A.
- (n) Funding Users will, unless their User Funding Agreement provides otherwise:
 - (i) have their capital investment refunded to them by QR Network in accordance with the depreciation profile associated with the capital expenditure;
 - (ii) receive from QR Network a return at the Varied WACC or Approved WACC (as applicable to the Extension being funded) on the un-refunded balance of the funding provided; and
 - (iii) receive from QR Network compensation for any tax or other financial benefits accruing to QR Network as legal owner of the Rail Infrastructure created by such funding,

subject to QR Network receiving Access Charges in respect of the Capacity developed by User Funding that are sufficient to make such payments after meeting approved operating and maintenance costs in respect of utilisation of such Capacity. If the relevant Access Charges are not sufficient to make such payments, QR Network's payment obligations are capped at the difference between the relevant Access Charges and the relevant operating and maintenance costs, with:

- (iv) the deficit first being allocated to each Funding User (or the relevant Access Seeker in the case of a Funding User which is a Customer) which did not utilise Access Rights they had contracted by subtracting the Access Charges they would have paid if those Access Rights had been fully utilised; and
- (v) any remaining deficit being allocated among the Funding Users in proportion to the amount of funding provided by the Funding Users.

7.6 Investment Framework Amendments and Standard User Funding Agreement

- (a) Within three (3) months after the Approval Date, following consultation with stakeholders, QR Network will submit to the QCA:
 - (i) a Proposed Standard User Funding Agreement; and
 - (ii) a draft amending access undertaking incorporating amendments to this Undertaking it considers reasonably necessary to fully implement the principles set out in Schedule J ("Investment Framework Amendments").
- (b) The QCA may develop a Proposed Standard User Funding Agreement and Investment Framework Amendments, if:
 - (i) QR Network does not submit the Proposed Standard User Funding Agreement and Investment Framework Amendments in accordance with Clause 7.6(a); or
 - (ii) the QCA refuses to approve the Proposed Standard User Funding Agreement and Investment Framework Amendments that are submitted in accordance with Clause 7.6(a).
- (c) Where QR Network submits, or the QCA develops, a Proposed Standard User Funding Agreement and Investment Framework Amendments, the QCA will:
 - (i) publish the Proposed Standard User Funding Agreement and Investment Framework Amendments on its website;
 - (ii) invite persons to make submissions to the QCA on the Proposed Standard User Funding Agreement and Investment Framework Amendments within a reasonable period of time specified by the QCA; and
 - (iii) consider any submission it receives within the time.
- (d) The QCA may approve a Proposed Standard User Funding Agreement and Investment Framework Amendments (including those developed by the QCA) only if the QCA:
 - (i) is satisfied that the Proposed Standard User Funding Agreement is consistent with this Undertaking (as proposed to be amended by the Investment Framework Amendments);
 - (ii) is satisfied that the Investment Framework Amendments will fully implement the principles set out in Schedule J;
 - (iii) considers it appropriate to do so having regard to the matters listed in section 138(2) of the Act; and
 - (iv) has complied with Clause 7.6(c).

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- (e) The QCA will consider a Proposed Standard User Funding Agreement and Investment Framework Amendments given to it by QR Network and either approve or refuse to approve it within sixty (60) days after the QCA receives them under this Clause 7.6 or such further period as the QCA and QR Network may agree or as the QCA may reasonably determine and notify to QR Network.
 - (f) If the QCA approves the Proposed Standard User Funding Agreement and Investment Framework Amendments submitted under Clause 7.6(a) or resubmitted under Clause 7.6(g)(ii):
 - (i) the Standard User Funding Agreement will apply and the Undertaking will be amended by the Investment Framework Amendments, from the date of the QCA decision, or any other date following the date of the QCA decision that the QCA determines;
 - (ii) the QCA will give QR Network a notice in writing stating the reasons for its decision; and
 - (iii) QR Network must publish the Standard User Funding Agreement and Undertaking (incorporating the Investment Framework Amendments) on its website;
 - (g) If the QCA refuses to approve a Proposed Standard User Funding Agreement and Investment Framework Amendments, the QCA will give QR Network a notice in writing:
 - (i) stating the reasons for its refusal; and
 - (ii) requiring QR Network to amend the Proposed Standard User Funding Agreement and Investment Framework Amendments in the way the QCA considers appropriate and resubmit the amended Proposed Standard User Funding Agreement and Investment Framework Amendments to the QCA within 30 days after the giving of that notice.
 - (h) If QR Network complies with the notice given under Clause 7.6(g)(ii), the QCA may approve the resubmitted Proposed Standard User Funding Agreement and Investment Framework Amendments in accordance with Clause 7.6(i).
 - (i) The QCA may approve the resubmitted Proposed Standard User Funding Agreement and Investment Framework Amendments only if the QCA:
 - (i) is satisfied that it is in accordance with the notice under Clause 7.6(g);
 - (ii) is satisfied that the Proposed Standard User Funding Agreement is consistent with this Undertaking (as proposed to be amended by the Investment Framework Amendments);
 - (iii) is satisfied that the Investment Framework Amendments fully implement the principles set out in Schedule J; and
 - (iv) considers it appropriate to do so having regard to the matters listed in section 138(2) of the Act.
 - (j) A proposed Standard User Funding Agreement and Investment Framework Amendments submitted or resubmitted in accordance with this Clause 7.6 may only be withdrawn by QR Network if approved by the QCA.
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- (k) The QCA may grant QR Network an extension of the time for submitting, or resubmitting, a Proposed Standard User Funding Agreement and Investment Framework Amendments, if:
 - (i) QR Network provides a written request to the QCA for an extension of time which outlines the reasons why QR Network requires the extension of time; and
 - (ii) the QCA, acting reasonably, considers that an extension of time is appropriate.
- (l) If the QCA grants QR Network an extension of time under Clause 7.6(k), QR Network must submit, or resubmit (whichever is applicable), a Proposed Standard User Funding Agreement and Investment Framework Amendments within the time specified by the QCA.
- (m) Prior to the approval of the Investment Framework Amendments, the principles in Schedule J will apply except to the extent they are directly inconsistent with the provisions of this Undertaking.
- (n) Any User Funding Agreement to be entered pursuant to this Undertaking after a Standard User Funding Agreement exists must be consistent with the terms of the Standard User Funding Agreement, except to the extent:
 - (i) otherwise agreed between QR Network and a Funding User (to satisfy an Access Condition or otherwise); or
 - (ii) variations are approved by the QCA in respect of a particular User Funded Extension on application by QR Network.

7.7 Investment Contrary to Undertaking

QR Network must not

- (a) refuse to undertake an Extension which it is required to undertake in accordance with Part 7 of this Undertaking;
- (b) undertake an Extension subject to conditions, or seek to impose terms of Access, which would be contrary to:
 - (i) Parts 6 or 7 of this Undertaking; and
 - (ii) until the Investment Framework Amendments have been incorporated into the Undertaking in accordance with Clause 7.6, the principles set out in Schedule J; or
- (c) seek to provide terms of Access to the Rail Infrastructure which excludes the operation of this Undertaking.

For the new Schedule J in the 2010 DAU:

Foundation premises

1. QR Network cannot be forced to fund an Extension other than in accordance with an approved access undertaking or the provisions of the Act regarding determination of access disputes.

2. To the extent that QR Network does invest in rail transport infrastructure used in the provision of declared services⁸, including Significant Investments, the QCA can determine the rate of return that is commensurate with the risk of the investment.
3. QR Network should not be able to exploit its monopoly power.
4. Users should have the right to fund Extensions (other than replacement capital expenditure) at their option.

Undertaking coverage

5. All Extensions in respect of rail transport infrastructure used to provide the Declared Service must take place under the auspices of an access undertaking approved under the Act to ensure even-handed dealing with all parties.
6. QCA will have the following roles in addition to those already in the previous undertaking:
 - (a) determining whether proposed capital expenditure forms part of a Significant Investment or not;
 - (b) approving Access Conditions sought in respect of Significant Investments;
 - (c) approving a Standard User Funding Agreement; and
 - (d) making binding arbitration determinations in relation to:
 - (i) Users' claims that they are unable to fund their shares of a Significant Investment via debt financing on reasonable terms obtained from a reputable financial institution; and
 - (ii) the terms of a proposed or existing User Funding Agreements including: (A) security requirements, and (B) any variations from a Standard User Funding Agreement approved by the QCA.

Network investment

Network Extensions

7. Subject to paragraph 8, Extensions should accommodate the needs of all Users who are seeking Access Rights which require additional Capacity and who are willing to commit to the approved terms and conditions of investment in the Extension during the Extension Process, whether or not these Users agreed to provide funding for the Extension.
8. However, where there is a Funding Shortfall in respect of a Significant Investment, only Funding Users are guaranteed to have their Capacity requirements accommodated in the relevant Extension.
9. If a User Funded Extension or Extension funded solely by QR Network produces Available Capacity, that Available Capacity and any pre-existing Available Capacity will be treated equally in future allocations of Available Capacity between Access Seekers.

⁸ The declaration regarding provision of access to the QR Network Rail Infrastructure will not cover access to railway lines to new coal basins. Access Seekers will have to seek declaration of these services via the QCA Act which has been amended to allow access to privately owned railway lines which meet the QCA Act's access criteria.

10. All Available Capacity, whether funded by QR Network or Users, will be allocated in accordance with the Undertaking's capacity allocation rules.

Funding

11. Users may opt to fund Extensions (other than replacement capital expenditure) and other system investments⁹, even in circumstances where QR Network is willing to do so. Users need not provide the funding themselves directly but may involve other parties (e.g. Users may seek debt financing).

12. If Users intend to fund an Extension, all potential Users for the Capacity to be created by an Extension must be given the opportunity to participate in the funding of the Extension in proportion to the Capacity the Access Rights they are seeking would utilise.

13. If Users fund an Extension, they will be compensated for their investment by receiving an amount equal to the return on and of the capital component of Access Charges from any Users of the Capacity created by their investment who did not participate in the user funding (with QR Network being entitled to receive an amount equal to the components of Access Charges based on operation and maintenance costs).

14. QR Network must fully fund:

- (a) replacement capital expenditure;
- (b) Expansions which are valued at less than \$300 million and are required to produce Available Capacity needed for provision of Access Rights sought by Access Seekers; and
- (c) capital expenditure valued at less than \$300 million needed to respond to a Capacity shortfall resulting from either a change in System Operating Assumptions or an incorrect forecast of capacity delivered by Infrastructure Enhancements.

The Regulated WACC will apply to any such investments and Access Conditions cannot be sought in respect of access which is dependent on such investments other than in accordance with Clause 6.5.2 of the Undertaking. An Extension may include a number of related projects on different parts of the network. There may also be more than one such Extension over the Term. In the case of a dispute, the QCA will determine whether capital expenditure forms part of a Significant Investment or comes within this provision.

15. QR Network has no obligation to fully fund Significant Investments or Customer Specific Branch Lines. However, it is anticipated that QR Network will want to fund all or part of Significant Investments and Customer Specific Branch Lines where it considers it is in its commercial interests to do so, unless:

- (a) it is unable to raise finance or in doing so would prejudice its capital management; or
- (b) Users propose to fund all or part of such an Extension.

As discussed later, QR Network may seek approval for Access Conditions and/or additional returns in respect of Significant Investments.

⁹ Investments that are not strictly 'Extensions', such as 'robustness' projects proposed in previous QR Network Master Plans.

If QR Network indicates that it is unwilling to fund all or part of an Expansion, the board of directors of QR Network must, or where the unwillingness to fund is based on a decision of its holding company, QR Network must procure that the board of its ultimate holding company, provide the QCA with a statement setting out the reasons for this, for publication on the QCA's website.

Smaller users and difficulties in providing user-funding

16. QR Network must fund up to 30% of a partially User Funded Significant Investment, if requested to do so by Users that are unable to raise their own share of the funds by debt funding on reasonable terms from reputable financial institutions. QR Network can seek approval from the QCA for special terms and conditions for that funding to the extent justified by special risks and costs being borne by QR Network.

17. The obligation to partially fund Significant Investments in accordance with paragraph 16 is subject to QR Network having a maximum commitment of \$300 million in respect of such funding for the Term.

18. If QR Network disputes that a User is unable to fund its share of the costs of a Significant Investment (by debt funding on reasonable terms from reputable financial institutions) and is unwilling to fund the User's share, the QCA will arbitrate. The onus of proof will rest with the User claiming they are unable to raise debt funding on reasonable terms from reputable financial institutions. If the QCA concludes that the User could have raised its share of the funds by debt funding on reasonable terms from reputable financial institutions, the User will not be eligible for QR Network funding under this provision.

19. While QR Network will not be otherwise obliged to provide funding for a Significant Investment, QR Network will have the right to participate in a User Funded Extension up to the level of the Capacity that is created in excess of that needed by the Funding Users.

Consequences of insufficient funding for Significant Investments

20. Where the aggregate of the development costs:

- (a) QR Network has voluntarily decided to fund;
- (b) Funding Users have decided to fund; and
- (c) QR Network has been obliged to fund in accordance with paragraph 16 above,

in respect of a Significant Investment (together the Committed Funding) is:

- (d) more than QR Network's estimate of the cost of building the smallest efficient Extension, then:
 - (i) QR Network will design the level of Planned Capacity to be created by the Extension to reflect the Committed Funding; and
 - (ii) the Capacity created by the Extension will be first allocated to all of the Funding Users (in the proportions their funding bore to the total development cost) and any remaining Available Capacity will be allocated among the other Users who put forward an expression of interest in accordance with paragraph 50 but did not provide User Funding based on the formation of a queue in accordance with the principles in the approved access undertaking;

- (e) is less than QR Network's estimate of the cost of building the smallest efficient Extension (with the difference being the Funding Shortfall):
- (i) QR Network will advise the Funding User of the Funding Shortfall and the Funding Users will be given a reasonable opportunity to elect to fund the Funding Shortfall (in which case they will be given the first right of refusal of Planned Capacity proportionate to the additional funding provided);
 - (ii) if the Funding Users in aggregate fail to provide sufficient additional funding to rectify the Funding Shortfall, then QR Network is not obliged to develop the Extension (but may do so if it wishes to itself fund the Funding Shortfall); and
 - (iii) if the Funding Shortfall is rectified, the Extension will be developed to reflect the smallest efficient Extension with Capacity created by the Extension being first allocated to all of the Funding Users (in the proportions their funding bore to the total development cost except to the extent a Funding User providing funding but did not exercise their right of first refusal) and any remaining Available Capacity will be allocated among the other Users who put forward an expression of interest in accordance with paragraph 50 but did not provide User Funding based on the formation of a queue in accordance with the principles in the approved access undertaking.

