

Queensland Competition Authority

Draft Decision

Aurizon 2014 Draft Access Undertaking — Draft Decision VOLUME I – Governance & Access

January 2015

We wish to acknowledge the contribution of the following staff to this report:

The Queensland Competition Authority – Aurizon Network Team

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SUBMISSIONS

Closing date for submissions: 17 April 2015

This report is a draft only and is subject to revision. Public involvement is an important element of the decision-making processes of the Queensland Competition Authority (QCA). Therefore submissions are invited from interested parties concerning its assessment of Aurizon Network's proposed draft access undertaking, submitted on 11 August 2014 under section 136 of the QCA Act. The QCA will take account of all submissions received.

Submissions, comments or inquiries regarding this paper should be directed to:

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PREFACE

Aurizon Network Pty Ltd (Aurizon Network) owns and operates the rail network in central Queensland – the Central Queensland Coal Network (CQCN). The network is mainly used to carry coal to export ports near Gladstone, Mackay and Bowen.

The CQCN is a natural monopoly — meaning it is uneconomic to duplicate the network’s physical infrastructure. Businesses can compete to provide ‘above-rail’ services (i.e. trains carrying freight) but all parties must use the ‘below-rail’ infrastructure.

By virtue of being a natural monopoly, Aurizon Network has a privileged position which could be used to set unjustifiably high prices for access to the network or prevent or hinder access in above-rail services. To provide access seekers and holders with protection from these possibilities, the CQCN has been regulated as a declared service¹ under Queensland’s access regime since 1998.

Under section 136 of the *Queensland Competition Authority Act 1997* (QCA Act), Aurizon Network can provide us with an undertaking setting out the terms and conditions of access to the network. We must either approve or reject this undertaking. If we do not approve the undertaking, we must explain how it should be amended to secure approval.

Since 2001, we have approved three undertakings for the CQCN. The latest undertaking, known as the 2010 AU, was approved on 1 October 2010 and was scheduled to expire on 30 June 2013. It has since been extended to 30 June 2015.

In April 2013, Aurizon Network submitted a draft access undertaking to replace the 2010 AU. The new draft access undertaking (2013 DAU) was proposed to apply from 1 July 2013 to 30 June 2017.

After extensive discussion with stakeholders, Aurizon Network withdrew the 2013 DAU on 11 August 2014, replacing it with another draft access undertaking (2014 DAU). Aurizon Network presented the 2014 DAU as its response to issues raised by stakeholders:

The 2014 DAU is the result of extensive consultation and negotiations with industry participants over a 15-month period in relation to positions reflected in the 2013 DAU. ... [It] reflects Aurizon Network's position on the outcome of the negotiated changes to the 2013 DAU. In large parts, the 2014 DAU adopts the positions argued for by industry participants, whilst in other parts it reflects Aurizon Network's preferred position after consideration of the position proposed by industry.²

Aurizon Network’s 2014 DAU is split into three volumes:

- the access undertaking and schedules, including system allowable revenues and reference tariff inputs (Volume 1)
- a standard user funding agreement (SUFA) (Volume 2)
- other standard agreements (Volume 3).

¹ The use of a coal system for providing transportation by rail is a service under Part 5 of the QCA Act and is referred as the 'declared service'. A 'coal system' means rail transport infrastructure (a 'facility' under section 70 of the QCA Act) that is part of the Blackwater system, Goonyella system, Moura system or Newlands system, which includes directly or indirectly connected rail transport infrastructure owned or operated by Aurizon Network; a coal system also includes particular extensions built on or after 30 July 2010 owned or operated by Aurizon Network, as defined in section 250 of the QCA Act. The declared rail transport infrastructure is collectively referred to as the 'Central Queensland Coal Network' (CQCN).

² Aurizon Network, 2014 DAU, sub no. 1

Aurizon Network provided a submission and explanatory materials to support its 2014 DAU. Aurizon Network said any explanatory documents provided in support of its 2013 DAU were still relevant, but the 2014 DAU prevails to the extent of any inconsistency.³

Under section 147A(2) of the QCA Act, we must use our best endeavours to approve, or refuse to approve, the 2014 DAU within set time limits. We gave notice of those time periods on 11 August 2014. We also gave a notice of investigation to Aurizon Network under section 146 of the QCA Act and invited submissions by 3 October 2014.

As the 2013 DAU and 2014 DAU have proposed fundamental changes to the regulation of the CQCN, we have encouraged regular discussions between Aurizon Network and its stakeholders to identify potential problematic issues and, wherever possible, to negotiate consensus solutions. An extended consultation period was provided in 2013 to ensure all parties had the opportunity to assess the proposed changes. We acknowledge the constructive approach of all parties to this process as well as the valuable assistance Aurizon Network staff and other stakeholders have provided to us through the investigation.

That said, industry discussions do not relieve us of our responsibility to assess the 2014 DAU in the light of the criteria in the QCA Act. We must also consider the interests of all stakeholders, including stakeholders who may not be directly involved or included in industry discussions. We must also be satisfied our approval of the 2014 DAU will meet the overarching objective of Part 5 of the QCA Act, to promote the economically efficient use of significant infrastructure, with the effect of promoting competition in upstream and downstream markets.

The 2013 SUFA DAAU

We are considering the 2014 DAU in parallel with Aurizon Network's proposed standard user funding agreement (2013 SUFA DAAU).

We released a Draft Decision on the 2013 SUFA DAAU on 31 October 2014. We understand Aurizon Network intends to incorporate an approved suite of SUFA agreements, from the 2013 SUFA DAAU, in its 2014 DAU. We must also consider whether the drafting of the 2014 DAU will have the effect of supporting a workable, credible and bankable SUFA arrangement.

Given this, we have not included revised SUFA documentation in this Draft Decision.

Our Draft Decision

Given the complex issues involved, and the demands being placed on all parties participating in the process, we decided to release our decision in two separate parts. A staged release allows thorough consideration by stakeholders of all issues and should facilitate a timely Final Decision.

We are therefore publishing two Draft Decisions on the 2014 DAU:

- on 30 September 2014 we published our Draft Decision on the Maximum Allowable Revenue (MAR) aspects of the 2014 DAU
- this Draft Decision deals with the remainder of the 2014 DAU.

Our Final Decision will encompass all aspects of the 2014 DAU.

In both Draft Decisions, we are refusing to approve the 2014 DAU. The first Draft Decision explains our reasons for rejecting Aurizon Network's proposed MAR.

³ Aurizon Network, 2014 DAU, sub no. 1: 4

This Draft Decision explains our views and preferred amendments on the remaining aspects of the 2014 DAU.

We understand that Aurizon Network intends for the 2014 DAU to take effect from the date of expiry of the 2010 AU, and to be known as 'UT4'. References to UT4 in this Draft Decision are references to the 2014 DAU, pending our approval of this undertaking

Way forward

This is a Draft Decision that explains our views at this stage. These views may change in response to issues raised by stakeholders with this, or the MAR, Draft Decision.

We will finalise the UT4 arrangements as soon as practicable. However, the timeframe will, in part, depend on the timeliness of Aurizon Network's and stakeholders' responses to this Draft Decision, and the scope and complexity of issues raised.

Submissions

We invite written submissions on this Draft Decision. Submissions must be received by no later than **17 April 2015**. We will consider all submissions received by this date.

EXECUTIVE SUMMARY

On 11 August 2014, Aurizon Network submitted its 2014 DAU, withdrawing its 2013 DAU. Our Draft Decision is to refuse to approve the 2014 DAU, for the reasons set out in this document.

Considerable time has elapsed since the 2013 DAU was submitted on 30 April 2013. This period of time reflects the sheer scope of changes Aurizon Network has proposed for the 2014 DAU compared to the existing undertaking (2010 AU), the intense stakeholder interest in the development of the new undertaking and our detailed consideration of the matters raised.

We would like to acknowledge that the 2014 DAU itself reflects the results of extensive consultation between Aurizon Network and industry participants. Aurizon Network used the 15-month period after the submission of the 2013 DAU to work cooperatively with its stakeholders and considerable progress was made between the parties. However, as reflected in the Draft Decision, there are still many difficult issues which have not been resolved by the parties.

Aurizon Network has identified the new challenges it sees as a privatised entity and what this means for its legitimate business interests.

We are also very aware that the development of the 2014 DAU is occurring at a challenging time for the coal industry in Queensland. Over the course of this investigation, stakeholders have all emphasised the need to improve the productivity and competitiveness of the coal supply chain, of which Aurizon Network is a part.

We consider that this changing market environment, and the challenges it presents for all parts of the supply chain, points to a need for a critical review of the way in which third-party access is considered for the CQCN. The changing market environment requires a different way of approaching issues to that from previous undertakings, and we have taken the time to consider, in depth, the need for change.

The view that the CQCN is capacity constrained is a key issue throughout Aurizon Network's 2014 DAU, as is the view that new capacity will only be met by costly new expansions. We note that the CQCN delivered its highest number of tonnes in 2013-14, at 214.5 million net tonnes, but this falls well short of the potential approximate 274 million net tonnes⁴ contracted in 2013-2014, and the 310 million net tonnes⁵ by the end of UT4 when the first stage of the Wiggins Island Rail Project (WIRP) is completed.

Against this background, a key theme of our Draft Decision is the need for the 2014 DAU to support the productive use of the existing CQCN capacity, and give stakeholders the confidence that infrastructure will be expanded in a timely, cost efficient way, where there is a case to do so. We consider this will require changes to the way undertakings have operated in the past. This focus requires careful consideration of many aspects of the 2014 DAU, of everything from reporting to capacity management and pricing, to access agreements, to ensure all elements are working together to maximise the most productive use of the CQCN.

However, while we have completed a full review, we are not interested in just making changes for changes sake. We consider there needs to be evidence to support the need for change. For example, we are of the view there is a lack of clarity regarding the effectiveness of the 2010 AU ring fencing regime, and there is insufficient information to support the extensive revisions Aurizon Network proposed in the 2014 DAU. Consequently, we have proposed to use the 2010 AU ring fencing arrangements as a base, and enhance them to provide a clearer set of safeguards regarding the flow of confidential information and staff

⁴ Aurizon Network 2013 DAU, sub no. 3: 15

⁵ Aurizon Network 2013 DAU, sub no. 3: 19

movements. We are open to further evidence-based input from Aurizon Network and stakeholders as to whether other approaches could be accommodated, while still addressing the issues we have identified.

In other instances, while we consider change is warranted, we have formed the view this will require a more incremental approach. For example, we consider the complex tariff structure which has been evolving since UT1 requires a full review, but we consider this needs to occur after the 2014 DAU has been completed, so it can happen in a strategic and considered manner. For this reason, we have not approved the tariff re-balancing changes proposed by Aurizon Network for the 2014 DAU.

Our Draft Decision on the 2014 DAU continues to feature core elements of the undertaking built on the 'negotiate–arbitrate' model of the QCA Act. In this respect, we have focused on the need for an effective negotiation framework, coupled with a timely and cost effective dispute process and the opportunities to improve transparency and reporting for all parties. Where possible, we have considered opportunities to streamline these arrangements, particularly where they have evolved to solve problems through time.

We have also taken into account, and further developed, new ideas introduced in Aurizon Network's 2014 DAU, including in relation to the:

- *expansion process – supporting access seekers initiating the development of new infrastructure in the CQCN and to support user funded expansions*
- *expansion pricing framework – a new and more transparent arrangement for setting prices for new infrastructure has been included.*

This Draft Decision may appear to take a more intrusive approach to regulation of the CQCN than the 'light handed' approach we are developing for other regulated industries. This approach is deliberate. While we would prefer to be less intrusive, we consider the 2014 DAU represents an important stage in the evolution of the regulation of the CQCN. The approach we have taken is designed to:

- *increase transparency and the flow of information between Aurizon Network, miners, train operators and other supply chain participants so all parties are better able to plan and manage their access entitlements and reduce the unit costs of below-rail infrastructure*
- *provide greater confidence to access holders that contracted access rights can be provided, which should minimise over-contracting (if it is occurring), support the development of a more flexible access rights trading arrangement, and minimise the need for unwarranted investment in infrastructure*
- *provide improved information and confidence to stakeholders that access is being provided on a non-discriminatory basis*
- *enhance the performance reporting arrangements so that access seekers and holders are better informed about CQCN performance, including on major items such as maintenance costs*
- *provide safeguards to balance Aurizon Network's position as a monopoly provider of infrastructure in the expansion of the network so it cannot unreasonably extend the time or request returns for infrastructure provision to gain commercial advantage*
- *make the undertaking simpler.*

The 2014 DAU provides an opportunity to put these arrangements into place, and with better informed stakeholders, we consider the longer-term direction of the access arrangements can move toward a lighter handed, but stronger evidence-based approach to the provision of access in the CQCN.

We consider our Draft Decision on the 2014 DAU to be consistent with all the criteria in section 138(2) of the QCA Act and consider it will provide a solid basis to support the provision of access in the CQCN. We encourage all stakeholders to carefully consider the Draft Decision and we welcome comments on the positions we have taken.

Draft Decision

Our Draft Decision is to refuse to approve the 2014 DAU. Our reasons for this proposed refusal are set out in this Draft Decision and identify the ways in which the 2014 DAU should be amended in order for us to approve it, including as set out in the changes marked to Aurizon Network's 2014 DAU.

We are satisfied that, in developing our Draft Decision, we have met our obligations under section 138(2) of the QCA Act. Our Draft Decision is presented in six volumes:

- Volume I - Governance & Access
- Volume II - Capacity & Expansions
- Volume III - Pricing & Tariffs
- Volume IV - Definitions, Interpretations, Glossary & Reference List
- Volume V - Clean and Marked Up 2014 Draft Access Undertaking
- Volume VI - Clean and Marked Up Agreements

A summary of our Draft Decision is provided below.

Volume 1: Governance & Access

Intent and scope of the 2014 DAU

The Intent and Scope of the 2014 DAU establishes the duration, intent and scope of the undertaking, including the extent to which it covers access and related services. It is an important part of the 2014 DAU, as it clarifies what the undertaking is trying to achieve, describes its overarching objectives and scope, and provides guidance as to the interpretation of the remainder of the undertaking.

Aurizon Network made a number of changes, in response to stakeholder concerns post-2013 DAU. Our Draft Decision proposes to accept many elements of Part 2 of the 2014 DAU, including:

- the majority of the provisions relating to intent and scope, but we have moved the non-discrimination requirements into the overarching Part 2, to make it unambiguous that this obligation is to be applied to all parts of the 2014 DAU, not just in relation to ring fencing provisions
- the provisions relating to supply and sale of electricity, although our Draft Decision includes drafting to clarify that the 2014 DAU dispute resolution mechanism is also applicable for matters relating to the sale of electricity
- not requiring inclusion of a definition and obligations relating to associated services, as we are unconvinced these services fall within the definition of the declared service
- the provisions relating to duration and application of reference tariffs, which have the 2014 DAU pricing and tariff arrangements effective for the period 1 July 2013 to 30 June 2017.

In addition, we have proposed the inclusion of a process for the development of an incentive mechanism.

Ring fencing

Aurizon Network is part of a vertically integrated group of companies, including the dominant supplier of above-rail services in the CQCN. In this context, we consider Aurizon Network's ring fencing regime must be sufficiently robust to ensure that it cannot use its privileged position or confidential information, knowingly or unknowingly, in a manner that favours its or the Aurizon Group's strategic intent, to the detriment of competition in upstream and downstream markets.

Aurizon Network has proposed a significant rewrite of the 2010 AU ring fencing arrangements for the 2014 DAU. Aurizon Network said these changes are necessary to reflect the now-privatised nature of its business.

Stakeholders consider the proposed arrangements to be inadequate. There is also a view that the 2010 AU arrangements still fall short of an effective ring fencing arrangement. The compliance audit for 2013–14 showed no ring fencing complaints and general compliance which means the regime is either very effective—which does not seem to be borne out in the stakeholder perceptions—or ineffective and stakeholders do not have confidence that the provisions work.

The Draft Decision proposes not to accept Aurizon Network's 2014 DAU ring fencing arrangements. Instead, we propose using the 2010 AU ring fencing principles as a base, and enhancing them to provide a clearer set of safeguards regarding confidential information flow and Aurizon Network staff movements by:

- strengthening the provisions around the management and release of confidential information, including, but not limited to:
 - strengthening the role of the Ultimate Holding Company Support Deed and confidentiality agreement provisions
 - maintaining registers of who has been provided information and the process for making any decisions using such information; and having this information available for audit
 - inclusion of tiered employee training measures regarding the treatment of confidential information
 - requiring secondments/transfers of employees between Aurizon Network and an Aurizon party to be notified to the QCA prior to the secondment/transfer being made
- maintaining the 2010 AU financial separation/accounting principles, as well as Aurizon Network's ring fencing obligations in respect of rail infrastructure.

Significant restructuring has occurred within the Aurizon Group since the 2010 AU commenced. The Draft Decision takes the approach that the 2014 DAU should allow for Aurizon Network to structure itself in a manner which supports its legitimate business interests in the provision of the declared service, however, in doing so it must be able to demonstrate that the business is committed to its ring fencing obligations.

In this context, the Draft Decision does not propose requiring separate directors on the Aurizon Network Board, as proposed by the QRC and Asciano. While stakeholders have expressed concern about inadequate separation, in the absence of any clear evidence about systematic discrimination, it would be difficult to make a firm case that such a step is necessary now. However, the changes proposed should have the effect of providing greater transparency.

Reporting

Improving the reporting arrangements to increase transparency and confidence for stakeholders is a key theme of the 2014 DAU. The reporting arrangements proposed for the 2014 DAU are largely in line with the 2010 AU. Aurizon Network re-included some reporting it had excluded from the 2013 DAU, including preparation of a condition based assessment.

The Draft Decision simplifies the maintenance cost and performance reporting (one report instead of two) and requires Aurizon Network to provide a maintenance and renewals plan prior to the commencement of a financial year.

We are also proposing that Aurizon Network provide operational information for stakeholders at least monthly (on time running etc) rather than quarterly. Train operators particularly have indicated this will

assist with their own planning and we consider it necessary to be providing adequate information for these stakeholders.

To support the ring fencing arrangements we are proposing:

- making the QCA, rather than Aurizon Network, responsible for appointment of the compliance auditor
- providing for a clear conflicts audit process, with the intent of identifying potential systematic areas of discrimination.

Disputes

A robust, cost-effective and binding dispute resolution process is an important part of the 2014 DAU. When disputes are resolved in a fair and timely way, parties can be confident that negotiations will proceed in a meaningful manner in accordance with the intent, obligations and processes of the undertaking. Effective dispute processes also ensure parties are held accountable for their conduct, decisions and performance.

The 2014 DAU provides for separate mechanisms to resolve disputes that may arise between Aurizon Network, access seekers, access holders and other parties. Part 11 of the 2014 DAU sets out a process that applies generally to access seekers and train operators relating to negotiations or Aurizon Network's other obligations under the undertaking. Disputes with other parties are also dealt with under Part 11, if they are related to matters expressly set out in the 2014 DAU.

Overall, we consider Aurizon Network's 2014 DAU provides an improved process from the perspective of an access seeker or a train operator. However, we do not consider it is sufficiently comprehensive to accommodate access holders or other parties affected by the 2014 DAU.

For these reasons, our Draft Decision is to refuse to approve Aurizon Network's proposed 2014 DAU dispute resolution arrangements. We require amendments to Part 11, as well as Parts 3 and 8, and Schedule G to ensure robust, cost-effective and binding dispute processes are available to any party dealing with Aurizon Network through the access undertaking. These include:

- broadening the Part 11 dispute provisions to apply generally to obligations in the access undertaking and ensuring dispute resolution is available to all relevant parties
- refining the processes, procedures and obligations on parties in resolving disputes, including providing for us to step in when parties cannot agree on how to progress the dispute
- providing for the outcome of any disputes to be binding.

We consider the amendments we have proposed to the dispute resolution process will act to enhance the 'negotiate–arbitrate' model on which the QCA Act is modelled, by providing stakeholders with more confidence about a cost effective and timely process for resolution of disputes in respect of the 2014 DAU.

Negotiation framework

A robust and effective negotiation framework can support negotiations by ensuring negotiations are conducted in a fair and balanced manner to deliver timely outcomes that respond to changing circumstances. It can also help to address the concern, whether real or perceived, that Aurizon Network could use negotiations to exercise its monopoly power to 'pick winners', delay proceedings or extract higher charges or better terms and conditions for itself.

Part 4 of the 2014 DAU sets up a framework for parties to negotiate with Aurizon Network to reach agreed terms and conditions for access. The 2014 DAU also sets out the key steps in the negotiation process and outlines the information access seekers and Aurizon Network may be required to provide as part of these negotiations.

We have not accepted Aurizon Network's negotiation framework. We have required amendments to:

- provide greater clarity and certainty about the obligations and processes for applying for access and negotiating agreements
- better balance Aurizon Network's and other parties' rights and interests, by addressing Aurizon Network's ability to use its market power and increasing the transparency and accountability of its decision making
- improve information flows so parties have sufficient information to make informed decisions in a timely manner
- not otherwise unnecessarily constrain competition between above-rail operators (e.g. tendering for rail haulage contracts).

In doing so, we have not accepted Aurizon Network's approach to defining and interpreting an access seeker or an access holder in the undertaking—and instead we consider that train operators are access seekers, or potential access seekers, having all relevant protections of Part 5 of the QCA Act, including the ability to use the dispute resolution arrangements, and ring fencing provisions of the 2014 DAU.

That said, we have also sought to address Aurizon Network's administrative burden by requiring it to only respond to, and negotiate with, parties that can demonstrate they have a genuine interest in obtaining access rights and there is a reasonable likelihood of them using access at the level sought.

Access agreements

Access agreements are essential for the provision of access to the CQCN. It is therefore important to have effective arrangements in place for the development and execution of these agreements. Having Standard Access Agreements (SAAs) available to parties can facilitate the timely development of access agreements by providing a 'safe harbour' access agreement parties may adopt without the need for further negotiation, as well as being used as a guide for parties when negotiating alternative terms of access.

The 2014 DAU includes 4 SAAs that apply under various contracting scenarios.

Our Draft Decision proposes to move to a simpler approach involving a:

- standard access agreement (AA) – dealing with access rights
- standard train operations deed (TOD) – dealing with train operations matters associated with the use of access rights.

This approach removes two of the four standard agreements from the 2014 DAU, but with our proposed amendments, will cover all contracting scenarios available under the existing access agreements. For example, it will allow mining companies and train operators to hold access rights and/or undertake train operations.

We consider simplifying the access agreements has a number of future benefits, including promoting the efficient use of the CQCN, supporting the development of a capacity transfer market and encouraging above-rail competition by delinking access rights from responsibility for train operations.

We also propose to retain various matters in the undertaking which Aurizon Network proposed to move into the access agreements, and provide stronger links within the AA and TOD to matters in the undertaking.

Our view is these matters should be dealt with consistently across all access holders, not subject to change on a case-by-case basis and updated over time to reflect changes in the undertaking. This should

avoid a future issue of having a myriad of different arrangements in place across the network, which makes trading and any future reforms unnecessarily complex.

As part of our review of the access agreements, we also considered the various roles and responsibilities of each party, making amendments we considered necessary to ensure the AA and TOD are workable and consistent with good commercial practice.

Private connecting infrastructure

Part 9 of the 2014 DAU identifies the circumstances where Aurizon Network will consent to a connection of private infrastructure to the rail network. The 2014 DAU also includes a Standard Rail Connection Agreement (SRCA) with standard terms and conditions for connection.

These provisions are an important component of the regulatory framework as third parties are increasingly being required to develop and own private infrastructure to connect to the network. We have focused on how the arrangements will allow connections to the network to be designed and developed more quickly and with greater certainty for all parties.

We have not accepted Aurizon Network's arrangements for connecting private infrastructure as proposed. We have required amendments to Part 9 and the SRCA to simplify and speed up negotiations for connections, while taking proper account of Aurizon Network's, Private Infrastructure Owners' (PIOs') and users' rights and interests. This includes further developing the terms and conditions of the SRCA, including by clarifying the treatment of coal loss mitigation.

We have also restated our intention that the SRCA be available to apply to all connections between the network and private infrastructure, unless otherwise agreed. This includes major connections, non-coal service connections and projects with multiple loading points.

Volume II: Capacity & Expansions

Baseline capacity

A theme throughout this Draft Decision is that Aurizon Network has a significant role to play in ensuring supply chains in the CQCN are efficient and low-cost. Our Draft Decision reflects our consideration that Aurizon Network must participate in supply chain groups where the cost of involvement is recoverable under the undertaking.

Our Draft Decision also includes a new section in the 2014 DAU which will require Aurizon Network to publish its baseline capacity, including the assumptions which underpin this process. As part of this process, we have proposed Aurizon Network:

- provide a capacity guarantee for existing capacity. This arrangement extends the capacity guarantee proposed for expansions to the existing arrangements
- support a common understanding of existing supply chain capacity capabilities (both contracted and uncontracted) and the supply chain capacity increments required to deliver the lowest cost additional capacity in each coal system
- prepare a comprehensive network development plan to provide all stakeholders with confidence that Aurizon Network is effectively operating existing infrastructure; with new investment in the CQCN only where clearly required.

Our view is that Aurizon Network providing a clear baseline for capacity to its stakeholders will improve confidence in the contracting arrangements. It will also support the future directions to develop new approaches to improving the efficient use of the CQCN, which may include non-infrastructure based

options. We consider this to be in the interests of all parties, including the legitimate business interest of Aurizon Network.

Capacity allocation

One of the major concerns of stakeholders for the 2014 DAU was what was described as new 'king maker' provisions in the undertaking, with Aurizon Network taking on the ability to allocate limited access rights based on a set of broad criteria. These criteria replaced the previous queuing mechanism and were perceived to give Aurizon Network the ability to negotiate and 'pick winners'.

Our Draft Decision proposes retaining the queuing mechanism in order to increase transparency of the capacity allocation process and ensure access holders are treated in a non-discriminatory manner.

This Draft Decision also proposes access holders be provided with certainty over use of contracted access rights by retaining relinquishment and resumption provisions, and ensuring renewing access holders retain priority treatment during renewals.

This Draft Decision also discusses removal of impediments to enable the development of an effective capacity transfer mechanism. We are seeking stakeholder feedback on how the CQCN can transition towards a flexible capacity trading mechanism.

Expansion process

Aurizon Network's 2014 DAU proposes a new expansion process, which fundamentally changes the dynamics of expanding the CQCN.

As drafted, the 2014 DAU transfers more responsibility and risk for funding CQCN expansions on to coal access seekers and third-party funders, reflecting Aurizon Network's changing approach to financing expansions. We consider the 2014 DAU allows Aurizon Network to dictate study scope, report deliverables and capacity allocation among coal customers and does not incorporate ongoing developments of SUFA into the arrangements. It also does not provide dynamic capacity assessments of existing access rights and new access requests over the medium term.

While we understand the new approach to the expansion process has been largely agreed between Aurizon Network and the QRC, we do not consider it is particularly workable. The proposed expansion process is still complex, and involves a significant number of dispute provisions through a process which is likely to make the overall approach adversarial and ineffective. The Draft Decision proposes a range of amendments to:

- provide reliable, transparent outputs with respect to standard, scope, cost and capacity for all expansion projects that go through the study stage gate process
- support flexible user funding arrangements to create competitive tension for financing projects of all scales
- prevent Aurizon Network from unreasonably or unnecessarily delaying the delivery of expansions.

Network management principles

The network management principles (NMP) are a set of train-planning and train-control rules which impact on Train Service Entitlements (TSEs) and therefore access rights. A clear and transparent set of NMP can assist in optimising the use of available capacity and improving productivity. It can also allow for informed decision-making, improve information symmetry among access holders and increase Aurizon Network's accountability.

Aurizon Network has proposed a new Strategic Train Plan, which will provide more transparency and accountability on Aurizon Network's ability to deliver contracted access entitlements.

Our Draft Decision is to require amendments to the 2014 DAU to:

- increase transparency and availability of train plans and TSE-reconciliation reports, including requiring additional detail in the content of train plans and TSE-reconciliation reports
- set timelines for Aurizon Network to submit train plans, aggregate TSE-reconciliation reports and initial system rules
- subject all system rules to QCA approval and ensure system rules are reviewed at least once per year.

Regulated asset base and customer voting

Aurizon Network is a capital intensive business. The return on, and return of, capital relating to its regulated asset base (RAB) is a significant component of the reference tariffs for each system in the CQCN. It is important for Aurizon Network (and investors) that it has confidence it will be able to recover the prudent and efficient costs of its investment in the CQCN. It is also important for access seekers and access holders to have confidence they will be paying no more than the prudent and efficient costs of capital expenditure projects.

We consider the arrangements for assessing the prudence of scope and efficiency of cost for capital expenditure projects in the 2014 DAU have become too complex and difficult to administer. We are proposing to significantly simplify the capital expenditure approval process and include a clearer process for regulatory pre-approval of projects, which we consider will improve regulatory confidence for Aurizon Network, as well as future user funders and financiers.

We have accepted Aurizon Network's proposal that equity raising costs should be recognised and included in the RAB, but will require Aurizon Network to show that its equity raising costs are efficient and necessary to support investment in the CQCN.

For customer voting, we are proposing customers should vote on a package of measures (i.e. scope, standard, and cost) not simply scope (as has been the case previously). This would enable the voters to make a more informed assessment of the project.

Volume III: Pricing & Tariffs

Pricing principles

Part 6 of the 2014 DAU sets out the processes to identify or develop reference tariffs for new train services, including those involving expansions; and/or new spur lines connected to the CQCN.

The 2014 DAU includes a specific process for setting new tariffs for expansion infrastructure, which has been negotiated with stakeholders. The new concept of expansion tariffs is based on the principle that existing users should not be made materially worse off as the below-rail infrastructure is expanded to accommodate new users.

In respect of the broader approach to pricing principles, our Draft Decision reflects our view that the:

- redrafting of the high-level pricing principles may result in a less credible and effective pricing regime. We have proposed to clarify and strengthen the boundaries, and the conditions, of how access charges are negotiated, and to set out effective mechanisms to enforce them
- application of Aurizon Network's proposed expansion pricing framework requires clarification and may unintentionally cause existing users to bear a significant part of expansion financial risks. We have proposed to apply a separate tariff with a 'fixed cost' regime to expanding users if an expansion is triggered

- revised approach to pricing train services that use new spur lines substantially increases the complexity of the pricing regime but with limited benefits. We have refined Aurizon Network's proposed Minimum Revenue Contribution (MRC) concept to address issues of the 2010 AU approach, but refused to approve the concept of Distance Discount
- the 2010 AU access conditions provisions should be reinstated and refined to strengthen regulatory oversight.

Reference tariffs and take-or-pay

Reference tariffs and related provisions in Schedule F provide the basis for which access charges are determined and recovered. These tariffs are relevant to Aurizon Network, access seekers (and holders) and other stakeholders. Aurizon Network proposed key changes to reference tariff arrangements in the 2014 DAU, with matters affected including characteristics of reference train services, rebalancing of the tariff structure, changes to take-or-pay arrangements and revenue cap adjustments.

The majority of train service characteristics proposed in the 2014 DAU are similar to the 2010 AU, other than some refinements to certain general train service characteristics. We consider most characteristics appropriate for application, although we have some concerns, including those relating to Aurizon Network's coal loss mitigation standard and the proposal for the most direct operating route.

Many of the proposed changes make the pricing arrangements even more complex, resulting in 'winners and losers' now. We consider a more strategic approach, supported by customer consultation, should be pursued for UT5. In our Draft Decision, we have rejected changes which we are not convinced align with the ongoing development of the CQCN including:

- Aurizon Network's proposed major rebalancing of its tariff structure, with significant increases in the AT2 reference tariff in various systems. Aurizon Network has also proposed a number of measures to address the potential adverse implications of the significant increases in the AT2 tariff
- Aurizon Network's proposed changes to the arrangements for the incremental maintenance charge (AT1 tariff) to minimise its variability and incorporate this tariff component in the revenue cap
- Aurizon Network's proposed changes to take-or-pay arrangements, including the adoption of operator capping and special arrangements for UT1 access holders to address perceived greater take-or-pay costs and risks for UT1 as compared with post-UT1 access holders.

We have also reassessed a number of new reference tariff arrangements approved during the 2010 AU period, including some GAPE pricing issues which were deferred until 2014 DAU consideration.

Given the lack of sufficient detailed information in Aurizon Network's WIRP proposal, and the fact we are conducting a separate consultation process, we have decided to treat WIRP separately from the overarching 2014 DAU Draft Decision.

THE ROLE OF THE QCA – TASK, TIMING AND CONTACTS

The Queensland Competition Authority (QCA) is an independent statutory authority established to promote competition as the basis for enhancing efficiency and growth in the Queensland economy.

Our primary role is to ensure that monopoly businesses operating in Queensland, particularly in the provision of key infrastructure, do not abuse their market power through unfair pricing or restrictive access arrangements. In 2012, that role was expanded to allow us to be directed to investigate, and report on, any matter relating to competition, industry, productivity or best practice regulation; and review and report on existing legislation.

Task, timing and contacts

On 11 August 2014, Aurizon Network submitted a Draft Access Undertaking (the 2014 DAU) for our approval. This follows extensive consultation between Aurizon Network and stakeholders on Aurizon Network's original UT4 proposal (the now-withdrawn 2013 DAU).

We commenced an investigation into the 2014 DAU in accordance with section 146 of the QCA Act.

We are required to either approve, or refuse to approve, the 2014 DAU. We are assessing the 2014 DAU, in the context of the statutory access regime in the QCA Act and, in particular, the object of Part 5 (section 69E) and the criteria for review of undertakings in section 138(2) of the QCA Act.

These criteria include promoting economically efficient operation of, use of and investment in regulated infrastructure with the effect of promoting competition in other markets (e.g. the above-rail haulage market). They also encompass the legitimate business interests of Aurizon Network, as well as the interests of access seekers and, more broadly, the public interest. A comprehensive discussion of the legal framework applying to the 2014 DAU, and our approach to assessment is included in Chapter 2.

In making our assessment we weighed the arguments and information put forward by Aurizon Network supporting its proposal, stakeholders' comments and submissions, as well as our own analysis. We recognise that stakeholders have already provided extensive and detailed comments on Aurizon Network's previous proposal. We will consider these submissions in our assessment of the 2014 DAU to the extent they remain relevant.

We commenced a public consultation process on the 2014 DAU and have:

- published on our website the 2014 DAU and Aurizon Network's supporting documentation
- published on our website our Draft Decision on the Maximum Allowable Revenue (MAR) aspects of the 2014 DAU
- sought submissions from interested parties.

We previously published on our website extensive comments on Aurizon Network's 2013 DAU proposal; our cost of capital forum; and our consultants' reports on maintenance and operating costs and volume forecasts. These are still relevant for aspects of the 2014 DAU. The details of our consultation process are provided in Appendix G (Volume IV).

Key dates

In accordance with section 147A(2) of the QCA Act, we must use our best endeavours to decide whether to approve, or refuse to approve, the 2014 DAU within the specified time periods. We gave notice of

those time periods on 11 August 2014 and invited persons to make submissions with a closing date of 3 October 2014.

In undertaking our investigation of the 2014 DAU, we must comply with Part 6 of the QCA Act. However, we have a high degree of flexibility in the manner in which we conduct an investigation.

For the purposes of the current investigation, we consider it appropriate to sequence our consideration of the 2014 DAU so that we invite submissions on two Draft Decisions. We are therefore publishing two Draft Decisions:

- first, on the MAR aspects of the 2014 DAU, published on 30 September 2014
- second, on the remainder of the 2014 DAU, being published now.

Our Final Decision will encompass all aspects of the 2014 DAU.

Our consideration of the 2014 DAU is also running in parallel with our consideration of Aurizon Network's proposed standard user funding agreement (2013 SUFA DAAU).

We have determined a proposed timetable for developing our Final Decision, as outlined in **Table 1** below. Meeting this timetable will be dependent on the scope and complexity of issues raised by stakeholders in response to our Draft Decision as part of the consultation and submission phases.

Table 1 Timetable

<i>Task</i>	<i>Indicative Date</i>
2014 DAU submission	11 August 2014
2014 DAU Draft Decision on MAR only	30 September 2014
Submissions on 2014 DAU due	3 October 2014
2013 SUFA DAAU Draft Decision	31 October 2014
Submissions on 2014 DAU Draft Decision on MAR due	12 December 2014
2014 DAU Draft Decision (on remaining matters)	30 January 2015
Submissions on 2014 DAU Draft Decision (on remaining matters) due	17 April 2015
2013 SUFA DAAU Final Decision	30 April 2015
2014 DAU Final Decision	31 July 2015
UT4 Commences	September 2015

Submissions

We seek submissions to be presented in writing regarding our indicative views on the remainder of the 2014 DAU as set out in this Draft Decision. Submissions must be received by no later than **17 April 2015**. We will consider all submissions received within this timeframe.

Contacts

Enquiries regarding this project should be directed to:

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1 INTRODUCTION

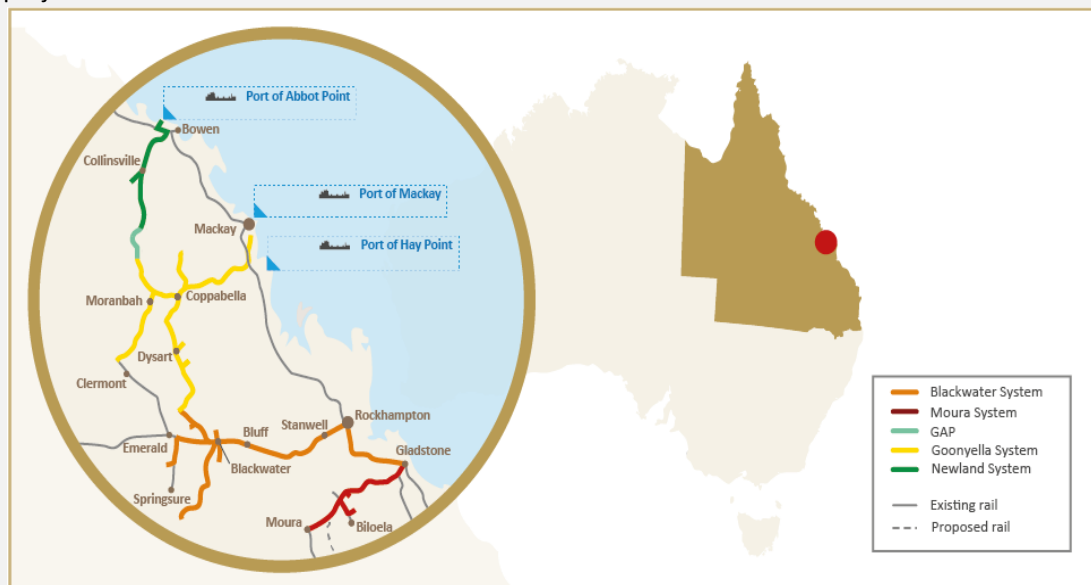
1.1 The market context

Aurizon Network is part of the broader coal supply chain in central Queensland. The CQCN is the largest coal rail network in Australia, carrying coal from mines either for export or for domestic use including in power stations and industrial plants (**Box 1**). In 2013, coal exports accounted for 55% of the total value of Queensland's overseas merchandise exports.⁶

Box 1 Central Queensland Coal Network

The CQCN is made up of around 2670 km of track servicing around 49 mines, three power stations and five port terminals. There are four major coal systems:

- Moura — primarily services coal mines in the Moura region, together with the Callide Basin, with all coal being hauled to Gladstone, either for use at domestic industrial plants, Gladstone Power Station or for export via the Port of Gladstone. On construction of the Surat Basin Railway, the Moura System will support the export of coal from the Surat Basin.
- Blackwater—primarily services coal mines in the central and southern Bowen Basin and carries the product through to Stanwell Power Station, Gladstone Power Station and the Port of Gladstone.
- Goonyella — services coal mines in the central and northern Bowen Basin and carries product to the ports at Hay Point. The Goonyella System connects to the Blackwater System in the south and the Newlands system in the north.
- Newlands — is located at the northern end of the Bowen Basin connecting to the port at Abbot Point. The system services mines located in the Newlands System, as well as an increasing number of mines located in the Goonyella System via the Goonyella to Abbot Point Expansion (GAPE) project.



Aurizon Network, 2013 DAU, sub. no. 2: 22; Aurizon Network, 2013 DAU, sub. no. 4: 15

⁶ Queensland Treasury and Trade, 2014(a): 1

The Queensland coal industry is competing in increasingly competitive global markets. Declining coal prices have outpaced cost-cutting, thereby reducing margins and putting further pressure on the profitability and competitiveness of some CQCN mines. Despite cash margins being positive on average, the variations in competitiveness between mines has meant around 30.7 million tonnes (Mt) of metallurgical coal (21 per cent of volumes) and 6.0 Mt of thermal coal (11% of volumes) had negative cash margins in 2013.⁷

These challenging conditions are continuing, with international markets remaining in oversupply and prices remaining subdued. The QRC said the challenges confronting the resources sector in Queensland have intensified:

... the current coal industry downturn is as severe as any in the country's history and its recovery is likely to be a three to five year process ... mines have been forced to close and coal jobs have been lost ... based on current prices, it would be hard to find a thermal coal mine in Queensland operating at a profit ... For metallurgical coal miners, the situation is hardly better, noting that according to McCloskey's metallurgical coal on the spot market fell below 115 dollars a tonne last week – and that's for the highest quality coal.⁸

While accepting the challenging conditions for many of its customers in the short term, Aurizon Network has indicated in its submission that it is cautiously confident about the outlook for the export coal industry in the medium to long term—noting the strong coal haulage volumes across 2013–14 for the CQCN (214.5 Mt, which is 27.1 Mt more than the previous best fiscal year of 2009–10), with a forecast volume of 204 Mt in 2014–15.⁹

1.2 Productivity, efficient costs and flexibility

The competitiveness of Queensland's mining sector is critical to Queensland's economy. The performance of the CQCN is a key factor to achieving this. UT4 has an important role in ensuring that the CQCN is used efficiently. Section 69E of the QCA Act states that the objective of the third party access regime that the CQCN and Aurizon Network are subject to is:

...to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets.

In this context, access holders (and seekers) operating in the CQCN need to be confident that they are paying an efficient cost for the services provided. Therefore, in addition to addressing the pricing principles contained in section 168A of the QCA Act (and discussed later in this Chapter) Aurizon Network's undertaking should endeavour to increase productivity, system flexibility and innovation within the CQCN, as well as encourage proactive coordination throughout the supply chain. This broadly encompasses:

- clear, simple and flexible access arrangements
- supporting the most productive use of existing infrastructure
- promoting efficient network expansion
- a governance framework encouraging trust and confidence.

⁷ Queensland Treasury and Trade, 2014(a):2

⁸ Roche, 2014: 1, 6

⁹ Aurizon Network, 2013 DAU, sub. no. 2: 30; Aurizon Network, 2014(f): 2

1.2.1 Clear and simple access arrangements

We note concerns have been expressed by stakeholders regarding the excessive complexity of the 2014 DAU and the resulting costs and risks this creates for all stakeholders, including Aurizon Network. We understand this complexity has developed over time and we consider it has reached a level that is unwarranted, particularly given the acute cost pressures on the industry.

We therefore consider that the 2014 DAU will better meet the objectives of Part 5 of the QCA Act through a degree of simplification, including in concepts, processes and drafting style. However, in doing so, we are mindful of the need to retain those concepts, processes and drafting with which all stakeholders are broadly familiar. Our approach to the review of the 2014 DAU has therefore sought to achieve simplification, yet to maintain familiarity.

We would be interested in the views of stakeholders regarding whether further simplification could be achieved.

1.2.2 Supporting the most productive use of existing infrastructure

Using the existing rail infrastructure to its maximum potential is critical to ensuring the efficient operation of the CQCN in accordance with the factors that we are required to have regard to under section 138 of the QCA Act. There are three main elements to this, comprising:

- management of capacity
- flexibility and the role of trading access entitlements
- pricing and take-or-pay.

Management of capacity

The declared service provided by Aurizon Network is defined in section 250 of the QCA Act as the use of the CQCN infrastructure. Central to the provision of this service is the provision of train paths in a manner that efficiently uses the capacity of the CQCN.

Having a transparent understanding of how network capacity is derived, whether contractual commitments can be met, what constrains capacity availability and how these constraints could be overcome are fundamental issues that the 2014 DAU needs to address. This requires:

- transparency in infrastructure planning over the long, medium and short term
- transparency in the measurement and modelling of capacity
- articulation of effective capacity provided by existing infrastructure, based on existing operational and contractual parameters
- articulation of baseline capacity provided by existing infrastructure, based on optimal operational and contractual parameters
- placing the above in the context of mine–rail–port supply chain efficiency.

Without consideration of the above, it is not possible to satisfy the object of Part 5 of the QCA Act – to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets.

Maximising the productivity of the existing CQCN infrastructure is important in ensuring Queensland's coal industry can continue to compete effectively in the global market. A transparent common understanding and approach to capacity can aid this. Stakeholders should

have access to sufficient information to ensure they can efficiently plan their operations and minimise costs, including in relation to proposed expansions. This can encourage innovation, trust and collaboration which, in turn, will enable stakeholders to use the existing CQCN infrastructure to its full potential, with resultant flow-on benefits throughout the Queensland coal industry supply chain.

The InfrastructureQ Directions Statement released by the Queensland Government in September 2014 noted that:

Supply chains compete globally, not just individually as mines, railways and ports. Better supply chain integration and coordination can uplift infrastructure utilisation, making Queensland more competitive globally, and more attractive to industry. This has the potential to bring major economic gains to Queensland.¹⁰

In assessing Aurizon Network's 2014 DAU and coming to this Draft Decision we have taken these matters into account, consistent with the factors to which we must have regard under section 138 of the QCA Act.

Flexibility and the role of trading

Greater understanding of capacity requirements and availability across stakeholders can increase the accuracy and timeliness of capacity allocation while permitting greater flexibility, which in turn can enhance efficiency in the use of the CQCN. Improved understanding and flexibility allows both Aurizon Network and network users to assess how operational practices and system parameters could be refined to better match tonnage throughput with port shipping capability at any particular point in time. This can allow a better coordinated flow of tonnage through the mine–rail–port supply chain, leading to greater throughput and enhanced productivity.

In this context, access seekers may wish to temporarily trade/transfer their access rights and the holding cost associated with those rights to other users if they do not need them at any particular point in time (i.e., reallocation of spare capacity). Section 106 of the QCA Act enables users to transfer their rights under an access agreement, although this is subject to, among other things, any relevant provisions or limitations on transfers set out in an approved access undertaking. As such, the 2014 DAU is critical to the effectiveness of any regime for the transfer/trading of access rights.

The Department of State Development, Infrastructure and Planning (DSDIP) has noted that:

Industry stakeholders have also raised the issue that Queensland's coal supply chains are not maximising tonnage throughput and that there is insufficient flexibility between access holders to access spare capacity.¹¹

Reducing barriers to trading access rights and encouraging operational flexibility within the CQCN can improve productivity and efficiency by ensuring that spare capacity is reallocated to those that need access to such capacity within the capacity constraints of the CQCN. This, in combination with greater transparency and understanding of the capacity dynamics of both the CQCN and end-to-end supply chain, can promote the more efficient use of the existing CQCN infrastructure. In a capacity constrained environment, trading and flexibility across the end-to-end supply chain may help in identifying ways of expanding incremental capacity in a cost effective and timely manner that is less infrastructure-intensive.

¹⁰ DSDIP, 2014: 15

¹¹ DSDIP, 2014 DAU, sub no. 47: 2

Developing a robust, transparent and equitable approach to trading access rights, however, is not a straightforward task. It may take some time to achieve and will require change within Queensland's coal industry. Such a change will require appropriate consideration and consultation with affected stakeholders. Aurizon Network provided a short-term capacity framework for our consideration in December 2014.¹² We are seeking stakeholder comments on this proposal.

Pricing and take-or-pay

The role of the pricing structure and the cost to both access holders and Aurizon Network of the right to capacity is of particular relevance to any trading mechanism developed. A trading regime is likely to work most effectively with a simple transparent pricing mechanism and a clear holding cost for the right to capacity.

Within this context we consider the existing pricing structure is overdue for simplification. This is also the case for the take-or-pay arrangements that provide a proxy for the holding cost of capacity. Simplification would complement the implementation of any trading mechanism. An appropriate holding cost for capacity is also needed to encourage efficient expansion of the CQCN.

Simplification of the existing pricing structures and take-or-pay will need further development and consultation, and so we intend to have a specific focus on simplification in the context of the next access undertaking. In this context, it is important that there is a clear understanding of the customer impacts associated with any changes, and how such impacts should be dealt with through transitional arrangements. Our approach to the 2014 DAU has been to minimise unnecessary change for the UT4 period—given we consider there is a need to consider the longer term pricing and take-or-pay arrangements.

1.2.3 A credible approach to efficient network expansion

Efficient expansion of the CQCN is a key element underpinning the objective of Part 5 of the QCA Act. The overarching issues with respect to the 2014 DAU are:

- the interrelationship between expansions and existing infrastructure
- the credibility of the expansion process and its outputs
- the financing of expansions, Aurizon Network's obligation to fund and 'commercial terms'.

The interrelationship between expansions and existing infrastructure

Understanding the capacity dynamics of the CQCN is not only critical for maximising the use of existing infrastructure, it, in part, also determines by how much and when systems within the CQCN should be expanded. Without this knowledge, it may not be clear whether the CQCN is being expanded in an efficient manner.

In assessing Aurizon Network's 2014 DAU and coming to this Draft Decision, we have taken issues regarding the interrelationship of expansions and existing infrastructure into account. We have covered these issues in detail later in this Draft Decision.

¹² Aurizon Network, 2014(d)

The credibility of the expansion process and its outputs

Although there has been significant expansion of the CQCN, the process underpinning this has been perceived, by some stakeholders, as lacking transparency and sufficient formality. The 2014 DAU proposed by Aurizon Network provides that Aurizon Network will:

- only fund expansions at the regulated rate of return if it chooses to
- provide no voluntary funding obligation for small/medium-sized expansions
- only adopt the expansion process for coal related projects.

As identified in this Draft Decision, we have some concerns with Aurizon Network's proposed approach. This approach creates uncertainty as to when and on what terms Aurizon Network will invest. It partially shifts the risks of investment appraisal and project financing for CQCN expansion to access seekers and other potential funders. This changes the roles various parties play in expanding the CQCN and, in our view, adversely impacts on the efficiency of CQCN expansions.

Within this context, for the expansion process to be effective it must appropriately balance the legitimate business interests of Aurizon Network with those of access seekers and any third parties involved in financing the expansion. In considering the appropriate balance, we are required to have regard to the factors set out in section 138 of the QCA Act.

In assessing Aurizon Network's 2014 DAU and coming to this Draft Decision, we have taken the above issues into account when considering the credibility of the expansion process.

Financing of expansions, Aurizon Network's obligation to fund and 'commercial terms'

The Standard User Funding Agreement (SUFA) has been developed as a financing tool that provides an alternative to Aurizon Network's terms of financing for a particular expansion, where Aurizon Network is unwilling to fund the expansion at the regulated rate of return, and instead proposes 'commercial terms'.¹³ SUFA, however, has yet to be practically tested and its use may only be cost effective for large expansions.

This situation provides Aurizon Network with market power which could incentivise monopolistic rent-seeking behaviour.

Aurizon Network's 2014 DAU has removed the voluntary funding obligation that is a feature of the 2010 AU. We cannot require Aurizon Network to include a funding obligation without a change to the QCA Act. However, the inclusion or exclusion of a voluntary funding obligation, potentially provides a signal regarding Aurizon Network's approach to ensuring the medium-to-long-term competitiveness of the CQCN.

In assessing Aurizon Network's 2014 DAU and coming to this Draft Decision we have taken into account the appropriateness of the role of 'commercial terms' and potential monopoly behaviour.

¹³ The funding of expansions of the CQCN is complicated by the fact that although Aurizon Network can be obliged under the QCA Act to expand the CQCN, it does not have to bear the costs of the expansion (see s. 119 of the QCA Act)

1.2.4 A governance framework encouraging trust and confidence

Aurizon Network is part of a vertically and horizontally integrated group of companies. This group also includes the dominant supplier of above-rail services in the CQCN.

The governance framework surrounding Aurizon Network must be sufficiently robust to prevent Aurizon Network from using its vertical integration or confidential information, knowingly or unknowingly, in a manner that discriminates in favour of the Aurizon Group, to the detriment of competition in upstream and downstream markets. Such a governance framework is critical in realising the objectives of Part 5 of the QCA Act.

The governance framework for the Aurizon Group is bespoke and has evolved in recognition of the particular issues raised by the Aurizon Group's current organisational structure. However, the governance framework must continue to be effective and hence must also appropriately respond to the evolution of the Aurizon Group.

To ensure there is a governance framework that encourages trust and confidence, the core areas to consider include:

- effective obligations to ensure non-discrimination between the Aurizon Group and other users of the CQCN
- ring fencing of the confidential information of other users of the CQCN
- reporting and accountability for performance and compliance
- dispute resolution
- the role of standard access agreements to promote the provision of the declared service by Aurizon Network on reasonable and non-discriminatory terms.

Each of these elements have to work effectively to ensure Aurizon Network's actions are transparent, Aurizon Network is accountable for its actions and the Aurizon Group cannot discriminate in favour of its own operations to the detriment of other users of the CQCN.

Discrimination

A vertically integrated business has incentives to exercise any discretion it may have in the provision of services in upstream markets in a way that promotes its downstream business vis a vis the businesses of competing providers. As a vertically integrated business, the Aurizon Group faces those incentives. An important function of the 2014 DAU is to manage these incentives, consistent with the objectives and requirements of Part 5 of the QCA Act.

In assessing the 2014 DAU, we have sought to address the risk of discrimination by a number of means, including:

- clarifying the non-discrimination obligations in the 2014 DAU and their means of application
- reducing any subjective discretions that could be exercised by Aurizon Network in a manner that favoured its downstream operations
- limiting the flow of confidential information outside Aurizon Network to those parts of the Aurizon Group that could use that information for purposes unconnected with the supply of the declared services
- increasing transparency in decision-making and information flows
- promoting the use of standardised terms and procedures that are objectively reasonable and unbiased.

We note section 137 of the QCA Act also imposes additional non-discrimination requirements on Aurizon Network as a 'related access provider', namely an access provider that not only owns or operates the declared service, but also provides, or proposes to provide, access to the service to itself or a related body corporate. Section 137(1A) requires that Aurizon Network must include provisions for identifying, preventing and remedying conduct of the related access provider that unfairly differentiates in a material way between:

- access seekers — in negotiating access agreements, or amendments to access agreements, relating to the service; or
- users — in providing access to the service.

Ring fencing

If ring fencing arrangements are to be perceived as credible, they need to be robust, clear and transparent, and actively enforced by Aurizon Network.

In this context, Aurizon Network should proactively manage the risk of discriminatory behaviour. Appropriate safeguards and processes to protect the flow of information regarding its customers to other areas of the Aurizon Group should be vigorously enforced. This should also be the case for the transfer of staff between Aurizon Network and other aspects of the Aurizon Group's business portfolio.

Overall, an effective ring fencing regime is critical to ensuring Aurizon Network's customers have confidence in and trust of its actions.

In assessing Aurizon Network's 2014 DAU and coming to this Draft Decision we have taken these issues into account when considering the ring fencing provisions.

Reporting and accountability for performance and compliance

The reporting regime should provide stakeholders and the QCA with relevant, accurate information in a timely manner. In this context, greater and more relevant information should be provided at greater frequency than is the case today. This creates a better informed customer base, builds trust and enhances the prospect of constructive engagement.

The reporting and audit framework should not just be a 'paper exercise'. It should be used to hold Aurizon Network accountable for its operational and financial performance, as well as its commitment to complying with its ring fencing obligations.

In assessing Aurizon Network's 2014 DAU and coming to this Draft Decision we have taken these issues into account when considering the reporting provisions and Aurizon Network's accountability for performance and compliance.

Dispute resolution

An effective dispute resolution process is critical for the 'negotiate–arbitrate' principle to operate effectively. The 'negotiate–arbitrate' principle is described in more detail in Section 2.9.3. In summary, parties should endeavour to negotiate a mutually beneficial outcome before they resort to arbitration. However, arbitration is recognised as an appropriate means to resolve disputes in the absence of commercial agreement given the inherent asymmetry in bargaining power between Aurizon Network and users of the CQCN. Importantly, if the dispute resolution process is not credible, the negotiation process can unduly bias in favour of Aurizon Network by not sufficiently addressing the asymmetry in bargaining power.

In this context, the dispute resolution process will benefit from encompassing all elements of the access undertaking, as well as applying to both access holders and access seekers. A procedurally streamlined dispute mechanism will also be beneficial and any decision should be binding on all parties.

In assessing Aurizon Network's 2014 DAU and coming to this Draft Decision, we have taken these issues into account when considering the dispute resolution provisions.

The role of the Standard Access Agreements

Where a person requires access to the CQCN, they are required to enter into an access agreement with Aurizon Network which governs the terms and conditions of that access.

Standard access agreements act as a 'safe harbour' in circumstances where an access seeker does not wish to negotiate alternative terms of access with Aurizon Network. Access agreements are intended to operate as default agreements that are unbiased and objectively reasonable. Access agreements are also intended to facilitate more timely provision of the declared service by Aurizon Network and to reduce costs for all stakeholders. However, through time the standard access agreements have become complex and lengthy. We consider they would benefit from greater simplification, while still remaining unbiased and objectively reasonable.

In assessing Aurizon Network's 2014 DAU and coming to this Draft Decision, we have taken these issues into account when considering the standard access agreements.

1.3 The evolution of the regulatory framework

The evolution of the regulatory framework from UT1 to UT3 has been largely dependent on the behaviour of Aurizon Network and, before that, Queensland Rail. How Aurizon Network responds in practice to the challenge of aligning its shareholders' interests with those of its customers and the public has a strong bearing on the future direction of that regulatory framework.

Aurizon Network's behaviour over time therefore influences whether a light-handed approach to regulation is appropriate. It also impacts on the extent to which the 'primacy of commercial negotiation' principle permeating Aurizon Network's 2014 DAU can be considered credible and the extent to which regulatory intervention may be required.

Our view of Aurizon Network's behaviour may change over time, in response to complaints received and practical issues encountered. Our view is also influenced by the information we receive and the perceived transparency of Aurizon Network's decision-making, including whether decisions are objectively reasonable.

Based on our current view, we consider it remains important that the 2014 DAU focuses on Aurizon Network being transparent with respect to its actions, providing relevant and timely information to us and stakeholders, committing to improving performance, acting in a non-discriminatory manner, and investing in the CQCN at the regulated return. We consider it essential that Aurizon Network remains accountable for its actions.

In assessing Aurizon Network's 2014 DAU, we have taken the above issues into account.

2 LEGISLATIVE FRAMEWORK

This chapter sets out our application of the legislative framework in making this Draft Decision. This chapter does not refer to specific definitions, clauses or approaches outlined in Aurizon Network's proposal. More specific analysis of these is provided in the subsequent chapters and in our marked version of the 2014 DAU and associated documents.

2.1 Part 5 of the Queensland Competition Authority Act 1997

Part 5 of the *Queensland Competition Authority Act 1997* (QCA Act) sets out the legislative framework for Queensland's third party access regime. Part 5 provides the legislative framework for facilitating access to services provided by means of infrastructure through:

- the declaration of a service and arbitration of access disputes
- the provision of access undertakings
- the ability to make access codes for declared services and provide rulings.

Part 5 of the QCA Act broadly mirrors the national access regime set out in Part IIIA of the *Competition and Consumer Act 2010* (Cth) (CCA).

As identified in the Preface to this Draft Decision, the use of a coal system for providing transportation by rail is a declared service for the purposes of Part 5 of the QCA Act by operation of section 250 of the QCA Act and is referred to in this Draft Decision as the 'declared service'.

A 'coal system' means rail transport infrastructure (a 'facility' under section 70 of the QCA Act) that is part of the Blackwater system, Goonyella system, Moura system or Newlands system, and which includes direct or indirectly connected rail transport infrastructure owned or operated by Aurizon Network, or which includes particular extensions built on or after 30 July 2010 owned or operated by Aurizon Network, as defined in section 250 of the QCA Act. The declared rail transport infrastructure is collectively referred to in this Draft Decision as the 'central Queensland coal network' (CQCN).

As a result of the declaration of the CQCN, Aurizon Network (as access provider) and access seekers are subject to various rights and obligations under the access regime in Part 5 of the QCA Act.

2.2 Access undertakings

Section 136 of the QCA Act permits Aurizon Network, as the owner or operator of a declared service, to voluntarily submit a draft access undertaking to us. We must then consider the draft access undertaking and either approve it, or refuse to approve it. If we refuse to approve the draft access undertaking, we must give Aurizon Network a written notice stating the reasons for the refusal and the way in which we consider it is appropriate to amend the draft access undertaking. Aurizon Network is the responsible person for QR Network's 2010 Access Undertaking (2010 AU) that we approved on 1 October 2010. The 2010 AU is an access undertaking previously given by Aurizon Network in relation to the declared service under section 136 of the QCA Act. The 2010 AU is set to expire on 30 June 2015.

On 11 August 2014, Aurizon Network voluntarily submitted a further draft access undertaking under section 136 of the QCA Act (the 2014 DAU) for the declared service for approval. The

2014 DAU replaces an earlier draft access undertaking submitted by Aurizon Network that was withdrawn on the same date (the 2013 DAU).

In accordance with section 147A(2) of the QCA Act, we must use our best endeavours to decide whether to approve, or refuse to approve, the 2014 DAU within the time periods specified in that section.

If we approve the 2014 DAU, Aurizon Network is required to offer third party access in accordance with the 2014 DAU.

If we refuse to approve the 2014 DAU, we must give reasons for the refusal and state the way in which we consider it appropriate to amend the DAU. The QCA Act does not prescribe precisely how and to what level of detail we are required to articulate any amendments we require.

2.3 Section 138(2) of the QCA Act

Section 138(2) of the QCA Act states that we may approve a DAU only if we consider appropriate to do so having regard to each of the matters set out in section 138(2) of the QCA Act. The drafting of section 138(2) therefore sets out the statutory factors guiding our decision-making process and appears in **Box 2** below.

Section 138(2) describes matters we are required to 'have regard to'. However, the QCA Act does not prescribe the weightings for each matter. Section 138(2)(h) also provides that we can 'have regard to' any other issue(s) we consider relevant.

In the context of statutory interpretation in Australia, the phrase 'have regard to' has been consistently interpreted to require the decision-maker to take into account the matter to which regard is to be had and given weight to, as an element in making the decision.¹⁴

More specifically, the expression 'have regard to' can take on different meanings depending on its context. In some contexts, it may require the decision-maker to take the matters into account and 'give weight to them as a fundamental element in making his [or her] determination'.¹⁵ However, it can also simply require the decision-maker to merely consider the matters, rather than treat them as fundamental elements in the decision-making process, provided that consideration of the matters is a 'a jurisdictional prerequisite' to the making of the decision.¹⁶

In this regard, the High Court of Australia has indicated that in the absence of any statutory or contextual indication of the weight to be given to factors to which a decision-maker must have regard (as is the case in the QCA Act), it is generally for the decision-maker to determine the appropriate weight to be given to them.¹⁷ A decision-maker, for example, is entitled to be brief in his or her consideration of a matter which has little or no practical relevance to the circumstances of a particular decision.¹⁸

In the context of assessing the 2014 DAU, we have to take into consideration all the factors listed in section 138(2) as jurisdictional prerequisites for the decision, but with a weighting of each factor we consider is appropriate based on the practical relevance of the factor to our decision.

