

Supplementary Draft Decision

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## Aurizon Network 2014 Draft Access Undertaking: Capacity Transfer Mechanism

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April 2015

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

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## SUBMISSIONS

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Closing date for submissions: 29 May 2015

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 Discussion Paper on a Potential Short Term Transfer Mechanism, submitted in December 2014. The QCA will take account of all submissions received.

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

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### Confidentiality

In the interests of transparency and to promote informed discussion, the QCA would prefer submissions to be made publicly available wherever this is reasonable. However, if a person making a submission does not want that submission to be public, that person should claim confidentiality in respect of the document (or any part of the document). Claims for confidentiality should be clearly noted on the front page of the submission and the relevant sections of the submission should be marked as confidential, so that the remainder of the document can be made publicly available. It would also be appreciated if two copies of each version of these submissions (i.e. the complete version and another excising confidential information) could be provided. Where it is unclear why a submission has been marked 'confidential', the status of the submission will be discussed with the person making the submission.

While the QCA will endeavour to identify and protect material claimed as confidential as well as exempt information and information disclosure of which would be contrary to the public interest (within the meaning of the Right to Information Act 2009 (RTI)), it cannot guarantee that submissions will not be made publicly available. As stated in s 187 of the Queensland Competition Authority Act 1997, the QCA must take all reasonable steps to ensure the information is not disclosed without the person's consent, provided the QCA believes that disclosure of the information would be likely to damage the person's commercial activities and that the disclosure of the information would not be in the public interest. Notwithstanding this, there is a possibility that the QCA may be required to reveal confidential information as a result of a RTI request.

### Public access to submissions

Subject to any confidentiality constraints, submissions will be available for public inspection at the Brisbane office, or on the website at [www.qca.org.au](http://www.qca.org.au). If you experience any difficulty gaining access to documents please contact us on (07) 3222 0555.

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## PREFACE

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*In December 2014, Aurizon Network submitted a discussion paper on Potential Short Term Transfer Mechanism which outlined its proposed approach to implementing short-term transfers in the 2014 DAU.*

*It is not open for Aurizon Network to amend the 2014 DAU after it has been submitted. Instead, we are treating Aurizon Network's discussion paper as a submission on the existing 2014 DAU.*

*Based on the analysis set out in this supplementary draft decision and in our 2014 DAU draft decision, we intend to refuse to approve the 2014 DAU on the basis that it does not include a suitable short-term capacity transfer mechanism. We are therefore required to identify the amendments that we consider should be made to the 2014 DAU. Aurizon Network's proposal is a relevant consideration for us in the context of those amendments.*

*In reviewing Aurizon Network's proposed Short Term Transfer Mechanism we considered the following issues:*

- *intent and scope of the short- and long-term transfer provisions*
- *governance process to administer transfers*
- *pricing arrangements to underpin transfers*
- *implementation of the transfer provisions in the 2014 DAU.*

*We applied weightings to each of the criteria in section 138(2) of the QCA Act to achieve what we consider a balanced approach consistent with the analysis we adopted in our draft decision on the 2014 DAU ('2014 DAU draft decision') dated 30 January 2015.*

*Following consideration of Aurizon Network's submission, we consider it appropriate that Part 7 of the 2014 DAU should be amended to:*

- *incorporate short-term transfer arrangements together with our previously proposed general capacity transfer provisions into one simplified process*
- *give effect to transfers where a transfer notice is provided at least 48 hours from the date of transfer and the transfer notice meets pre-defined access criteria*
- *provide an ability for a transfer notice to be considered by Aurizon Network in a more timely manner subject to a rapid capacity assessment*
- *allow Aurizon Network a maximum of three months to consider transfer notices that require a detailed capacity assessment before responding to the notice*
- *incorporate a governance framework for the administration of the transfer provisions*
- *require the access charges for the transferred Train Service Entitlements (TSEs) to be the higher of the access charges set for the origin of the TSEs in the transferor's access agreement and the access charges set for the origin of the TSEs in the transferee's access agreement*
- *provide for amendments to existing access agreements to allow access holders to access the new transfer provisions.*

*The detailed drafting of Part 7 of the 2014 DAU accompanying this supplementary draft decision includes the amendments we consider are required to implement the new transfer provisions.*

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## THE ROLE OF THE QCA – TASK, TIMING AND CONTACTS

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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.

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 note that in their recent responses to the QCA's 2014 DAU Draft Decision, some stakeholders commented on the short-term capacity transfer mechanism. These comments were received too late to be considered in this Supplementary Draft Decision, but will be taken into account for the final decision.

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, where 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.

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 this investigation, we consider it appropriate to sequence our consideration of the 2014 DAU so that we invite submissions on two draft decisions. We have published 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, on 30 January 2015.

In December 2014, Aurizon Network provided us with a discussion paper on its proposed short-term transfer mechanism. The discussion paper was developed by Aurizon Network in consultation with its stakeholders to progress towards more flexible, timely and transferable access rights.

It is not open for Aurizon Network to amend its 2014 DAU after having submitted in August 2014, without restarting a further undertaking process. Instead, we are treating Aurizon Network's proposal as set out in the discussion paper as a submission by Aurizon Network on the existing 2014 DAU.

Our final decision will encompass all aspects of the 2014 DAU.

All dates provided by the QCA 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.

## 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 29 May 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

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## 1.1 Discussion paper on Potential Short Term Transfer Mechanism

In December 2014, Aurizon Network submitted to us a discussion paper on a Potential Short Term Transfer Mechanism (the discussion paper) that it said could be implemented in the amended 2014 DAU if the current draft of the 2014 DAU was not approved.

We commenced a public consultation process and sought submissions from interested parties. In this respect, we are aware that Aurizon Network and stakeholders had agreed to progress towards more flexible, timely and transferable access rights.

### Relationship to 2014 DAU

In our 2014 DAU draft decision (30 January 2015), we advised that we had deferred full consideration of the proposed 2014 DAU capacity transfer provisions until we had the opportunity to consider Aurizon Network's short term transfer mechanism. In section 11.7.3 of the 2014 DAU draft decision we said:

*Aurizon Network's discussion paper on Potential Short Term Transfer Mechanism is out for submissions until 30 January 2015. We have not formed a view for this draft decision, but will address the issues raised separately and the results will be included in our final decision on the 2014 DAU.*

In our 2014 DAU draft decision<sup>1</sup> we considered it appropriate to move Aurizon Network's proposed transfer provisions out of its suite of Standard Access Agreements (SAAs) and back into our mark up of Part 7<sup>2</sup> in the 2014 DAU.

Our approach in the 2014 DAU draft decision mirrored the placement of the transfer provisions in each of UT1, UT2 and UT3. We were concerned Aurizon Network's proposal to put the transfer provisions in the SAAs created the potential for inconsistencies to arise over generations of access agreements. Such differences could create contractual barriers to the efficient transfer of access rights, favour one access holder over another and prevent the efficient use of the Central Queensland Rail Network (CQCN).<sup>3</sup>

We also identified that it was not clear to us why there should be delineation between what is a long-term or short-term transfer and why it required different processes in the 2014 DAU. Accordingly, we posed a number of questions in our 2014 DAU draft decision:<sup>4</sup>

- What is the difference between a short- and a long-term transfer? Should there be separate mechanisms for short- and long-term transfers?
- What provisions should be in place to facilitate a flexible trading mechanism? Are transfer fees cost reflective? When does a transfer impose a cost?
- What is the best method to enact a transfer—via rules in the undertaking, or through access agreements?

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<sup>1</sup> QCA 2015 (j): Chapter 11.

<sup>2</sup> QCA 2015 (j): Volume V.

<sup>3</sup> QCA 2015 (j):Chapter 11.

<sup>4</sup> QCA 2015 (j): pp. 231–234.



We have now considered Aurizon Network's proposed short-term transfer mechanism and how Aurizon Network proposes to implement the mechanism in Part 7 of the 2014 DAU. Our supplementary draft decision is to:

- refuse to approve the 2014 DAU because it does not include a short-term capacity transfer mechanism (including any consideration of whether the existing transfer mechanisms in the 2014 DAU are sufficient)
- propose amendments to the 2014 DAU for any short-term capacity transfer mechanism.

This draft decision consolidates our assessment of both the discussion paper and the transfer provisions in the 2014 DAU and expresses our view on whether the capacity transfer provisions, in their entirety<sup>5</sup>, address the matters set out in sections 138(2) and 168A of the QCA Act and meet the object of Part 5 of the QCA Act (s.69E).

We have taken into account comments received from stakeholders on Aurizon Network's proposed short-term capacity transfer mechanism. Any stakeholder comment on our broader 2014 DAU draft will be considered as part of our final decision.

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<sup>5</sup> If Part 7 of the 2014 DAU was amended in the manner proposed by Aurizon Network in its discussion paper.