If QR Network is unwilling to fully fund a Significant Investment and some Users who are seeking additional Capacity are unable or unwilling to raise their shares of the funding, the Users who are willing to fund the Significant Investment will have to meet the full cost of the Significant Investment, subject to paragraph 16 above, and QR Network will not be obliged to develop the Significant Investment until such funding arrangements between Users are agreed or one or more Users will fund the Funding Shortfall in return for being allocated the remaining uncontracted Planned Capacity.

Ownership

21. QR Network will own and operate the rail transport infrastructure utilised to provide the declared service, including Extensions other than Customer Specific Branch Lines which are wholly funded by Users. Access to parts of the rail network created by Extensions to other coal basins will not automatically be declared and QR Network may or may not be the owner or operator for such Extensions.

22. Users will have the right to own and operate Customer Specific Branch Lines while QR Network must facilitate their connection to the existing network and ongoing operation.

Security

23. In relation to any User Funded Extension, each Funding User (or Funding User's financier where debt financed) may take security over the contracts, including the User Funding Agreement, and associated cash flows and QR Network's creditors may take security over its cash flows and the resulting Rail Infrastructure.

Construction

24. QR Network must construct all Expansions because of operational/safety concerns with multiple parties accessing an operating railway with multiple Users, subject only to the step-in rights described in paragraph 26.

25. Prudent cost overruns on construction will be incorporated into the Regulatory Asset Base and passed on to Access Holders via Access Charges, unless special Access Conditions are approved by the QCA which provide differently. QR Network will absorb all other cost overruns (as is the case now).

26. QR Network must expeditiously construct Extensions, including Extensions funded by Users. QR Network must, prior to developing an Extension, provide Users with an indicative timetable for the construction of the Extension. If QR Network unnecessarily delays the construction of an approved User Funded Extension, including an Extension that QR Network has agreed to fund, Users may undertake the construction at Users' expense. If there is a dispute regarding whether QR Network has unnecessarily delayed construction the QCA will arbitrate (having regard to QR Network's indicative timetable and any circumstances QR Network claims have delayed the construction). In the event of such a step-in right being exercised QR Network must use its best endeavours to facilitate Users' undertaking the construction of the Extension including, to the extent it can do so, by:

- (a) providing access to land and electricity required for the development of the Extension;
- (b) providing the Users with details of the required standards and specifications for the Rail Infrastructure;
- (c) providing the Users with details of the current status of the work on the Extension;
- (d) keeping all relevant Users informed regarding operations of the Rail Infrastructure which may impact on the development of the Extension;
- (e) providing the funds it has received through User Funding that it has not spent in the development of the Extension to the Users undertaking the development of the Extension;
- (f) assigning or novating contracts required for the development of the Extension or, where assignment or novation is not practicable, entering into back-to-back arrangements where QR Network on-supplies goods or services to the Users on the same terms as they are supplied to QR Network by third party suppliers; and
- (g) assisting the Users undertaking the development to obtain all necessary licences and approvals for the development (by assignment from QR Network or otherwise).

27. Users will be permitted to construct Customer Specific Branch Lines to their own specifications, with interface standards approved by QR Network. QR Network must facilitate Users developing their own Customer Specific Branch Line including by providing access to land which QR Network has the power to provide and entering into a Rail Connection Agreement in respect of the Connecting Infrastructure.

WACC/Rate of Return/Access Conditions

28. The Regulated WACC provides an appropriate return on capital for normal monopoly infrastructure risks that are systematic.

29. The WACC that applies will be the same whether infrastructure investment is undertaken by QR Network or Users, reflecting the same infrastructure investment risk. Coal-company WACCs are not appropriate to User investment in coal rail transport infrastructure as they relate to the risks associated with coal-mine ownership (e.g. production, sales, prices etc) and not coal rail transport infrastructure risks.

30. All investments in Rail Infrastructure (by QR Network or Users) will earn the Regulated WACC, unless they incur risks in addition to those that are compensated for in the Regulated WACC. Such risks might include demand risk, asset stranding risk and construction risk.

31. If QR Network intends to impose Access Conditions in respect of the provision of access which is dependent on a Significant Investment it must seek approval from the QCA for such Access Conditions. The QCA may approve special Access Conditions including additional returns to address any additional risks associated with Significant Investment. Special Access Conditions may relate to matters such as: the depreciation period and/or profile, take or pay arrangements or the term of contracts. To the extent that QR Network seeks additional returns to compensate it for additional risks, the risks should be accounted for in the cash flows to which the Regulated WACC rate is applied, with the cash flows being determined considering the possible outcomes and the probabilities of the outcomes as a consequence of the additional risks.

32. If QR Network considers that its cost of funds for a Significant Investment is inconsistent with the Regulated WACC, then QR Network may ask the Authority to approve an uplift on the Regulated WACC (the Varied WACC). The circumstances in which the QCA will approve a Varied WACC will be limited to changes in the risk free rate and debt margin in respect of the Significant Investment unless QR Network can show that, as a result of funding the Significant Investment, it has a materially different gearing ratio or credit rating. Users will have the option to accept a Varied WACC approved by the QCA, or to pursue User funding instead.

33. QR Network must obtain the QCA's approval for any proposed Access Conditions or other risk adjustments. However, parties will first have the opportunity to commercially negotiate the terms of access.

The QCA will approve Access Conditions that are commercially agreed between QR Network and all relevant Users unless:

- (a) it is not in the public interest, including the public interest in having competition in markets;
- (b) it may disadvantage the interests of parties who are not parties to the agreement;
- (c) QR Network has failed to provide the required information to Users regarding risk and return (see below); or
- (d) it would contravene a provision of the Act or the Undertaking.

34. As part of the process for negotiating the proposed Access Conditions, QR Network must provide upfront a detailed analysis to both the QCA and the Users of the additional risks faced by QR Network and the Access Conditions (including additional returns) it considers are required to mitigate or to compensate for those risks. Failure to provide this analysis will be grounds for the QCA to refuse to approve Access Conditions.

35. If parties are unable to agree terms within 60 days of the detailed analysis being provided by QR Network, or such further period of time approved by the QCA, the QCA will arbitrate the matter. The QCA will not grant extensions that take the total negotiation period to more than 120 days, unless a majority by number of the Access Seekers or Customers ask for such an extension. All periods referred to in this paragraph commence on the date that the QCA considers the price negotiations to have effectively commenced. Unless particular circumstances indicate otherwise, the QCA would consider the negotiation period to begin on the date when QR Network issues its detailed analysis of the additional risks and Access Conditions for an Extension. If the QCA has reason to believe that QR Network has commenced negotiating with Users regarding Access Conditions in respect of an Extension, it may require QR Network to provide the detailed analysis required by this Investment

Framework to all relevant Users within 10 Business Days and cease negotiating the content of Access Conditions until that analysis has been provided.

36. Users may at any time decide to refer the matter to the QCA for arbitration or to fund the Extension themselves. In considering the appropriateness of the proposed Access Conditions, the QCA will consult with stakeholders. The QCA may decline to arbitrate during the process, where it considers the referral is vexatious or the referring party has not negotiated Access Conditions in good faith.

37. Whether or not QR Network accepts the Access Conditions that the QCA considers to be reasonable, the QCA will publish its decision, which will indicate the Access Conditions the QCA considers reasonable.

38. QR Network may not seek to impose, and the QCA will not approve, any Access Condition that:

- (a) restricts Access Seekers or their Customers from raising disputes with the QCA or disclosing proposed Access Conditions or other contract terms to the QCA;
- (b) requires Access Seekers, Access Holders, or their Customers to disclose information that is confidential to one or more of them, to any other Access Holder, Access Seeker, or their Customer in circumstances other than those permitted by this Undertaking; or
- (c) results in QR Network earning Access Charges based on a Varied WACC or otherwise earning above the return provided by Reference Tariffs based on the Approved WACC, other than as approved by the QCA.

Pricing

39. Access Charges in respect of Access which is able to be provided by virtue of Extensions should be determined in accordance with the pricing principles incorporated in the undertaking, (i.e. a uniform tariff that sits between incremental and stand-alone costs), unless the QCA considers, on application from QR Network, that an alternative approach is appropriate in the circumstances.

40. The QCA will revise Reference Tariffs when a Significant Investment occurs, based initially on forecast costs and subsequently on actual costs.

41. Where a User Funded Extension is deemed by the Authority to have created Available Capacity in excess of that needed for an efficient expansion of the network (e.g. a User may want to construct a facility with excess Capacity), the cost of the excess Capacity may not be incorporated in the Regulatory Asset Base for the purposes of calculating current Access Charges and may instead be carried forward (at the Regulated or Varied WACC, as applicable to Access Charges for train services which utilise the Extension) for inclusion in Access Charges at a later date.

42. User funding will cover the capital costs of the Extension, with ongoing maintenance and operating costs included in the Reference Tariff in the usual way.

43. The Funding Users will have their capital investment (including any amounts of a relevant feasibility study) refunded to them in accordance with the depreciation profile associated with the capital expenditure, together with the Regulated or Varied WACC (as applicable) on the un-refunded balance, subject to QR Network receiving Reference Tariffs in respect of the user funded Capacity that are sufficient to cover the amount of the refund after meeting approved operating and maintenance costs. If Reference Tariff revenues are not sufficient, QR Network is obliged to refund only the amount it has received from such Reference Tariffs net of approved operating and maintenance costs. Users must also be refunded any financial benefits that accrue to QR Network as legal owner of the

Rail Infrastructure. The arrangements should be such that QR Network receives no benefit (tax or cash flow) from wholly User Funded Extensions, with QR Network retaining only the portion of Reference Tariffs related to operating and maintenance costs.

44. If a shortfall (or surplus) in Reference Tariff revenue occurs in respect of Capacity funded by QR Network or Users, the shortfall (or surplus) will be met by (or refunded to) all Access Holders in the relevant Individual Coal System through the existing revenue cap adjustment process. A shortfall (or surplus) caused solely by a Funding User will be to the account of that Funding User.

45. No additional fees or on-costs may be charged by QR Network in respect of User Funded Extensions, unless there are additional costs or risks assumed.

Extension Process

46. The investment decision process (deciding on the reasonableness of/need for the investment in the Extension) should be independent of who funds the investment – QR Network, Users or a combination of the two.

47. QR Network will initiate an Extension Process where it:

- (a) believes an Extension is required to meet demand within the coal supply chain; or
- (b) is requested to do so by the owner or operator of an expanding or new unloading facility that services users of the Rail Infrastructure; or
- (c) is requested to do so by a coal supply chain group such as the DBCT Coal Chain Coordinator, the Gladstone Coal Export Executive and the BMA Hay Point Coal Chain;
- (d) has received access requests which would utilise in excess of 70% of the Planned Capacity to be developed by the smallest efficient Extension of the Rail Infrastructure; or
- (e) has received access requests for less than 70% of the Planned Capacity to be developed by the smallest efficient an Extension, but those Users are willing to meet 70% of the costs associated with development of the Extension.

48. The Extension Process must include timetables, deadlines and information requirements.

49. Where a need for further Infrastructure Enhancements can be reasonably anticipated, QR Network must undertake the necessary scoping and planning studies (including pre-feasibility and feasibility studies). Access Seekers seeking Access that is dependent on such Infrastructure Enhancements can be requested to underwrite the studies and all prudent costs of the studies will be:

- (a) considered as User Funding in respect of determining how Planned Capacity to be developed by an Extension is allocated and in respect of return of capital; and
- (b) included in the Regulatory Asset Base irrespective of whether the project is completed through to the commissioning stage.

If QR Network unreasonably delays the necessary studies, Users may undertake the necessary work at their cost and QR Network must give the Users all reasonable assistance, including any necessary information and site access.

50. A mechanism must be in place to inform all Users who would reasonably be expected to have an interest in gaining Access Rights which might be generated by a potential Extension of the network (including those listed on the Committed Capacity Register or in a queue for Available Capacity), and

invite all Users to put forward an expression of interest in respect of the Access Rights they are seeking.

51. Funding Users must be given the opportunity to collaborate with QR Network in relation to all key matters affecting the cost and timing of the Extension, including, but not limited to project scope, cost, procurement strategy, construction and timing.

Dispute Resolution

52. Disputes arising between potential or existing Funding Users and QR Network in respect of:

- (a) proposed user funding terms, or
- (b) existing User Funding Agreements;

can be referred to the QCA for determination, or to commercial arbitration if the QCA does not hold the power to hear the matter

Finalisation of the Investment Framework

53. QR Network will be required to submit:

- (a) a Standard User Funding Agreement; and
- (b) a draft amending access undertaking which incorporates the principles set out in this Investment Framework into the approved access undertaking,

with QR Network having 3 months from Approval Date to finalise the Standard User Funding Agreement and amendments to the Authority's satisfaction.

54. If QR Network fails to do so, the QCA will have the power to finalise and approve a Standard User Funding Agreement and amendments to the approved access undertaking to incorporate the principles set out in this Investment Framework.