¹⁴ DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (7th Ed, 2011) [12.15]

¹⁵ *R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322 at 329 (per Mason J)

¹⁶ *Minister for Immigration and Citizenship v Khadgi* (2010) 190 FCR 248

¹⁷ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41 (per Mason J)

¹⁸ *Elias v Commissioner of Taxation* (2002) 123 FCR 499 at [62] (p 512) (per Hely J)

Box 2: The legal framework

The QCA may approve the 2014 DAU only if the QCA considers it appropriate to do so having regard to each of the matters set out in section 138(2) of the QCA Act:

The Authority may approve a draft access undertaking only if it considers it appropriate to do so having regard to each of the following —

- (a) *the object of this part;*
- (b) *the legitimate business interests of the owner or operator of the service;*
- (c) *if the owner and operator of the service are different entities—the legitimate business interests of the operator of the service are protected;*
- (d) *the public interest, including the public interest in having competition in markets (whether or not in Australia);*
- (e) *the interests of persons who may seek access to the service, including whether adequate provision has been made for compensation if the rights of users of the service are adversely affected;*
- (f) *the effect of excluding existing assets for pricing purposes;*
- (g) *the pricing principles mentioned in section 168A;*
- (h) *any other issues the authority considers relevant.*

The 'object of this part' as referred to in section 138(2)(a) is set out in section 69E:

The object of this part is to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets.

The section 168A pricing principles are:

The pricing principles in relation to the price of access to a service are that the price should —

- (i) *generate expected revenue for the service that is at least enough to meet the efficient costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved; and*
- (j) *allow for multi-part pricing and price discrimination when it aids efficiency; and*
- (k) *not allow a related access provider to set terms and conditions that discriminate in favour of the downstream operations of the access provider or a related body corporate of the access provider, except to the extent the cost of providing access to other operators is higher; and*
- (l) *provide incentives to reduce costs or otherwise improve productivity.*

In the context of assessing the 2014 DAU, we also have to balance the factors listed in section 138(2), as we see appropriate, consistent with this weighting.

The criteria in section 138(2) apply to our overall decision whether to approve or refuse to approve the 2014 DAU. In order to make that decision, we also need to apply the criteria to the different components of the overall decision, and the acceptability of each of the relevant components of the 2014 DAU. Different criteria may have different practical relevance to each of those components, meaning we are required to exercise our discretion and judgement in a manner consistent with previous judicial authority.

Conversely, while we have considered the section 138(2) criteria for each part of the 2014 DAU, as set out in the remainder of this Draft Decision, we must also be satisfied that the 2014 DAU, as a whole, satisfies the section 138(2) criteria.

The remainder of this chapter focuses on how we have interpreted and considered the key section 138(2) factors in our Draft Decision.

2.4 The object of Part 5 of the QCA Act

The object of part 5 of the QCA Act is to:

.....promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets.

2.4.1 Economically efficient outcomes for the operation of, use of and investment in the CQCN

We consider there are a number of interconnected aspects to ensuring economically efficient outcomes for the operation of, use of and investment in the CQCN. These include:

- efficient operation of the existing CQCN infrastructure, including the efficient allocation of existing capacity within the CQCN
- efficient expansion of the CQCN to provide new capacity at efficient cost
- ensuring that capacity is allocated within the CQCN as part of the broader mine-to-port supply chain to maximise the productivity of coal production in Queensland, in the public interest.

Efficient operation of the existing CQCN infrastructure

In order for the 2014 DAU and standard agreements to promote economically efficient operation and use of the CQCN infrastructure, we are of the view it would need to ensure non-discrimination and enhance the transparency associated with:

- capacity measurement and assessment systems
- the efficient allocation of existing capacity within the CQCN
- network management principles
- system rules
- maintenance practices.

We also consider it is necessary to improving the technical processes and approach to customer engagement for communicating why operational practices result in economically efficient outcomes.

Efficient expansion of the CQCN

We consider economically efficient operational practices on the existing network are a pre-requisite for efficient expansion. We are also of the view that efficient operational practice requires the use of potential operational solutions to mitigate relevant bottlenecks so as to reduce the need for expansions. We consider the 2014 DAU should ensure non-discrimination and enhance the transparency and processes associated with:

- identifying and mitigating bottlenecks

- identifying the need to expand the network
- actioning expansions to the network.

Again, we also consider it is necessary to improving the technical processes and approach to customer engagement underpinning the expansion process.

Supply chain coordination

Developing an effective long-term solution and improving alignment across central Queensland's coal supply chains has the potential to increase the economic efficiency of the CQCN in terms of current capacity and future expansion.

We are of the view that supply chain coordination is at the cornerstone of the objectives of Part 5 of the QCA Act. In the absence of instituting a regime for effective coordination, it will be difficult to conclude that the 2014 DAU is consistent with the promotion of the efficient use of, operation of, and investment in infrastructure in the CQCN.

In this respect, we consider the 2014 DAU should complement the development of supply chain coordination in the CQCN, including ensuring that participants have the information necessary to make informed coordination decisions.

2.4.2 Promoting effective competition in upstream and downstream markets

In assessing whether or not the 2014 DAU will promote competition, we must consider the relevant upstream and downstream markets affected by the provision of the declared service and the manner in which provision of the declared service will have the effect of promoting effective competition in those dependent markets.

In the context of the concept of 'promoting competition' in the declaration criteria in section 44H(4)(a) of the analogous national access regime in the CCA, the Australian Competition Tribunal has previously provided the following guidance, which is useful in interpreting this concept in the QCA Act:

*"The Tribunal does not consider that the notion of 'promoting' competition in s 44H(4)(a) requires it to be satisfied that there would be an advance in competition in the sense that competition would be increased. Rather, the Tribunal considers that the notion of 'promoting' competition in s 44H(4)(a) involves the idea of creating the conditions or environment for improving competition from what it would be otherwise"*¹⁹

The Australian Competition Tribunal has also relevantly stated in a similar context:

*"Before turning to the specific arguments raised in this matter, we must address the question of what is meant by the term "promote competition" in s 44H(4)(a) of the Act. The Tribunal has expressed a view in the past that the promotion of competition test does not require it to be satisfied that there would necessarily or immediately be a measurable increase in competition. Rather, consistent with the purpose of Pt IIIA being to unlock bottlenecks in the supply chain, declaration is concerned with improving the conditions for competition, by removing or reducing a significant barrier to entry. Other barriers to entry may remain and actual entry may still be difficult and take some time to occur, but as long as the Tribunal can be satisfied that declaration would remove a significant barrier to entry into at least one dependent market and that the probability of entry is thereby increased, competition will be promoted."*²⁰

¹⁹ *Re Sydney International Airport* [2000] ACompT 1 at [106]

²⁰ *Re Services Sydney Pty Limited* [2005] ACompT 7 at [131]

We consider that Aurizon Network continues to have the ability and incentive to use its market power to adversely affect competition in a number of dependent markets, particularly as the Aurizon Group has its own above-rail operations in the CQCN.²¹

We therefore consider the 2014 DAU should seek to:

- minimise any impediments to access to the declared services, hence should minimise any barriers to participation
- improve the conditions for competition in upstream and downstream markets by providing tangible evidence of the economically efficient provision of access within the CQCN
- more specifically, improve the conditions for competition in upstream and downstream markets throughout Queensland's coal supply chain and other affected markets.

2.5 The legitimate business interests of Aurizon Network

Section 138(2) of the QCA Act provides that we may approve a DAU only if we consider it appropriate to do so having regard to, among other things:

- the legitimate business interests of the owner or operator of the service, section 138(2)(b); and
- the protection of the legitimate business interests of the operator of the service, if the owner and operator of the service are different entities, section 138(2)(c).

The term 'legitimate business interests' is not a defined term under the QCA Act, but has been considered in other similar contexts as further discussed below.

2.5.1 Consideration of legitimate business interests by the ACCC

The CCA also requires the consideration of an access undertaking by the ACCC to have regard to, among other things, the legitimate business interests of the provider (section 44ZZA(3)(a) of the CCA). The ACCC has, in a number of arbitration determinations, and in its own publications, considered the meaning of the term 'legitimate business interests'. The ACCC has indicated that this term:

- refers to the commercial considerations of the service provider such as the provider's obligations to shareholders and other stakeholders, including the need to earn normal commercial returns on the facility
- includes ensuring that the access provider has appropriate incentives to maintain, improve and invest in the efficient provision of the facility
- is unlikely to extend to achieving for an access provider a higher than normal commercial return through the use of market power. However, access providers should not be precluded from earning higher than normal commercial returns, where these returns are generated from, for example, innovative investments or unique cost cutting measures rather than through the exercise of market power
- could include taking into account obligations imposed on the service provider by government (such as community service obligations) and binding contractual obligations of the service provider.²²

²¹ For an assessment of the relevant dependent markets in relation to the declared service, see Queensland Government, May 2010: 12-14

2.5.2 Consideration by the Australian Competition Tribunal

In *Re Telstra Corporation Ltd*, the Australian Competition Tribunal considered the 'legitimate business interests' criterion under the analogous section 152AH(1)(b) of the CCA (then the *Trade Practices Act 1974* (Cth) (TPA)) in the context of access to certain declared telecommunications services supplied over telecommunications network infrastructure owned and operated by Telstra. The Tribunal stated that the legitimate business interests of Telstra require that Telstra be allowed to recover its costs of supplying the relevant service and achieve a normal return on its invested capital. Specifically, the Tribunal stated:

The expression 'legitimate business interests' is a general expression and is somewhat open-textured. What is 'legitimate' conduct or a 'legitimate' interest in business may be open to a number of differing interpretations. We consider that a carrier's 'legitimate business interests' is a reference to what is regarded as allowable and appropriate in commercial or business terms. In the context of s152AH(1)(b), the expression connotes something which is allowable and appropriate when negotiating access to the carrier's infrastructure. When looked at through the prism of a charge term and condition of access and its relationship to a carrier's cost structure, it is a reference to the interest of a carrier in recovering the costs of its infrastructure and its operating costs and obtaining a normal return on its capital.²³

The Tribunal cited the Explanatory Memorandum to the *Trade Practices Amendment (Telecommunications) Bill 1996* (Cth) which introduced Part XIC into the Act as support for its view. We note the Explanatory Memorandum relevantly stated:

Consistent with Part IIIA of the TPA, the references here to the 'legitimate' business interests of the carrier or carriage service provider and to the 'direct' costs of providing access are intended to preclude arguments that the provider should be reimbursed by the third party seeking access for consequential costs which the provider may incur as a result of increased competition in an upstream or downstream market.²⁴

In *Application by Telstra Corporation Limited*, the Tribunal, in reviewing a decision of the ACCC to reject an access undertaking in relation to the unconditioned local loop service (ULLS) that had been submitted to it by Telstra, held that a price to be charged by Telstra would be consistent with its legitimate business interests if it were charged as though Telstra faced competition in the provision of the ULLS. The Tribunal noted that:

no business has a right to revenues higher than those obtainable in a competitive market.²⁵

We consider the 'legitimate business interests' of an owner or operator of a facility are those commercial interests of the owner or operator that, if catered for, would allow the owner or operator to recover its costs in providing the relevant service and to earn a normal (regulated) return on its invested capital.

We also consider the term 'legitimate business interests' connotes a reference to what is objectively regarded as allowable and appropriate in commercial or business terms in the context of providing access to the declared service, meaning that a concept of reasonableness and proportionality is implied by the use of the word 'legitimate'.

²² ACCC (2006) Arbitrations – A Guide to Resolution of Access Disputes under Part iiiA of the TPA: 27-28, ACCC (2006), Assessment of Telstra's ULLS Monthly Charge Undertaking – Final Decision: 23, ACCC (2007), Arbitration Report of Access Dispute between Services Sydney Pty Ltd and Sydney Water Corporation: 20

²³ *Re Telstra Corporation Limited* [2006] ACompT 4 at [89]

²⁴ Trade Practices Amendment (Telecommunications) Bill 1996, Explanatory Memorandum, see discussion under: Proposed section 152AH - Reasonableness - terms and conditions

²⁵ *Re Telstra Corporation Limited* [2010] ACompT 1 at [192]

2.5.3 Test against a competitive market

We consider the relevant market structure against which an entity's 'legitimate business interests' should be assessed is a market resembling (as far as possible) a competitive market structure (rather than a monopoly market structure). This is the structure the Tribunal and the ACCC have had regard to when considering the 'legitimate business interests' of service providers. Of course, a service provider is entitled to earn a return on its capital. However, as discussed above, relevant cases have held that a service provider's 'legitimate business interests' will be preserved where they earn a normal commercial return as opposed to a monopoly rent.

2.5.4 Balance of legitimate business interests against other criterion

In our view, section 138(2)(c) of the QCA Act does not require that, in circumstances where the interests of an access provider, access seeker and the public are not aligned, the interests of the access provider must be given priority. Section 138(2) requires us to undertake a balancing exercise having regard to all factors listed in paragraphs (a)–(h) of section 138(2). We refer to our comments in relation to the phrase 'having regard to' in Section 2.3 above.

2.6 Interest of access seekers and holders

Section 138(2)(e) of the QCA Act requires us to have regard to the interests of persons who may seek access to the service. We also consider that the rights of existing access holders are relevant under section 138(2)(h), to the extent they are not already access seekers under section 138(2)(e).

To assess the interests of access seekers (and holders) in respect of the 2014 DAU, we have undertaken an extensive consultation process, on both the 2013 DAU and the re-submitted 2014 DAU.²⁶ Consideration of submissions made during the public consultation process are particularly relevant for us in having regard to Section 138(2)(e). A wide range of considerations were raised by access seekers and access holders in the context of the public consultation process and are discussed in this Draft Decision.

2.6.1 Treatment of train operators as access seekers

For the avoidance of doubt, and in the context of the 2014 DAU, we consider section 138(2)(e) of the QCA Act encompasses the interests of train operators, as access seekers. We consider that train operators as access seekers, or potential access seekers, should have all the protections of Part 5 of the QCA Act, including the ability to use the dispute resolution arrangements, and have the benefit of ring fencing provisions of the 2014 DAU.

The access arrangements in the CQCN provide for train operators to hold access rights in their own right, or provide train operations for access holders.

We have received submissions from Aurizon Operations, Asciano and BMA, all of them train operators in the CQCN, and the views of train operators are reflected through our Draft Decision.

2.6.2 Coal and non-coal access seekers

The 2014 DAU is primarily drafted in the context of the movement of coal across the CQCN. The 2014 DAU is also applicable to non-coal access seekers, with the CQCN transporting grain and

²⁶ Public submissions are available on the QCA website.

other bulk commodities. However, to the extent that the predominant use of the CQCN is access for haulage of coal, we consider it appropriate that the 2014 DAU be predominantly focused on the provision of access for coal related activities.

2.7 The public interest

Section 138(2)(d) requires us to have regard to the public interest, including the public interest in having competition in markets (whether or not in Australia).

The DSDIP noted that:

The coal industry is a key part of the Queensland economy, employing an estimated 28,000 people, and contributing \$1.7 billion in royalties in 2012-13, with the majority of this impact from Central Queensland. In total, mining made up around 9 per cent of the Queensland economy in 2012-13, up from just under 6 per cent in 2002-03; coal represents more than two-thirds of this mining contribution.²⁷

We also consider there to be a strong alignment between effective supply chain coordination and the public interest. In the context of the 2014 DAU, there is a clear link between allowing for the coal supply chain to operate in the most effective and efficient way possible and the public interest in maintaining an internationally competitive Queensland coal sector.

We therefore consider that the provision of effective access to the CQCN via the 2014 DAU has the potential to enhance the efficiency of Queensland coal producers seeking to compete with international rivals for the sale of coal to global customers. In this context, we consider that the 2014 DAU should support the continued competitiveness of Queensland's coal mining sector. The need for costs to be minimised is also particularly important in light of the current adverse economic climate in the Queensland mining industry, so is in the public interest under section 138(2)(d).

Further, we consider effective supply chain coordination, the ability to trade access rights and cost reflective prices for access should all work together to ensure that resources are used for the most efficient provision of access. In this way, investment in potential surplus capacity or in assets which might ultimately be under-utilised could be better avoided, and better use could be made of the State's land and other strategic resources. Again, this is in the public interest under section 138(2)(d).

2.8 The pricing principles in section 168A of the QCA Act

Section 138(2)(g) of the QCA Act requires us to have regard to the pricing principles in section 168A, specifically that the price of access to a service should—

- (a) *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; and*
- (b) *allow for multi-part pricing and price discrimination when it aids efficiency; and*
- (c) *not allow a related access provider to set terms and conditions that discriminate in favour of the downstream operations of the access provider or a related body corporate of the access provider, except to the extent the cost of providing access to other operators is higher; and*
- (d) *provide incentives to reduce costs or otherwise improve productivity.*

²⁷ DSDIP, 2014 DAU, sub no. 47: 1

The intent of the pricing principles is to provide a transparent framework for determining price limits, the structure of access charges and dealing with issues of price discrimination.

2.8.1 Efficient cost

We undertook a detailed analysis of the pricing principles applicable to the 2014 DAU in the context of our earlier Draft Decision for the MAR. As part of that decision, we undertook a detailed analysis of the concept of 'efficient costs'. We refer to our earlier reasoning as set out in section 2.1.2 of that decision, and note we hold the same view and have applied the same conclusions in relation to this Draft Decision.

2.8.2 Allocation of costs

When considering the pricing principles, section 168A(b) and (c) of the QCA Act deal with cost allocation. In respect of cost allocation we must also have regard to section 137(1A)(b) of the QCA Act. Section 137(1A)(b) applies to Aurizon Network as a 'related access provider', namely an access provider that not only owns or operates the declared service, but also provide, or proposes to provide, access to the service to itself or a related body corporate.

Section 168A(b) provides for a price to allow for multi-part pricing and price discrimination, when it aids efficiency. In this context, we must consider whether the proposed tariff arrangements for the 2014 DAU provide appropriate price signals to access seekers and holders for the efficient use of infrastructure in the CQCN and if there is a clear case for price discrimination. The appropriate allocation of costs is a key consideration in developing the system allowable revenue (SAR) for each rail system in the CQCN to ensure equitable allocation of costs between systems and our consideration of proposed expansion tariffs.

Section 137(1A)(b) and Section 168A(C) require that Aurizon Network's access undertaking must include provisions for preventing Aurizon Network from recovering, via the access price, costs that are not reasonably attributable to the provision of the service. We therefore need to be satisfied that our proposed pricing arrangements provide neither a competitive advantage nor a competitive disadvantage for Aurizon Network's related parties.

2.9 Any other issues the QCA considers relevant

Section 138(2)(h) of the QCA Act requires us to have regard to any other issues that we consider relevant. We are therefore permitted to exercise our judgment as to what other issues we consider to be relevant. In addition to the issues we have identified above, we consider the following issues are relevant:

- the extent to which the 2010 AU should be used as a benchmark in order to promote commercial certainty
- the extent to which sections 118 and 119 of the QCA Act are relevant in the context of extensions and enhancements to the CQCN
- the extent to which commercially negotiated outcomes should be recognised under the negotiate–arbitrate principle
- the extent to which the 2014 DAU promotes greater supply chain coordination.

Each of these issues and their relevance are discussed in turn below.

2.9.1 Role of the 2010 AU as a benchmark

The 2010 AU comprises a set of legally binding terms and conditions that is in use, that all stakeholders are familiar. Many submissions we have received have compared the 2014 DAU against the 2010 AU. Accordingly, we consider the 2010 AU provides a useful benchmark from which to assess the context and balance of the proposals in the 2014 DAU and associated standard agreements.

However, while the 2010 AU provides a robust starting point for contextual assessment, this does not mean we consider the terms and conditions in it remain appropriate today. The 2014 DAU needs to reflect, for example, industry developments since then. Moreover, the balancing exercise we must undertake in applying the statutory factors in the QCA Act needs to reflect today's considerations, not those that applied at the time the 2010 AU was accepted.

2.9.2 Sections 118 and 119 of the QCA Act

Section 118(1)(d) of the QCA Acts allows for an access determination to require an access provider to extend, or permit the extension of the facility. However, section 119(2) imposes limitations on the making of an access determination. The limitations imposed on the making of an access determination include the QCA making an access determination that:

- (a) reduces the amount of service able to be obtained by the service provider
- (b) results in an access seeker, or someone else, becoming the owner, or one of the owners, of the facility, without the existing owner's agreement
- (c) requires an access provider to pay some or all of the costs of extending the facility.

Although these sections of the QCA Act are not triggered unless an access dispute arises, they do provide some context for the SUFA and expanding the network. The SUFA is being considered separately, with a Draft Decision released on 31 October 2014.

2.9.3 Negotiate–arbitrate model and primacy of commercial negotiations

The third party access regime in the QCA Act is underpinned by a 'negotiate–arbitrate' approach to regulation, with the regime incorporating the principle of the 'primacy of contractual negotiations'.

In its Application to the National Competition Council for a Recommendation on the Effectiveness of an Access Regime (June 2010), the Queensland Government said:

The Regime incorporates the primacy of contractual negotiations through the adoption of a 'negotiate-arbitrate model' in the QCA Act. This operates so that once a service is declared the following process applies:

- (a) *the service provider is obliged to negotiate with the access seekers in respect of an access agreement; and*
- (b) *if, and only if, commercial agreement cannot be reached then an access dispute may be raised and arbitration by the QCA is available.²⁸*

The Queensland Government also said that:

The primacy of contractual negotiations is also recognised by the Access Undertaking which contains the following provisions:

- (a) *a detailed negotiation framework to facilitate commercial negotiation;*

²⁸ Queensland Government, 2010: 30-31.

- (b) *a dispute resolution process where commercial agreement cannot be reached; and*
- (c) *an acknowledgement that the standard access agreement approved by the QCA (Standard Access Agreement) applies 'unless otherwise agreed between QR Network and the Access Seeker'. This acknowledges that the Standard Access Agreements only apply when commercial agreement has not been reached. This applies irrespective of whether the Access Undertaking has been submitted voluntarily under section 136 of the QCA Act or the QCA has required the owner or operator to submit the Access Undertaking under section 133 of the QCA Act.²⁹*

As we identified above, we consider that parties should endeavour to negotiate a mutually beneficial outcome before they resort to arbitration. However, arbitration is recognised as an appropriate means to resolve disputes in the absence of commercial agreement, given the inherent asymmetry in bargaining power between Aurizon Network and users of the CQCN. Importantly, if the dispute resolution process is not credible, the negotiation process can be unduly biased in favour of Aurizon Network by not sufficiently addressing the asymmetry in bargaining power.

In considering the application of the negotiate–arbitrate model and the primacy of commercial negotiations, we have therefore considered how the 2014 DAU and the standard access agreements:

- affect the role of customer engagement
- affect the balance of negotiation strength
- impact on barriers to participation, whether real or perceived
- affect the flow of relevant and timely information
- provide for effective dispute mechanisms, accountability and transparency.

Failure to achieve the correct balance of outcomes in these matters could have implications for the credibility and reputation of the regulatory framework operated within Queensland and Queensland's future economic prospects. Failure to achieve the correct balance of outcomes in these matters would also impede our ability to achieve the objectives of Part 5 of the QCA Act.

2.9.4 Supply chain coordination

While variously already contemplated by the other section 138(2) factors, as discussed in Chapter 10 we consider supply chain coordination has a significant role to play in achieving the desired regulatory outcomes by:

- facilitating economically efficient outcomes for the CQCN
- increasing transparency with respect to capacity availability
- improving end-to-end supply chain capacity alignment
- ensuring end-to-end supply chain costs are minimised and throughput maximised.

The way in which the 2014 DAU and the standard agreements approach the following issues could have implications for the efficiency of both the CQCN and Queensland's coal supply chain:

- supply chain coordination and developing long term co-operative solutions
- capacity measurement and management within the CQCN

²⁹ Queensland Government, 2010: 31.

- capacity measurement, management and alignment across the end-to-end supply chain
- the trade-off between expansions and operational solutions.

It could also impact on global perceptions of Queensland's coal sector with respect to its competitiveness and reliability. These considerations are also relevant to the public interest under section 138(2)(d) of the QCA Act.

3 INTENT AND SCOPE

Part 2 of the 2014 DAU outlines the intent and scope of Aurizon Network's undertaking. It establishes the aims and objectives of the undertaking and provides guidance as to the interpretation of the remainder of the 2014 DAU.

The key elements of our Draft Decision are to:

- amend the intent clause to refer to non-discriminatory negotiation of access agreements and re-instate a clause similar to the non-discriminatory treatment clause included in the 2010 AU, so as to emphasise the importance of non-discrimination in provision of declared services*
- require the general principles of non-discrimination and independence to be moved from Ring fencing to Intent and Scope, in order to make clear that they underpin the operations of the entire undertaking, and to be widened to cover additional potential favourable treatment of related parties*
- amend the scope clause to clarify that the scope includes all matters addressed in the undertaking, not just the negotiation and provision of access*
- accept the clauses relating to the supply and sale of electricity, but require inclusion of a dispute resolution provision to make clear that the 2014 DAU dispute resolution provisions apply to this service*
- not require a definition of Associated Services to be included in the undertaking, as it is not clear that these services are non-contestable and/or covered by the declaration*
- require inclusion of a process allowing for development of an incentive mechanism, as we consider a well developed incentive mechanism would be beneficial for the 2014 DAU.*

3.1 Introduction

Part 2 of the 2014 DAU establishes the duration, intent and scope of the undertaking, including the extent to which it covers access and related services.

The Intent and Scope of the 2014 DAU is important as it should provide:

- clarity over what the undertaking is trying to achieve
- a description of the overarching objectives
- an appropriate description of the scope of the undertaking
- guidance as to the interpretation of the remainder of the undertaking.

3.2 Overview

3.2.1 Aurizon Network proposal

Aurizon Network's 2014 DAU proposes that:

- the intent of the undertaking is, among other things, to facilitate negotiation of access agreements by Aurizon Network and access seekers
- the scope of the undertaking indicates that it provides only for the negotiation and provision of access and is not applicable to the negotiation or provision of services other than access

- to the extent Aurizon Network sells or supplies electricity to a related operator, it cannot refuse to sell or supply electricity to another access seeker or access holder
- the undertaking be effective from the approval date to the terminating date (the earlier of 30 June 2017 and the date on which the undertaking is withdrawn in accordance with the QCA Act)
- reference tariffs apply retrospectively and are effective from the Commencing Date (1 July 2013).

Part 2 of the 2014 DAU differs from Part 2 of the 2013 DAU in three main respects:

- removal of 'commercial' from the provision relating to negotiation of access
- inclusion of provisions requiring Aurizon Network to: act in a manner consistent with the unfair differentiation obligations in the QCA Act; and apply the provisions of the undertaking consistently to all access seekers, access holders, train operators, access applications and negotiations for access, except where the undertaking provides otherwise
- re-inclusion, in large part, of the provisions relating to electricity supply and sale that were included in the 2010 AU.

3.2.2 Stakeholders' position

Stakeholders raised several concerns with Aurizon Network's 2014 DAU proposals, including:

- lack of a clear and unambiguous statement supporting non-discriminatory treatment of all access seekers and access holders³⁰
- inappropriate limitation of the scope of the undertaking³¹
- lack of an absolute obligation on Aurizon Network to supply electricity to access seekers and access holders³² or to do so in a non-discriminatory manner³³
- non-inclusion of a dispute resolution mechanism for disputes arising in respect of electricity supply³⁴
- non-inclusion of a definition of, and obligations related to, 'Associated Services'³⁵
- non-inclusion of requirements regarding an incentive mechanism³⁶
- specific elements of the drafting, where stakeholders proposed changes to improve clarity, certainty and/or transparency.³⁷

³⁰ Asciano, 2014 DAU, sub. no. 22: 28-29

³¹ QRC, 2014 DAU, sub. no. 42: 10

³² Anglo American, 2014 DAU, sub. no. 7: 17-19; QRC, 2014 DAU, sub. no. 42: 11

³³ Asciano, 2014 DAU, sub. no. 22: 29

³⁴ Anglo American, 2014 DAU, sub. no. 7: 20; Asciano, 2014 DAU, sub. no. 22: 65; QRC, 2014 DAU, sub. no. 42: 11

³⁵ QRC, 2014 DAU, sub. no. 42: 11-12

³⁶ Asciano, 2014 DAU, sub. no. 22: 66

³⁷ QRC, 2014 DAU, sub no. 31

3.2.3 Legislative framework and QCA assessment approach

Legislative framework

In assessing Part 2 of Aurizon Network's 2014 DAU, we have had regard to all the factors in section 138(2) of the QCA Act and given them an appropriate level of weighting, as identified in Chapter 2.

Against this background, we consider that, in our assessment of Part 2 of the 2014 DAU:

- sections 138(2)(a), (b), (d), (e) (g) and (h) should be given more weight, as identified below
- section 138(2)(g) refers to the pricing principles mentioned in section 168A, of which we consider sections 168A(a), (c) and (d) should be given more weight, as identified below
- sections 138(2)(c) and (f) should be given less weight, as they are less practically relevant to our assessment.

QCA assessment approach

Sections 69E and 138(2)(a) of the QCA Act requires us to have regard to the object of Part 5 of the QCA Act, namely to promote the economically efficient operation, use of and investment in the CQCN, as the significant infrastructure by which the declared service is provided, with the effect of promoting effective competition in upstream and downstream markets. For Part 2 of the 2014 DAU, we consider the object clause will be satisfied if it acts to:

- promote economically efficient use of, and investment in, the rail infrastructure, including by encouraging supply chain coordination initiatives and giving appropriate incentives for Aurizon Network to provide an efficient service
- enhance effective competition in upstream and downstream markets, including by ensuring access seekers and access holders are not treated in a discriminatory manner and the scope of the undertaking is appropriately described.

Section 138(2)(b) of the QCA Act requires that we have regard to the legitimate business interests of Aurizon Network, while sections 138(2)(d) and 138(2)(e) require us to have regard to the public interest and the interests of access seekers. We also consider the interests of existing access holders are relevant under section 138(2)(h), to the extent they are not already 'access seekers' under section 138(2)(e). We consider these various interests will be satisfied if Part 2:

- provides accountability and transparency, including by appropriately describing the scope of the declared services and providing for the scope to cover other services, where this has been proposed by Aurizon Network
- ensures effective dispute resolution mechanisms apply to all services covered by the undertaking
- enhances effective negotiation and customer engagement, including by providing a clear statement of the intent or objective of the undertaking.

Sections 138(2)(g) and 168A of the QCA Act require us to have regard to certain pricing principles, including that the price of access to the declared service should:

- generate expected revenue for the service that is at least enough to meet the efficient cost of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved (section 168A(a))

- not allow a related access provider to set terms and conditions that discriminate in favour of the downstream operations of the access provider or a related body corporate of the access provider, except to the extent the cost of providing access to other operators is higher (section 168A(c))
- provide incentives to reduce costs or otherwise improve productivity (section 168A(d)).

With regard to our assessment of Part 2 of the 2014 DAU, we consider these principles will be satisfied if Part 2:

- provides for efficient pricing arrangements that are consistent with section 168A(a)
- enhances accountability and transparency, including providing for non-discriminatory treatment of access holders and access seekers
- encourages efficient use of, and investment in, the rail infrastructure, including providing for establishment of mechanisms that incentivise cost and productivity improvements.

3.3 Non-discriminatory treatment and objective of the DAU

3.3.1 Aurizon Network proposal

Part 2 of Aurizon Network's 2014 DAU includes clauses that provide that the intent of the undertaking is to:

- 'ensure Aurizon Network acts in a manner that is consistent with the unfair differentiation obligations under sections 100(2) to (4) and section 168C of the Act' (cl.2.2(e))
- 'ensure Aurizon Network applies the provisions of this Undertaking consistently to all Access Seekers, Access Holders, Train Operators, Access Applications and negotiations for Access, except where this Undertaking provides otherwise' (cl.2.2(f)).

These clauses were not included in Aurizon Network's 2013 DAU.

Part 2 of the 2010 AU included a more detailed statement of obligations relating to non-discriminatory treatment (see cl.2.2 of that undertaking).

3.3.2 Stakeholders' position

Asciano said it considered Aurizon Network's 2013 DAU proposal to be a fundamental shift away from the clear statement of intent in the 2010 AU relating to non-discriminatory treatment. In its submission on the 2014 DAU, Asciano said:

Aurizon Network may believe that this issue has been addressed via its changes in 2014 DAU clauses 2.2(e) and 2.2(f); however Asciano does not believe that this is the case. The 2014 DAU still lacks a clear and unambiguous statement supporting non-discriminatory treatment of all access seekers and access holders.³⁸

Asciano proposed that this could be at least partly remedied by amending clause 2.2 of the 2014 DAU as follows (additional wording in bold):

The intent of this Undertaking is to:

*(a) facilitate the **non-discriminatory** negotiation of access agreements by Aurizon Network and Access Seekers.³⁹*

³⁸ Asciano, 2014 DAU, sub. no. 22: 28

³⁹ Asciano, 2014 DAU, sub. no. 22: 28

The QRC proposed a minor drafting change to clause 2.2(f) of the 2014 DAU, as follows (additional wording in bold):

*ensure Aurizon Network applies the provisions of this Undertaking consistently to all Access Seekers, Access Holders, Train Operators, Access Applications and negotiations for Access, except where this Undertaking **expressly** provides otherwise.*⁴⁰

The QRC also commented on the general principles of non-discrimination and independence, which are contained in Part 3 of Aurizon Network's 2014 DAU. These principles differ somewhat from those contained in the 2013 DAU, primarily by virtue of the addition of specific provisions providing that Aurizon Network will not:

- provide access on more favourable terms to a related party in respect of a port owned or operated by the related party where the port is connected to the rail infrastructure in the CQCN
- discriminate in the granting of access rights to an expansion based on the source of funding for the expansion.

The QRC considered the extension of these non-discrimination and independence principles to ports connected to the CQCN and owned and operated by a related party is still too narrow. It said the principles should extend to:

- Aurizon Network and any other related party (not only related operators)
- ports in which the Aurizon Group holds any existing or future interest (not only ports owned or operated by the Aurizon Group)
- railways in Queensland (other than the CQCN) in which the Aurizon Group holds any existing or future interest
- coal mines in Queensland in which the Aurizon Group holds any existing or future interest.⁴¹

Anglo American said the principles should apply to 'related parties', which should be defined as any related body corporate with interests in ports or mines.⁴²

Asciano was concerned that the principles may allow Aurizon Network to favour a non-related third party, such as, for example, a third party that has a commercial agreement with another Aurizon entity (say an Aurizon above-rail operator). Asciano believes this issue should be addressed to ensure Aurizon Network does not act to unduly benefit third party access holders who use Aurizon's above-rail services.⁴³

3.3.3 QCA analysis and Draft Decision

Our Draft Decision is that the relevant clauses of the 2014 DAU be amended to:

- refer to the objective of the 2014 DAU rather than intent
- refer to the 'non-discriminatory' negotiation of access agreements
- include the word 'expressly' in clause 2.2(f)
- include the general principles of non-discrimination and independence (moved from Part 3 of the 2014 DAU and amended to include additional matters)

⁴⁰ QRC, 2014 DAU, sub. no. 31: 1

⁴¹ QRC, 2014 DAU, sub. no. 42: 14

⁴² Anglo American, 2014 DAU, sub. no. 7: 23

⁴³ Asciano, 2014 DAU, sub. no. 22: 29

- effectively re-instate the 2010 AU non-discriminatory treatment clause (as cl. 2.4 of the 2014 DAU).

This will ensure that the Intent and Scope part of the 2014 DAU includes recognition of the importance of treating all parties in a non-discriminatory and consistent manner for the negotiation and provision of access and other matters covered by the undertaking.

We consider that Aurizon Network's inclusion of clauses 2.2(e) and 2.2(f) in the 2014 DAU, which were not included in the 2013 DAU, represents an improvement on the 2013 DAU. In that context, we note the drafting of the proposed clause:

- 2.2(e) refers to the relevant sections of the QCA Act and uses similar language to the Act – i.e. 'unfair differentiation'
- 2.2(f) largely replicates significant elements of clause 2.2(a) from the 2010 AU
- 2.2(f) specifically includes reference to Train Operators, which was not the case with clause 2.2(a) from the 2010 AU.

Clear statement regarding non-discriminatory treatment

We share Asciano's concern that the 2014 DAU, unlike the 2010 AU, does not include a clear statement regarding non-discriminatory treatment.

We consider that an up-front recognition of the importance of non-discriminatory treatment, in the Intent and Scope part of the access undertaking, would act to underpin the fair negotiation and provision of access via the 2014 DAU. We consider this will provide an unambiguous statement for all parties about the objective of the undertaking and serve as a clear guide to the behaviour of Aurizon Network in conducting business and providing the declared service. Our Draft Decision is to require clause 2.2(a) of the 2014 DAU be amended to refer to 'non-discriminatory' negotiation of access agreements.

We also consider the QRC's proposed drafting change should be accepted, as we believe it will add clarity to clause 2.2(f) of the 2014 DAU, thereby further acting to improve the accountability and transparency arrangements underpinning the operation of the undertaking.

In addition, we consider that the more detailed statement of obligations relating to non-discriminatory treatment included in the 2010 AU is also applicable to the 2014 DAU. Our Draft Decision requires that this clause, with some amendments for clarity and to ensure it is fit-for-purpose for the 2014 DAU regulatory framework, be included in the 2014 DAU. In the detailed drafting which accompanies our Draft Decision, this is clause 2.4.

Unfair discrimination and related parties

With regard to the general principles of non-discrimination and independence (which are contained in Part 3 of the 2014 DAU), we share stakeholders' concerns that these principles do not go far enough in identifying circumstances where Aurizon Network may be able to unfairly advantage a related party.

While we acknowledge that Aurizon Network has improved the provisions (compared to the 2013 DAU) by incorporating requirements to not provide favourable treatment to a port owned or operated by a related party, and not discriminate on the basis of the source of funding for an expansion, our Draft Decision reflects that the general principles should also provide that Aurizon Network will not unfairly discriminate in favour of:

- ports in which the Aurizon Group holds an interest, which will deal with any circumstance where the Aurizon Group becomes a minority partner in a port in the future

- coal mines in central Queensland in which the Aurizon Group holds an interest, noting the Aurizon Group has recently acquired a shareholding in Aquila Resources, which owns significant coal mining assets in central Queensland
- a third party which has a commercial agreement with a related party, particularly noting the growing trend for end users to hold their own access rights and separately contract with an above-rail operator for haulage services.

We consider these additions to the general principles of non-discrimination and independence will provide greater accountability and transparency to the negotiation and provision of access in the CQCN, and will also act to protect and enhance competition in upstream and downstream markets.

We also consider the general principles of non-discrimination and independence should be moved from Part 3 (Ring fencing) of the 2014 DAU to Part 2 of the 2014 DAU (and inserted into the intent clause of Part 2). This will indicate to all stakeholders the importance of the non-discrimination provisions and that they act to underpin the operations of the entire undertaking, not just the ring fencing provisions.

In addition, we propose that the drafting in the non-discrimination and independence provisions of the 2014 DAU make clear that the existence of these provisions does not derogate in any way from Aurizon Network's obligations under the QCA Act.

Intent versus objective

We have also given consideration to the appropriateness, or otherwise, of the heading and first line of clause 2.2 of the 2014 DAU. The clause is headed 'Intent' and the first line begins with the words:

The intent of this Undertaking is to

Our view is that the importance of the clause in influencing interpretation of the rest of the 2014 DAU will be enhanced if the references to 'intent' are replaced with 'objective' and it is made clear that the objective cannot be limited in any way. Thus, our Draft Decision is to require the heading of clause 2.2 to be amended to 'Objective' and the first line to be amended to begin:

The objective of this Undertaking is, without limitation, to

In addition, our Draft Decision also requires inclusion of drafting making clear that the undertaking must be interpreted in a manner that best achieves its objective, subject to the object of Part 5 of the QCA Act (section 69E).

Interpretation

We also consider the intent of the 2014 DAU can be further clarified by including an additional clause providing greater guidance on interpretation.

Our Draft Decision is to require a new clause 2.3 to be included in the 2014 DAU. This clause provides that the undertaking must:

- be interpreted in a manner that best achieves the objectives set out in the Objectives clause, subject to section 69E of the QCA Act
- also be interpreted in a manner that best gives effect to the objective of Part 5 of the QCA Act, as specified in section 69E.

Draft Decision

3.1 Our Draft Decision is to refuse to approve Aurizon Network's proposed Intent clause of the 2014 DAU. We would approve arrangements with amendments to:

- (a) refer to the 'non-discriminatory' negotiation of access agreements**
- (b) provide that the provisions of the undertaking be applied consistently, except where the undertaking 'expressly' provides otherwise**
- (c) include a clause similar to the non-discriminatory treatment clause that was included in the 2010 AU, with some amendments for clarity and to ensure it is fit-for-purpose for the 2014 DAU regulatory framework**
- (d) provide that the general principles of non-discrimination and independence include that Aurizon Network will not unfairly discriminate in favour of: ports or coal mines in central Queensland in which the Aurizon Group holds an interest; or third-parties which have commercial agreements with related party above-rail operators**
- (e) move the general principles of non-discrimination and independence from Part 3 to Part 2**
- (f) include a heading for clause 2.2 of 'Objective' and include the words 'The objective of this Undertaking is, without limitation, to' at the beginning of the clause**
- (g) include a new 'Interpretation' clause (as clause 2.3).**

3.4 Scope of the undertaking

3.4.1 Aurizon Network proposal

Clause 2.3(a) of Part 2 of Aurizon Network's 2014 DAU states that:

This Undertaking provides only for the negotiation and provision of Access and is not applicable to the negotiation or provision of services other than Access.

The 2010 AU included the following provision (see cl.2.4(a) of that undertaking):

Subject to Clauses 2.4(b) to (f), this Undertaking provides only for the negotiation and provision of access.

Clauses 2.4(b) to 2.4(f) of the 2010 AU are largely replicated (i.e. with minor drafting changes) in the 2014 DAU, as follows (clause references refer to the 2014 DAU):

- access holders are responsible for the provision of services (other than access) required for the operation of train services (cl.2.3(b)(i))
- access holders are also responsible for the necessary approvals from the owners of land on which rail infrastructure is situated, if it is not owned by Aurizon Network or Aurizon Network does not have legal right to authorise access to the land (cl.2.3(b)(ii))
- nothing in the undertaking can require Aurizon Network to act in a way that is inconsistent with its passenger priority or preserved train path obligations (cl.2.3(c))
- nothing in the undertaking can require Aurizon Network or another party to vary, or act inconsistently, with an existing access agreement or train operations agreement (cl.2.3(d))
- nothing in the undertaking affects the rights of Aurizon Network under the QCA Act (cl.2.3(e))

- the undertaking will not apply to the extent it is inconsistent with an access agreement or train operations agreement (cl.2.3(f))
- provisions related to the supply and sale of electricity are included (cls.2.4(a) and 2.4(b)) – these are discussed in Section 3.5 of this Draft Decision.

3.4.2 Stakeholders' position

The QRC said the scope of the 2014 DAU should be broadened to also include other matters addressed in the undertaking. It said restricting the scope of the 2014 DAU (to access rights only) unreasonably restricts the dispute resolution mechanisms available to parties with respect to ancillary matters which effectively fall within the scope of the undertaking. It added that the current scope provision misrepresents the true scope of the subject matter of the undertaking.⁴⁴

The QRC considered this could be clarified by adding the following words to the beginning of clause 2.3(a):

*Except as provided for in this Undertaking.*⁴⁵

The QRC also proposed that clause 2.3(e) of the 2014 DAU be removed.⁴⁶ Clause 2.3(e) says that:

Nothing in this Undertaking affects the rights of Aurizon Network under the Act.

This clause is similar to a provision that was included in the 2010 AU (see cl.2.4(f) of that undertaking).

3.4.3 QCA analysis and Draft Decision

We agree with the QRC that the scope of the undertaking should be considered to include any matter that is addressed in the 2014 DAU. The proposed clause 2.3(a) in the 2014 DAU appears to seek to unreasonably restrict the scope, including by limiting the ability of access seekers and access holders to effectively use the undertaking's dispute resolution mechanisms.

Our Draft Decision is to reject Aurizon Network's proposed clause 2.3(a) of its 2014 DAU and instead require additional drafting to be included to clarify that all matters addressed in the undertaking are considered to be within the scope of the undertaking.

Our Draft Decision is that the words 'Except where expressly stated to the contrary' should also be included at the beginning of clause 2.3(a) of the 2014 DAU. We consider this proposed change to be important as it will provide greater transparency for stakeholders regarding the scope, coverage and operations of the 2014 DAU. We also propose that similar wording be included in clause 2.3(f) of the 2014 DAU, which relates to inconsistency between the undertaking and access agreements or TODs.

We propose to accept the main elements of clause 2.3(e) of the 2014 DAU as proposed by Aurizon Network, as we consider this clause to be a statement of fact regarding rights under the QCA Act, which does not negatively impact on the scope of the undertaking. However, for

⁴⁴ QRC, 2014 DAU, sub. no. 42: 10

⁴⁵ QRC, 2014 DAU, sub. no. 31: 2

⁴⁶ QRC, 2014 DAU, sub. no. 31: 2

clarity and the avoidance of doubt, we consider the clause should also refer to the rights under the Act of parties other than Aurizon Network.⁴⁷

Draft Decision

3.2 Our Draft Decision is to refuse to approve Aurizon Network's proposed Scope clause of the 2014 DAU. We would approve arrangements with amendments to:

- (a) include the words 'Except where expressly stated to the contrary' at the beginning of clauses 2.3(a) and 2.3(f) (now cls.2.5(a) and 2.5(f) in our marked up drafting)**
- (b) provide for clause 2.3(e) (cl.2.5(e) in the marked up drafting) to read: 'Nothing in this Undertaking affects the rights of Aurizon Network or other parties under the Act'.**

3.5 Supply and sale of electricity

3.5.1 Aurizon Network proposal

Part 2 of Aurizon Network's 2014 DAU provides that:

- to the extent Aurizon Network sells or supplies a related operator with electricity, it cannot refuse to sell or supply electricity to another access seeker or access holder. However, the sale or supply of electricity is not part of access and, except as expressly referred to in the undertaking, is not subject to the provisions of the undertaking (cl.2.4(a))
- Aurizon Network will not be obliged to sell or supply electricity to an access seeker or access holder or to agree to do so: if it is not lawfully entitled to; or on terms that would be unreasonable or uncommercial (cl.2.4(b)).

These clauses largely mirror clauses in the 2010 AU, but they did not appear in the 2013 DAU.

3.5.2 Stakeholders' position

The QRC said the 2014 DAU should include an absolute obligation for Aurizon Network to supply electricity to an access seeker or access holder, as it is not practical for access seekers or access holders to procure their own electricity. It supplied proposed drafting it considered would achieve this outcome. It emphasised it did not consider this means the supply of electricity becomes part of access.⁴⁸

Anglo American was concerned that Aurizon Network is only obliged to sell and supply electricity to third party operators so as long as it continues to supply a related operator in connection with access. It was also concerned that there is no definition of what terms might be deemed by Aurizon Network to be 'unreasonable or uncommercial' for the purposes of clause 2.4(b)(ii) of the 2014 DAU. It submitted that the most appropriate method of dealing with this issue is to require Aurizon Network to supply electricity on a cost pass-through basis.⁴⁹

Anglo American said the 2014 DAU should also establish a series of principles relating to electricity supply and sale, which:

⁴⁷ We note that, due to other amendments, clause 2.3 of the 2014 DAU is now clause 2.5 in the marked changes to Part 2 attached to this Draft Decision.

⁴⁸ QRC, 2014 DAU, sub. no. 42: 11

⁴⁹ Anglo American, 2014 DAU, sub. no. 7: 17-19

- apply for all points of connection and load levels across the CQCN
- provide for the monitoring and management of all connection points
- provide safety and other technical standards, and also apply appropriate and prudent design levels for third party connectors
- outline terms and conditions that could be agreed in any supply contract entered into by third party suppliers.⁵⁰

Anglo American also said that, at the very least, refusal to supply electricity should be subject to notice periods (of two years or greater) to take account of the time and expense that would be required in order for a user to ensure the connection of third party supply of electricity.⁵¹

Asciano said it recognises that the sale of electricity is not governed by the access undertaking, however it believes Aurizon Network should provide a commitment that the supply and sale of electricity to third party operators should be on identical terms to the supply and sale to Aurizon Network's related party operator, and that the terms should be commercial.⁵²

3.5.3 QCA analysis and Draft Decision

Our Draft Decision is to approve Aurizon Network's 2014 DAU proposal, as it relates to the supply and sale of electricity.

We note that Aurizon Network's 2014 DAU, in large part, replicates the provisions relating to the supply and sale of electricity that were contained in the 2010 AU. We consider this represents a significant improvement on the 2013 DAU.

Terms and conditions for supply and sale of electricity

We note the 2014 DAU provides that, if Aurizon Network supplies or sells electricity to its related operator, it must agree to also supply or sell electricity to other access seekers or access holders (or a nominated railway operator). This contrasts with the 2013 DAU, which merely provided for Aurizon Network to supply or sell electricity to access holders or train operators if it agreed to do so on terms acceptable to it and which were reasonable.

We understand Asciano's concern that the 2014 DAU does not explicitly require supply or sale of electricity to third parties to be on identical terms as supply and sale to Aurizon Network's related party operator. However, we consider the obligation to supply or sell electricity to third parties if it is supplied or sold to the related operator, combined with the unfair discrimination provisions in the 2014 DAU and the QCA Act, should be sufficient to ensure discrimination on this basis cannot occur. Additional safeguards are available if dispute resolution mechanisms apply (discussed in Section 3.6).

We also understand the rationale of the QRC's and Anglo American's preference for an absolute obligation to be placed on Aurizon Network to supply and sell electricity to access seekers and access holders, and Anglo American's view that principles for supply and sale should be established. However, it is not clear that the supply and sale of electricity falls within the declaration under the QCA Act (the terms of the declaration are discussed further in Section 3.7.3 below). We note, in this context, that both the QRC and Asciano have conceded that supply and sale of electricity may not be part of provision of access to the declared service.

⁵⁰ Anglo American, 2014 DAU, sub. no. 7: 18

⁵¹ Anglo American, 2014 DAU, sub. no. 7: 19

⁵² Asciano, 2014 DAU, sub. no. 22: 29

That said, this does not preclude Aurizon Network from nominating to include provisions relating to the supply and sale of electricity in the 2014 DAU, as it has done.

Notice period for decision to cease supply

We are not convinced of the need for the undertaking to include lengthy notice periods relating to any decision by Aurizon Network to cease supplying electricity to train operators (for example, if it considers the terms of supply have become unreasonable or uncommercial). In that context, we note that supply and sale of electricity will continue to be governed by existing access agreements for the course of those agreements and that, as indicated above, Aurizon Network must agree to supply electricity to other access seekers or holders if it supplies it to its related operator.

Draft Decision

3.3 Our Draft Decision is to approve Aurizon Network's 2014 DAU proposal, as it relates to supply and sale of electricity.

3.6 Electricity dispute resolution

3.6.1 Aurizon Network proposal

Part 2 of Aurizon Network's 2014 DAU does not include a specific clause providing a dispute resolution mechanism for disputes relating to the supply and sale of electricity.

The 2010 AU did include such a clause. Clause 2.4(e) of that undertaking stated that:

If a Dispute arises between an Access Holder, a Nominated Railway Operator or an Access Seeker and QR Network regarding a refusal by QR Network to sell or supply electric energy (or procure such a sale or supply from a QR Party) or the proposed terms and conditions on which QR Network (or a QR Party) offers to sell or supply electric energy to the Access Holder, Nominated Railway Operator or Access Seeker, the Dispute may be referred to Dispute resolution in accordance with Clause 10.1.

3.6.2 Stakeholders' position

The QRC proposed that the 2014 DAU be amended to include a dispute resolution mechanism for disputes arising in respect of electricity supply, as provided for in the 2010 AU. It said that, if there is no ability to dispute a wrongful failure by Aurizon Network to enter into an electricity supply agreement, there is no effective obligation on Aurizon Network.⁵³ Both Anglo American⁵⁴ and Asciano⁵⁵ agreed with the QRC that a dispute resolution mechanism relating to the supply and sale of electricity should be included in the 2014 DAU.

3.6.3 QCA analysis and Draft Decision

We consider it is important that any matter addressed in the undertaking should be subject to dispute resolution, and that the ability for supply and sale of electricity to be disputed be made clear.

⁵³ QRC, 2014 DAU, sub. no. 42: 11

⁵⁴ Anglo American, sub. no. 7: 20

⁵⁵ Asciano, sub. no. 22: 65

Our Draft Decision is that a clause similar to the dispute resolution clause relating to supply and sale of electricity that was included in the 2010 AU (i.e. cl.2.4(e) of that undertaking) should be included in the 2014 DAU.

Our view is that it is important that matters included in the undertaking, which are subject to Aurizon Network discretion and negotiation with access seekers and/or access holders, should be subject to effective dispute resolution mechanisms. Without the inclusion of a specific clause making clear that the supply and sale of electricity is subject to the dispute resolution mechanisms contained in Part 11 of the 2014 DAU, it is not clear that these mechanisms apply to this service. Our Draft Decision is that the requirements of the 2010 AU, with regard to this matter, should also be included in the 2014 DAU.

Draft Decision

3.4 Our Draft Decision is to refuse to approve Aurizon Network's 2014 DAU proposal, as it relates to electricity dispute resolution. We would approve amendments to include specific provision for dispute resolution regarding supply and sale of electricity, as set out in the marked changes to Part 2 of this Draft Decision.

3.7 Associated services

3.7.1 Aurizon Network proposal

Aurizon Network's 2014 DAU does not include a definition of 'Associated Services', nor any obligations relating to such services. This is consistent with the 2010 AU. In the UT3 period, Aurizon Network said these services were unregulated, and has been charging customers for them outside of the regulatory framework.

In its response to submissions on its 2013 DAU, Aurizon Network said it considers the undertaking only applies to negotiation and provision of access to the declared service, and is not applicable to negotiation or provision of services other than access (except for supply and sale of electricity, which it has elected to include). Aurizon Network said Associated Services were outside the scope of the regulatory regime.⁵⁶

3.7.2 Stakeholders' position

The QRC and Anglo American considered that the 2014 DAU should be amended to include a definition of Associated Services, which identifies ancillary services for which it is only practicable for access holders to engage Aurizon Network.⁵⁷ Their detailed comments are summarised in the table below.

⁵⁶ Aurizon Network, 2013 DAU, sub no. 77: 44

⁵⁷ QRC, 2014 DAU, sub. no. 42: 11; Anglo American, 2014 DAU, sub. no. 7: 14

Table 2 Stakeholders' comments on Associated Services

<i>Stakeholder</i>	<i>Comments</i>
QRC	<p>For these services, access seekers and access holders face a situation where engagement of another service provider would result in significant inefficiencies or where engagement of an alternative is not possible. The 2014 DAU should thus include an obligation on Aurizon Network to perform these services upon request and to not unreasonably delay performance of such services.⁵⁸</p> <p>Associated Services should be exhaustively defined, with matters to include:</p> <ul style="list-style-type: none"> • Rail Infrastructure Management and train control services for rail spurs • level and other crossings – i.e. services including maintenance and upgrades to existing level crossings and the design and construction of new crossings • land leases – i.e. leasing to customers of corridor land and land owned by Aurizon Network, within balloon loops at mine sites or port terminals • design, scope and standard reviews – i.e. to the extent Aurizon Network requires connecting infrastructure to comply with minimum standards, provision of review and comment services.⁵⁹ <p>Access holders should reimburse Aurizon Network for the actual prudent costs of performing Associated Services, plus a margin approved by the QCA. Any approved margin would be based on the degree of risk borne by Aurizon Network under the service agreement, having regard to market practices. Prudence of underlying costs would be agreed between the parties or, where agreement cannot be reached, determined by the QCA or an expert.⁶⁰</p>
Anglo American	<p>Anglo American drew attention to clause 3.4(b) of the 2014 DAU, which describes the access-related functions to be performed by Aurizon Network (this clause is discussed further in Chapter 4). It said this clause should be widened to include Associated Services - all services provided by Aurizon Network relating to accessing the network to transport coal and which are non-contestable or weakly contestable.⁶¹</p> <p>Anglo American said the purpose of regulating a natural monopolist is to prevent it from abusing its market power. Allowing Aurizon Network to place non-contestable, or weakly contestable, services outside the scope of the undertaking would allow it to determine its own margin without competition, thereby undermining regulation.⁶²</p> <p>The definition of Associated Services should be inclusive, allowing the QCA to determine further services over time. Examples of Associated Services include:</p> <ul style="list-style-type: none"> • electricity supply and sale • rail relocation and related construction and maintenance services (for private spurs and loops) • Transfer Facilities Licences regarding load-out interface requirements, load profiling, dust veneering and other matters Aurizon Network has sole authority over, especially where the producer does not own the spur or loop • capacity modelling – specifically dynamic modelling services such as system capacity and private infrastructure interface.⁶³

⁵⁸ QRC, 2014 DAU, sub. no. 42: 11

⁵⁹ QRC, 2014 DAU, sub. no. 42: 12

⁶⁰ QRC, 2014 DAU, sub. no. 42: 12

⁶¹ Anglo American, 2014 DAU, sub. no. 7: 15

⁶² Anglo American, 2014 DAU, sub. no. 7: 15

⁶³ Anglo American, 2014 DAU, sub. no. 7: 15

3.7.3 QCA analysis and Draft Decision

Our Draft Decision is to approve Aurizon Network's proposal to not include a definition of, or obligations related to, Associated Services in the 2014 DAU.

We understand the rationale underpinning the concerns about Associated Services expressed by the QRC and Anglo American. In particular, we accept that some of the examples of services identified may have limited contestability or be services where Aurizon Network's economies of scale and scope may mean they are the lowest cost practical supplier.

However, we note the examples identified by the QRC and Anglo American appear to primarily relate to services provided on private infrastructure (i.e. infrastructure not owned or operated by Aurizon Network). This suggests provision of these services may not be covered by the declaration in the QCA Act.

We also note that at least some of the examples of Associated Services identified by the QRC and Anglo American appear to be theoretically contestable. For example:

- Rail infrastructure management services and train control services on private infrastructure, which can be provided by entities other than Aurizon Network
- rail relocation and related construction and maintenance services (for private spurs and loops), which can be provided by independent construction and maintenance service providers
- capacity modelling, which can be conducted privately by various engineering firms – noting this does not impinge on requirements regarding capacity reviews (which are discussed in Chapter 10 of this Draft Decision)
- level and other crossing services, which can also be provided by outside parties.

Given this, our Draft Decision is to not require Aurizon Network to include a definition of, and obligations related to, Associated Services in the 2014 DAU.

We note Aurizon Network is able to voluntarily include in the undertaking matters that may extend beyond the scope of the declaration (e.g. obligations relating to the supply and sale of electricity). We encourage Aurizon Network to continue to discuss issues regarding Associated Services with its stakeholders, with a view to considering whether agreement could be reached to include additional obligations in the undertaking.

Draft Decision

3.5 Our Draft Decision is to approve Aurizon Network's proposal to not include a definition of, or obligations related to, Associated Services in the 2014 DAU.

3.8 Incentive mechanism

3.8.1 Aurizon Network proposal

Aurizon Network's 2014 DAU does not include, or provide for development of, formal incentive mechanisms. By contrast, the 2010 AU included provisions relating to the potential development and approval of a Draft Incentive Mechanism. Such a mechanism was intended to provide an incentive framework giving Aurizon Network an incentive to operate, and invest in, the rail infrastructure efficiently and to do so in a way that promotes efficiency of a coal supply chain.

3.8.2 Stakeholders' position

Asciano said there should be an incentive mechanism prescribed in the 2014 DAU to promote efficiency in the supply chain. It was concerned that the 2014 DAU does not have sufficient performance related incentives in place to drive efficient behaviours by Aurizon Network. It said it strongly supports inclusion of a requirement in the undertaking for Aurizon Network to develop and implement an incentive mechanism, with such a mechanism to include:

- relevant performance metrics and KPIs which are linked to performance, contracted access entitlements and regulatory framework outcomes (such as system allowable revenue and reference tariffs)
- linkages to individual operators rather than whole of system performance – this is required to ensure that differential treatment of operators (and other coal chain users) is not hidden by aggregated performance metrics
- a degree of symmetry between the incentives linked to over-performance and under-performance.

Asciano also said an incentive mechanism requires a transparent and agreed information base, methodology and target values. It added that the mechanism also requires the development of an independent audit process to audit the operation of the incentive mechanism.⁶⁴

3.8.3 QCA analysis and Draft Decision

Our Draft Decision is to include a process for development and approval of an incentive mechanism in the undertaking.

We note the 2010 AU (cl.2.6) required Aurizon Network to:

- consult with access holders, access seekers, customers and affected infrastructure service providers in relation to how the revenue cap adjustment provisions might be amended to provide an incentive framework (as described above)
- submit a proposed incentive mechanism to the QCA for consideration within one year of the approval date of the 2010 AU.

Aurizon Network submitted a proposed incentive mechanism to us in 2012. Consultation on the proposed mechanism was conducted with stakeholders. Stakeholders considered the proposed mechanism would not be effective, and also considered they were not sufficiently consulted in its development. Stakeholders nonetheless maintained in-principle support for a more fully developed incentive mechanism to be applied to provision of the declared services.⁶⁵

Aurizon Network has subsequently acknowledged that its proposed Draft Incentive Mechanism was not supported by most respondents to our consultation process.⁶⁶ That said, we have not made a decision to either approve or reject the proposed Draft Incentive Mechanism, and we consider it is better dealt with as part of UT4.

We agree with stakeholders' view that a well developed incentive mechanism would be beneficial for the 2014 DAU and, if one is to be developed, should include:

⁶⁴ Asciano, 2013 DAU, sub. no. 43: 36-39

⁶⁵ See relevant documents at <http://www.qca.org.au/Rail/Aurizon/Intro-to-Aurizon/2010-Access-Undertaking/Variations/Proposed-Incentive-Mechanism/In-Progress/Proposed-Incentive-Mechanism>

⁶⁶ Aurizon Network, 2014 (c): 14

- performance metrics and KPIs that are linked to performance and contracted entitlements
- linkages to individual operators
- symmetry between incentives linked to over-performance and under-performance.

We also consider that an incentive mechanism needs to:

- be simple and relatively inexpensive to administer
- be based on properly developed baselines, against which changes in performance can be measured
- be transparent to all stakeholders
- ensure equity among operators and customers
- at least for an initial period, not increase or decrease system allowable revenues by more than five per cent
- promote efficient operation of the rail infrastructure and of the wider coal supply chain
- be appropriately linked to the relevant reporting requirements contained in the undertaking, including the proposed maintenance performance incentive discussed in our Draft Decision on Aurizon Network's MAR⁶⁷
- be effective within the regulatory framework established by the approved undertaking.

We consider that an incentive mechanism that meets these criteria will act to:

- encourage efficient use of, and investment in, the rail infrastructure
- promote competition in upstream and downstream markets
- enhance customer engagement
- improve transparency and accountability in provision of the declared service.