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## 2 OVERVIEW

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### 2.1 Aurizon Network proposal

Aurizon Network's short-term capacity transfer mechanism is intended to allow capacity transfer requests from access holders to be processed in the weekly planning process to develop the Intermediate Train Plan (ITP). Outside of the ITP scheduling timeframe, Aurizon Network considers the general capacity transfer mechanisms in the 2014 DAU provide sufficient transfer flexibility for access holders and access seekers.

Aurizon Network has proposed that the general capacity and short-term capacity transfer mechanisms will work independently of each other and any short-term transfers will not be counted in the calculation of transfer timeframes applying to the general capacity transfer mechanism.

#### Short-term capacity transfer mechanism

The short-term capacity transfer mechanism manages transfers between existing access holders<sup>6</sup> within the weekly ITP scheduling environment. Aurizon Network proposed that it will:

- **pre-approve** all capacity transfers which meet the following access criteria without the need to undertake a full capacity assessment, that is:
  - utilising the same network path on a coal system (e.g. are located on the same branch line and can use the same mainline path)
  - having a common unloading destination (i.e. have the same supply chain exit rights)
  - not requiring additional access rights for a complete train path from the transferee's origin (e.g. transferee mine is located closer to the common destination along the same network route as the transferor mine)
- **undertake a rapid capacity assessment** process for capacity transfers which meet the access criteria but require ancillary access rights to enable the use of that network path from the transferee's point of origin. Aurizon Network has proposed that the rapid capacity assessment process would err in favour of not adversely affecting existing access rights. This means, if Aurizon Network cannot satisfy itself that the proposed capacity transfer does not adversely affect existing access rights then the capacity transfer will not be approved.

Short-term capacity transfer notices may be given not more than seven business days and not fewer than 48 hours prior to the close of train orders for the Intermediate Train Plan (ITP). Transfer notices can be issued within the ITP period for train paths that have not already been scheduled. However, train services once scheduled in an ITP cannot themselves be the subject of a short-term transfer.

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<sup>6</sup> Short-term capacity transfers can only occur between existing access holders because it requires the transferor and transferee to already have in place a current access agreement (based on the suite of SAAs in the 2014 DAU), rail operating plan, interface risk management plan and access interface deed (if applicable).

## 2.2 Stakeholders position

The QRC, Anglo American and Vale welcomed Aurizon Network's discussion paper on a short-term capacity mechanism as a positive step towards providing a flexible and a timely capacity transfer process.<sup>7</sup>

However, Anglo American and Vale questioned elements of the capacity transfer mechanism including the constraints imposed by Aurizon Network on the scope of the pre-approved capacity transfers, the scheduling timeframes imposed on transfers. Vale proposed a 12-month review period to encourage further assessment of the merits of the new mechanism.<sup>8</sup>

Asciano did not support the short-term mechanism proposed by Aurizon Network because it considered Schedule G of the 2010 Access Undertaking (and a variation also in the 2014 DAU) already provided a short-term capacity transfer mechanism.<sup>9</sup> Asciano provided detailed comments on Aurizon Network's short-term trading mechanism and these largely mirror the concerns raised by Anglo American and Vale.<sup>10</sup>

## 2.3 Legislative framework and QCA assessment approach

### 2.3.1 Legislative framework

Chapter 2 of our 2014 DAU draft decision, Aurizon 2014 Draft Access Undertaking—Draft Decision Volume I—Governance and Access, outlines our application of the QCA Act in making this draft decision to not approve the capacity transfer provisions in the 2014 DAU.

Section 138(2) of the QCA Act states that we may approve a DAU only if we consider 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.*

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<sup>7</sup> QRC, 2014 DAU sub. no. 66:1-2

<sup>8</sup> Vale, 2014 DAU sub. no. 64:1-4; Anglo American, 2014 DAU sub. no. 65:3-5; QRC, 2014 DAU sub. no. 66:1-2

<sup>9</sup> Asciano, 2014 DAU sub. no. 63:3.

<sup>10</sup> Asciano, 2014 DAU sub. no. 63:7

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.*

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.

Sections 138(2)(g) and 168A of the QCA Act require that we have regard to certain pricing principles, including that the price of access to the declared services should generate expected revenue for the service that is at least enough to meet the efficient costs of providing access to the service, including a return on investment commensurate with the regulatory and commercial risks involved.

We have also had particular regard to section 106(1)-(5) of the QCA Act which provides for a transfer of rights under an access agreement. This includes that:

- the user of a declared service under an access agreement may transfer all or part of the user's interest in the agreement
- a transfer must be made by written notice given to the access provider
- the notice must state the interest being transferred, the name and address of transferee and the date of the transfer
- the date of the transfer notice must not be earlier than the day the notice is given
- even if a user effects a transfer, the users' obligations under the access agreement continue, unless the transferee and other parties to the access agreement agree.

Finally, we note that the QCA Act does not set out a mechanism for a draft access undertaking to be amended by the proponent after it has been submitted. This means that the discussion paper proposed by Aurizon Network has been treated by us as a submission to take into account in the context of our consideration of the DAU 2014, rather than as an amendment to DAU 2014.

Given the important issues raised by this discussion paper, we have sought stakeholder views to enable us to make an informed decision in light of these various statutory requirements and considerations.

### 2.3.2 QCA assessment approach

The QCA Act describes matters we must have regard to, but does not prescribe the weightings for each matter. In relation to both Aurizon Network's drafting of the transfer provisions in the DAU 2014 and the discussion paper, we have applied weightings on each of the criteria in section 138(2) of the QCA Act to achieve what we consider a balanced approach. Our weightings are as follows:

- sections 138(2)(a), (d), (e), (g) and (h) should be given more weight because an effective capacity trading framework will promote the efficient use of the CQCN, facilitate competition in related markets, address the needs of access holders and access seekers in permitting greater flexibility in the use of access rights and lead to greater throughput and enhanced productivity
- section 138(2)(b) should be given weight. We consider Aurizon Network's legitimate business interests are satisfied through the provision of the regulated rate of return and any

relevant incremental operating and maintenance costs. However, we recognise Aurizon Network's commercial risk position can be adversely impacted in a transfer process and must be given some weight in our assessment of any capacity trading framework

- sections 138(2)(c) and (f) should be given no weight as they are not relevant to our assessment of the capacity trading framework.

A summary of our approach to assessing Aurizon Network's capacity transfer framework (both in the existing 2014 DAU and in Aurizon Network's discussion paper) is set out in the table below.

**Table 2 QCA's approach to the capacity transfer framework in the 2014 DAU**

<i>Assessment criterion</i>	<i>Rationale—matters for consideration</i>
<b>Object of Part 5 (and public interest)</b>	
Efficient use of the CQCN	Can users respond to daily, weekly and monthly production, supply chain, shipping and marketing demands?
	Does it enable users to efficiently use the provisions to increase their production profile without needing to trigger a costly expansion?
Competition in related markets	Does it provide an efficient, timely and flexible transfer process for access holders and access seekers seeking access to the CQCN?
Balanced framework	Does its implementation balance the interests of users and the legitimate business interests of Aurizon Network?
Non-discriminatory access	Does it provide non-discriminatory access to the transfer provisions for all access holders and access seekers (i.e. non coal traffics)?
	Does it provide an opportunity for Aurizon Network to discriminate in favour of its related above rail business?
Transfer guidelines	Does it align with the transfer guidelines in section 106 of the QCA Act?
<b>Legitimate business interests of Aurizon Network</b>	
Maximum allowable revenue	Does the capacity transfer framework affect Aurizon Network's guaranteed revenue stream and not impact on the recovery of all efficient costs and a regulated rate of return?
Commercial risk liability matrix	Does it adversely impact on Aurizon Network's commercial risk position in the SAA and in existing access agreements?
	Does it expose Aurizon Network to: <ul style="list-style-type: none"> <li>• a transferee's counterparty risk if it differs to the transferor's counterparty risk profile?</li> <li>• the risk of optimisation under clause 1.2(b)(ii) of Schedule E in the 2014 DAU?</li> <li>• the risk it is unable to schedule or operate a train service because it exceeds the daily loading and unloading limit of the relevant loading and/or in-loading facilities?</li> <li>• an increased risk and cost profile for access holders not party to the trade?</li> </ul>
<b>Interests of access holders and access seekers</b>	
User-friendly process	Is it simple to access, time responsive and provide users with scheduling and commercial certainty that transferred access rights will be delivered?
Information provision	Is information on available capacity on the network readily available and accurate for access holders and access seekers?
	Is it implemented through a transparent and accountable process?
No barriers to entry	Do any administrative and operational requirements underpinning a transfer

	process create unnecessary hurdles and prevent efficient and timely transfers from occurring?
Transfer allocation	Is the allocation of capacity subject to a transfer administered in an objective and auditable manner to ensure certainty in negotiation and contracting?
Ring fencing and dispute resolution protections	Is the allocation of capacity and information around transfers subject to the governance provisions of the undertaking?
<b>Pricing principles</b>	
Efficient pricing	Does the pricing of transfers generate the expected revenue for the transferor's service and is it at least enough to meet the efficient costs of providing access in accordance with the transferor's access agreement?
	Is the pricing of transfers representative of the cost of the transfer?
	Does the pricing of transfers impose costs (or increase access charges) on Access Holders who are not parties to the access agreements which are subject to a transfer?
Non-discriminatory pricing	Does the pricing of transfers allow Aurizon Network to favour its related above rail business?
	Is the pricing of transfers transparent for all access holders and access seekers?
Reduce costs or improve productivity	Will it result in the increased use of the CQCN by making access rights available to access holders and access seekers where those access rights would not otherwise have been consumed?
Allow efficient price discrimination	Does the pricing of transfers allow price discrimination to aid efficiency and avoid unnecessary expansions?