55. In the interim, the QCA will require Parts 4, 6 and 7 of the approved undertaking to incorporate the most critical elements of these principles. As such, Extensions which are currently being progressed or considered such as Wiggins Island are covered by the new investment framework. However, in respect of Extensions which are currently in process (such as Wiggins Island), it will be treated as if QR Network had formed the intention to negotiate Access Conditions on the Approval Date.

56. Definitions

For the purposes of this Schedule the following terms have the meanings given below:

Committed Funding has the meaning given in paragraph 20.

Customer Specific Branch Line means an Extension that when constructed will connect an Access Holder or Customer's single loading facility to Rail Infrastructure.

Expansion means an Extension that is not a Customer Specific Branch Line.

Extension of Rail Infrastructure includes an enhancement, expansion, augmentation, duplication or replacement of all or part of the Rail Infrastructure. An Extension may include a number of related Infrastructure Enhancements on different parts of the Rail Infrastructure.

Extension Process means the process described in paragraphs 47-51.

Funding Shortfall has the meaning given in paragraph 20.

Funding User means a User which has entered a User Funding Agreement with QR Network.

Infrastructure Enhancement means new Rail Infrastructure or a modification to existing Rail Infrastructure.

Investment Framework means the principles set out in this Schedule.

Major Expansion means an Expansion for the purpose of creating or providing additional Capacity substantially as a result of or in connection with a single Major External Development.

Regulated WACC means 9.96% per annum.

Significant Investment means investment applying to a Major Expansion estimated to cost in excess of \$300 million.

Standard User Funding Agreement means a pro forma User Funding Agreement

Users means Access Seekers and/or their Customers.

User Funding Agreement means an agreement by which a User agrees to provide funding to QR Network for the development of Infrastructure Enhancements.

User Funded Extension means an Extension, the costs of which are to be wholly or partly funded by Users pursuant to User Funding Agreements.

Varied WACC means a weighted average cost of capital different to that of the Regulated WACC.

Where a term has not been specifically defined in this Schedule, the definitions in Part 12 of the Undertaking apply.

APPENDIX 2 – SCOPE AND INTENT OF THE UNDERTAKING

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- (D) This deed sets out the terms upon which QR Network and Second Railway Manager will disclose Confidential Information to each other as permitted by the Applicable Undertaking.

OPERATIVE PROVISIONS

1. Definitions

1.1. Unless the context otherwise requires, and subject to Clause 1.2, terms defined in the Applicable Undertaking which applies to QR Network will have the same meanings when used in this deed.

1.2. In this deed, the following words and expressions shall have the respective meanings:

“**Applicable Undertaking**” means the access undertaking approved by the QCA in accordance with Part 5 of the Act which applies in relation to access to some or all of the rail transport infrastructure for which QR Network is the Railway Manager (and any equivalent access undertaking approved by the QCA in relation to access to rail transport infrastructure for which the Second Railway Manager is the Railway Manager).

“**Confidential Information**” means:

- (a) any information, data or other matter (‘information’) disclosed to QR Network or the Second Railway Manager by, or on behalf of, an Owner in contemplation of, or during the course of, the negotiations for Access to rail transport infrastructure for which QR Network or Second Railway Manager (as applicable) are the Railway Manager, or during the term of an Access Agreement that results from those Access negotiations, where:-
 - (i) the disclosure of the information by the recipient might reasonably be expected to affect the commercial affairs of the Owner; or
 - (ii) the information is marked confidential by the Owner when disclosed; and
- (b) any information or data collected by QR Network or Second Railway Manager in the performance of an Access Agreement where the disclosure of the information by QR Network or Second Railway Manager (as applicable) might reasonably be expected to affect the commercial affairs of the other party to the Access Agreement, which party shall be deemed to be the Owner of the Confidential Information;

provided that such information;

- (c) is not disclosed in relation to services other than the provision of Access to rail transport infrastructure, which is either the subject of an Applicable Undertaking or managed by the Second Railway Manager for the purpose of operating Train Services;
- (d) is not already in the public domain;
- (e) does not become available to the public through means other than a breach of the confidentiality provisions in this deed;
- (f) was not in the other party’s lawful possession prior to such disclosure; and
- (g) is not received by QR Network or the Second Railway Manager (as applicable) independently from a third party free to disclose such information, data or other matter;

and provided further that information will cease to be Confidential Information if the information has ceased to retain its confidential nature, for example:

- (h) the information is now in the public domain through means other than a breach of the confidentiality provisions in this deed; or
- (i) the information has been received by QR Network or the Second Railway Manager (as applicable) independently from a third party free to disclose the information;

“**Owner**” means the Third Party Access Holder or Third Party Access Seeker who is the owner of the Confidential Information which QR Network or the Second Railway Manager wishes to disclose to the other.

“**Permitted Purpose**” means the purpose of one or both of QR Network or the Second Railway Manager negotiating or providing Access to their respective rail transport infrastructure in relation to the relevant Owner.

2. Disclosure and Use of Confidential Information

2.1. Each of QR Network and the Second Railway Manager (“the Recipient”) undertakes to keep confidential and not disclose any Confidential Information disclosed by the other Railway Manager (“the Discloser”) or permit any person employed or engaged by it to disclose any such Confidential Information to any person (including other individuals employed or engaged by that party) except in accordance with this deed or an Applicable Undertaking, and to use Confidential Information disclosed by the other Discloser only for a Permitted Purpose, unless:

- (a) the relevant Owner provides its prior written approval; or
- (b) the disclosure and/or use is:
 - (i) required or compelled by any law;
 - (ii) required or compelled by any order of a court;
 - (iii) required or compelled by notice validly issued by any Authority;
 - (iv) necessary for the conduct of any legal proceedings, including any dispute resolution process under the Applicable Undertaking or the Act;
 - (v) required under any stock exchange listing requirement or rule;
 - (vi) to the Safety Regulator;
 - (vii) to the Recipient’s solicitors, barristers, or accountants under a duty of confidentiality;
 - (viii) to the Recipient’s banker or other financial institution, to the extent required for the purpose of raising funds or maintaining compliance with credit arrangements, if such banker or financial institution has executed a legally enforceable confidentiality deed in favour of the Owner;
 - (ix) requested by the shareholding ministers of QR Network’s Ultimate Holding Company (for as long as it has ministers as shareholders);

- (x) for the purpose of facilitating Train Control directions where the disclosure of information is reasonably necessary for the usual course of undertaking of Train Control Services;
- (xi) by any person involved in clearing an incident or emergency that is preventing the operation of Train Services on rail transport infrastructure; or
- (xii) subject to clause 2.2(a), by QR Network to a Related Party of QR Network (“QR Party”) provided that the disclosure is in accordance with clauses 2.2(b) to (i) and subject to a legally enforceable agreement between QR Network and the QR Party with provisions requiring keeping confidential and not disclosing (and not permitting any person employed or engaged by that QR Party to disclose) Confidential Information disclosed to the QR Party by QR Network (provided that QR Network must notify the QCA of any breach of such provisions of which QR Network becomes aware, and the actions QR Network has taken, or proposes to take, to rectify that breach (to the extent possible) and prevent further improper use or disclosure).

2.2.

- (a) QR Network may disclose the Owner’s Confidential Information to:
 - (i) individuals within QR Network; and
 - (ii) the Chief Executive Officer, the Chief Financial Officer and the board of directors of QR and QR Network’s Ultimate Holding Company, and persons providing clerical or administrative assistance to any of them including any Company Secretary and Assistant Company Secretary.
- (b) Subject to Clause 2.2(c), QR Network may disclose the Owner’s Confidential Information to those groups within QR specified in this Paragraph, provided that disclosure to each recipient is limited to the extent necessary to carry out a Permitted Purpose:
 - (i) Rollingstock Engineering Division, QR Services in relation to Rollingstock or Rollingstock Interface issues;
 - (ii) Property Division, QR in relation to real property issues; and
 - (iii) QR Services employees in management level 2, 3 and 4 in relation to issues regarding rail transport infrastructure subject to the Applicable Undertaking for QR Network.
- (c) The Owner may, in applying for access, give notice to the Second Railway Manager that in the event of the Second Railway Manager disclosing its Confidential Information to QR Network that it does not wish QR Network to disclose its Confidential Information to any one or more of the groups listed in Clause 2.2(b). If the Owner gives such a notice to the Second Railway Manager, then:
 - (i) the Second Railway Manager must advise QR Network of having received such a notice at the time that it first discloses relevant Confidential Information of that Owner to QR Network in accordance with this deed, and QR Network must then not disclose Confidential Information relating to that Access Application to the groups so noted; and

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- (ii) QR Network and the Second Railway Manager may agree a reasonable alternate mechanism (which must be approved by the QCA prior to being implemented) whereby QR Network can obtain the information it requires for the Permitted Purpose;
- (d) QR Network may disclose the Owner's Confidential Information to a Related Operator where:
- (i) the Owner approves such disclosure;
 - (ii) such disclosure is required for a Permitted Purpose in respect of Access to a station or platform, provided that any disclosure is limited to the extent required for this purpose;
 - (iii) such disclosure is required for a Permitted Purpose to facilitate the performance of Field Incident Management and Yard Control services, provided that any disclosure is limited to the extent required for this purpose; or
 - (iv) such disclosure is required for a Permitted Purpose to facilitate the performance of scheduling and Train Control Services in the Metropolitan Region, provided that any disclosure is limited to the extent required for this purpose.
- (e) If, for a Permitted Purpose, QR Network wishes to disclose an Owner's Confidential Information to a QR employee or group (or an employee or group of a QR Party) not specified in Clauses 2.2(a), (b) or (d), or to a group specified in Clause 2.2(b) on an issue not specified in that Clause, QR Network must:
- (i) obtain written consent of the Owner prior to making the disclosure; and
 - (ii) only disclose the Confidential Information to that employee or group to the extent necessary for the Permitted Purpose.
- (f) QR Network will not, without first obtaining the consent of the Owner, disclose an Owner's Confidential Information to a QR employee (or an employee of a QR Party) where that person is advising one of the Related Operators in relation to the same or a related matter.
- (g) If, during the process of responding to an Access Application or negotiating an Access Agreement, QR Network seeks the consent of an Owner for the disclosure of Confidential Information pursuant to Clause 2.2 (e) or (f) and:
- (i) where such consent has been sought during the Negotiation Period and the Owner of the Confidential Information refuses its consent to the disclosure of that Confidential Information, or fails to respond to QR Network's request for consent within thirty (30) days of its receipt of QR Network's written request, then QR Network may give a Negotiation Cessation Notice to the Owner, in accordance with Paragraph 4.6(b) of the Applicable Undertaking; or
 - (ii) where such consent has been sought at any time during the negotiation process (including during the Negotiation Period) and the Owner of the Confidential Information fails to respond to QR Network's request for consent within five (5) days of its receipt of QR Network's written request (referred to as the "Consent Response Date"), then all relevant timeframes applicable to QR Network will be extended by the same number of days as the day on which a response is given exceeds the Consent Response Date.
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This Paragraph does not apply where QR Network has requested consent to disclose the information to a Related Operator.

- (h) If, during the process of administering an Access Agreement, QR Network seeks the consent of the Owner for the disclosure of Confidential Information pursuant to Paragraph 2.2(e) or (f), and the Owner fails to respond to QR Network's request for consent within thirty (30) days of its receipt of QR Network's written request, consent shall be deemed to have been given. This Clause does not apply where QR Network has requested consent to disclose the Confidential Information to a Related Operator.
 - (i) QR Network is permitted to disclose Confidential Information to the Ringfencing Compliance Officer, and QR employees in Internal Audit and Information Services Division, to the extent necessary for these employees to perform their duties, without obtaining the consent of the Owner.
- 2.3 For the purpose of this deed, a person who has been a consultant or contractor to either QR Network or the Owner for a continuous period of at least three months, who works at least an average of 30 hours per week for that party, and who is subject to confidentiality obligations in favour of that party, shall be treated as if they were an employee of that party rather than an external consultant or independent adviser of that party.

3. General Obligations

3.1. Each Recipient acknowledges and agrees that:

- (a) the Confidential Information of the Owner is confidential to the Owner and is and remains at all times the valuable and exclusive property of the Owner;
- (b) the Recipient is responsible for any use or disclosure of Confidential Information which is contrary to the provisions of this deed by persons to whom the Recipient discloses the Confidential Information, and shall take such steps as may be necessary to prevent any such improper use or disclosure (including enforcing any confidentiality deed or confidentiality provisions contained in another arrangement pursuant to which the Recipient disclosed that Confidential Information);
- (c) the Recipient shall not copy or reduce into tangible, visible or recorded form or allow to be copied or reduced into tangible, visible or recorded form, any Confidential Information furnished to it by or on behalf of another party to this deed or an Owner except to the extent necessary to carry out a Permitted Purpose;
- (d) this deed shall not be construed as assigning any other rights to use Confidential Information, or as granting to the Recipient any licence or other rights relating to any Confidential Information or other intellectual property rights owned by the Owner;
- (e) the Recipient shall secure and protect the Confidential Information received from another party to this deed from unauthorised disclosure, access or use;
- (f) the QCA, the Discloser, and the relevant Owner may take legal proceedings against the Recipient and/or any third party if there is any actual, threatened or suspected breach of this deed or a breach by a Related Party of the Recipient of a confidentiality deed or confidentiality provisions contained in another arrangement with the Recipient pursuant to which the Confidential Information was disclosed to it; and
- (g) damages may be inadequate compensation for breach of this deed and, subject to the court's discretion, the QCA, the Discloser and the Owner shall be entitled to specific

performance of this deed and may restrain, by an injunction or similar remedy, any conduct or threatened conduct which is or will be a breach of this deed.