We have not been prescriptive about how the Incentive Mechanism should be developed. We consider this can best be achieved by Aurizon Network working in collaboration with its stakeholders.

Draft Decision

3.6 Our Draft Decision is to refuse to approve Aurizon Network's 2014 DAU proposal, as it relates to the incentive mechanism. We would approve arrangements with amendments to include a process providing for the development of a draft incentive mechanism.

3.9 Other specific drafting

3.9.1 QCA analysis and Draft Decision

In addition to the issues discussed above, stakeholders also proposed a number of additional specific amendments to the drafting contained in Part 2 of the 2014 DAU. With regard to two of these, we consider the proposed amendments will provide additional clarity and certainty to

⁶⁷ QCA, *Draft Decision: Aurizon Network's 2014 Draft Access Undertaking - Maximum Allowable Revenue*, September 2014: 111-113

the Intent and Scope part of the undertaking. Our Draft Decision is to accept the following proposed amendments:

- addition of the word 'flexible' to the list of descriptors of the processes for access negotiations and utilisation of capacity contained in clause 2.2(b)(i) (Asciano)⁶⁸ —we consider addition of flexible to the descriptors (expeditious, efficient, timely, commercial and non-discriminatory) will enhance the potential for this clause to support effective negotiation and stakeholder engagement
- inclusion of a requirement in clause 2.3(b)(ii)⁶⁹ for Aurizon Network to notify access holders in writing if it is not the owner of, or does not have a legal right to authorise access to, land to which the access holder is seeking access (QRC).⁷⁰

We also propose that the requirements relating to the Ultimate Holding Company Support Deed be moved from Part 3 (Ring fencing) to Part 2 of the 2014 DAU. This reflects our view that this commitment at the holding company level to avoid anti-competitive and discriminatory behaviour is more than just a ring fencing matter, and should encompass the entire undertaking. This is discussed in greater detail in Chapter 4 of this Draft Decision, along with amendments we are proposing to the Ultimate Holding Company Support Deed itself.

Draft Decision

3.7 Our Draft Decision is to refuse to approve Aurizon Network's proposed clauses 2.2(b)(i) and 2.3(b)(ii) of the 2014 DAU. We would approve arrangements with amendments to include:

- (a) the word 'flexible' in the list of descriptors of the processes for access negotiations and utilisation of capacity (cl.2.2(b)(i))**
- (b) a requirement for Aurizon Network to notify access holders in writing if it is not the owner, or does not have a legal right to authorise access to, land to which the access holder is seeking access (this is cl. 2.5(c) in our marked-up drafting)**
- (c) movement of the requirements relating to the Ultimate Holding Company Support Deed from Part 3 to Part 2 (as cl.2.6 in our marked-up drafting).**

⁶⁸ Asciano, 2014 DAU, sub. no. 22: 28

⁶⁹ Clause 2.5(b)(ii) in our marked up drafting

⁷⁰ QRC, 2014 DAU, sub. no. 42: 10-11

4 RING FENCING

Aurizon Network has proposed a significant rewrite of the 2010 AU ring fencing arrangements for the 2014 DAU. Aurizon Network has said these changes are necessary to reflect the now privatised nature of its business. Stakeholders consider the proposed arrangements to be inadequate. There is also a view that the 2010 AU arrangements still fall short of an effective ring fencing arrangement.

Our Draft Decision is not to accept Aurizon Network's 2014 DAU ring fencing arrangements. Instead, we will propose using the 2010 AU ring fencing principles as a base, and enhancing them to provide a clearer set of safeguards regarding confidential information flow and Aurizon Network staff movements by:

- *strengthening the provisions around the management and release of confidential information, including, but not limited to:*
 - *strengthening the role of the Ultimate Holding Company Support Deed and confidentiality agreement provisions*
 - *maintaining registers of who has been provided information and the process for making any decisions using such information; and having this information available for audit*
 - *inclusion of tiered employee training measures regarding the treatment of confidential information*
 - *requiring secondments/transfers of employees between Aurizon Network and an Aurizon party to be notified to the QCA prior to the secondment/transfer being made*
 - *requiring Aurizon Network to use a different email address to the remainder of Aurizon Holdings, providing clearer separation when employees do transfer.*
- *maintaining the 2010 AU financial separation/accounting principles as well as Aurizon Network's ring fencing obligations in respect of rail infrastructure.*

Significant restructuring has occurred within the Aurizon Group since the 2010 AU commenced. The Draft Decision takes the approach that the 2014 DAU should allow for Aurizon Network to structure itself in a manner which supports its legitimate business interests in the provision of the declared service, however, in doing so it must be able to demonstrate that the business is committed to its ring fencing obligations.

The detailed drafting of Parts 2, 3, 10 and Schedules D and I attached to this Draft Decision is consistent with our approach and shows all of the amendments required.

4.1 Introduction

Aurizon Network is part of a vertically integrated group of companies. This group also includes the dominant supplier of above-rail services in the CQCN. In this context, Aurizon Network's ring fencing regime has to be sufficiently robust to ensure Aurizon Network cannot use its monopoly power or receive confidential information, knowingly or unknowingly, in a manner that favours

its or the Aurizon Group's strategic intent, to the detriment of competition in upstream and downstream markets.⁷¹

The existing ring fencing arrangements that apply to Aurizon Network (in the 2010 AU) are broadly covered in the table below.

Table 3 Measures covered in the 2010 AU ring fencing regime

<i>Measure</i>	<i>Purpose</i>
Information separation	Processes for handling of confidential information
Operational separation	Measures to separate Aurizon Network's operations from the Aurizon Group
Functional separation	Measures to separate Aurizon Network functions into access and non-access functions
Management separation	Measures to separate management of Aurizon Network from the Aurizon Group
Employee separation	Measures to separate Aurizon Network's employees from the Aurizon Group
Accounting separation	Measures to separate Aurizon Network's accounts from the Aurizon Group
Compliance measures	Mechanisms for dealing with compliance and complaint handling
Decision making	Principles for making and recording how decisions are made

Aurizon Network's proposed ring fencing arrangements for UT4 are set out in Part 3 of the 2014 DAU and Schedules D and I.

Aurizon Network's 2013 DAU and subsequent 2014 DAU, broadly rewrite the ring fencing regime contained in the 2010 AU. Aurizon Network considers its proposals meet its core ring fencing obligations, but in a more streamlined and cost effective manner. Stakeholder response to this re-write has been resoundingly negative. This is primarily because the proposals in both the 2013 DAU and 2014 DAU are perceived by stakeholders to weaken the existing ring fencing provisions at a time when Aurizon Network has communicated its strategic intent to leverage the benefits it obtains from vertical integration. Stakeholders also suggest that existing 2010 AU ring fencing provisions are not sufficiently robust.

Going forward the key issue is whether the existing ring fencing regime is fit for purpose given the evolution of the Aurizon Network, the Aurizon Group and its strategic intent.

We consider an effective ring fencing regime is critical to promoting effective competition in upstream and downstream markets and customer confidence and trust in Aurizon Network's actions. We are of the view that Aurizon Network's 2014 DAU proposals are unlikely to meet these requirements.

This chapter outlines how we have come to this Draft Decision and the way in which we consider it appropriate for Aurizon Network to amend the ring fencing provisions in the 2014 DAU. In making our Draft Decision, we have deliberately taken a conservative and robust approach when developing amendments to address the issues we have identified with the ring fencing regime. We acknowledge these amendments strengthen existing ring fencing requirements and unwind some of the flexibility afforded Aurizon Network in the 2010 AU. We consider this is appropriate given the importance for ring fencing arrangements to remain relevant and effective.

⁷¹ Examples of such behaviour include preferential treatment to upstream or downstream operations of the Aurizon Group and related entities, the sharing of confidential information and personnel with access to, or knowledge of, this information between related entities; as well as cost shifting, cross-subsidisation and price/margin squeezing.

However, we are open to further evidence-based input from Aurizon Network and stakeholders as to whether a more flexible approach can be accommodated, while still addressing the issues we have identified with the 2014 DAU ring fencing regime.

4.2 Overview

Aurizon Network's 2014 DAU is, in broad terms, a rewrite of the 2010 AU provisions. This section provides a summary of Aurizon Network's reasoning and stakeholders' overarching views. Issues of detail are considered in subsequent sections of this chapter.

4.2.1 Aurizon Network proposal

Aurizon Network said its core ring fencing obligations had remained largely unchanged since UT1. Aurizon Network also noted that, at each regulatory review, new provisions have been added in response to concerns of a hypothetical nature, resulting in an unnecessarily complex and unwieldy regime.⁷²

Aurizon Network said its intent in the 2014 DAU was to streamline the ring fencing regime so it is effective, widely understandable and contributes to a low-cost compliance culture.⁷³ Aurizon Network said the 2014 DAU contains, in substance, the same principal controls as existed in prior undertakings, with obligations clarified or strengthened.⁷⁴ In its view, the 2014 DAU creates a workable and balanced framework that addresses key competition risks and ensures a level playing field.⁷⁵

Aurizon Network said it recognises ring fencing is important to the way the Aurizon Group is structured, how it operates, and how it creates value for its shareholders and customers. Aurizon Network viewed its proposals as seeking to achieve a ring fencing regime that is clear, readily understandable and workable for its large number of employees, contractors and other Aurizon parties.⁷⁶

4.2.2 Stakeholders' positions

Stakeholders did not support Aurizon Network's 2014 DAU ring fencing proposals.

Stakeholders said Aurizon Network's 2014 DAU proposals represent a weaker ring fencing regime than that contained in the 2010 AU. Stakeholders were of the view the 2014 DAU proposal is almost entirely unchanged compared with the 2013 DAU. As such, the 2013 DAU stakeholder comments and submissions including proposed redrafting of the ring fencing provisions in Part 3 of the undertaking are equally relevant to the 2014 DAU assessment.⁷⁷

Stakeholders also said the ring fencing regime in the 2014 DAU is inadequate to regulate the activities of a privatised integrated business whose stated goals are to leverage its integrated model.⁷⁸ Announcements of Aurizon Group's intention to rely on its integrated model to leverage business efficiencies and its desire to increase involvement in other multi-user

⁷² Aurizon Network, 2013 DAU, sub. no.2:55

⁷³ Aurizon Network, 2013 DAU, sub. no. 2:55

⁷⁴ Aurizon Network, 2013 DAU, sub. no. 2:54

⁷⁵ Aurizon Network, 2013 DAU, sub. no. 2:55

⁷⁶ Aurizon Network, 2013 DAU, sub. no. 2:55

⁷⁷ QRC, 2014 DAU, sub. no. 42:13; BMA, 2014 DAU, sub. no. 23:3; Asciano, 2014 DAU, sub no 22:5,10; Anglo American, 2014 DAU, sub no 7:5

⁷⁸ QRC, 2013 DAU, sub no 84:20-21; QRC, 2014 DAU, sub no 42:14

infrastructure upstream and downstream of the CQCN heightened these concerns.⁷⁹ In particular, Aurizon Network's proposed arrangements did not adequately address the numerous actual or potential conflicts of interest between Aurizon Network and related parties or operators given increasing involvement in above-rail, ports and non-regulated rail infrastructure.

Overall, stakeholders said the 2014 DAU is less acceptable than the ring fencing and non-discrimination provisions in the 2010 AU.⁸⁰ They also said a lack of confidence remained in the current ring fencing regime and even more so in the proposed 2014 DAU ring fencing regime.⁸¹ They noted that Aurizon Network had proposed substantial changes rather than learning from other regimes and building on the 2010 AU.⁸²

4.2.3 Legislative framework and QCA assessment approach

Legislative framework

We are required to assess Aurizon Network's ring fencing proposals having regard to the factors in section 138(2) of the QCA Act, as set out in Chapter 2 of this Draft Decision.

In the context of assessing Aurizon Network's proposed ring fencing regime and protections against anti-competitive or discriminatory behaviour, we must have regard to the factors listed in section 138(2) and give them an appropriate level of weighting. Against this background, we consider:

- sections 138(2)(a), (b), (d), (e), (g) and (h) should be given more weight as they each raise important considerations from a ring fencing perspective
- section 138(2)(g) refers to the pricing principles mentioned in section 168A of the QCA Act, of which we consider sections 168A(a), (c) and (d) should be given more weight
- sections 138(2)(f) and 168A(b) should be given less weight, as they are not as practically relevant to our assessment of Aurizon Network's proposed ring fencing regime and protections against anti-competitive or discriminatory behaviour.

We have taken into account some additional considerations within section 138(2)(h) including:

- predictability – the regulatory arrangements should be as stable and predictable as possible given other objectives. Stability and predictability are likely to promote confidence in the regulatory arrangements and economic efficiency by reducing uncertainty associated with long-term investment decisions.

We also note section 137 of the QCA Act which contains two relevant provisions:

- section 137(1A)(a) requires that an access undertaking for a service owned or operated by a related access provider must include provisions for identifying, preventing and remedying conduct of the related access provider that unfairly differentiates in a material way between access seekers or users. The definition of 'material way' in the same section clarifies that this concept is directed at discrimination that may adversely affect competition

⁷⁹ Wesfarmers Curragh, 2013 DAU, sub. no. 76:2; Glencore, 2013 DAU, sub. no. 74:1-5; Freightliner, 2013 DAU, sub. no.75:1-2; BMA, 2013 DAU, sub. no. 41:1; Peabody, 2013 DAU, sub. no. 37:2; Anglo American, 2013 DAU, sub. no. 39:1,5; Vale, 2013 DAU, sub. no. 42:3; RTCA, 2013 DAU, sub no 73:12; QRC, 2013 DAU, sub. no. 46:31; Asciano, 2013 DAU, sub. no. 43:6,18-19

⁸⁰ Asciano, 2013 DAU, sub. no. 43:11, 15; Asciano, 2014 DAU, sub. no. 22:10

⁸¹ QRC, 2013 DAU, sub. no. 84:5, 7; QRC, 2014 DAU, sub. no. 42:13

⁸² RTCA, 2013 DAU, sub. no. 72:2

- section 137(2)(ea) clarifies that an access undertaking may include details of arrangements to be made by the owner or operator to separate the owner's or operator's operations concerning the service from other operations of the owner or operator concerning another commercial activity.

QCA assessment approach

We have applied the QCA Act in the context of the assessment criteria shown in the table below, when assessing the detailed ring fencing provisions Aurizon Network is proposing.

We also consider it important that the regime is not only effective, but is perceived by access seekers and access holders to be effective – raising important considerations of credibility. We consider that these assessment criterion best give effect to the weighting of the statutory factors we have identified above in the practical context of identifying a credible and effective ring fencing regime that achieves the objectives of Part 5 of the QCA Act.

Table 4 QCA approach to assessing effectiveness of the 2014 DAU ring fencing regime

<i>Assessment criterion</i>	<i>Rationale</i>
Does the regime support the objective of non-discrimination and competition in upstream and downstream markets?	This involves assessing whether the: <ul style="list-style-type: none"> • commitments to avoid discriminatory and anti-competitive behaviour • ultimate holding company deed have sufficiently strong provisions within them to be fit for purpose.
Is the management of confidential information and decision making principles credible and effective?	This involves assessing if the ring fencing regime: <ul style="list-style-type: none"> • protects confidential information from inappropriately flowing between the declared service and upstream or downstream activities or related parties • provides suitable decision making principles.
Are the operational and functional separation provisions credible and effective?	This involves assessing if the ring fencing regime effectively separates: <ul style="list-style-type: none"> • Aurizon Network's operations from the Aurizon Group • operations regarding the declared service from other operations.
Are the employee separation provisions credible and effective?	This involves assessing if the ring fencing regime: <ul style="list-style-type: none"> • places effective controls on staff movements between Aurizon Network and related parties.
Are the management separation provisions credible and effective?	This involves assessing if the ring fencing regime: <ul style="list-style-type: none"> • ensures the independence of management and Aurizon Network corporate decision making regarding the declared service from other commercial activities.
Are the accounting separation provisions credible and effective?	This involves assessing if the ring fencing regime effectively separates: <ul style="list-style-type: none"> • Aurizon Network's accounts from the Aurizon Group • the accounts, relating to operations associated with the declared service, from other operations.
Are the reporting, compliance and auditing provisions credible and effective?	This involves assessing if the ring fencing regime: <ul style="list-style-type: none"> • provides transparent, timely and meaningful information reporting • provides an effective compliance regime • includes a robust and transparent audit process.

In assessing the details of the ring fencing issues, we have also considered which is the most effective baseline to work from — either Aurizon Network's revised drafting of Part 3 in its 2014 DAU, or arrangements in the 2010 AU. In doing so, we have considered Aurizon Network's reasons for rewriting the ring fencing provisions, while also taking into account stakeholders' related comments, as discussed in the following section.

4.3 Reasons for rewriting the ring fencing provisions

4.3.1 Aurizon Network proposal

Aurizon Network provided various reasons to substantiate its overarching approach to ring fencing. These are outlined in the table below.

Table 5 Aurizon Network's ring fencing proposals—a summary of reasons for its approach

<i>Issue</i>	<i>Aurizon Network's reasons</i>
Legislative environment	<ul style="list-style-type: none"> • Prior to privatisation, the Queensland Government strengthened ring fencing obligations through legislation in the <i>Transport Infrastructure Act 1994</i>. This required an independent board and arms length dealings between Aurizon Network and its related operator. Aurizon Network said the ring fencing obligations in the QCA Act should supplement enforcement of statute, not supplant it, and said the QCA should not, and cannot, make a statute stricter than the legislature intended through imposing additional requirements in the access undertaking.⁸³ • Aurizon Network said the relevance of section 137(2)(ea)⁸⁴ of the QCA Act has lessened due to legal separation of Aurizon Network from its parent company. Aurizon Network said the QCA's focus, when considering ring fencing, resides in section 138(2) regarding the legitimate business interests of access providers, seekers, holders and users.⁸⁵ • Aurizon Network also said it is the service that is regulated, not all activities of the legal entity Aurizon Network Pty Ltd. Aurizon Network challenged the legal basis for ring fencing beyond declared services and suggested limits on imposing obligations.⁸⁶
Aurizon Network's legitimate business interests	<ul style="list-style-type: none"> • Aurizon Network said privatisation meant the Aurizon Group and Aurizon Network were no longer subject to mixed mandates of public ownership, having instead a predominant objective of advancing shareholders interests. Aurizon Network said this had implications for a regulatory framework that had previously too readily assumed Aurizon Network's commercial interest could be subordinated to the larger purpose of promoting development of Queensland coal mines. The 2014 DAU was an opportunity to develop a regulatory framework that balanced Aurizon Network's commercial interests with access seekers, holders and the public interest.⁸⁷
Vertical integration	<ul style="list-style-type: none"> • Aurizon Network said vertical integration produces tangible efficiency benefits that flow and promote the interests of access providers, access seekers and users as well as the public interest.⁸⁸ This creates powerful incentives to contribute to supply chain performance, compared with weak financial incentives for standalone network businesses.⁸⁹ Aurizon Network said efficiency benefits should be preserved by ring fencing, with the focus instead on guarding against cross-subsidy and confidential information misuse undermining competition.⁹⁰
Behavioural constraints	<ul style="list-style-type: none"> • Aurizon Network said access negotiations increasingly centre on producers rather than operators. As such, ring fencing should also change. Aurizon said it does not compete in the same market as producer access seekers, so anti-competitive concerns are not prominent.⁹¹ • Aurizon Network also said it is 'policed' by 20 of the largest Australian companies and users who are 'alive' to risks of Aurizon Network discriminating against third party

⁸³ Aurizon Network, 2013 DAU, sub. no. 2:60

⁸⁴ s 137(2)(ea) requires separating operations concerning a regulated service from another commercial activity

⁸⁵ Aurizon Network, 2013 DAU, sub. no. 2:59

⁸⁶ Aurizon Network, 2013 DAU, sub. no. 77:19-20

⁸⁷ Aurizon Network, 2013 DAU, sub. no 2:25

⁸⁸ Aurizon Network, 2013 DAU, sub. no. 2:57

⁸⁹ Aurizon Network, 2013 DAU, sub. no. 2:57

⁹⁰ Aurizon Network, 2013 DAU, sub. no. 2:57

⁹¹ Aurizon Network, 2013 DAU, sub. no. 2:57

<i>Issue</i>	<i>Aurizon Network's reasons</i>
	operators. As a result, the level of regulatory ring fencing intervention, to protect informed consumer interests, can be substantially less than in a retail context. ⁹²

4.3.2 Stakeholders' position

Stakeholders did not agree with Aurizon Network's reasons for its changed approach to ring fencing. The QRC said Aurizon Network had taken an overly restrictive and incorrect interpretation of the QCA Act and the intention of ring fencing. The QRC said it was open to us to impose a broader ring fencing regime and that a broader and more effective ring fencing regime was justified.⁹³

The QRC also said that narrow arguments in relation to the difference between separation of the 'service' as opposed to the 'business' lead to an inadequate ring fencing regime.⁹⁴ In this context, stakeholders said non-regulated activities undertaken by Aurizon Network should be limited to those directly related to core-access-related functions.⁹⁵

RTCA said privatisation was not a game changer. Private capital does not affect the economic or legal rationale for access regulation, while vertical integration increased the ability and incentive to discriminate, cost-shift, and cross-subsidise, as well as seek to avoid scrutiny by customer and regulator.⁹⁶

4.3.3 QCA analysis and Draft Decision

We intend to adopt the 2010 AU as the baseline from which to consider whether further change to ring fencing provisions is necessary. Our decision is based on the fact that we do not find Aurizon Network's stated reasons for its extensive revision of the ring fencing provisions, particularly those revisions which have the effect of diluting the effectiveness of the ring fencing regime, sufficiently convincing to choose the redrafted Part 3 of the 2014 DAU as the baseline. Our reasons are discussed below in the context of:

- the legislative environment
- Aurizon Network's legitimate business interests
- the benefits of vertical integration
- credible behavioural constraints
- evidence and practice in the 2010 AU.

Legislative environment

We agree with the QRC that Aurizon Network has taken an overly restrictive and incorrect interpretation of the QCA Act and the intention of ring fencing.

Section 137 of the QCA Act sets out what a draft access undertaking must, and can, include. Section 137(1A) of the QCA Act provides that an access undertaking for a service operated by an access provider, which provides itself or a related body corporate with access to that service,

⁹² Aurizon Network, 2013 DAU, sub. no. 2:58

⁹³ QRC, 2013 DAU, sub. no. 84:23; QRC, 2014 DAU, sub. no. 42:14

⁹⁴ QRC, 2013 DAU, sub. no. 84:22; QRC, 2014 DAU, sub. no. 42:15

⁹⁵ QRC, 2014 DAU, sub. no. 42:21-22; Asciano, 2013 DAU, sub. no. 82:5; Anglo American, 2014 DAU, sub. no. 7:13-17; Asciano, 2014 DAU, sub. no. 22:18, 29, 68-69

⁹⁶ RTCA, 2013 DAU, sub. no. 73:5

must include provisions for preventing and remedying conduct which unfairly differentiates between access seekers and users.

Further, section 137(2)(ea) of the QCA Act specifically provides that a draft access undertaking may include more general ring fencing provisions, as it provides for:

arrangements to be made by the owner or operator to separate the owner's, or operator's, operations concerning the service from other operations of the owner or operator concerning another commercial activity.

We are of the view that, based on sections 137 and 138 of the QCA Act, the adequacy of the ring fencing provisions is a relevant consideration when deciding whether or not to approve the 2014 DAU.

In the context of making this assessment under the QCA Act, Aurizon Network's legal separation from its parent company is not directly relevant. Nor do the obligations included in the *Transport Infrastructure Act 1994* limit our discretion when assessing the adequacy of the ring fencing provisions.

Aurizon Network's legitimate business interests

In assessing ring fencing provisions for the 2014 DAU, we must have regard to Aurizon Network's legitimate business interests.

As discussed in Chapter 2, we consider the 'legitimate business interests' of an owner or operator of a facility are those commercial interests of the owner or operator that, if catered for, would allow the owner or operator to recover its costs in providing the relevant service and to earn a regulated return on its invested capital.

The regulatory regime is designed to ensure this is the case — regardless of whether Aurizon Network is in private or public ownership. As such, it is not clear to us how Aurizon Network has been subject to a 'mixed mandate' due to public ownership or how its legitimate business interests have been subordinated in previous undertakings. Indeed, it is not obvious why any form of ring fencing regime is to the detriment of Aurizon Network's legitimate business interests.

Vertical integration

Aurizon Network has included a number of theoretical arguments regarding the interaction of vertical integration and ring fencing to support its 2014 DAU ring fencing proposals. We do not find these theoretical arguments convincing because:

- Aurizon Network has provided us no compelling evidence to demonstrate its premise that vertical integration provides it with efficiency gains in comparison to the costs it would face if it were a stand-alone entity. Aurizon Network has also provided us no substantive empirical analysis to suggest that any cost efficiencies realised are material and flow through to Aurizon Network's customer base
- it is not completely clear that — in the presence of an effective ring fencing regime — a vertically integrated Aurizon Network would face materially differing financial incentives to contribute to supply chain efficiency than a stand-alone Aurizon Network. It is also not clear why an effective ring fencing regime would erode any efficiencies Aurizon Network gains from vertical integration, given it is in Aurizon Network's legitimate business interests that the efficient costs of compliance with the ring fencing framework in place should be included in its maximum allowable revenue.

Behavioural constraints

We do not consider Aurizon Network's argument that it is 'policed' by access seekers, access holders and train operators who are 'alive' to the risks of anti-competitive behaviour to be a convincing argument for diluting the ring fencing arrangements.

Aurizon Network has provided no practical evidence that a small customer base, comprising large mining and transport companies is capable of such a function. Further, stakeholder submissions do not suggest stakeholders consider themselves capable of performing this function, or that the regulatory arrangements provide sufficient information for customers to do so. We are of the view that Aurizon Network retains significant bargaining power as a monopoly access provider of CQCN below-rail services, and therefore we cannot rely on it being 'policed' by customers.

We also note Aurizon Network said access negotiations increasingly centre on producers rather than operators. As such, Aurizon Network said it does not compete in the same market as producer access seekers so anti-competitive concerns are not prominent. We do not find this argument compelling given Aurizon Network's related body corporate has acquired an interest in a coal mine and the Aurizon Group is pursuing interests in other infrastructure in the coal supply chain, such as ports.

Evidence and practice in the 2010 AU

Not only do stakeholders consider Aurizon Network's 2014 DAU ring fencing proposals inadequate, they also claim a lack of confidence in the 2010 AU ring fencing regime.

We note, however, that despite an apparent lack of confidence, there have been very few complaints and audit issues with respect to the existing ring fencing provisions. In our view the mere absence of complaints alone does not suggest that the regime is effective. It could also suggest, for example, that:

- the audit scopes require refocusing; and/or
- stakeholders accept the existing ring fencing regime, despite concerns; and/or
- stakeholders are unwilling to lodge complaints or regard the complaint process as ineffective.

Against this background, we are of the view there is a lack of clarity regarding the effectiveness of the existing ring fencing regime, and there is insufficient data to demonstrate conclusively whether the regime is effective or not.

In this context, we also note stakeholders pointed out that Aurizon Network proposed significant changes to the ring fencing regime, rather than learning from other regimes and building on the 2010 AU.

As we are not convinced by Aurizon Network's overarching rationale for its extensive revision of the 2014 DAU ring fencing provisions, we consider it more pragmatic to adopt an incremental approach to assessing whether the existing ring fencing regime requires change. Consequently, for ring fencing we propose to use the provisions in the 2010 AU as the baseline position from which to assess the extent of any subsequent change, rather than accept Aurizon Network's proposals in the 2014 DAU as the benchmark.

We are of the view that this approach appropriately balances the legitimate business interests of Aurizon Network with the interests of access seekers and access holders (ss. 138(2)(b) and (e)

of the QCA Act). We are also of the view that this ensures greater predictability in the ring fencing regime adopted (s. 138(2)(h) of the QCA Act).

Draft Decision

4.1 Our Draft Decision is to refuse to approve Aurizon Network's rationale for its 2014 DAU ring fencing arrangements. We would approve amendments that:

- (a) adopt the ring fencing provisions in the 2010 as the baseline from which to assess the extent of subsequent change.**

4.4 Overarching principles

4.4.1 Aurizon Network proposal

Aurizon Network's approach to the principle of avoiding anti-competitive and discriminatory behaviour in the 2010 AU is compared with its approach in the 2014 DAU in the table below. The table also shows a similar comparison in terms of the role of the ultimate holding company support deed.

Table 6 Aurizon Network's approach to ring fencing—in the 2010 AU and the 2014 DAU

<i>Ring fencing element</i>	<i>2010 AU approach</i>	<i>2014 DAU approach</i>
Commitments to avoid anti-competitive and discriminatory behaviour	Contained in Part 2 of the undertaking regarding the intent and scope of the entire undertaking. This can be applied to the Aurizon Group by virtue of the Ultimate Holding Company deed provisions.	Includes a statement of general principles of non-discrimination in Part 3 of the 2014 DAU. The commitments are similar to the 2010 AU but are now no longer included in the Intent and Scope part of the undertaking. These commitments can be applied to the Aurizon Group by virtue of the Ultimate Holding Company deed provisions. ⁹⁷
Ultimate Holding Company Support Deed	2010 AU contains a commitment that Aurizon Network will procure Aurizon Holdings to enter into a deed which obliges the Aurizon Group to, among other things, take steps to ensure Aurizon Network can comply with its obligations in the undertaking (cl 2.5.1 of the 2010 AU).	Contains a commitment that Aurizon Network will request Aurizon Holdings to enter into a deed, which, among other things, obliges the Aurizon Group to not instruct Aurizon Network to contravene its obligations under Part 3 of the 2014 DAU. Aurizon Network considered that focusing on its obligations under Part 3 of the 2014 DAU is more appropriate, as it targets where competition risks are highest, namely in the handling of confidential information, separation of functions, minimising conflicts of interest and the risk of discriminatory behaviour. ⁹⁸

4.4.2 Stakeholders' position

Stakeholders raised a number of concerns with respect to Aurizon Network's ring fencing proposals. These are outlined in the table below.

⁹⁷ Aurizon Network, 2013 DAU, sub. no. 2:64-65

⁹⁸ Aurizon Network, 2013 DAU, sub. no. 2:65

Table 7 Key issues raised by stakeholders relating to overarching principles

<i>Issue</i>	<i>Comments</i>
Commitments to avoid anti competitive and discriminatory behaviour	<p>Non-discrimination principles to capture all related parties</p> <p>Stakeholders said non-discrimination principles should include related operators and any other related party where Aurizon Group holds a direct or indirect interest such as mines, ports or railways other than CQCN.⁹⁹</p> <p>The QRC said any extension of the non-discrimination principles to just ports remains too narrow. Ring fencing should address the numerous conflicts of interest with related parties, not just related operators, in order for ring fencing in its entirety to be meaningful and effective.¹⁰⁰</p> <p>Moving of network functions</p> <ul style="list-style-type: none"> • Moving network functions out of Aurizon Network such as engineering, project delivery and specialised track services has increased the risks of conflicts of interest and discrimination.¹⁰¹ <p>Rail infrastructure ownership</p> <ul style="list-style-type: none"> • Stakeholders said Aurizon Network should own all rail infrastructure and the QCA should maintain oversight of line diagrams, modifications and disputes.^{102 103}
Ultimate holding company deed	<p>Stakeholders said requirements for the deed to be 'procured' rather than requested should be reinstated.¹⁰⁴ The deed should be amended to provide positive assistance of related parties to assist Aurizon Network to comply and ensure related parties comply with protected information rules.¹⁰⁵</p>

4.4.3 QCA analysis and Draft Decision

Our assessment in the context of the overarching principles relates to:

- commitments to avoid anti-competitive and discriminatory behaviour
- the ultimate holding company deed.

Commitment to avoid anti-competitive and discriminatory behaviour

Aurizon Network said the 2014 DAU retains a statement of commitment to general principles of non-discrimination and is consistent with the 2010 AU. This provision, however, was moved from the Intent and Scope section of the undertaking to Part 3 of the 2014 DAU (Ring fencing), as its placement within Intent and Scope suggested it was not a ring fencing-specific issue.¹⁰⁶

We do not share Aurizon Network's view that a commitment to avoid anti-competitive and discriminatory behaviour is a ring fencing-only issue. We consider the ring fencing provisions are intended to give effect to the underlying principle that Aurizon Network should not partake in anti-competitive and discriminatory behaviour in any of its actions. This principle encompasses the entire undertaking, consistent with the objectives of the QCA Act.

⁹⁹ QRC, 2013 DAU, sub. no. 46: 33, QRC, 2014 DAU, sub. no. 42: 14, Asciano, 2014 DAU, sub. no. 22: 18, Anglo American, 2014 DAU, sub. no. 7: 6, 20

¹⁰⁰ QRC, 2014 DAU, sub. no. 42: 13–14; Anglo American, 2014 DAU, sub. no. 7: 13-17, 20-23

¹⁰¹ RTCA, 2013 DAU, sub. no. 73: 12, Asciano, 2014 DAU, sub. no. 22: 18; Anglo American, 2014 DAU, sub. no. 7: 13-17

¹⁰² QRC, 2013 DAU, sub. no. 46:35; QRC, 2014 DAU, sub. no. 42:16; Anglo American, 2014 DAU, sub. no. 7:23-24; Asciano, 2014 DAU, sub. no. 22: 79-80

¹⁰³ We consider the adoption of the 2010 AU ring fencing provisions negate this concern.

¹⁰⁴ Asciano, 2013 DAU, sub. no. 44: 6; QRC, 2014 DAU, sub. no. 42: 15

¹⁰⁵ QRC, 2013 DAU, sub. no. 46:34; QRC, 2014 DAU, sub. no. 42: 15; Asciano, 2014 DAU, sub. no. 22: 18

¹⁰⁶ Aurizon Network, 2013 DAU, sub. no. 2: 63

As discussed in Chapter 3, we are of the view the commitment to avoid anti-competitive and discriminatory behaviour should be in the Intent and Scope section of the undertaking and that this should be an overarching principle-based set of statements similar to that in clause 2.2(a) of the 2010 AU. We also consider this should be accompanied by a clause in Part 3 of the undertaking that focuses on the detail underpinning the overarching principles.

The commitments must also be fit-for-purpose, given the evolution of Aurizon Network, the Aurizon Group and its strategic intent. In this context, we are of the view that a strengthening of the non-discrimination commitments is needed to account for the strategic intent of Aurizon Network and the Aurizon Group to leverage the benefits it obtains from vertical integration. We agree with stakeholders that the Aurizon Group's strategic intent provides for a greater propensity for potential conflicts of interest. Accordingly, we consider it is necessary to extend ring fencing provisions to account for port and mine interests.

We also accept that a potential impact of moving network functions, such as engineering, project delivery and specialised track services out of Aurizon Network is a potential increase in the risk of conflicts of interest.

Overall, our Draft Decision reflects that we have:

- reinstated in Part 2 of the 2014 DAU an overarching principle-based set of statements similar to those in clause 2.2(a) of the 2010 AU, but updated to reflect the evolution of Aurizon Network
- included a strengthened clause 3.2 from the 2010 AU in Part 2 of the undertaking that covers issues surrounding port and mine ownership and clarifies the standard of competitive harm applicable with respect to the anti-competitive practices of cross-subsidisation, cost shifting and price/margin squeezing
- amended and included definitions, as required to accommodate these changes.

We consider this is in the interests of access holders, access seekers and train operators (s. 138(2)(e) of the QCA Act). While it may be in the interests of Aurizon Network to enhance flexibility regarding the interpretation and scope of its commitment to avoid anti-competitive and discriminatory behaviour, this does not necessarily represent a legitimate business interest in the context of the QCA Act (s. 138(2)(b)).

Draft Decision

4.2 Our Draft Decision is to refuse to approve Aurizon Network's 2014 DAU provisions regarding its commitment to avoid anti-competitive and discriminatory behaviour. We would approve amendments that:

- (a) include an overarching principle-based set of statements (similar, but updated, to that in clause 2.2(a) of the 2010 AU) reinstated in Part 2
- (b) replace clause 3.2 of the 2014 DAU with a strengthened version of clause 3.2 from the 2010 AU, widening its coverage to issues surrounding port and mine ownership and clarifying the standard of competitive harm applicable with respect to the anti-competitive practices of cross-subsidisation, cost shifting and price/margin squeezing (and moved to Part 2).

Ultimate holding company support deed

We are of the view that Aurizon Network's 2014 DAU proposals for the ultimate holding company support deed are likely to render it ineffective. We agree with stakeholders that there is a need to strengthen Aurizon Network's obligations to obtain compliance of each member of the Aurizon Group with respect to Aurizon Network's ring fencing obligations. We consider the commitment on behalf of the Aurizon Group proposed in the 2014 DAU lacks sufficient strength or credibility to ensure compliance with the ring fencing regime. Nor does it provide confidence to existing and potential participants in the CQC that an effective regime exists.

Given the significance of the ultimate holding company support deed, we are of the view that Aurizon Network should ensure the deed is in full force and effect at all times. We do not consider this requirement is inconsistent with the application of sections 137 and 138 of the QCA Act.

Further, in light of the Aurizon Group's stated strategic intent to leverage the benefits obtained from vertical integration, as well as developments in the corporate structure of the Aurizon Group, we are also of the view that the status of the ultimate holding company support deed and its contents requires enhancement. Our view reflects the fact that the potential for conflicts of interest and incentives for anti-competitive and discriminatory behaviour are increased with the changes that have occurred to the Aurizon Group corporate structure.

Accordingly, we have proposed a stronger link between the contents of the ultimate holding company deed and the undertaking than in the 2014 DAU. Effectively, the undertaking sets out the detailed obligations, requirements and implications to be included in the ultimate holding company deed. Thereafter, these requirements are included within the actual deed.

Although as a vertically integrated entity it may be in Aurizon Network's interests to lessen its obligations associated with the ultimate holding company support deed, we do not accept that this appropriately balances Aurizon Network's legitimate business interests under the QCA Act (s. 138(2)(b)) with other relevant considerations. We consider our Draft Decision appropriately balances the interests of access seekers, access holders and train operators, with Aurizon Network's legitimate business interests (ss. 138(2)(b), (d) and (e) of the QCA Act). We also consider it compatible with encouraging competition in upstream and downstream markets and the public interest (ss. 138(2)(a) and (e) of the QCA Act). It also adopts an incremental predictable approach to change with respect to the ring fencing provisions (s. 138(2)(h) of the QCA Act).

Draft Decision

4.3 Our Draft Decision is to refuse to approve Aurizon Network's 2014 DAU provisions regarding the ultimate holding company support deed. We would approve arrangements that:

- (a) provide that, at all times, the ultimate holding company deed is in full force and effect in the form set out in schedule D our marked up DAU**
- (b) move clause 3.2 to part 2 and amend it to mirror the requirements of the ultimate holding company support deed and outline the implications if the ultimate holding company support deed is not in full force and effect.**

4.5 Information management and decision making principles

4.5.1 Aurizon Network proposal

Aurizon Network said the information access control measures in the 2010 AU permitted full disclosure of access seeker confidential and protected information within Aurizon Network, but tightly restricted access beyond Aurizon Network.

Aurizon Network considered this unduly constrained its legitimate use of shared corporate services, even where no competition concerns would be raised by disclosure.¹⁰⁷ It said the redrafted Part 3 contains the same principle controls as existed in the 2010 AU, but adopted a more targeted approach. The control applied only to disclosures by third-party access seekers that, if made available to a related operator, would provide a competitive advantage that it would not otherwise have.¹⁰⁸

Aurizon Network's proposed approach to information management and decision making records in the 2014 DAU and, how this compares with the 2010 AU, is summarised in the table below.

Table 8 Aurizon Network's approach to information management and decision making records in the 2010 AU and the 2014 DAU

<i>Ring fencing element</i>	<i>2010 AU approach</i>	<i>2014 DAU approach</i>
Management of confidential information	<p>Regime set up very broadly, to be a framework for all confidential information, rather than limiting coverage to information that could be used anti-competitively by an above-rail business group.</p> <p>Framework allows full disclosure of confidential information within Aurizon Network and limited disclosure elsewhere in business. This approach was workable for the 'Network Access Unit', but is not consistent with a large stand-alone network business.¹⁰⁹</p>	<p>Introduces a concept of 'protected information', to distinguish regulated restrictions on information flow from those entered into voluntarily by Aurizon Network.</p> <p>Disclosure framework based on a 'need to know' basis, with cascading system of disclosures across various categories of recipients (both in and outside Aurizon Network) that require access to the information. Appropriate controls are retained.¹¹⁰</p>
Decision making principles	<p>Contained a set of decision making principles that required:</p> <ul style="list-style-type: none"> • the decision maker to be identified • decisions to be consistent between access seekers / holders • decision to be in compliance with the undertaking, laws, lawful direction, access agreements, access code, Aurizon policies and procedures • decisions to be documented 	<p>Specific decision making principles have been removed on the basis they captured too many decisions and had no means of auditing if all decisions were made consistent with the principles.</p> <p>Aurizon Network questioned whether strict compliance with the provisions was proportional to competition risks of many decisions captured.</p> <p>In accordance with the <i>Transport Infrastructure Act 1994</i>, access agreements with related operators requires board processes to document arms length arrangements, and are capable of being audited.¹¹¹</p>

¹⁰⁷ Aurizon Network, 2013 DAU, sub. no. 2:72

¹⁰⁸ Aurizon Network, 2013 DAU, sub. no. 2:71

¹⁰⁹ Aurizon Network, 2013 DAU, sub. no. 2:61-62

¹¹⁰ Aurizon Network, 2013 DAU, sub. no. 2:61-62

¹¹¹ Aurizon Network, 2013 DAU, sub. no. 2:63

4.5.2 Stakeholders' position

Stakeholders' main positions are summarised in the table below.

Table 9 Summary of stakeholder views on Aurizon Network's 2014 DAU

<i>Issue</i>	<i>Comments</i>
Definition of protected information	QRC said the definition of protected information is too narrow and unless rectified may lead to non-disclosure of information or claiming all information as confidential. ¹¹²
Increasing conflicts of interest across the Aurizon Group of activities	Stakeholders said that due to the increasing conflicts of interest, such as ports, the definition of confidential information should be expanded, adequate physical and electronic security measures should be implemented, confidential material should not be disclosed unless permitted, with maintenance of a record of which staff members have accessed confidential information, recording the reason it was required. ¹¹³
Extensive list of exempted persons or business units	Use and disclosure of confidential information was too broad. All access should be recorded in the information register for auditing and transparency purposes, with tiered confidentiality protection training. ¹¹⁴
Permissible access to confidential and protected information	Stakeholders said confidential and protected information should only be disclosed to the extent necessary for recipients to discharge their duties, on a 'need to know' basis and only for use for the purpose that it was disclosed and only to the extent necessary for that purpose. In any event, it is not to be used or disclosed where it is likely to result in a commercial advantage. Further, no disclosure to related operators should be made without prior written consent of the information provider. ¹¹⁵
Transparent information register of access to confidential and protected information	Stakeholders supported the recording of all access to confidential information within a register; with recipients signing declarations of awareness and understanding of obligations regarding access and, if not already covered by the ultimate holding company support deed, signing a confidentiality deed. Register entries would capture the period access was granted, material provided, who accessed the material, who approved access and the reasons for access. ¹¹⁶ The register would be available to access seekers, access holders, auditors and the QCA to inspect and interrogate.
Mandatory training with higher levels for access related staff	Stakeholders supported mandatory minimum training to promote awareness of Aurizon Network's conflict of interest protections, with more detailed training for Aurizon Network staff performing access-related functions, including operational areas such as planning and scheduling. ¹¹⁷
Standard confidentiality agreement	Stakeholders supported retention of the confidentiality agreement pro-forma (Schedule B1 of 2010 AU) including liquidated damages provisions. ¹¹⁸
Decision making principles	Stakeholders support retention of the decision making principles referred to in clause 3.5 of the 2010 AU, and their expansion specifically concerning decision making processes in relation to negotiation and management of access. ¹¹⁹

¹¹² QRC, 2014 DAU, sub. no. 42: 17

¹¹³ QRC, 2013 DAU, sub. no. 46:37-39; QRC, 2014 DAU, sub. no. 42: 13-14,17-18; Asciano, 2014 DAU, sub. no. 22: 30; Anglo American, 2014 DAU, sub. no. 7: 22-23

¹¹⁴ QRC, 2014 DAU, sub. no. 42: 17-18; Anglo American, 2014 DAU, sub. no. 7: 25-29; Asciano, 2014 DAU, sub. no. 22: 30

¹¹⁵ QRC, 2013 DAU, sub. no. 46: 38; QRC, 2014 DAU, sub. no. 42: 17-18; Asciano, 2014 DAU, sub. no. 22: 30; Anglo American, 2014 DAU, sub. no. 7: 25-29

¹¹⁶ QRC, 2013 DAU, sub. no. 46: 39; QRC, 2014 DAU, sub. no. 42: 17-18; Asciano, 2014 DAU, sub. no. 22: 30; Anglo American, 2014 DAU, sub. no. 7: 25-29

¹¹⁷ QRC, 2013 DAU, sub. no. 46: 39; Asciano, 2014 DAU, sub. no. 22: 77-78; QRC, 2014 DAU, sub. no. 42: 18

¹¹⁸ Anglo American, 2013 DAU, sub. no. 39: 5; QRC, 2014 DAU, sub. no. 42: 17-18; Anglo American, 2014 DAU, sub. no. 7: 30-31; Asciano, 2014 DAU, sub. no. 22: 52

4.5.3 QCA analysis and Draft Decision

Our Draft Decision is to refuse to approve Aurizon Network's proposed information handling arrangements for the 2014 DAU. In coming to this conclusion in the Draft Decision, we have considered the characteristics of an effective information management system and assessed Aurizon Network's proposals.

What are the characteristics of an effective information management system?

In the context of ring fencing, an effective information management system must produce meaningful, comprehensive information that can be used to assess any material concerns regarding discrimination, anti-competitive behaviour and inappropriate disclosure of/access to confidential/protected information.

In addition to the definition of confidential/protected information, we consider an effective information management system also requires a robust and complete record keeping system, which records:

- who, when and for what reason confidential/protected information is being disclosed/accessed
- what decisions are being made with that information and how these are being made.

We consider the production and availability of such records to be the key purpose of the information management system adopted. If they are unable to be produced, we do not consider the system to be fit-for-purpose and the credibility of the ring fencing regime is weakened.

We also recognise any information management system has to have regard to proportionality and must allow Aurizon Network to operate its business. We recognise there needs to be recognition that certain individuals and groups of individuals may require routine access to certain confidential/protected information when performing their duties. In the case of Aurizon Network and the Aurizon Group, we consider this primarily relates to activities associated with keeping the CQCN trains operational. This does not preclude other reasons that could benefit from disclosure of/access to certain confidential/protected information. These, however, would appear to be discretionary.

Overall, we are of the view that in the context of ring fencing, an information management system is needed that will produce robust and complete records, identify how decisions were made using particular information, as well as have regard to proportionality and the operational needs within Aurizon Network. Such a system will meet the requirements of the QCA Act, in that it will appropriately balance the interests of access seekers, access holders and train operators with Aurizon Network's legitimate business interests.

We also consider competition in upstream and downstream markets may be encouraged if there is confidence the ring fencing regime has adequate controls and produces appropriate records that can be accessed by the relevant parties.

Aurizon Network's proposals in the 2014 DAU

Aurizon Network is of the view that the evolution of the corporate structure of the Aurizon Group and transfer of roles and functions from Aurizon Network to the Aurizon Group, requires

¹¹⁹ Asciano, 2013 DAU, sub. no. 44: 9

an expansion in the pool of Aurizon Group employees who need unconstrained access to protected/confidential information to undertake their duties.

While we acknowledge that the ring fencing regime may need to evolve, the central objective of any such change should be producing meaningful, comprehensive records that can be used to assess concerns regarding discrimination, anti-competitive behaviour and inappropriate disclosure of/access to confidential/protected information.

We consider Aurizon Network's 2014 DAU approach could create a complex information management system and a blurring of when unconstrained disclosure of/access to confidential/protected information is needed. We are of the view the probable impact of this is to reduce the level of record taking to the extent that it becomes relatively meaningless and renders ring fencing ineffectual.

Against this background, we are of the view that it is appropriate to take a conservative and robust approach in our Draft Decision. Our specific proposals are set out below. We acknowledge these proposals will cause some reduction of the flexibility afforded Aurizon Network in the 2010 AU. However, we are open to further evidence based input from Aurizon Network and industry as to whether a more flexible approach can be accommodated.

Our reasoning and Draft Decision is outlined in subsequent sections, comprising:

- definition of confidential/protected information
- disclosure process and information registers
- exemptions, consent, confidentiality and their relationship with the disclosure process
- decision making principles
- supporting provisions.

Given the extensive and often diametrically opposed nature of the changes proposed by Aurizon Network in the 2014 DAU and stakeholders, we have not commented on each individual suggested amendment or proposal as we consider this would be of limited value.

Our analysis and Draft Decision focus on what we consider are the main issues and the drafting in the undertaking we would accept. The aim of this is to provide a baseline for comment prior to the Final Decision.

Definition of confidential/protected information

Aurizon Network's 2014 DAU introduces the concept of protected information (cl. 3.11 of the 2014 DAU) which is used in respect of the ring fencing provisions. This is a different approach to the 2010 AU, in which the ring fencing provisions relate to 'confidential information' as defined under that undertaking (see cl. 3.4 of the 2010 AU).

Aurizon Network said the concept of protected information distinguishes regulated restrictions on information flow from those entered into voluntarily by Aurizon Network. This, in part, reflects Aurizon Network's view that the ring fencing provisions should not constrain the legitimate use of shared corporate services where no competition concerns would be raised by disclosure.¹²⁰ In order for this to occur, Aurizon Network said information flow has to be more fluid.

¹²⁰ Aurizon Network, 2013 DAU, sub. no. 2:72

We consider that, when compared to the 2010 AU, the approach adopted by Aurizon Network in the 2014 DAU:

- narrows the range of information to which the ring fencing provisions apply
- increases the scope of information disclosure and the level of subjectivity associated with that disclosure
- widens the spectrum of exemptions/carve-outs.

Overall, we consider Aurizon Network's concept of protected information increases complexity and the potential for disputes about whether specific information should be categorised as protected.

Against this background, we share the QRC's view that the approach in the 2014 DAU may encourage access seekers, access holders and train operators to ensure information remains confidential. Indeed, it is not clear how Aurizon Network's proposals benefit access seekers, access holders and train operators.

We do not consider such an outcome lends itself to the efficient operation of the CQCN or the supply chain. Nor does it encourage trust or collaborative engagement between Aurizon Network and its customer base.¹²¹ We consider this to be contrary to our overall objective of increasing the provision of information to support improvements to the productivity of the coal supply chain.

As such, we do not consider Aurizon Network's proposal aligns well with the objective of Part 5 of the QCA Act or the public interest (ss. 138(2)(a) and (d) of the QCA Act). While it may be in Aurizon Network's interest to broaden the opportunity for information disclosure across the vertically integrated corporate group, we do not consider this represents a legitimate business interest (s. 138(2)(b) of the QCA Act).

Accordingly, our Draft Decision is to refuse to approve Aurizon Network's proposed definition of protected information and to adopt the definition of confidential information used in the 2010 AU, with minor modifications. We consider this appropriately balances the interests of access seekers, access holders and train operators with the legitimate business interests of Aurizon Network (ss. 138(2)(b) and (e) of the QCA Act).

¹²¹ We are also of the view that the QRC's proposal to adopt a tighter definition of protected information and subsume it into a broader definition of confidential information suffers from similar concerns. This is because we consider it has the potential to constrain Aurizon Network's ability to use information for operating the CQCN.

Draft Decision

4.4 Our Draft Decision is to refuse to approve the definition of protected information. We would approve amendments to:

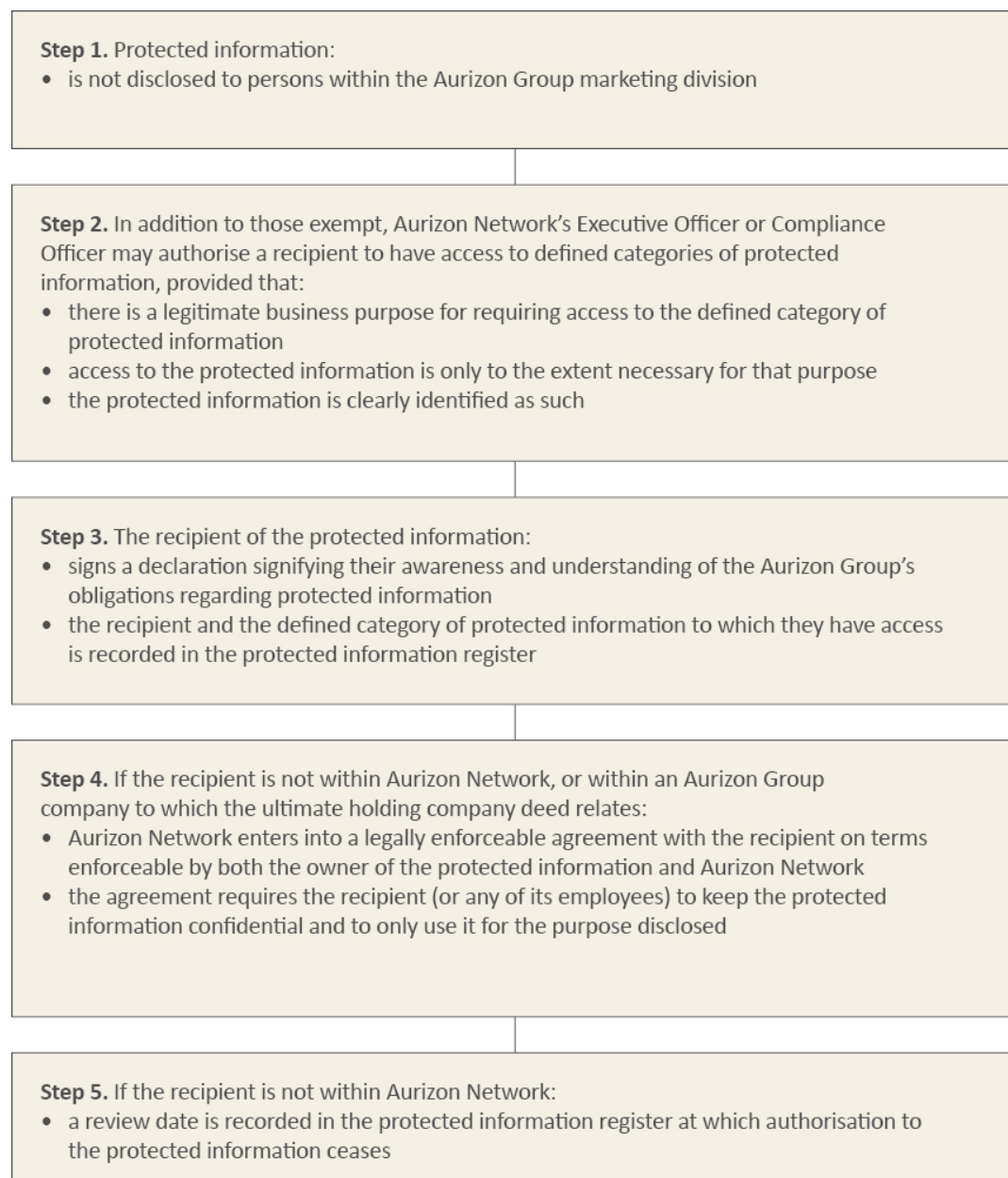
- (a) replace the definition of protected information with a modified version of the definition of confidential information used in the 2010 AU**
- (b) replace, in all instances 'protected information' with 'confidential information'.**

Disclosure process and information registers

Aurizon Network's 2014 DAU includes a standard procedure for the disclosure of protected information (cl. 3.18 of the 2014 DAU). The 2010 AU does not include an explicit disclosure process similar to that in the 2014 DAU.

The steps involved in the disclosure process in the 2014 DAU are outlined in **Figure 1**.

Figure 1 2014 DAU protected information disclosure process



In our view, the inclusion of an explicit disclosure process within the ring fencing provisions is beneficial, provided it is effective. The effectiveness of Aurizon Network's 2014 DAU proposal depends on the type of information that is recorded in the confidential information register. We consider this relates to:

- whether the information recorded on the register is meaningful and sufficient
- how broad, clear and transparent the list of exemptions is
- whether the confidential information register accurately reflects the incidence of disclosure
- confidentiality and consent.

The remainder of this section focuses on the information recorded in the confidential information register, with the subsequent section considering the role of exemptions and its relationship to the disclosure process.

We consider the production and availability of robust records to be the fundamental purpose of the information management system. This should be considered in the context of:

- Aurizon Network's stated strategic intent to leverage the benefits it obtains from vertical integration
- the transfer of roles and functions from Aurizon Network to the Aurizon Group.

We consider these factors strengthen the need to provide access seekers, access holders and train operators with confidence that robust and comprehensive records exist and that these can be used to assess concerns regarding discrimination, anti-competitive behaviour and inappropriate disclosure of/access to ring-fenced information, if that becomes necessary.

Against this background, we consider Aurizon Network's proposal – to include in the information register the name of the recipient and the defined category of information to which access is authorised – to be insufficient¹²² (cl. 3.20 of the 2014 DAU).

We share stakeholders' view that information register entries should be more comprehensive, and consider the information register should capture:

- who required access to the confidential information
- who approved access to the confidential information
- the period for which access to the confidential information is granted
- what confidential information training the recipient has received and when
- what the confidential information is to be used for
- what decisions were made using the confidential information
- how those decisions were made.

We also consider a record of all confidentiality agreements required should be maintained as part of the information register.

We consider this appropriately balances the interests of access holders, access seekers and train operators with the legitimate business interests of Aurizon Network (ss. 138(2)(b) and (e) of the

¹²² In coming to this view, we have also had regard to the fact the ring fencing register in the 2010 AU only recorded the names of those persons required to comply with it if they were provided access to confidential information.

QCA Act). This is because it provides a cost effective way of recording meaningful and necessary information.

Against this background, our Draft Decision is to refuse to accept clauses 3.18 and 3.20 of the 2014 DAU, and require amendments as set out below.

Draft Decision

4.5 Our Draft Decision is to refuse to approve Aurizon Network's disclosure process and provisions regarding the protected information register. We would approve amendments to:

- (a) replace the protected information register with the confidential information register**
- (b) include in the confidential information register entries as set out in clause 3.13 of the marked 2014 DAU**
- (c) require a record of all confidentiality agreements to be maintained as part of the confidential information register.**

Exemptions, consent and confidentiality, and the disclosure process

Aurizon Network's 2014 DAU identifies a number of instances when access to ring-fenced information does not have to comply with or observe the disclosure process (cl. 3.17 of the 2014 DAU). In assessing the 2014 DAU's proposals regarding exemptions from the disclosure process, we have had regard for the following:

- how broad, clear and transparent the list of exemptions is
- whether the confidential information register accurately reflects the incidence of disclosure
- confidentiality and consent provisions.

Breadth, clarity and transparency of the list of exemptions

Disclosure process exemptions in the 2014 DAU can broadly be split into exemptions on an 'as needs' basis and exemptions within the Aurizon Group.

The 2014 DAU broadens the scope of the activities which require access to confidential information on an 'as needs' basis. It provides Aurizon Network employees with more freedom in obtaining ring fenced information and more discretion on the disclosure of financial information to Aurizon Group bankers or other financial institutions. It allows disclosure on an 'as needs' basis to external third parties/advisors¹²³ and to an access seeker's customer in certain circumstances.¹²⁴ Similarly Aurizon Network's 2014 DAU broadens the scope of confidential information that can be disclosed across the Aurizon Group. The language describing the activities is less specific and more activities are exempt.

Our view is that the approach proposed for the 2014 DAU for defining exemptions from the disclosure process lowers the likelihood that the information management system will provide

¹²³ Aurizon Network may disclose information to external legal, accounting, financial, engineering, environmental or other advisors, consultants or service providers to Aurizon Network, whose role in advising or providing services to Aurizon Network requires disclosure to be made and who are under an obligation of confidentiality to Aurizon Network (cl. 3.17(b)(xiii) of the 2014 DAU).

¹²⁴ Aurizon Network may disclose information to a customer of an access seeker for the purpose of making assessments of, and decisions on, matters required or contemplated by the undertaking (cl. 3.17(b)(xiv) of the 2014 DAU).

credible records that can be used to assess concerns regarding discrimination, anti-competitive behaviour and inappropriate disclosure of/access to ring-fenced information. This is because it provides greater scope for interpreting a particular activity as exempt.

Does the protected information register reflect the incidence of disclosure?

The 2014 DAU does not define precisely how, or who, makes the decision to exempt an individual or group of individuals from the disclosure process. There also appears to be no requirement to keep a record of individuals exempt from the disclosure process. Indeed, the protected information register in the 2014 DAU is only required for individuals who are not exempt. In our view, this makes it difficult to gauge:

- what information is being disclosed
- what the disclosure process actually manages
- what the protected information register is capturing
- whether the incidence of disclosure is accurately reflected, and
- whether there is a meaningful benchmark of the disclosure pattern of protected information can be measured through time.

We consider this failure in the disclosure process and protected information register particularly relevant given the change in organisational structure within the Aurizon Group.

Confidentiality and consent

Broadly there are three aspects to confidentiality and consent with respect to the disclosure of information, comprising:

- information flows across the Aurizon Group
- information flows on an 'as needs' basis
- overarching right to enter into a confidentiality agreement.

Information flows across the Aurizon Group

For information flows across the Aurizon Group, the proposed confidentiality and consent provisions are broadly if:

- exempt from the disclosure process, individuals are informed by Aurizon Network of the need to keep protected information confidential and the prohibition of disclosure to the marketing division (cl. 3.17(d) of the 2014 DAU)
- required to go through the disclosure process they are required to sign a declaration that they are aware of and understand the Aurizon Group's obligations regarding protected information (cl. 3.18 of the 2014 DAU).

The disclosure of protected information to individuals within the Aurizon Group is not subject to explicit confidentiality agreements. There are also no explicit consent provisions that need to be complied with.

By contrast, the 2010 AU includes a number of provisions restricting the flow of confidential information across the corporate group. These include but are not limited to:

- requiring Aurizon parties receiving confidential information to enter into a legally enforceable agreement requiring them to keep confidential and not disclose, or permit any

person employed or engaged by that Aurizon party to disclose, the confidential information (cl. 3.4.2(i) of the 2010 AU)¹²⁵

- restricting the provision of confidential information to a related operator unless approved by the third party access seeker or access holder (cl. 3.4.2(d) of the 2010 AU)¹²⁶
- in the majority of cases requiring Aurizon Network to seek the consent of an access seeker or access holder to disclose confidential information and to adopt the consent process (cl. 3.4.2(g) of the 2010 AU).

We consider that, under Aurizon Network's 2014 DAU proposals, it is possible for owners of protected information to have very little understanding of how protected information relating to them is being used throughout the Aurizon Group. We are of the view this raises legitimate concerns regarding the ability to detect discrimination, anti-competitive behaviour and the inappropriate disclosure of ring-fenced information. We consider this is exacerbated by the fact the 2014 DAU also increases the scope of activities and potentially the pool of individuals exempt from the disclosure process.