Our assessment approach considered the following issues:

- intent and scope of the existing transfer provisions in the 2014 DAU and those that have been subsequently proposed in the discussion paper
- pricing arrangements for capacity transfers
- implementation of transfers in the 2014 DAU.

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## 3 CAPACITY TRANSFER PROVISIONS

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### 3.1 Aurizon Network proposal

The following chapter provides an overview of the proposed short-term capacity transfer mechanism set out in Aurizon Network's discussion paper. The submitted draft of the 2014 DAU does not contain a short-term capacity transfer mechanism.

#### Short-term capacity transfer mechanism—pre-approved access criteria

Aurizon Network's discussion paper has proposed that it will, 'as-of-right',<sup>11</sup> facilitate short-term capacity transfers between existing access holders, where the proposed transfer meets all of the following access criteria:

- Train Service Entitlements (TSEs) utilise the same route
- TSEs have the same destination
- TSEs have the same reference tariffs applying to the TSEs in the transferor and transferee's access agreements<sup>12</sup>
- the transferee does not require additional TSEs for a complete network path from the transferee's origin
- the TSEs to be transferred would not exceed the load out capability at the transferee's mine
- the transfer involves a like-for-like train service description for the train services
- the transferee confirms a rail operator will operate the transferred capacity
- the transferee rail operator confirms sufficient resources to operate 100% of transferred TSEs plus its existing TSEs
- the transfer notice has been given to Aurizon Network not more than seven business days prior to the proposed transfer date and not less than 48 hours prior to the close of train orders for the weekly ITP in which the transfer will take place.<sup>13</sup>

Aurizon Network has proposed that it will consider transfer notices within the ITP period for train paths that have not already been scheduled. However, train services once scheduled in a weekly ITP cannot themselves be the subject of a short-term transfer.

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<sup>11</sup> An as-of-right transfer means access holders have an entitlement under the undertaking requiring Aurizon Network to administer the transfer without any need for Aurizon Network to approve the transfer.

<sup>12</sup> The transferor's and transferee's access agreements must apply to the same coal system as defined in the 2014 DAU.

<sup>13</sup> Aurizon Network's approved Capricornia System Rules (see p. 16) and proposed Draft Northern Bowen Basin System Rules (see p. 22) provide an overview of the weekly planning process for developing a weekly ITP. Specifically, access holders must submit ITP train orders to Aurizon Network by 14:00 on a Tuesday. In terms of short-term transfers, it would mean access holders must give Aurizon Network a transfer notice by 14:00 on the preceding Sunday and notice cannot be given to Aurizon Network more than a week before this Sunday deadline. This appears to indicate that Aurizon Network will not consider transfer notices lodged more than nine days from the date of transfer.

### Short-term capacity transfer mechanism—rapid capacity assessment transfers

Aurizon Network has proposed that it will undertake a rapid capacity assessment for any capacity transfers which meet all the pre-approved access criteria with one exception. That is, the transferee will use the transferor's mainline path but requires additional access rights in order to obtain a complete train path from the transferee's point of origin in order to connect with the transferor's mainline path.<sup>14</sup>

Aurizon Network has proposed including a margin of error in its favour so approval is subject to:

- a rapid capacity assessment on the availability of the additional access rights required to provide a complete train path from the transferee's point of origin
- it being satisfied the transferee's use of the additional access rights will not adversely affect any access holder's use of their existing access rights.

Where Aurizon Network receives more than one transfer notice that requires additional access rights which are mutually exclusive<sup>15</sup>, Aurizon Network has proposed that it will give priority to the transfer notice issued earliest in time.

Aurizon Network has also proposed that once the proposed rapid capacity assessment is in place and operating, it may be able to make incremental changes to its assessment process to allow more transfers requiring additional access rights to be approved within the ITP scheduling environment. Aurizon Network would provide access holders with more information on any improvements to its rapid capacity assessment as and when the advancements occur.

## 3.2 Stakeholders' position

Asciano supported the flexible use of access rights but did not support the short-term mechanism proposed by Aurizon Network. Asciano said that Schedule G already provides a basis for a short-term transfer mechanism.<sup>16</sup> Asciano recommended Schedule G should simply be amended to extend the flexibility to TSE transfers between access holders and ensure take or pay liabilities apply to any transferred TSEs.<sup>17</sup> Asciano suggested the late introduction of the short-term capacity transfer mechanism in December 2014 should not be allowed to prolong the proposed resolution of the 2014 DAU.<sup>18</sup>

The QRC, Anglo American and Vale supported the introduction of a flexible and timely capacity transfer mechanism to enable coal producers to overcome day-of-operations and other coal supply chain losses in order to maximise coal throughput.<sup>19</sup> The QRC and Vale also supported

<sup>14</sup> Such a capacity transfer is characterised as simply a transfer from a shorter distance mine to a longer distance mine on the same branch line of a system or on a different branch line of the same system but using the same network path on the main line.

<sup>15</sup> Two transfer requests may seek additional access rights on the same branch line which may not be able to service both transfer requests without adversely affecting existing access holders on that branch line.

<sup>16</sup> Asciano, 2014 DAU sub. no. 63:4-6. Schedule G allows an access holder to maintain its contractual priority where it maintains the monthly limit in TSE orders. This gives the access holder the flexibility to under- or over-order different origin destination TSEs within the monthly TSE limit. Whilst this flexibility exists within an access holder's portfolio of TSEs, Asciano believes less complex amendments to the 2014 DAU and SAAs could extend the TSE flexibility to transfers between access holders.

<sup>17</sup> Asciano, 2014 DAU sub. no. 63:3. Asciano also proposes a further enhancement to Schedule G would be to formally transfer the take or pay obligations associated with a scheduling transfer to align scheduling and contractual arrangements.

<sup>18</sup> Asciano, 2014 DAU sub. no. 63:3

<sup>19</sup> Anglo American, 2014 DAU, sub. no. 7:41-42, QRC, 2014 DAU, sub. no. 65:1 and Vale, 2014 DAU sub. no. 64:1



Aurizon Network's suggestion that further improvements be considered after the initial proposed mechanism has been tested.<sup>20</sup>

Anglo American and Vale<sup>21</sup> expressed concern that the access criteria and pricing protections underpinning the short-term transfer mechanism created too many barriers for them to use the short-term mechanism in an efficient, flexible and timely manner.

Stakeholders' issues with the short-term capacity transfer mechanism have been documented in the table below.

**Table 3: Stakeholder issues with the short-term capacity transfer mechanism**

<i>Issue</i>	<i>Stakeholder comments</i>
<b>Short-term capacity transfer timeframes</b>	
Notification of capacity transfers to occur not more than seven days prior to the lodgement of train orders in the ITPP	This requirement creates a barrier to short-term capacity transfers and the efficient use of network capacity, as: <ul style="list-style-type: none"> <li>many transfers will not be feasible if they cannot be applied for and confirmed well ahead of the transfer date<sup>22</sup></li> <li>the transferee may require transfer capacity to be confirmed for multiple week periods to allow for maximum use of peak production periods.<sup>23</sup></li> </ul>
Unused paths in ITP can be subject to transfers within the ITP period	This option has limited benefit as only parties with access to information of unused paths are train operators. This information should be made transparent to the customers of train operators as they incur the take or pay liability. <sup>24</sup>
Capacity transfer refusal notice at the close of orders for the ITP	A transfer refusal notice should be issued within 24 hours of the notice being given to provide greater certainty to the transferor and transferee. <sup>25</sup>
<b>'As-of-right' capacity transfer criteria</b>	
Transferred TSEs to have the same reference tariff	This is too restrictive and the mechanism should be broadened to ensure capacity can be transferred between coal systems to increase the total usage of network capacity. <sup>26</sup> To the extent different rail operators have different reference tariffs then it may favour one rail operator over another rail operator. <sup>27</sup>
Transferred TSEs to have common destination	Common destination should include an alternative terminal in the same port precinct as the original TSE being transferred. <sup>28</sup>
Load out capability of transferee mine	It is not appropriate for Aurizon Network to determine whether sufficient load out capability exists to accommodate the capacity transfer. <sup>29</sup>
Rail operator to confirm it has resources sufficient to deliver 100% of short-term access rights plus existing	This requirement exceeds the level of commitment which would exist under many haulage agreements and creates a barrier to any capacity transfers where a transferee uses a different rail operator to the transferor. <sup>30</sup>