4. Liquidated Damages

- 4.1. Subject to Clause 5.1, where the QCA or the relevant Owner can establish that a Related Operator is in possession of the Owner's Confidential Information, QR Network will pay to the Owner an amount of \$10,000 by way of liquidated damages in full and final settlement of any claim that the Owner may have against QR Network in respect of the breach, UNLESS QR Network can establish that the Related Operator came into possession of the Confidential Information by means other than as a result of a breach by QR Network of Clause 2.2 or a breach by a Related Party of QR Network of a confidentiality deed or confidentiality provisions contained in another arrangement with QR Network pursuant to which the Confidential Information was disclosed to it.
- 4.2. Any Dispute between an Owner and QR Network arising in connection with this Clause may be referred to the QCA. The QCA's review will determine whether QR Network is liable to pay the complainant the liquidated damages specified in Clause 4.1.

5. Compensation for loss in excess of \$50,000

- 5.1 If an Owner or the QCA is able to establish that such Owner has suffered more than \$50,000 loss or damage as a result of a breach by QR Network of Clause 2.2 or a breach by a Related Party of QR Network of a confidentiality deed or confidentiality provisions contained in another arrangement with QR Network pursuant to which the Confidential Information was disclosed to it, this deed shall not preclude the Owner from taking action to recover compensation from QR Network in any court of competent jurisdiction. In the event of the Owner recovering compensation in these circumstances the parties agree that QR Network shall not be liable to the Owner for the payment of liquidated damages in accordance with Clause 4.

6. General

- 6.1. Nothing in this deed obliges QR Network or the Second Railway Manager to disclose any particular Confidential Information or enter into any further agreement with the other if it decides, in its absolute discretion, that it is not in its commercial interests to do so (although an Owner may have entered agreements with one or both parties that do impose such an obligation).
- 6.2. Unless otherwise terminated by mutual consent of all parties in writing, this deed will continue in force notwithstanding:
 - (a) any subsequent termination of any discussions or negotiations between any Owner of Confidential Information and either or both of QR Network and the Second Railway Manager; or
 - (b) the return of all copies of Confidential Information held by both QR Network and the Second Railway Manager to the Owner.

The parties will review and discuss in good faith the appropriateness of this deed (including whether it should be terminated or amended) in connection with the submission of any draft access undertaking submitted by QR Network or the Second Railway Manager which, if approved by the QCA, would become an Applicable Undertaking.

- 6.3. This deed is personal to the parties and may not be assigned or otherwise transferred in whole or in part without the prior written consent of the other party.
- 6.4. The laws of Queensland will govern the construction and performance of this deed and the parties submit to the non-exclusive jurisdiction of the Supreme Court of Queensland. This deed constitutes the entire agreement between the parties in respect of the Confidential Information and supersedes all previous agreements and understandings in respect of the Confidential Information. Nothing in this deed derogates from any obligation of any party under any Applicable Undertaking with respect to the Confidential Information.
- 6.5. In this deed, references to Clauses are references to Clauses contained in this deed unless otherwise stated.

EXECUTED as a DEED

Executed by **QR NETWORK PTY LTD (ACN 132 181 116)** under Section 127(1) of the Corporations Act 2001 in the presence of:

..... Director Director/Secretary
..... Name (Please Print) Name (Please Print)

Executed by [**Second Railway Manager**] under Section 127(1) of the Corporations Act 2001 in the presence of:

..... Director Director/Secretary
..... Name (Please Print) Name (Please Print)

Executed by **Queensland Competition Authority** by its *Chief Executive Officer* in the presence of:

.....
Witness

.....
 Name (Please Print)

.....
Chief Executive Officer

.....
Name (Please Print)

APPENDIX 4 – NEGOTIATION FRAMEWORK

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APPENDIX 5 – ACCESS AGREEMENTS

Part A: Operator Standard Access Agreement – Drafting for Schedule 13

SCHEDULE 13

ACCESS INTERFACE DEED

QR Network Pty Ltd

[Insert Customer]

Access Interface Deed

Date

Parties

QR Network Pty Ltd ACN 132 181 116 of Level 14, 305 Edward Street, Brisbane, Queensland (Railway Manager)

[insert] (**Customer**) of [insert address]

Background

The Customer and the Operator are parties to the Rail Haulage Agreement.

The Railway Manager and the Operator are parties to the Access Agreement.

The Parties wish to enter into this Deed to create a contractual relationship between the Railway Manager and the Customer and record their agreement in respect of circumstances in which they will be liable to each other for loss suffered in connection with the provision or utilisation of Access.

Agreed terms

1. Interpretation

1.1 Definitions

In this Deed:

Access Agreement means the *Access Agreement* [insert] between the Railway Manager and the Operator dated on or about the date of this Deed.

Access Rights means entitlements, rights and interests granted by the Railway Manager to the Operator under the Access Agreement which are required to enable the Operator to provide the Haulage Services.

Claim means any action, proceeding, claim, demand, damage, loss, cost, liability or expense including the costs and expenses of defending or settling any action, proceeding, claim or demand.

Consequential Loss means, subject to paragraph (e) and (f) below:

- (a) any special, indirect or consequential loss;
- (b) any economic loss in respect of any claim in tort;
- (c) any loss of profits, production, revenue, use, contract, opportunity, reputation or goodwill, any wasted overheads or any damage to credit rating whatsoever; and
- (d) any loss arising out of any Claim by a third party,

but **Consequential Loss** does not include:

- (e) a loss (including a loss arising out of a Claim by a third party) in respect of:
 - (A) the cost of repairing, replacing or reinstating any real or personal property of any person (including a Party) that has been lost, damaged or destroyed; or
 - (B) personal injury to or death of any person; or
- (f) in respect of any personal injury claim, special loss or economic loss as those terms are used in the context of personal injury claims.

Deed means this Access Interface Deed.

Haulage Services means the haulage services provided by the Operator to the Customer under the Rail Haulage Agreement.

Infrastructure has the meaning given in the Access Agreement.

Operator means (insert).

Party means a party to this Deed.

Rail Haulage Agreement means the agreement between the Operator and the Customer for the provision of rail haulage services to the Customer and for which purpose the Operator requires the Access Rights.

Staff of a Party, means the employees, contractors and agents of the Party and any other person under the control or supervision of the Party which is involved in:

- (a) in the case of the Railway Manager, any activity associated with the Access Agreement, the Infrastructure or the provision of Access rights; and
- (b) in the case of the Customer, any activity associated with:
 - (i) the haulage services provided by the Operator to the Customer under the Rail Haulage Agreement; or
 - (ii) the Customer's mine or other production facility (if any) to which the haulage services provided by the Operator under the rail haulage Agreement relate.

1.2 Construction

Unless expressed to the contrary, in this Deed:

- (a) words in the singular include the plural and vice versa;
- (b) any gender includes the other genders;
- (c) if a word or phrase is defined its other grammatical forms have corresponding meanings;
- (d) "includes" means includes without limitation;
- (e) no rule of construction will apply to a clause to the disadvantage of a party merely because that party put forward the clause or would otherwise benefit from it;
- (f) a reference to:
 - (i) a person includes a partnership, joint venture, unincorporated association, corporation and a government or statutory body or authority;
 - (ii) a person includes the person's legal personal representatives, successors, assigns and persons substituted by novation;
 - (iii) any legislation includes subordinate legislation under it and includes that legislation and subordinate legislation as modified or replaced;
 - (iv) an obligation includes a warranty or representation and a reference to a failure to comply with an obligation includes a breach of warranty or representation;
 - (v) a right includes a benefit, remedy, discretion or power;
 - (vi) time is to local time in Brisbane;
 - (vii) "\$" or "dollars" is a reference to Australian currency;
 - (viii) this or any other document includes the document as novated, varied or replaced and despite any change in the identity of the parties;

- (ix) writing includes any mode of representing or reproducing words in tangible and permanently visible form, and includes fax transmissions; and
- (x) a clause, schedule or annexure is a reference to a clause, schedule or annexure, as the case may be, of this Deed; and
- (g) where time is to be calculated by reference to a day or event, that day or the day of that event is excluded.

1.3 Headings

Headings do not affect the interpretation of this Deed.

2 Relations between the Parties

2.1 No liability for Consequential Loss

The Railway Manager and Customer are not liable to the other Party and must not make any Claim against the other Party under or in connection with the Access Agreement, the Access Rights or the Infrastructure in respect of any Consequential Loss whether as a result of:

- (a) the performance, non-performance or breach of the Access Agreement or any other obligation;
- (b) the standard of or any failure of or defect in the Infrastructure;
- (c) negligence;
- (d) breach of warranty or representation; or
- (e) any other act, omission or circumstance whatsoever,

2.2 Indemnities between Customer and the Railway Manager

- (a) Subject to Clauses 2.1 and 2.4, the Customer is solely liable for and releases, indemnifies and will keep indemnified the Railway Manager, its directors and the Railway Manager's Staff against all Claims of any nature suffered or incurred by or made or brought against the Railway Manager, its directors or the Railway Manager's Staff due to or arising out of the Access Agreement or this Deed in respect of any loss of or damage to or destruction of real or personal property (including property of the Railway Manager) 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 negligence act or omission of the Customer.
- (b) Subject to Clauses 2.1 and 2.4, the Railway Manager is solely liable for and releases, indemnifies and will keep indemnified the Customer, its directors and the Customer's Staff against all Claims of any nature suffered or incurred by or made or brought against the Customer, its directors or the Customer's Staff due to or arising out of the Access Agreement or this Deed in respect of any loss of or damage to or destruction of real or personal property (including property of the Customer) 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 negligence act or omission of the Railway Manager.

2.3 Extent of QR Network's liability to Customer for non-Consequential Loss

Subject to clauses 2.1, 2.4 and 2.5, the Railway Manager will be liable to the Customer for any Claim to the same extent that the Railway Manager would have been liable for that Claim under the Access Agreement if the Claim was made by the Operator.

2.4 Exclusions of Liability in Access Agreement apply

For the purposes of Clauses 2.2 and 2.3, each provision of the Access Agreement that directly or indirectly has the purpose or effect of regulating, excluding or limiting the liability of, or the making of a Claim against, the Railway Manager or the Operator (including limiting what conduct will constitute a breach and setting out when and how a Claim may be brought including any preconditions to doing so) will also operate to regulate, exclude or limit the liability of, or the making of a Claim against, the Railway Manager or the Customer by the other Party.

2.5 Application of References to Operator in Access Agreement

For the purposes of applying Clauses 2.3 and 2.4, all references to the Operator in relevant provisions of the Access Agreement will be deemed to include reference to the Customer, except to the extent that any such provision refers to or requires the Operator or the Railway Manager and the Operator to agree anything which shall only be deemed to be a reference to the Customer where:

- (a) the matter to be agreed relates to the Claim or subject of the Claim by the Customer; and
- (b) the matter has not, prior to the Claim, been agreed by the Railway Manager and the Operator for the purposes of the Access Agreement.

3 Assignment

A Party must not assign its interests under the Access Agreement or the Rail Haulage Agreement (as applicable) to another person (*intended assignee*) unless the intended assignee has first executed and delivered to the other Party a deed of assumption, in a form acceptable to the other Party, acting reasonably, under which the intended assignee undertakes to be bound by the terms of this Deed,

4 General

4.1 Duty

- (a) The Customer as between the Parties is liable for and must pay all duty (including any fine or penalty except where it arises from default by another Party) on or relating to this Deed, any document executed under it or any dutiable transaction evidenced or effected by it.
- (b) If a Party other than the Customer pays any duty (including any fine or penalty) on or relating to this Deed, any document executed under it or any dutiable transaction evidenced or effected by it, the Customer must pay that amount to the paying Party on demand.

4.2 Legal costs

Except as expressly stated otherwise in this Deed, each Party must pay its own legal and other costs and expenses of negotiating, preparing, executing and performing its obligations under this Deed.

4.3 Amendment

This Deed may only be varied or replaced by a document executed by the Parties.

4.4 Waiver and exercise of rights

- (a) A single or partial exercise or waiver by a Party of a right relating to this Deed does not prevent any other exercise of that right or the exercise of any other right.
- (b) A Party is not liable for any loss, cost or expense of any other Party caused or contributed to by the waiver, exercise, attempted exercise, failure to exercise or delay in the exercise of a right.

4.5 Governing law and jurisdiction

- (a) This Deed is governed by and is to be construed in accordance with the laws applicable in Queensland.
- (b) Each Party irrevocably and unconditionally submits to the non exclusive jurisdiction of the courts exercising jurisdiction in Queensland and any courts which have jurisdiction to hear appeals from any of those courts and waives any right to object to any proceedings being brought in those courts.

4.6 Liability

An obligation of two or more persons binds them separately and together.

4.7 Counterparts

This Deed may consist of a number of counterparts and, if so, the counterparts taken together constitute one document.

4.8 Entire understanding

- (a) This Deed contains the entire understanding between the Parties as to the subject matter of this Deed.
- (b) All previous negotiations, understandings, representations, warranties, memoranda or commitments concerning the subject matter of this Deed are merged in and superseded by this Deed and are of no effect. No Party is liable to any other Party in respect of those matters.
- (c) No oral explanation or information provided by any Party to another:
- (d) affects the meaning or interpretation of this Deed; or
- (e) constitutes any collateral agreement, warranty or understanding between any of the Parties.

Executed as a deed.