Information flows on an 'as needs' basis

Aurizon Network's proposed disclosure of protected information on an 'as needs' basis in the 2014 DAU has the following constraints:

- for all 'as needs' disclosures, the written prior approval of the owner of the protected information is required before disclosing the information, but the owner of the protected information may not withhold approval unreasonably (cl. 3.17(b)(xv) of the 2014 DAU)
- a consent process that deals with external third party/advisor conflicts of interest when a particular party is advising both Aurizon Network and a related operator on the same or a related matter (cl. 3.19 of the 2014 DAU)
- bespoke confidentiality agreements/duties for the disclosure of protected information when providing such information to other railway managers for the purposes of managing access across rail networks, to other infrastructure providers for the purposes of coordinating capacity allocation and when disclosing information to external third parties/advisors.

In our view, the critical aspect of the authorisation process for all 'as needs' disclosures is a clear understanding of the grounds on which the owner of the protected information could legitimately refuse disclosure. The 2014 DAU does not provide any direction. Consequently, we do not consider the process provides any meaningful rights and protections for access seekers, access holders and train operators.

Further, the 2014 DAU does not provide a credible mechanism through which access seekers, access holders and train operators can either refuse the disclosure of protected information or have sufficient assurance about who has access to it or how it will be used when an external

¹²⁵ All individuals working within Aurizon Network were exempt from this requirement. The Chief Executive Officer, the Chief Financial Officer and board of directors of Aurizon Network and the ultimate holding company, as well as individuals providing clerical or administrative assistance to them, including any Company Secretary or Assistant Company Secretary, were also exempt.

¹²⁶ The exception is if Aurizon Network had executed an agreement with a related operator for the provision of field incident management services and yard control services (at yards other than major yards). Confidential information may be disclosed to the related operator to the extent required for providing those services (as per cl. 2.2(d) of Schedule B2 of the 2010 AU (Confidentiality deed)).

third party/advisor is advising both Aurizon Network and a related operator on the same or a related matter.

This, in our view, is particularly the case for the consent process in the 2014 DAU (cl. 3.19 of the 2014 DAU). For example:

- Aurizon Network does not have to provide reasons for disclosing the protected information, it only has to consider the disclosure of the information is necessary
- Aurizon Network has the option to cease negotiations when consent is sought during the process of responding to an access application or negotiating an access agreement
- if Aurizon Network seeks consent during the process of administering an access agreement or a train operations agreement, consent cannot be unreasonably withheld, despite the fact that what constitutes a legitimate reason for refusing consent is not defined.

In addition, external third parties/advisors are only under an obligation of confidentiality to Aurizon Network, not the access seeker, access holder or train operator (cl. 3.17(b)(xiii) of the 2014 DAU).

We are of the view the 2010 AU provided a more robust approach to concerns regarding disclosure of confidential information to external third parties/advisors because:

- it includes a separate clause (cl. 3.4.1 of the 2010 AU) that explicitly deals with issues surrounding the provision of confidential information to third parties/advisors who are advising both Aurizon Network and a related operator on the same or related manner. This provides a prescriptive approach with respect to who will have access to the confidential information and specifies their obligations. It also provides the option of executing a confidentiality deed in favour of, and on terms and conditions satisfactory to, the party requiring the deed
- consent from the owner of the confidential information is required where an employee within the corporate group is advising a related operator in relation to the same or a related matter (cl. 3.4.2(f) of the 2010 AU).

Overarching right to enter into a confidentiality agreement

The 2014 DAU allows an access seeker or train operator to enter into a confidentiality agreement with Aurizon Network during the negotiation period of an access agreement (cl. 3.14 of the 2014 DAU). The confidentiality agreement will, unless otherwise agreed, take the form of the standard confidentiality deed (Schedule I of the 2014 DAU). We are of the view the effectiveness of this option is limited, because the confidentiality deed mirrors the exclusions and permitted disclosures of protected information discussed above.

We consider the 2010 AU provides a more meaningful approach. At any time during the during the negotiation process, including prior to the submission of an access application, an access seeker can require Aurizon Network to enter into a standard confidentiality deed. Similarly, Aurizon Network can require this of the access seeker in the negotiation period (cl. 3.4(c) of the 2010 AU).

The confidentiality deed in the 2010 AU (Schedule B1) broadly mirrors the disclosure and exemption provisions in the 2010 AU. We are of the view these are more transparent and robust than Aurizon Network's proposals in the 2014 DAU. Furthermore, Schedule B1 includes a suite of general obligations, as well as clauses regarding liquidated damages and compensation for breaches of the information flow obligations within the Aurizon corporate group (cl. 4 and 5

of Schedule B1 in the 2010 AU). These are excluded from the confidentiality deed included in the 2014 DAU.

Overall, we consider the confidentiality and consent provisions in Aurizon Network's 2014 DAU reduce the protections available to access seekers, access holders and train operators, compared to those included in the 2010 AU.

4.5.4 Summary and Draft Decision

When compared to the 2010 AU, we consider Aurizon Network's proposals in the 2014 DAU regarding the interaction between the disclosure process, exemptions, consent and confidentiality provisions:

- provide greater scope for interpreting a particular activity as exempt from the disclosure process, thereby lowering the likelihood that the information management system will provide credible records that can be used to assess concerns regarding discrimination, anti-competitive behaviour and inappropriate disclosure/access of ring-fenced information
- in the context of the change in the organisational structure within the Aurizon Group, introduce complexity in gauging if the information captured through the disclosure process accurately reflects the incidence of disclosure and provides a meaningful benchmark for assessing the disclosure pattern of protected information through time
- adopt confidentiality and consent provisions that reduce the protections available to access seekers, access holders and train operators.

Against this background, we have a degree of sympathy for the concerns expressed by stakeholders. Indeed, we consider the possible result of Aurizon Network's 2014 DAU proposals is a ring fencing regime that is ineffective.

We view this with considerable concern and do not consider Aurizon Network's proposals to be in the interests of access seekers, access holders and train operators (s. 138(2)(e) of the QCA Act). Additionally, we are of the view an ineffective ring fencing regime does not provide potential market entrants with any assurance they will be treated in a non-discriminatory manner or that credible mechanisms to investigate and redress potential cases of discrimination exist. This may stifle upstream and downstream competition and impact negatively on the efficient operation of the CQC and end-to-end coal supply chain. We consider this contrary to the object of Part 5 of the QCA Act (s. 69E of the QCA Act).

We also consider it preferable for the Aurizon Group to be able to structure itself as it sees fit, provided there is sufficient recognition of Aurizon Network's ring fencing obligations, and the needs of its customers and the regulatory regime within this context.

Therefore, at this stage in the process, and in forming our Draft Decision, we have developed what we consider to be appropriate ring fencing provisions given the new organisational structure of the Aurizon Group, rather than focusing on changes to organisational structure that may also ensure an effective ring fencing regime.

Our approach places considerable emphasis on the role of the confidential information register as a credible source of information and how this relates to the role of exemptions, confidentiality and consent.

Confidential information register as a credible source of information

We understand the change in the Aurizon Group's organisational structure results in Aurizon Network subcontracting more services from the Aurizon Group than was previously the case. This changes the dynamics of the flow of confidential information across the Aurizon Group.

We are not aware of an objective baseline data set that can be used to assess to what extent the change in the Aurizon Group's organisational structure impacts on the flow of confidential information, and whether this has a detrimental impact on the ring fencing of Aurizon Network. We consider the confidential information register pivotal to understanding this.

In this context, if the confidential information register is to provide credible information we consider it has to:

- provide a sufficiently complete picture of the flow of confidential information
- be up-to-date and accurate
- be underpinned by fit-for-purpose processes and procedures that are consistently applied.

Our Draft Decision regarding the information to be included in the confidential information register was discussed previously in section 4.5.3. We consider it provides a complete picture for a particular set of confidential information that is required to be disclosed (i.e. not exempt).

However, to ensure the confidential information register is seen as a credible and effective tool, we are of the view that an agreed structure and definition set for the confidential information register has to be developed. We consider this will enhance the effectiveness and usefulness of the register, by ensuring the information contained in the register is transparent and accessible.

Ideally, these should be developed by Aurizon Network in consultation with stakeholders to ensure inputs into the register are easily identifiable and commonly understood by all parties. Accordingly, Aurizon Network should develop and submit these for our approval, within the first 4 months of the commencement of UT4. As a contingency, if this process proves unsuccessful we will develop these and require Aurizon Network to adopt them.

Further, the confidential information register should be submitted to us every 12 months, or upon request, for review, with the QCA also able to undertake spot audits at our discretion to ensure the processes and procedures underpinning the information collection are fit-for-purpose, being adhered to and used in a consistent manner.

In our view, this provides incentives to maintain the confidential information register in an appropriate manner, given its pivotal role in the ring fencing regime. Indeed, we consider Aurizon Network's compliance, or otherwise, with maintaining the confidential information register provides a clear and transparent indicator of its approach to its ring fencing obligations that can be placed on public record.

We are of the view this appropriately balances the interests of access seekers, access holders and train operators, with the legitimate business interests of Aurizon Network (ss. 138(2)(b) and (e) of the QCA Act). It provides all parties with a set of baseline information from which to consider how the ring fencing regime is performing. Against this background, our Draft Decision with respect to ensuring that the confidential information register is a credible source of information is not to accept the provisions in the 2014 DAU and to require amendments as below.

Draft Decision

4.6 Our Draft Decision is to refuse to approve Aurizon Network's protected information register in the 2014 DAU as a credible source of information. We would approve arrangements with amendments to include provisions:

- (a) for Aurizon Network, following consultation with access holders and train operators, to develop a proposed structure and definition set for inputs into the confidential information register. This must be submitted to the QCA for approval within the first 4 months of the operation of this Undertaking**
- (b) for the confidential information register to be submitted to the QCA, every 12 months or upon request, for review**
- (c) that allow the QCA to undertake spot audits at its discretion, to ensure the processes and procedures underpinning the information collection are fit-for-purpose, being adhered to and used in a consistent manner.**

The role of exemptions, confidentiality and consent

We acknowledge that not all disclosures of confidential information need to be recorded. However, our view is this has to be balanced against the lack of a transparent objective data set regarding the flow of confidential information across the organisational structure of the Aurizon Group.

Against this background, we are of the view that exemptions from the disclosure process should be narrowly defined, with the majority of confidential information disclosures being included in the confidential information register. We consider this ensures there is confidence that robust and comprehensive records exist and that these can be used to assess concerns regarding discrimination, anti-competitive behaviour and inappropriate disclosure/access of ring-fenced information if that becomes necessary.

Once a baseline understanding of the flow of confidential information outside of Aurizon Network is firmly established, the scope for exemptions could be widened. This can be assessed on a case-by-case basis from an objective footing.

Our Draft Decision regarding Aurizon Network disclosing confidential information in specific circumstances is summarised in **Tables 10 and 11**. The tables relate to Aurizon Network disclosing confidential information on an 'as needs' basis and across the Aurizon Group. They summarise the confidentiality and consent provisions associated with disclosure in those circumstances. For avoidance of doubt, if any circumstance is not included in the tables, our Draft Decision is that disclosure of the confidential information by Aurizon Network (whether to Aurizon Group or their employees or contractors or to third parties) should be subject to:

- inclusion in the confidential information register
- the recipient entering into a confidentiality agreement
- the consent of the owner of the confidential information.

In our Draft Decision, we have required the consent of the owner of the confidential information to be obtained in a number of circumstances. We consider this provides a meaningful veto if there are concerns with respect to how Aurizon Network and the Aurizon Group are using confidential information. It also provides Aurizon Network and the Aurizon Group with an incentive to provide owners of confidential information with a requisite level of assurance about the reasons for the use of the confidential information and the checks in place

to protect that information. Our Draft Decision also strengthens the confidentiality agreement(s) relative to the proposals in the 2014 DAU.

We consider our approach provides a pragmatic balance between allowing Aurizon Network to disclose confidential information, while providing an appropriate level of transparency and ensuring a robust, objective understanding of the flow of confidential information is developed. We are of the view this is in the interests of access holders, access seekers and train operators (s. 138(2)(e) of the QCA Act) and aligns with Aurizon Network's legitimate business interests (s. 138(2)(b) of the QCA Act).

Table 10 Summary of the QCA Draft Decision for disclosure process on an 'as needs' basis

<i>Reason for disclosure</i>	<i>Confidentiality, consultation and information register provisions</i>	<i>Consent provisions</i>
If, but only to the extent, required or compelled by any Law, an order of a court, notice validly issued by any authority or the safety regulator	<ul style="list-style-type: none"> no confidentiality agreement excluded from the confidential information register 	<ul style="list-style-type: none"> consent from the owner of the confidential information not required
If necessary for the conduct of any legal proceedings, any dispute resolution process or audit under the undertaking, QCA Act or standard agreement	<ul style="list-style-type: none"> no confidentiality agreement excluded from the confidential information register 	<ul style="list-style-type: none"> consent from the owner of the confidential information not required
If to any person involved in clearing an incident or emergency that is preventing the operating of train services on the rail infrastructure	<ul style="list-style-type: none"> no confidentiality agreement excluded from the confidential information register 	<ul style="list-style-type: none"> consent from the owner of the confidential information not required
If required under any stock exchange listing requirement or rule	<ul style="list-style-type: none"> no confidentiality agreement consultation with the owner of the confidential information as any disclosure may impact on the owner's own listing excluded from the confidential information register 	<ul style="list-style-type: none"> consent from the owner of the confidential information not required
If for the purposes of train control in the usual course of undertaking train services	<ul style="list-style-type: none"> no confidentiality agreement excluded from the confidential information register 	<ul style="list-style-type: none"> consent from the owner of the confidential information not required
If to a railway manager to the extent required for the purpose of negotiating or providing access to that railway manager's rail transport infrastructure <ul style="list-style-type: none"> If to an infrastructure provider for infrastructure forming part of the supply chain for the purpose of facilitating the coordination of the capacity allocation process of the infrastructure provider and Aurizon Network 	<ul style="list-style-type: none"> confidentiality agreement required excluded from the confidential information register 	<ul style="list-style-type: none"> consent from the owner of the confidential information not required
If to a subcontractor to the extent necessary to enable subcontractors to perform the relevant subcontract	<ul style="list-style-type: none"> confidentiality agreement required included in the confidential information register 	<ul style="list-style-type: none"> consent from the owner of the confidential information required
If to external legal, accounting, financial, engineering advisors or consultants to Aurizon Network whose role in advising or providing services to Aurizon Network requires disclosure, are under an obligation of confidentiality to Aurizon Network and have been advised of the Aurizon Group's obligations regarding confidential information.	<ul style="list-style-type: none"> confidentiality agreement is not required included in the confidential information register 	<ul style="list-style-type: none"> consent from the owner of the confidential information is not required

<i>Reason for disclosure</i>	<i>Confidentiality, consultation and information register provisions</i>	<i>Consent provisions</i>
These service providers do not include any member of the Aurizon Group or a service provider engaged by a member of the Aurizon Group for the benefit of Aurizon Network.		

Table 11 Summary of the QCA Draft Decision for disclosure process across the Aurizon Group

<i>Disclosure process for</i>	<i>Confidentiality and information register provisions</i>	<i>Consent provisions</i>
Aurizon Network employees and officers may access and use confidential information to the extent necessary to perform their duties	<ul style="list-style-type: none"> • no confidentiality agreement • excluded from the confidential information register 	<ul style="list-style-type: none"> • consent from the owner of the confidential information not required
Directors of Aurizon Network and Aurizon Holdings; executives of the Aurizon Group, including the Chief Executive Officer of the Aurizon Group, the Chief Financial Officer of the Aurizon Group or the General Counsel of the Aurizon Group; any Company Secretary or Assistant Company Secretary of Aurizon Network or Aurizon Holdings; and any persons providing clerical or administrative assistance to any of the above ¹²⁷	<ul style="list-style-type: none"> • confidentiality agreement required • included in the confidential information register 	<ul style="list-style-type: none"> • consent from the owner of the confidential information is not required
Subcontracted service provision from the Aurizon Group to Aurizon Network ¹²⁸	<ul style="list-style-type: none"> • confidentiality agreement required • included in the confidential information register 	<ul style="list-style-type: none"> • consent of the owner of the confidential information required
Subcontracting to an Aurizon Group entity anything associated with regulatory advice regarding the development/interpretation of the Undertaking	<ul style="list-style-type: none"> • prohibited due to a direct conflict of interest 	<ul style="list-style-type: none"> • not applicable
Related operators, rail-port entities and mine-rail entities	<ul style="list-style-type: none"> • confidentiality agreement required • included in the confidential information register 	<ul style="list-style-type: none"> • consent of the owner of the confidential information required
All other confidential information flow from Aurizon Network to an individual in the Aurizon Group	<ul style="list-style-type: none"> • confidentiality agreement required • included in the confidential information register 	<ul style="list-style-type: none"> • consent of the owner of the confidential information required

¹²⁷ The Aurizon Group's organisational structure allows for directors/executives to sit on more than one board across the Aurizon Group. By law any director/executive on a board has a duty to act in the interests of that company. We consider this can create conflicts of interest. In such circumstances a potential option would be to consider the merits of prohibiting director/executives sitting on any board in the Aurizon Group if also sitting on the Aurizon Network board. We would prefer not to adopt such a position but allow Aurizon Network and the Aurizon Group to proactively manage confidential information and its ring fencing obligations. We consider a critical aspect of this is a rigorous disclosure process across directors/executives and those providing them with clerical and administrative assistance.

¹²⁸ We consider that the change in the organisational structure of the Aurizon Group results in Aurizon Network effectively subcontracting more services from the Aurizon Group. In order to develop a robust understanding of the flow of confidential information associated with the delivery of these services we are of the view that a rigorous disclosure process needs to be adopted.

Draft Decision

4.7 Our Draft Decision is to refuse to approve Aurizon Network's exemptions process, confidentiality and consent provisions in the 2014 DAU. We would approve arrangements with amendments to:

- (a) replace the obligations and processes for disclosure of confidential information in accordance with our marked drafting**
- (b) allow any relevant party, at any time during negotiations for access, to require Aurizon Network to enter into the standard form confidentiality agreement (schedule I)**
- (c) replace the standard form confidentiality agreement in accordance with our marked drafting.**

Decision making principles

Aurizon Network's 2014 DAU has removed the decision making criteria that were included in the 2010 AU. The reasons for this are summarised in **Table 8**. In our view these primarily relate to Aurizon Network being of the view that the decision making principles adopted in the 2010 AU are disproportionate to the protection provided to stakeholders. We do not share Aurizon Network's view.

As discussed previously, we consider Aurizon Network's proposals in the 2014 DAU have the potential to severely constrain the ability of access seekers and access holders to understand the flow of ring-fenced information outside of Aurizon Network. In our view, removing any principles from the undertaking regarding the approach to decision making means that not only does the flow of ring fenced information lack transparency, there is no way of assessing how the information has been used in the decision making process.

We consider this to be critical to assessing any concerns regarding discriminatory and anti-competitive behaviour. We are also of the view that the change in the Aurizon Group's structure heightens this issue rather than mitigate it. This is because the changes result in Aurizon Network subcontracting more services from the Aurizon Group, as well as there being cross-board directorships within the Aurizon Group.

Asciano was concerned about the removal of the decision making principles and suggested that not only should they be returned but they should be expanded specifically around the negotiation and management of access.¹²⁹

The decision making principles in the 2010 AU were aimed at ensuring there was a clear and transparent link between access to ring fenced information and the process of decision making. We do not see any objective reason as to why this process is no longer valid. Moreover, as it is part of the 2010 AU we would assume Aurizon Network already complies with its obligations and that it would be relatively straightforward to record the relevant information in the confidential information register.

Consequently, our Draft Decision is to reinstate and update the decision making principles included in the 2010 AU. We consider this appropriately balances the interest of access holders, access seekers and train operators (s. 138(2)(e) of the QCA Act), and aligns with Aurizon Network's legitimate business interests (s. 138(2)(b) of the QCA Act).

¹²⁹ Asciano, 2013 DAU, sub. no. 44: 9

Draft Decision

4.8 Our Draft Decision is to refuse to approve Aurizon Network's omission of decision making principles in the 2014 DAU. We would approve arrangements with amendments to:

- (a) reinstate the decision making principles included in the 2010 AU.**

Supporting provisions

Aurizon Network's 2014 DAU also includes a number of other provisions associated with the information management system, such as:

- training and exit certificates
- commitments to information security
- security measures
- waiver of the undertaking.

Training and exit certificates

Unlike the 2010 AU, Aurizon Network's 2014 DAU includes provisions for the mandatory training of various groups of employees, with respect to the Aurizon Group's obligations regarding protected information (cl. 3.21(a) of the 2014 DAU).

Aurizon Network has also included an exit certificate process for the circumstances when an Aurizon Network employee that has had access to protected information is either employed by another Aurizon Group business or an employer outside the Aurizon Group. In such circumstances the employee will undergo a debriefing session regarding Aurizon Network's and their own obligations, as applicable, regarding the management of protected information. Each employee is asked to sign an exit certificate that includes an acknowledgement of having undergone the debriefing session. A record of the exit certificates is recorded in the protected information register (cl. 3.21(b) and (c) of the 2014 DAU).

We agree with stakeholders' views that including explicit training and exit certificate provisions in the undertaking are beneficial. We also consider there is merit in the arguments that a tiered approach to training be used. Training should be undertaken periodically rather than just once and a 'reasonable endeavours' approach should be adopted by Aurizon Network when obtaining exit certificates.

We are of the view that, if tiered training is adopted, it needs to be appropriately targeted. We are not convinced this just relates to providing more detailed and frequent training to those employed by the Aurizon Group in the performance of access-related functions as suggested by stakeholders. We consider it should involve targeting the more detailed training requirements to high-risk personnel. That is, individuals who are at a high risk of being placed in situations where conflicts of interest arise. In our view, this encompasses individuals who may have access to confidential information and be in a position to:

- use that information to influence train scheduling
- use that information for purposes other than supplying core Aurizon Network services
- influence or control the decisions of any Aurizon Group company that is not Aurizon Network.

We are of the view Aurizon Network should be capable of identifying the functions/activities where such high-risk personnel reside. We therefore invite Aurizon Network to provide comments to us on the personnel it considers should be listed as high-risk personnel.

We consider Aurizon Network should maintain a register of high-risk personnel, which includes a detailed explanation of why individuals are on the register. The high-risk personnel register can be used to create a tiered training structure, with more detailed robust training applying to the individuals on the register. We also consider the register should be provided to the QCA periodically and we should be able to audit how it has been developed, and updated over time, in order to ensure that it fully captures high-risk personnel.

For avoidance of doubt, we consider the directors and executive officers of the Aurizon Group are high-risk personnel. This is because the organisational structure of the Aurizon Group allows for directors and executive officers to sit on more than one company board across the Aurizon Group. This creates the potential for conflicts of interest. Given this, we are of the view directors and executive officers should undertake the same training as any individual on the high-risk personnel register. We also consider this enhances the credibility and endorses the training process throughout the Aurizon Group.

Overall, our Draft Decision is to refuse to accept the training and exit certificate provisions in clause 3.21 of Aurizon Network's 2014 DAU. We consider a targeted tiered approach to training can be adopted through the development of a high-risk personnel register. This process should encompass directors and executive officers of the Aurizon Group, as well as employees. Finally Aurizon Network should adopt a 'reasonable endeavours' approach to obtaining exit certificates.

We consider this appropriately balances the interests of access holders, access seekers and train operators, with the legitimate business interests of Aurizon Network (ss. 138(2)(b) and (e) of the QCA Act).

Draft Decision

4.9 Our Draft Decision is to refuse to approve Aurizon Network's training and exit certificate provisions in the 2014 DAU. We would approve arrangements with amendments to:

- (a) require confidential information training for all Aurizon Network personnel, as well as employees of the Aurizon Group receiving or having access to confidential information**
- (b) require Aurizon Network to adopt a 'best endeavours' approach to obtaining exit certificates for Aurizon Network personnel that have had access to confidential information**
- (c) include provisions that:**
 - (i) require the development of a high-risk personnel register that can be used to target training requirements**
 - (ii) provide for a copy of the high-risk personnel register to be given to the QCA, upon request, and to allow for the QCA to audit its development and update over time.**

Commitments to information security

The 2014 DAU includes the following overarching commitments regarding the flow of ring-fenced information (cl. 3.15 of the 2014 DAU):

- to keep confidential and not to disclose protected information, unless in accordance with the undertaking
- to only use protected information for the purpose for which it is disclosed to Aurizon Network, and only to the extent necessary for that purpose
- not to use or disclose protected information for the purpose of a related operator obtaining an unfair commercial advantage.

We consider it necessary to strengthen these commitments. Most importantly, we consider the obligation not to use confidential information for the purpose of a related operator obtaining an unfair commercial advantage should also extend to the disclosure of confidential information to associated port/rail and mine/rail entities.

We consider this is in the interests of access holders, access seekers and train operators (s. 138(2)(e) of the QCA Act) given Aurizon's strategic intent to leverage its vertically integrated structure. We are of the view this aligns with Aurizon Network's legitimate business interests (s. 138(2)(b) of the QCA Act).

Draft Decision

4.10 Our Draft Decision is to refuse to approve Aurizon Network's commitments to information security in the 2014 DAU. We would approve amendments that:

- (a) require Aurizon Network not to disclose confidential information for the purpose of a related operator or associated port/rail and mine/rail entities obtaining an unfair commercial advantage.**

Security measures

In the 2014 DAU, Aurizon Network commits to ensuring that in its major office premises there is adequate security to ensure employees working for a related operator cannot access Aurizon Network offices unless access is authorised by an Aurizon Network employee and, while in the Aurizon Network offices, the employee of a related operator is accompanied by an Aurizon Network employee to the extent reasonably practicable. A related operator can be located in the same building as Aurizon Network (cl. 3.22 of the 2014 DAU).

We do not consider these measures effective. In particular, it is not clear why the measures focus solely on related operators, what 'adequate security' means and how such security can be enforced if any Aurizon Network employee can authorise access to Aurizon Network offices and thereafter only be required to accompany the employee of the related operator 'when reasonably practicable'.

In our view, Aurizon Network's obligations to ensure the security of the confidential information it holds need to be sufficiently robust to ensure they are considered credible by access holders, access seekers and train operators. In this regard we are minded to adopt the following:

- security measures apply to all persons other than directors/employees of Aurizon Network
- security measures apply to all Aurizon Network premises

- any person visiting an Aurizon Network premises is accompanied by an Aurizon Network employee
- with the exception of Aurizon Network directors/employees, a record is maintained of all persons who have accessed an Aurizon Network premises, who they are, who they are affiliated to, who they were meeting and when
- an employee of Aurizon Network on secondment with another Aurizon Group company is considered to be staff of that other Aurizon Group company and subject to the security measures for non-Aurizon Network employees.

We are of the view that such measures are in the interests of access holders, access seekers and train operators (s. 138(2)(e) of the QCA Act) and are compatible with the legitimate business interests of Aurizon Network (s. 138(2)(b) of the QCA Act).

Draft Decision

4.11 Our Draft Decision is to refuse to approve Aurizon Network's commitments regarding the security of premises in 2014 DAU. We would approve amendments that require:

- (a) security measures to apply to:**
 - (i) all persons other than directors/employees of Aurizon Network**
 - (ii) all Aurizon Network premises**
- (b) any person visiting an Aurizon Network premises to be accompanied by an Aurizon Network employee**
- (c) a record to be maintained of all persons who have accessed an Aurizon Network premises, with the exception of Aurizon Network directors/employees**
- (d) an employee of Aurizon Network on secondment with another Aurizon Group company to be considered as staff of that other company and be subject to the security measures for non-Aurizon Network employees.**

Waiver of the undertaking

Aurizon Network's 2014 DAU provides for access holders and access seekers to voluntarily enter into a binding agreement, which excludes the operation of all, or some, of the ring fencing provisions included in Part 3 of the 2014 DAU, with respect to protected information. It also provides for Aurizon Network and a third party access holder or access seeker to enter into a confidentiality agreement/deed or an access agreement containing confidentiality obligations in relation to the negotiation of access rights. Any such agreement will prevail over the provisions in Part 3 of the undertaking, to the extent of any inconsistency (cl. 3.13 of the 2014 DAU).

In our view, this clause could provide Aurizon Network with incentives to exert its monopoly power in any negotiation with an individual access holder, access seeker or train operator in order to reduce its ring fencing obligations. We are of the view it is inappropriate for the undertaking to include provisions that may encourage such behaviour. We consider this particularly pertinent given the changes to the Aurizon Group's organisational structure.

Our Draft Decision is to replace this clause with explicit provisions prohibiting Aurizon Network requesting that an access holder, access seeker or train operator waive Aurizon Network's ring fencing obligations as set out in Part 3 of the undertaking. We have also included provisions to ensure the ring fencing obligations and requirements in Part 3 of the undertaking are not

superseded by a confidentiality agreement/deed or access agreement containing confidentiality provisions in relation to the negotiation or provision of access rights.

We consider, given Aurizon Network's position as the monopoly provider of access to the CQCN, this appropriately balances the interests of access holders, access seekers and train operators with Aurizon Network's legitimate business interests (ss. 138(2)(b) and (e) of the QCA Act).

Draft Decision

4.12 Our Draft Decision is to refuse to approve Aurizon Network's proposals allowing for Aurizon Network and third party access seekers or access holders to agree to waive the ring fencing provisions in 2014 DAU. We would approve amendments that:

- (a) prohibit Aurizon Network from requesting an access holder, access seeker or train operator to waive Aurizon Network's ring fencing obligations**
- (b) ensure ring fencing obligations and requirements are not superseded by:

 - (i) a confidentiality agreement/deed or**
 - (ii) an access agreement****containing confidentiality provisions in relation to the negotiation or provision of access rights.****

4.6 Role of functional separation

4.6.1 Aurizon Network proposal

Aurizon Network's view on its proposed approach to functional separation and how this compares with the 2010 AU is summarised in the following table.

Table 12 Aurizon Network's approach to functional separation the 2010 AU and the 2014 DAU

<i>Ring fencing element</i>	<i>2010 AU approach</i>	<i>2014 DAU approach</i>
Functional separation	Separation is achieved by a specific clause containing a requirement for prior approval by QCA for any proposal for a related operator 'to become responsible for matters integral to the provision of below-rail services'. This is combined with a list of examples of the 'responsibilities' of Aurizon Network. ¹³⁰	Adopt a clear statement of core access-related functions performed by Aurizon Network (adapted from the 2010 AU), combined with an obligation that those functions will not be undertaken by, or contracted out to, a related operator, but that nothing prevents Aurizon Network undertaking a non-core function or requires it to undertake a non-core function. ¹³¹

Aurizon Network said it had undergone major structural change since the 2010 AU when it was structured by business units (i.e. coal, freight, network). It is now structured along functional lines to improve customer focus, align operational focus and improve company performance.¹³²

Aurizon Network said the restructure continues to separate management and operation of declared below-rail infrastructure from train services.¹³³

¹³⁰ Aurizon Network, 2013 DAU, sub. no. 2:61-62

¹³¹ Aurizon Network, 2013 DAU, sub. no. 2:61-62

¹³² Aurizon Network, 2013 DAU, sub. no. 2:65-66

¹³³ Aurizon Network, 2013 DAU, sub. no. 2:66

Aurizon Network said the 2014 DAU provides for functional separation through clause 3.5(a) of the 2014 DAU. This requires that access-related functions will be performed by Aurizon Network and not transferred or delegated to, contracted out to, or otherwise undertaken, by a related operator.

According to Aurizon Network, this provides greater assurance than the 2010 AU obligation, which restricted 'matters integral to the provision of Below Rail Services' from becoming the 'responsibility' of a related operator, and required a draft amending access undertaking to be submitted to the QCA for prior approval of any functional change.¹³⁴ Aurizon Network noted the list of access-related functions outlined in clause 3.4 of the 2014 DAU does not contemplate change – rather, they ensure certainty throughout the life of the undertaking. Aurizon Network said its proposals retained the key functions and was substantially the same as the 2010 AU.¹³⁵

Aurizon Network noted that nothing in the 2010 AU required it to perform a function that is not an access-related function; or prevented it from performing any function which is not a access-related function, apart from commercial above-rail services.¹³⁶

Aurizon Network said that the 2014 DAU contains a similar exception to the 2010 AU, whereby Aurizon Network may contract with related operators for provision of certain components of the train control service being field incident management and yard control services at yards other than major yards.¹³⁷

4.6.2 Stakeholders' position

Stakeholder's main positions are summarised in the table below.

Table 13 Summary of stakeholder views on Aurizon Network's 2014 DAU proposals for functional separation

<i>Issue</i>	<i>Comment</i>
Separation of regulated activities from other commercial activities	Stakeholders considered that Aurizon Network proposed a narrow interpretation of section 137 of the QCA Act and overly relies on legal separation from its parent as a basis to reduce ring fencing obligations. Stakeholders suggest the potential for anti-competitive behaviour due to vertical integration is not adequately considered. Stakeholders wanted a broader capture of other commercial activities to include above-rail operations, ports and Queensland rail infrastructure development outside of CQCN. ¹³⁸ Stakeholders suggested Aurizon Network's inclusion in the preamble that it undertakes both regulated and non-regulated activities, reflects a non-genuine commitment to compliance with non-discrimination principles. ¹³⁹
Definition of Access-related Functions and separation from other commercial activities	Stakeholders suggested core access related functions concerning the declared service must be performed by Aurizon Network and separated from other commercial activities. A definition of Access-related Functions that includes all 'Below Rail Services' unless specifically excluded was proposed and included. ¹⁴⁰ ¹⁴¹

¹³⁴ Aurizon Network, 2013 DAU, sub. no. 2:66

¹³⁵ Aurizon Network, 2013 DAU, sub. no. 2: 66-67

¹³⁶ Aurizon Network, 2013 DAU, sub. no. 2:68

¹³⁷ Aurizon Network, 2013 DAU, sub. no. 2:67

¹³⁸ QRC, 2013 DAU, sub. no. 46:32; QRC, 2014 DAU, sub. no. 42:14; Anglo American, 2014 DAU, sub. no. 7:13-17, 20-23

¹³⁹ Asciano, 2013 DAU, sub. no. 43:31, 63-64

¹⁴⁰ QRC, 2013 DAU, sub. no. 46:33; QRC, 2014 DAU, sub. no. 42:15-16; Anglo American, 2014 DAU, sub. no. 7:13-17

¹⁴¹ Asciano, 2013 DAU, sub. no. 43:31; Asciano, 2014 DAU, sub. no. 22:29-30

<i>Issue</i>	<i>Comment</i>
	<p>(a) Any changes to the undertaking, any future access undertaking, any pro forma or standard documentation contemplated or required by the 2014 DAU and any amendments to any of these;</p> <p>(b) Reporting under and performing the 2014 DAU;</p> <p>(c) Receiving and dealing with access applications;</p> <p>(d) Negotiating agreements for expansions (including funding arrangements for expansions) and studies for expansions;</p> <p>(e) Negotiating an access agreement, a user funding agreement, a rail connection agreement and any related agreements;</p> <p>(f) Train control, marshalling yards, electric infrastructure, access to land;</p> <p>(g) Performing and enforcing access agreements, agreements for studies for expansions, agreements for expansions.</p> <p>(h) Put in place strict control or prohibitions on delegation, transfer or subcontracting of access related functions with related parties.¹⁴²</p> <p>Anglo American¹⁴³ said that 'Access related Functions' should cover all services provided by Aurizon relating to accessing the network to transport coal and which are non-contestable or weakly contestable, including:</p> <p>(a) electricity supply and sale</p> <p>(b) rail relocation and related construction and maintenance services (e.g. of private spurs & loops) under standard terms & conditions performed by Aurizon Network</p> <p>(c) Transfer Facilities Licences (TFLs) regarding load-out interface requirements, load profiling, dust veneering and other matters which Aurizon Network has sole authority over</p> <p>(d) capacity modelling, specifically dynamic modelling services such as system capacity and private infrastructure interface; this is essential for customers to determine the 'usability' when contracting capacity particularly where Aurizon Network is the only entity that has access to all the necessary information required to carry out such modelling</p> <p>(e) due to the difficulty in precisely identifying all services that Aurizon Network should be required to provide as regulated services, the definition should be inclusive, allowing the QCA to determine further services over time that require oversight under the Access Undertaking.</p>

4.6.3 QCA analysis and Draft Decision

We are of the view that the 2014 DAU adopts a narrow, overly prescriptive definition of Aurizon Network's functional responsibilities, while simultaneously allowing Aurizon Network to perform functions not related to those functional responsibilities. These provisions operate in tandem with the changes to the Aurizon Group's organisational structure that appear to result in Aurizon Network subcontracting more of the services/functions required to operate the CQC from the Aurizon Group.

In the context of developing an effective ring fencing regime, we consider the overall impact of this approach is to render the concept of 'access-related functions' or 'below-rail services' less meaningful than the 2010 AU. Consequently, we are of the view that Aurizon Network's functions should be defined in a manner that encapsulates the core service it provides. We consider Aurizon Network's functional responsibilities and obligations relate to the provision of the declared service.

¹⁴² QRC, 2013 DAU, sub. no. 46:36; QRC, 2014 DAU, sub. no. 42:15-16

¹⁴³ Anglo American, 2014 DAU, sub. no. 7:13-20

Given the restructuring of the Aurizon Group, we consider this a more realistic and pragmatic approach. Indeed, from a ring fencing perspective, we consider the main implication of the Aurizon Group's organisational change is not the precise set of functions Aurizon Network undertakes but controlling the flow of confidential information from Aurizon Network to the Aurizon Group and other external third parties. This has been reflected in our approach to the management of confidential information discussed in previous sections of this chapter.

Overall, our Draft Decision is to refuse to accept Aurizon Network's proposals in the 2014 DAU regarding Aurizon Network's definition of access-related functions and its obligation to perform these (cl. 3.4 and 3.5 of the 2014 DAU). For the purposes of ring fencing, this is to be replaced with an overarching statement that Aurizon Network's primary function is to supply the declared service and it is obliged to fulfil all relevant functions required to do so. The Draft Decision also requires that Aurizon Network will not:

- undertake any above-rail services
- undertake the operation or marketing of train services, unless for the purpose of providing a below-rail service or the provision of services in respect of private infrastructure
- undertake any port service (including providing access to a port service) or hold any direct or indirect (by way of a subsidiary or trust) interest in any port in Queensland
- hold any direct or indirect (by way of a subsidiary or trust) interest in any coal mine or project in Queensland.

In the context of the changes to the Aurizon Group's organisational structure and our view on the implications of this, we consider our approach appropriately balances the interests of access holders, access seekers and train operators with the legitimate business interests of Aurizon Network (ss. 138(2)(b) and (e) of the QCA Act).

Draft Decision

4.13 Our Draft Decision is to refuse to accept Aurizon Network's proposals regarding the definition of access-related functions and Aurizon Network's obligation to perform these in the 2014 DAU. We would approve amendments to:

- (a) remove clause 3.4 and 3.5
- (b) include an overarching statement that Aurizon Network's primary function is to supply the declared service and provide all relevant functions
- (c) require Aurizon Network not to:
 - (i) undertake any above-rail services
 - (ii) undertake the operating or marketing of train services, unless for the provision of the declared service
 - (iii) undertake any port service or hold any direct or indirect interest in any port in Queensland.

4.7 Role of employee separation

4.7.1 Aurizon Network proposal

Aurizon Network's view on its proposed approach to employee separation and how this compares with the 2010 AU is summarised in the following table.

Table 14 Aurizon Network's approach to employee separation in the 2010 AU and the 2014 DAU respectively

<i>Ring fencing element</i>	<i>2010 AU approach</i>	<i>2014 DAU approach</i>
Employee separation	Commitment in the 2010 AU to avoid conflicts of interest for Aurizon Network employees by preventing their participation in 'working groups' that may affect access. This approach creates substantial uncertainty in practice. ¹⁴⁴	Replace the 'working group' clause with a clear commitment that access-related Aurizon Network employees work principally for Aurizon Network and do not work at the direction of a related operator, unless transferred or seconded (subject to requirements for handling protected information). ¹⁴⁵

Aurizon Network said it requires flexibility to avoid limiting employee career advancement, and to ensure the Aurizon Group can efficiently deploy staff where this does not cause a ring fencing risk.¹⁴⁶

Aurizon Network also said the 2010 AU contained no practicable controls for employee separation, and attempted to prohibit involvement of employees in vaguely described 'working groups'.¹⁴⁷

4.7.2 Stakeholders' position

The various stakeholder's main positions are summarised in the table below.

Table 15 Summary of stakeholder views on Aurizon Network's employee separation proposals in the 2014 DAU

<i>Issue</i>	<i>Comment</i>
Staff duties and secondments	Stakeholders said stricter controls should be placed on duties Aurizon Network staff can undertake and a prohibition on secondments to related parties. ¹⁴⁸

Stakeholders said Aurizon Network's secondment proposals are insufficient due to the continued crossover of people that was symptomatic of a culture of non-compliance. Stakeholders suggested secondments should be prohibited other than specific approved secondments.¹⁴⁹

4.7.3 QCA analysis and Draft Decision

The 2014 DAU includes a number of exceptions to the principle proposed by Aurizon Network that Aurizon Network employees primarily working in access-related functions will largely work in this area. The exceptions are outlined in the table below (cl. 3.6(b) of the 2014 DAU).

¹⁴⁴ Aurizon Network, 2013 DAU, sub. no. 2:61

¹⁴⁵ Aurizon Network, 2013 DAU, sub. no. 2:61

¹⁴⁶ Aurizon Network, 2013 DAU, sub. no. 2:68

¹⁴⁷ Aurizon Network, 2013 DAU, sub. no. 2:68

¹⁴⁸ QRC, 2013 DAU, sub. no. 46:36; QRC, 2014 DAU, sub. no. 42:16; Anglo American, 2014 DAU, sub. no. 7:24-25

¹⁴⁹ QRC, 2013 DAU, sub. no. 84:24; QRC, 2014 DAU, sub. no. 42:16-17, 18; Anglo American, 2014 DAU, sub. no. 7:24-25

Table 16 Exceptions allowing Aurizon Network employees to perform non access-related functions and to move throughout the Aurizon Group

Aurizon Network employees primarily involved in access-related functions are not prevented or restricted from activities:

- performing functions required to negotiate for or provide access to a related operator in accordance with the undertaking
- being seconded subject to the requirements in the undertaking regarding the handling of protected information¹⁵⁰
- ceasing to work for Aurizon Network and commencing work for a related operator subject to the requirements in the undertaking regarding the handling of protected information
- undertaking any function or activity:
 - required or compelled by any law
 - required or compelled by any order of a court
 - required or compelled by notice validly issued by any authority
 - necessary for the conduct of any dispute resolution process or audit under the undertaking, the QCA Act or a standard agreement
 - in the course of responding to an emergency or natural disaster
 - that does not relate, whether directly or indirectly, to the provision of below-rail services
- an employee engaged in:
 - asset construction, maintenance, renewal or repair
 - support services and/or corporate functions
 is not restricted from undertaking work for any Aurizon Group business unit or corporate functional areas, subject to the requirements in the undertaking regarding protected information.

Further, provided Aurizon Network complies with its ring fencing obligations in the 2014 DAU, Aurizon Network can obtain assistance in the performance of access-related functions and its undertaking obligations from staff within the Aurizon Group that provide shared services and corporate functions across the Aurizon Group (cl. 3.6(d) of the 2014 DAU).

We have concerns about the effectiveness of Aurizon Network's employee separation proposals. Further, we do not share Aurizon Network's view that the working group approach in the 2010 AU is vague and creates uncertainty in practice (cl. 3.4.3(c) of the 2010 AU). The working group approach requires that if the activities of:

- a project working group whose members include staff members from a related operator, or
- a related operator

affect or could affect the access of access holders or access seekers, then it would be necessary for Aurizon Network to ensure that no Aurizon Network employee works in such a working group or is temporarily transferred to the related operator. The exception is when Aurizon Network is satisfied that the employee, as an employee of Aurizon Network, has not had access to information regarding the operations of an access holder or access seeker which, if disclosed to the related operator, could provide it with a competitive advantage.

We consider the effective operation of this approach requires Aurizon Network to have an understanding of the ring-fenced information that its employees have had access to and whether there would be a conflict of interest if a given employee or employees were to work on a specific project that involved a related operator.

¹⁵⁰ This excludes temporary transfers/secondments to the marketing division. Temporary is defined as less than six months (cl. 3.6(c) of the 2014 DAU).

Within this context, it is difficult to understand why, as a matter of good business practice, Aurizon Network would not have a detailed knowledge of the ring-fenced information its employees had access to, particularly as it would be expected that Aurizon Network would only disclose such information to its employees to the extent necessary to discharge their duties. Indeed, we would have reservations if Aurizon Network did not have such records of disclosure and would have to consider options to rectify this.

Further, while we understand the need for career advancement opportunities for Aurizon Network employees and Aurizon Network's objective to use its resources efficiently, we consider these goals need to be balanced against the credibility and effectiveness of the ring fencing regime.

In our view, this means a greater level of transparency over the secondment/transfer of employees to and from Aurizon Network and the Aurizon Group is required. The need for this is heightened until there is greater understanding of the dynamics of the flow of confidential information between Aurizon Network, the Aurizon Group and third parties that result from the organisational changes implemented across the Aurizon Group and its strategic intent to leverage the benefits of vertical integration.

Our Draft Decision is to refuse to accept Aurizon Network's 2014 DAU proposals regarding employee separation (cl. 3.6 of the 2014 DAU) and to:

- reinstate the working group concept and extend its application to associated rail–port and rail–mine entities
- introduce measures requiring secondments/transfers of employees between Aurizon Network and an Aurizon party to be notified to the QCA prior to the secondment/transfer being undertaken
- include in the undertaking a requirement for Aurizon Network employees to have a separate email address that identifies them as Aurizon Network employees.

We consider this measure is reasonable given the confidential information employees have access to and the potential conflicts of interest that can arise when secondments/transfers take place. We consider these measures underpin a credible and effective ring fencing regime and balance the interests of access holders, access seekers and train operators with the legitimate business interests of Aurizon Network (ss. 138(2)(b) and (e) of the QCA Act).

Draft Decision

4.14 Our Draft Decision is to refuse to approve Aurizon Network's proposals regarding employee separation in the 2014 DAU. We would approve amendments that:

- (a) reinstate the working group concept and extend its application to associated rail–port and rail–mine entities**
- (b) require Aurizon Network to notify the QCA of secondments/transfers of employees to another Aurizon party prior to being made**
- (c) require Aurizon Network employees to have a separate email address that identifies them as Aurizon Network employees.**

4.8 Role of management separation

4.8.1 Aurizon Network proposal

Aurizon Network's proposed approach to management separation in the 2014 DAU and comparison to the 2010 AU is summarised in the table below.

Table 17 Aurizon Network's approach to management separation in the 2010 AU and the 2014 DAU

<i>Ring fencing element</i>	<i>2010 AU approach</i>	<i>2014 DAU approach</i>
Management separation	There is a general obligation for Aurizon Network to be managed independently from related operators, and for related operators not to participate in the supervision or appointment of the executive management of Aurizon Network. ¹⁵¹	Replace the general obligation of independent management with a formalisation of the current, independent management structure of Aurizon Network. Provide for the creation and maintenance of an independent network executive management team that: <ul style="list-style-type: none"> (a) does not manage a related operator; (b) has independent management reporting and supervision lines that do not include any person with direct management responsibility for a related operator; (c) has an executive manager of equivalent or greater seniority to the executive manager of a related operator.¹⁵²

Aurizon Network said that independence of upstream from downstream interests in the 2010 AU was addressed by a high-level commitment to independence of network business senior management. It said ensuring independent management of Aurizon Network continues to be a feature of the 2014 DAU. However, Aurizon Network said the 2010 AU provisions lacked clarity and developed new provisions that are simple and clear by defining the key elements of independence.¹⁵³

4.8.2 Stakeholders' position

Stakeholders' main positions are summarised in the table below.

¹⁵¹ Aurizon Network, 2013 DAU, sub. no. 2:61

¹⁵² Aurizon Network, 2013 DAU, sub. no. 2:61

¹⁵³ Aurizon Network, 2013 DAU, sub. no. 2:69-70

Table 18 Summary of stakeholder views on Aurizon Network's management separation proposals in the 2014 DAU

<i>Issue</i>	<i>Comment</i>
Management separation from related parties	Stakeholders said management separation should extend to related operators and associated port or rail entities. ¹⁵⁴
Cross-directorships within Aurizon Group	Stakeholders said Aurizon Network's board should exclude directors of related parties, and that the chair and majority of directors should be independent. Otherwise corporate duties to each entity may conflict with regulatory principles. ^{155 156} Cross-directorships in common with other Aurizon Group entities including the holding company can neither independently or effectively consider Aurizon Network issues separately from the broader Aurizon Holdings considerations. ¹⁵⁷

Stakeholders said executive seniority equivalency and Board cross-directorships raise concerns and the provisions have been narrowed.¹⁵⁸

The QRC said board cross-directorships can undermine ring fencing effectiveness. To ensure independent management of access rights, there should be a prohibition on cross-directorships of any port, rail or mining entity in which an Aurizon party has an interest.¹⁵⁹

4.8.3 QCA analysis and Draft Decision

The general obligation in the 2010 AU regarding the independence of the senior management of Aurizon Network requires that Aurizon Network is managed independently of related operators. Aurizon Network is also to procure that related operators do not participate in the appointment or supervision of the executive management of Aurizon Network (cl. 3.1.2 of the 2010 AU).

Aurizon Network's 2014 DAU includes the provisions outlined in the table below (cl. 3.8, 3.9 and 3.10 of the 2014 DAU).

¹⁵⁴ QRC, 2013 DAU, sub. no. 46:36-37; QRC, 2014 DAU, sub. no. 42:14; Anglo American, 2014 DAU, sub. no. 7:22-23

¹⁵⁵ QRC, 2013 DAU, sub. no. 46:37; QRC, 2014 DAU, sub. no. 42:16-17; Anglo American, 2014 DAU, sub. no. 7:25

¹⁵⁶ Asciano, 2013 DAU, sub. no. 43:28-29; Asciano, 2014 DAU, sub. no. 22:20, 68

¹⁵⁷ Asciano, 2013 DAU, sub. no. 43:28; Asciano, 2014 DAU, sub. no. 22:20,68; QRC, 2014 DAU, sub. no. 42:16-17; Anglo American, sub. no. 7:25

¹⁵⁸ QRC, 2014 DAU, sub. no. 42:16-17; Anglo American, 2014 DAU, sub. no. 7:21

¹⁵⁹ QRC, 2014 DAU, sub. no. 42:17; Asciano, 2014 DAU, sub. no. 22:20

Table 19 The 2014 DAU provisions regarding management separation

<i>Area</i>	<i>Provisions</i>
Network Executive Team	<p>Aurizon Network is to be managed by a team comprising:</p> <ul style="list-style-type: none"> • the Aurizon Network Executive Officer and his or her direct reports • any other person nominated by Aurizon Network's Executive Officer <p>Aurizon Network is to ensure that related operators do not participate in the process of appointing the Aurizon Network Executive Officer or any other person to the Network Executive Team.</p>
Management separation from related operators	<p>The Network Executive Team, including the Aurizon Network Executive Officer:</p> <ul style="list-style-type: none"> • must not have direct management responsibility for a related operator • may have direct management responsibility for an Aurizon Group business unit that is not a related operator • must have an independent management reporting line that does not include any person with direct management responsibility for a related operator. <p>A person has direct management responsibility for a related operator when that person has authority to make decisions about the day-to-day management and operation of a related operator. This definition excludes a director/managing director of Aurizon Holdings or Aurizon Operations, as well as the Chief Executive Officer and Chief Financial Officer of the Aurizon Group.</p> <p>In terms of seniority, Aurizon Network's Executive Officer will have the same or a greater level of seniority within the organisational structure of the Aurizon Group than the most senior executive manager with direct management responsibility for a related operator.</p>
Management of access rights	<p>Aurizon Network will not act on directions from a related operator in respect of the granting or exercise of access rights to or by:</p> <ul style="list-style-type: none"> • a related operator; or • a third party access holder, access seeker or train operator (without its consent) <p>provided nothing prevents the related operator providing a direction to Aurizon Network in relation to the exercise of the related operators access rights in accordance with the terms of an access agreement between the related operator and Aurizon Network.</p>

While the 2014 DAU retains a requirement preventing related operators from participating in the appointment of Aurizon Network's executive management team, we note that, unlike the 2010 AU, the 2014 DAU does not explicitly exclude related operators from directly supervising Aurizon Network's executive management team. We consider this narrows Aurizon Network's obligations and provides less protection to access holders, access seekers and train operators than exists in the 2010 AU.

Further, we consider the approach in the 2014 DAU to the management separation of Aurizon Network from related operators may result in unnecessary complexity, lessen clarity and increase the likelihood of disputes. For instance:

- if conflicts of interest arise, it is not clear what will be achieved in practice by having Aurizon Network's Executive Officer at equivalent or greater seniority than the most senior executive manager with direct management responsibility for a related operator
- because they are excluded from the definition of direct management responsibility, it appears possible for the Aurizon Group to give direct management responsibility for a related operator to a director/managing director of Aurizon Holdings or Aurizon Operations; but not precluding them from being nominated to the Aurizon Network executive management team. This would not achieve the management separation of Aurizon Network.

Finally, we consider Aurizon Network's 2014 DAU proposal for the independent management of access rights of limited value. This is because the commitment to 'not act upon directions from a related operator in respect of the granting or exercise of access rights' has the caveat that:

'nothing prevents a direction from a related operator, provided it is in accordance with the terms of the related operator's access agreement.'

In our view the adoption of such an approach may encourage incentives to interpret clauses or include clauses in a related operator's access agreements in an unduly flexible manner.

In summary, we are not convinced that Aurizon Network's 2014 DAU proposal improves upon the general management separation obligation included in the 2010 AU. We do not consider that it enhances transparency and, on balance, may narrow Aurizon Network's obligations relative to the management separation provisions in the 2010 AU.

We also share the stakeholder view that a focus on concerns regarding related operators is unlikely to be sufficient to cover conflicts of interest between Aurizon Network and associated rail–port and rail–mine entities within the Aurizon Group.

We do not, however, at this stage consider the board of Aurizon Network should exclude directors of related parties within the Aurizon Group. For the avoidance of doubt, this does not mean we do not share stakeholder concerns in this regard. However, in the first instance, we consider it more appropriate to see whether this can be dealt with through a focus on the flow of confidential information and there being appropriate recognition that any individual who holds cross-directorships should be categorised as high-risk for the purposes of ring fencing. If these efforts prove unsatisfactory, consideration of a prohibition on cross-directorships may become necessary.

Against this background, our Draft Decision is to refuse to accept Aurizon Network's proposals in the 2014 DAU regarding the management separation of Aurizon Network and to reinstate an updated version of clause 3.1.2 of the 2010 AU that accounts for associated rail–port and rail–mine entities, as well as related operators. We consider this appropriately balances the interests of access holders, access seekers and train operators with the legitimate business interests of Aurizon Network (ss. 138(2)(b) and (e) of the QCA Act).

Draft Decision

4.15 Our Draft Decision is to refuse to approve Aurizon Network's proposals regarding management separation in the 2014 DAU. We would approve amendments to:

- (a) remove clauses 3.8, 3.9 and 3.10**
- (b) reinstate an updated version of clause 3.1.2 of the 2010 AU to account for associated rail–port and rail–mine entities, as well as related operators.**

4.9 Role of accounting separation

4.9.1 Aurizon Network's proposal

Aurizon Network said the 2014 DAU retained the 2010 AU accounting separation provisions, including providing annual financial accounts. It said drafting was amended to remove references to 'general purpose' statements as Aurizon Network prepares statements for the

specific purpose of demonstrating costing manual compliance, and the statements exclude information relating to non-regulated activities conducted by Aurizon Network.¹⁶⁰

4.9.2 Stakeholders' position

Stakeholders did not support Aurizon Network's proposals for the provision of separated financial accounts. Asciano said Aurizon Network's proposal to exclude non-regulated activities from reporting in essence made the accounts useless. Asciano said Aurizon Network's regulated and non-regulated activities share common costs and disclosure was essential to ensure transparency and no cross-subsidisation between regulated and non-regulated activities. Asciano said the argument equally applies to common costs between Aurizon Holdings and Aurizon Network; the regulated accounts need to cover not only all of Aurizon Network's activities but also cost allocations from Aurizon Holdings.¹⁶¹

4.9.3 QCA analysis and Draft Decision

Aurizon Network's approach to accounting separation is split across the provisions in Part 3 and Part 10 of the 2014 DAU which are respectively concerned with ring fencing and reporting. The table below provides a comparison of the approach proposed in the 2014 DAU with that in the 2010 AU.

Table 20 Aurizon Network's approach to accounting separation in the 2010 AU and the 2014 DAU

2010 AU	2014 DAU
<p>The following financial statements to be prepared annually¹⁶²:</p> <ul style="list-style-type: none"> • general purpose financial statements for Aurizon Network in accordance with the relevant legislation and applicable Australian accounting standards • a supplementary set of financial statements separately identifying Aurizon Network's business regarding the rail infrastructure regulated by the undertaking from any other business conducted by Aurizon Network. • Aurizon Network will produce the supplementary set of financial statements in accordance with the methodology and format set out in the costing manual, these statements will be certified by the Aurizon Network Executive General Manager as being in accordance with the costing manual. 	<p>The following financial statements to be prepared annually:</p> <ul style="list-style-type: none"> • Aurizon Network's below-rail services regulated by the undertaking. These financial statements do not include information relating to any other business conducted by Aurizon Network. <p>Aurizon Network will produce financial statements in accordance with the costing manual, these statements will be certified as accurate by Aurizon Network's Executive Officer and, unless otherwise agreed with the QCA, published on Aurizon Network's website within six months of the end of the relevant financial year.¹⁶³</p>

The 2010 AU allows the creation of a hierarchical system of financial statements. Aurizon Network's general financial accounts represent the top tier. These financial statements are then split into two sub-sets relating to Aurizon Network's regulated and unregulated business. The costing manual is intended to set out the methodology for this process.

The 2010 AU creates a fully reconcilable system of financial statements that have a direct link back to a set of financial accounts that comply with relevant legislation and accounting standards. In our view this will allow:

¹⁶⁰ Aurizon Network, 2013 DAU, sub. no. 2:69

¹⁶¹ Asciano, 2014 DAU, sub. no. 22: 18-19

¹⁶² Clause 3.3.1 of the 2010 AU

¹⁶³ Clause 3.7 and 10.1.1 of the 2014 DAU

- a robust and transparent understanding of the costs allocated to the regulated business
- a robust and transparent audit to be undertaken with respect to the application of the methodology and rules in the costing manual
- the holistic impact of any proposed changes to the costing manual to be fully understood and objectively assessed.

We consider Aurizon Network's 2014 DAU proposal reduces robustness and transparency because it removes the link with Aurizon Network's general financial statements. It is unclear what merit this approach has, particularly as Aurizon Network has an obligation to produce financial accounts that comply with existing legislation and accounting standards.

We consider that, in order for stakeholders to have confidence in the accounting separation process, it would be necessary to provide a full reconciliation of the financial statements associated with the regulated and non-regulated businesses of Aurizon Network back to a set of fully audited financial accounts for Aurizon Network. This is particularly important as Aurizon Network seeks to expand its business in non-regulated rail. Aurizon Network's CQCN customers require confidence they are not cross-subsidising other activities. In our view, this represents best practice from an accounting separation perspective.

In this regard, we also consider it appropriate that Aurizon Network's Executive Officer should certify that the relevant financial statements have been prepared in accordance with the costing manual, rather than certifying that the financial statements are 'accurate'. Indeed, we are not clear what 'accurate' means in the absence of a full reconciliation back to Aurizon Network's audited financial accounts.

Overall, our Draft Decision is to refuse to approve Aurizon Network's proposals with respect to accounting separation and to require:

- the accounting separation process in the 2010 AU be included in clause 10.1.1 of the 2014 DAU
- deletion of clause 3.7 of the 2014 DAU, as this will not be relevant because it primarily relates to stating that the financial statements prepared as part of the accounting separation process will not include information relating to any other business conducted by Aurizon Network.

We are of the view this will enable the regulatory regime to provide a robust and transparent understanding of the costs allocated to the regulated business and, as such, appropriately balance the interests of access holders, access seekers and train operators with the legitimate business interests of Aurizon Network (ss. 138(2)(b) and (e) and the QCA Act).

Draft Decision

4.16 Our Draft Decision is to refuse to approve Aurizon Network's proposals regarding accounting separation in the 2014 DAU. We would approve amendments that:

- include the accounting separation process in clause 10.1.1 of the 2010 AU in Part 10 of the 2014 DAU**
- delete clause 3.7 of the 2014 DAU.**

4.10 Role of complaint handling, audit and compliance

4.10.1 Aurizon Network's proposal

Aurizon Network said the 2014 DAU retained the 2010 AU complaint, reporting and audit mechanisms in a single broad mechanism encompassing all Part 3 obligations, including the prohibition of unfair differentiation between access seekers.¹⁶⁴

4.10.2 Stakeholders' position

Stakeholders' main positions are summarised in the table below. These cover complaint handling, audit and compliance in a broad-ranging manner.

Table 21 Summary of stakeholder views on Aurizon Network's complaint handling, audit and compliance proposals in the 2014 DAU

<i>Issue</i>	<i>Comments</i>
Complaint handling, audit and compliance	Stakeholders said we should: <ul style="list-style-type: none"> • appoint the auditor and be able to request re-performance of audits • auditor to maintain audit issues register and report on implementation of recommendations • auditor to provide public copies of reports, engage with customers and discuss audit investigations • introduce a whistleblower line • publish breach disclosure processes • require regular compliance KPI's • include a compliance declaration by the CEO and all key senior managers across Aurizon.¹⁶⁵

The QRC said dispute, auditing and reporting of compliance are essential for effective regulation and confidence in the regime, and that a mechanism must be available for Part 3 disputes.¹⁶⁶

4.10.3 QCA analysis and Draft Decision

Our assessment considers complaint handling, compliance and audit separately. Audit issues are considered as they relate to ring fencing and are dealt with in more detail in Chapter 5 (reporting).

Complaint handling

Aurizon Network's 2014 DAU proposes a broad complaints handling mechanism aimed at encompassing all its obligations with respect to ring fencing. The following table compares this with the mechanism in the 2010 AU.