<sup>20</sup> QRC, 2014 DAU, sub. no.66:1 and Vale, 2014 DAU sub. no. 64:4

<sup>21</sup> Anglo American, 2014 DAU, sub. no. 65 and Vale, 2014 DAU, sub. no. 64

<sup>22</sup> QRC, 2014 DAU sub. no. 66:2; Vale, 2014 DAU sub. no. 64:3

<sup>23</sup> Anglo American, 2014 DAU sub. no. 65:3; Vale, 2014 DAU sub. no. 64:3

<sup>24</sup> Vale, 2014 DAU sub. no. 65:3

<sup>25</sup> Vale, 2014 DAU sub. no. 65:3

<sup>26</sup> Anglo American, 2014 DAU sub. no. 65:3

<sup>27</sup> Asciano, 2014 DAU sub. no. 63:8

<sup>28</sup> Anglo American, 2014 DAU sub. no. 65:4; Asciano, 2014 DAU sub. no. 63:7

<sup>29</sup> Anglo American, 2014 DAU sub. no. 65:7

<sup>30</sup> QRC, 2014 DAU sub. no. 66:1

<i>Issue</i>	<i>Stakeholder comments</i>
access rights.	
Like-for-like train service description	<p>It is unclear what this restriction means. The preference is to reference need for the transferee's train service to be able to operate within a train path matching the train service of the transferor. There should be no reference to mode of traction, size of train or other items that do not impact on its operation within a train path.<sup>31</sup></p> <p>To the extent different train operators have different train service descriptions (related to slightly different train consists) this restriction may favour one train operator over another train operator.<sup>32</sup></p>
Scheduled train services cannot be subject to a short-term transfer	There should be no lockdown of any services until the 72/48 hour scheduling period, with services outside that period being able to be altered or transferred. <sup>33</sup>
<b>Rapid capacity assessment process</b>	
Margin for error in Aurizon Network's favour to reject a capacity transfer request	<p>Aurizon Network should have no discretion to refuse transfers. Only objective criteria should be applied.<sup>34</sup></p> <p>The lack of transparency of available capacity and baseline capacity in the CQCN means the margin for error being applied is a black box and imposes no accountability on Aurizon Network to facilitate short-term transfers.<sup>35</sup></p> <p>Aurizon Network should publish an exhaustive list noting the factors it will take into account when determining whether capacity is available to effect a transfer.<sup>36</sup></p> <p>With effective dynamic modelling it should be a relatively simple process for Aurizon Network to determine if capacity is available to be utilised.<sup>37</sup></p> <p>There should be a predetermined capacity assessment based on a regular cycle to consider the changing demand over the year and reflect the short period being considered under the transfers. This would increase transfer flexibility and increase throughput.<sup>38</sup></p>
<b>Governance</b>	
Review period.	There should be a transfer review period after 12 months in operation to determine if the mechanism is achieving the goals of increased flexibility and increased throughput. <sup>39</sup>
Dispute resolution process	Relevant parties should have access to dispute resolution if required where time permits. <sup>40</sup>
Vertical integration	<p>To mitigate concerns the mechanism may unfairly favour Aurizon Holding's above rail business, Asciano seeks confirmation on whether:</p> <ul style="list-style-type: none"> <li>ring-fencing, discrimination and confidentiality provisions of the undertaking will apply</li> <li>independent audits will occur, with the QCA having appropriate powers to remedy any breaches.<sup>41</sup></li> </ul>

<sup>31</sup> Vale, 2014 DAU sub. no. 64:2

<sup>32</sup> Asciano, 2014 DAU sub. no. 63:9

<sup>33</sup> Anglo American, 2014 DAU sub. no. 65:11

<sup>34</sup> Asciano, 2014 DAU sub. no. 63:11-12

<sup>35</sup> Anglo American, 2014 DAU sub. no. 65:5

<sup>36</sup> Anglo American, 2014 DAU sub. no. 65:5

<sup>37</sup> Anglo American, 2014 DAU sub. no. 65:5

<sup>38</sup> Vale, 2014 DAU sub. no. 64:1-2

<sup>39</sup> Vale, 2014 DAU sub. no. 64:1-4

<sup>40</sup> Anglo American, 2014 DAU sub. no. 65:10

<sup>41</sup> Asciano, 2014 DAU sub. no. 63:10

### 3.3 QCA analysis and draft decision

Our draft decision is to refuse to approve the existing drafting of the 2014 DAU insofar as it relates to the short-term capacity transfer mechanism. We do so because the submitted 2014 DAU does not contain a short-term capacity transfer mechanism and we consider that short-term transfer provisions should be included.

In this context, we acknowledge Aurizon Network's commitment to working with its stakeholders to develop a short-term capacity transfer mechanism, as part of the 2014 DAU process.

However, we consider that the short-term capacity transfer mechanism Aurizon Network has proposed for inclusion in the 2014 DAU is also not sufficient, for the reasons set out below. We do consider though that Aurizon Network's proposal would be sufficient if various amendments that we have identified were made.

We consider that our proposed amendments would result in a flexible and efficient transfer mechanism in the 2014 DAU. This is discussed below in terms of:

- appropriateness of the capacity transfer provisions
- scope of participation
- access criteria to trigger capacity transfers
- capacity transfer timelines
- transfer governance process.

#### 3.3.1 Appropriateness of the capacity transfer mechanism

Our 2014 DAU draft decision identified two key ingredients to the efficient operation, use of and investment in the CQCN:

- greater transparency and understanding of the capacity of the CQCN within the context of the mine–rail–port supply chain.<sup>42</sup> We proposed that Aurizon Network undertake a baseline capacity assessment to define the total capacity<sup>43</sup> in each coal system, available capacity, and when coal systems should be expanded
- a robust investment stage gate process so access holders and access seekers can fully understand the standard, scope, cost and pricing underpinning any expansion to the network.<sup>44</sup>

Against this background, we agree with Aurizon Network that a more flexible and timely capacity transfer process could lead to the efficient operation of the network and increase asset utilisation by making TSEs available to access holders and access seekers where they otherwise would not have been used.<sup>45</sup> Better use of the existing network could postpone the need for expansions to the network, as access holders and access seekers can be accommodated by the more flexible use of train paths on the existing infrastructure.

This outcome is consistent with the object of the third party access regime in section 69E of the QCA Act. We therefore consider the establishment of a flexible and timely transfer process in

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<sup>42</sup> QCA 2015 (j): p. 194.

<sup>43</sup> QCA 2015 (j): Volume V. Existing, planned and available capacity as defined in Part 12.

<sup>44</sup> QCA 2015 (j): pp. 248-249.

<sup>45</sup> Aurizon Network 2014 (d): p. 3.

combination with greater transparency and understanding of the capacity dynamics of the CQCN and end-to-end supply chains, will promote the more efficient use of the CQCN.

#### Draft decision

**3.1 Our draft decision is to refuse to approve the existing DAU 2014 as it does not incorporate a flexible and timely transfer process in Part 7 of the 2014 DAU. We consider it appropriate that the existing 2014 DAU should be amended to include such a process in the manner indicated in our proposed drafting attached to this Decision.**

### 3.3.2 Scope of participation

Aurizon Network's proposed short-term transfer mechanism only applies to coal access holders.

We consider the application of any transfer provisions should be applicable to all access holders and access seekers in the CQCN on the basis that:

- non-coal access holders should have use of the transfer provisions in order to compete in their own markets and respond to market variations
- access seekers should have access to the transfer provisions to provide a more flexible and timely entry into their upstream or downstream markets.

We consider any preclusion of access seekers and non-coal users would be contrary to the object of the third party access regime in the QCA Act and inconsistent with section 138(2)(d) and (e) of the QCA Act. We consider all access holders and access seekers should be given the opportunity to access the network to service their respective markets through the transfer provisions and without unnecessarily triggering a costly expansion of the CQCN.

At the same time, we understand Aurizon Network's position that a transferor and transferee of TSEs must be access holders, with all relevant approvals in place to use the transferred TSEs and operate train services from the transferee's point of origin to destination.<sup>46</sup> We accept this criterion is essential for Aurizon Network to comply with the safety, accreditation and operational obligations under the Rail Safety Act. If a transferee is an access seeker, then the transferee should be aware that any approved transfer of access rights could not be scheduled by Aurizon Network until the access seeker had executed an access agreement in accordance with Parts 4 and 7 of the access undertaking. We consider this requirement reflects a legitimate business interest of Aurizon Network and is a consideration to which the QCA must give weight under section 138(2)(b) of the QCA Act.