APPENDIX 6 – PRICING PRINCIPLES

6.5.2 Access Conditions

- (c) QR Network may require an Access Seeker to agree to Access Conditions before being granted Access Rights, to the extent that this is reasonably required in order to mitigate QR Network's exposure to the financial risks associated with providing Access for the Access Seeker's proposed Train Service.
- (d) For the purposes of Clause 6.5.2(a), Access Conditions are deemed to be reasonably required:
 - (i) where:
- (C) QR Network is to develop Infrastructure Enhancements (for example, a new branch line or increasing the height of tunnels to accommodate taller than usual trains);
- (D) either:
 - (1) there will be no more than one Customer using those Infrastructure Enhancements; or
 - (2) if the relevant Access Seeker is not reasonably expected to have any Customers, only Train Services operated for that Access Seeker will use those Infrastructure Enhancements; and
- (E) those Infrastructure Enhancements would not be required had that Access Seeker not sought Access for its Train Services;
 - (ii) if QR Network requires those Access Conditions pursuant to Clause 6.5.2(e)(ii), provided that the sharing of responsibility between the First Party and the Subsequent Party in respect of the Access Conditions originally borne by the First Party is equitable; or
 - (iii) where QR Network cannot provide the Access sought unless it invests in a Significant Investment.
- (e) For the purposes of Clause 6.5.2(a) and subject to Clause 6.5.2(b), Access Conditions are deemed not to be reasonably required where QR Network is to construct Infrastructure Enhancements:
 - (i) that are likely to be used by a number of Customers, Access Seekers or Access Holders such that QR Network's risk of being unable to recover the costs of the Infrastructure Enhancements if any one of those Customers, Access Seekers or Access Holders ceases to require all or part of the relevant Train Services is not material; or
 - (ii) that are for the purpose of increasing Capacity for the operation of Reference Train Services and that will form part of the Central Queensland Coal Region Mainline except where the Infrastructure Enhancement is part of a Significant Investment.
- (f) If an Access Condition results in QR Network earning revenue from the Access Seeker's Access that is in addition to the ongoing Access Charge (for example, an upfront contribution or Access Facilitation Charge), QR Network will:
 - (i) negotiate an agreement separate from the Access Agreement with the party who agreed to pay such additional revenue (or their nominee Access Seeker) which will provide for payment of a rebate to that party or their nominee, where the rebate is

- equivalent to the amount provided in the Access Charge for a cost component to the extent that this component is separately funded through the additional revenue (for example, depreciation and the non-diversifiable component of the return on any relevant Infrastructure Enhancements); or
- (ii) exclude the cost components separately funded through the additional revenue (for example, the value of any relevant Infrastructure Enhancements to the extent supported by the additional revenue) from the cost base (including the asset base) used to determine the ongoing Access Charge.
- (g) Where the Access of an Access Holder (“First Party”) is subject to an Access Condition in relation to the construction of Infrastructure Enhancements and Access is sought by an Access Seeker (“Subsequent Party”) to operate Train Services using all or part of those Infrastructure Enhancements, QR Network will use reasonable endeavours to either:
- (i) negotiate an agreement with the First Party where a rebate paid in accordance with Clause 6.5.2(d)(i) includes the amount provided in the Access Charge paid by the Subsequent Party for the cost component to the extent that the component is separately funded through the additional revenue (for example, depreciation and the non-diversifiable component of the return on the relevant Infrastructure Enhancements); or
 - (ii) renegotiate the terms of the First Party’s Access Conditions and impose Access Conditions on the Subsequent Party, so that the First Party and the Subsequent Party share the responsibility that was originally borne by the First Party.
- (h) For the purposes of determining for this Clause 6.5.2 whether another Customer or a Subsequent Party uses (or will use) an Infrastructure Enhancement, the Customer or Subsequent Party is deemed not to do so unless the particular characteristics of the Train Service for the Customer or the Subsequent Party’s Train Service would also have resulted in the Infrastructure Enhancement being required for Access to be provided in relation to the Customer or to the Subsequent Party. (For example, if QR Network increased the height of tunnels to provide Access to an Access Seeker using taller than usual trains, Train Services for Subsequent Parties operating through those tunnels will not use that Infrastructure Enhancement unless they use trains of a height that would also have required the height of the tunnels to be increased.)

6.5.3 Access Conditions Register

- (i) QR Network will maintain a register (“Access Conditions Register”) of any Access Conditions that result in:
 - (i) QR Network earning revenue from an Access Holder’s Access that is in addition to the ongoing Access Charge (in accordance with Clause 6.5.2(d));
 - (ii) revenue being paid by a party other than an Access Holder to QR Network in order to directly fund capital expenditure on the Rail Infrastructure incurred by QR Network; or
 - (iii) Rail Infrastructure assets being given to QR Network or sold to QR Network at significantly less than market value (except where such assets are given to or sold to QR Network by a QR Party).
- (j) The Access Conditions Register will identify:

- (i) the person paying revenue or providing the assets;
 - (ii) the nature of the Access Conditions (if applicable);
 - (iii) the date when the arrangement commenced;
 - (iv) the costs and assets to which the arrangement relates;
 - (v) the amount of the additional revenue; and
 - (vi) the action that QR Network has taken in accordance with Clause 6.5.2(d).
- (k) The QCA may, within one (1) month of the end of a Year, request QR Network in writing to conduct an audit of the Access Conditions Register.
- (l) The audit will follow a process agreed to by QR Network and the QCA (acting reasonably) or, failing such agreement, QR Network will make the information from the Access Conditions Register available to the QCA for the QCA to review.

CQCR reference tariffs and revenue caps

<i>Tariff Component (as at 1 July 2009)^a</i>	<i>Blackwater</i>	<i>Goonyella</i>	<i>Moura</i>	<i>Newlands</i>
AT ₁ – incremental maintenance (\$/gtk)	0.78	0.54	1.45	1.51
AT ₂ – incremental capacity (\$/train path)	1829.45	1159.06	547.99	245.01
AT ₃ – allocative component (\$/ntk)	4.22	4.35	8.89	7.08
AT ₄ – allocative component (\$/nt)	1.43	0.93	1.11	1.01
AT ₅ – electric infrastructure (\$/egtk)	4.65	2.11	-	-
Premium / Discount (\$/ntk)				
Rolleston	2.95			
Minerva	1.41			
Vermont	1.63			
Stanwell	-1.41			
Revenue Cap^b – Non-electric (AT₂₋₄)(<i>\$m</i>)	2009-10	2010-11	2011-12	2012-13
Blackwater	\$203.9	\$213.0	\$230.6	\$236.2
Goonyella	\$215.3	\$235.7	\$260.0	\$266.5
Moura	\$29.3	\$42.8	\$41.9	\$43.1
Newlands	\$32.8	\$32.3	\$30.3	\$31.0
Revenue Cap – Electric (AT₅)(<i>\$m</i>)				
Blackwater	\$63.2	\$84.4	\$65.1	\$83.0
Goonyella	\$71.0	\$79.9	\$78.6	\$80.6

^a Tariff components displayed are as at 1 July 2009 and are inclusive of the revenue cap adjustment amount from 2007-08.

^b The revenue caps presented for 2009-10 and 2010-11 are inclusive of the revenue cap adjustment amounts from 2007-08 and 2008-09.

APPENDIX 7 – CAPACITY MANAGEMENT

7.3.6 Capacity Relinquishment and Transfer

- (a) Unless otherwise specified in the Access Holder’s Access Agreement, an Access Holder may relinquish ~~(whether with or without a transfer of those Access Rights)~~ or transfer Access Rights in accordance with this Clause 7.3.6.
- (b) An Access Holder who intends to relinquish Access Rights must give QR Network reasonable notice of its intention to do so (“Notice of Intention to Relinquish”), specifying:
- (i) ~~specifying the Access Rights to be relinquished~~ (“Nominated Access Rights”); and
 - (ii) subject to Clause 7.3.6(cd), the date (“Relinquishment Date”) on which and the period for which the Nominated Access Rights are to be relinquished; and
 - ~~(iii) if the Access Holder wishes to affect a transfer of all or part of the Nominated Access Rights to an Access Seeker (“Transferee”), the identity of the Transferee and the Access Rights proposed to be transferred.~~
- (c) An Access Holder who intends to transfer all or part of its Access Rights to an Access Seeker (the “Transferee”) must give QR Network reasonable notice of its intention to do so (“Notice of Intention to Transfer”), specifying:
- (i) the Nominated Access Rights;
 - (ii) subject to Clause 7.3.6(d), the date (“Transfer Date”) on which and the period for which the Nominated Access Rights are to be transferred; and
 - (iii) the identity of the Transferee.
- (d) The period from the giving of the Notice of Intention to Relinquish until the Relinquishment Date, or the period from the giving of the Notice of Intention to Transfer until the Transfer Date, must not:
- (i) exceed two (2) years, where:
- (F) Access Rights are to be relinquished or transferred under an Access Agreement that was executed on or after 30 June 2006; and
- (G) that Access Agreement is for coal carrying Train Services (including those Train Services in relation to the Access Rights that are to be relinquished or transferred) operating in the Central Queensland Coal Region; or
- (ii) exceed six (6) months, where Clause 7.3.6(ed)(i) does not apply.
- (e) An Access Holder who wishes to relinquish or transfer Nominated Access Rights must pay a Relinquishment Fee to QR Network. The relinquishment or transfer of any Nominated Access Rights in accordance with this clause 7.3.6 is subject to and conditional on the Access Holder’s payment of the Relinquishment Fee to QR Network.
- (f) The Access Holder immediately prior to paying the Relinquishment Fee (but not less than 5 Business Days prior to the Relinquishment Date or Transfer Date), must request QR Network to calculate the Relinquishment Fee, ~~and, if~~ Upon being so requested, QR Network will calculate the Relinquishment Fee in accordance with this Clause 7.3.6.

Subject to Clause 7.3.6(fg), QR Network will notify the Access Holder as soon as reasonably practical of the Relinquishment Fee and how it was calculated.

- (g) If the calculation of the Relinquishment Fee in accordance with this Undertaking changes during the period from the time QR Network notifies the Access Holder under Clause 7.3.7(ef) to the time the Access Holder seeks to pay the Relinquishment Fee, then QR Network:
 - (i) may refuse to accept that payment; and
 - (ii) must advise the Access Holder of the correct Relinquishment Fee and the circumstances giving rise to the change in the calculation.
- ~~(h) The relinquishment or transfer of the Nominated Access Rights is subject to the Access Holder's payment of the Relinquishment Fee to QR Network.~~
- (h) The terms of the applicable Access Agreement will continue to apply in respect of the Nominated Access Rights until the later of:
 - (i) the Access Holder paying the Relinquishment Fee to QR Network; and
 - (ii) the Relinquishment Date or Transfer Date.
- (i) Where QR Network identifies an opportunity for it to enter into an Access Agreement with an Access Seeker that would result in a lessening of a Relinquishment Fee, QR Network will not unreasonably delay the process for negotiating and executing an Access Agreement with that Access Seeker.
- (j) ~~To the extent that a Notice of Intention to Relinquish identifies a Transferee, In the event of a transfer of Access Rights under this Clause,~~ QR Network will transfer the applicable Nominated Access Rights provided that:
 - (i) the Access Rights sought by the Transferee are for the same type of Train Service Entitlement (i.e. either Cyclic Traffic or Timetabled Traffic) as the Nominated Access Rights;
 - (ii) corresponding Access Rights are included in a new or varied Access Agreement with the Transferee;
 - (iii) QR Network's obligation to provide Access, for all or part of the period specified in Clause 7.3.6(bc)(ii), under that new or varied Access Agreement in respect of the relevant Access Rights commences on and from the later of the Access Holder paying the Relinquishment Fee to QR Network and the ~~Relinquishment~~Transfer Date;
 - (iv) QR Network is satisfied that the new or varied Access Agreement has been developed in accordance with the requirements of this Undertaking;
 - (v) the Access Holder complies with Clauses 7.3.6(b) to (f); and
 - (vi) the nature and extent of Available Capacity available to existing Access Seekers and QR Network's ability to satisfy obligations to existing Access Holders are not adversely affected.
- (k) Subject to Clauses 7.3.6(l) and (m), a Relinquishment Fee is the amount calculated as follows:

(i) for coal carrying Train Services included in:

(H) Access Agreements in place on the day immediately prior to 30 June 2006; or

(I) New Access Agreements entered as part of transferring Access Rights from such Access Agreements pursuant to Clause 7.3.7(a)(i) but only to the extent that the terms of the Old Access Agreement apply in respect of the relevant Access Rights pursuant to Clause 7.3.7(a)(ii),

("Pre-30 June 2006 Coal Access Agreements")

~~the amount that would be payable over the following two (2) year period if the Access Holder were to pay 40% of the Access Charges that would be payable if the Access Holder # operated the relevant Train Services pursuant to the Nominated Access Rights over the following two (2) year period~~ less the product of that amount and the Reduction Factor;

(ii) in respect of an Access Agreement, other than Pre-30 June 2006 Coal Access Agreements, that includes an obligation to pay take or pay if an Access Holder does not operate Train Services, the amount equivalent to the present value calculated at the Discount Rate, of the payment of the take or pay amount that would have been payable for the remainder of the term of the Access Agreement if the Nominated Access Rights were not relinquished but the Access Holder did not operate the relevant Train Services less the product of that amount and:

(J) if the Nominated Access Rights to be relinquished:

(3) are for coal carrying Train Services operating in the Central Queensland Coal Region under an Access Agreement executed on or after 30 June 2006;

(4) are not to be transferred to a Transferee,

the greater of the Reduction Factor and 0.5; or

(K) if Clause 7.3.6(k)(ii)(A) does not apply, the Reduction Factor; and

(iii) in respect of an Access Agreement to which neither Clauses 7.3.6(k)(i) nor (ii) apply, the amount that would have been contributed over the following two (2) year period to the Common Costs of providing the Rail Infrastructure as a result of the operation of the ~~relevant~~ Train Services pursuant to the Nominated Access Rights and payment of the applicable Access Charge less the product of that amount and the Reduction Factor.