¹⁶⁴ Aurizon Network, 2013 DAU, sub. no. 2:62

¹⁶⁵ Asciano, 2013 DAU, sub. no. 43:23-26; Asciano, 2014 DAU, sub. no. 22:19-20

¹⁶⁶ QRC, 2014 DAU, sub. no. 42:19; Asciano, 2014 DAU, sub. no. 22:5-6,17-19; Anglo American, 2014 DAU, sub. no. 7:29-30

Table 22 Aurizon's approach to complaint handling in the 2010 AU and the 2014 DAU

<i>2010 AU (clause 3.6 of the AU)</i>	<i>2014 DAU (clause 3.23 of the DAU)</i>
<p>Step 1: If a third party access holder or access seeker considers that:</p> <ul style="list-style-type: none"> • Aurizon Network has breached one or more of its obligations with respect to the management of confidential information or decision making • an Aurizon Network party has breached a confidentiality agreement or confidentiality provisions contained in another agreement with Aurizon Network in accordance to which the confidential information was disclosed to it, they may lodge a complaint with Aurizon Network. 	<p>Step 1: If a third party access holder, access seeker or train operator considers Aurizon Network has breached one or more of its ring fencing obligations, they may lodge a written complaint to Aurizon Network.</p> <p>Unless otherwise notified in writing by the third party access holder, access seeker or train operator, the written complaint and any accompanying information (whether documentary or otherwise) will be protected information.</p>
<p>Step 2: Aurizon Network will advise the QCA, as soon as practicable, of any complaints it receives in relation to step 1.</p>	<p>Step 2: Aurizon Network will advise the QCA, as soon as practicable, of any complaints it receives in relation to step 1.</p>
<p>Step 3: Aurizon Network will investigate complaints received in relation to step 1 and advise the complainant and the QCA in writing of the outcome of the investigation and Aurizon Network's proposed response, if any, and use reasonable endeavours to do so within twenty-eight days after receiving such a complaint.</p>	<p>Step 3: Aurizon Network will investigate complaints received in relation to step 1 and advise the complainant and the QCA in writing of the outcome of that investigation and Aurizon Network's proposed response, if any, and use reasonable endeavours to do so within twenty business days after receiving such complaint.</p>
<p>Step 4: Where a complainant relates to an alleged breach by Aurizon Network of its decision making obligations and the complainant is not satisfied with the outcome of Aurizon Network's investigation, the complainant can apply to the QCA seeking an audit of the relevant Aurizon Network decision(s) the subject of the complaint, and the audit must be conducted in accordance with the audit process in clause 10.3 of the 2010 AU.</p>	<p>Step 4: Where the complainant is not satisfied with the outcome of Aurizon Network's investigation, the complainant can apply to the QCA seeking an audit of the relevant subject of the complaint. The QCA will consider such a request and determine whether to request Aurizon Network to conduct an audit in accordance with clause 10.8 of the 2014 DAU.</p>

We note that despite the 2014 DAU broadening the scope of the complaints handling process with respect to Aurizon Network, it does not apply to complaints with respect to other Aurizon parties who may have access to confidential information. We do not consider this to be adequate.

Aurizon Network is responsible for ensuring compliance with its ring fencing obligations. We consider this responsibility extends to the parties to which it has shared confidential information because Aurizon Network decides who has access to confidential information. As such, Aurizon Network should be responsible for dealing with complaints regarding potential ring fencing breaches by any Aurizon party, associated port–rail and mine–rail entities, as well as breaches of the ultimate holding company support deed by the ultimate holding company.

Additionally, we are unconvinced it is credible for Aurizon Network to undertake an audit of its own investigation into a complaint when the complainant is not satisfied with that investigation. We consider this issue is alleviated by amendments to the audit process that ensure an auditor is independent of Aurizon Network and all other Aurizon parties. This is discussed further in Chapter 5 (reporting).

Finally, at this stage, we are not convinced it is appropriate that a complaint (and any related information) is automatically deemed confidential. It is unclear to us why all complaints should

require confidentiality. We are of the view there should be genuine objective grounds to require confidentiality, although we do not want this to be a deterrent to an access seeker or holder making complaints.

Overall, our Draft Decision is to refuse to approve Aurizon Network's complaints handling process in the 2014 DAU and require it to be replaced by the process outlined in the table below.

Table 23 Proposed approach in the Draft Decision to complaint handling

Stage 1	<p>If an access holder or train operator considers that:</p> <ul style="list-style-type: none"> • Aurizon Network has breached one or more of its ring fencing obligations • the ultimate holding company has breached the ultimate holding company support deed • an Aurizon party or associated port-rail or mine-rail entity has breached a confidentiality deed or confidentiality provisions contained in another agreement with Aurizon Network in accordance to which the confidential information was disclosed to it, <p>then the complainant may lodge a written complaint with Aurizon Network.</p> <p>Any accompanying information will not be considered confidential information unless objective grounds for confidentiality are provided in writing.</p>
Stage 2	Aurizon Network will advise the QCA of any complaints it receives in accordance with stage 1.
Stage 3	Aurizon Network will investigate complaints received in accordance with stage 1 and advise the complainant and the QCA in writing of the outcome of that investigation and Aurizon Network's proposed response, if any, and use best endeavours to do so within twenty business days after receiving the complaint.
Stage 4	Where the complainant is not satisfied with the outcome of Aurizon Network's investigation, the complainant can apply to the QCA seeking an audit of the relevant subject of the complaint and that audit must be conducted in accordance with the 'compliance audit requested by the QCA' process .

We consider this approach allows the complaints handling process to be suitably inclusive, and transparent, and means the response time for dealing with complaints can be assessed. We consider this to be in the interests of access holders, access seekers and train operators (s. 138(2)(e) of the QCA Act). We also note that, while it may be in Aurizon Network's interests to limit its responsibility for complaints handling to itself, we do not consider this a legitimate business interest in the context of applying the QCA Act (s. 138(2)(b) of the QCA Act).

Draft Decision

- 4.17 Our Draft Decision is to refuse to approve Aurizon Network's proposals regarding the complaints handling process in the 2014 DAU. We would approve amendments that:**
- (a) reflects the complaints handling process in clause 3.19 of our marked up drafting.**

Audit

Aurizon Network's 2014 DAU includes all the proposed audit requirements in the reporting section of the undertaking (Part 10 of the 2014 DAU). By contrast, the 2010 AU included some specific audit requirements in the ring fencing section comprising:

- audit provisions for Aurizon Network's financial statements associated with accounting separation (cl. 3.3.2 of the 2010 AU)
- audit provisions regarding Aurizon Network's general adherence with its undertaking obligations (cl. 3.7 of the 2010 AU).

The audit provisions in the 2010 AU regarding the financial statements focus on insuring the financial statements are developed in accordance with the costing manual. These provisions have been removed from the 2014 DAU. We consider such measures to be a matter of accurately defining the work programme for the audit of the financial statements. Given this, at this stage we consider that explicit audit provisions for financial statements are not required.

The specific audit provisions in the 2010 AU regarding Aurizon Network's general adherence with its undertaking obligations have also been removed from the 2014 DAU. The provisions in the 2010 AU allowed the QCA to specifically request an auditor assess any matter we reasonably believed necessary.

This covered, but was not limited to, auditing whether Aurizon Network was engaging in cost shifting or margin squeezing, refusing to/discriminating in the provision of associated facilities, discriminating between train operators with respect to live run variations from train plans, complying with the capacity allocation process/negotiation process/investment obligations in the undertaking. It could also relate to auditing Aurizon Network's conduct if we received a complaint or a breach report in relation to the undertaking.

Compliance

Aurizon Network's 2014 DAU does not include any obligation to proactively monitor compliance with its ring fencing obligations. Instead, the 2014 DAU includes provisions whereby Aurizon Network can apply to us to waive some, or all, of its ring fencing obligations on either a temporary or permanent basis (cl. 3.24 of the 2014 DAU).

As previously discussed, in the context of the Aurizon Group's organisational restructure and the strategic intention to leverage the advantages of vertical integration, we do not consider there to be an adequate level of accurate, transparent baseline data from which to assesses how confidential information flows out from Aurizon Network and across the Aurizon Group and third parties.

We consider this is essential to understanding the effectiveness of the ring fencing regime. Given this, it would not be reasonable for us to waive any of Aurizon Network's ring fencing obligations. Further, it is unclear why a waiver would, in any circumstance, be in the interests of access holders, access seekers or train operators (s. 138(2)(e) of the QCA Act).

We also consider that, as part of the process of developing a credible baseline data set for the flow of confidential information, Aurizon Network should provide a six-monthly compliance declaration to the QCA. This will complement the submission of the confidential information register and provide a degree of confidence that Aurizon Network is proactively monitoring its adherence to its ring fencing obligations and maintaining accurate records.

This provides a degree of transparency and assurance Aurizon Network is proactively managing its ring fencing obligations. We consider such measures are aligned with Aurizon Network's legitimate business interests and are in the interests of access holders, access seekers and train operators (ss. 138(b) and (e) of the QCA Act).

Draft Decision

4.18 Our Draft Decision is to refuse to approve Aurizon Network's 2014 DAU proposals regarding the right to request the QCA to waive all or some of its ring fencing obligations. We would approve amendments that:

- (a) prohibit Aurizon Network from requesting the QCA to waive Aurizon Network's ring fencing obligations**
- (b) include an obligation for Aurizon Network to provide a six-monthly compliance declaration to the QCA.**

4.11 Rail infrastructure and the declared service

The 2010 AU included the following provisions related to Aurizon Network's ring fencing responsibilities for rail infrastructure relating to the provision of the declared service:

- a clause outlining Aurizon Network's responsibility for updating and maintaining the line diagrams which outline those parts of rail network that form part of the declared service (cl. 3.8.1 of the 2010 AU)
- a clause requiring the transfer of rail infrastructure that constitutes part of the declared service to Aurizon Network from an Aurizon party (cl. 3.8.2 of the 2010 AU).

These have been excluded from the ring fencing provisions in the 2014 DAU.

Aurizon Network said line diagrams would be provided in preliminary information and are publicly available on its website. Aurizon Network also said we had no power to require divestiture of assets from one entity to another.¹⁶⁷

Stakeholders said the requirements to maintain and update line diagrams should be retained as incorporation of rail diagrams in previous undertakings have been a transparent and clear process with the QCA retaining oversight of corrections to the diagrams and to ensure consistency with the *Transport Infrastructure Act 1994*, Aurizon Network is required to take over rail infrastructure owned by other Aurizon parties if its proven to be a regulated service.¹⁶⁸

Our Draft Decision is to reinstate these provisions. It is not clear to us why the provisions should be removed given Aurizon Network's primary function is the provision of the declared service. Indeed, we are of the view the line diagrams represent a valuable, transparent depiction of the boundaries of the CQCN; whilst the requirement to transfer rail infrastructure that constitutes part of the declared service to Aurizon Network from an Aurizon party represents a continuing commitment.

Draft Decision

4.19 Our Draft Decision is to refuse to approve Aurizon Network's 2014 DAU proposals to remove Aurizon Network's ring fencing obligations regarding the rail infrastructure associated with the declared service. We would approve amendments that:

- (a) reinstate appropriately updated versions of clauses 3.8.1 and 3.8.2 of the 2010 AU.**

¹⁶⁷ Aurizon Network, 2013 DAU, sub. no. 77:48-49

¹⁶⁸ Anglo American, 2014 DAU, sub. no. 7:23-24; Asciano, 2013 DAU, sub. no. 44: 10-11

5 REPORTING

Aurizon Network's performance and its compliance with the 2014 DAU, can be measured through an effective reporting regime. Through a reporting regime, stakeholders can form a view on Aurizon Network's overall performance in providing infrastructure services on the CQCN.

One of the key themes of our Draft Decision is the need to improve the productivity of the CQCN through improved coordination of the supply chain. We consider this can be achieved through a number of means including ensuring that Aurizon Network stakeholders are provided with sufficient information to allow them to make their own operating decisions.

We largely accept Aurizon Network's proposed reporting obligations for the 2014 DAU. However, we are proposing some additional reporting requirements to reflect stakeholders' concerns particularly in areas of transparency and accountability. The proposed drafting also reflects customers' requests for more robust performance measures from Aurizon Network and its compliance against the proposed 2014 DAU.

5.1 Introduction

The overarching objective of reporting in the 2014 DAU involves making available meaningful, transparent, timely and relevant information to support the 'negotiate–arbitrate' framework, and maintaining Aurizon Network's accountability, transparency and commitment to non-discriminatory behaviour.

An effective reporting mechanism affirms that accountability and compliance framework in the access undertaking is measurable. It provides stakeholders with confidence in the regulatory regime, reflects the network's ongoing activities and allows stakeholders and the regulator to assess changes in performance over time.

As well, an effective reporting regime should allow stakeholders and customers to broadly access the same level of information on network performance. Reporting provides confidence that a balance between Aurizon Network's legitimate business interests and stakeholders' need for information disclosure is maintained. This includes the ability for stakeholders to assess Aurizon Network's conduct and the disclosure of information relevant to the CQCN.

5.2 Overview

5.2.1 Aurizon Network proposal

Aurizon Network said in response to its ring fencing obligations in the 2014 DAU, that transparent accounting and financial reporting is part of an overall approach, aimed at addressing 'risks to competition' that arise out of vertical integration.¹⁶⁹

Aurizon Network considers reporting, as part of its accountability and compliance framework, is also aimed at promoting transparency and compliance with its access obligations, and provides relevant information to access seekers, access holders and the QCA.¹⁷⁰

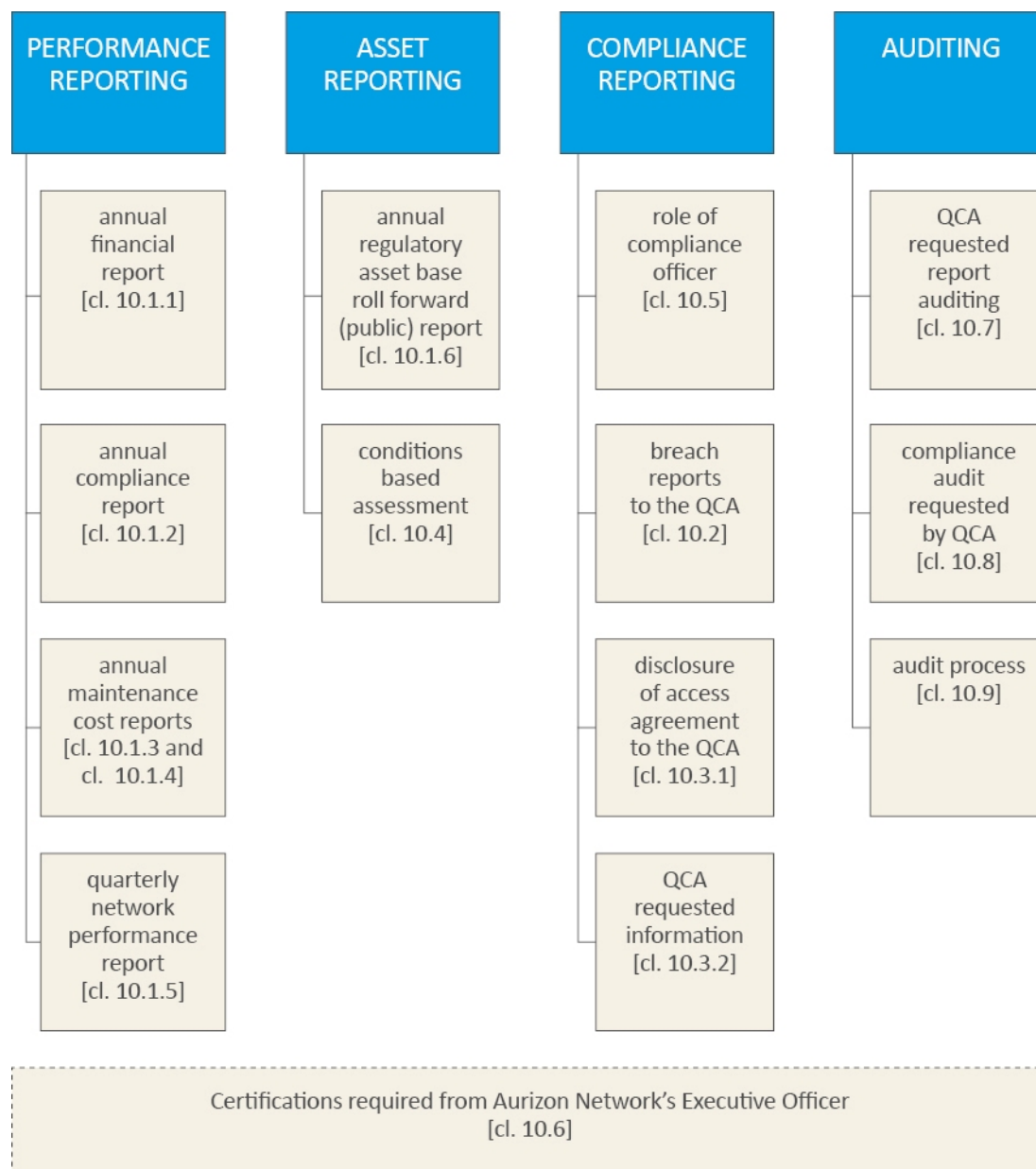
Aurizon Network has broadly retained the 2010 AU complaints, reporting and auditing mechanisms in the 2014 DAU (**Figure 2**).¹⁷¹

¹⁶⁹ Aurizon Network, 2013 DAU, sub. no. 2: 58

¹⁷⁰ Aurizon Network, 2013 DAU, sub. no. 2: 306

However, Aurizon Network said it aimed to simplify and streamline¹⁷² ring fencing arrangements, so has proposed to restructure the reporting and audit obligations, and place them all in Part 10 of the 2014 DAU.¹⁷³

Figure 2 Aurizon Network's proposed reporting obligations summarised



The reporting mechanism proposed above, covers the broad activities undertaken by Aurizon Network, including information related to costs, maintenance activities, asset information, volumes hauled, tracks utilisation information, and the general performance of each coal system. The proposed reporting framework under the 2014 DAU also covers audit and compliance requests.

Details on key measures proposed by Aurizon Network are discussed below.

¹⁷¹ Aurizon Network, 2013 DAU, sub. no. 2: 62

¹⁷² Aurizon Network, 2013 DAU, sub. no. 2: 58

¹⁷³ Aurizon Network, 2013 DAU, sub. no. 2: 69

5.2.2 Stakeholders' position

Stakeholders said auditing and reporting of compliance is essential to the effectiveness of the regulatory regime and industry confidence in the regime.¹⁷⁴

Stakeholders did not support the reduction of Aurizon Network's reporting obligations, and expressed the view that the 2014 DAU is less transparent than the 2010 AU. Specifically, they said:

- they did not support the relaxation of Aurizon Networks operational and reporting obligations¹⁷⁵
- Aurizon Network needs to provide increased transparency with annual audits of Aurizon Network's reporting and ring fencing obligations in order to preserve access holder confidence.¹⁷⁶

5.2.3 Legislative framework and QCA assessment approach

Legislative framework

In the context of assessing Aurizon Network's reporting obligations, we have to balance the factors listed in section 138(2) and give them an appropriate level of weighting, as identified in Chapter 2 of this Draft Decision.

Against this background:

- we consider that sections 138(2)(a), (b), (d), (e), (g) and (h) should be given more weight, as identified below
- section 138(2)(g) refers to the pricing principles mentioned in section 168A, of which we consider sections 168A(c) and (d) should be given more weight, as identified below
- we consider that section 138(2)(c), (f), sections 168A(a) and (b) should be given less weight as they are less practically relevant to our assessment of reporting obligations.

Compliance and non-discrimination

Sections 69E and 138(2)(a) of the QCA Act require that we have regard to the object of Part 5 of the QCA Act, namely to promote the economically efficient operation, use of and investment in the CQCN, as the significant infrastructure by which the declared services are provided.

Sections 138(2)(g) and 168A(c) require that we have regard to certain pricing principles, including that a related access provider not be allowed to set terms and conditions that discriminate in favour of the downstream operations of the access provider. Section 168A(d) of the pricing principles also require that we have regard to incentives to reduce costs or improve productivity. The reporting mechanism in the 2014 DAU should allow Aurizon Network to demonstrate it is providing its service on a non-discriminatory basis. This means that information should be recorded, and should be of a quality which allows for compliance to be assessed. .

We consider that, pursuant to section 138(2)(b) of the QCA Act, the legitimate business interests of Aurizon Network in relation to reporting will be met if Aurizon Network provides

¹⁷⁴ QRC, 2014 DAU, sub. no. 42: 19

¹⁷⁵ QRC, 2013 DAU, sub. no. 46: 75, Anglo American, 2013 DAU, sub. no. 78: 6

¹⁷⁶ QRC, 2013 DAU sub. no. 46: 10-11, 15, 40, Anglo American, 2013 DAU, sub. no. 78: 41, Freightliner, 2013 DAU, sub. no. 75: 1, BMA, 2013 DAU, sub. no. 41: 11

sufficient transparency and information for access seekers so that they are positioned to be able to compete effectively on their own merits.

Legitimate business interest of access holders, access seekers, and network owner

Regulatory reporting provides information flows between the operator of a declared service and access holders, seekers, and train operators in accordance with section 138(2)(b) and (d) of the QCA Act. This contributes to the overarching object of Part 5 in section 69E to promote the economically efficient operation of, use of, and investment in the CQCN and promote effective competition in upstream and downstream markets. Markets must have efficient mechanisms for the transfer of information and knowledge in order to facilitate effective competition. The transfer of information encompasses the legitimate business interests of Aurizon Network, as well as the interests of access seekers.

An effective reporting mechanism can also satisfy access seekers and access holders that Aurizon Network is providing its services efficiently. This includes reporting on the operational performance of the CQCN, as well as reporting on major activities which impact on network performance, such as maintenance.

The reporting arrangements in this way, can provide either confidence to all stakeholders about Aurizon Network's operations, or can act as an early warning system if problems are emerging.

Transparency and separation of operations (including accounting operations)

The QCA Act defines a 'negotiate–arbitrate' model for regulation of third-party access rights that encourages negotiated outcomes, and commitments to non-discriminatory behaviour when negotiating or providing access. Sections 168A(c) and (d) give due regard to separation and transparency to facilitate effective accounting controls and transparent reporting.

These factors enhance stakeholder confidence in a range of matters including resolving conflicts of interest and showing that the access provider is committed to non-discriminatory behaviour and effectively engaging on a level playing field without discrimination between access seekers, holders and operators.

QCA assessment approach

Our role is to assess whether Aurizon Network's proposed reporting regime delivers a way for network performance to be meaningfully measured and which will in turn, inform stakeholders on how Aurizon Network is performing.

Key issues for consideration

In assessing the Aurizon Network reporting regime we consider the key issues to be:

- accountability for performance—whether transparency disclosures and control allow access holders, operators and stakeholders to observe network performance in a timely fashion; yet are adequately balanced with Aurizon Network's legitimate business interests regarding sensitive information disclosures
- informed customers—if these reporting tools are effective, and useful in providing stakeholders with the information they require to make informed decisions, including optimising supply chain performance, and whether these can be quantified on a timely and ongoing basis

- confidence in the regime—whether there is an effective audit process as well as ongoing engagement with stakeholders including access holders, access seekers and train operators to strengthen confidence in the compliance and reporting mechanisms.

Our approach to assessing Aurizon Network's reporting framework for UT4 is set out in the table below.

Table 24 QCA's approach to effective reporting

<i>Assessment criteria</i>	<i>Characteristics</i>	<i>Rationale</i>
Performance accountability <ul style="list-style-type: none"> • Does the reporting mechanism provide accountability for forecast performance? • Does data collected show that maintenance and operational requirements have been performed to the standard necessary to provide the service? 	<ul style="list-style-type: none"> • measureable • timely • accurate and reliable 	Information reported should reflect Aurizon Network's accounting and cost reporting manual and should be measured against established forecasts so that performance comparisons can be made Aurizon Network and users need to be satisfied that information on network performance is accurate, and that access seekers and access holders can access comparable information
Informed customers <ul style="list-style-type: none"> • Is there adequate information for customers to form a view on the reliability of the network? • Are the services provided generally to the standard required by customers? 	<ul style="list-style-type: none"> • informative • comprehensive • useful 	Customers should be able to be reliably informed on Aurizon Network's performance, and where this might impact where practicable, its access arrangements. Customers should have sufficient information to make decisions about the effectiveness of supply chain coordination, and that capacity is being provided as contracted
Confidence in the regime <ul style="list-style-type: none"> • Is there sufficient information being collected to verify whether current arrangements are working? 	<ul style="list-style-type: none"> • auditable • clear and transparent • cost effective 	Information provided to customers on access to services, included in the undertaking, should be informative and reflect non-discriminatory treatment between aspects of downstream and upstream business interests There must be confidence in the effectiveness of competition. Factors that encourage confidence may include information given to access holders, information given to the QCA, arrangements made to separate owners from operators' commercial activity, and auditable data and processes

We have also proposed drafting amendments that are not discussed in detail in this chapter, but are nonetheless consistent with this approach and meet our assessment criteria. These include amendments made in the interest of simplifying and clarifying the reporting arrangements in the undertaking more broadly.

5.3 Performance and asset reporting

5.3.1 Aurizon Network proposal

Aurizon Network's proposed performance reporting obligations for the 2014 DAU largely retained the functions and parameters set out in the 2010 AU.

Parameters to be reported in the proposed 2014 DAU include Aurizon Network's:

- financial performance —reports information on the costs and revenue of the declared below-rail services, guided by the Costing Manual.
- state of its assets— reports information on the RAB, and condition based assessments of assets. The condition and value of the assets is crucial to stakeholders' knowledge of network asset performance
- maintenance costs— reports forecast against actual maintenance costs, including information about the actual versus forecast maintenance scope as accepted by the QCA, as well as data on indices used in escalating approved maintenance costs
- system performance— provides data which shows the CQCN's performance in a number of key areas including coal haulage, breach reporting, number of train services, delays, number of disputes if any, number of access applications. These are measures which point to system reliability and effectiveness.

Aurizon Network has proposed changes in the 2014 DAU performance reporting framework. Key measures include:

- the timing of the operational performance report has been adjusted, including amending information verification measures
- a requirement for certification from the executive officer on the accuracy of financial statements.¹⁷⁷

Aurizon Network said these changes are necessary for its operational performance reporting to reflect changes to timing of continuous disclosure requirements. Aurizon Network said its information verification measures have been amended in recognition of the greater scrutiny provided by Aurizon Network's public listing.¹⁷⁸

The table below summarises the type and frequency of information that is reported by Aurizon Network as part of its performance measures.

Table 25 Key measures on Aurizon Network's proposed performance

<i>Proposed reporting</i>	<i>Key measures</i>	<i>Frequency</i>	<i>Availability</i>
Financial reporting (cl. 10.1.1)	Financial statements, consistent with approved costing manual	Annual	Published on Aurizon Network's website
Compliance reporting (cl. 10.1.2)	Annual performance measures including (but not limited to): <ul style="list-style-type: none"> • number of access applications • number of requests for capacity information • IAPs • instances of disputes and dispute referral 	Annual	Published on Aurizon Network's website Submitted to the QCA
Maintenance costs reports (cl. 10.1.3 and cl. 10.1.4)	Actual costs vs forecast costs for maintenance activities in ballast undercutting, rail grinding, resurfacing, and general track	Annual	Published on Aurizon Network's website Submitted to the QCA
Performance reports (cl. 10.1.5)	Information on the number and reliability of train services, including but not limited to:	Every Quarter	Published on Aurizon Network's website

¹⁷⁷ Aurizon Network, 2013 DAU, sub. no. 2: 306

¹⁷⁸ Aurizon Network, 2013 DAU, sub. no. 2: 306

<i>Proposed reporting</i>	<i>Key measures</i>	<i>Frequency</i>	<i>Availability</i>
	<ul style="list-style-type: none"> • average delays • number and percentage of cancellations • coal system carrying information on hauls • number of train paths scheduled 		
Asset base roll forward (public) (cl. 10.1.6)	Changes to the regulatory asset base to account for approved capital expenditures and indexation and depreciation rates	Annual	Published on Aurizon Network's website
Breach reports (cl. 10.2)	Aurizon Network will report any breaches of the undertaking	As needed	Submitted to the QCA only
Conditions based assessment (cl. 10.4)	Asset condition is assessed by an independent assessor	Once per undertaking term	Submitted to the QCA

Source: Aurizon Network 2014 DAU.

5.3.2 Stakeholders' position

QRC and Asciano viewed Aurizon Network's proposed 2014 DAU reporting mechanisms as part of an overall governance regime encompassing ring fencing, auditing, reporting, and dispute resolution, that should apply to the whole of the access undertaking and is essential to industry confidence.¹⁷⁹

QRC, BMA, RTCA and Anglo American were concerned about the perceived narrowing and relaxation¹⁸⁰ of reporting requirements, and what they considered to be a lack of transparency.¹⁸¹

A common theme of stakeholders' submissions was the lack of a transparency and accountability framework for Aurizon Network's maintenance performance. Stakeholders were concerned Aurizon Network was not achieving its maintenance scope targets and appeared to be reallocating its budget on an ad hoc basis to respond to short-term problems, rather than meeting the requirements of the long-term asset plan presented to industry each period.¹⁸²

Stakeholders' comments are summarised in the table below.

Table 26 Key issues raised by stakeholders

<i>Issue</i>	<i>Comments</i>
Narrowing of reporting obligations	<p>Aurizon Network has considerably narrowed its reporting and auditing obligations from those contained in the 2010 AU.¹⁸³</p> <p>The QRC does not support the potential relaxation of Aurizon Network's operational reporting requirements as contemplated by the 2014 DAU.¹⁸⁴</p> <p>Anglo American is particularly concerned with the weakening of the ring fencing and compliance provisions in UT4. This is not assisted by Aurizon Network's attempt to reduce its overall transparency by reducing its reporting and audit requirements.¹⁸⁵</p> <p>Asciano was concerned about the lack of obligations on Aurizon Network to provide</p>

¹⁷⁹ Asciano, 2014 DAU, sub. no. 22: 43, QRC, 2014 DAU, sub. no. 42:19

¹⁸⁰ QRC, 2013 DAU, sub. no. 46:10, QRC, 2014 DAU, sub. no. 42: 52

¹⁸¹ RTCA, 2013 DAU, sub. no. 73: 10, BMA, 2013 DAU, sub. no. 41:7, Anglo American, 2013 DAU, sub. no. 39: 19

¹⁸² QRC, 2013 DAU, sub no. 68:1–2; BMA, 2013 DAU, sub no. 41: 1

¹⁸³ QRC, 2013 DAU, sub. no. 46: 10

¹⁸⁴ QRC, 2014 DAU, sub. no. 42: 49

¹⁸⁵ Anglo American, 2013 DAU, sub. no. 78: 6

<i>Issue</i>	<i>Comments</i>
	detailed and frequent operational reporting. ¹⁸⁶
Information should be measurable and format agreed upon or agreed by QCA	<p>Asciano said a robust and consistently applied KPI reporting regime is required to allow users and operators to monitor Aurizon Network's compliance with, and its performance against, the access undertaking and access agreements. A robust KPI regime needs to be incorporated into the access undertaking before it can be approved by the QCA.¹⁸⁷</p> <p>The QRC supports the inclusion of a requirement in UT4 for the format of all reports required under UT4 to be approved by the QCA in advance. This requirement existed in part under the 2010 AU and will ensure consistency of reporting for the term of UT4.¹⁸⁸</p>
Preference for monthly KPIs	<p>Asciano proposed the introduction of monthly operational KPI reporting to the QCA and access holders by system on an origin-destination pairing basis, access agreement basis, and access holder basis and a total basis. KPIs to be reported should include at a minimum:</p> <ul style="list-style-type: none"> • sectional run time performance • below-rail transit time performance • contracted vs actual Train Service Entitlements consumption • availability days • actual vs forecast system GTKs. <p>Similar KPI reporting obligations should also apply in individual Access Agreements.¹⁸⁹</p>
Frequent information and details necessary, more transparency	<p>BMA/BMC said that the 2014 DAU needs to provide more detail and transparency around Aurizon Network's performance to plan with respect to maintenance and operational performance.¹⁹⁰</p> <p>While Anglo American appreciates that Aurizon Network is now subject to a number of further reporting requirements due to its position in the Aurizon Network Holdings Group (eg, ASX), this does not impact on the need for full and frank reporting under the provisions of the Access Undertaking. Rather, Aurizon Network has drafted the reporting requirements in UT4 to give it less restrictive, less frequent, and fewer reporting requirements than it had under the 2010 AU. Anglo American does not agree with this approach.¹⁹¹</p> <p>Freightliner said that it would be prudent that we compare key financial indicators in the published financial statements with those proposed in the DAU for transparency, fairness and reasonableness.¹⁹²</p> <p>Asciano said that if a network system has a separate tariff structure, such as the GAPE, then there should be an obligation on Aurizon Network to report separately on system finance, cost, compliance, maintenance and operations.¹⁹³</p>
Performance accountability of network provider to its access seekers, and access holders	<p>Asciano said that the KPIs should be incorporated into both the DAU and the KPI reporting obligations in individual access agreements (i.e. the KPI reporting obligations including the above KPIs should be included in the Standard Access Agreement). This will provide access holders with sufficient detail to enable them to make informed assessments and decisions on issues such as take-or-pay liability and Train Service Entitlement consumption.¹⁹⁴</p>

¹⁸⁶ Asciano, 2013 DAU, sub. no. 43: 10

¹⁸⁷ Asciano, 2014 DAU, sub. no. 22: 15

¹⁸⁸ QRC, 2013 DAU, sub. no. 46: 76

¹⁸⁹ Asciano, 2013 DAU, sub. no. 43: 7

¹⁹⁰ BMA, 2013 DAU, sub. no. 41:11-12

¹⁹¹ Anglo American, 2013 DAU, sub. no. 78: 41

¹⁹² Freightliner, 2013 DAU, sub. no. 75:1

¹⁹³ Asciano, 2013 DAU, sub. no. 43: 126

¹⁹⁴ Asciano, 2013 DAU, sub. no. 43: 35

<i>Issue</i>	<i>Comments</i>
	<p>RTCA said Aurizon Network should be accountable for its performance and one way of doing this was to make delivery of the maintenance scope linked to the maintenance cost allowance (i.e. non-delivery of scope results in a decreased maintenance cost allowance).¹⁹⁵</p> <p>Asciano was concerned that high level annual reports of information provide little assistance either access holders or the QCA in managing access agreements or identifying potential access undertaking breaches.¹⁹⁶</p> <p>RTCA said that Aurizon Network retains a broad, unfettered discretion about what information is included and the level of detail which is reported on.¹⁹⁷</p>
Transparency in maintenance of costs and asset renewals	<p>BMA/BMC proposed Aurizon Network provide one page quarterly reports to all producers outlining: Network maintenance key performance indicators which outline performance against Aurizon Network's annual maintenance plan, including:</p> <ul style="list-style-type: none"> • resleepering (actual delivery vs plan) • resurfacing (actual delivery vs plan) • rail Grinding (actual delivery vs plan) • track Recording (actual delivery vs plan); • ballast Undercutting (actual vs plan) • non Destructive Testing (actual delivery vs plan) • routine maintenance vs plan • scheduled closure performance (actual vs plan) • overall track condition index (benchmarked against other heavy haul railways).¹⁹⁸ <p>Stakeholders suggested genuine transparency and involvement in defining and overseeing the maintenance task was required. The QRC and RTCA proposed a five-year rolling maintenance plan be developed, with a more detailed annual plan approved by industry (or the QCA).¹⁹⁹</p>

5.3.3 QCA analysis and Draft Decision

Our interim decision, as reflected in this Draft Decision, is to refuse to accept the performance and asset reporting provisions proposed by Aurizon Network in its 2014 DAU. However, we would approve the provisions if the following changes occur:

- that financial reporting be reported in accordance with relevant legislation and applicable accounting standards
- include self-insurance reporting under the annual financial reports
- consolidated maintenance costs reports into a single report, with asset renewals included

The rationale for our Draft Decision is set out below.

Reporting costs, performance, and assets

Aurizon Network's proposed approach to performance reporting in the 2014 DAU is largely consistent with the reporting regime in the 2010 AU, with some streamlining of approach. We support Aurizon Network's general aim of streamlining its reporting regime, but at the same time need to ensure there are sufficient information flows for all relevant stakeholders.

¹⁹⁵ RTCA, 2013 DAU, sub. no. 73: 21

¹⁹⁶ Asciano, 2013 DAU, sub. no. 43: 98

¹⁹⁷ RTCA, 2013 DAU, sub. no. 73:44

¹⁹⁸ BMA, 2013 DAU, sub. no. 41: 11

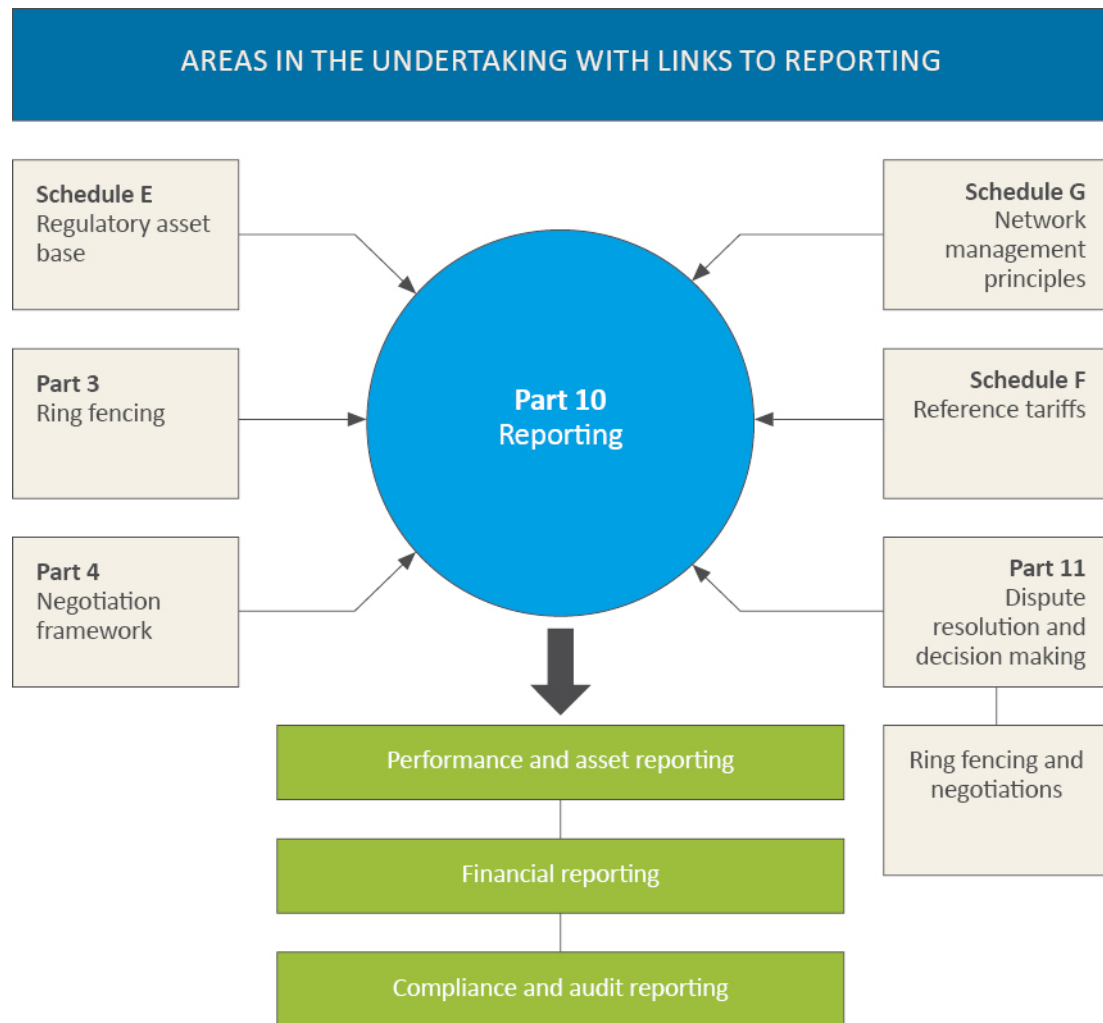
¹⁹⁹ QRC, 2013 DAU, sub. no. 68: 8; RTCA, 2013 DAU, sub. no. 73: 21

We consider the 2014 DAU performance reporting must give access seekers and access holders a good understanding of how the rail network is being maintained and operated. This can provide some level of assurance that Aurizon Network is performing against its own proposed targets and that stakeholders have the same access to information.

Further, it is important for us to ensure that adequate information is being collected and reported in order to support us making informed decisions about the efficient costs of providing services in the CQCN. We made a number of observations in our Draft Decision on the MAR about the need to develop baselines against which future costs and performance can be measured.

We consider the reporting arrangements in Part 10 of the 2014 DAU are an important part of developing an effective baseline of performance and cost information.

Figure 3 Reporting obligations and their function in the undertaking



As the above chart shows, the reporting framework informs stakeholders of the many functions within the 2014 DAU, and reflects on the overall performance of the network.

While we are broadly comfortable with Aurizon Network's proposed approach to reporting operational matters, we agree with stakeholders that reporting should go beyond merely recording results.

Financial Reporting

Regulatory accounting and the costing manual

We have not accepted Aurizon Network's proposal that its financial reports be provided six months after the end of the financial year, rather than the four months included in the 2010 AU. We will reconsider this position if Aurizon Network is able to provide a stronger reason for the longer timeframe for reporting.

Part 5, Division 9 of the QCA Act provides for the accounting procedures for declared services, including the requirements of the preparation of a cost allocation manual (referred to in this Draft Decision as the 'costing manual').

As discussed in Chapter 4 (ring fencing) of this Draft Decision, we consider Aurizon Network's costing manual to be crucial and the methodological lynchpin for ensuring that there is clear accounting separation between Aurizon Network's regulated and unregulated businesses.

We consider it is necessary for the costing manual to set out arrangements to create a fully reconcilable system of financial statements that have a direct link back to a set of financial accounts (that comply with relevant legislation and accounting standards). In our view this ensures that:

- there is a robust and transparent understanding of the costs allocated to the regulated business
- a robust and transparent audit can be undertaken with respect to the application of the methodology and rules in the costing manual
- the holistic impact of any proposed changes to the costing manual can be fully understood and objectively assessed.

As such, we consider the reporting component for Aurizon Network's financial accounts must be consistent with the ring fencing provisions. We consider Aurizon Network's existing costing manual must be reviewed and revised to reflect this objective. Particularly as Aurizon Network is part of the larger Aurizon Holdings Group, with an emphasis on shared services, it is essential that the costing manual be able to clearly attribute costs to Aurizon Network so that we can be satisfied that there is neither over-recovery, nor under-recovery, of costs from access holders.

We also consider that, in order for stakeholders to have confidence in the accounting separation process, it is necessary to provide a full reconciliation of the financial statements associated with the regulated and non-regulated businesses of Aurizon Network back to a set of fully audited financial accounts for Aurizon Network. In our view this represents best practice from an accounting separation perspective.

We note that Aurizon Network has indicated its view that its non-regulated activities are relatively small, in comparison to the regulated business; however, we consider that the most appropriate way of demonstrating this is for these revenues and costs to be made transparent in the financial reporting arrangements.

Draft Decision

- 5.1 Our Draft Decision is to refuse to approve clause 10.1 Part 10 of the 2014 DAU. Instead, we consider it appropriate for Aurizon Network to amend the 2014 DAU as indicated in our proposed draft to:**
- (a) require financial reports to be provided to the QCA within four months, rather than six months, of the end of the financial year**
 - (b) reflect amendments to clause 10.1.1 in our attached changes to the 2014 DAU and any minor amendments to clause 10.1**

Self-insurance provision

In our September 2014 Draft Decision on MAR²⁰⁰, we proposed to accept Aurizon Network's methodology for the development of its self-insurance estimates, but noted that:

- these estimates and the methodology are not transparent to Aurizon Network's customers
- reports supporting self-insurance arrangements are publicly available for electricity network providers and we see no reason why Aurizon Network should not also disclose this information
- Aurizon Network should develop and maintain a comprehensive database of self-insured losses, which would significantly streamline the analysis and provide for more robust outcomes.

We consider maintaining such a record to be good practice. It that can be used to demonstrate that there is no duplication of maintenance costs, and to clearly distinguish the costs associated with self-insurance related events.

Accordingly, we require Aurizon Network to report on its self-insurance arrangements as part of the annual regulatory accounts, including disclosing the number of self-insurance events by type and value each year.

Draft Decision

- 5.2 Our Draft Decision is to refuse to approve clause 10.1 Part 10 2014 DAU. We would approve amendments to the 2014 DAU to provide that self-insurance arrangements be reported as part of the annual regulatory accounts (cl. 10.1.1) including disclosing the number of self-insurance events by type and value each year.**

Performance and asset reporting

Maintenance planning

There has been considerable concern from stakeholders about Aurizon Network's maintenance performance during the 2010 AU, particularly about the planned scope of maintenance not being delivered.²⁰¹

²⁰⁰ QCA, 2014(h), p. 82

²⁰¹ QRC, 2013 DAU, sub. no. 68: 8

We agree with stakeholders that Aurizon Network should provide industry with annual information that details how it is delivering its proposed maintenance plan and how it is monitoring and improving the efficiency of the delivery of maintenance services.²⁰²

From this perspective, we consider that a robust and transparent reporting framework for Aurizon Network's maintenance activities is necessary to enable stakeholders to have confidence in the delivery of the maintenance reflected in access charges.

In our September 2014 Draft Decision on MAR we noted that stakeholders said these maintenance plans should be complemented by a maintenance reporting regime so it is clear whether Aurizon Network is performing and delivering to the plan. This would also help determine whether efficiency gains built into the costs have been achieved, as it is not clear whether similar improvements in forecasts in previous periods eventuated.²⁰³

We propose that Aurizon Network provide access holders and their customers with a briefing, three months before each financial year, on its planned scope of maintenance. In its response to the September 2014 MAR Draft Decision, Aurizon Network indicated it is willing to work with stakeholders to develop an alternative framework, including (but not limited to) the reporting of maintenance works. Aurizon Network proposed to discuss each report with the QCA, including applications for returns to, or recoveries from, access holders for scope and cost adjustments supported by the QRC and other stakeholders.²⁰⁴

Draft Decision

5.3 Our Draft Decision is to refuse to approve clauses 10.1.3 and 10.1.4 of Part 10. We would approve amendments to the 2014 DAU to:

- (a) require Aurizon Network to provide access holders (and their customers) a presentation on the planned scope of maintenance for any forthcoming year, three months prior to the commencement of that year.**

Maintenance reporting

Similar to the 2010 AU, Aurizon Network has proposed providing two different maintenance cost reports— one for stakeholders and one for the QCA.

The maintenance reporting regime is intended to provide clear guidance on whether Aurizon Network is performing to its maintenance plan. This would also help determine whether efficiency gains built into the costs have been achieved, and whether improvements in forecasts from previous periods eventuated.

Importantly, we consider it necessary to develop a clear baseline for performance, in order to develop longer-term accountability arrangements for the delivery of the maintenance program, within the maintenance allowance provided through the MAR. However, the development of any such arrangement cannot occur without having confidence in the reporting arrangements which underpin such an arrangement.

We do not see a clear reason why two different maintenance cost reports continue to be required. Instead, unless Aurizon Network is able to provide a case about why this continued

²⁰² BMA, 2013 DAU, sub. no. 41: 7

²⁰³ QCA, 2014(h), p. 107

²⁰⁴ Aurizon Network, 2014 DAU, sub. no. 59: 111

separation is necessary, we consider that the two maintenance cost reports should be combined into a single, streamlined approach. We consider this will reduce the administrative burden on Aurizon Network and ensure that all relevant parties have access to the same level of information.

Further, we have not accepted Aurizon Network's proposal that its maintenance cost report be provided six months after the end of the financial year, rather than the four months included in the 2010 AU. We will reconsider this position if Aurizon Network is able to provide a stronger reason for the longer timeframe for reporting.

Specifically, we propose that the separate maintenance reporting for stakeholders and the QCA be consolidated, taking both clause 10.1.3 and clause 10.1.4 together, so that:

- a comprehensive maintenance cost reporting is available to all parties and unredacted version is provided to the QCA
- provisions within this section will account for any agreed changes within user group meetings or customer working groups
- information contained in this clause captures the information provided to the QCA as well as information agreed with industry²⁰⁵
- we can determine whether Aurizon Network is delivering to its agreed maintenance plan.²⁰⁶

We consider the above proposal:

- to be important in developing reliable and consistent performance data that can be used to measure changes in performance through time
- will allow for assessment of productivity changes in the delivery of maintenance services, which is important for measuring efficiency through time

Aurizon Network has acknowledged the concerns raised and said it embraced the concept of transparency. It is working with all supply chain participants and stakeholders to improve how relevant data and information is provided.²⁰⁷

In its response to our September 2014 MAR Draft Decision, Aurizon Network also outlined possible maintenance reporting arrangements including:

- a single annual maintenance and asset replacement and renewals cost report, aligned with both the quarterly maintenance report and annual capital expenditure report, and published by Aurizon Network following discussions with the QRC and other stakeholders
- providing the scheduled program of maintenance works as part of the discussions on the maintenance reporting framework²⁰⁸
- proposing that the annual maintenance cost report is either excluded from the list of reports to be accompanied by a responsibility statement, or the timeframe for submission of the responsibility statement be extended, to allow for the QRC and other stakeholders to be given a reasonable opportunity to review the maintenance cost report and provide comments prior to its finalisation and publication by Aurizon Network. This would allow for a

²⁰⁵ QRC, 2013 DAU, sub. no. 68: 8

²⁰⁶ QCA, 2014(h), p. 107

²⁰⁷ Aurizon Network, 2013 DAU, sub. no. 77: 32

²⁰⁸ Aurizon Network, 2014 DAU, sub. no. 59: 117

faster and more transparent ongoing consultation process with Aurizon Network's stakeholders.²⁰⁹

These amendments will help stakeholders assess whether the maintenance regime is consistent with planning and forecasts, and due to matters within Aurizon Network's control. It also allows Aurizon Network the opportunity to provide timely and relevant information to stakeholders on maintenance activities in a more systematic way.

We will consider Aurizon Network's proposed changes as part of our Final Decision on the 2014 DAU.

Asset renewals program

In our September 2014 MAR Draft Decision, we noted that Aurizon Network is proposing to spend around \$0.5 billion on renewals over UT4.²¹⁰ We proposed that, given the increasing significance of the renewals expenditure program in Aurizon Network's proposals, it should submit its planned renewals program (including proposed scope and cost) to the QCA prior to the commencement of each financial year, with the renewals program to be included as part of the annual maintenance report.²¹¹

In its response to the MAR Draft Decision, Aurizon Network agreed that renewals activities be included as part of the reporting for the annual maintenance report, commencing in the 2015–16 year consistent with the arrangements for maintenance cost reporting.²¹²

Consequently, we have proposed drafting to achieve this under 'annual maintenance cost report', which now also reflects asset renewals reporting.

We consider it appropriate that along with submitting a detailed asset renewal costs and scope plan on an annual basis, Aurizon Network's renewal activities be included as part of the reporting arrangements for maintenance and assets.

This would provide a greater level of transparency around the trade-off between asset renewals and maintenance.

Draft Decision

5.4 Our Draft Decision is to refuse to approve clauses 10.1.3 and 10.1.4 of Part 10 of the 2014 DAU. We would approve amendments to the 2014 DAU, to:

- (a) require annual maintenance cost and scope reporting to be consolidated into a comprehensive single report for all stakeholders**
- (b) require the maintenance cost report to be provided within four months of the end of the financial year**
- (c) include asset renewals as part of maintenance costs reporting (cl. 10.1.3).**

Timing of operational performance reports

Performance data reports are used by access holders and access seekers, and timely operational information is crucial to these stakeholders.

²⁰⁹ Aurizon Network, 2014 DAU, sub. no. 59: 111

²¹⁰ QCA, 2014(h), p. 141

²¹¹ QCA, 2014(h), p. 149

²¹² Aurizon Network, 2014 DAU, sub. no. 59: 155

While Aurizon Network said that disclosure requirements to its shareholders under the ASX listing rules require a coordinated approach with its market reporting policies, it has not provided justification for its 2014 DAU proposal to extend the timing of performance reporting publication to stakeholders from four to six months after a period.

Timing of information provided is important for Aurizon Network and its stakeholders. Given this, we propose to retain the 2010 AU arrangements for the timeline of publication of performance reports.

We propose to change the performance reporting timeframe to stakeholders from quarterly to at least monthly, to provide stakeholders, with the information they need to make an informed decision — particularly if it has the potential to lead to improved performance in the above-rail market.

Information in these performance reports would then require further discussions between stakeholders and Aurizon Network, and would be subject to disclosure requirements to the ASX. We also propose that Aurizon Network make monthly performance reports available on its website within ten business days after the end of each calendar month.

We consider that these changes reflect Aurizon Network's ongoing approach and commitment to real time reporting and to informing its stakeholders. Aurizon Network's overall performance is dependent on the performance of its customers as part of the broader coal supply chain.

However, we consider that quarterly performance reporting to the QCA should be retained, subject to minor re-drafting of the provisions.

Draft Decision

5.5 Our Draft Decision is to refuse to approve clauses 10.1.5 of Part 10. We would approve amendments to the 2014 DAU that:

- (a) require Aurizon Network to provide monthly network performance reports within ten business days of the end of the calendar month.**

Condition based assessment

Prudent asset management cannot be conducted without consideration of the agreed operational objectives of the assets, their continued condition in use, and the context in which the assets or asset system operates. Consequently, we view the assessment of asset condition to be an important part of both an overall tool that provides detailed review of performance, and a continuous cycle of asset operational evaluation.

We agree with Aurizon Network's proposal of re-including a condition based assessment of assets in its reporting requirements in the 2014 DAU.

We consider retaining condition based assessments and developing a data series through time to be in the best interest of all access seekers and access holders as it will address anti-discrimination concerns. We also consider our draft decision is in Aurizon Network's legitimate business interest as it will incentivise Aurizon Network to maintain the assets adequately in order to recover efficient costs.

We consider that a condition based assessment process will also be important to demonstrate non-discrimination in the treatment of assets where future SUFA assets are included in the RAB.

Draft Decision

5.6 Our Draft Decision is to approve Aurizon Network's proposal to include a condition based assessment in the 2014 DAU.

5.4 Disclosures of requested information

5.4.1 Aurizon Network Proposal

Aurizon Network said its proposed approach to the reporting obligations for the 2014 DAU is a new and comprehensive framework for handling protected information, based on, among other things, disclosure on a 'need to know' basis such that:

- the disclosure of information is only allowed where the recipient must have access to the information for legitimate business purposes, such as to progress an access application or for governance requirements
- accountability measures are required to ensure security of protected information and compliance.²¹³

This is reflected in Aurizon Network's approach to clause 10.3 of the 2014 DAU (see **Table 27**).

Aurizon Network has proposed to modify the disclosure of access agreements provision contained in clause 5.4 of the 2010 AU, and include it under reporting to the QCA in Part 10 of the 2014 DAU. Specifically, Aurizon Network proposed:

- to provide the QCA with the below-rail aspects of signed access agreements, in order to allow the QCA to satisfy itself that the agreements do not breach the non-discrimination provisions of either the access undertaking or the QCA Act
- not to retain the requirement for Aurizon Network to publish the below-rail aspects of signed access agreements, nor permit the QCA to publish the agreements in the absence of consent by Aurizon Network and the access holder.²¹⁴

Table 27 Information requested by the QCA

<i>Proposed reporting</i>	<i>Key measures</i>	<i>Frequency</i>	<i>Information availability</i>
Disclosure of access agreements (cl. 10.3.1)	Aurizon Network will provide access agreements and details of access agreements.	Upon request	For the QCA only
Requested information (c. 10.3.2)	Applies to information requested by the QCA to perform its functions under the undertaking	As requested	For the QCA only, unless documents are public.

Source: Aurizon Network 2014 DAU.

5.4.2 Stakeholders' position

Asciano said that in an environment where access rights operate under take-or-pay arrangements, and where Aurizon Network is protected by a revenue cap regime, it is necessary that access holders have the ability to assess Aurizon Network's performance in relation to its provision of access rights against their obligations outlined in their access agreements and the

²¹³ Aurizon Network, 2013 DAU, sub. no. 2: 54

²¹⁴ Aurizon Network, 2013 DAU, sub. no. 2: 104

access undertaking. Aurizon Network is a service provider, and their performance should be measured against performance standards.²¹⁵

Aurizon Holdings said the CQC market is one with low information asymmetry, given a small number of firms, in a single geographic region, and an often common workforce.²¹⁶ Aurizon Operations still considers it important that appropriate data is captured and reported by Aurizon Network.²¹⁷

Table 28 Key issues raised by stakeholders

<i>Issue</i>	<i>Comments</i>
Information is discretionary or constrained	RTCA said that Aurizon Network retains a broad, unfettered discretion about what information is included and the level of detail which is reported on. ²¹⁸ Asciano said, Aurizon Network is seeking to withhold information by preventing the access agreements from being published. ²¹⁹
Information disclosure	Asciano noted with concern that some of the terms Aurizon Network is proposing to withhold (for example insurance provisions, rolling stock configurations) and which are not 'below-rail aspects' are precisely the areas which discrimination is likely to occur. ²²⁰ The QRC considers the public disclosure of this information to be a significant mechanism for providing access seekers and access holders with confidence about non-discriminatory treatment by Aurizon Network. ²²¹
Intent and data for reporting sake is not meaningful	Anglo American said that, simply including a reporting requirement gives industry no provision to ensure compliance, or even certainty as to what the transfer timeline will be when dealing with short term capacity transfers. ²²²

5.4.3 QCA analysis and Draft Decision

Our interim position, as reflected in this Draft Decision, is to refuse to accept the compliance reporting provisions proposed by Aurizon Network in its 2014 DAU. We propose amendments to Part 10 of the 2014 DAU to improve compliance arrangements.

Specifically, we have generally accepted the Annual Compliance Report process proposed by Aurizon Network 2014 DAU, with only minor amendments. However, we are also proposing that the compliance reporting arrangements be enhanced, including:

- a requirement for Aurizon Network to keep an issues register recording breaches of the undertaking and actions taken to remedy identified breaches
- requirements for the disclosure of non-standard access agreements to us, to allow for monitoring against the non-discrimination obligations of the undertaking.

As set out in Chapter 4 (ring fencing), we are concerned that Aurizon Network's 2014 DAU does not appear to include an obligation to proactively monitor compliance with its ring fencing obligations, and the ability to audit activities as part of this obligation has been shifted under compliance reporting.

²¹⁵ Asciano, 2013 DAU, sub. no. 43: 35

²¹⁶ Aurizon Holdings, 2014 DAU, sub. no. 25: 5

²¹⁷ Aurizon Operations, 2014 DAU, sub. no. 26: 7

²¹⁸ RTCA, 2013 DAU, sub. no. 73:44

²¹⁹ Asciano, 2013 DAU, sub. no. 43:24

²²⁰ Asciano, 2013 DAU, sub. no. 43:24

²²¹ QRC, 2013 DAU, sub. no. 46:75

²²² Anglo American, 2013 DAU, sub. no. 78:28

Issues register

Our Draft Decision reflects our view that Aurizon Network should be required to maintain an issues register, as part of the broader breach reporting requirements. Our drafting for the 2014 DAU reflects our view that the issues register should record:

- any known breaches of the undertaking
- any alleged breaches of the undertaking that Aurizon Network is aware of
- any written complaints by access seekers or access holders about Aurizon Network's performance in relation to the undertaking
- the steps Aurizon Network has taken to remediate or otherwise address these issues.

We consider that the maintenance of the issues register should be available for audit, and would become a tool for monitoring Aurizon Network's compliance with its ring fencing obligations.

We consider the maintenance of an issues register is in the interests of access seekers and access holders, as it will provide for improved capture of issues about non-compliance with the undertaking. It is also in Aurizon Network's legitimate business interests to be able to demonstrate its compliance with the undertaking obligations.

Access agreements and disclosures

We consider that access seekers, access holders and their customers should have confidence that the information is available to allow an assessment of whether Aurizon Network:

- is acting reasonably and efficiently in negotiating access contracts
- shows performance that is consistent with agreed outcomes in its access agreements.

The complementary side of effective reporting on the network's performance and asset conditions is a mechanism for assessing Aurizon Network's compliance against the undertaking.

Consistent with Chapter 4 (ring fencing) on information management and decision making principles, reporting of information particularly in access agreements requires industry consultation for discussions on what should be included as part of confidential information registers.

We are also ensuring that any disclosure of information be consistent with ring fencing obligations and the provision that prohibits Aurizon Network from requesting that access holders, access seekers or train operators waive ring fencing obligations.

Non-standard access agreements and disclosures

We agree with Aurizon Network that the disclosures of contents within access agreements are matters for negotiation between access seekers and Aurizon Network. However, this must be balanced with the need for stakeholders to feel confident that access arrangements satisfy undertaking provisions, particularly in respect of the general non-discrimination provisions of the 2014 DAU.

Aurizon Network's 2014 DAU largely maintains the arrangements for disclosure aspects of access agreements, subject to written consent from relevant access holders. However, this only covers standard access agreements. It is not explicit in the current drafting whether access holders with non-standard access agreements are subject to the same disclosure regime.

We consider that including a requirement in the access undertaking for non-standard agreements to also be subject to disclosure requests from the QCA is warranted. Further, given

the potential for discrimination to occur in non-standard agreements, we are proposing a positive obligation on Aurizon Network to provide non-standard agreements to us within five days of signing. This will allow for monitoring against the non-discrimination provisions of the undertaking.

This would then provide stakeholders with confidence that the interests of access holders are being protected, with information subject to disclosure to the QCA regardless of the type of access agreements, while recognising the primacy of commercial negotiations between parties. This would also provide consistency for Aurizon Network and its stakeholders, in the manner in which disclosures of access agreements are treated and reported.

Draft Decision

5.7 Our interim position, as reflected in this Draft Decision, is to refuse to approve the compliance reporting provisions proposed by Aurizon Network in its 2014 DAU. We would accept arrangements that:

- (a) include an obligation for Aurizon Network to keep an issues register recording breaches of the undertaking and actions taken to remedy identified breaches**
- (b) include an obligation for Aurizon Network to disclose non-standard access agreements to us within five business days for signing.**

5.5 Compliance and audit reporting

5.5.1 Aurizon Network proposal

Aurizon Network said under the 2010 DAU we have very wide discretion in our ability to require Aurizon Network to undertake audits. Notably, the QCA:

- can request Aurizon Network to undertake an audit in relation to whether any specific conduct or decisions of Aurizon Network comply with the undertaking, provided it has reasonable grounds to believe that the audit is necessary
- can specify an annual audit of Aurizon Network's compliance with reporting obligations in the access undertaking
- is not limited in the number and scope of audits we can require.²²³

More specifically, under the ring fencing umbrella (Part 3 of the 2010 AU), the following built-in criteria included reporting requirements:

- mechanism for complaint investigation
- reporting to the QCA and annual audit of compliance with ring fencing obligations
- disclosures of confidential information.²²⁴

As discussed in Chapter 4 (ring fencing), Aurizon Network said it changed its approach to transparency and reporting in the 2014 DAU, to a single broad mechanism that encompasses all of the Part 3 obligations, including prohibition on unfair differentiation between access seekers, while retaining most aspects of the complaint, reporting and audit mechanisms.²²⁵

²²³ Aurizon Network, 2013 DAU, sub. no. 2: 261

²²⁴ Aurizon Network, 2013 DAU, sub. no. 2: 62

²²⁵ Aurizon Network, 2013 DAU, sub. no. 2: 62

The table below summarises Aurizon Network's proposed audit and compliance obligations.