Our draft decision is that Aurizon Network should extend the flexible and timely transfer provisions that it has proposed in its discussion paper for Part 7 of the 2014 DAU to all users of the CQCN.

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<sup>46</sup> This means the transferee must have an operating plan, interface risk management plan, access interface deed (if applicable) and a train operations agreement where access rights are held in an end user access agreement.

### Draft decision

**3.2 Our draft decision is that Aurizon Network's proposal, in respect of the scope of participation in transfers, is not an acceptable basis for an amendment to the 2014 DAU following our refusal to approve the 2014 DAU. Instead we consider it appropriate for Aurizon Network to amend the 2014 DAU to:**

- (a) give all coal and non-coal users of the network the opportunity to access flexible and timely transfer provisions in the 2014 DAU.**
- (b) where a transferee is not an access holder, the transferee must execute an access agreement, including all relevant approvals, before the transfer can be scheduled by Aurizon Network.**

### 3.3.3 Access criteria

In reviewing the short-term transfer mechanism proposed in Aurizon Network's discussion paper and the transfer provisions in the 2014 DAU it is clear that Aurizon Network's treatment of each transfer notice is dependent on whether it has to undertake a detailed capacity assessment to identify if the capacity exists to order to give effect to the transfer notice.<sup>47</sup>

We understand that a detailed capacity assessment is required for complex transfer notices where a transferee may require additional access rights to complete a network path from origin to destination. It may also require Aurizon Network to consider cross system capacity issues and pricing implications for transfers involving more than one reference tariff.

By identifying two specific types of transfer notices which can be administered in a more timely manner than provided for in the three-month notice period of the transfer provisions in the 2014 DAU,<sup>48</sup> Aurizon Network has made the access criteria it would apply to the approval or refusal of a transfer notice more readily transparent to all access holders and access seekers. On this basis we consider there to be three categories of transfers:

- transfers which meet the **pre-approved access criteria** ('access criteria A') will occur as an 'as of right' transfer and do not require Aurizon Network assessment
- transfers which meet the specified access criteria for a **rapid capacity assessment** ('access criteria B') and which will be approved by Aurizon Network if it is satisfied existing access rights will not be adversely affected by the transfer
- transfers which do not meet either access criteria A or B and require a **detailed capacity assessment** ('access criteria C') before Aurizon Network can respond to approve or refuse the transfer notice.<sup>49</sup>

We consider the provision of access criteria for capacity transfers is consistent with the object of the third party access regime in the QCA Act and section 138(2)(d) and (e) of the QCA Act. Greater transparency and accountability surrounding Aurizon Network's treatment of different transfers would identify potentially successful transfer opportunities, demystify Aurizon

<sup>47</sup> Aurizon Network 2014 (d): p. 6. Aurizon Network identifies that the major time factor in processing transfers lies in the need to assess the available capacity of the CQCN to determine if the requested access rights can be provided.

<sup>48</sup> The 2014 DAU stipulates that a transfer notice must be lodged a minimum of three months from the transfer date for it to be considered by Aurizon Network.

<sup>49</sup> The intention of Aurizon Network is that these transfer notices would be dealt with in accordance with the transfer provisions in its 2014 DAU.

Network's administration of the transfer provisions and promote the efficient use, operation of and investment in the CQCN.

#### Access criteria A—pre-approved access criteria

For a transfer to occur 'as of right', we accept that the transfer must reflect a one-for-one transfer of contracted TSEs and the transfer must have no capacity impact on the use of the CQCN by any other access holder.

We have considered Aurizon Network's proposed list for inclusion in access criteria A and we consider the list is too detailed in scope and application and creates unnecessary hurdles for a transferor and transferee to meet in order to access flexible and timely transfers.

We consider the only requirements needed to give effect to a one-for-one transfer of TSEs are as follows:

- transferred TSEs must utilise the same mainline path
- transferred TSEs must exit at the same destination
- transferee must not require additional TSEs for a complete network path from the transferee's origin
- transferee must confirm a rail operator will operate the transferred capacity
- transferee must confirm the rail operator's train service will be a like for like train service.

We consider that if a transfer can fulfil the above access criteria, it represents a one-for-one transfer of access rights and the rail infrastructure capacity exists to give effect to the transfer without adversely affecting the contracted rights of existing access holders. We consider this outcome addresses the legitimate business interest test in clause 138(2)(b) of the QCA Act because it ensures that Aurizon Network can facilitate the transfer and still meet its contractual obligations to deliver contracted services to all of its access holders.

We understand that some stakeholders have raised an issue with the criterion restricting the destination of the transfer to the same destination. We understand the stakeholder's reasoning that some export port precincts have more than one coal unloading destination and the potential exists to transfer between these unloading destinations.

However, in the context of a one-for-one transfer of TSEs, we consider the transferred TSEs should only require the use of the rail infrastructure that the transferor has contracted in its access agreement. It would not be considered as pre-approved under access criteria A if the transferee requires the use of additional access rights (access to rail infrastructure that is not used by the transferor) to complete a network path from the transferee's origin to destination. We have therefore accepted this criterion as consistent with section 138(2)(b) of the QCA Act.

The second limb of our consideration of section 138(2)(b) of the QCA Act relates to Aurizon Network's commercial risk liability position pre- and post-transfer. We note Aurizon Network's reference to the following criteria aims to address its commercial risk concerns:

- transferee load out capability—if a transferred TSE is not capable of being scheduled in the daily plan, ITP or MTP, the transferee could trigger Aurizon Network Cause provisions to avoid take or pay liability for unused transferred TSEs
- sufficient resources (confirmed by the rail operator) to operate 100% of transferred TSEs plus existing TSEs—Aurizon Network requires certainty the TSEs can be used by the transferee and avoid transfers being undertaken to game take or pay provisions in their access agreement

- like-for-like train service description—train services for the transferred access rights do not vary from the nature or type of the transferor's train services
- same reference tariff—the transferred TSEs must be priced on the same reference tariff applying to the transferor's TSEs.

#### Transferee load out capability

Aurizon Network has advised the calculation of TSEs, coupled with a train service description, is a time-based calculation which includes time at a loading facility, sectional run times, crewing time, provisioning time and time at an unloading facility. This calculation, together with a mine recharge rate, is used by Aurizon Network to determine a particular load point capability, or number of trains that are able to be loaded in a 24-hour period. Aurizon Network then extrapolates this calculation to identify the daily, weekly or monthly cap for TSEs at each load point in each coal system.

We consider the definition of Aurizon Network Cause in the 2014 DAU draft decision deals with some of Aurizon Network's commercial risk concerns as it includes an exemption if Aurizon Network can demonstrate that the inability to schedule or operate a train service is attributable to the unavailability of the relevant access holder's loading facility or the unavailability of the destination's unloading facility.

However, to put the matter beyond doubt we would consider amendments to Schedule 2 of the SAA to set down the maximum number of daily TSEs which are able to be accommodated at the nominated loading facility and unloading facility. If a transferee is not able to use the transferred TSEs because the transferee's train orders exceed the daily loading limit, then Aurizon Network can demonstrate its failure to schedule or operate a train service is not due to Aurizon Network Cause.

We consider this proposed amendment to Schedule 2 of the SAA would assist in clarifying the circumstances when Aurizon Network can refuse to schedule a transferred TSE.

#### Rail operator to confirm sufficient resources to operate 100% of transferred TSEs

We do not consider this a necessary requirement to give effect to a one-for-one transfer of TSEs.

We are of the view that the issue of whether a rail operator has sufficient resources to deliver the transferred TSEs is a contractual issue between the transferee and its nominated rail operator. The risk that a rail operator cannot deliver transferred TSEs is the transferee's risk<sup>50</sup> and the transferee is incentivised to not have this occur because it is exposed to the take or pay liability of any unused transferred TSEs.<sup>51</sup>

To require a higher contractual hurdle for transfers of TSEs than Aurizon Network requires for contracted TSEs creates a barrier to entry into the transfer market and is not consistent with the object of the QCA Act.

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<sup>50</sup> The ability for the transferee to manage this risk sits in the haulage contract it has with the rail operator which is subject to commercial negotiation where both parties will determine how best to allocate this risk.

<sup>51</sup> This contract risk sits in all haulage contracts between customers and rail operators. Aurizon Network does not have a line of sight into the haulage contracts of rail operators operating on the CQCN, it is not involved in the negotiation of haulage contracts between customers and rail operators and so Aurizon Network cannot know how this issue is managed for the use of contracted TSEs.