(l) If:

(i) a calculation in accordance with Clauses 7.3.6(k)(i), (ii) or (iii) results in an amount that is less than zero (0); or

(ii) the Nominated Access Rights to be ~~relinquished~~ transferred:

(L) are for coal carrying Train Services operating in the Central Queensland Coal Region; and

(M) are to be transferred to a Transferee for a period of less than two (2) years and only used by the Transferee for coal carrying Train Services operating in the Central Queensland Coal Region,

then, despite any other provision of this Clause 7.3.6, the Relinquishment Fee is deemed to be zero (0).

- (m) For the purposes of Clause 7.3.6(k)(ii), if:
- (i) the relevant Train Services of the existing Access Holder and of the new Access Holder or Transferee are coal carrying Train Services;
 - (ii) the Transferee's or new Access Holder's Train Services that will use the Nominated Access Rights will operate predominantly in and have a Nominated Unloading Facility in, the same Individual Coal System as the Train Services of the existing Access Holder that used those Nominated Access Rights; and
 - (iii) a System Premium applies in relation to the Nominated Access Rights,

then the amount under Clause 7.3.6(k)(ii) (as applicable) must be further adjusted by QR Network to account for any consequential increase in the System Premium that would otherwise result in QR Network over recovering amounts from the Access Holder due to the application of the System Premium and that amount as so adjusted, will be the Relinquishment Fee.

- (n) For the purposes of Clause 7.3.6(k), a Reduction Factor is the amount calculated as follows:
- (i) if:
 - (N) a new Access Holder or a Transferee has executed an Access Agreement (or a variation to an existing Access Agreement) in respect of Access Rights that QR Network could not have provided without using the whole or part of the Nominated Access Rights; and
 - (O) QR Network's provision of the Access Rights under that Access Agreement commenced, for a new Access Holder:
 - (1) who is not a Transferee, after QR Network was given the Notice of Intention to Relinquish, but prior to the payment to it of the Relinquishment Fee; or
 - (2) who is a Transferee, on and from the Transfer Date,
- then:

- (P) for the purposes of Clause 7.3.6(k)(ii), if:
- (1) the relevant Train Services of the existing Access Holder and of the new Access Holder or Transferee are coal carrying Train Services; and
 - (2) the Transferee's or new Access Holder's Train Services that will use the Nominated Access Rights will operate predominantly in and have a Nominated Unloading Facility in, the same Individual Coal System as the Train Services of the existing Access Holder that used those Nominated Access Rights,

an amount calculated as follows:

$$TOP_B / TOP_A$$

where:

TOP_A is the amount equivalent to the present value, calculated at the Discount Rate, of the payment of the take or pay amount that would have been payable for the remainder of the term of the Access

Agreement ("Remainder of the Original Term") if the Nominated Access Rights were not relinquished but the existing Access Holder did not operate the relevant Train Services; and

TOP_B is the amount equivalent to the present value, calculated at the Discount Rate, or the payment of the take or pay amount that would be payable in accordance with the new Access Holder's or Transferee's Access Agreement (in relation to the whole or part of the Nominated Access Rights) if the new Access Holders' or Transferee's Train Services using the Nominated Access Rights were not operated by or for the new Access Holder or Transferee during the same period as the Remainder of the Original Term; or

(Q) If Clause 7.3.6(n)(i)(C) does not apply, an amount calculated as follows:

A / B

where:

A is the annual train kilometres over the Common Corridor attributable to the new Access Holder's or Transferee's Train Services in respect of which Access Rights could not have been provided without using the whole or part of the Nominated Access Rights; and

B is the annual train kilometres over the Rail Infrastructure attributable to the Train Services operated under the Nominated Access Rights

provided that to the extent that the new Access Holder's average contribution to Common Costs per train kilometre for its relevant Train Service is less than the existing Access Holder's average contribution to Common Costs per train kilometre for its relevant Train Service, the Reduction Factor will be decreased in proportion to that relative contribution; and

(ii) if Clause 7.3.6(n)(i) does not apply, zero (0).

(o) For the purposes of Clause 7.3.6(k)(ii) and Clause 7.3.6(n)(i)(C), if the Nominated Access Rights are for Train Services in the Central Queensland Coal Region, then:

(i) QR Network must calculate any relevant take or pay amount in accordance with the relevant Access Agreement; and

(ii) if that calculation requires information about future events, QR Network may make assumptions about those future events – for example, assumptions about Reference Train Services or Train Services – for the purposes of calculating the maximum amount of take or pay that could potentially be payable.

But QR Network will:

(iii) not make any assumptions about the amount of future Reference Tariffs, ~~except in relation to the escalation of Reference Tariffs in accordance with this Undertaking or the relevant Access Agreement by reference to an index including, for example, CPI~~; and

(iv) must assume that the forecast inflation rate is 2.5%.

- (p) Within one (1) month of the Approval Date, QR Network must publish on its website worked examples of the calculation of a Relinquishment Fee in accordance with this Clause 7.3.6.

APPENDIX 8 – INTERFACE CONSIDERATIONS

8.3 CONNECTING INFRASTRUCTURE

- (a) Subject to Clause 8.3(c), in the event that an Access Seeker or Access Holder proposes to construct Connecting Infrastructure which connects Private Infrastructure to the Rail Infrastructure QR Network must consent to such a connection provided:
- (i) the Connecting Infrastructure meets the technical specifications reasonably required by QR Network for connection to the Rail Infrastructure;
 - (ii) the Connecting Infrastructure has been constructed to a standard appropriate to the nature of the traffic and the current service standards of the adjoining Rail Infrastructure, and there is no adverse impact on safety;
 - (iii) the Connecting Infrastructure will not, by virtue of its existence, reduce Capacity or Supply Chain Capacity; and
 - (iv) the Access Seeker or Access Holder meets the initial and continued costs associated with constructing and maintaining the Connecting Infrastructure, including the reasonable costs incurred by QR Network in connection with the Connecting Infrastructure,

but neither the Private Infrastructure nor any Connecting Infrastructure is required to be of a standard or to be of any condition which exceeds the standards and condition of any QR Network infrastructure.

- (b) Where Connecting Infrastructure is constructed by an Access Seeker or Access Holder in accordance with Clause 8.3(a), QR Network must:
- (i) do all things reasonably necessary, and in a timely manner, to ensure that the Connecting Infrastructure is physically connected to the Rail Infrastructure and to facilitate the movement of Trains between the Connecting Infrastructure and the Rail Infrastructure; and
 - (ii) offer to provide train control and planning services for the Connecting Infrastructure in a manner consistent with the QR Network operated network. These services must be provided by QR Network on a basis agreed by the parties or, in the event of a dispute, determined by the QCA in accordance with clause 10.1.4.
- (c) ~~(a)~~ Unless otherwise agreed, where an Access Seeker or Access Holder proposes to construct Connecting Infrastructure, which connects Private Infrastructure to the Rail Infrastructure, QR Network reserves the right to design, project manage, construct, commission, maintain, upgrade and in any other way manage the Connecting Infrastructure, provided that:
- (i) ~~in undertaking any tasks associated with this right, QR Network may only undertake a reasonable~~ the standard of the works bearing in mind is appropriate to the nature of the traffic and the current or planned service standards for of the adjoining Rail Infrastructure; and
 - (ii) the Access Seeker or Access Holder:

- (R) is given a reasonable period within which to provide comments to QR Network on any design or construction matters; and
- (S) may provide comments to QR Network identifying any matters relating to QR Network's proposed project management of the construction of the Connecting Infrastructure that the Access Seeker or Access Holder considers will result in unreasonable costs or delays being incurred.
- (d) ~~(b)~~ The Access Seeker or Access Holder will, subject to the terms and conditions of any agreement governing the development of the Connecting Infrastructure, meet the reasonable costs incurred by QR Network in respect of work undertaken in accordance with Clause 8.3(a), provided that QR Network will pay the reasonable costs (excluding Consequential Loss) incurred by the Access Seeker or Access Holder where QR Network has unreasonably delayed the development of the Connecting Infrastructure.
- (e) ~~(e)~~ Where the Access Seeker or Access Holder and QR Network cannot agree as to:
- (i) whether standard of the works referred to under Clause 8.3(~~ac~~) are reasonable;
 - (ii) what is a reasonable period within which to provide comments to QR Network under Clause 8.3(~~ac~~)(ii)(A);
 - (iii) whether QR Network's proposed project management of the construction of the Connecting Infrastructure will result in unreasonable costs or delays being incurred;
 - (iv) an amount payable under Clause 8.3(~~ed~~);
 - (v) whether QR Network has unreasonably delayed the construction of Connecting Infrastructure; or
 - (vi) any other aspect of a Rail Connection Agreement,
- then, subject to any other remedies sought by a party at law, either party may seek to resolve the Dispute in accordance with Clause 10.1.
- (f) QR Network will include operating and maintenance costs of Connecting Infrastructure in the cost build up for Reference Tariffs and not through separate agreements with the owner of the Private Infrastructure.
- ~~(d) Where QR Network does not elect to exercise its rights under Clause 8.3(a) and the Connecting Infrastructure is constructed by an Access Seeker or Access Holder, QR Network must do all things reasonably necessary to ensure that the Connecting Infrastructure is physically connected to the Rail Infrastructure and to facilitate the movement of Trains between the Connecting Infrastructure and the Rail Infrastructure, provided that:~~
- ~~(i) the Connecting Infrastructure meets the technical specifications required by QR Network (acting reasonably) for connection to the Rail Infrastructure;~~
 - ~~(ii) the Connecting Infrastructure has been constructed to a reasonable standard bearing in mind the nature of the traffic and the current or planned service standards for the Rail Infrastructure; and~~
 - ~~(iii) the Access Seeker or Access Holder has agreed to pay or reimburse to QR Network (on demand by QR Network from time to time) all of the reasonable costs and expenses incurred by QR Network in connection with the Connection~~

~~Infrastructure (including costs and expenses incurred in complying with its obligations under this Clause 8.3(d)).~~

~~(e) Where the Access Seeker or Access Holder and QR Network cannot agree as to whether the Connecting Infrastructure:~~

~~(i) meets the relevant technical specifications required by QR Network for connection to the Rail Infrastructure; or~~

~~(ii) has been constructed to a reasonable standard bearing in mind the nature of the traffic and the current or planned service standards for the Rail Infrastructure,~~

~~then, subject to any other remedies sought by a party at law, either party may seek to resolve the Dispute in accordance with Clause 10.1.~~

8.4 Development of Standard Rail Connection Agreement

(a) Following consultation with stakeholders, QR Network will submit to the QCA a Proposed Standard Rail Connection Agreement within nine (9) months after the Approval Date, or such further period as the QCA may in its absolute discretion determine.

(b) The QCA will consider a Proposed Standard Rail Connection Agreement given to it by QR Network under clause 8.4(a) and either approve or refuse to approve it within sixty (60) days after it is received by the QCA or such further period as the QCA may determine.

(c) If the QCA refuses to approve a Proposed Standard Rail Connection Agreement submitted under Clause 8.4 (a), the QCA will give QR Network a notice in writing:

(i) stating the reasons for its refusal; and

(ii) requiring QR Network to amend the Standard Rail Connection Agreement in the way the QCA considers appropriate and to resubmit the amended Proposed Standard Rail Connection Agreement to the QCA within 30 days after the giving of that notice or such further period as the QCA may in its absolute discretion determine.

(d) The QCA may develop a Proposed Standard Rail Connection Agreement that is consistent with the Undertaking, if:

(i) QR Network does not submit a Proposed Standard Rail Connection Agreement in accordance with Clause 8.4(a);

(ii) QR Network does not re-submit the Proposed Standard Rail Connection Agreement in accordance with Clause 8.4(c); or

(iii) the QCA refuses to approve a Proposed Standard Rail Connection Agreement that was re-submitted in accordance with Clause 8.4(c).

(e) The QCA may approve a Proposed Standard Rail Connection Agreement (including a Proposed Standard Rail Connection Agreement developed by the QCA) only if the QCA:

(i) is satisfied that, in the case of a resubmitted Proposed Standard Rail Connection Agreement, it is in accordance with the notice given under Clause 8.4(c);

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- (ii) is satisfied that the Proposed Standard Rail Connection Agreement is consistent with this Undertaking;
 - (iii) considers it appropriate to do so having regard to the matters listed in section 138(2) of the Act; and
 - (iv) has complied with Clause 8.4(f).
 - (f) Where QR Network submits a Proposed Standard Rail Connection Agreement under clause 8.4(a) or the QCA develops a Proposed Standard Rail Connection Agreement under clause 8.4(d), the QCA will:
 - (i) publish the Proposed Standard Rail Connection Agreement on its website;
 - (ii) invite persons to make submissions on the Proposed Standard Rail Connection Agreement to the QCA within a reasonable period of time specified by the QCA; and
 - (iii) consider any submission it receives within the time specified.
 - (g) If the QCA approves a Proposed Standard Rail Connection Agreement:
 - (i) the Standard Rail Connection Agreement will apply from the date of the QCA decision, or such later date that the QCA determines;
 - (ii) the QCA will give QR Network a notice in writing stating the reasons for its decision; and
 - (iii) QR Network must publish the Standard Rail Connection Agreement on its website.
 - (h) An approved Standard Rail Connection Agreement which was submitted in accordance with clause 8.4(a) or resubmitted in accordance with this Clause 8.4(c) may only be withdrawn by QR Network if approved by the QCA.
 - (i) If the QCA considers it necessary to do so, the QCA may ask QR Network to submit a replacement Standard Rail Connection Agreement within a reasonable period advised by the QCA, in which case clauses 8.4(b) to (h) will apply but with references to clause 8.4(a) being read as a reference to this clause 8.4(i).
 - (j) Unless otherwise agreed between QR Network and a proponent of infrastructure which is proposed to connect to Rail Infrastructure (but for which QR Network will not be the Railway Manager), any Rail Connection Agreement entered pursuant to this Undertaking after a Standard Rail Connection Agreement has been approved must be consistent with the terms of the Standard Rail Connection Agreement.
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APPENDIX 9 – REPORTING INFORMATION PROVISION AND COMPLIANCE

9.1 Quarterly Network Performance Reports

- (a) Within thirty (30) days after the end of each Quarter in the Term, QR Network will publicly release a quarterly report in relation to that Quarter:
- (i) containing the information set out in Clauses 9.1 (d) to (i) and/or other indicators in a format to be approved by the Authority from time to time (except for the quarterly report for the first quarter in the Term that begins on or after the Approval Date (“First Quarter Report”), which is only required to contain the information set out in Paragraphs (e) to (m) of the 2008 undertaking); and
 - (ii) in a format to be approved by the Authority from time to time.