Table 29 Aurizon Network's proposed audit reporting summarised

<i>Proposed reporting</i>	<i>Key measures</i>	<i>Frequency</i>	<i>Information availability</i>
Compliance officer (cl. 10.5)	Aurizon Network will appoint a compliance officer for the term, tasked with the governance framework to ensure Aurizon Network complies with undertaking obligations.	Report breaches as soon as possible	Notify Aurizon Network Executive Officer
Certification required from Executive Officer (cl. 10.6)	Certification requirements within the undertaking, including accuracy of financial statements and cost reports.	As required	Certification will accompany the relevant reports
Report auditing (cl. 10.7)	An audit of Aurizon Network's reporting obligations in Part 10.	Must be requested by QCA, and no more than once a year.	For the QCA to publish, if appropriate and agreed by parties
Compliance auditing (QCA requested) (cl. 10.8)	Aurizon Network must engage an auditor to audit whether it has complied in all material respects with its obligations, conduct or decision.	No more than once a year.	For the QCA to publish, if appropriate and agreed by parties

Source: Aurizon Network 2014 DAU.

Aurizon Network's reasons for these proposed changes include:

- audits are costly and time consuming processes
- there is potential for audits to be used as a substitute for more effective mechanisms that are available for the resolution of issues directly between Aurizon Network and an aggrieved access seeker or holder, including dispute resolution and complaints handling
- Aurizon Network bears the full cost of each audit, regardless of its ultimate findings. Aurizon Network does not have direct control over the amount of audit costs it will incur each year, and it is very difficult to forecast likely costs as Aurizon Network has no way of anticipating the number and scope of audits that the QCA could require in any one year.²²⁶

Aurizon Network also proposed amendments in the 2014 DAU to:

- limit the frequency of audits to once a year
- make an annual adjustment to system allowable revenues for the difference between actual and forecast audit costs.²²⁷

5.5.2 Stakeholders' position

The QRC said the accountability and compliance framework proposed by Aurizon Network under its current proposal removed all ongoing obligations for annual audits contained in the 2010 AU.²²⁸

²²⁶ Aurizon Network, 2013 DAU, sub. no. 2: 261

²²⁷ Aurizon Network, 2013 DAU, sub. no. 2: 261

²²⁸ QRC, 2014 DAU, sub. no. 42: 51

The QRC also said that, in order to provide increased transparency and preserve access holder confidence, annual audits of Aurizon Network's reporting and ring fencing obligations should be undertaken. The QRC considered that the benefits of increased transparency will outweigh any incremental increase in Aurizon Network's auditing costs and maintained its position on this issue in respect of the 2014 DAU.²²⁹

Asciano was concerned, in light of the NCC decision²³⁰ and reference to the 2010 AU non-discrimination provisions, that if reporting on issues such as non-discrimination, ring fencing, compliance monitoring and reporting are being diluted in the 2014 DAU, then the certification of the Queensland rail access regime may be questioned.²³¹

Anglo American supported the comments made by stakeholders that, as Aurizon Network is now a privately owned enterprise, it is vital to have transparency and audit rights in order to ensure compliance with regulation and to provide regulatory certainty.²³²

The table below summarises stakeholder comments.

Table 30 Key issues raised by stakeholders

<i>Issue</i>	<i>Comments</i>
Intent and data for reporting sake is not meaningful	Simply including a reporting requirement gives industry no provision to ensure compliance, or even certainty as to what the transfer timeline will be when dealing with short term capacity transfers. ²³³ Aurizon Network agreed to amend UT4 to allow the QCA to annually approve an auditor to complete the necessary compliance audits. Beyond this however, Aurizon Network showed little willingness to make any meaningful changes to the UT4 auditing framework. ²³⁴
Audit and conduct reporting curtailed, restrictive	Without mandatory auditing, it is difficult to see how parties outside the Aurizon Group would be sufficiently informed to be able to identify a complaint. ²³⁵ The QRC considered that an audit of Aurizon Network's compliance with its obligations under Part 3 and other issues for which the QCA reasonably believes an audit is necessary, will function as an appropriate mechanism to address these concerns. ²³⁶ Asciano noted that the audit provisions in the 2013 DAU are quite limited and restrictive. ²³⁷ Asciano strongly believes that an annual audit of general compliance should be undertaken but if this cannot be done then at the very least the QCA should have the ability to seek a compliance audit. ²³⁸ It also sought the inclusion of a mandatory annual audit of Aurizon Network's reporting obligations under the 2014 DAU and a separate ability for the QCA to require an audit of those obligations as required. ²³⁹

²²⁹ QRC, 2014 DAU, sub. no. 42: 49

²³⁰ National Competition Council, November 2010, Queensland Rail Access Regime: Final Recommendation, p21

²³¹ Asciano, 2014 DAU, sub. no. 22: 14

²³² Anglo American, 2013 DAU, sub. no. 78: 41

²³³ Anglo American, 2013 DAU, sub. no. 78: 28

²³⁴ QRC, 2013 DAU, sub. no. 84: 37

²³⁵ QRC, 2013 DAU, sub. no. 46: 40

²³⁶ QRC, 2014 DAU, sub. no. 42: 51

²³⁷ Asciano, 2013 DAU, sub. no. 43: 80

²³⁸ Asciano, 2014 DAU, sub. no. 22: 42

²³⁹ QRC, 2014 DAU, sub. no. 42: 49

Audit required for transparency	<p>An effective external audit is another key to identifying discrimination by Aurizon Network, particularly given the multiple and detailed forms that discrimination can take. Stakeholders have been frustrated with the lack of effectiveness and transparency in the 2010 AU audit regime and believe it should be strengthened. However, Aurizon Network has weakened the audit provisions in 2013 DAU at the very time when Aurizon's strategy dictates they should be strengthened and expanded in scope.²⁴⁰</p> <p>It is vitally important to increase the reporting and auditing standards in order to ensure full transparency for the business. Unfortunately, Aurizon Network's UT4 submission has not reflected this need, but rather attempted to reduce the reporting and auditing requirements that it is required to undertake.²⁴¹</p>
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5.5.3 QCA analysis and Draft Decision

Our interim position, as reflected in this Draft Decision, is to refuse to accept the audit provisions proposed by Aurizon Network in its 2014 DAU. We propose amendments to Part 10 of the 2014 DAU to improve audit arrangements.

We also propose the addition of a new clause (cl. 10.9), to restore the conflicts auditing mechanism from Aurizon Network's ring fencing obligations under Part 3 of the 2010 AU. Consequently, the matters covered under the audit process in clause 10.10, have also changed.

Audit reporting

We note that the perceived narrowing of scope in the 2014 DAU on what can be audited and reported, and the limitation on automatic annual audits, has stakeholders concerned about the potential for discriminatory behaviour.

Conflicts audit and compliance under the ring fencing obligations

The 2010 AU formalised the scope of what is to be audited under the ring fencing regime of Part 3. Also, while consultation with other stakeholders in an audit process is done at our discretion, we consider the 'prescriptive' list of items routinely audited within that scope gave stakeholders confidence that a comprehensive approach is undertaken to review accountability, conduct and compliance practices.

Aurizon Network's proposal for the 2014 DAU to simplify the compliance and reporting aspects from Part 3 would reduce stakeholders' confidence in the rigour of the audit and compliance process.

We consider that re-including ring fencing compliance into the audit provision would provide some assurance that Aurizon Network is able to satisfy its ring fencing obligations, as discussed in the compliance section of Chapter 4 (ring fencing).

We also consider that the addition of clause 10.9 (Conflicts Audit), ensures a mechanism remains where:

- compliance obligations under Part 3 are maintained
- stakeholders can task the QCA to audit discriminatory practices
- conduct can be reasonably audited and monitored.

²⁴⁰ Asciano, 2013 DAU, sub. no. 43: 25

²⁴¹ Anglo American, 2013 DAU, sub. no. 78: 40

For these reasons, we consider linking audit reporting with the ring fencing regime would provide confidence in the regulatory regime. This would also reflect Aurizon Network's aim of greater market engagement, and provide more transparency for its stakeholders.

Annual audits and the audit process

We believe that concerns by stakeholders about frequency and triggers for audits placed on Aurizon Network can be addressed through re-insertion of an automatic annual audit as per the 2010 AU.

While an annual audit does not automatically address scope and quality of information audited, it provides stakeholders with some confidence that there is an avenue for the regulator to audit in a consistent manner. As well, scope and quality of information being audited can be planned and deliberately considered at each annual audit process.

We are therefore including an annual audit provision under the relevant clauses in Part 10. We are also changing the relevant provision so that the QCA rather than Aurizon Network is responsible for the appointment of the compliance auditor.

As drafted, the 2014 DAU does not prevent us from requesting a compliance audit given reasonable grounds. The power to appoint the auditor will allow us to be able to call an audit when required. This makes the audit process more transparent as the auditors' responsibility under a compliance process is to the QCA, and should be reflected in their appointment.

We consider that the existence of an annual audit is more cost effective once planning and forward costs are included, and the more it is regularly planned for. Together with monitoring and compliance audits, annual audit reporting allows for greater consistency and reliability for stakeholders to assess that reasonable endeavours are undertaken to ensure compliance with the undertaking and the QCA Act. As well, this allows for the development of a consistent baseline for assessing changes through time.

Actionable audit recommendations

The substance of any audit lies in taking action on audit recommendations. As such, while we respect Aurizon Network's view that it may need to keep confidential aspects of audits, it is still necessary to ensure that any recommendations to address substantive issues raised by auditors are implemented.

Our ability to request and recommend timeframes for audit implementation as part of the audit scope, is intended to provide stakeholders the assurance that issues raised in the audits will be actioned, and that auditors' recommendations will be acted upon in a timely way.

Therefore, we propose as part of the audit process under clause 10.10, that an audit implementation plan be undertaken for audit recommendations. We consider these proposals will provide a benchmark of actionable items year after year.

We consider an automatic annual audit, at the end of financial year, with actionable items for implementation, will best serve the need for a cost effective regime and will be one which can be planned, coordinated and reported against thoroughly.

Draft Decision

5.8 Our Draft Decision is to refuse to approve the audit arrangements for the 2014 DAU proposed in Part 10 of the 2014 DAU. We would approve amendments to the 2014 DAU which:

- (a) make minor amendments to the annual compliance report process**
- (b) include a new clause to re-instate a conflicts audit**
- (c) require the QCA to appoint the compliance auditor**
- (d) include clauses to reflect annual audits requirements, including a compliance audit**
- (e) include drafting to allow the QCA to request from Aurizon Network a plan for audit recommendation implementation, and consequential changes.**

6 DISPUTE RESOLUTION AND DECISION MAKING

The 2014 DAU provides for separate mechanisms to resolve disputes that may arise between Aurizon Network, access seekers, access holders and other parties:

- *Part 11 of the 2014 DAU sets out a process that applies generally to access seekers and train operators relating to negotiations or Aurizon Network's other obligations under the undertaking*
- *Disputes with other parties are also dealt with under Part 11, if they are related to matters expressly set out in the 2014 DAU.*

Part 11 does not apply to complaints addressing Aurizon Network's non-compliance with ring fencing arrangements and its reporting obligations because these are dealt with separately (i.e. in their respective parts of the DAU). Beyond these, the standard agreements (Volume VI) provide for dispute resolution under those agreements, once executed.

A robust, cost-effective and binding dispute resolution process is an important part of the undertaking. When disputes are resolved in a fair and timely way, parties can be confident that negotiations will proceed in a meaningful manner in accordance with the intent, obligations and processes of the undertaking. Effective dispute processes also ensure parties are held accountable for their conduct, decisions and performance.

Overall, we consider the 2014 DAU, as proposed by Aurizon Network, improves the process that existed under the 2010 AU for an access seeker or a train operator. However, we consider the dispute resolution process does not insufficiently accommodate access holders or other parties affected by the 2014 DAU.

Our Draft Decision is to refuse to approve Aurizon Network's proposed 2014 DAU dispute resolution arrangements. We require amendments to be made to ensure robust, cost-effective and binding dispute processes are available to any party dealing with Aurizon Network through the access undertaking. This includes:

- *broadening the Part 11 dispute provisions to apply generally to obligations in the access undertaking and ensuring dispute resolution is available to all relevant parties*
- *refining the processes, procedures and obligations on parties in resolving disputes, including providing for us to step in when parties cannot agree on how to progress the dispute*
- *providing that the outcome of any dispute is binding.*

The detailed drafting of Parts 3, 8, 11 and Schedule G attached to this Draft Decision is consistent with our approach and shows all of the amendments required.

6.1 Introduction

The third party access regime in the QCA Act is underpinned by a 'negotiate–arbitrate' approach to regulation, which acknowledges the 'primacy of contractual negotiations'. Parties negotiate with Aurizon Network in order to, among other things, access and operate on the CQCN, develop the funding arrangements for network expansions, and connect private infrastructure.

In this way, the dispute resolution mechanism in the access undertaking plays two critical roles:

- supporting the 'negotiate–arbitrate' framework by providing the fallback of external determination if commercial negotiations fail

- maintaining Aurizon Network's accountability by providing parties with a means to instigate formal investigations on potential breaches of the undertaking.

A robust and cost-effective process, which stakeholders can rely on to achieve timely resolution of disputes regarding Aurizon Network's obligations, is consistent with the overarching objective of providing access to the relevant services efficiently.

6.2 Overview

6.2.1 Aurizon Network proposal

Aurizon Network said it intended to use dispute resolution (as set out under the access undertaking or under access agreements) and complaints handling as the primary means for resolving disputes or other concerns about compliance between it and individual users.²⁴²

The dispute resolution mechanism in Part 11 of the 2014 DAU is a key component of this accountability framework. Aurizon Network said:

*... the availability of an effective and timely dispute process in relation to obligations and decisions included in the undertaking is of significant importance to the operation of the undertaking. Aurizon Network's intention is that the dispute resolution mechanism will apply to any provision of the undertaking.*²⁴³

Part 11 applies generally to access seekers and train operators²⁴⁴ and also to other parties to the extent that the 2014 DAU expressly provides for them to be. Complaints arising under an executed agreement are dealt with under that agreement.²⁴⁵

For most disputes, Part 11 provides for a staged resolution process with escalation through chief executive resolution, mediation, and ultimately external determination (by an expert or the QCA).²⁴⁶ Aurizon Network said it considers that maximising the opportunity for negotiated outcomes (including escalation within the internal management of parties) is cost-effective and more likely to result in mutually beneficial outcomes for the parties, than escalating disputes to a third party.²⁴⁷

Part 11 also sets out timeframes for each stage of the process and includes guidance on the allocation of costs. It details procedures where a dispute is referred to an expert or the QCA for determination.

Aurizon Network said it has largely preserved the staged resolution framework included the 2010 AU, with key amendments to support commercial resolution of disputes and to provide additional rigour around the timeframes and processes for disputes.²⁴⁸ Aurizon Network has also sought to move away from the 2010 AU approach of providing 'umbrella' provisions to deal with all disputes under the undertaking, to separately deal with disputes with access seekers (and train operators) and disputes with other parties.²⁴⁹

²⁴² Aurizon Network, 2013 DAU, sub. no. 2: 309–10

²⁴³ Aurizon Network, 2014 DAU, sub. no. 4: 270-271

²⁴⁴ It does not apply to disputes in relation to non-compliance with the ring fencing and reporting obligations, which are dealt with under separate mechanisms (see Parts 3 and 10 of the 2014 DAU).

²⁴⁵ This could include access agreements, TOAs, rail connection agreements, agreements in relation to user-funded expansions.

²⁴⁶ Some disputes under the 2014 DAU can be fast tracked to the QCA or expert.

²⁴⁷ Aurizon Network, 2013 DAU, sub. no. 2: 311

²⁴⁸ Aurizon Network, 2013 DAU, sub. no. 2: 311-313

²⁴⁹ Aurizon Network, 2014 DAU, sub. no. 4: 271-272

6.2.2 Stakeholders' position

Stakeholders did not support Aurizon Network's proposed dispute mechanism in the 2014 DAU.²⁵⁰ They said amendments were necessary to improve effectiveness and increase accountability. These included:

- broadening the application of the dispute resolution procedure set out in Part 11 to ensure that it clearly encompasses any disputes that may arise under the access undertaking²⁵¹
- amending the obligations and processes included in the Part 11 framework, including around the timeframes, allocation of costs and required procedures.²⁵²

6.2.3 Legislative framework and QCA assessment approach

Legislative framework

In assessing Aurizon Network's 2014 DAU, we have had regard to all of the factors in section 138(2) of the QCA Act. In doing so, we have applied a weighting of each matter we consider appropriate based on the practical relevance of that matter.

Against this background, we consider that, in our assessment of Aurizon Network's arrangements for dispute resolution:

- sections 138(2)(a), (b), (d), (e) and (h) should be given more weight, as identified below
- section 138(2)(g) refers to the pricing principles mentioned in section 168A of the QCA Act, which we consider only relevant to the extent that having recourse to effective dispute resolution should support effective negotiations on terms and conditions for access, including access charges
- sections 138(2)(c) and (f) should be given less weight, as they are less practically relevant to our assessment.

Promoting successful negotiations

Section 138(2)(a) of the QCA Act requires us to have regard to the object of Part 5 of the QCA Act as set out in section 69E, namely to promote the economically efficient operation of, use of, and investment in the CQCN, as the significant infrastructure by which the declared service is provided. Section 138(2)(d) of the QCA Act requires us to have regard to the public interest, including the public interest in having competition in markets.

We consider that including processes in the access undertaking to promote successful negotiations is consistent with the economically efficient use of the network (we address this in detail in Chapter 7). A robust and cost-effective dispute resolution process promotes successful negotiations of the terms of access by enabling parties to resolve disputes in a timely manner and at a reasonable cost. If access can be negotiated and provided more successfully, the infrastructure can be used more readily, thereby promoting its efficient use.

²⁵⁰ Anglo American, 2014 DAU, sub. no. 7: 20; Asciano, 2014 DAU, sub. no. 22: 43–4; QRC, 2014 DAU, sub. no. 42: 11; 55–7

²⁵¹ Anglo American, 2014 DAU, sub. no. 7: 20; Asciano, 2014 DAU, sub. no. 22: 43–4; QRC, 2014 DAU, sub. no. 42: 11; 55–6

²⁵² Asciano, 2014 DAU, sub. no. 22: 44; QRC, 2014 DAU, sub. no. 42: 56–7

Success will depend upon robust and cost-effective mechanisms that:

- simplify and provide a timely process for resolving disputes, available to all relevant parties
- clearly define processes, procedures and obligations, so that they are readily understood by parties and are relatively simple to administer
- enhance the balance of information between parties
- encourage parties to seek to resolve matters as expeditiously as possible
- otherwise facilitate effective negotiation and customer engagement.

Aurizon Network's and other parties' rights and interests

Section 138(2)(b) of the QCA Act requires that we have regard to the legitimate business interests of Aurizon Network. For dispute resolution, Aurizon Network's 'legitimate business interests' include that only genuine disputes are raised and they are resolved in a timely and cost-effective way. Aurizon Network's legitimate business interests do not extend to being able to use the dispute resolution mechanism to delay negotiations to extract higher access charges or better terms and conditions for itself.

Sections 138(2)(d) and (e) require us to have regard to the public interest, and the interests of access seekers. We also consider the interests of other parties are relevant under section 138(2)(h), to the extent they are not 'access seekers' under section 138(2)(e).

In broad terms, we consider these various interests are best balanced when the process for dispute resolution included in the access undertaking:

- facilitates parties developing and entering into an access agreement in a timely manner
- clearly identifies the matters that can be disputed, and who can be party to a dispute
- addresses Aurizon Network's ability to use its unique position to delay negotiations
- provides transparency and accountability of Aurizon Network's decision making
- encourages effective negotiation and customer engagement, maximising the opportunity for a negotiated outcome to be reached—but resolving remaining disputed matters in an expedient and balanced way
- discourages frivolous or vexatious disputes.

Section 138(2) of the QCA Act requires us to balance competing interests to the extent that Aurizon Network's legitimate business interests are not aligned with the interests of access seekers, access holders and the public. In these circumstances, we have given due weight to all parties' needs and requirements.

QCA assessment approach

Our approach to assessing Aurizon Network's dispute resolution process in Part 11 of the 2014 DAU is based on seeking to address those matters outlined above.

We consider that, taken as a whole, this assessment approach allows us to appropriately weigh the factors set out in section 138(2) of the QCA Act, as discussed earlier in this chapter.

Key issues for consideration

This chapter deals with the key issues arising from Aurizon Network's approach to resolving disputes. Specifically, we have sought to put a robust and cost-effective process for resolving disputes in place by:

- broadening the Part 11 dispute provisions to apply generally to Aurizon Network's obligations in the access undertaking and ensuring dispute resolution is available to all relevant parties
- refining the processes, procedures and obligations on parties in resolving disputes, to provide certainty should the matter come to dispute, without being unnecessarily prescriptive or onerous
- providing for the outcome of any disputes to be binding.

We have also proposed drafting amendments that are not discussed in detail in this chapter, but are nonetheless consistent with our broad approach and meet our assessment criteria. These include amendments:

- to improve the clarity and certainty of arrangements
- made in the interests of simplifying the access undertaking more broadly.

Our more detailed consideration is reflected in the marked drafting of Parts 2, 3, 8, 11 and Schedule G of the 2014 DAU.

6.3 Broadening the scope of the dispute resolution process

6.3.1 Aurizon Network proposal

Part 11 of Aurizon Network's 2014 DAU sets out a dispute resolution mechanism that applies to any dispute between it and an access seeker or a train operator relating to negotiations or its other obligations under the undertaking (except for non-compliance with ring fencing and reporting obligations which are dealt with under separate accountability mechanisms) (cl. 11.1.1(a)).

Disputes with other parties (including access holders) are dealt with under the Part 11 provisions to the extent they are related to matters the 2014 DAU expressly requires to be resolved in accordance with Part 11 (cl. 11.1.1 (a)).²⁵³

The 2014 DAU also provides that the dispute provisions in an executed access agreement or a TOA (Train Operations Agreement) take precedence over Part 11 provisions, unless the disputing parties agree otherwise (cl. 11.1.1(b)).

The Part 11 provisions in the 2014 DAU have moved away from the 2010 AU 'umbrella' approach to disputes (where any party could dispute a matter) to primarily addressing concerns of access seekers or a train operator.²⁵⁴ Aurizon Network considered the 2010 AU mechanism was too broad.²⁵⁵

Aurizon Network said the dispute resolution mechanism in Part 11 of the 2014 DAU was nevertheless comprehensive in terms of the issues it may resolve, noting:

²⁵³ For example, there are specific dispute resolution provisions for key decision points in the network expansion process (Part 8, see Chapter 12).

²⁵⁴ Aurizon Network, 2013 DAU, sub. no. 2: 308; 2014 DAU, sub. no. 4: 271

²⁵⁵ Aurizon Network, 2014 DAU, sub. no. 4: 271

- an executed agreement appropriately addresses the rights, obligations, and remedies of the involved parties²⁵⁶
- where it may be appropriate for another party (e.g. a customer of an access seeker or access holder) to have disputing rights under the undertaking, Aurizon Network has reflected them within the applicable clauses²⁵⁷
- separate accountability mechanisms exist for compliance with ring fencing and reporting obligations.²⁵⁸

6.3.2 Stakeholders' position

Stakeholders were concerned the Part 11 provisions of the 2014 DAU unreasonably narrowed the application of the dispute resolution mechanism in the undertaking, and sought amendments to broaden its application.²⁵⁹ The QRC said the dispute resolution mechanism in the undertaking was:

... an integral component of the accountability of Aurizon Network to users. It is therefore imperative that the dispute resolution process apply to a broad range of matters which may arise under the Undertaking ... it is essential that the application of Part 11 is broad enough to clearly encompass any disputes arising under those and other applicable Parts.²⁶⁰

Anglo American said parties should not be limited to only raising disputes in relation to matters that have a direct impact on them — while some decisions under the undertaking do not affect certain parties immediately, such decisions might have implications for those parties in the future.²⁶¹

Asciano said the complaints-based process for non-compliance with ring fencing arrangements and reporting audits (set out in Parts 3 and 10 of the 2014 DAU) should not necessarily be the only remedy for such complaints.²⁶²

Stakeholders were concerned that the 2014 DAU provides for the dispute processes in an executed access agreement or a TOA to have precedence over the Part 11 provisions in the 2014 DAU.²⁶³ Asciano said it has been confined to the dispute processes under access agreements, even in cases where the disputes were related to fundamental issues under the access undertaking (e.g. the calculation of take-or-pay). Asciano said this made resolving disputes more complex and time consuming.²⁶⁴ Anglo American said the consistency and regularity of the Part 11 provisions would be preferable to numerous variations under different agreements.²⁶⁵

Asciano noted the definition of 'access seeker' proposed in the 2014 DAU would further restrict who can access the Part 11 provisions, as it excludes parties that have not properly completed

²⁵⁶ Aurizon Network, 2013 DAU, sub. no. 2: 308

²⁵⁷ Aurizon Network, 2014 DAU, sub no. 3: 271-272

²⁵⁸ Aurizon Network, 2013 DAU, sub. no. 2: 311

²⁵⁹ Anglo American, 2013 DAU, sub. no. 78: 42; Asciano, 2014 DAU, sub. no. 22: 43, 130; QRC, 2014 DAU, sub. no. 42: 55–6

²⁶⁰ QRC, 2014 DAU, sub. no. 42: 56

²⁶¹ Anglo American, 2013 DAU, sub. no. 78: 42

²⁶² Asciano, 2014 DAU, sub. no. 22: 43

²⁶³ Asciano, 2014 DAU, sub. no. 22: 130; Anglo American, 2013 DAU, sub. no. 78: 42

²⁶⁴ Asciano, 2013 DAU, sub. no. 43: 81; 2014 DAU, sub. no. 22: 130

²⁶⁵ Anglo American, 2013 DAU, sub. no. 78: 42

an access application.²⁶⁶ Asciano said that it is important the Part 11 provisions be available to a party that has attempted to make an access application as it is highly possible for a dispute to arise over the acceptability of an access application. It added that the Part 11 provisions would have been available under the 2010 AU arrangements.²⁶⁷

6.3.3 QCA analysis and Draft Decision

Our interim position, as set out in this Draft Decision, is to reject Aurizon Network's proposed dispute resolution mechanism. We propose to require amendments to Parts 2, 3, 8, and 11 and Schedule G of the 2014 DAU to:

- broaden the scope of the dispute resolution mechanism in Part 11 of the 2014 DAU
- consolidate dispute processes in the 2014 DAU.

We consider Part 11 of the 2014 DAU is comprehensive in its application from the perspective of an access seeker or a train operator in negotiation with Aurizon Network.²⁶⁸ However, we are concerned the provisions do not provide adequate protection for other parties (including access holders), as the application of Part 11 relies on matters being expressly required by the undertaking to be resolved in accordance with such a process.

To reflect this, we have sought to ensure the undertaking clearly identifies the matters that can be disputed, and who can be party to a dispute. In our view this can be achieved by:²⁶⁹

- providing an umbrella provision in Part 11, where any party can refer any matters relating to the operation of the access undertaking to dispute (cl. 11.1.1(a))²⁷⁰—to provide an appropriate safety net for all parties for any legitimate disputes that may arise
- providing for disputes arising under an executed access agreement or train operations deed to be dealt with in accordance with the provisions in the agreement (cl. 11.1.1(c), (d))—but making the dispute mechanism in the undertaking available to relevant parties in cases where a matter is not covered in an agreement or has broader implications (e.g. maintenance or pass throughs under the access agreements)²⁷¹
- consolidating dispute arrangements in the undertaking and streamlining the approach in other parts of the 2014 DAU — in the interests of simplicity and clarity.

We consider our proposed amendments reinstate, for the most part, the 2010 AU approach to dispute resolution. While Aurizon Network said it was concerned a broader scope would effectively provide for a party that might not be impacted by decisions under the undertaking to raise disputes, it did not provide evidence that it had received vexatious disputes. Nonetheless, we have sought to address Aurizon Network's concern by proposing amendments to the

²⁶⁶ Asciano, 2013 DAU, sub. no. 43: 81

²⁶⁷ Asciano, 2013 DAU, sub. no. 43: 81

²⁶⁸ We have not accepted Aurizon Network's approach to defining and interpreting an access seeker or an access holder in the undertaking – and instead consider train operators as access seekers, or potential access seekers, having all relevant protections of Part 5 of the QCA Act, including the ability to use the dispute resolution arrangements, and ring fencing provisions of the 2014 DAU (see Chapter 2)

²⁶⁹ Clause references that follow refer to those in our mark-up attached to this Draft Decision (Vol 5).

²⁷⁰ This includes the supply and sale of electricity (Part 2 of the DAU, see Chapter 3)

²⁷¹ We have proposed a range of capacity and train operation arrangements be subject to pass through arrangements in the access agreements (see Chapter 8).

processes and procedures to discourage frivolous or vexatious disputes,²⁷² and ensure any disputes that are raised will be dealt with in the most cost-effective way. This is consistent with Aurizon Network's and other parties' rights and interests.

On that basis, we have not sought to restrict the application of the dispute mechanism in the undertaking. Our view is that to the extent that a stakeholder has a legitimate concern about Aurizon Network's conduct, an effective dispute process should be available to this party.

Draft Decision

6.1 Our Draft Decision is to refuse to approve Aurizon Network's proposed dispute resolution mechanism. We would approve consolidated provisions for dispute resolution in Part 11 with amendments to:

- (a) apply broadly to Aurizon Network's obligations within the undertaking**
- (b) be open to any party that has legitimate concerns about Aurizon Network's conduct, decisions and performance.**

6.4 Refining processes, procedures and obligations

6.4.1 Aurizon Network proposal

Aurizon Network said its intent is to provide a cost-effective and efficient dispute resolution mechanism in the 2014 DAU. Accordingly, Aurizon Network considers resolution of disputes through commercial negotiation will generate the best opportunity for maximising efficiency as:

- a negotiated outcome is more likely to be mutually beneficial for the parties
- the direct costs involved in a negotiation are likely to be lower than in an external determination
- an external determination (such as arbitration) is likely to be time-consuming.²⁷³

Reflecting this, its proposed dispute resolution mechanism in Part 11 provides significant opportunities for disputing parties to reach resolution (including escalation within the internal management of parties) without having an externally imposed determination. Part 11 also sets out timeframes and guidance on the allocation of dispute costs.

Staged dispute process

Part 11 of the 2014 DAU sets out a staged dispute resolution process, where all issues are escalated through several stages including:

- providing for all issues to be referred to disputing parties' chief executives (or their nominees) in the first instance (cl. 11.1.2)
- providing a new option for mediation after the chief executive resolution stage (cl. 11.1.3)
- requiring some matters, in particular relating to network expansions, to be referred directly to expert determination or the QCA if unresolved after the chief executive resolution stage (cl. 11.1.4) (see Figure 4).

²⁷² Under our proposed amendments, all disputes that are unresolved at the Chief Executive Resolution stage can be directly escalated to us. We can order full costs to the initial party if we think the dispute is vexatious.

²⁷³ Aurizon Network, 2013 DAU, sub. no. 2: 310–312

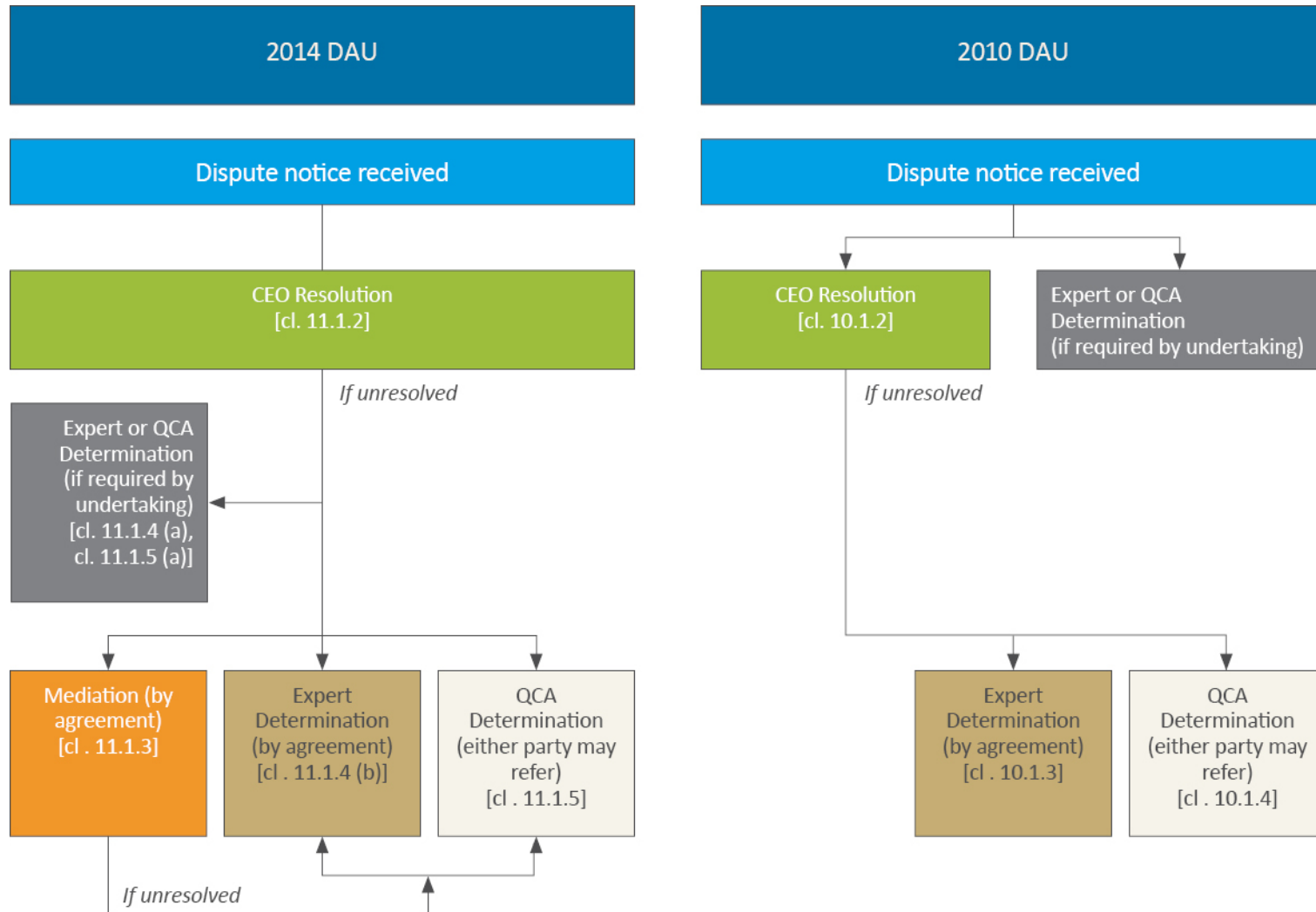
Part 11 also sets out timeframes for each stage of the process and includes guidance on the allocation of costs.

For the most part, the costs charged for mediation or determination are borne by the parties in equal shares, with parties bearing their own participation costs (cl. 11.1.3(a), 11.1.4(g)). This includes costs imposed where we have sought advice from the Safety Regulator (cl. 11.1.5(e), (f)). In contrast, under the 2010 AU, we determined the split of costs when we called on the Safety Regulator to provide advice (cl. 10.1.4(d) of the 2010 AU).

Part 11 of the 2014 DAU also sets out procedures where a dispute is referred to an expert or the QCA for determination (cl. 11.1.4, 11.1.5 and 11.1.6). These include obligations intended to replicate the *Judicial Review Act 1991* (Qld), which the QCA is required to follow when making any decision under the access undertaking (cl. 11.2). Aurizon Network said that replicating these obligations is necessary because decisions in relation to the undertaking are not made 'under an enactment'.²⁷⁴

²⁷⁴ Aurizon Network, 2014 DAU, sub. no. 4: 284

Figure 4 Dispute process under the 2014 DAU and the 2010 AU respectively



6.4.2 Stakeholders' position

Stakeholders raised specific issues around the effectiveness and efficiency of the dispute resolution mechanism (see Table 31).

Table 31 Key issues raised by stakeholders in relation to the dispute process

<i>Issue</i>	<i>Comments</i>
Chief executive resolution	All disputes should be referred in the first instance to the relevant chief executives. This is commercially sensible and will encourage parties to resolve the dispute without the need to resort to more formal dispute resolution mechanisms. ²⁷⁵
Mediation	The four-month period for mediation might be too long. A shorter time may be appropriate, given parties can agree to extend the time frame if required. ²⁷⁶
Expert determination	The undertaking should set out time limits for expert determination. ²⁷⁷
QCA determination	Parties should be able to opt for QCA determination before expert determination. ²⁷⁸ It is unclear if a dispute would be escalated where it was not subject to expert determination and one of the parties did not agree to mediation. ²⁷⁹
Procedures for determinations	It is not appropriate for Part 11 to detail the process for arbitration by the QCA because this is already set out in the QCA Act. ²⁸⁰ The QCA should strengthen its powers to: <ul style="list-style-type: none"> • require Aurizon Network to demonstrate the benefit of its decisions to the whole supply chain (particularly where Aurizon above-rail is the beneficiary of an Aurizon Network decision) • consider efficiency and equity issues when making a dispute determination.²⁸¹ The QCA should not be required to provide parties with a draft determination and to give those parties reasonable opportunity to make submissions. ²⁸² These requirements will delay the dispute process, and may be of limited benefit (e.g. when nature of information available means that only one party can make meaningful comments). ²⁸³
Safety regulator costs	Providing for parties to equally share costs imposed by the safety regulator is arbitrary and might lead to commercial imbalance in the case where a referral to the safety regulator was initiated by an individual party. ²⁸⁴ The QCA should determine the proportion of costs imposed by the safety regulator each party bears. ²⁸⁵
Information disclosure	With a dispute involving alternative form of access, a written consent should be given by the initial party (i.e. the party raising the dispute) prior to the other relevant party (i.e. the corresponding end user or train operator(s)) being notified and invited to participate in the dispute. ²⁸⁶

²⁷⁵ QRC, 2014 DAU, sub. no. 42: 56

²⁷⁶ Asciano, 2014 DAU, sub. no. 22: 44

²⁷⁷ Asciano, 2014 DAU, sub. no. 22: 132

²⁷⁸ Asciano, 2013 DAU, sub. no. 43: 81

²⁷⁹ Asciano, 2014 DAU, sub. no. 22: 44

²⁸⁰ QRC, 2014 DAU, sub. no. 42: 56

²⁸¹ Asciano, 2014 DAU, sub. no. 22: 43

²⁸² QRC, 2014 DAU, sub. no. 42: 56-57

²⁸³ QRC, 2014 DAU, sub. no. 42: 56-7

²⁸⁴ QRC, 2014 DAU, sub. no. 42: 56

²⁸⁵ QRC, 2014 DAU, sub. no. 42: 56

²⁸⁶ Asciano, 2014 DAU, sub. no. 22: 131

<i>Issue</i>	<i>Comments</i>
	Parties should be able to provide information even if they choose not to be party to the dispute. ²⁸⁷
Delays	A party should be held liable for any costs associated with delay in resolving a dispute or enforcement of a QCA decision if it has acted unreasonably. ²⁸⁸

6.4.3 QCA analysis and Draft Decision

Our interim position, as set out in this Draft Decision, is to refuse to approve Aurizon Network's proposed process for dispute resolution. While we are generally satisfied with a staged dispute process, we have proposed amendments to Part 11 to refine the process to:²⁸⁹

- provide for us to determine how a dispute might proceed, including nominating an expert for determination if parties cannot agree (cl. 11.1.2(d)(iii), 11.1.3(d)(iv), 11.1.4(g), 11.1.5)—to limit unnecessary delays and provide an avenue for resolution
- require Aurizon Network to update us on the progress of the resolution of the dispute, including notices, formal correspondence and its outcomes (cl. 11.1.1(g))—to improve transparency and incentivise timely resolution, as well as provide us with insights into the operation of the undertaking
- simplify processes and procedures for QCA decision making (including determinations to resolve disputes) where we consider these are not necessary (cl. 11.1.5, 11.1.6)
- clarify that disputes resolved through the dispute resolution mechanism are binding (cl. 11.1.2(c), 11.1.3(c), 11.1.6(b))—to provide certainty and ensure that there is a meaningful resolution to the dispute (whether resolved by the CEOs, as a mediated outcome or, ultimately, by determination).

We consider these amendments will make the dispute resolution provisions more robust and cost effective—facilitating effective negotiation and customer engagement by appropriately balancing Aurizon Network's and other parties' rights and interests.

Staged dispute process

We consider a staged resolution process, with an emphasis on commercial negotiation and appropriate timeframes, is cost effective and consistent with reaching timely resolution of disputes. That said, we have proposed that Part 11 of the 2014 DAU provide for us to step in on a limited number of matters where there is likelihood for unnecessary delay, should parties not be able to otherwise reach an agreement (cl. 11.1.2(d)(iii), 11.1.3(d)(iv), 11.1.4(g), 11.1.5).

We have also proposed to require amendments to Part 8 of the 2014 DAU that fast-track some disputes about network expansions to us for determination (see Chapter 12). We consider this appropriate given expansions will generally involve a number of access seekers, access holders and other relevant parties, making it unlikely for CEO resolution and mediation to be effective. We can refer a matter to an expert for determination if requested by the parties (cl. 11.1.5(b)). This is to address the practical issue that some matters are best determined by experts.

Further, we are concerned the 2014 DAU does not keep us adequately informed about the progress and outcome of a dispute. While the 2014 DAU requires the mediator to provide us

²⁸⁷ Asciano, 2014 DAU, sub. no. 22: 44

²⁸⁸ QRC, 2013 DAU, sub. no. 46: 81

²⁸⁹ Clause references that follow refer to those in our mark-up attached to this Draft Decision (Vol 5)

with a copy of any agreement reached, it has no such requirements in any other stages of the process.

To address this, we propose that Aurizon Network keep us up to date about the progress of a dispute, by providing us with any notices and formal correspondence given in connection with the dispute, including its outcome (cl. 11.1.1(g)). We consider the increased transparency will encourage timely resolution of disputes, and provide us with insights into the operation of the undertaking.

Timeframes for dispute resolution

We consider Aurizon Network's proposed timeframes applying to each stage of the process, including the four-month limit for mediation, appropriate. This is because a referral to mediation can only occur with agreement of all disputing parties, and parties can further escalate the dispute if the mediator considers: (1) a mediated outcome is unlikely; or (2) a party to the mediation has failed to participate in good faith. We do not consider it appropriate to include a time limit for expert determination, given the broad range of disputes which may be covered.

Procedures for QCA determinations

We have simplified processes and procedures for QCA determinations (cl. 11.1.5, 11.1.6). We do not consider it appropriate or necessary for the 2014 DAU to set out the procedures we will follow in making a determination as these are already addressed under Division 5 of Part 5 of the QCA Act. Reflecting this, we have not included many of the detailed procedures Aurizon Network has proposed. Instead, we require that if a dispute is referred to the QCA under the undertaking or otherwise, Division 5 of Part 5 of the QCA Act shall apply. We have strengthened the drafting to remove uncertainty about whether Division 5 of Part 5 of the QCA Act applies to any dispute referred to the QCA.

Accordingly, we have not set out how we would allocate costs arising from our determination. Having said that, we broadly support an approach where the costs charged for mediation or determinations are borne by the parties in equal shares, with parties bearing their own participation costs. For example, we consider parties should generally share the costs of the safety regulator (or indeed any expert) in providing advice, and bear their own costs for participating in the determination and any flow-on costs as a result of the determination.

Decisions to be binding

As we set out in our assessment approach in section 6.1.3, we consider that a dispute resolution process will only be effective if it is binding on the parties to the dispute. Part 11 of the 2014 DAU, as submitted, did not make clear that the outcomes of disputes should be made binding.

For this reason, our Draft Decision is to include a requirement in Part 11 of the 2014 DAU that clearly indicates that disputes resolved through the dispute resolution mechanism are binding (cl. 11.1.2(c), 11.1.3(c), 11.1.6(b)).

We consider complying with a properly made dispute determination is consistent with Aurizon Network's legitimate business interests and is also in the interests of access seekers and holders.

Draft Decision

6.2 Our Draft Decision is to refuse to approve Aurizon Network's proposed dispute resolution mechanism. We would approve consolidated provisions for dispute resolution in Part 11 with amendments to make the:

- (a) dispute resolution process more robust and cost effective**
- (b) outcome of decisions binding on parties.**

7 NEGOTIATION FRAMEWORK

Part 4 of the 2014 DAU sets up a framework for parties to negotiate with Aurizon Network to reach agreed terms and conditions for access to its track. The 2014 DAU also outlines the key steps in the negotiation process (Schedule H) and the information access seekers and Aurizon Network may be required to provide as part of these negotiations (Schedules A and B). Schedule C sets out the requirements for an operating plan.

A robust and effective negotiation framework can promote the conduct of negotiations in a fair and balanced manner to deliver timely outcomes that respond to changing circumstances. It can also help to address any concern, whether real or perceived, that Aurizon Network could use negotiations to 'pick winners', delay proceedings or extract higher charges or better terms and conditions for itself.

Our Draft Decision is to refuse to approve Aurizon Network's negotiation framework. We require amendments to Part 4 and Schedules A, B, C and H to:

- provide greater clarity and certainty about the obligations and processes for applying for access and negotiating agreements
- better balance Aurizon Network's and other parties' rights and interests, by addressing Aurizon Network's ability to use its unique position and increasing the transparency and accountability of its decision making
- improve information flows so parties have sufficient information to make informed decisions in a timely manner
- better facilitate competition between above-rail operators (e.g. tendering for rail haulage contracts).

The detailed drafting of Part 4 and Schedules A, B, C and H attached to this Draft Decision is consistent with our approach and shows the amendments we consider necessary in order to approve the 2014 DAU.

7.1 Introduction

The third-party access regime in the QCA Act is underpinned by a 'negotiate–arbitrate' approach to regulation, which acknowledges the 'primacy of contractual negotiations'. For the CQCN, third parties (access seekers²⁹⁰) negotiate with Aurizon Network to reach agreed terms and conditions for access to its track.

Consistent with this outlook, Aurizon Network said it considers that increased flexibility for the negotiation of access rights will generate the best opportunity for maximising efficiency:

... resolving access through commercial negotiation, rather than via a prescriptive set of processes, will facilitate a more timely and appropriately scoped response to access seeker preferences.²⁹¹

However, there is still an important role for the regulatory framework to facilitate negotiations. On this point, the QRC said:

²⁹⁰ The QCA Act defines an access seeker as 'a person who wants access, or increased access, to the service' and could include end users, train operators, existing access holders and other parties.

²⁹¹ Aurizon Network, 2013 DAU, sub. no. 2: 84

A model which relies on negotiations with a monopoly to deliver efficient outcomes is fundamentally flawed ... Coal miners do not have countervailing power. They depend on the access undertaking to assist them in their quest to achieve a commercial outcome from negotiations with a monopoly service provider.²⁹²

A robust and effective negotiation framework can promote more successful negotiations, so parties negotiate for access in good faith²⁹³, in a timely manner and on reasonable terms. It can also protect Aurizon Network from having to engage in protracted negotiations with parties that have no genuine interest in gaining access or present a commercial risk.

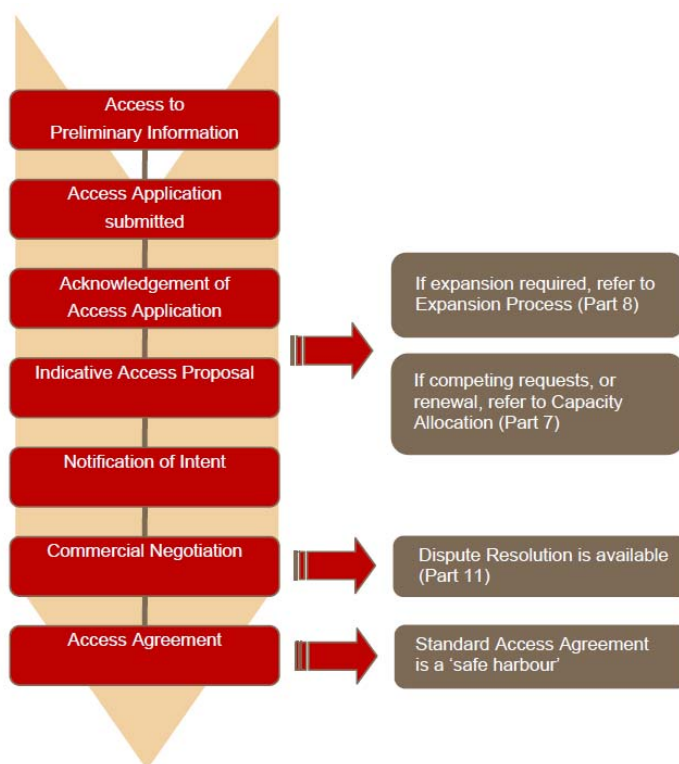
7.2 Overview

7.2.1 Aurizon Network proposal

The 2014 DAU seeks to establish the process Aurizon Network will follow in negotiating access and developing access agreements, as well as the access seeker’s responsibilities during this process. Aurizon Network has placed a strong emphasis on the primacy of commercial negotiations in all matters relating to access and, in particular, the ‘negotiate–arbitrate’ model of Queensland access regulation.

Part 4 of Aurizon Network’s 2014 DAU defines both the boundaries, and the conditions, of negotiation (see Figure).

Figure 5 Stylised overview of the negotiation process



Source: Aurizon Network, 2013 DAU, sub. no. 2: 90

²⁹² QRC, 2013 DAU, sub. no. 46: 1, 21

²⁹³ The QCA Act provides that Aurizon Network and an access seeker must negotiate in good faith for reaching an access agreement (s100(1)) and Aurizon Network must make all reasonable efforts to satisfy the reasonable requirements of the access seeker, including providing information to the access seeker about the access sought (s101).

It sets out the framework for negotiating capacity that is available, or is committed to become available, including the process and conduct of negotiations, information requirements and timeframes for action. The 2014 DAU includes an explanatory diagram that outlines the key steps in the negotiation process (Schedule H) and the information access seekers and Aurizon Network may be required to provide (Schedules A and B). Schedule C sets out the requirements for an operating plan.

Other elements of the 2014 DAU also affect the negotiation process. There are important linkages between the Part 4 provisions and the arrangements:

- allocating available capacity (Part 7 of the 2014 DAU, see Chapter 11)
- for network development and expansions (Part 8 of the 2014 DAU, see Chapter 12)
- dealing with access agreements and SAAs (Part 5 and Volume 3 of the 2014 DAU, see Chapter 8)
- dealing with Aurizon Network's obligation to not unfairly differentiate between access seekers through the ring fencing regime (Part 3 of the 2014 DAU, see Chapter 4).

In response to stakeholders' comments on the 2013 DAU, Aurizon Network has sought to provide additional rigour to the process and an increased obligation for it to act reasonably and in good faith when negotiating with access seekers.²⁹⁴ Aurizon Network accepts there is a role for the regulatory framework to ensure balanced commercial negotiations. However, it argues that extending the regulatory framework beyond the point it has proposed, results in distortions to commercial decision making and inefficiency.²⁹⁵

7.2.2 Stakeholders' position

Stakeholders did not support Aurizon Network's approach to negotiations. Asciano said:

*... the 2014 DAU drafting continues to reflect Aurizon Network's preference for a monopolistic negotiation framework over a regulated and more transparently equitable negotiation framework.*²⁹⁶

While stakeholders considered the 2014 DAU had addressed some of their concerns in response to the 2013 DAU, they said further amendments were required to:

- provide greater clarity over the obligations and processes included in the negotiation framework, including over the nature of information required to be provided and the timing of its provision
- address Aurizon Network's ability to use its market power, including providing greater transparency and accountability in its decision making
- facilitate competition in above-rail markets.

If made, these amendments would support successful negotiations by providing greater certainty, transparency and stronger regulatory oversight.²⁹⁷

²⁹⁴ Aurizon Network, 2014 DAU, sub. no. 3: 3

²⁹⁵ Aurizon Network, 2013 DAU, sub. no. 2: 86

²⁹⁶ Asciano, 2014 DAU, sub. no. 22: 30

²⁹⁷ Anglo American, 2014 DAU, sub. no. 7: 6-7, 31-34; Asciano, 2014 DAU, sub. no. 22: 30-34, 80-96; QRC, 2014 DAU, sub. no. 42: 20-23

7.2.3 Legislative framework and QCA assessment approach

In assessing Aurizon Network's proposed negotiation framework, we have had regard to all the factors in section 138(2) of the QCA Act. In doing so we have applied a weighting to each factor we consider appropriate based on the practical relevance of that factor.

Against this background, we consider that, in our assessment of Aurizon Network's negotiation framework:

- sections 138(2)(a), (b), (d), (e) and (h) should be given more weight
- section 138(2)(g) refers to the pricing principles mentioned in section 168A of the QCA Act which we consider relevant to the extent that the negotiation framework should support effective negotiations on terms and conditions for access, including price
- sections 138(2)(c) and (f) should be given less weight, as they are less practically relevant to our assessment.

Promoting successful negotiations

Section 138(2)(a) of the QCA Act requires us to have regard to the object of Part 5 of the QCA Act as set out in section 69E, namely to promote the economically efficient operation of, use of, and investment in the CQCN, as the significant infrastructure by which the declared services are provided. Section 138(2)(d) of the QCA Act requires us to have regard to the public interest in having competition in markets. We consider that taken together, these objectives are best met when the negotiation framework included in the undertaking promotes successful negotiations by:

- supporting parties wishing to negotiate access to do so in a timely manner and at a reasonable cost – by simplifying and providing a more timely process for negotiating access
- providing some certainty over processes and obligations in negotiations, without being unnecessarily prescriptive or onerous
- enhancing customer engagement for negotiating access – including by removing barriers to participation, whether actual or perceived
- not unnecessarily constraining competition between above-rail operators (in tendering for rail haulage contracts).

When negotiations are effective, end users and operators seeking access to the network can obtain and use rights that better reflect their needs and requirements, within a reasonable time and at a price reflective of the cost of supplying the service. This is consistent with the economically efficient use of the existing network. It can also help indicate where there may be a current or future need for the network to be expanded, which is relevant to promoting economically efficient investment in the network.

Aurizon Network's and other parties' rights and interests

Section 138(2)(b) of the QCA Act requires we have regard to the legitimate business interests of Aurizon Network. For the process of negotiating access agreements, we consider Aurizon Network's 'legitimate business interests' include providing for it to recover the efficient costs to it of undertaking negotiations (but not more) and providing some protection from having to negotiate with access seekers who are unlikely to use the access sought.

At the same time, section 138(2)(e) require us to have regard to the interests of access seekers. We also consider the interests of access holders are relevant under section 138(2)(h), to the extent they are not already 'access seekers' under section 138(2)(e).

In broad terms, we consider these various interests are best balanced when the negotiation framework included in the access undertaking:

- clearly defines both the boundaries, and the conditions, of what is being negotiated
- addresses Aurizon Network's ability to use its position to delay negotiations, extract a higher price or better terms and conditions for itself, or favour its related above-rail provider
- has mechanisms to ensure accountability and transparency of Aurizon Network's decision making
- includes measures to ensure non-discriminatory treatment of access seekers
- protects Aurizon Network from having to engage in protracted negotiations with parties that have no genuine interest in gaining access or may represent a poor commercial risk
- ensures the fair prioritisation of access seekers and a regime for Aurizon Network to marshal them.

In doing so, we sometimes need to balance competing interests – to the extent that Aurizon Network's interests are not aligned with those of access seekers and access holders and the public. In these circumstances we have not necessarily given priority to Aurizon Network's interests, but have given due weight to all parties' needs and requirements.

QCA assessment approach

Our approach to assessing Aurizon Network's proposed negotiation framework is set out in **Table 32**. This approach is based around our assessment of whether Aurizon Network's proposed arrangements:

- appropriately balance Aurizon Network's and other parties' rights and interests
- simplify and provide a timely process for negotiations
- promote effective competition between train operators.

We consider omitting or insufficiently developing any of these features in the access undertaking's negotiation framework may, of itself, hinder or prevent access.

We consider that, taken as a whole, this assessment approach for assessing Aurizon Network's proposed negotiation framework allows us to appropriately weigh up the factors set out in section 138(2) of the QCA Act, as contemplated earlier in this chapter.

Table 32 QCA approach to assessing arrangements for access negotiations

<i>Assessment criterion</i>	<i>Rationale</i>
Do the arrangements appropriately balance Aurizon Network's and other parties' rights and interests?	<p>We consider arrangements that appropriately balance Aurizon Network's and other parties' rights and interests will:</p> <ul style="list-style-type: none"> • clearly define both the boundaries, and the conditions, of what is being negotiated • address Aurizon Network's ability to use its position to delay negotiations, extract a higher price or better terms and conditions for itself, or favour its related above-rail provider • have mechanisms to ensure accountability and transparency of Aurizon Network's decision making • include measures to ensure non-discriminatory treatment of access seekers • protect Aurizon Network from having to engage in protracted negotiations with parties that have no genuine interest in gaining access or may represent a poor commercial risk • ensure the fair prioritisation of access seekers and a regime for Aurizon Network to marshal them.
Do the arrangements simplify and provide a timely process for negotiating access?	<p>We consider arrangements that simplify and provide a timely process for negotiating access will:</p> <ul style="list-style-type: none"> • provide greater certainty for end users and operators wanting access to the network • clearly define negotiation procedures, including timeframes for action • balance the exchange of information between parties • address Aurizon Network's ability to delay negotiations for its benefit • include effective dispute resolution procedures, including fair and timely resolution of disputes • otherwise facilitate effective negotiation and customer engagement.
Do the arrangements promote effective competition between above-rail operators	<p>We consider arrangements should not unnecessarily constrain competition between above-rail operators (e.g. tendering for rail haulage contracts).</p>

Key issues for consideration

This chapter deals with our key concerns with Aurizon Network's proposed negotiation framework and identifies our proposed amendments to arrangements to improve outcomes. In enacting the approach outlined above in **Table 32**, our assessment deals with three key themes. These are:

- providing greater clarity and certainty about the obligations and processes for applying for access and negotiating agreements
- improving information flows so parties have sufficient information to make informed decisions in a timely manner
- otherwise promoting competition between above-rail operators (e.g. tendering for rail haulage contracts).

We have also proposed drafting amendments that are not discussed in detail in this chapter, but are nonetheless consistent with this approach and meet our assessment criteria. These include amendments made in the interest of simplifying the access undertaking more broadly.

Our more detailed consideration is reflected in the drafting of Part 4 and Schedules A, B, C and H of the 2014 DAU.

In doing so, we have not accepted Aurizon Network's approach to defining and interpreting an access seeker or an access holder in the undertaking – and instead consider train operators as access seekers, or potential access seekers, having all relevant protections of Part 5 of the QCA Act, including the ability to use the dispute resolution process, and ring fencing provisions of the 2014 DAU (see Chapter 2).

That said, we have also sought to address Aurizon Network's administrative burden by requiring it to only respond to, and negotiate with, parties that can demonstrate they have a genuine interest in obtaining access rights and a reasonable likelihood of using access at the level sought. We have also accepted Aurizon Network's general approach that the full protections of the undertaking be provided once a completed access application has been submitted.

7.3 A streamlined process for applying for access and negotiating agreements

7.3.1 Aurizon Network proposal

Aurizon Network said it sought to recalibrate the undertaking to:

... ensure balanced commercial negotiations between Aurizon Network and access seekers, many of whom are large, well-resourced international mining companies. Extending the regulatory framework beyond this point results in distortions to commercial decision making and inefficiency.²⁹⁸

In doing so, Aurizon Network said its overarching intent in drafting Part 4 was to provide a clear and efficient path for parties to apply for and negotiate access rights, without substantially altering from the 2010 AU the steps in that process or Aurizon Network's key obligations in negotiating with access seekers (see Table 33).²⁹⁹

²⁹⁸ Aurizon Network, 2013 DAU, sub. no. 2: 86

²⁹⁹ Aurizon Network, 2013 DAU, sub. no. 77:26

Table 33 Applying for access and negotiating agreements – overview of Aurizon Network's proposal

<i>Stage</i>	<i>Effect</i>
Initial inquiries cl. 4.2, Sch A	Provides for preliminary meetings to seek clarification over the process and an initial exchange of preliminary information. Information is to be available on Aurizon Network's website or provided by Aurizon Network on request (for capacity information).
Application submitted cl. 4.3, 4.9, Sch B	<p>A prospective access seeker (or train operator) can submit an access application (or request to enter a TOA) that includes detailed information on planned operations (and also confirms that the train operator has been nominated by the end user).</p> <p>Aurizon Network must notify a party where the application is incomplete, specifying what information is required for the application to be complete. Aurizon Network can also request additional evidence, including on a party's ability to fully use the access rights sought or that is required to assess capacity allocation related issues and to prepare the IAP.</p> <p>Aurizon Network can cease negotiations if the requested information is available, but is not provided.</p>
Acknowledgement of access application cl. 4.4	<p>Aurizon Network will acknowledge a properly completed access application and confirm it will prepare an IAP.</p> <p>Aurizon Network can suspend negotiations for access where capacity is not available, pending agreement on scope and terms of required expansion. In that event, the access seeker must confirm its ongoing requirements for access; confirm any material change to their application; and provide information on their ability to fully use the access rights sought, if requested.</p> <p>Aurizon Network can reject an application for access rights commencing more than 5 years after the application was received. It can also reject applications proposed to commence between 3 and 5 years away, if it considers that seeking rights so far in advance is not required given necessary lead times.</p>
Revisions cl. 4.5, 4.10.2	An access seeker can revise its access application, provided that the revision does not represent a material variation to the access rights requested, after an acknowledgement notice has been given but prior to IAP or during the negotiation period. Aurizon Network determines if the revision is a material variation.
IAP cl. 4.6	Aurizon Network will develop an IAP for the access rights sought. An access seeker can notify Aurizon Network if it believes the IAP is not an appropriate basis for continuing negotiations. Aurizon Network can revise the IAP in response to those concerns.
Negotiation process cl. 4.7, 4.10, 4.11, 4.12, Sch A, Sch C	<p>The negotiation period for an access seeker (train operator) commences when it provides a notification of intent (provides all the relevant information for a TOA).</p> <p>During the negotiation period the parties endeavour to agree on terms and conditions of access. Unless otherwise agreed, the terms and conditions are those provided in the relevant SAA. During the negotiation period, parties will commence an interface risk assessment and prepare an Interface Risk Management Plan (IRMP) if requested, or if reasonably necessary to do so. Aurizon Network may seek further information during negotiations, including on an access seeker's ability to fully use the requested access rights.</p> <p>The negotiation period for an access seeker (train operator) ceases in defined circumstances. If negotiations cease because Aurizon Network is no longer able to offer access to the access seeker under the terms of the IAP, negotiations can continue for those parts of the access rights sought which can be provided. Aurizon Network can recover its reasonable costs if it ceases negotiations because it believes the access seeker does not intend to obtain or fully use the access rights at the level sought.</p>
Primacy for end users cl. 4.8, 4.9, 4.10	Provides primacy to end users (or a railway operator nominated by the end user). A train operator must include a copy of their nomination by an end user as part of its request to enter a TOA. Where there are multiple applications for the same access, Aurizon Network can suspend negotiations with all railway operators if an end user fails to nominate which operator should be treated as the access seeker.

In response to stakeholder comments on the 2013 DAU, Aurizon Network included provisions it said will add rigour to the negotiation process and provide increased obligations for it to act reasonably and in good faith when negotiating with access seekers.³⁰⁰ It also included an explanatory diagram that sets out the key steps in the negotiation process (Schedule H).