### Like-for-like train service

In respect of Aurizon Network's reference to a 'like-for-like' train service, we are not clear how this term is to be interpreted in Aurizon Network's discussion paper. To address this issue, we have required that the Train Services for the transferred access rights do not vary from the nature or type of the transferor's access rights. This would ensure that a cyclic train service cannot be transferred to a timetabled train service or vice versa.

### Same reference tariff

Aurizon Network's remaining criteria for the transferor and transferee to have the same reference tariff applying to the transferred TSEs is considered in section 1.4 of this draft decision. Section 1.4 of this draft decision also deals with the take or pay gaming pricing protections proposed by Aurizon Network in the discussion paper.

### Draft decision

**3.3 Our draft decision is that Aurizon Network's proposal in respect of the transfer criteria to underpin 'as of right' transfers would not an acceptable basis for an amendment to the 2014 DAU following our refusal to approve the 2014 DAU. Instead we consider it appropriate for Aurizon Network to amend the 2014 DAU in the manner indicated in our proposed draft so that:**

- (a) Access holders can transfer 'as of right' if the transfer meets access criteria A:**
  - (i) transferred TSEs utilise the same mainline path**
  - (ii) transferred TSEs exit at the same destination**
  - (iii) transferee does not require additional access rights to complete the train path from the transferee's origin**
  - (iv) transferee can confirm a rail operator will operate the transferred capacity**
  - (v) transferee train service is operated on a like-for-like basis compared to the transferor's train service.**
- (b) Schedule 2 of the SAA includes a reference to the maximum number of daily TSEs which are able to be accommodated at the nominated loading and unloading facilities.**

### Access criteria B—rapid capacity assessment

We do not consider there is a need to strictly apply all the access criteria A for a transfer to qualify for a rapid capacity assessment under access criteria B. This is because Aurizon Network has full discretion to approve or refuse transfers which fulfil access criteria B.

We consider Aurizon Network's restrictions on transfers, where it retains full discretion to approve a transfer, are not consistent with the object of the QCA Act. Such restrictions create unnecessary market hurdles for a transferee and transferor, as it could affect getting their transfer considered in a flexible and timely manner. It will also limit the ability for transfers to be used by access holders and access seekers to respond to variations in the demand and supply of their end market.

We consider that a rapid capacity assessment can be achieved where the transferred TSEs will use the same mainline path in the same direction of traffic flow. This means that the transfer must occur in the same system and, if it requires additional capacity on the mainline of that system, not affect the capacity of any other access holder. In these circumstances, the only



capacity issues that need to be subject to a rapid capacity assessment are the physical constraints on the branch lines which lead into the mainline path, the physical constraints associated with a point of origin further out on a mainline path than the transferor's point of origin, and/or the physical constraints on the rail infrastructure which lead from the mainline path to the different unloading facilities in a port precinct.

We consider our proposed access criteria B to be consistent with sections 69E and 138(2) of the QCA Act as it would:

- enable more transfer requests to be processed
- increase transfer flexibility amongst transferors and transferees
- improve the timeliness of the transfer market
- result in the use of TSEs that would otherwise not have been consumed by the transferor.

We also consider that by making access criteria B more accessible to access holders and access seekers, Aurizon Network will be able to more readily build up a database of its rapid capacity assessment findings and responses to notices which will, in turn, create precedent transfer rules to apply to future transfer notices.

Our approach is consistent with Aurizon Network's intent to develop and refine its rapid capacity assessment process over time to improve the determination of available capacity for the purposes of facilitating timely transfers.

Our proposed baseline capacity review and amendments to the network development plan which we outlined in our 2014 DAU draft decision<sup>52</sup> will greatly assist Aurizon Network in processing Access Criteria B transfers. Once completed, the proposed baseline capacity review will identify the existing capacity of the CQCN, comprising both committed and available capacity within each coal system, and stakeholders will readily see the different transfer options which may exist in each system.

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<sup>52</sup> QCA 2015 (j): pp. 202–210.

### Draft decision

**3.4 Our draft decision is that Aurizon Network's proposal, in respect of the transfer criteria for access holders wishing to access a transfer which is subject to a rapid capacity assessment, is not an acceptable basis for an amendment to the 2014 DAU following our refusal to approve the 2014 DAU. Instead we consider it appropriate for Aurizon Network to amend the 2014 DAU in the manner indicated in our proposed draft so that:**

- (a) access criteria B differ from access criteria A in the following way: while transferred TSEs use the same mainline path as the transferor, ancillary access rights required at the point of origin and/or at the destination port precinct are to be identified and subject to capacity assessment.**
- (b) Aurizon Network will undertake a rapid capacity assessment on transfer notices which meet access criteria B.**
- (c) Aurizon Network will refuse an access criteria B transfer request if the rapid capacity assessment shows that existing access holders' access to the network will be adversely affected by the transfer.**

### Access criteria C—other transfers

Aurizon Network identified that access criteria C transfer notices require detailed capacity assessments to determine whether sufficient capacity exists to give effect to the transfer.

In its discussion paper, Aurizon Network identified that these transfer notices will continue to be managed under the general transfer provisions in Part 7 of the 2014 DAU. In the 2014 DAU, there is a minimum three-month notice period for access criteria C transfers to be lodged with Aurizon Network. The three-month transfer notice period is consistent with the transfer provisions contained in previous undertakings.<sup>53</sup>

We consider that, given the advances in rail simulation modelling undertaken over the last six years, a three-month timeframe is reasonable to accommodate the worst case response scenario in the event of a very complex transfer. We do not consider the proposed three-month timeframe should therefore be applied generically to all access criteria C transfer notices and have dealt with this issue in our discussion of the capacity transfer timelines below.

#### 3.3.4 Capacity transfer timelines

It is our view that capacity transfers should not be subject to fixed regulatory timelines. Rather, the timing for Aurizon Network to respond to a transfer notice should be dependent on the scale of capacity assessment required to consider whether the requested transfer can be provided without adversely affecting any existing access rights. This means that Aurizon Network transfer response timeframes should align to the nature of the transfer notice and the nature of the infrastructure constraints which will need to be considered by Aurizon Network before approving or refusing the transfer notice.

We consider that the timeframes for notice lodgement and Aurizon Network's response be aligned to the efficient timeframes required for Aurizon Network to determine whether sufficient capacity exists to give effect to the transfer notice. This outcome is consistent with the

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<sup>53</sup> UT1, UT2 and UT3

QCA Act and provides an objective and verifiable process for establishing the reasonable timeframes required for Aurizon Network to consider and respond to transfer notices.

#### Access criteria A and access criteria B transfers and response times

We do not consider the timing for transfers or Aurizon Network's proposed response times to be efficient or reasonable. For example, the requirement for a transfer notice to be issued 'not more than seven business days and not less than 48 hours prior to the close of train orders' for the ITP appears unnecessarily restrictive and creates barriers to the flexible use of transfers by access holders. It is unclear to us why Aurizon Network has proposed these restrictive time limits, particularly by prohibiting transfer notices from being lodged in advance of the ITP scheduling process.

We consider that if an access criteria A transfer of TSEs can be approved as-of-right in the ITP then it should similarly be eligible for approval over the longer term in the MTP. Moreover, if Aurizon Network has received advance notice of the access criteria B transfers which may occur in the ITP and MTP, then it will deliver efficiency benefits for all parties to the transfer, including

- allowing Aurizon Network to undertake the rapid capacity assessment, if required, well in advance of the planned transfer
- providing contractual certainty to all parties that the transfer has been approved
- providing scope for the transferee to align a mine's operational capability to its use of the transferred TSEs
- streamlining Aurizon Network's administration of transfers in the ITP process.

In our view the only timing limitation on these transfers should be with respect to Aurizon Network's ability to administer the transfer and, if required, conduct a rapid capacity assessment and respond to the transfer notice. In the UT3 End User Access Agreement (EUAA) there is a two-business-day period within which an end user can switch between rail operators for the use of contracted TSEs. We have similarly proposed a two-business-day turnaround timeframe in our 2014 DAU draft decision on the 2014 DAU standard access agreement.<sup>54</sup>

We consider that two business days would be a reasonable timeframe for Aurizon Network to administer an access criteria A transfer and to advise the parties to an access criteria B transfer that a rapid capacity assessment is required. The time for Aurizon Network to complete a rapid capacity assessment and approve or refuse to approve an access criteria B transfer should not exceed two business days. This means an access criteria B transfer:

- will occur with two business days notice from the date of transfer
- could occur with four business days notice from the date of transfer.

If the transfer notices are lodged after the close of train orders for an ITP and during a period covered by a current ITP, then Aurizon Network can still give effect to the transfers by scheduling any additional train services or vary existing train services in accordance with the Network Management Principles.