QR Network will use reasonable efforts to ensure that the information contained in each quarterly report is accurate.

- (b) [no change to drafting]
- (c) [no change to drafting]
- (d) Information on the number and reliability of Train Services that have operated in the subject Quarter, as follows:
 - (i) the number and percentage of train services that reach their destination within the Allotted Time Threshold;
 - (ii) the number and percentage of Train Services that do not reach their destination within the Allotted Time Threshold:

(T) due solely to the acts or omissions of QR Network;

(U) due solely to delays attributed to an Access Holder; and

(V) that are not Train Services of the types identified in Subparagraphs 9.1(d)(ii)(A) or (B); and

- (iii) the total number of Train Services.

- (e) [no change]
- (f) [no change]
- (g) [no change]
- (h) [no change]
- (i) Information for each Individual Coal System on coal carrying Train Services that have operated in the subject Quarter, being:
 - (i) the aggregate gtk;
 - (ii) the aggregate nt;
 - (iii) the aggregate ntk;

- (iv) the aggregate egtk;
- (v) the average actual Below Rail Transit Time Percentage (including the methodology for calculating the amount);
- (vi) the aggregate Train Paths used by the relevant Train Services; ~~and~~
- (vii) the aggregate Train Paths contracted for relevant Train Services in accordance with the relevant Train Service Entitlements;
- (viii) the aggregate number of Train Paths available for coal carrying Train Services;
- (j) Information for each Individual Coal System for the subject Quarter in respect of:
 - (i) the aggregate number of Train Paths scheduled;
 - (ii) the aggregate number of Train Paths used for planned maintenance;
 - (iii) the aggregate number of Train Paths used for unplanned maintenance; and
 - (iv) the percentage of Train Paths available but not used.

9.2.3 Maintenance Cost Report

- (a) Within two (2) months after the Approval Date, QR Network must submit to the QCA a draft template of its proposed maintenance cost report. The QCA will consider the draft template and approve the proposed format provided it discloses the information required to be reported in accordance with this clause in a reasonably transparent manner. If the QCA considers that the proposed format fails to satisfy that requirement, the QCA will decide how the proposed format is required to be amended in order to satisfy that requirement. The approved format may be varied from time to time as agreed between QR Network and the Authority or, failing agreement, as required by the Authority.
- (b) Within four (4) months after the end of each Year in the Term, or such longer time as agreed by the QCA, QR Network will publicly release an annual report of actual maintenance costs and scope of maintenance in the subject Year containing the information set out in Clause 9.2.3(c) for the geographic areas specified in Clause 9.2.3(d) in the a format agreed approved or required with the QCA from time to time in accordance with clause 9.2.3 (a).
- (c) QR Network will:
 - (i) [no change]
 - (ii) for the Central Queensland Coal Region:
 - (W) report the MCI for the subject year (including the indices, if any, comprised in the MCI); and
 - (X) provide an explanation of any significant difference between the variation in the overall (weighted average) MCI index and the variation in total actual maintenance costs for the subject year; and
 - (Y) report on the effect of the completion of planned maintenance work of action necessarily taken to restore QR Network's rail network after derailments (but QR Network is not obliged to report in respect of any derailments with a repair cost of less than or equal to \$2100,000).

9.2.4 Maintenance Cost Report to the QCA

- (a) Within two (2) months after the Approval Date, QR Network must submit to the QCA a draft template of its proposed maintenance cost report. The QCA will consider the draft template and approve the proposed format provided it discloses the information required to be reported in accordance with this clause in a reasonably transparent manner. If the QCA considers that the proposed format fails to satisfy that requirement, the QCA will decide how the proposed format is required to be amended in order to satisfy that requirement. The approved format may be varied from time to time as agreed between QR Network and the Authority or, failing agreement, as required by the Authority.
- (b) Within four (4) months after the end of each Year in the Term, unless otherwise agreed between QR Network and the QCA, QR Network will report its actual maintenance cost and scope of maintenance in the subject Year compared to the forecast maintenance cost and scope of maintenance accepted by the QCA for the purpose of determining Reference Tariffs in ~~a the format agreed approved or required with the QCA from time to time in accordance with 9.2.4 (a),~~ including:
 - (i) [no change]

9.6 Compliance

- (a) [no change]
- (b) [no change]
- (c) Information provided to the QCA in accordance with Clauses 9.2.4, 9.2.5, 9.3.1 and 9.3.2 will be accompanied by a responsibility statement signed by the QR Network Executive General Manager of QR Network and one independent director of QR Network.

APPENDIX 10

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APPENDIX 11 - COORDINATION AND PLANNING**11.1 COAL SUPPLY CHAIN COORDINATION FOR CENTRAL QUEENSLAND COAL REGION****11.1.1 Whole of Supply Chain Coordination**

QR Network will use reasonable endeavours to

- (a) participate in a Supply Chain Group for the purpose of contributing to the coordination and effective performance of the relevant coal supply chain; and
- (b) coordinate its maintenance activities with other service providers and participants in the coal supply chains.

11.1.2 Supply Chain Master Plan

If a Supply Chain Group seeks to develop a Supply Chain Master Plan for a relevant coal supply chain, QR Network will use reasonable endeavours to participate in the development of the Supply Chain Master Plan.

11.1.3 Supply Chain Operating Assumptions

- (a) Within 6 months of the Approval Date, QR Network will develop Supply Chain Operating Assumptions in relation to each Individual Coal System ~~and the Western System~~.
- (b) If a Supply Chain Group seeks to develop supply chain operating assumptions for a coal supply chain, QR Network will:
 - (i) participate in the development of those supply chain operating assumptions;
 - (ii) notify the Supply Chain Group of the Supply Chain Operating Assumptions applicable to the relevant coal supply chain;
 - (iii) consider any submissions from the Supply Chain Group in respect of whether the Supply Chain Operating Assumptions are reasonable; and
 - (iv) respond to any submissions from the Supply Chain Group as soon as reasonably practicable including whether and, if so, how QR Network has varied the relevant Supply Chain Operating Assumptions in response to those submissions.
- (c) The Supply Chain Operating Assumptions in relation to each Individual Coal System must be reviewed at least once each year, or more frequently following a change to a coal system that would result in a material change in Supply Chain Operating Assumptions or in conjunction with the development of a Coal Rail Infrastructure Master Plan. In undertaking the review, QR Network will:
 - (i) notify the Supply Chain Group of the Supply Chain Operating Assumptions applicable to the relevant coal supply chain and the time in which to make submissions;
 - (ii) consider any submissions from the Supply Chain Group in respect of whether the Supply Chain Operating Assumptions are reasonable and whether variation is required; and

- (iii) respond to any submissions from the Supply Chain Group as soon as reasonably practicable including whether and, if so, how QR Network has varied the relevant Supply Chain Operating Assumptions in response to those submissions.
- (d) If a participant in a Supply Chain Group is not satisfied that the relevant Supply Chain Operating Assumptions developed by QR Network are reasonable or with QR Network's response to submissions made by that Supply Chain Group regarding those Supply Chain Operating Assumptions, that participant may refer the matter to the QCA for determination in accordance with Clause 10.1.4.

11.1.4 Regular review of capacity

- (a) Within 6 months of the Approval Date, QR Network will conduct a review of:
 - (i) Capacity; and
 - (ii) the difference between Capacity and Committed Capacity,
- (b) in relation to each Individual Coal System (a "Capacity Review").
- (c) A Capacity Review must then subsequently be undertaken:
 - (i) in relation to each Individual Coal System, whenever a review of System Operating Assumptions occurs in accordance with Clause 11.1.3; and
 - (ii) in relation to a particular Individual Coal System, whenever a Change in Existing Capacity is assessed in accordance with Clause 11.3.
- (d) In calculating Capacity in a Capacity Review, QR Network will apply the latest Supply Chain Operating Assumptions applicable to the relevant Individual Coal System developed in accordance with Clause 11.1.3, which are not the subject of an unresolved referral to the QCA in accordance with paragraph 11.1.3(d).
- (e) If a Capacity Review reveals that, for a Individual Coal System, Committed Capacity at a particular point in time will exceed Capacity at that time, then:
 - (i) where Clause 7.5.4 applies, QR Network will be obliged to develop Infrastructure Enhancements in that Individual Coal System which it reasonably expects to be sufficient to ensure that Capacity will be equal to or greater than Committed Capacity at that time;
 - (ii) QR Network will not contract for provision of additional Access Rights that would increase the deficit between Capacity and Committed Capacity at that time;
 - (iii) if a queue for Available Capacity has been formed in accordance with Clause 7.3.4 QR Network will not provide Access Rights to Access Seekers in the queue where doing so would increase the deficit between Capacity and Committed Capacity at that time; and
 - (iv) where QR Network proposes to contract for the provision of Access Rights conditional on the completion of the relevant Infrastructure Enhancements, the Infrastructure Enhancements will be designed to provide sufficient Planned Capacity to provide the additional Access Rights conditionally contracted for and rectify the deficit between Capacity and Committed Capacity, unless separate Infrastructure Enhancements are being developed to rectify that deficit in accordance with paragraph 11.1.4(d).

11.1.5 Review of Undertaking following LTS Outcome

- (a) If the LTS Process results in an LTS Outcome or if QR Network considers that other circumstances have arisen that have materially impacted coal chain stakeholders, QR Network will promptly submit to the QCA for approval:
- (i) a draft amending access undertaking (the "Coal Chain DAAU"); and
 - (ii) amendments to the Standard Access Agreement or new Proposed Standard Access Agreements (the "Coal Chain SAAs"),
- which between them incorporate in appropriate detail all relevant amendments to this Undertaking and the Standard Access Agreements which are reasonably necessary to implement such of the LTS Outcome as is relevant to the provision of Access or this Undertaking;
- (b) Clause 2.6(c)-(k) will apply in relation to the Coal Chain DAAU as if:
- (i) all references to the Draft Incentive Mechanism Amendments were to the Coal Chain DAAU;
 - (ii) 2.6(f)(ii) was deleted and replaced with: "the amendments introduced by the Coal Chain DAAU are reasonably necessary to implement such of the LTS Outcome as is relevant to the provision of Access or this Undertaking; and
 - (iii) 2.6(g)(i)-(ii) was deleted
- (c) Clause 5.2 will apply in relation to the Coal Chain SAAs as if:
- (i) the Coal Chains SAAs were a Proposed Standard Access Agreement required to be submitted in accordance with Clause 5.2(n);
 - (ii) references to the principles contained in Clause 5.2(n) are a reference to the principle in Clause 11.1.4(a)(iv).

11.2 COAL RAIL INFRASTRUCTURE MASTER PLANNING

11.2.1 Master Plan Process

- (a) QR Network will develop a Coal Rail Infrastructure Master Plan in accordance with this Clause 11.2.
- (b) The Coal Rail Infrastructure Master Plan may be made for a period of up to three (3) years but can extend to a longer time period.
- (c) QR Network will establish a Coal Rail Infrastructure Master Planning Forum comprising:
 - (i) Customers for coal carrying Train Services;
 - (ii) Access Holders that hold Access Rights for coal carrying Train Services and Access Seekers that are seeking Access Rights for coal carrying Train Services;
 - (iii) each Railway Operator that has an agreement with an Access Holder to provide Train Services to that Access Holder in respect of some or all of the Access Rights subject to the Access Holder's Access Agreement;

- (iv) the owners and/or operators of ports utilised by coal carrying Train Services and other coal unloading destinations;
 - (v) the Queensland Resources Council Ltd ABN 59 050 486 952, ~~as an observer only;~~
~~and~~
 - (vi) the QCA, ~~as an observer only~~ . and
 - (vii) other interested parties in the coal supply chain (e.g. a Supply Chain Group).
- (d) The Coal Rail Infrastructure Master Planning Forum's function is to act as a consultative body for the purposes of QR Network's development of the Coal Rail Infrastructure Master Plan.
- (e) QR Network will actively involve the Coal Rail Infrastructure Master Planning Forum in the development of the Coal Rail Infrastructure Master Plan. QR Network must:
- (i) as soon as reasonably practical after the Approval Date and then prior to 1 July in each Year (other than the first Year) in the Term, give each member of the Coal Rail Infrastructure Master Planning Forum a program setting out the consultations that are intended to occur through the Coal Rail Infrastructure Master Planning Forum over the forthcoming Year (including any processes for obtaining Customer Group acceptance of the scope of capital expenditure projects);
 - (ii) use reasonable endeavours to comply with a plan given to members of the Coal Rail Infrastructure Master Planning Forum in accordance with Clause 11.2.1(e)(i);
 - (iii) give participants at least ten (10) Business Days prior notice of any proposed meetings of the Coal Rail Infrastructure Master Planning Forum; and
 - (iv) at least five (5) Business Days prior to the proposed meeting, provide each participant with an agenda of the issues to be discussed, and any materials to be considered at that meeting.
- (f) QR Network is to provide an updated Coal Rail Infrastructure Master Plan to the Coal Rail Infrastructure Master Planning Forum (including the QCA) where changes in Supply Chain Operating Assumptions or other factors relevant to the development of the Coal Rail Infrastructure Master Plan would be reasonably expected to result in any material change to the Coal Rail Infrastructure Master Plan. ~~that plan has substantially changed since the issue of the previous plan.~~