7.3.2 Stakeholders' position

Stakeholders said the 2014 DAU had addressed a number of their concerns about the process for applying for access and negotiating agreements, but said further amendments were required to provide greater certainty, transparency and stronger regulatory oversight.³⁰¹ These include amendments to:

- better focus the nature and type of information Aurizon Network provides, and can request or require, through the process (see section 7.4)
- address Aurizon Network's ability to use its market power – by limiting Aurizon Network's discretion within the negotiation framework and setting out relevant, easily assessable and not unnecessarily restrictive decision criteria³⁰²
- improve the process for applications where an expansion is required – by providing for the access seeker to progress the application for that part of the access rights that do not require an expansion; clarifying when negotiations will resume;³⁰³ setting up a register to keep track of requests when a suspension occurs;³⁰⁴ and clarifying the treatment of provisional capacity allocation³⁰⁵
- improve the process for revising an access application – by clarifying what a material variation is³⁰⁶ and how Aurizon Network will respond to a revised access request; providing that any new application (as amended by the material variation) is immediately deemed to have been submitted; and providing that, where negotiations have started, a material variation will not cause the application to be withdrawn (rather Aurizon Network can revise the IAP, with timeframes adjusted accordingly)³⁰⁷
- change how Aurizon Network will deal with multiple applications for the same access, to facilitate competition in above-rail markets – by removing the requirement that a train operator be nominated by an end user (see section 7.5).

In addition, stakeholders did not support Aurizon Network's proposal to recover reasonable costs where it ceases negotiations because it does not believe the access seeker intends to obtain or use access at the level sought. The QRC and Anglo American sought greater clarity over when Aurizon Network could recover costs.³⁰⁸ Asciano said, where negotiations cease,

³⁰⁰ Aurizon Network, 2014 DAU, sub. no. 3: 3

³⁰¹ Anglo American, 2014 DAU, sub. no. 7: 6-7, 31-34; Asciano, 2014 DAU, sub. no. 22: 30-34, 80-96; QRC, 2014DAU, sub. no. 42: 20-23

³⁰² Anglo American, 2014 DAU, sub. no. 7: 32-33, sub. no. 8; Asciano, 2014 DAU, sub. no. 22: 31-34, 86-87, 94; QRC, 2014 DAU, sub. no. 37

³⁰³ Anglo American, 2014 DAU, sub. no. 8; QRC, 2014 DAU, sub. no. 42: 22; sub. no. 37

³⁰⁴ Asciano, 2014 DAU, sub. no. 22: 84

³⁰⁵ Anglo American, 2014 DAU, sub. no. 8; Asciano, 2014 DAU, sub. no. 22: 86; QRC, 2014 DAU, sub. no. 37

³⁰⁶ This is discussed in Volume IV of this Draft Decision.

³⁰⁷ Anglo American, 2014 DAU, sub. no. 8; QRC, 2014 DAU, sub. no. 42:22-23, sub. no. 37

³⁰⁸ Anglo American, 2014 DAU, sub. no. 8; QRC, 2014 DAU, sub. no. 37;

both parties should bear their own costs (assuming both parties entered the negotiations in good faith).³⁰⁹

7.3.3 QCA analysis and Draft Decision

We acknowledge Aurizon Network's endeavours to improve the efficacy of Part 4. However, our interim position, as set out in this Draft Decision, is to reject Aurizon Network's proposed process for applying for access and negotiating agreements. We propose to require amendments to Part 4 of the 2014 DAU to help simplify and provide a timely process for negotiations (see Volume V, Part 4).

A better balance of Aurizon Network's and other parties' rights and interests

We are concerned Part 4 of the 2014 DAU does not adequately balance Aurizon Network's and other parties' rights and interests, and in particular continues to provide Aurizon Network with significant discretion in decision making. Reflecting this, we have proposed amendments to increase the transparency and accountability of its decision making. These include:

- setting out relevant and focussed decision criteria (cl. 4.4(g); 4.8; 4.10.2(c); 4.12)
- requiring Aurizon Network to advise access seekers of its decisions, providing clear reasons, including if it:
 - intends to take no further action in relation to an access application, including rejecting an application or ceasing negotiations (cl. 4.3(c); 4.3(e); 4.4(g),(j); 4.12)
 - intends to suspend access negotiations pending an expansion (cl. 4.4(d), (e))
 - considers a revised application to be a material variation – as well as identifying options available to deal with the revised application and the potential consequences for the access seeker should it wish to continue with its revised proposal (cl. 4.5(c),(f))
 - can no longer offer access under the terms of the IAP because of reduced capacity, providing an objective evidence-based reasons why (cl. 4.10.1(d)(iii)) which provides additional clarity and greater certainty over the process and is consistent with effective customer engagement practices more broadly
- extending the time period for lodgement of access applications to 5 years (cl. 4.4(g)) – to better accommodate long lead times in mine assessment and development, which is in the interests of access seekers
- providing for the access seeker to decide how it will proceed should its request be considered to be a material variation (cl. 4.5(d))³¹⁰ – to provide the access seeker with greater control over its decision making
- providing for the IAP to be revised in response to a material variation (cl. 4.5(c)) – to better account for the time and resources that would otherwise be lost restarting the application as a new request

³⁰⁹ Asciano, 2014 DAU, sub. no. 22: 34, 94-95

³¹⁰ The access seeker can: continue process without variation; continue with revised application in its entirety as a material variation; continue with revised application where the initial application is progressed and the revision is treated as a second application.

- ensuring Aurizon Network focuses on whether an access seeker is, or will be, likely to be able to use the access rights when the relevant train services are scheduled to commence (cl. 4.3(c)(ii), 4.12(c)) – which is particularly important given the potential long lead times.

We consider these amendments are necessary to achieve a better balance of Aurizon Network's and other parties' rights and interests.

Recovery of costs

We have not accepted Aurizon Network's proposal to allow it to recover its reasonable costs if it ceases negotiations because it believes the access seeker does not intend to obtain or fully use access rights at the level sought.

We consider negotiating with access seekers is Aurizon Network's core business – and these activities are already sufficiently dealt with in the approved costs. Moreover, given the significant informational requirements in the framework and the conditions an access application will have to meet, the likelihood of negotiating with a party that does not intend (or cannot) use the access rights sought appears to be low.

Cessation of negotiations

We have also not accepted the provision that deals with disputes over whether Aurizon Network was entitled to cease negotiations. We agree with stakeholders³¹¹ that, as drafted, this clause is unduly in Aurizon Network's favour (at the access seeker's expense) because it substantially softens Aurizon Network's obligations to comply with the negotiation cessation provisions. We consider Aurizon Network should still be in breach of its obligations even if it made a good faith and reasonable attempt to comply.

Clarity and certainty

We consider amendments to improve clarity will allow negotiations for access to proceed more quickly and with greater certainty for all parties. While we have accepted Aurizon Network's broad framework for negotiations, we have proposed amendments to Part 4 of the 2014 DAU that:

- require Aurizon Network to advise the access seeker of the status of its application at key stages in the process (cl. 4.3(c), 4.4(a), 4.12) – to provide additional clarity over progress
- refine the process for applications for access rights that require an expansion (cl. 4.4(c), (d)) to also provide for an access seeker to progress applications for rights that can be accommodated without an expansion – to allow for negotiations over access to continue where they can
- clarify when and how an access seeker can revise its access application (cl. 4.5), including: putting timeframes on decision making and requiring any new application be deemed to be submitted – to provide better guidance around the likely outcomes from seeking a revision and limit delays
- consolidate provisions dealing with revisions (cl. 4.5) – in the interests of streamlining arrangements and simplicity.

Together, these amendments will allow negotiations to proceed more quickly and with greater certainty for all parties.

³¹¹ Anglo American, 2014 DAU, sub. no. 8; QRC, 2014 DAU, sub. no. 42: 23; sub. no. 37; Asciano, 2014 DAU, sub. no. 22: 33-34

Schedule H

We consider including flow chart(s) that accurately set out the negotiation framework in the access undertaking can provide greater clarity over the processes and the links to other parts of the undertaking. This increases transparency and accountability and provides all parties greater certainty over the process.

This is in the interests of all parties and is particularly important given the strong linkages between the negotiation framework and the processes for allocating available capacity (Part 7 of the 2014 DAU, see Chapter 11) and the process for network development and expansions (Part 8 of the 2014 DAU, see Chapter 12).

To be effective, the flow chart(s) should clearly and accurately reflect the process and relevant linkages. We have not included flow chart(s) in this Draft Decision, and instead propose to require Schedule H be updated to reflect the amended arrangements, including clearly identifying linkages between the negotiation framework and other parts of the access undertaking, as part of the Final Decision.

Draft Decision

7.1 Our Draft Decision is to refuse to approve Aurizon Network's proposed process for applying for access and negotiating agreements. We would approve amendments to the 2014 DAU to:

- (a) address Aurizon Network's ability to use its position to delay negotiations and increase the transparency and accountability of its decision making**
- (b) clarify the process for applying for access and negotiating agreements and increase certainty over the process.**

7.4 Providing relevant and accurate information, in a timely manner

It is important the 2014 DAU includes provisions to ensure parties have access to relevant, accurate and up-to-date information. Negotiations are more likely to be effective and resolved quickly when parties have the information they need to understand the options available and to make decisions accordingly. That said, parties should not be obliged to provide any more information than what is reasonably available and necessary to progress matters, particularly in the earlier stages of the process.

We also note the nature and type of information required for the purpose of negotiating access should take account of information otherwise made available under the 2014 DAU. This includes information related to network development and expansions (Part 8 of the 2014 DAU, see Chapter 12) and the Network Management Principles (Schedule G of the 2014 DAU, see Chapter 13); and information provided more broadly through public reporting requirements (Part 10 of the 2014 DAU, see Chapter 5).

7.4.1 Aurizon Network proposal

Part 4 of the 2014 DAU puts obligations on Aurizon Network and access seekers (and train operators) to provide information to the other party throughout the application and negotiation process (Table 34).

Table 34 Applying for access and negotiating agreements – information

<i>Stage</i>	<i>Information provided/required/requested</i>
Initial inquiries cl. 4.2, Sch A	<p>Aurizon Network must provide information to prospective access seekers either on its website (technical and operational information and standards) or on request (capacity information including the Master Train Plan (MTP) and the Daily Train Plan (DTP)).</p> <p>Schedule A sets out the information Aurizon Network will provide. This also deals with Aurizon Network's confidentiality obligations in providing this information.</p>
Application submitted cl. 4.3, 4.9, Sch B	<p>An access application (or a request to enter a TOA) includes detailed information on planned operations (and also confirms that the train operator has been nominated by the end user).</p> <p>Schedule B sets out the access application information requirements. This includes specific arrangements for transfers and renewals.</p> <p>Aurizon Network must notify a party where the application is incomplete, specifying what information is required for the application to be complete. Aurizon Network can also request additional evidence or information, including on a party's ability to fully use the rights sought or that is required to assess capacity allocation related issues and to prepare the IAP.</p> <p>Aurizon Network can cease negotiations if the requested information is available, but is not provided.</p>
Acknowledgement of access application cl. 4.4	<p>Aurizon Network will acknowledge a properly completed access application and confirm it will prepare an IAP.</p> <p>Parties can suspend negotiations for access where capacity is not available, by written notice giving reasons. If access negotiations are suspended, the access seeker must confirm: its ongoing requirement for access rights and any material change to the information contained in their access application; and provide information of their ability to fully use the requested access rights.</p>
Revisions cl. 4.5, 4.10.2	<p>Aurizon Network will give a written notice of its view that a revision is a material variation.</p>
IAP cl. 4.6	<p>Aurizon Network will prepare an IAP for the rights sought. This includes an initial capacity assessment except where the system rules or Aurizon Network considers such an assessment is not required (and Aurizon Network has notified the access seeker of the reasons why the assessment is not required).</p>
Negotiation process cl. 4.7, 4.10, 4.11, 4.12, Sch A, Sch C	<p>An access seeker must notify Aurizon Network of its intention to progress its access application under the IAP prior to the expiry of the IAP.</p> <p>Aurizon Network will provide the access seeker relevant additional information and any requested capacity information (as set out in Schedule A).</p> <p>The access seeker (other than end user) or train operator must prepare an operating plan (as set out in Schedule C) and must demonstrate the rollingstock and rollingstock configurations meet the required standards.</p> <p>Aurizon Network can seek further information from the access seeker on any matter to be addressed during negotiations, or on the access seeker's ability to fully use the requested access rights.</p>
Primacy of end users cl. 4.8, 4.9, 4.10	<p>Aurizon Network may disclose to a customer that a railway operator has submitted an access application for the same access or that there are multiple access applications for the same access. Such disclosures will not constitute a breach of the confidentiality obligations owed.</p> <p>A train operator must provide a copy of its nomination as part of its application for a TOA.</p>

This includes information to facilitate negotiations (for example, dealing with operational matters and capacity issues) as well as written notices to support transparent decision making (in particular notifying parties of decisions and providing reasons). Schedules A and B of the 2014 DAU set out the specific information requirements.

Schedule C sets out the operating plan requirements. Aurizon Network said Schedule C expands the 2010AU requirements to reflect best practice arrangements for providing a detailed description of how the train service will operate. Aurizon Network said it has also sought to improve the clarity and structure around the operating plan.³¹²

Aurizon Network said it was seeking to put arrangements in place that improve the quality of information provided in applications to provide it with a better understanding of the services required and, in turn, form a more workable basis for commencing negotiations:³¹³

*... ensuring that access seekers lodge complete access applications will improve the quality of the information that Aurizon Network can provide in the IAP and will have flow on improvements to the timeliness of negotiations.*³¹⁴

In response to stakeholder comments on the 2013 DAU, Aurizon Network has also included provisions in Part 4 of the 2014 DAU that require it to provide access seekers with relevant and accurate information in a more timely manner, and appropriately constrain the nature and type of information that it can request and require from access seekers.³¹⁵

7.4.2 Stakeholders' position

Stakeholders proposed a number of amendments to better focus the nature and type of information Aurizon Network provides, and can request or require, in a negotiation.

Stakeholders were concerned about the level of detail and nature of information they would be required to provide through the process, saying it could result in the potential for the negotiation process to be controlled by Aurizon Network in order to delay or terminate access applications.³¹⁶

Stakeholders accepted the access undertaking should provide for Aurizon Network to seek further information on some matters (including the access application, matters reasonably required to be addressed during negotiations or evidence of an access seeker's ability to fully use the requested access rights), but they wanted the access undertaking to put clear boundaries around what additional information Aurizon Network could seek.

Stakeholders also wanted the access undertaking to address the circumstance where there is a reasonable explanation for the access seeker not being able to provide the requested information.³¹⁷ On this, Asciano said, during the development phase of a project, it may be difficult for an access seeker to provide the information required to demonstrate it will fully use access rights.³¹⁸

³¹² Aurizon Network, 2013 DAU, sub. no. 2: 351-352, 2014 DAU, sub. no. 4: 81

³¹³ Aurizon Network, 2013 DAU, sub. no. 2: 95

³¹⁴ Aurizon Network, 2013 DAU, sub. no. 2: 96

³¹⁵ Aurizon Network, 2014 DAU, sub. no. 4: 44, 46, 53, 55-57, 69, 75, 78

³¹⁶ Asciano, 2014 DAU, sub. no. 22: 138-139

³¹⁷ Anglo American, 2014 DAU, sub. no. 8; QRC 2014 DAU, sub. no. 42: 21; sub. no. 37

³¹⁸ Asciano, 2014 DAU, sub. no. 22: 33, 94

Stakeholders raised concerns about the specific information Aurizon Network could request, and would use, to determine whether an access seeker was able to fully use their requested access rights.³¹⁹ They said:

- it was premature to require much of this type of information at the access application stage of the process³²⁰
- requiring this level of detail early in the process will cause delays, may incur unnecessary additional costs, and may be of commercial benefit to Aurizon above-rail (without effective ringfencing)³²¹
- the access seeker should not be required to prove it has sufficient facilities and mine output to support the capacity sought (Schedule B, 3(e)(f)) – as neither are relevant for Aurizon Network’s consideration)³²²
- an access seeker should be required to provide evidence it has a customer (not that it is reasonably likely to obtain a customer).³²³

Stakeholders also objected to being required to confirm their ongoing requirement for access rights when negotiations are suspended, pending agreement on scope and terms of a required expansion. Asciano said doing so imposes an unnecessary administrative burden, given access requests are non-binding.³²⁴ Anglo American and the QRC sought to provide for Aurizon Network to request confirmation of ongoing requirement for rights.³²⁵

Asciano was also concerned that, as Aurizon Network has discretion over whether additional information could be required, requests for additional information could be applied unequally between access seekers.³²⁶

Stakeholders also sought improvements in the nature and type of information Aurizon Network is required to provide to them through the process. This included requiring Aurizon Network to:

- generally keep any information it provides current and accurate
- appropriately deal with confidential information, including relating to capacity information³²⁷
- provide a capacity assessment as part of the IAP, with no discretion to waive this requirement³²⁸
- generally provide reasons for its decisions, including relating to any cessation of negotiation.³²⁹

³¹⁹ Anglo American, 2014 DAU, sub. no. 8; Asciano, 2014 DAU, sub. no. 22: 31, 33, 82-83, 138-139; QRC, 2014 DAU, sub. no. 37

³²⁰ Asciano, 2014 DAU, sub. no. 22: 138-139

³²¹ Asciano, 2014 DAU, sub. no. 22: 31, 82-83, 138-139

³²² Anglo American, 2014 DAU, sub. no. 7: 32-33

³²³ Anglo American, 2014 DAU, sub. no. 8; QRC 2014 DAU, sub. no. 37

³²⁴ Asciano, 2014 DAU, sub. no. 22: 84-85

³²⁵ Anglo American, 2014 DAU, sub. no. 8; QRC 2014 DAU, sub. no. 37

³²⁶ Asciano, 2014 DAU, sub. no. 22: 31,82-83

³²⁷ Anglo American, 2014 DAU, sub. no. 7: 31-32; sub. no. 12; Asciano, 2014 DAU, sub. no. 22: 82; QRC, 2014 DAU, sub. no. 43

³²⁸ Anglo American, 2014 DAU, sub. no. 8; QRC, 2014 DAU, sub. no. 42:22; sub. no. 37

³²⁹ Asciano, 2014 DAU, sub. no. 22: 34

7.4.3 QCA analysis and Draft Decision

Our interim position, as set out in this Draft Decision, is to reject Aurizon Network's proposed arrangements relating to the information that Aurizon Network will provide to access seekers, and that it expects stakeholders to provide it, as part of the application process and during negotiations.

We consider there are benefits from ensuring parties make informed decisions in a timely manner as they progress through the process. On that basis, we support Aurizon Network's objective for access seekers to submit access applications that provide sufficient information to progress the process, where this is possible. However, in practice, access seekers may not always have full information, especially very early in the process. Accordingly, the access undertaking should take account of the circumstances where the information is not reasonably available (cl. 4.3(g), 4.4(k), 4.5(f), 4.10.2(e)).

We are also concerned Part 4 and Schedule B of the 2014 DAU do not adequately balance Aurizon Network's and other parties' rights and interests, relating to the nature and type of information Aurizon Network can request or require. To address this imbalance we have proposed amendments to:

- limit the additional information Aurizon Network can request from access seekers regarding their ability to use the requested access rights (on the basis of defined factors) or information required to assess capacity allocation related issues and to prepare an IAP (cl. 4.3(c), 4.4(i); Schedule B)
- focus information requested regarding an access seeker's ability to use the requested access rights on whether the access seeker has a reasonable likelihood of being able to use the access rights at the proposed commencement date (4.4(i)(i); 4.12(c)).
- no longer require an access seeker to confirm their ongoing requirement for access rights, pending agreement on scope and terms of a required expansion – and instead have provided that Aurizon Network request confirmation and take no further action if the information is not provided (cl. 4.4(i)(i), (j)).

We have also strengthened Aurizon Network's obligations to provide accurate and up-to-date information (cl. 4.2(d), 4.4(i)(ii)) and advise access seekers of its decisions, providing clear reasons, within the negotiation framework (see section 7.3.3).

Together we consider these amendments will ensure parties have relevant information necessary to progress matters while taking proper account Aurizon Network's and access seekers' rights and interests. This is in the interests of all parties as it allows negotiations for access to proceed more quickly and is also consistent with effective customer engagement practices more broadly.

We do this having regard to amendments we are proposing to other parts of the 2014 DAU to provide greater transparency and improve information flows relating to network capacity, network development and expansions and more broadly through public reporting requirements. In doing so, we have sought to ensure confidential information is dealt with appropriately (Schedule A, cl. 2).

Draft Decision

7.2 Our Draft Decision is to refuse to approve Aurizon Network's proposed arrangements relating to the information it provides, and can request or require, as part of the process for applying for access and negotiating agreements. We would approve amendments to the 2014 DAU to:

- (a) better balance Aurizon Network's and other parties' rights and interests, relating to the nature and type of information provided as part of the process**
- (b) clarify the nature and type of information Aurizon Network provides, and can request or require – and increase certainty over when this information is to be made available as set out in the marked changes to Part 4, Schedule A and Schedule B attached to this Draft Decision.**

7.5 Facilitating competition in above-rail markets

7.5.1 Aurizon Network proposal

Part 4 of the 2014 DAU separately sets out how Aurizon Network will deal with parties wishing to:

- negotiate and develop access agreements (as an operator, access holder or end user)
- enter into a Train Operations Agreement (TOA) under the alternative form of standard access agreements (SAAs).³³⁰

A train operator wishing to enter into a TOA under the alternative standard access agreements is not an access seeker.³³¹ Instead, the 2014 DAU includes provisions that outline how a train operator will participate in the negotiation process. In doing so, Aurizon Network has sought to establish a structure that gives primacy to the end user as the 'access seeker' – because it is the party who will eventually contract for the access rights.

Nomination

Part 4 of the 2014 DAU requires a train operator be nominated by an end user for particular functions within the negotiation process. This includes:

- requiring a prospective train operator to provide Aurizon Network with notification that an end user has nominated it as the train operator as part of its request to enter a TOA (cl. 4.9(a)(ii))
- providing for an end user to nominate an operator as an access seeker where there are multiple applications for the same access (cl. 4.8(a)(ii)) – and allowing Aurizon Network to suspend negotiations until an operator is nominated (cl. 4.8 (c))
- requiring an end user to nominate its train operator during the negotiation period (if it has not already done so) (cl. 4.10.2(a)(i))

³³⁰ These agreements allow an end user to contract for long term access rights while its selected operator contracts directly with Aurizon Network regarding the operational requirements for running train services using those access rights (see Part 5 and Volume 3 of the 2014 DAU, discussed in Chapter 8 of this draft decision).

³³¹ Although a railway operator can be treated as an access seeker in certain circumstances (e.g. if it has been nominated by the customer as the access seeker (DAU 2014, cl. 4.8)).

- providing for an end user to nominate an operator to act on its behalf for the purposes of assisting it with its access application including in negotiations with Aurizon Network (cl. 4.8(b)).³³²

The concept of nomination is also relevant to network development and expansions (Part 8 of the 2014 DAU, see Chapter 12) and underpins the alternative form of access agreements (see Chapter 8).

7.5.2 Stakeholders' position

Anglo American and the QRC sought to extend Aurizon Network's proposal giving primacy to end users in the access application stage. In particular, they proposed a person seeking access rights for another party be required to identify the customer as part of the access application — and the application will only progress if the intended customer confirms (and maintains its support) of the application.³³³ The QRC said this is important because: any lack of support demonstrates the access seeker is unlikely to use access rights at the level sought; and allowing operators to secure access rights for no particular customer could transfer monopoly power from Aurizon Network to the operator.³³⁴ In contrast, Asciano was concerned that focusing on whether there is a customer for the access rights sought disregards an access seeker's ability to attract a customer in the future — further restricting an access seeker seeking access.³³⁵

Stakeholders did not support Aurizon Network's proposal relating to the nominations when there are multiple applications for the same access rights. Even when stakeholders accepted Aurizon Network's general approach giving primacy to end users in negotiations, they nonetheless sought amendments to the nomination process to facilitate competition between operators.³³⁶ The QRC said:

*Aurizon Network should facilitate the ability for operators to undergo a competitive tender with an end customer by continuing to negotiate with all operators. This should be done on the understanding that only one maximum capacity application exists with the customer. This will allow an end customer to nominate the division of tonnes between the operators based on an operator's proposal following the tender process.*³³⁷

Asciano said the undertaking should allow for the negotiations to continue with all potential operators regardless of whether they had been nominated.³³⁸

7.5.3 QCA analysis and Draft Decision

Our interim position, as set out in this Draft Decision, is to reject Aurizon Network's proposal that a train operator be required to be nominated by an end user, when there are multiple applications for the same access rights.

Our key concern is requiring a nomination, and providing for Aurizon Network to suspend negotiations should it not occur, is likely to unnecessarily and artificially restrict competition

³³² In this case, the nominee operator is taken to be the customer's agent (for the purposes of giving notices and treatment of information).

³³³ Anglo American, 2014 DAU, sub. no. 8; QRC, 2014 DAU, sub. no. 37

³³⁴ QRC, 2014 DAU, sub. no. 42: 21-22

³³⁵ Asciano, 2014 DAU, sub. no. 22: 94

³³⁶ QRC, 2014 DAU, sub. no. 42:22; sub. no. 37; Anglo American, 2014 DAU, sub. no. 8; Asciano, 2014 DAU, sub. no. 22: 32, 89-90

³³⁷ QRC, 2013 DAU, sub. no. 46:44

³³⁸ Asciano, 2014 DAU, sub. no. 22: 32, 89-90

between train operators. This is not in the interests of existing or potential future train operators, or end users.

We consider a better framework will allow for potential operators to negotiate the best TOD deal they can with Aurizon Network, present this to the end user and allow the end user to select the operator(s) they wish to engage. In doing this, we accept this approach may increase the complexity of Aurizon Network's negotiations, as it may have to negotiate with more than one party. However, given the nature of matters dealt with under the TOD, we do not consider this increase in complexity to be significant. We have also sought to ensure Aurizon Network only be required to progress applications and enter into negotiations with train operators who are engaged in negotiations for potential haulage agreements (or are party to an existing haulage agreement) reflecting the access being sought (cl. 4.8).

That said, we have provided for an end user to nominate a railway operator to act on its behalf — and in that event, have sought to give primacy to that train operator (cl. 4.8). This will reduce the costs and resources Aurizon Network would otherwise spend to progress applications with parties who are ultimately not going to use access. In any event, it is difficult to envisage a circumstance where an operator that has not been nominated would wish to continue its application where another party has been nominated for all of the access sought.

We have also refined the requirements for end users nominating train operators for other functions in negotiations (cl. 4.9). In doing so, we do not share some stakeholders' views that a train operator should only apply for access, or hold access rights, on behalf of a specified end user. Instead we have provided for an end user to nominate a train operator to act on its behalf, and set out arrangements should the nomination be withdrawn, transferred or taken over.

Taken together, we consider this approach maintains the benefits of providing for competition between operators while avoiding the cost involved in progressing multiple negotiations for the same access rights where they will not go ahead.

We have proposed to accept Aurizon Network's proposal for an operator to negotiate access on an end user's behalf, in principle, but have included amended drafting to improve clarity and implementation (cl. 4.9.1). We consider this is in the interests of all parties and can simplify and streamline processes.

Draft Decision

- 7.3 Our Draft Decision is to refuse to approve Aurizon Network's proposal that a train operator be required to be nominated by an end user for particular functions within the negotiation process. We would approve amendments to the 2014 DAU to:**
- (a) allow an end user to nominate a train operator to act on its behalf — and in that event have sought to give primacy to that train operator**
 - (b) require Aurizon Network to continue negotiating with all train operators until a nomination is made.**

8 ACCESS AGREEMENTS

Part 5 of the 2014 DAU sets out the framework for the development and execution of access agreements between Aurizon Network and access seekers in relation to the CQCN. The 2014 DAU includes standard access agreements (SAAs) which regulate access rights to the CQCN under different contracting scenarios and the terms on which access holders may exercise those rights through an accredited railway operator.

Access agreements are essential for the provision of access to the CQCN. It is therefore important effective arrangements are in place for the development and execution of these agreements. SAAs facilitate the timely execution of access agreements by providing a model agreement parties may adopt without the need for further negotiation, or they may be used as a guide for parties when negotiating alternative terms of access.

While there is a system of well established SAAs available for the CQCN, we consider they have become complicated, and it is timely to consider simpler agreements which will support clarification of access rights and obligations and are in a form that can be more readily tradeable.

Our Draft Decision is to refuse to approve Aurizon Network's proposed framework for the access arrangements, including the SAAs. We require amendments to Part 5 and the SAAs to:

- establish a streamlined framework comprising an access agreement and a train operations deed*
- provide stronger links to matters in the undertaking and avoid any unnecessary duplication of provisions*
- increase clarity and certainty of the terms of access and management of trains by simplifying concepts, processes and drafting style*
- ensure the access agreement and train operations deed are workable, effective and commercially balanced*
- provide that the access agreement and train operations deed will govern access to the CQCN, unless an access seeker wishes to negotiate alternative terms with Aurizon Network.*

The detailed drafting of Part 5 and the new standard access agreement and train operations deed attached to the Draft Decision is consistent with our approach and shows all of the amendments required.

8.1 Introduction

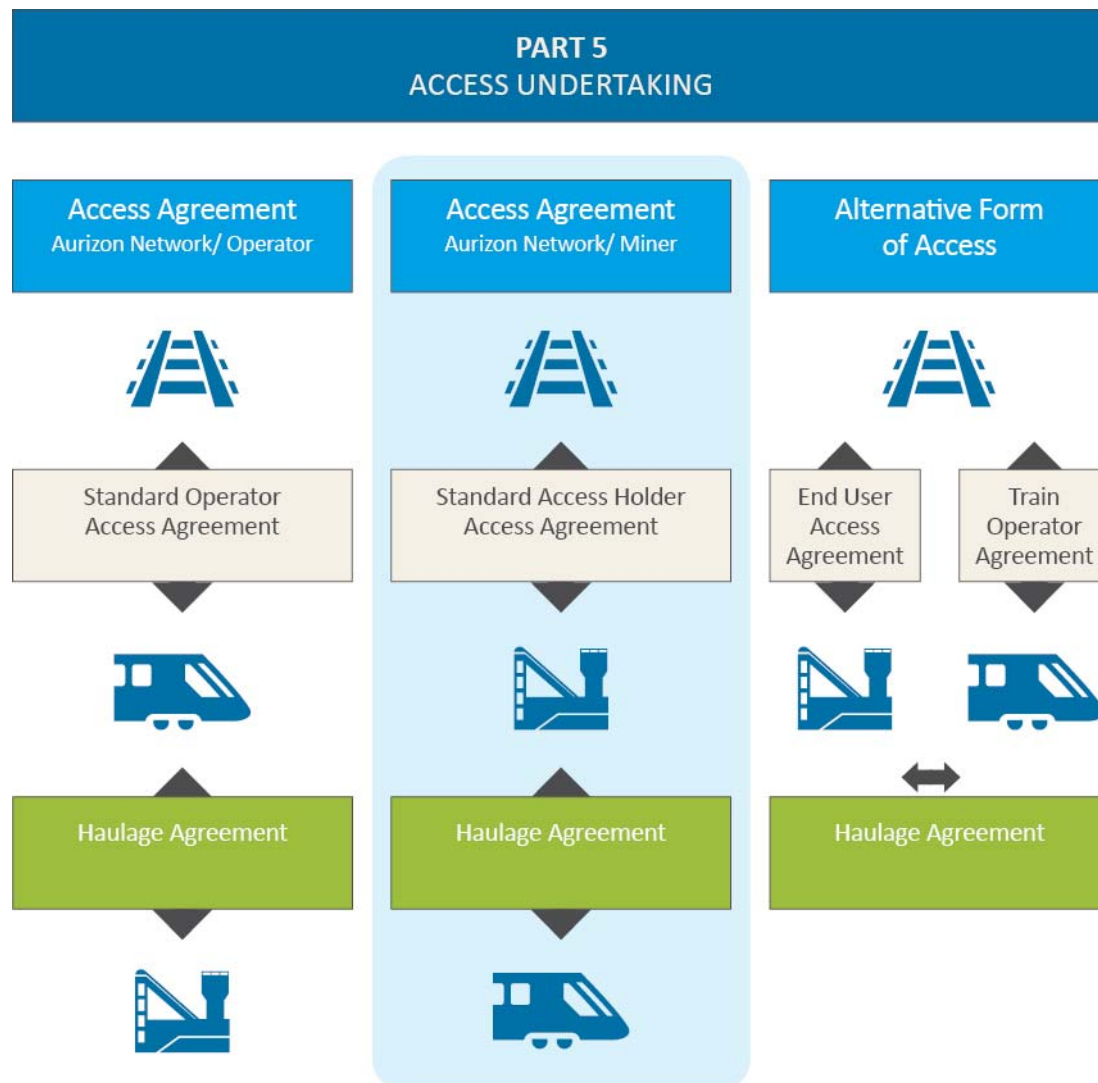
Access agreements form the contractual basis between Aurizon Network and an access seeker for the grant, and use of, access rights to the CQCN. They contain the agreed terms and conditions of access and set out the rights and obligations of each party, and underpin the access rights and operation of train services on the network.

Part 5 of the 2014 DAU sets out provisions for the development and execution of access agreements required for access to the CQCN. The 2014 DAU also includes a suite of four standard access agreements (SAAs) which contain standard terms and conditions on which

Aurizon Network will provide access under different contracting scenarios (see **Figure 6**).³³⁹ There are important linkages between the SAAs and other matters in the 2014 DAU:

- allocating capacity (Part 7 of the 2014 DAU, see Chapter 11)
- reference tariffs (Part 6 and Schedule F of the 2014 DAU, see Chapter 17 and 18).

Figure 6 2014 DAU SAA contracting scenarios



8.2 Overview

8.2.1 Aurizon Network proposal

In Part 5 of the 2014 DAU, Aurizon Network proposed that the terms of the access agreement be agreed between Aurizon Network and the access seeker. It also establishes the SAAs as a set of ‘safe harbour’ arrangements to the extent that:

³³⁹ The suite of SAAs included as part of the 2014 DAU are the Standard Operator Access Agreement (SOAA), the Access Holder Access Agreement (AHAA), the End User Access Agreement (EUAA) and the Train Operator Agreement (TOA). These have been developed specifically for coal-carrying services.

- if parties cannot agree the terms of an access agreement, an access seeker may require, and Aurizon Network must offer to provide, access on the terms contained in the relevant SAA (modified, where required, for non-coal carrying services) (cl 5.1(c)) or
- disputes in relation to terms of an access agreement will be resolved based on the terms of the SAAs (modified, where required, for non-coal carrying services) (cl 5.1(d)).

Aurizon Network said it has simplified the existing arrangements for the development and execution of access agreements, as well as reinforced the ability for the parties to negotiate and agree terms other than the SAA terms if they choose.³⁴⁰

Standard access agreements

Volume 3 of the 2014 DAU includes a suite of four SAAs based on existing arrangements developed over multiple undertaking periods (see **Box 3**).

Aurizon Network said it reviewed and updated the SAAs to reflect the new policy positions it adopted for the purposes of the 2013 DAU (and which have been carried over into the 2014 DAU).³⁴¹ This includes introducing new Train Service Type and Supply Chain Rights concepts, and processes for reductions in nominated monthly train service entitlements based on train payloads.³⁴²

Aurizon Network has also revised a number of clauses in the 2014 DAU SAAs in response to stakeholder comments on the 2013 DAU SAAs.

Aurizon Network dealt with a number of matters exclusively within the SAAs, whereas previously these were also included within the body of the undertaking. Aurizon Network intended this to facilitate negotiation by removing 'standard outcomes' of negotiations from the body of the undertaking, and to avoid uncertainty caused when matters are duplicated across the undertaking and access agreements (see section 8.5).³⁴³

These changes are discussed in the sections that follow.

³⁴⁰ Aurizon Network, 2013 DAU, sub. no. 2: 98

³⁴¹ Aurizon Network, 2013 DAU, sub. no. 2: 11,325

³⁴² Aurizon Network, 2013 DAU, sub. no. 2: 366, 369 (all changes p. 366-421)

³⁴³ Aurizon Network, 2013 DAU, sub. no. 2: 14, 99-100.

Box 3: History of standard access agreements in the CQCR

There have been two SAAs available to access seekers since the 2001 AU:

- Standard Operator Access Agreement (SOAA) – a train operator contracts directly with Aurizon Network to acquire access rights, and then separately contracts with miners to haul their coal, and
- Access Holder Access Agreement (AHAA) – a miner contracts directly with Aurizon Network to acquire access rights, and the miner then separately sub-contracts a train operator to haul their coal.

These agreements are based on the model of bundling all rights and obligations associated with the access rights (including above-rail operational matters) into a single agreement with Aurizon Network. Under the AHAA the miner is responsible to Aurizon Network for operational matters. While the miner may sub-contract the performance of operational matters to a train operator, the miner is still ultimately responsible to Aurizon Network for these matters.

In response to stakeholder requests, the 2010 AU included a requirement for Aurizon Network to develop alternative SAAs that 'split' the SAA model, to separate the management and holding of access rights from train operation matters.

In August 2013, we approved the alternative form of SAAs:

- End User Access Agreement (EUAA) – an end user contracts directly with Aurizon Network for access rights without bearing liability and obligations for above-rail operational issues
- Train Operations Agreement (TOA) – one or more railway operator(s) nominated by the end user assume liability and obligations for above-rail operational issues associated with some or all of the user's access rights

The 2014 DAU includes all four SAAs, although each has been amended since the 2010 AU to reflect new policy positions adopted by Aurizon Network.

8.2.2 Stakeholders' position

Stakeholders did not support Aurizon Network's proposed approach to the access agreements in the 2014 DAU.

In general, stakeholders opposed dealing with matters exclusively within the SAAs where these had previously been included in the body of the undertaking (see section 8.5). Stakeholders were not confident these matters should be negotiated in an access agreement.³⁴⁴ Asciano noted this:

*reduces transparency, certainty and regulatory scrutiny, and increases the potential for Aurizon Network to negotiate discriminatory terms with its related above rail operator.*³⁴⁵

Stakeholders also did not support the terms and conditions in the SAAs proposed by Aurizon Network. Rio Tinto noted they 'lack balance and are not consistent with those that would be agreed in an efficient and contestable market.'³⁴⁶ Stakeholders identified a number of changes they considered necessary before the SAAs should be approved. These included further changes in favour of the access holder in respect of indemnity and liability provisions, and changes to

³⁴⁴ Anglo American, 2013 DAU, sub. no. 39: 6

³⁴⁵ Asciano, 2013 DAU, sub. no. 43: 9

³⁴⁶ Rio Tinto, 2013 DAU, sub. no. 73: 106

various processes under the SAAs to generally enhance the rights of access holders and limit the discretion of Aurizon Network (see section 8.6).

8.2.3 Legislative framework and QCA assessment approach

Legislative framework

In assessing Aurizon Network's arrangements for the development and execution of access agreements, we have had regard to all of the criteria in section 138(2) of the QCA Act. In doing so we have undertaken a balancing exercise based on the practical relevance of each matter.

Against this background, we consider in our assessment of Aurizon Network's arrangements for access agreements:

- sections 138(2)(a), (b), (d), (e) and (h) should be given more weight
- section 138(2)(g) refers to the pricing principles mentioned in section 168A, which we consider relevant to the extent access charges levied under an access agreement should be consistent with the pricing principles
- sections 138(2)(c) and (f) should be given less weight, as they are less practically relevant to our assessment.

Facilitating access to the network

Section 138(2)(a) requires us to have regard to the object of Part 5 of the QCA Act (set out in section 69E), namely to promote the economically efficient operation of, use of and investment in the CQCN, as the significant infrastructure by which the declared service is provided. Section 138(2)(d) of the QCA Act requires us to have regard to the public interest in having competition in markets.

As access agreements are essential for the provision of access to the service, we consider section 138(2)(a) and (d) are best met where an access seeker can enter into an access agreement with Aurizon Network in a timely manner and on reasonable terms and conditions.

Aurizon Network's and users' rights and interests

Section 138(2)(b) of the QCA Act requires us to have regard to the legitimate business interests of Aurizon Network. We consider Aurizon Network's 'legitimate business interests' in respect of the access agreements include providing access to the CQCN on terms that provide certainty to Aurizon Network and appropriately managing its exposure to risks for loss, damages or default in relation to the use of the network by third parties. This does not extend to being able to use its market power to impose unreasonable terms and conditions for access, including inappropriately allocating risks or liabilities to other parties which Aurizon Network is best placed to manage, or which go beyond what could be reasonably expected in a commercial environment.

Sections 138(2)(d) and (e) require us to have regard to the public interest, and the interests of access seekers.

In broad terms, we consider these various interests are best balanced when the framework:

- facilitates parties developing and entering into an access agreement in a timely manner
- uses the SAAs as a benchmark for negotiations of alternative terms of access or as default agreements
- promotes flexible use of access rights

- provides opportunities for greater competition between train operators
- ensures a transparent and consistent approach to matters which affect all access holders, or where there is a public interest in adopting this approach.

QCA assessment approach

Our approach to assessing Aurizon Network's arrangements for developing and executing access agreements and the 2014 DAU SAAs is set out in **Table 35**. It is based on whether Aurizon Network's proposed arrangements:

- facilitate the timely development and execution of access agreements (and consequently avoid unnecessary costs, monetary or otherwise, when using the processes established by the 2014 DAU)
- appropriately balance Aurizon Network's and users' rights and interests
- promote effective competition in the above-rail market, and
- promote efficient use of the network in both the short and long term.

We consider that, taken as a whole, this assessment approach allows for an appropriate balancing of the criteria set out in section 138(2) of the QCA Act, as contemplated earlier in this chapter.

Table 35 QCA approach to assessing arrangements for the development and execution of access agreements and the 2014 DAU SAAs

<p>Do the arrangements facilitate the timely development and execution of access agreements?</p>	<p>We consider Part 5 will facilitate the timely development and execution of access agreements by:</p> <ul style="list-style-type: none"> • allowing the SAAs to be used as a 'safe harbour' agreement so that, unless otherwise agreed by Aurizon Network and the access seeker, the terms of the SAA apply • establishing appropriate review mechanisms to ensure that an SAA remains a relevant and effective agreement over the term of the undertaking • We consider the SAAs should: <ul style="list-style-type: none"> – clearly define terms and conditions so they are readily understood by parties and relatively simple to negotiate and administer – be workable and commercially balanced to: <ul style="list-style-type: none"> - be used by parties as an 'anchor' or starting point to guide negotiations - provide an effective safe harbour agreement parties can adopt without the need for further negotiation.
<p>Do the arrangements appropriately balance Aurizon Network's and users' rights and interests?</p>	<p>We consider Part 5 will appropriately balance Aurizon Network's and users' rights and interests by:</p> <ul style="list-style-type: none"> • providing certainty in the each party's rights and obligations in relation to the development and execution of an access agreement • ensuring the interests of users of non-coal services are adequately provided for. <p>We consider the SAAs will appropriately balance Aurizon Network's and users' rights and interests by:</p> <ul style="list-style-type: none"> • representing a reasonable and commercially balanced allocation of rights, obligations and risks between parties • providing certainty and security to parties by ensuring that processes under which access rights can be varied (resumed, relinquished, transferred), or other rights and obligations of the parties that may be affected, are transparent and clearly defined. This should enable Aurizon Network and users to properly assess and manage their risks.
<p>Do the arrangements promote effective competition in the above-rail market?</p>	<p>We consider the SAAs will promote effective competition in the above-rail market by:</p> <ul style="list-style-type: none"> • providing a clear separation of roles relating to the management of access rights and the operation of train services on the network • providing opportunities for customers (i.e. mining companies) to switch train operators.
<p>Do the arrangements promote efficient use of the network?</p>	<p>We consider the SAAs will promote efficient use of the network by:</p> <ul style="list-style-type: none"> • providing an access holder with flexibility in the use and management of its access rights • facilitating consistency of arrangements between access holders, where appropriate.

Key issues for consideration

This chapter outlines our assessment of Part 5 of Aurizon Network's 2014 DAU, including the SAAs, having regard to the matters above.

We have proposed amendments to address our concerns where we consider the proposed arrangements omit or do not satisfactorily deal with any of these matters. This includes:

- amending the process for developing and executing an access agreement under Part 5 of the 2014 DAU, to clarify the rights and obligations of parties in relation to the standard arrangements
- establishing a new standard Access Agreement (AA) and a Train Operations Deed (TOD) to simplify existing arrangements and to clearly separate roles between the management of access rights and the operation of train services
- ensuring matters best dealt with in the undertaking are retained in the undertaking and appropriately linking matters in the AA/TOD to the undertaking to reduce duplication and increase certainty.

Our more detailed consideration of these issues, including the terms and conditions contained in the new standard arrangements, is reflected in the marked drafting of Part 5 of the 2014 DAU and the AA and TOD attached to this Draft Decision.

8.3 An effective process for developing access agreements

8.3.1 Aurizon Network proposal

Part 5 requires that access to the CQCN is underpinned by an access agreement, with terms agreed between Aurizon Network and the access seeker. Under these arrangements:

- if parties cannot agree on the terms of an access agreement, an access seeker may require, and Aurizon Network must offer to provide, access on the terms contained in the relevant SAA (modified, where required, for non coal-carrying services) (cl 5.1(c))
- disputes in relation to the development of an access agreement will be resolved by the QCA or an expert under Part 11 of the 2014 DAU having regard to the relevant SAA (cl 5.1(d)).

Aurizon Network said these arrangements reinforce the ability of parties to commercially negotiate terms and conditions of access, with the SAAs providing a 'clear fallback position in the event that negotiations on non-standard terms fail'.³⁴⁷

Part 5 of the 2014 DAU no longer:³⁴⁸

- sets out general principles to be included in SAAs, as Aurizon Network considered it more informative to use the comprehensive standard arrangements as a baseline for non-coal services³⁴⁹
- requires the development of new coal-related SAAs, as Aurizon Network considered it unnecessary given the suite of SAAs directly address the vast majority of access negotiations it conducts.³⁵⁰

³⁴⁷ Aurizon Network, 2013 DAU, sub. no. 2: 98

³⁴⁸ Part 5 of the 2014 DAU omits other provisions previously included in Part 5 of the 2010 AU relating to protections against discrimination (e.g. publication of access agreements and arrangements for access agreements with a related operator). See Chapter 3 and 5 of this Draft Decision.

³⁴⁹ Aurizon Network, 2013 DAU, sub. no. 2: 99

In addition, following its submission of the 2014 DAU, Aurizon Network indicated it supported the principle of giving existing access holders an ability to migrate access agreements developed under the previous undertakings into the 2014 DAU form of SAA, and will consult further with stakeholders on how this will be achieved.³⁵¹

8.3.2 Stakeholders' position

Stakeholders were concerned that Part 5 did not adequately address the interests of access seekers.

The QRC proposed several drafting changes to clarify and enhance the rights and obligations of parties when developing and executing an access agreement. These include:

- an express right for an access holder to renew an expiring access agreement on the 2014 DAU form of SAA
- a prohibition on the execution of an access agreement where there is insufficient available capacity (unless the access agreement is conditional on the creation of the required capacity).³⁵²

Asciano did not support disputes about the terms of an access agreement being resolved through the adoption of an SAA. It considered the QCA (or expert resolving the dispute) should be able to consider variances to the SAA put forward by the parties and have regard to the terms Aurizon Network is offering, or has offered, other access seekers in similar circumstances.³⁵³

Asciano was also concerned that Part 5 of the 2014 DAU no longer included provisions related to the publication of access agreements and arrangements for access agreements between Aurizon Network and a related train operator, which were previously included in the 2010 AU.³⁵⁴ These issues are dealt with in Chapter 4 (ring fencing) and Chapter 5 (reporting) of this Draft Decision.

8.3.3 QCA analysis and Draft Decision

Our interim position, as set out in this Draft Decision, is to reject Aurizon Network's proposed arrangements for developing access agreements. We have proposed amendments to Part 5 to facilitate the timely development of an AA/TOD and to ensure that they remain effective over the term of the undertaking.

Enhancing an access seeker's rights in relation to the SAAs

We are not satisfied that an access seeker's rights under Part 5 are adequate. Under Part 5, the access seeker may only require the adoption of an SAA if the parties cannot agree on the terms of an access agreement. Compelling an access seeker to negotiate is not a necessary requirement of the 'negotiate-arbitrate' framework. This will unnecessarily prolong the development of an access agreement where an access seeker does not wish to negotiate different terms than those contained in the SAAs.

³⁵⁰ Aurizon Network, 2013 DAU, sub. no. 2: 100, 101

³⁵¹ Aurizon Network, 2014 DAU, sub. no. 48: 11

³⁵² QRC, 2014 DAU, sub. no. 35: 2

³⁵³ Asciano, 2013 DAU, sub. no. 43:70; sub. no. 44: 19

³⁵⁴ Asciano, 2013 DAU, sub. no. 43: 70-71

While parties should be able to negotiate an access agreement that is different to an SAA, we consider it important an access seeker has a certain and clear right to enter into an access agreement on the terms of an SAA, if they elect to do so. This is in the interests of allowing an access agreement to be finalised in a timely and efficient manner, should the access seeker not wish to negotiate alternative terms of access with Aurizon Network.

Accordingly, we require Aurizon Network to amend Part 5 so the terms of access will be those under the relevant AA / TOD, unless otherwise agreed by the access seeker and Aurizon Network.

If a dispute arises during the negotiation of an AA/TOD, we accept Aurizon Network's proposal that it be resolved through adoption of the standard arrangements. We consider this is appropriate as it reinforces the role of standard arrangements as a default and will minimise delays and uncertainty about how these disputes may be resolved.

Amendments related to our proposed simplification of the SAAs

To ensure the standard arrangements are effective and remain so over the life of the undertaking, we propose to include a mechanism that may be used to review the new arrangements during the term of the undertaking and, if necessary, to develop amendments to improve their workability. Notably, we do believe the mechanism would be triggered sparingly and only in limited circumstances.

Draft Decision

8.1 Our Draft Decision is to refuse to approve Part 5 of the 2014 DAU. We would approve Part 5 if amended to:

- (a) provide for the new standard arrangements (AA/TOD) to govern the terms of access to the CQCN, unless otherwise agreed by the access seeker and Aurizon Network**
- (b) introduce a process for the review of the new standard arrangements during the term of the access undertaking.**

8.4 Simplification of Standard Access Agreements

8.4.1 Aurizon Network proposal

The suite of four SAAs included in the 2014 DAU comprise:

- the AHAA
- the SOAA
- the alternative form of access agreements – the EUAA and TOA.

This is consistent with the 2010 AU and reflects the development of SAAs over time to accommodate the different access contracting scenarios that have evolved in the CQCN (see the history of SAAs at **Box 3** above).

In response to our Stakeholder Notice regarding Submission Guidelines for the 2014 DAU,³⁵⁵ Aurizon Network said it is workable to simplify the suite of SAAs to the EUAA and TOA model

³⁵⁵ This stakeholder notice sought (among other things) stakeholders' views on whether there is merit in adopting a simpler approach to the SAAs by consolidating the proposed suite of four agreements into two

(excluding the AHAA and SOAA), subject to certain amendments being made to the EUAA and TOA.³⁵⁶

Aurizon Network said there would be merit in the proposed simplification of the SAAs as:

- train operators having one form of agreement for operational rights (i.e. not having to administer both the SOAA and TOA forms of agreement) would assist in the administration and implementation of these provisions on a day to day basis³⁵⁷
- train operators should be familiar with the form of the TOA and, as such, this should not present any burden to them.³⁵⁸

Aurizon Network also considered that the time required to draft the necessary amendments to the SAAs would be minimal.³⁵⁹

8.4.2 Stakeholders' position

With the exception of Aurizon Holdings, stakeholders indicated qualified support for the proposed simplification of the SAAs. However, views on how the SAAs should be simplified differed.

BMA and Vale indicated general support for the proposed simplification of the SAAs.³⁶⁰ However, BMA and Asciano considered simplification should not remove the ability for both end users and train operators to hold access rights.³⁶¹

Anglo American considered the AHAA was redundant as it has been effectively replaced by the EUAA/TOA model.³⁶² It also suggested an alternative option for simplification of the SAAs, where both the SOAA and the EUAA have an 'Access Agreement' at the front dealing with the obligations to provide access and payment terms, with a TOA as a schedule.³⁶³

Asciano indicated in principle support for the proposed simplification, pending its consideration of the detailed drafting.³⁶⁴ It also suggested incorporating into the access agreement structure a requirement for certain standard clauses that cannot be altered or negotiated away to be contained in all access agreements, such as clauses related to take-or-pay and reference tariffs.³⁶⁵

Aurizon Holdings did not support our proposal. It said:

agreements based on the EUAA and the TOA (i.e. the two agreements would separately deal with (a) holding access rights; and (b) train operations matters).

³⁵⁶ Aurizon Network, 2014 DAU, sub no. 48: 6–7. These amendments provide for the situation where a train operator is both an 'End User' under the EUAA and the 'Operator' under the TOA by including certain customer related provisions (such as including an Access Interface Deed and customer initiated capacity transfers).

³⁵⁷ Aurizon Network, 2014 DAU, sub no. 48: 8

³⁵⁸ Aurizon Network, 2014 DAU, sub no. 48: 8

³⁵⁹ Aurizon Network, 2014 DAU, sub no. 48: 7

³⁶⁰ BMA, 2014 DAU, sub no. 23: 3; Vale, 2014 DAU, sub no. 24: 4

³⁶¹ Asciano, 2014 DAU, sub no. 22: 34; BMA, 2014 DAU, sub no. 23: 3

³⁶² Anglo American, 2014 DAU, sub no. 7: 35

³⁶³ Anglo American, 2014 DAU, sub no. 7: 35

³⁶⁴ Asciano, 2014 DAU, sub no. 22: 20

³⁶⁵ Asciano, 2014 DAU, sub no. 22: 21

- simplifying the SAAs should be examined as part of a broader, principled review of the CQCN regulatory regime³⁶⁶
- the 2014 DAU is not an appropriate time to undertake regulatory reform (including simplification of the SAAs) and expressed concerns about any further delays to the approval process for this undertaking³⁶⁷
- the SOAA should not be removed at this time, given it is 'uncontroversial, stable and well-understood'³⁶⁸ and its removal would require an operator seeking to hold access rights to enter into two agreements with Aurizon Network (as opposed to a single SOAA).³⁶⁹

8.4.3 QCA's analysis and Draft Decision

Our interim position, as set out in this Draft Decision, is to reject Aurizon Network's proposed SAAs for the 2014 DAU and instead move to a streamlined framework.

We consider this will enhance the effectiveness of the access arrangements by clearly delineating matters related to the access rights and the operation of train services and simplifying concepts, processes and drafting style.

We propose to include as part of the 2014 DAU:

- a standard access agreement (AA) – that allows either a mining company or a train operator to contract directly with Aurizon Network for access rights only. This agreement does not deal with above-rail operations
- a standard train operations deed (TOD) – that allows a nominated train operator to contract directly with Aurizon Network to operate train services, or a mining company which is also an accredited operator, to contract with Aurizon Network to take on the responsibility of train operations in connection with access rights granted under an access agreement.

These agreements will be based substantially on the structure of the EUAA and TOA included in the 2014 DAU. However, amendments will be required to preserve existing contracting scenarios (e.g. enabling both an end user and a train operator to hold access rights).

Simplifying existing arrangements

We are of the view that the current approach of having a suite of four SAAs has become highly complex, in terms of the substantive issues involved, the interaction between the undertaking and the related documents and the various processes by which the access agreements are implemented. It is also unlikely to meet future needs. As Aurizon Holdings noted, the length of standard agreements has expanded over time from 281 pages in the 2006 AU to 949 pages in the 2013 DAU.³⁷⁰ It also said the more complex the framework, the greater the resource requirements (monetary and otherwise) and risk of inconsistencies and ambiguities, highlighting the need to continually re-evaluate arrangements.³⁷¹

A streamlined framework comprising only two key documents (described above) will provide access holders with greater flexibility in the use and management of access rights and promote:

³⁶⁶ Aurizon Holdings, 2014 DAU, sub no. 25: 2

³⁶⁷ Aurizon Holdings, 2014 DAU, sub no. 25: 2

³⁶⁸ Aurizon Holdings, 2014 DAU, sub. no. 25: 6

³⁶⁹ Aurizon Holdings, 2014 DAU, sub. no. 25: 7

³⁷⁰ Aurizon Holdings, 2014(e): 21 (Table 1).

³⁷¹ Aurizon Holdings, June 2014(e): 20-21.

- the efficient use of the CQCN – by giving access holders greater flexibility to transfer rights in the short or long term to meet, or respond to, the operating environment
- above-rail competition – by enabling access holders to use one or more train operators for haulage and to vary these allocations over time.

While broader reforms to the regulatory regime may be necessary in the longer term to fully realise these aims (such as enhancing capacity trading arrangements), simplifying the SAAs is a necessary first step which is achievable in the context of the 2014 DAU process.

Moreover, we consider the changes are necessary now to a number of aspects of the 2014 DAU to improve the operation of the CQCN and reduce costs for all stakeholders.

The simplification of the standard arrangements will not affect the following:

- the contracting scenarios that are already available to access seekers. That is, both an end user (i.e. mining company) and a train operator will retain the ability to hold access rights, and an end user will also be able to assume responsibility for operating train services if it elects to do so. The drafting changes to the EUAA and TOA necessary to give effect to this are not extensive
- a person's status as an access seeker. We consider that, regardless of whether a person is seeking to enter into an AA or a TOD, they are still seeking access to the declared service and the protections afforded to access seekers under the QCA Act and the undertaking should apply in each case (discussed in detail in Chapter 2).

We propose to base the simplification on the EUAA and TOA model as it already reflects the delineation of roles we consider important, and represents an appropriate split between the rights, obligations and risks of all parties. Additionally, the documents were developed relatively recently and with the benefit of extensive stakeholder consultation. There are no indications the model is ineffective. Our view is also supported by the Hunter Valley Coal Network's experience, where the framework is based on the same model and appears to work effectively.

We acknowledge the proposed streamlined framework does not include the SOAA, which is well established among CQCN's stakeholders. However, we also consider the SOAA included in the 2014 DAU contained substantial changes compared to the 2010 AU (and earlier) form of the SOAA. It is a different agreement to previous undertakings and its continued adoption is no longer justifiable.

Draft Decision

8.2 Our draft decision is to refuse to approve the set of SAAs proposed by Aurizon Network on the basis that the current framework has become highly complex. We would approve a simpler set of standard arrangements consisting of:

- (a) an access agreement (AA) – that allows either a mining company or a train operator to contract directly with Aurizon Network for access rights only. This agreement does not deal with above-rail operations**
- (b) a train operations deed (TOD) – that allows a nominated train operator to contract directly with Aurizon Network to operate train services, or a mining company which is also an accredited operator to contract with Aurizon Network and take on the responsibility of train operations in connection with access rights granted under an access agreement.**

8.5 Matters moved from the undertaking to the SAAs

8.5.1 Aurizon Network proposal

Aurizon Network proposed a number of matters be dealt with solely in the SAAs and not in the body and schedules of the 2014 DAU. These relate to:

- train operations – including requirements for rollingstock authorisation and development of operating plans
- capacity management arrangements – including train service specification and train scheduling, capacity resumptions, capacity relinquishments and transfers
- interface and environmental management processes – including the development of plans to manage interface and environmental risks and the amendment of plans and systems to manage compliance (see **Table 36**).

Aurizon Network said including these provisions solely in the SAAs would:

- simplify and streamline the undertaking, better aligning it to its key purpose
- remove duplication and reduce uncertainty, by having matters dealt with in only one document
- encourage open and effective commercial negotiations (rather than prescribed regulatory outcomes) in the first instance.³⁷²

It considered that provisions relating to users of the network that have already entered into a contract are appropriately addressed in the SAAs, not the access undertaking.

Once an access agreement has been negotiated, the agreement should govern the relationship between Aurizon Network and an access holder. It should therefore be unnecessary to retain provisions in the access undertaking that are also addressed in the SAA (unless it relates to matters that could impact an access holder that is not a party to the access agreement). ... it is now clearly appropriate to remove these 'standard outcomes' of negotiation from the main body of the access undertaking. This does not reflect a hesitancy to make these commitments by Aurizon Network – as they remain part of the SAAs.³⁷³

³⁷² Aurizon Network, 2013DAU, sub no 1: 10; sub. no. 2: 99-100

³⁷³ Aurizon Network, 2013DAU, sub no 1: 10; sub. no. 2: 99-100

Where processes set out in the SAA commence during the negotiation of the access agreement (e.g. the interface and environmental processes), the 2014 DAU provides for these to be conducted in accordance with the provisions set out in the SAAs (cl. 4.10.2(b), (c)).

8.5.2 Stakeholders' position

Stakeholders did not support Aurizon Network's approach. They were concerned that including provisions in the SAAs (and not the body of the access undertaking) reduces transparency and certainty³⁷⁴ and increases the potential for Aurizon Network to negotiate discriminatory terms, in particular with its related above-rail operator.³⁷⁵

Stakeholders said obligations should be included in the undertaking to:

- retain the significantly stronger protections afforded to stakeholders under the undertaking³⁷⁶
- ensure the QCA can monitor and investigate Aurizon Network's performance and intervene if Aurizon Network does not comply with its obligations. This is particularly important to stakeholders given they cannot unilaterally refer disputes under the access agreements to the QCA.³⁷⁷

Stakeholders noted this would ensure access is granted on appropriate and transparent terms.³⁷⁸ This is also consistent with the undertaking being more prescriptive, not less.³⁷⁹

The QRC agreed particular matters (i.e. capacity transfers) could be dealt with predominantly in the SAAs.³⁸⁰ Where matters are best dealt with in the SAAs, stakeholders noted it is necessary to have a clear statement that any obligation under the SAA (or other ancillary document) take effect as part of the undertaking and may be enforced by the QCA.³⁸¹

8.5.3 QCA analysis and Draft Decision

Our interim position, as set out in this Draft Decision, is to reject Aurizon Network's proposal to have particular obligations in the SAAs only (that had previously been dealt with in the body of the undertaking). We have proposed amendments to:

- ensure matters best dealt with in the undertaking, particularly those that affect all stakeholders and/or are essential to ensure transparency and efficiency of the network, are retained in the undertaking
- link the operation of the AA / TOA to matters dealt with in the undertaking, by incorporating the relevant provisions into the AA / TOA so parties are contractually bound to them.

³⁷⁴ Anglo American, 2013 DAU, sub no. 39: 1, 5, 6, Asciano, 2013 DAU, sub no. 43: 9, 99-100, Anglo American, 2013 DAU, sub no. 78: 19

³⁷⁵ Asciano, 2013 DAU, sub no. 43: 9

³⁷⁶ Rio Tinto, 2013 DAU, sub no. 73: 11-12, 22, Anglo American, 2013 DAU, sub no. 39: 5-6, QRC, 2013 DAU, sub no. 84: 18-19

³⁷⁷ QRC, sub no. 84: 19, Rio Tinto, sub no. 73: 107, Anglo American, 2013 DAU, sub no. 78:19, Asciano, 2013 DAU, sub no. 82:8

³⁷⁸ Anglo American, 2013 DAU, sub no. 39: 1,6, Anglo, 2013 DAU, sub no. 78: 19

³⁷⁹ Anglo American, 2013 DAU, sub no. 39: 1,6, Anglo American, 2013 DAU, sub no. 78: 19-20

³⁸⁰ QRC, 2013 DAU, sub no. 46: 60-61

³⁸¹ Rio Tinto, 2013 DAU, sub no. 73: 12, 107

Matters to be included in the access undertaking

We consider commercial negotiation plays a central role in an access seeker securing access rights, provided this is done in an environment which:

- takes appropriate account of Aurizon Network's monopoly position
- will not lead to arrangements which adversely affect the public interest or, in an inappropriate way, access by other access seekers and access holders (see Chapter 2).