#### Access criteria C transfers and response times

We do not consider the three-month notice period represents the most efficient process because the timeframes required to conduct a detailed capacity assessment will vary dependent on the nature, scope and capacity impact of each transfer. We consider the

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<sup>54</sup> QCA 2015 (j): Volume V-VI, clause 4.5 of proposed Access Agreement Coal.

timeframes for detailed capacity assessments can be truncated for straightforward transfers and lengthened for more complex transfers. However, we do agree with Aurizon Network that a detailed capacity assessment should be completed within a maximum three-month limit.

We therefore propose that Aurizon Network should respond to a notice for an access criteria C transfer within two business days of lodgement, with details on the scope and timing of the detailed capacity assessment required before Aurizon Network can provide a final response. The time for Aurizon Network to complete a detailed capacity assessment and respond to an access criteria C transfer notice should not exceed three months

### Draft decision

**3.5 Our draft decision is that Aurizon Network's proposal, in respect of the capacity transfer timeframes, is not an acceptable basis for an amendment to the 2014 DAU following our refusal to approve the 2014 DAU. Instead we consider it appropriate for Aurizon Network to amend clause 7.4.2 of the 2014 DAU in the manner indicated in our proposed draft so that:**

- (a) all transfer notices must be lodged with Aurizon Network not fewer than 48 hours prior to the transfer date**
- (b) Aurizon Network must respond to the transfer notice not more than two business days after the transfer notice is lodged and**
  - (i) schedule transfers under access criteria A**
  - (ii) either advise access criteria B transfers that a rapid capacity assessment is required, or**
  - (iii) advise access criteria B transfers that a detailed capacity assessment is required and outline the scope and timing before a response to the notice can be provided**
- (c) where Aurizon Network has to undertake a rapid capacity assessment to respond to a transfer notice, Aurizon Network must approve or refuse the transfer within four business days of the notice being lodged**
- (d) where Aurizon Network has to undertake a detailed capacity assessment in order to respond to a transfer notice, Aurizon Network must approve or refuse the transfer within three months of the notice being lodged**
- (e) the information that should be included in an Aurizon Network transfer response contains**
  - (i) the result of the capacity assessment**
  - (ii) an indication of whether the transfer can be approved or refused**
  - (iii) reasons for refusing the transfer request.**

### 3.3.5 Transfer governance process

We consider the success of the transfer provisions will be heavily dependent on Aurizon Network's use of its discretion to refuse a transfer under access criteria B and access criteria C. To avoid potential concerns regarding Aurizon Network's use of its discretionary power, we propose that Aurizon Network establish a regulatory governance process to monitor transfers to ensure Aurizon Network uses its transfer discretion reasonably and in a non-discriminatory manner consistent with the QCA Act.

The governance process we propose to apply to all transfer applications will require Aurizon Network to maintain a register of:

- transfer notices lodged with Aurizon Network
- Aurizon Network's responses to transfer notices and the timeframes taken.

The compilation of this information will provide objective data to assess whether the transfer provisions in the undertaking are facilitating flexible and timely transfers, maximising the use of contracted TSEs in the CQCN and increasing throughput volumes. It will also provide observable data on how Aurizon Network administers its rapid capacity assessment and uses its discretion to refuse an access criteria B transfer. Such information can then be relied on in the event there are access disputes regarding Aurizon Network's use of its discretionary power in the transfer process.

We propose that Aurizon Network provide us with a copy of its transfer register on a quarterly basis as part of its ongoing reporting obligations under the undertaking.

We also propose that Aurizon Network conduct an annual review of the transfer process, in consultation with stakeholders, with the first review to be 12 months from the approval of the undertaking. The results of the annual review and any proposed amendments to the transfer provisions in the undertaking should be submitted to the QCA for consideration and approval.

Our proposed approach is consistent with section 138(2)(d) and (e) of the QCA Act and will increase the transparency and accountability of Aurizon Network's administration of the transfer process. It will also engender confidence the transfer process is being managed on a non-discriminatory basis and does not allow Aurizon Network to favour its above-rail operator over other rail operators.

#### Draft decision

**3.6 Our draft decision is that Aurizon Network's proposal, in respect of the transfer criteria for access holders wishing to access a transfer which is subject to a rapid capacity assessment, is not an acceptable basis for an amendment to the 2014 DAU following our refusal to approve the 2014 DAU. Instead we consider it appropriate for Aurizon Network to amend the 2014 DAU in the manner indicated in our proposed draft so that:**

- (a) Aurizon Network will keep a register of all transfer notices, its responses and the timeframes taken to respond.**
- (b) Aurizon Network will provide a quarterly update of the transfer register to the QCA as part of its regulatory reporting obligations under the 2014 DAU.**
- (c) Aurizon Network will annually review, in consultation with stakeholders, the transfer provisions in the undertaking and submit the results of the annual review, and any proposed amendments to the transfer provisions in the undertaking, to the QCA for approval.**

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## 4 PRICING ARRANGEMENTS TO APPLY TO CAPACITY TRANSFERS

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### 4.1 Aurizon Network proposal

Aurizon Network defined the transfer fee as the loss of revenue which arises when a longer haul path is transferred to a shorter haul. Aurizon Network has proposed a zero transfer fee for short-term transfers with any revenue difference amongst access holders being socialised within the coal system in which the transfer occurs.<sup>55</sup> Aurizon Network has justified this position with reference to the:

- revenue cap protections in the undertaking which shield Aurizon Network from any revenue impact arising from differences between projected and actual coal volumes
- existing UT3 capacity transfer provisions which have a zero transfer fee for transfers with a term of less than two years
- adverse impact that a transfer fee would have on Aurizon Network's ability to quickly process a short-term transfer.

Aurizon Network has proposed that the short-term transfers will be managed in accordance with the access agreements held by the transferor and transferee. This means when a short-term transfer occurs, Aurizon Network will:

- amend the transferor's and transferee's access agreements by reducing or increasing their relevant monthly TSEs (access charges and associated take or pay liabilities) by the number of TSEs being transferred<sup>56</sup>
- send out monthly invoices to all access holders based on the train services railed under their access agreement
- levy take or pay, if triggered, based on the unused TSEs in access agreements.<sup>57</sup>

Any over- or under-recovery in Aurizon Network's annual system-allowable revenue would be corrected through the 2014 DAU's annual revenue cap adjustment process.

Aurizon Network has identified that if it becomes subject to any additional costs in administering the short-term transfer mechanism which are not already included in the calculation of its UT4 approved maximum annual allowable revenue, then it will consider future amendments to the undertaking to address the additional costs. Aurizon Network has proposed two alternatives through which it could receive compensation for additional costs:

- socialising the cost between all access holders via a Schedule F revenue adjustment, or
- imposing a direct charge on access holders completing a short-term transfer.

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<sup>55</sup> Aurizon Network has advised that its reference in the discussion paper to the same reference tariff applying to a short term transfer was used to describe a capacity transfer that takes place in the same coal system and for which the same system reference tariff would apply to the transfer.

<sup>56</sup> Existing contracts will need to be amended to allow this to occur. This is dealt with in s.1.5 of this Draft Decision.

<sup>57</sup> There is no need to amend Aurizon Network's current billing processes.

### Transfer pricing protections

Aurizon Network has proposed to adopt some transfer rules to prevent transferees and transferors from gaming the short-term capacity mechanism to the cost detriment of other access holders.

Firstly, to prevent access holders from gaming the take or pay liabilities for different origins within a coal system, Aurizon Network has proposed that:

- the proposed capacity transfer must not exceed 25 per cent of the TSEs in an access holder's access agreement for the relevant origin in any financial year
- the proposed transferee must have a genuine intention or ability to utilise the TSEs by reference to whether
  - the transferee has utilised 85 per cent of any TSEs previously transferred to it in the same year under a short-term transfer provision in its access agreement
  - the transferee, over the previous three months, has fully utilised all contracted TSEs held in the access agreement for the origin and destination specified in the transfer notice.

Secondly, to prevent access holders from gaming the take or pay liabilities contained in the different generations of access agreements,<sup>58</sup> Aurizon Network has proposed that:

- where a transferor and transferee have multiple access agreements with the same origin destination TSEs, then the origin destination TSEs will be grouped into separate tranches based on the date of execution
- the transfer of nominated TSEs by a transferor will be deemed to be drawn from the transferor's earliest executed access agreement in the sequence
- the receipt of nominated TSEs by a transferee will be deemed to be drawn from the transferee's most recently executed access agreement in the sequence.

This proposal ensures that a UT1 access holder cannot use the transfer process to transfer the differential UT1 take or pay benefits to a transferee. Instead, a transferee can only receive the transferred TSEs in accordance with the take or pay obligations in the transferee's most recently executed access agreement. This will accelerate the phasing out of UT1 access agreements by ensuring transferees pay any take or pay liability on unused transferred TSEs at the rate set by their most recent access agreement.