11.2.2 Content of Master Plan

- (a) QR Network must:
- (i) to the extent that QR Network considers it reasonable to do so, align the Coal Rail Infrastructure Master Plan to each applicable Supply Chain Master Plan; and
 - (ii) if applicable, identify in its Coal Rail Infrastructure Master Plan the reasons why it does not agree with a Supply Chain Master Plan;
 - (iii) if there is any material difference between QR Network's Coal Rail Infrastructure Master Plan and a Supply Chain Master Plan, include in the Coal Rail Infrastructure Master Plan an explanation of the reasons for those differences; and

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- (iv) if there any differences in the Supply Chain Operating Assumptions used in the Coal Rail Infrastructure Master Plan and a Supply Chain Master Plan, include in the Coal Rail Infrastructure Master Plan:
 - (A) the reasons for; and
 - (B) To the extent that QR Network is reasonably able to assess the potential impacts of,
 - (C) the differences; and
 - (v) if QR Network intends to invest other than in accordance with a Supply Chain Master Plan, include in its Coal Rail Infrastructure Plan the reasons why its Infrastructure Enhancements differ from those proposed in a Supply Chain Master Plan.
- (b) The Coal Rail Infrastructure Master Plan must include information on the following matters for each Individual Coal System and the Western System:
 - (i) the Supply Chain Operating Assumptions upon which the Coal Rail Infrastructure Master Plan is based;
 - (ii) the aggregated contracted Train Paths for coal carrying Train Services;
 - (iii) the capacity planning scenarios; and
 - (iv) the proposed Asset Replacement Expenditure, General Expansion Capital Expenditure and Customer and Access Holder specific projects required to satisfy the capacity planning scenarios.
 - (c) QR Network will provide in the Coal Rail Infrastructure Master Plan information on the scope, standard and preliminary costs of proposed General Expansion Capital Expenditure projects including information that:
 - (i) identifies, by Individual Coal System or the Western System (as applicable), capacity analysis information, reasons for the expansion, identification of the projects that will be required to provide increased capacity to meet increased demand and estimated trigger points for each project;
 - (ii) identifies for each specific project, the scope of the project and describes the general standard of works, the additional Capacity to be delivered by the expansion and preliminary cost information;
 - (iii) quantifies the impact on Capacity during construction and measures for ameliorating this impact;
 - (iv) provides the rationale for the choice of project and a consideration of alternative solutions including:
 - (A) a preliminary analysis of the other Infrastructure Enhancement solutions considered by QR Network; and
 - (B) an indicative assessment of alternative supply chain solutions arising from discussions with other (present and prospective) service providers in the coal supply chain (even if this may involve capacity solutions which QR Network cannot deliver, but which may present a better supply chain solution); and
 - (v) identifies each project that is anticipated to be a Major Expansion.
-

- (d) In order to provide the information referred to in Clause 11.2.2(c)(i), QR Network will undertake capacity analysis modelling, on the basis of Supply Chain Operating Assumptions, in connection with proposed General Expansion Capital Expenditure projects. QR Network will provide access to the capacity analysis model to a consultant who has been jointly appointed by, and at the cost of, the members of a Customer Group for the purpose of peer reviewing the model, the model's output and sensitivity analysis in respect of proposed General Expansion Capital Expenditure projects relevant to that Customer Group. QR Network will run a reasonable range of scenarios for consideration, as requested by the members of the Customer Group.

11.3 CONTRACTING FOR CAPACITY IN COAL SUPPLY CHAINS

- (a) QR Network will use reasonable endeavours to grant Access Rights to an Access Seeker in respect of coal carrying Train Service only where QR Network has formed a reasonable opinion that the Access Seeker has secured or is reasonably likely to secure the rights required to ~~leave the QR Network rail network in order to~~ unload at its destination.
- (b) Where the provision of Access Rights to an Access Seeker is partly or wholly dependent on Planned Capacity, to be created other than by a User Funded Expansion, becoming Available Capacity, QR Network must:
- (i) only contract for the provision of such Access Rights conditional on the completion of the relevant Infrastructure Enhancements in accordance with this clause 11.3; and
 - (ii) only contract for the provision of such Access Rights to the extent of the surplus Capacity above Committed Capacity that the Infrastructure Enhancement(s) are expected to result in.
- (c) If QR Network grants Access Rights (“Conditional Access Rights”) to Access Seekers (“Conditional Access Holders”) that are conditional on the completion of particular Infrastructure Enhancements, then:
- (i) after the commissioning of the last of the relevant Infrastructure Enhancements, QR Network will, subject to Clause 11.3(d), undertake an assessment of the change in Existing Capacity arising as a result of those Infrastructure Enhancements (“Change in Existing Capacity”); ~~and~~
 - (ii) where Change in Existing Capacity is measured as the Existing Capacity at that time, less the Existing Capacity of the system in the absence of the Infrastructure Enhancement, using consistent Supply Chain Operating Assumptions ;
 - (iii) the assessment must be done expeditiously with an evaluation period of no more than six months following commissioning;
 - (iv) if that assessment indicates that the Change in Existing Capacity is not due to an Infrastructure Enhancement , then Conditional Access Rights will not be reduced ;
 - (v) if the Change in Existing Capacity is due to an Infrastructure Enhancement, but:
 - (A) that assessment indicates that the change in Existing Capacity is not due to an Infrastructure Enhancement, then Conditional Access Rights will not be reduced;

- (B) that assessment indicates that the Change in Existing Capacity is less than the Planned Capacity for those Infrastructure Enhancements at the time when the Conditional Access Rights were granted; and
- (C) that Change in Existing Capacity is not sufficient to provide all of the Conditional Access Rights to all of the Conditional Access Holders and rectify any existing deficit of Available Capacity to Committed Capacity in respect of the relevant Rail Infrastructure,
- then:
- (D) the Conditional Access Rights of each Conditional Access Holder will be reduced on a pro rated basis, to a proportion of the Capacity that is:
- (1) the Change in Existing Capacity; less
 - (2) the Capacity required to be provided to existing non-conditional Access Holders to rectify any existing deficit of Available Capacity to Committed Capacity in respect of the relevant Rail Infrastructure,
- by reference to the proportion that those Conditional Access Rights bear to the aggregate of the Conditional Access Rights for all of the Conditional Access Holders;
- (E) QR Network will notify each of the Conditional Access Holders:
- (1) of the assessment that has been undertaken;
 - (2) of the reduction in that Conditional Access Holder's Conditional Access Rights ("Access Rights Reduction") and the basis of that calculation; and
 - (3) that each of the Conditional Access Holders together will be placed in a queue (or returned to the queue if one already exists) in accordance with clause 7.3.4 and be given a starting position in the queue based on the date of their original Access Application given the first position in the queue for new Planned Capacity, but only to the extent of their Access Rights Reduction unless they notify QR Network within 30 days that they do not wish to seek the additional Access Rights; and
- (F) for the purposes of the Conditional Access Holders' position in a queue, QR Network and each Conditional Access Holder is taken to have complied with Clauses 4.1 to 4.4 provided that:
- (1) each Conditional Access Holder's Access Application is taken to be on the same terms as the previous Access Application made by that Conditional Access Holder for those Access Rights but only to the extent of its Access Rights Reduction; and
 - (2) if QR Network considers it reasonably necessary to do so, QR Network will as soon as reasonably practical provide supplementary material to the Indicative Access Proposal previously provided to each Conditional Access Holder (including in respect of the Infrastructure Enhancements that may be needed to provide the Conditional Access Holders with Access Rights equivalent to their Access Rights Reductions); and
- (G) QR Network must:
- (1) as soon as practicable after the assessment for the purposes of Clause 11.3(b) occurred, commence planning for the Infrastructure Enhancements that would be needed to provide the Conditional Access Holders with additional Access Rights equivalent to their Access Rights Reductions; and

- (2) provided sufficient of the Conditional Access Holders remain interested in seeking the additional Access Rights to justify the development of such Infrastructure Enhancements, as soon as practicable commence construction of the required Infrastructure Enhancements.
- (d) QR Network may defer an assessment for the purposes of Clause 11.3(c) until such time as QR Network reasonably considers that the relevant Infrastructure Enhancements are fully operational and the demand conditions are such that a reasonable assessment can be undertaken.
- ~~(e) QR Network is not required to comply with Clause 11.3(b) to the extent that compliance with Clause 11.3(b) is inconsistent with any Access Agreement for a Conditional Access Holder.~~
- (e) If, subject to clause 11.4, QR Network does not comply with any aspect of this clause 11.3, it must notify all supply chain participants, and publish on its website, the reasons why it has not complied provided that QR Network is not obliged to disclose any other persons Confidential Information in doing so.
- (f) This Clause 11.3 is in addition to and is not intended to limit or restrict either Part 4 or Part 7. For the avoidance of doubt, if QR Network cannot comply with both its obligations in accordance with this Clause 11.3 and its obligations in accordance with Part 4 and Part 7, then QR Network's obligations in accordance with Part 4 and Part 7 prevail to the extent of the inconsistency.

11.4 NO FETTER

Notwithstanding any other provision in this Part 11, QR Network is only obliged to comply with ~~Clauses 11.1 and~~ 11.3 to the extent that such compliance:

- (a) is consistent with QR Network's commercial objectives; and
- (b) does not (and QR Network is not compelled to do anything that would) inhibit, restrict, fetter or adversely affect QR Network's ability:
- (i) to exercise any discretion, power, function or right; or
- (ii) to comply with any obligation or to do anything, in accordance with this Undertaking or an Access Agreement.

For the avoidance of doubt, QR Network's compliance with ~~Clauses 11.1 and~~ 11.3 does not limit QR Network's rights or obligations in respect of Clauses 11.1 and 11.2.

APPENDIX 12 – DEFINITIONS AND INTERPRETATION

12.1 DEFINITIONS

“Capacity Review” has the meaning given to that term in Clause 11.1.4(a).

“Coal Chain DAAU” has the meaning given to that term in Clause 11.1.4(a).

“Coal Chain SAA” has the meaning given to that term in Clause 11.1.4(a).

“DBCT Coal Chain” means all infrastructure relating to raiing and shipping of coal (from mine outloaders to terminal shiploaders and adjacent infrastructure), generally referred to as the DBCT Coal Chain, but (unless all relevant stakeholders otherwise agree) disregarding the Goonyella to Abbott Point expansion rail line (also referred to as the Northern Missing Link) and any part of the coal chain which solely relates to the Hay Point Terminal.

“Declared Service” means the service that is declared pursuant to Section 250 (1)(a) of the Act.

“LTS Outcome” means an agreement by all affected stakeholders (including QR Network) pursuant to an LTS Process, to a course of action which requires an amendment to the Undertaking or to the Standard Access Agreement.

“LTS Process” means:

- (a) an initiative undertaken by stakeholders in the DBCT Coal Chain to implement a series of objectives (generally referred to at the Commencement Date as the "LTS" or "Long Term Solution") to (amongst other things) align Access Agreements with access arrangements at the Dalrymple Bay Coal Terminal and rail freight agreements, and to provide both efficiency and certainty in respect of optimum usage and future expansion of the capacity of the DBCT Coal Chain; or
- (b) a similar initiative undertaken by stakeholders in another coal supply chain which includes access to Rail Infrastructure, to implement alignment of Access Agreements with access arrangements at relevant coal port terminals and rail freight agreements, and to provide both efficiency and certainty in respect of optimum usage and future expansion of the capacity of infrastructure in that coal supply chain.

“Private Infrastructure” means the infrastructure, including but not limited to the track, signalling and electrical overhead traction system (if applicable), that is not Rail Infrastructure.

“Proposed Standard User Funding Agreement” means a proposed pro forma User Funding Agreement.

“Proposed Standard Rail Connection Agreement” means a proposed pro forma Rail Connection Agreement.

“Rail Infrastructure” means rail transport infrastructure (as defined under the TIA) for which QR Network is the owner, lessee, or operator, the use of which is declared pursuant to section 250 (1)(a) of the Act the purposes of Part 5 of the Act.

“Standard Rail Connection Agreement” means a Proposed Standard Rail Connection Agreement which has been approved pursuant to clause 8.4.

“Standard User Funding Agreement” means a Proposed Standard User Funding Agreement which has been approved pursuant to clause 7.6.

“Ultimate Holding Company” means the holding company (as defined in the Corporations Act 2001 (Cth)) of QR Network, which is the ultimate owner of QR Network.

“User Funding Agreement” means an agreement by which a Customer, Access Seeker or Access Holder agrees to provide funding to QR Network for the development of Infrastructure Enhancements.

LIST OF SUBMISSIONS

<i>Organisation/ Individual</i>	<i>Submission number</i>
Asciano	33, 49, 78, 86, 92
Anglo American	47, 83, 100
Australian Rail Track Corporation (ARTC)	32, 48
BMA	34, 74, 93
Concept Economics	35
DBCT Management	76
Ensham Resources	36
Macarthur Coal	95
Project Iron Boomerang	72
QR Freight	37
QR National	50, 71*
QR Network	1,2,3,4,5,6,7,8,9,10,11,12,13,14,15,16,17*,18*, 19*,20*,21*,22,23*,24,25,26,27,30,31,56,57,58,59,60, 61,62,63*,64,65,66,67,68,69,70, 96
Queensland Government	53
Queensland Resources Council	38,44,55,75, 81, 82, 84, 85, 98
Queensland Treasury Corporation	39,51
Rio Tinto Alcan	40
Rio Tinto Coal Australia	41,52*,73, 99
Stanwell Corp	42
Syntech Resources	80
Xstrata	43,45,54,77,87,88,89,90,91, 97
Vale	79

* *Claims of confidentiality have been made for part or all of these submissions*

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