The undertaking creates boundaries in which parties can seek access to, and operate on, the network and the SAAs provide corresponding formal obligations, rights and responsibilities of parties that allow this to occur.

We have carefully considered Aurizon Network's proposal to remove obligations from the 2014 DAU and include them in the SAAs only. We do not agree that key rights and obligations for access should be included solely within the SAAs where:

- it is important and in the public interest that arrangements apply consistently across all access seekers / holders, including by being enforced under the QCA Act
- the matter has impacts beyond the interests of the parties to the contract, including where it supports the effective functioning of the supply chain and is relevant to the ongoing relationship of all parties in the industry generally
- the resolution of disputes on the matter should take account of, and apply more broadly to, parties beyond the contract – in particular, those relating to safety or environmental obligations.

There is a strong case for these rights and obligations to be included in the undertaking and we propose to retain them as in the previous undertakings. The standard arrangements (AA/TOD) should focus on those rights and obligations that are better characterised as one of a 'private' nature which should only apply between Aurizon Network and the persons with whom it has a contract.

A summary of our views on Aurizon Network's proposal to include particular rights and obligations in the SAAs are set out in the table below. The detailed drafting in Volume V and VI attached to this Draft Decision is consistent with our approach. Our views on the content of particular provisions are contained in Section 8.6.3 of this Draft Decision.

Table 36 Key matters retained in the undertaking

<i>Item</i>	<i>Description</i>	<i>2014 DAU location</i>	<i>QCA Mark-up</i>	<i>QCA View</i>
Train Operations	Operating plan	TOA: cl. 15	AU: Sch C TOD: cl. 12	Include in access undertaking and SAAs Rationale: <ul style="list-style-type: none"> • arrangements should apply consistently across all train operators • overall industry benefit in having clear and transparent arrangements apply for the operation of train services on the network • the outcome of disputes may have broader implications and should be binding on all parties.
Capacity	Resumptions	EUA: cl. 6	AU: cl. 7.7 AA: cl. 7	Include in access undertaking and SAAs Rationale: <ul style="list-style-type: none"> • arrangements should apply consistently to all access holders • overall industry (and public interest) benefit in having a transparent regime for making underused capacity available (via transfers or relinquishment) • impacts parties beyond the agreement – effecting the utilisation of coal system capacity for all users on the network • consistent arrangements being applied and contained in access agreements may assist future capacity trading regime.
	Capacity shortfall	EUA: cl. 7	AU: cl. 8.9.3 AA: cl. 8	
	Relinquishment	EUA: cl. 11 and 12	AU: cl. 7.4.3 AA: cl. 9	
	Transfers	EUA: cl. 13	AU: cl. 7.4.2 AA: cl. 10	
IRMP	IRMP	TOA: cl. 25	AU: Sch C AA: cl. 21	Include in access undertaking and SAAs Rationale: <ul style="list-style-type: none"> • arrangements should apply consistently to all access holders • overall industry (and public interest) benefit in having transparent and known safety and environmental requirements • the outcome of disputes may have broader implications and should be binding on all parties.

Linking the operation of the SAAs to the undertaking

The SAAs under the 2010 AU provide a direct reference to some provisions from the undertaking—such as the reference tariffs—so the SAAs can change through time to reflect the last approved undertaking. We propose to extend this approach to other matters. The standard AA / TOD (attached to this Draft Decision) incorporates by reference particular provisions of the undertaking, including:

- transfers (AA)
- relinquishment (AA)
- reduction factor (AA)
- conditional access (AA)
- interface risk (TOD).

We consider that a key benefit of this approach is it will facilitate the consistent application of arrangements across access holders over time. This is because it allows amendments to UT4 during the regulatory period, and future undertakings, to flow through to the AA (or TOD)

without extensive negotiations. It ensures arrangements that have broad impacts are not locked into long term contracts, having the potential to hinder the development of future regulatory arrangements.³⁸² It will also help address stakeholder concerns (real or perceived) that Aurizon Network can unfairly differentiate between access holders.

This approach works effectively already for reference tariffs and we see no reason why it would not also be effective for other matters. It will improve workability, remove unnecessary duplication in the standard arrangements and provide a clearer link between obligations in the undertaking and the AA/TOD. In particular, it provides:

- access holders:
 - (a) certainty – knowing that a consistent set of arrangements applies to all access holders over time
 - (b) transparency – it is clear which arrangements apply at any point in time for all access holders, without needing to reconcile how the SAA arrangements compare to the access undertaking
 - (c) a level playing field – different generations of access holders would not be subject to different treatment
- Aurizon Network: simpler administration of contracts – having the ability to apply, monitor and reconcile performance (including revenues) against a common set of arrangements applied to all access holders
- all parties:
 - (a) greater flexibility in managing the network – the incorporation of provisions of the undertaking into the standard arrangements by reference enables changes to the undertaking (or approaches in future undertakings) to flow through to the AA / TOD without extensive negotiations
 - (b) clear terms – by avoiding duplicate provisions in the undertaking and the AA / TOD, the potential for disputes arising out of inconsistent, ambiguous or contradictory wording is mitigated.

We have not included drafting in the AA linking reference tariffs, and calculations, to the undertaking at this stage. Instead, we propose to finalise Schedule 4 of the AA once policy positions on Schedule F (see Chapter 17) of the undertaking are settled.

³⁸² An example of this is the 2001 undertaking take-or-pay arrangements that are included in long term contracts and continue to have an effect on access holders today.

Draft Decision

8.3 Our Draft Decision is to amend the 2014 DAU and SAAs to:

- (a) include matters in the body of the undertaking where they affect access seekers/holders more broadly and there is a public interest in having a consistent approach applied
- (b) incorporate these provisions from the undertaking into the AA and TOD by reference, providing a clearer link to matters dealt within the undertaking and which can be updated over time.

8.6 Standard Access Agreements – terms and conditions

The SAAs include standard terms and conditions on which Aurizon Network will provide access to the CQCN, including:

- administration (e.g. billing, invoicing)
- access rights (e.g. transfers, relinquishment, suspension and termination)
- pricing (e.g. access charges, take-or-pay and other charges)
- risk allocation (e.g. security, insurance, liability and indemnities)
- train operations (e.g. train scheduling and planning and operation of ad hoc services)
- dispute resolution.

The marked-up standard arrangements attached to this Draft Decision reflect our consideration of the operation and workability of the terms and conditions of the SAAs within the new structure.

The mark-up is against the EUAA and TOA included as part of the 2014 DAU. However, we have considered all stakeholder submissions made in respect of each 2014 DAU SAA and have applied these (where relevant) to the new standard arrangements we have proposed.

8.6.1 Aurizon Network proposal

The 2014 DAU SAAs are based on existing arrangements, reviewed and updated to reflect new policy positions adopted in the 2013 DAU, and carried into the 2014 DAU. Aurizon Network said it had proposed a more balanced and flexible framework for negotiating access.³⁸³ This included:

- aligning the terms and conditions to reflect how access agreements are administered in practice³⁸⁴ and improve their operation³⁸⁵
- introducing new concepts to maximise the efficient use of the network, ensure users are accountable for their capacity rights and prevent unnecessary network expansion³⁸⁶
- ensuring risks are appropriately allocated between parties³⁸⁷

³⁸³ Aurizon Network 2013 DAU, sub no. 2: 14

³⁸⁴ Aurizon Network, 2013 DAU, sub no. 2: 366

³⁸⁵ Aurizon Network, 2014 DAU, sub no 5: 118

³⁸⁶ Aurizon Network, 2013 DAU, sub no. 2: 112

³⁸⁷ Aurizon Network 2013 DAU, sub no. 2: 367, 375-6

- clarifying drafting and processes contained in the SAAs³⁸⁸ and addressing key concerns and issues raised by stakeholders on its previous 2013 DAU SAAs³⁸⁹
- retaining a number of terms consistent with the 2010 SAAs, where it considered these remained appropriate.³⁹⁰

Aurizon Network considers the proposed 2014 DAU SAAs contain reasonable terms, if parties cannot reach agreement on non-standard terms.³⁹¹

8.6.2 Stakeholder comments

Stakeholders were not convinced the SAAs provided a commercially feasible negotiating framework. Stakeholders said the changes to the SAAs weakened users' rights and security over those rights.³⁹² Stakeholders were particularly concerned the SAAs:

- created greater negotiating powers in favour of Aurizon Network³⁹³ and disproportionately allocated risks to access holders³⁹⁴
- reduced access holders' security and certainty over their access rights³⁹⁵
- provided greater scope for differentiation between users³⁹⁶ and gave existing users an advantage³⁹⁷
- addressed issues by drafting increasingly complex rules that are overly prescriptive and onerous and may ultimately act as barriers to entry³⁹⁸
- restricted the ability of operators to flexibly use access rights³⁹⁹
- do not clearly provide incentives for efficient behaviour or use of the network.⁴⁰⁰

As such, stakeholders considered significant amendments were required to address these issues and ensure the SAAs contained terms and conditions commensurate with what would be struck in a workably competitive market.⁴⁰¹

8.6.3 QCA analysis and Draft Decision

Our interim position, as set out in the Draft Decision, is to not accept the terms and conditions of the 2014 DAU SAAs.

³⁸⁸ Aurizon Network 2013 DAU, sub no. 2: 366-381

³⁸⁹ Aurizon Network, 2013 DAU, sub no. 77: 113-143

³⁹⁰ Aurizon Network 2013 DAU, sub no. 2: 313, 367

³⁹¹ Aurizon Network 2013 DAU, sub no. 2: 98

³⁹² Rio Tinto 2013 DAU, sub no. 73: 107

³⁹³ Anglo 2013DAU, sub no. 78: 17

³⁹⁴ QRC, 2013 sub no. 46: 46-48, Rio Tinto 2013DAU, sub no. 73: 11,22,106, Asciano, 2013 DAU, sub no. 43: 86, Anglo 2014 DAU, sub no. 7: 7, 35, Asciano 2014DAU, sub no. 22: 169

³⁹⁵ Anglo 2013DAU, sub no. 78: 17, Rio Tinto 2013DAU, sub no. 73: 107, Asciano 2013DAU, sub no. 43: 90

³⁹⁶ Anglo 2013DAU, sub no. 78: 17,20, Rio Tinto 2013DAU, sub no. 73: 11,82, Asciano 2014DAU sub no. 22: 159-160, 165-171

³⁹⁷ Asciano 2013 DAU, sub no. 43: 94-96

³⁹⁸ Asciano, 2013 DAU, sub no. 82: 8, Asciano, 2013 DAU, sub no. 43: 86,89,92; QRC, 2013 DAU, sub no. 46: 47

³⁹⁹ Asciano, sub no. 43: 9,53,57,93,94,98, Asciano 2014DAU, sub no. 22: 162

⁴⁰⁰ Asciano 2013DAU, sub no. 43: 96; Asciano 2014DAU sub no. 22: 160

⁴⁰¹ Rio Tinto 2013 DAU, sub no. 73: 22,107, Anglo American, 2014 DAU, sub no. 7:7

We have proposed a number of amendments to the terms and conditions of the SAAs which we consider are necessary to ensure the new standard arrangements are workable, effective and commercially balanced and provide a credible model parties may rely on.

Broadly, we have made amendments to:

- ensure there is sufficient security and certainty over access rights
- ensure there is an appropriate balance between the interests of Aurizon Network and those of an access seeker, including a reasonable allocation of risks under the agreement
- streamline the agreements, including:
 - (a) providing a clearer separation of roles between an access holder and an operator and increasing clarity of arrangements more generally
 - (b) simplifying processes and procedures under the SAAs, especially those related to plans and approvals for train operations.

Stakeholders should refer to the marked-up SAAs attached to this Draft Decision for the detailed changes we require.

Certainty and security of access rights

Certainty and security over access rights is a key element of effective access arrangements. It is important to support investment decisions in related markets and is a prerequisite for the development of a viable capacity trading market in the longer term.

The SAAs play an essential role in this respect given they set the contractual basis for the grant and use of access rights. As such, a key focus of ours is whether the terms and conditions of the SAAs will provide sufficient certainty to access holders about their access rights and the ways in which those rights may be affected over time.

We consider the SAAs attached to this Draft Decision will provide access holders with sufficient certainty and security over their access rights.

We propose to accept, in principle, the Supply Chain Rights concept included in the 2014 DAU SAAs, subject to amendments we have proposed to ensure this is not too burdensome for access holders to satisfy. This concept provides for an access holder to demonstrate to Aurizon Network it has, or is likely to have, the necessary supply chain rights to use its access rights (e.g. access to relevant private infrastructure or port facilities). We consider this concept has merit in two respects:

- ensuring a train service cannot be operated without having the necessary supply chain rights for that service – we consider this is a practical requirement which will prevent a train service from being operated without having the necessary entry and exit rights to the network
- providing a means for the access holder to demonstrate to Aurizon Network it has (or the steps it will take to secure) the relevant supply chain rights in the longer term – we consider that, with our proposed amendments, this will not be an unreasonable requirement for an access holder and may assist in identifying supply chain capacity issues in the longer term and promote greater supply chain coordination.

However, we are not satisfied that a failure to demonstrate Supply Chain Rights should be grounds for the resumption of the relevant access rights. The existing take-or-pay arrangements generally provide financial incentives for an access holder to ensure it is able to use its access

rights. Other mechanisms, such as the relinquishment and transfer of access rights processes, provide a more appropriate and balanced means for ensuring that access rights are used efficiently.

We have not provided processes for reducing nominated monthly train services based on train payloads (see cl. 8, 9 and 10 of the 2014 DAU EUAA).⁴⁰² We are concerned about the effect these processes will have on the certainty and security of contracted access rights, along with the effect this may have on competition in the above-rail market, particularly to the extent it may unreasonably interfere with a train operator's operations. To the extent Aurizon Network considers investments in above-rail operations may be a cheaper alternative to creating capacity through below-rail investments, there is nothing preventing Aurizon Network from commercially negotiating this with access holders/train operators. However, we consider prescribing such a process in the standard arrangements will be detrimental to the certainty and security of contracted access rights, and may also have negative implications for the above-rail market.

We propose to remove Aurizon Network's entitlement to require security from a train operator. The *Transport (Rail Safety) Act 2010* mandates the requirements of accreditation for railway operations, which includes evidence of financial capacity or public risk insurance arrangements to meet reasonable potential accident liabilities arising from the railway operations. Accordingly, accreditation itself should provide Aurizon Network the necessary comfort regarding the operator's financial capability. We do not consider the security requirement to be justifiable. Additional reasons for this proposal are outlined below.

We consider the amendments proposed will provide a clear and more certain framework so parties have a better understanding of their rights and obligations, and how these may be affected over the life of the contract.

[An appropriate balance between the interests of Aurizon Network and those of an access seeker](#)

We have reviewed the terms and conditions of the SAAs to ensure they appropriately balance Aurizon Network's and access seekers' interests, and represent a reasonable and commercially balanced allocation of rights, obligations and risks between the parties.

An essential element of this is the risk profile for each party established by the various indemnity and limitation of liability clauses under the SAAs. An appropriate risk profile should manage a party's potential risk exposure and liability under the agreement, yet still ensure that a party can be held accountable for its actions or negligence.

We are satisfied our liability and indemnity clauses, as a whole, represent an appropriate allocation of risk between the parties. We have made some changes where the 2014 DAU SAA clauses are inconsistent with the risk profile established under the 2010 AU SAAs and which have not been sufficiently justified by Aurizon Network.

For example, we have not included cl. 16.2 of the 2014 DAU EUAA (cl. 14.6 of the 2014 DAU TOA), which can affect whether or not a party is in breach of the AA / TOD depending on whether it conflicts with, or may otherwise affect, Aurizon Network's accreditation. We are

⁴⁰² These processes enable the nominated monthly train services to be reduced if: (a) the Operator exceeds the maximum payload over a defined period of time; (b) the Access Holder requests an increase in the maximum payload; (c) if Aurizon Network provides notice to increase the nominal payload, with compensation to be paid to the Operator.

concerned about the effect this clause will have on the contractual certainty of the standard arrangements, including with respect to each party's liability to each other, and are not satisfied its inclusion has been sufficiently justified. In particular, we consider there needs to be a clear demonstration of the types of risks to Aurizon Network's accreditation this clause is intended to address and how these risks are not already addressed within the context of the existing framework of the SAAs.

Other amendments we have made to appropriately balance interests include:

- extending Aurizon Network's liability for provision of train services to also include ad hoc services it schedules
- reducing the threshold for which Aurizon Network is liable for failing to provide access from 10% to 5% of the total number of daily train services (excluding operation constraints)
- reducing the maximum amount of security payable (if applicable) under the AA to 6 months annual take-or-pay charges
- removing the Operator indemnities in respect of Aurizon Network's actions to remove the Operator's rollingstock.

We consider the amendments proposed will better balance the interests of all parties and provide a commercially balanced and reasonable set of terms and conditions to facilitate negotiations or be used as a default agreement.

Streamlining the agreements

We have reviewed the terms and conditions of the SAAs with a view to streamlining and consolidating arrangements to increase their useability and workability, both now and in the future.

Clear separation of rights and responsibilities

A key part of simplifying and consolidating the existing SAAs is to ensure the terms and conditions of the new standard arrangements more clearly reflect the separation of rights and obligations between access rights (in the AA) and train operations (in the TOD) and any unnecessary complexity and duplication is removed.

Consistent with this principle, we have proposed the access holder be responsible for payment of all access charges under the AA and have removed the option for the train operator to pay access charges under the TOD.⁴⁰³ We consider this provides a clearer delineation of roles between an access holder and a train operator, and will reduce the complexity involved in the payment of access charges and associated arrangements in the AA / TOD.

In making this change, we recognise that train operators may wish to retain the ability to pay access charges as part of their service offering to an access holder. We do not propose to prevent this type of arrangement, but consider it a commercial matter between the access holder and the operator which is best dealt with under the relevant haulage agreement.

With the removal of this option, we consider it no longer necessary for the train operator to provide security to Aurizon Network under a TOD. Any remaining charges a train operator may pay under the TOD (e.g. ancillary services charges) do not expose Aurizon Network to a

⁴⁰³ Aurizon Network's proposed 2014 DAU SAAs include the option for the end user to pay take-or-pay charges, with the operator to pay the remainder of the access charges. This reflects what is provided for under the 2010 AU EUAA and TOA.

significant risk for non-payment, and the risk of damages to Aurizon Network caused by the train operator (e.g. damage to infrastructure etc.) should already be covered by the various insurance policies required under the TOD.

A consequential amendment arising from this change is the nature of the document governing train operations. It is now a deed on the basis there is no consideration payable under it.

We have also made various other changes to the AA and TOD more generally to ensure each is better focussed on its purpose and to remove provisions duplicated across both agreements.

Simplifying processes and providing greater clarity

We have proposed amendments where we consider it may assist parties in understanding the arrangements and to provide more confidence and certainty on how the AA / TOD operate in practice.

An essential element of this is clearly identifying new arrangements (or amendments to existing known arrangements) where stakeholders were concerned about the impacts on their rights and obligations, or where it was not clear how the amendments operated in the context of the SAAs or the undertaking more broadly.

We propose to accept the new 'train service type' concept included in the 2014 DAU SAAs. We consider this concept has merit, insofar as it will:

- better reflect how access agreements are administered in practice
- clearly separate the various train services (e.g. multiple origin-destination pairs) that can be included in an agreement over time
- provide greater clarity around how this links to the concept of reference train in the undertaking.

As discussed in Chapter 16, we have clearly defined under the pricing arrangements in Part 6 of the 2014 DAU, the circumstances in which Aurizon Network can vary access charges. We consider it is appropriate to use the processes within the undertaking, rather than have separate provisions in the AA / TOD, to deal with variations based on increased cost or risk. As such, we have removed these provisions from the standard arrangements.

We also propose to incorporate various provisions of the undertaking into the AA / TOD by reference, so they will be consistently applied to all access holders and will update over time to reflect any changes to the undertaking (see Section 8.5.3 above).

We are satisfied our proposed amendments provide greater clarity on the operation of arrangements in the AA/TOD and ensure stakeholders are better informed when their rights and obligations are affected. We have also made some amendments for clarity where we considered Aurizon Network's 2014 DAU SAAs to be unnecessarily complex or unclear. These include:

- streamlining the process for the authorisation of rollingstock and rollingstock configurations, by providing for authorisations to be made based solely on the decision of a certifier pre-approved by the parties. Where an independent certifier is involved, there is no reason why Aurizon Network should have the discretion to accept or reject the certifier's findings
- consolidation of emergency response and operating plan approval processes

We consider the amendments proposed will reduce complexity and duplication, and refine the terms and conditions in a way that assists the practical administration and application of the agreements.

Draft Decision

- 8.4 Our Draft Decision is to amend the terms and conditions of the 2014 DAU SAAs to:**
- (a) provide access holders with increased certainty and security over their access rights**
 - (b) ensure there is an appropriate balance between the interests of Aurizon Network and those of an access holder / train operator**
 - (c) better separate out the rights and responsibilities relating to an access holder and an operator**
 - (d) simplify arrangements and provide greater clarity around the rights and obligations of parties to an AA / TOD**
 - (e) reflect our broader structural reforms.**

9 CONNECTING PRIVATE INFRASTRUCTURE

Part 9 of the 2014 DAU identifies the circumstances where Aurizon Network will consent to a connection of private infrastructure to the rail network. The 2014 DAU also includes a Standard Rail Connection Agreement (SRCA) with standard terms and conditions for connection.

These provisions are an important component of the regulatory framework as third parties are increasingly being required, and want the option, to develop and own private infrastructure to connect to the network. We have focused on how the arrangements will allow connections to the network to be designed and developed more quickly and with greater certainty for all parties.

Our Draft Decision is to refuse to approve Aurizon Network's arrangements for connecting private infrastructure as proposed. We require amendments to Part 9 and the SRCA to:

- *ensure there is an effective process for connecting private infrastructure – by clarifying the Part 9 process for connections and addressing Aurizon Network's ability to use its unique position to delay the connection process*
- *further develop the terms and conditions of the SRCA to guide negotiations – including by clarifying the treatment of coal loss mitigation in the SRCA and the access undertaking.*

The detailed drafting of Part 9 and the SRCA attached to this Draft Decision is consistent with our approach and shows all of the amendments required.

9.1 Introduction

Third parties are increasingly being required, and want the option, to develop and own private infrastructure that is connected to Aurizon Network's existing rail track.⁴⁰⁴ This means having the ability to connect to the network (on reasonable terms and within a reasonable time) and is an important component of the regulatory framework.

Including provisions in the undertaking to deal with the process of connecting private infrastructure to the network constrains Aurizon Network's ability to use its monopoly power beyond its current network by:

- allowing third parties to construct, own and operate private infrastructure that connects to the network
- specifying a process to underpin the connection of private infrastructure to the network
- imposing obligations on Aurizon Network in its dealings with these matters, particularly in relation to timing.

The SRCA assists negotiations by setting out standard terms and conditions for the connection. Parties can agree to other terms and conditions on a case-by-case basis – but in the event that negotiations fail, the SRCA provides a fall-back position for resolving a dispute. The SRCA was approved under the 2010 AU and has applied from April 2013.⁴⁰⁵

⁴⁰⁴ The development of mine specific infrastructure is a competitive service. Aurizon Network said that it will not necessarily undertake the development, construction and management of spur lines through the UT4 period (Aurizon Network, 2013 DAU sub. no. 2: 101).

⁴⁰⁵ QCA 2013(a)

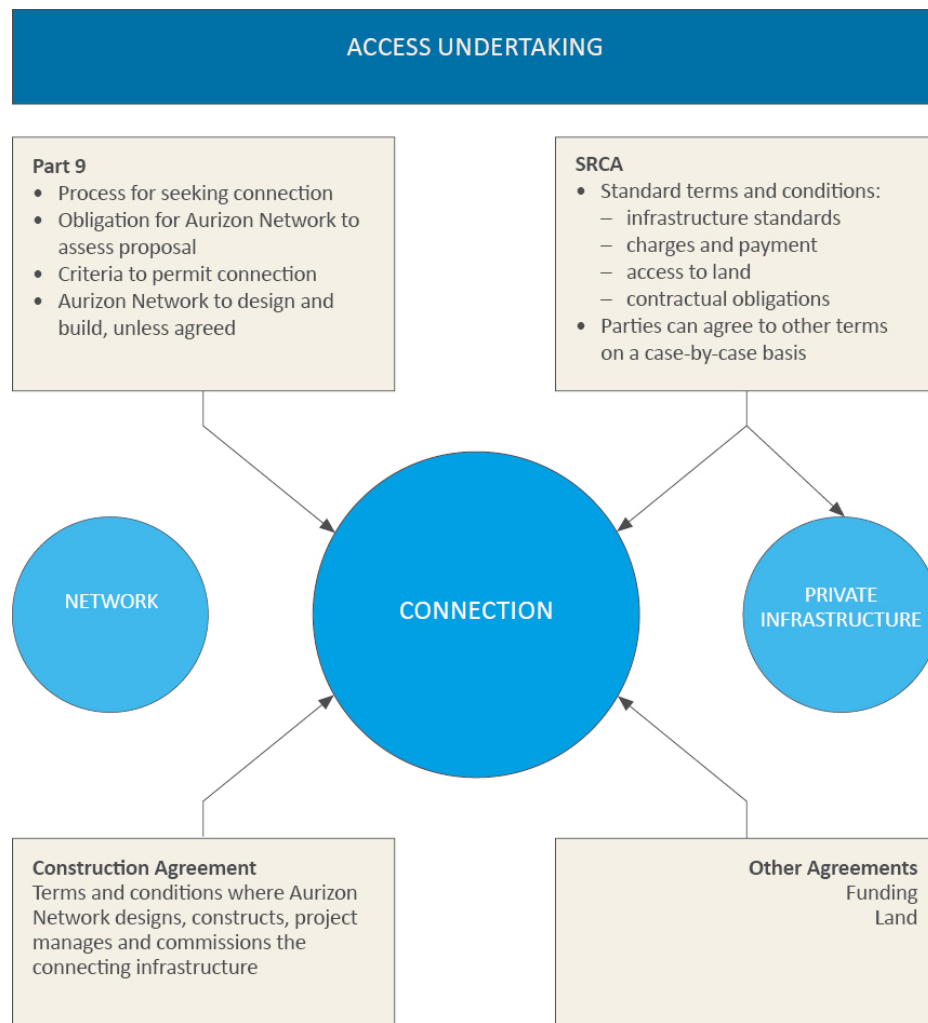
Overall, the provisions in the undertaking and the SRCA facilitate timely and efficient connections of private rail infrastructure – and so underpin the economically efficient operation and use of the network.

9.2 Overview

9.2.1 Aurizon Network proposal

Part 9 of the 2014 DAU sets out the process for connecting private infrastructure to the network. The 2014 DAU also includes a SRCA with standard terms and conditions for connection. Parties will also need to reach agreement on other matters for the connection to go ahead, including construction, land and funding (see **Figure 7**).

Figure 7 Connecting private infrastructure



Connecting infrastructure

Aurizon Network said the 2014 DAU arrangements for connecting private infrastructure represent a material simplification of existing arrangements in the 2010 AU.⁴⁰⁶ This includes removing a number of obligations from the body of the undertaking on the basis these are now

⁴⁰⁶ Aurizon Network, 2013 DAU, sub. no. 2: 102

generally dealt with in the 'safe harbour' of the SRCA (see Section 9.4) and dealing with disputes under Part 11 (dispute resolution).⁴⁰⁷

These arrangements set out a framework to connect private infrastructure to the rail network, including identifying the circumstances where Aurizon Network will consent to a connection. These arrangements apply to a Private Infrastructure Owner (PIO): a person proposing to construct and own private infrastructure which will connect to the network in order to allow trains to enter and exit the network for the purpose of access.

SRCA

Volume 3 of the 2014 DAU includes a SRCA that sets out standard terms and conditions for connection of private rail infrastructure to the network. Aurizon Network said the SRCA ensures that no party is disadvantaged with regard to the requirements for interconnection of rail infrastructure when electing to construct and own its own infrastructure.⁴⁰⁸

Aurizon Network intends the SRCA to cover the connection of private rail infrastructure to the network for the purpose of entering loaded coal trains into the relevant individual coal system. While the proposed SRCA largely reflects the existing approved SRCA arrangements⁴⁰⁹, it adopts a different approach to Coal Loss Mitigation Provisions (CLMPs) (discussed in detail below) and includes a number of new provisions that clarify interpretation of the SRCA or otherwise reflect consequential amendments.⁴¹⁰

Aurizon Network said the SRCA is not intended to apply to the connection of major new expansions (which will require varied terms and conditions) or to the connection to the rail network for services other than coal services (which would be dealt with under separate contractual agreements).⁴¹¹

9.2.2 Stakeholders' position

Stakeholders did not support Aurizon Network's proposal for connecting private infrastructure.⁴¹² They said amendments were necessary to support successful negotiations between Aurizon Network and PIOs to ensure connections to the network are designed and developed more quickly and with greater certainty for all parties. These included providing:

- further detail around the obligations and processes included in the Part 9 framework
- greater certainty over terms and conditions where Aurizon Network constructs the connecting infrastructure
- changes to the proposed treatment of CLMPs.

Stakeholders said providing for a party other than an access seeker to invoke the connecting infrastructure provisions is appropriate, as it is likely PIOs (for example, Surat Basin Railway) rather than access seekers will be seeking to connect to the network.⁴¹³

⁴⁰⁷ Aurizon Network, 2013 DAU, sub. no. 2: 102, 312, 345

⁴⁰⁸ Aurizon Network, 2013 DAU, sub. no. 2: 330

⁴⁰⁹ Aurizon Network, 2013 DAU, sub. no. 2: 332

⁴¹⁰ Aurizon Network, 2013 DAU, sub. no. 2: 332; Aurizon Network, 2014 DAU, sub. no. 3: 242–243

⁴¹¹ Aurizon Network, 2013 DAU, sub. no. 2: 330–331

⁴¹² Anglo American, 2014 DAU, sub. no. 7: 57–60; sub. no. 11; Asciano, 2014 DAU, sub. no. 22: 41–42; 125–126; QRC, 2014 DAU, sub. no. 42: 50; sub. no. 36

⁴¹³ QRC, 2014 DAU, sub. no. 42: 50

9.2.3 Legislative framework and QCA assessment approach

Legislative framework

In assessing Aurizon Network's 2014 DAU, we have had regard to all of the factors in section 138(2) of the QCA Act. In doing so, we have applied a weighting to each matter we consider appropriate based on the practical relevance of that matter.

Against this background, we consider that, in our assessment of Aurizon Network's arrangements for connecting private infrastructure:

- sections 138(2)(a), (b), (d), (e) and (h) should be given more weight
- section 138(2)(g) refers to the pricing principles mentioned in section 168A of the QCA Act, which we consider relevant to the extent that a connection agreement should only allow Aurizon Network to recover the costs of a connection not already built into access prices
- sections 138(2)(c) and (f) should be given less weight, as they are less practically relevant to our assessment.

Facilitate connections to the network

Section 138(2)(a) of the QCA Act requires us to have regard to the object of Part 5 of the QCA Act as set out in section 69E, namely to promote the economically efficient operation of, use of, and investment in the QCCN, as the significant infrastructure by which the declared service is provided. Section 138(2)(d) of the QCA Act requires us to have regard to the public interest, including the public interest in having competition in markets.

Section 138(2)(g) requires us to have regard to certain pricing principles mentioned in section 168A, including that the price for access to the service should generate expected revenue that is at least enough to meet the efficient costs of providing access to the service and include a return on investment commensurate with regulatory and commercial risks involved.

We consider that, taken together, these objectives are best met where parties wishing to connect private infrastructure to the network can do so in a timely manner and at a reasonable cost (irrespective of who designs, constructs, maintains or upgrades the infrastructure).

Aurizon Network's and users' rights and interests

Section 138(2)(b) of the QCA Act requires us to have regard to the legitimate business interests of Aurizon Network. For the connecting infrastructure, we consider Aurizon Network's legitimate business interests include: (1) having infrastructure connected to its network that is built and maintained to be fit-for-purpose; and (2) providing for it to recover the efficient costs to it for connections (but not more), including meeting its obligations under the SRCA.

Sections 138(2)(d) and (e) require us to have regard to the public interest, and the interests of access seekers. We also consider the interests of potential PIOs are relevant under section 138(2)(h), to the extent they are not already 'access seekers' under section 138(2)(e).

In broad terms, we consider these various interests are best balanced when arrangements for connecting private infrastructure to the network:

- facilitate infrastructure being built and maintained to a standard that meets minimum technical, operational and safety requirements (including not adversely affecting the safety and operation of the network), but does not extend to requirements beyond this

- provide for Aurizon Network to recover its reasonable costs for efficient connections, including meeting its obligations under the SRCA
- enhance effective negotiation and customer engagement for connections – by simplifying and speeding up the process and addressing Aurizon Network’s ability to use the negotiation process to delay interconnection or otherwise undermine the ability of users to connect
- appropriately limit Aurizon Network’s level of discretion in decision making, including having mechanisms to ensure accountability and transparency of Aurizon Network’s decision making
- provide for Aurizon Network to use the SRCA to manage coal loss on the network where load-outs are located on private infrastructure, but not to the extent that compliance by PIOs becomes impracticable and uncommercial, and to appropriately allocate responsibilities/obligations and risks between Aurizon Network and PIOs in doing so.

QCA assessment approach

Our approach to assessing Aurizon Network's arrangements for connecting private infrastructure in the 2014 DAU is set out in the table below. This approach is based around our assessment of whether Aurizon Network's proposed arrangements:

- appropriately balance Aurizon Network’s and users’ rights and interests
- simplify and speed up the process of negotiating connection arrangements
- promote effective competition for the construction and management of private rail infrastructure and connections to the network
- encourage parties to reduce costs or otherwise improve productivity.

We consider that, taken as a whole, this assessment approach allows us to appropriately weigh the factors set out in section 138(2) of the QCA Act, as discussed earlier in this chapter.

Table 37 QCA approach to assessing arrangements for connecting private infrastructure

<i>Assessment criterion</i>	<i>Rationale</i>
Do the arrangements appropriately balance Aurizon Network’s and users’ rights and interests?	<p>We consider arrangements that appropriately balance Aurizon Network’s and users’ rights and interests will:</p> <ul style="list-style-type: none"> • clearly define both the boundaries, and the conditions, of what is being negotiated • address Aurizon Network’s ability to use its position, including by unnecessarily delaying connections to the network to extract a higher price or better terms and conditions for itself • limit Aurizon Network’s level of discretion in decision making, where appropriate, including having mechanisms to ensure accountability and transparency of Aurizon Network’s decision making • appropriately allocate responsibilities/obligations and risks between Aurizon Network and PIOs • appropriately balance negotiating power between Aurizon Network and PIOs.
Do the arrangements simplify and speed up the process of negotiating connections?	<p>We consider arrangements that simplify and speed up processes will:</p> <ul style="list-style-type: none"> • provide greater certainty for PIOs who wish to connect • balance the exchange of information between parties

<i>Assessment criterion</i>	<i>Rationale</i>
	<ul style="list-style-type: none"> • allow connections to the network to be designed and developed more quickly and with greater certainty for all parties • address Aurizon Network's ability to use the negotiation process to delay interconnection or otherwise undermine the PIO's ability to connect private infrastructure to the existing network • otherwise facilitate effective negotiation and customer engagement.
Do the arrangements promote effective competition?	We consider effective competition in markets for construction and management of private rail infrastructure and connections will be realised when private rail infrastructure can be connected to the network on reasonable terms irrespective of who designs, constructs, maintains or upgrades the infrastructure.
Do the arrangements encourage parties to reduce costs or otherwise improve productivity?	<p>We consider parties can better reduce costs or otherwise improve productivity when arrangements:</p> <ul style="list-style-type: none"> • encourage parties to identify where performance gaps exist/improvements can be made • provide for a broad consideration of options and implications • allow parties to make relevant changes in a timely manner <p>without compromising technical and service standards and the safety and operation of the connection or the network.</p>

We consider omitting or insufficiently developing any of these features in the arrangements for connecting private infrastructure framework may, of itself, hinder or prevent access — in particular, if it allows Aurizon Network to realise the benefits of its position, delay connections or favour its above-rail party.

Key issues for consideration

This chapter deals with the key issues arising from Aurizon Network's approach to connecting private infrastructure. Specifically we have sought to:

- ensure there is an effective process for connecting private infrastructure – by clarifying the Part 9 process for connections and addressing Aurizon Network's ability to use its unique position and delay the connection process
- further develop the terms and conditions of the SRCA to guide negotiations – including by clarifying the treatment of CLMPs in the SRCA and the access undertaking.

We have also proposed drafting amendments that are not discussed in detail in this chapter, but are nonetheless consistent with our broad approach and meet our assessment criteria. These include amendments:

- to improve the clarity and certainty of arrangements
- to otherwise improve transparency and accountability of Aurizon Network's decisions
- made in the interest of simplifying the access undertaking more broadly.

Our more detailed consideration is reflected in the marked drafting of Part 9, Schedule J and the SRCA in Volumes V and VI of this Draft Decision.

We have also restated our intention that the SRCA be available to apply to all connections between the network and private infrastructure, unless otherwise agreed. This includes major

connections, non-coal service connections and projects with multiple loading points (see Section 9.4.3).

9.3 An effective process for connecting private infrastructure

9.3.1 Aurizon Network proposal

Part 9 of the 2014 DAU sets out the following process for connecting private infrastructure to the rail network:

- the PIO provides Aurizon Network with a written proposal for the proposed connection for it to review and assess (cl. 9.1(b), (c))
- Aurizon Network will permit the connection if:
 - it is satisfied that the connection is to be used to allow trains operating on the private infrastructure to enter or exit the network for the purpose of access; meets minimum construction and service standards and will not adversely impact safety; and will not, by virtue of its existence, reduce capacity or supply chain capacity (cl. 9.1(c))
 - it owns, or holds the appropriate lease, over the connecting infrastructure (cl. 9.1(d))
 - it can access the necessary land (cl. 9.1(e))
 - it and the PIO have entered into required relevant agreements – including a rail connection agreement (consistent with the SRCA, unless agreed) and any other agreement necessary relating to design, construction, project management or commissioning of the connecting infrastructure or other works (cl. 9.1(e))
- Aurizon Network must notify parties, providing reasons, if it is not satisfied the connection requirements are met, and it refuses to enter a connection agreement (cl. 9.1(f)).

Part 9 of the 2014 DAU provides for Aurizon Network to be responsible for designing, constructing, project managing and commissioning the connecting infrastructure, unless otherwise agreed (cl. 9.1(g)).

It does not include the 2010 AU arrangements that outline the standards required and the PIO's role for connections in this event (2010 AU, cl. 8.3(c)). Instead these terms are to be set out in a separate construction agreement – although the SRCA deals with minimum terms which must be included in such an agreement (SRCA, cl. 6(d)).

Part 9 of the 2014 DAU does not include other 2010 AU arrangements that Aurizon Network said are also now dealt with in the SRCA:

- ensure connecting infrastructure built by third parties is physically connected to the network, facilitate the movement of trains and offer to provide train control and planning services (2010 AU, cl. 8.3(b))
- require Aurizon Network to pay reasonable costs where it has unreasonably delayed the development of the connecting infrastructure (2010 AU, cl. 8.3(d)).⁴¹⁴

Part 9 does not include a process to refer disputes to dispute resolution. Instead, Aurizon Network has advised disputes in relation to the connection framework are subject to the Part 11 dispute resolution provisions (see Chapter 6).

⁴¹⁴ Aurizon Network, 2013 DAU, sub. no. 2: 345

9.3.2 Stakeholders' position

Stakeholders did not accept Aurizon Network's proposed process for connecting private infrastructure.⁴¹⁵

Stakeholders said Part 9 of the 2014 DAU is at odds with their understanding of the agreed regulatory approach (reached in approving the SRCA)⁴¹⁶ and provides Aurizon Network with too much discretion and too little accountability over its decisions. They considered too much discretion could be used by Aurizon Network to favour its related party rail operator.⁴¹⁷ Anglo American also proposed a new definition of connecting infrastructure.⁴¹⁸

Construction

A key stakeholder concern was around the design, construction, project management and commissioning of connecting infrastructure.

Anglo American and the QRC supported Aurizon Network's option to design and build connecting infrastructure but were concerned that this would be undertaken under a separate construction agreement to be agreed between the parties with limited oversight.⁴¹⁹ The QRC said this is a 'significant shortfall in the process' that undermines the benefit of having a SRCA.⁴²⁰ Anglo American said Aurizon Network could seek to achieve a margin on its role in this process, or to request higher standards than those established in the relevant legislation and safety standards ('gold plating').⁴²¹

In contrast, Asciano said responsibility for these matters should be at the discretion of the proponent of the connection rather than Aurizon Network.⁴²²

Stakeholders also proposed a number of additional specific amendments to the drafting contained in Part 9 of the 2014 DAU to improve clarity and transparency.⁴²³

9.3.3 QCA analysis and Draft Decision

Our interim position, as set out in this Draft Decision, is to reject Aurizon Network's proposed arrangements for connecting private infrastructure. We propose to require amendments to Part 9 of the 2014 DAU and the SRCA to balance Aurizon Network's and PIOs' rights and interests and simplify and speed up the negotiation process.

Clarifying the process and improving transparency

We consider a clear process for proposing connecting infrastructure; assessing the proposal; and putting it into effect, will simplify and speed up negotiations for connections. While we have accepted Aurizon Network's approach in principle, we have proposed amendments to Part 9 of the 2014 DAU to clarify the process and improve transparency (see the marked changes to Part 9 of the 2014 DAU). These include:

⁴¹⁵ Anglo American, 2014 DAU, sub. no. 7: 57–60; sub. no. 11; Asciano, 2014 DAU, sub. no. 22: 41–42; 125–126; QRC, 2014 DAU, sub. no. 42: 50; sub. no. 36

⁴¹⁶ Anglo American, 2014 DAU, sub. no. 7: 57–58

⁴¹⁷ Asciano, 2014 DAU, sub. no. 22: 42

⁴¹⁸ Anglo American, 2014 DAU, sub. no. 7: 58–59

⁴¹⁹ Anglo American, 2014 DAU, sub. no. 7: 58; QRC, 2014 DAU, sub. no. 42: 50

⁴²⁰ QRC, 2014 DAU, sub. no. 42: 50

⁴²¹ Anglo American, 2014 DAU, sub. no. 7: 59

⁴²² Asciano, 2014 DAU, sub. no. 22: 42

⁴²³ Anglo American, 2014 DAU, sub. no. 11; QRC, 2014 DAU, sub. no. 36

- the PIO's proposal should provide reasonably sufficient detail about the proposed connection (cl. 9.1(a)) — so Aurizon Network can assess the proposal without delay
- testing for whether the connection will reduce capacity following the completion of any planned expansion (cl. 9.1(b)(v)) — to provide a realistic view of the capacity implications of connection
- Aurizon Network will promptly assess the PIO's proposal and notify the PIO (and the QCA) whether the requirements for connection are satisfied or not satisfied and identify the amendments that might be made (cl. 9.1 (d), (f)) – to make Aurizon Network more accountable for its decision making, and give the PIO a better understanding of what is required and to assist in determining the facts should the matter go to dispute
- the SRCA may be used by parties as an 'anchor' or starting point to guide negotiations (cl. 9.1(e)(i)).

Together, these amendments streamline processes and thereby allow connections to the network to be designed and developed more quickly and with greater certainty for all parties.

We have also proposed to provide greater clarity over timeframes for decision making (cl. 9.1(b), (d), (f)) to give all parties certainty over when decisions will be made and how the process will proceed. We seek stakeholders' comments on what timeframes would be appropriate.

Dealing with delays

We are concerned Part 9 of the 2014 DAU does not adequately deal with Aurizon Network unreasonably delaying or failing to enter agreements required for connection beyond requiring it to review a written proposal in a timely fashion.

For this reason we consider it appropriate to require Aurizon Network to pay costs arising out of loss suffered by PIOs, Access Seekers or Access Holders from delays in meeting key milestones and entering into connection agreements and / or other identified agreements required for connection (clause 9.1(i),(j)). This includes delays in finalising the construction agreement (see below). This should remove any incentive Aurizon Network may have to use the negotiation process to delay connection or otherwise diminish users' ability to connect private infrastructure to the existing network – and so provides a better balance for negotiations between Aurizon Network and PIOs.

We have also required Aurizon Network to notify a timeframe for reaching key connection milestones,⁴²⁴ providing reasons explaining the length of the timeframe selected (cl. 9.1(d)) – to provide transparency for the likely timing of progress to connection.

Construction matters

We consider unambiguous terms of the construction agreement are important where Aurizon Network constructs the connecting infrastructure. Uncertainty regarding terms of a construction agreement could lead to disputes and delays, particularly where there is limited competitive pressure on Aurizon Network to provide a timely or cost effective response or where Aurizon Network seeks to use its position to remove risk and liability for the project being built.

⁴²⁴ These include entering a rail connection agreement with the PIO; the design and construction of any connecting infrastructure; and commissioning.

We consider matters relevant to the negotiation of the construction of the connecting infrastructure to be within the scope of the access undertaking, including the SRCA.⁴²⁵

We consider the manner in which the design and construct contract is negotiated, and the timeframes applicable to the negotiation and performance of the contract, fall within the scope of the 2014 DAU. While the performance of the construction contract itself might not be within the scope of the relevant access agreement, the 2014 DAU already permits disputes relating to the negotiation and formation of the construction contract.⁴²⁶ Including these matters within an access undertaking is also implicitly permitted by the framework of the QCA Act.⁴²⁷ Accordingly, we have proposed amendments to increase certainty and limit the possibility for delay and cost blow-outs (cl. 9.1(i), (j), (k)). We have also proposed to amend the SRCA to set out required steps and timeframes to guide the process where Aurizon Network designs and builds the connecting infrastructure (see section 9.4.3).

Taken together, these amendments better balance Aurizon Network's and PIOs' negotiating power and provide greater clarity and certainty when Aurizon Network is responsible for designing and building the connecting infrastructure. This will simplify and speed up negotiations for connections whilst taking proper account of Aurizon Network's, PIOs' and users' rights and interests.

In making these amendments, we have not adopted stakeholders' proposals – i.e. that a standard construction agreement be separately attached to the undertaking or alternatively that complete terms and pricing principles for construction be set out in the SRCA.⁴²⁸ However, we note a standard construction agreement is being developed for SUFA⁴²⁹ and we believe this could be the reference point for a construction agreement for connecting infrastructure. We are interested in stakeholders' views on whether this SUFA construction agreement is a useful starting point and what changes might be required to be made so it is relevant for constructing connecting infrastructure.

⁴²⁵ Aurizon Network said disputes on a construction agreement are out of the scope of the 2014 DAU (Aurizon Network, 2014 DAU, sub. no. 4: 239).

⁴²⁶ The intent and scope of the access undertaking deals with facilitating the negotiation of access arrangements. Where connecting infrastructure is required, access cannot be negotiated or provided without the existence of a construction contract between the parties – and the formation of an appropriate construction contract for connecting infrastructure is one of the pre-conditions to access.

⁴²⁷ For example, the QCA Act provides that an access undertaking must include provisions preventing Aurizon Network from unfairly differentiating between access seekers or users (s137(1A)) and may include details of time frames for giving information in the conduct of negotiations (s137(2)(c)) and provisions to be included in access agreements (s137(2)(j)). The QCA must also have regard to the interests of persons who may seek access to the service in deciding whether to approve a draft undertaking (s138(2)(e)).

⁴²⁸ QRC, 2014DAU, sub. no. 42: 50; sub. no. 36:2

⁴²⁹ For more detail on the SUFA construction agreement, or the SUFA assessment process more broadly, see the SUFA project page on our website.

Draft Decision

- 9.1 Our Draft Decision is to refuse to approve Part 9 of the 2014 DAU as proposed by Aurizon Network. We would approve Part 9 with amendments to:**
- (a) clarify the process for connecting private infrastructure and improve transparency**
 - (b) address Aurizon Network's ability to unreasonably delay or fail to enter agreements required to connect private infrastructure**
 - (c) clarify arrangements where Aurizon Network is responsible for designing and building the connecting infrastructure.**

9.4 Standard Rail Connection Agreement – scope and terms

The SRCA guides negotiations between Aurizon Network and PIOs seeking to connect private infrastructure to the network. While a negotiated connection agreement may differ from the SRCA, the conditions in the SRCA will be relied upon in resolving a dispute if negotiations fail.

9.4.1 Aurizon Network proposal

Aurizon Network said its proposed SRCA for the 2014 DAU largely reflects the approved SRCA arrangements from the 2010 AU.⁴³⁰ The key difference is the proposed SRCA now includes CLMPs as a schedule to the SRCA (see below). The proposed SRCA also includes a number of new provisions that clarify interpretation of the SRCA or otherwise reflect consequential amendments (e.g. requiring Aurizon Network to notify the PIO of changes to system operating parameters (SRCA, cl. 6(m) in accordance with the proposed approach for notification in Schedule G of the 2014 DAU)).⁴³¹

Aurizon Network has proposed the SRCA cover the connection of private rail infrastructure to the network for the purpose of entering loaded coal trains into the relevant individual coal system. In particular, Aurizon Network said:

- the SRCA is not intended to apply to the connection of major new expansions, as these may require varied terms and conditions
- connection to the rail network for services other than coal services would also not be covered by the SRCA, but by other agreements negotiated between Aurizon Network and the other party.⁴³²

9.4.2 Stakeholders' position

Stakeholders generally supported continuing to use the recently approved SRCA. Asciano said it saw no reason why the 2014 DAU SRCA should be any different to the approved SRCA and there was no benefit from reopening these issues shortly after final decisions have been released.⁴³³ Anglo American highlighted its support for using the approach for CLMPs included in the approved SRCA⁴³⁴ (see section 9.5.2).

⁴³⁰ Aurizon Network, 2013 DAU, sub. no. 2:332

⁴³¹ Aurizon Network, 2014 DAU, sub. no. 3:242-243

⁴³² Aurizon Network, 2013 DAU, sub. no. 2: 330–331

⁴³³ Asciano, 2014 DAU, sub. no. 22: 41; 2013 DAU, sub. no. 43: 77; QRC, 2013 DAU, sub. no. 46:10

⁴³⁴ Anglo American, 2013 DAU, sub no. 78: 24

Anglo American and the QRC also said the SRCA should be amended to provide greater clarity and certainty over the terms and pricing principles for construction where Aurizon Network is responsible for the design and build of the connecting infrastructure⁴³⁵ (see section 9.3.2).

Asciano said the approved SRCA should apply to all connections – but if both parties agreed, terms can be varied from the SRCA.⁴³⁶

9.4.3 QCA analysis and Draft Decision

Our interim position, as set out in this Draft Decision, is to accept the SRCA included in the 2014 DAU where this is consistent with the recently approved SRCA in the 2010 AU. As part of that review and approval process, we undertook a lengthy and comprehensive assessment that included extensive consultation with stakeholders. We do not consider stakeholders have raised any new or material concerns.

That said, there is merit in updating the SRCA where doing so provides greater clarity (without changing the intent) or is required to properly deal with our proposed approach to other parts of the access undertaking (including construction matters) (see the marked changes to the SRCA attached to the Draft Decision).

On this basis, we consider it appropriate to require the SRCA to be amended to:

- provide a process by which Aurizon Network may design, construct and commission the connecting infrastructure – to provide greater clarity and certainty and reduce delay:
 - setting out timelines for Aurizon Network to prepare a proposed construction contract and design for the connecting infrastructure and for the PIO to respond to Aurizon Network's proposal (SRCA, cl. 7(b)(ii), (iii), (v), (vi))⁴³⁷
 - providing for the PIO to request modifications to each document in particular circumstances⁴³⁸ and for Aurizon Network to consider the PIO's proposal and modify and resubmit or dispute (SRCA, cl. 7(b)(ii), (iii)(C), (iv), (v), (vi)(A))
 - providing a process to modify any agreed construction contract or design to reflect a material change in circumstances (SRCA, cl. 7(b)(vii))
 - require that, unless otherwise agreed, the construction agreement must contain terms and conditions identified in the SRCA (SRCA, cl. 7(b)(viii))
- require Aurizon Network to consult (not just notify) with the PIO on proposed changes to system operating parameters as soon as practicable (SRCA, cl. 8(i))– to reflect proposed amendments to the process for changing system operating parameters to put greater emphasis on third-party involvement and consultation (see Chapter 13)
- define consequential loss with greater particularity (SRCA, cl. 1) – to improve clarity and certainty.

Together, we consider our amendments will simplify and speed up negotiations for connections whilst taking proper account of Aurizon Network's, PIOs' and users' rights and interests. We

⁴³⁵ Anglo American, 2014 DAU, sub no. 7: 59-60, QRC, 2014 DAU, sub no. 42: 50

⁴³⁶ Asciano, 2013 DAU, sub. no. 43: 117

⁴³⁷ In doing so, we seek stakeholders' comments on what timeframes would be appropriate.

⁴³⁸ Being limited to the technical specifications required, the standard appropriate to the nature of traffic and current service standards, safety and capacity; and project management or timing issues that will result in non-prudent or unreasonable costs or delays.

consider including an SRCA in the access undertaking with terms and conditions that are transparent and equally applied, is preferable to individually negotiated arrangements for each connection. Clarifying the standard terms and conditions will ultimately allow connections to be designed and built quickly and with certainty. This is consistent with PIOs' and users' rights and interests and is not inconsistent with Aurizon Network's legitimate business interests.

We have also sought to develop the treatment of coal loss management by including CLMPs as a schedule to the access undertaking (and not as a schedule to the SRCA) (see section 9.5).

We do not accept Aurizon Network's proposal to exclude particular connections from using the SRCA. We consider it is inappropriate for the SRCA to apply to some connections but not others.

While it is conceivable that the terms and conditions for different types of connections should be different, there is no reason why negotiations for those different types of connections could not deal with those matters on a case by case basis.⁴³⁹

We are of the view that where a party requires a connection to access the network the SRCA should be applied, but we accept flexibility might sometimes be required to finalise terms and conditions. In these circumstances, we see the SRCA as providing a template to start from, even if the finalised agreements necessarily move from the standard conditions (including for more complex connections or for connections for other freight commodities). This will simplify and speed up negotiations for connections, while taking proper account of Aurizon Network's, PIOs' and users' rights and interests.

If this approach proves to be unworkable, there is no reason why Aurizon Network could not develop, and submit for our approval, a draft amending access undertaking including other SRCAs to deal with the types of issues that may arise with more complex connections or connections to support non-coal services.

Draft Decision

9.2 Our Draft Decision is to refuse to approve the SRCA included in the 2014 DAU. We would approve the SRCA with amendments to:

- (a) provide greater clarity (without changing the intent)**
- (b) properly deal with our proposed approach to other parts of the access undertaking, including:**
 - (i) providing a process by which Aurizon Network may design, construct and commission the connecting infrastructure**
 - (ii) requiring Aurizon Network to consult (not just notify) with the PIO in respect of proposed changes to system operating parameters as soon as practicable.**

9.5 Standard Rail Connection Agreement – Coal Loss Mitigation Provisions

9.5.1 Aurizon Network proposal

Aurizon Network has included proposed CLMPs as a schedule to the SRCA (SRCA, Schedule 7). Under these arrangements, the PIO has primary responsibility for ensuring wagons are loaded, profiled and veneered in a manner that prevents coal loss (i.e. by taking measures to satisfy

⁴³⁹ QCA 2012(b): 32

relevant standards, targets and levels when handling and loading coal) (cl. 1.1(c), 1.3). This includes:

- a general requirement for the PIO to comply with applicable laws, instructions, guidelines and standards (now or in the future) (cl. 1.4)
- detailed requirements relating to the PIO's operations and practices (cls. 1.5, 2.3, 2.4, 2.5)
- reporting requirements relating to material non-compliance with the CLMPs (cl. 1.8).

Aurizon Network can also monitor the PIO's compliance with the CLMPs, require remedy for a default (if possible) or otherwise take reasonable steps to prevent the event from reoccurring or, ultimately, suspend services if the owner does not comply (cls. 1.6, 1.7).

Aurizon Network said including CLMPs as a schedule to the SRCA is consistent with its proposal to deal with matters of technical detail, such as the CLMPs, by agreement between the parties (backed up by the 'safe harbour' of a standard form agreement), rather than in the undertaking itself. Aurizon Network said it had included provisions that will ensure the SRCA can flexibly deal with changes in coal loss mitigation strategies or obligations over time (cls. 1.3, 1.4).⁴⁴⁰

9.5.2 Stakeholders' position

Stakeholders reiterated concerns about Aurizon Network's proposed approach to deal with CLMPs in the SRCA. These concerns were previously raised in our assessment and approval of the 2010 AU SRCA.⁴⁴¹ The two key issues are:

- whether the SRCA is an appropriate mechanism to deal with coal loss mitigation
- the nature and content of the proposed CLMPs.

Asciano said CLMPs should not be included in the SRCA, which should focus on connections, not coal management. It said the infrastructure owner is not in the best position to manage the handling and loading of coal at all load-out sites served by the infrastructure. It would be more appropriate to address CLMPs issues through a separate process or agreement (similar to the access interface deed in the 2010 AU).⁴⁴²

Regarding the contents of the CLMPs, Anglo American said:

- users and operators should be required to abide by all relevant statutory authorities' requirements or any reasonable safety requirements imposed by a government body (or delegated authority)⁴⁴³
- the proposed CLMPs go further than the obligations that industry agreed to in the 2010 Coal Dust Management Plan (2010 CDMP)⁴⁴⁴
- any proposed CLMPs that seek to supersede the agreed CDMP should be set out in their entirety in a DAAU⁴⁴⁵

⁴⁴⁰ Aurizon Network, 2013 DAU, sub. no. 2: 331

⁴⁴¹ See QCA 2013(a) and 2012(b) for a summary of matters raised in that process.

⁴⁴² Asciano, 2013 DAU, sub. no. 43: 78, 117

⁴⁴³ Anglo American, 2014 DAU, sub. no. 17

⁴⁴⁴ Anglo American, 2013 DAU, sub. no. 78: 24

⁴⁴⁵ Anglo American, 2013 DAU, sub. no. 78: 24

- it is not appropriate to take account of the terms of existing coal loss mitigation arrangements because these were implemented in a non-regulated environment and might reflect Aurizon Network's monopoly powers.⁴⁴⁶

9.5.3 QCA analysis and Draft Decision

Our interim position, as set out in this Draft Decision, is to reject Aurizon Network's proposal to include CLMPs as a schedule to the SRCA. While we consider it is appropriate to address coal loss mitigation through the SRCA, we propose to require the CLMPs be:

- included as a schedule to the 2014 DAU (with the SRCA referring to CLMPs as specified in the access undertaking)
- amended to align with the 2010 CDMP, while also providing an adequate framework to implement 'best practice' strategies if it is practicable for the relevant coal producer to do so.

In doing so, we maintain our view that it is in the interests of the safe operation of the network and of the participants in coal supply chain more broadly to implement the 2010 CDMP effectively. We consider having CLMPs attached to the SRCA is a convenient way to ensure the CDMP obligations extend to all mines using the network (i.e. mines using the network should not be excluded from CDMP obligations simply because they load on private infrastructure). Including the CLMPs as a schedule to the access undertaking clarifies requirements and provides greater certainty over parties' obligations.

Inclusion of CLMPs in access undertaking

We consider the CLMPs are best dealt with in the body of the access undertaking (see the new Schedule J of the 2014 DAU) and not as a schedule to the SRCA. Coal loss mitigation is a matter of broader interest to PIOs, access seekers and access holders and in which there is a public benefit in having a consistent approach applied and enforced by us.

We consider having the CLMPs as a part of the access undertaking:

- will ensure ongoing connection between the SRCA and Aurizon Network's broader coal loss mitigation obligations
- provide more structure about how changes to the CLMPs should be implemented and can ensure equity of treatment
- continue to allow sufficient stakeholder consultation and regulatory oversight on the exact terms of the CLMPs (and future changes to those provisions).

This is consistent with PIOs' and users' rights and interests and is not inconsistent with Aurizon Network's legitimate business interests.

Content of the CLMPs

We have proposed amendments to the nature and content of the proposed CLMPs to ensure they do not impose obligations which are higher, different or in addition to the obligations agreed under the CDMP (see the new Schedule J in the marked up drafting of Volume V of this Draft Decision). We have also taken account of more recent developments in best practice for coal loss management (in particular where methods outlined may not be applicable to all supply chain participants due to location and operation characteristics). Our proposed amendments:

⁴⁴⁶ Anglo American, 2012: 2

- focus on meeting standards, targets and levels that reflect applicable laws (now and in the future) and not those otherwise specified by Aurizon Network (cl. 1.3)
- provide a general obligation for the PIO to use reasonable endeavours to prevent coal loss (cl. 1.4) as well as new requirements for the PIO's particular operations and practices (cl. 1.5, 2.1, 2.3, 2.5)— and provides clarity over the factors that might affect the proposed approach⁴⁴⁷
- provide a general process for continuous improvement for parties to identify where performance gaps exist/improvements can be made with a focus on using their reasonable endeavours to achieve 'best practice' (cl. 1.9)
- clarify the proposed reporting requirements and monitoring (cl. 1.6, 1.8) – including, in the event of noncompliance, requiring parties to agree on a reasonable program setting out the activities, and a timetable to undertake those activities, to prevent its reoccurrence.

We consider these amendments will appropriately allocate responsibilities/obligations for coal loss management in line with the industry agreed approach. We consider parties should comply with the agreed 2010 CDMP, but there should be no obligation to go beyond these responsibilities. We note that while the 2010 CDMP is the most recent plan approved in respect of the CQCN, research and development in the industry in respect of coal dust management continues.⁴⁴⁸ This is consistent with PIOs' and users' rights and interests and is consistent with Aurizon Network's legitimate business interests.

We encourage parties to consider where performance gaps exist and where existing coal loss mitigation practices can be improved or changed for the better. For example, it may be the case that in time, when ballast fouling is more measurable, other options become available to reduce costs without compromising desired objectives (i.e. parties pay a levy if they elect not to implement mitigation measures). Implementing improvements to effect positive change in a timely manner is in all parties' interests.

Draft Decision

9.3 Our Draft Decision is to refuse to approve the proposed CLMPS included in the SRCA in the 2014 DAU. We would approve CLMPs that are:

- included as a schedule to the access undertaking (Schedule J) – with the SRCA referring to CLMPs as specified in the access undertaking**
- better aligned with the 2010 CDMP, while also providing an adequate framework to implement 'best practice' strategies if it is practicable for the relevant coal producer to do so.**

⁴⁴⁷ By taking into account limiting factors including the: prevailing business conditions; effectiveness of the particular mitigation approach given technology and cost constraints; timeframes required to implement mitigation strategies; specific characteristics underlying the relevant PIO's contribution to dust; and the impact on other supply chain participants.

⁴⁴⁸ This includes the CDMP for the South West system (released in November 2013).