## 4.2 Stakeholders' position

Asciano, Anglo American and Vale supported the proposed zero transfer fee for short-term transfers but raised concerns with the pricing protections to be applied by Aurizon Network to prevent any gaming of the transfer pricing arrangements.<sup>59</sup>

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<sup>58</sup> For example, UT1 and UT2 access agreements contain specific take or pay provisions applying to TSEs while UT3 access agreements provide for take or pay provisions as set by the access undertaking in force at the time take or pay is triggered.

<sup>59</sup> Asciano, 2014 DAU sub. no. 63:12; Vale, 2014 DAU sub. no. 64:3; Anglo American, 2014 DAU sub. no. 65:6

**Table 4: Stakeholder issues with Aurizon Network's short-term transfer pricing arrangements**

<i>Issue</i>	<i>Stakeholders' comments</i>
<b>Pricing of short-term transfers</b>	
Any additional administration costs incurred will be recovered	Should Aurizon Network identify it is subject to additional costs for administering short-term transfers then any cost recoveries should be substantiated before they are charged to access holders. <sup>60</sup>
<b>Pricing protections</b>	
Transferee has a genuine intention or ability to use the transferred capacity.	<p>Gives Aurizon Network an inappropriate and subjective decision making power.<sup>61</sup></p> <ul style="list-style-type: none"> <li>• Past use of capacity is not a determinant of future use of capacity given lack of utilisation could be due to mine production variability, cargo assembly port operations or a number of other factors in the coal supply chain<sup>62</sup></li> <li>• The 85% threshold is not supported as it could undermine the transfer mechanism and is only marginally possible. Day of operations losses in the supply chain mean a user is only likely to use 85% of its contracted monthly entitlement hence the need for an effective transfer process<sup>63</sup></li> <li>• Aurizon Network does not suffer any revenue shortfall from underutilisation as take or pay applies to the transfer<sup>64</sup></li> <li>• Existing customers are not adversely affected by the transfer.<sup>65</sup></li> </ul> <p>This restriction does not prevent customers from gaming and will favour customers who rail to an even railings port operation and disadvantage customers railing to a cargo assembly port operation.<sup>66</sup></p> <p>Support ensuring a transfer reflects a genuine intention to utilise TSEs and suggest an additional objective should be to increase system throughput. However, question the application of the take or pay gaming protections.<sup>67</sup></p>
25 per cent cap on the transferor's TSEs.	<p>Remove the 25 per cent cap on transfers as it restricts the ability to achieve efficient outcomes<sup>68</sup></p> <ul style="list-style-type: none"> <li>• it is inconsistent with the objective of improving overall system throughput and efficiency. If a producer has more than 25% of TSEs to transfer and there is a bona fide transferee then such a transfer should be allowed<sup>69</sup></li> <li>• the use of percentages in determining transfer limits disadvantages smaller producers. Smaller producers generally have to manage single mine variability and are in need of greater flexibility to manage demand fluctuations.<sup>70</sup></li> </ul>
Interface with existing access agreements.	Different generations of access agreements could be varied in a way which potentially favours one access holder over another. <sup>71</sup>
Interface with commercial arrangements.	Aurizon Network should clarify how take or pay obligations of transferred access rights will be treated between different generations of undertakings. <sup>72</sup>

<sup>60</sup> Asciano, 2014 DAU sub. no. 63:12; Anglo American, 2014 DAU sub. no. 65:6

<sup>61</sup> Anglo American, 2014 DAU sub. no. 65:7-8; Asciano, 2014 DAU sub. no. 63:11-12

<sup>62</sup> Anglo American, 2014 DAU sub. no. 65:7-8; Vale, 2014 DAU sub. no. 64, p.2-3

<sup>63</sup> Anglo American, 2014 DAU sub. no. 65:7-8 and Vale, 2014 DAU sub. no. 65:2

<sup>64</sup> Anglo American, 2014 DAU sub. no. 65:7-8; Asciano, 2014 DAU sub. no. 63:7

<sup>65</sup> Anglo American, 2014 DAU sub. no. 65:7-8

<sup>66</sup> Anglo American, 2014 DAU sub. no. 65:8

<sup>67</sup> Vale, 2014 DAU sub. no. 64:2

<sup>68</sup> Anglo American, 2014 DAU sub. no. 65:9-10, Vale, 2014 DAU sub. no. 64:2; Asciano, 2014 DAU sub. no. 63:7

<sup>69</sup> Anglo American, 2014 DAU sub. no. 65:9-10; Vale, 2014 DAU sub. no. 64:2

<sup>70</sup> Vale, 2014 DAU sub. no. 64:2

<sup>71</sup> Asciano, 2014 DAU sub. no. 63:12-13

<sup>72</sup> Asciano, 2014 DAU sub. no. 63:12



### 4.3 QCA analysis and draft decision

Aurizon Network has raised concerns regarding the potential for some access holders to game the transfer provisions to reduce their upfront access charges, annual take or pay liabilities and socialise the costs of any resultant system under-recovery of revenue amongst all access holders via a revenue cap adjustment.

This is because Aurizon Network's proposal for a zero transfer fee means the pricing impacts of capacity transfers are socialised across all access holders operating in each coal system. For example:

- a transferor can remove its take or pay liability for a nominated origin/destination at its contracted access charge if it can successfully transfer its TSEs to a transferee
- a transferee will only pay the access charge (and associated take or pay liability) contained in its access agreement for its nominated origin/destination
- any revenue difference between the transferor's transferred TSEs and the transferee's receipt of the transferred TSEs is payable by all access holders via the revenue cap process.<sup>73</sup>

This means Aurizon Network's proposed transfer pricing approach can result in 'winners and losers' amongst existing access holders in each coal system dependent on the:

- nominated origin/destination for take or pay liability if take or pay is triggered—the system take or pay trigger test is activated in each coal system if the total coal gross tonne kilometres (gtks) in each system is less than the system forecast (after taking into account the coal gtks not provided due to Aurizon Network Cause). System forecasts are set annually and minimise the risk of take or pay being triggered. Take or pay liability is levied on an origin destination basis
- generation of access agreements held by the access holder—there are various take or pay vintages depending on when particular access agreements are executed.<sup>74</sup> This introduces a number of inequities across different access holders that are difficult to resolve while there are still UT1 and UT2 access agreements in place that provide take or pay arrangements as per the access agreement rather than the access undertaking in force.

We understand that this concern led to Aurizon Network's incorporation of the proposed pricing protections in the Discussion Paper outlined in Section 4.1 of this draft decision. Our assessment considers the transfer cost and differing generations of access agreements separately below.

#### Transfer costs

We consider Aurizon Network's proposal results in an outcome that would be inconsistent with section 106(5) and does not meet section 138(2)(g) of the QCA Act.

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<sup>73</sup> The undertaking's revenue cap mechanism addresses any over- or under-recovery of annual revenue by Aurizon Network. Any under-recovery of Aurizon Network's annual revenue allowance is determined once take or pay liabilities have been collected. A revenue cap adjustment via an increase in access charges is then applied to all access holders with a two year lag but includes indexation to keep Aurizon Network neutral with respect to timing.

<sup>74</sup> The biggest differential is with respect to UT1 access agreements where the take or pay provisions are only around 40 per cent of access charges. Aurizon Network has advised that UT1 access agreements will be phased out by the end of UT4.

We also consider that if access holders are participating in capacity transfers only to avoid the take or pay liabilities in their access agreement, then the transfer process is not efficient or productive and does not meet the object of the QCA Act. This is because such a transfer is not implemented to use TSEs that would otherwise not be consumed by the transferor. Rather, the transfer is implemented to reduce the cost to the transferor and results in no increased use of the QCCN.

We consider Aurizon Network's proposed pricing arrangements for transfers should be considered in the context of sections 106(1)-(5), 138(2)(b), (d), (e) and (g) and 168A of the QCA Act. Accordingly, in assessing Aurizon Network's proposed zero transfer fee, we are of the view:

- Aurizon Network's legitimate business interest is met (s.138(2)(b)) because the application of the revenue cap mechanism in the undertaking ensures Aurizon Network will receive its regulated rate of return and any additional incremental costs incurred in the transfer process
- Aurizon Network's legitimate business interest may not be met however (s.138(2)(b)), if a transfer changes the risk profile of Aurizon Network and existing access holders by exposing Aurizon Network to a different counterparty risk and increasing the access charges of existing access holders. In the extreme, this may increase the risk of optimisation of some RAB assets<sup>75</sup>
- section 138(2)(e) is not met because the pricing impact of a transfer can result in a transfer revenue under-recovery being redistributed across access holders not connected with the transfer via the revenue cap process. Aurizon Network's transfer pricing proposal does not compensate existing access holders who are not connected with the transfer for the potential adverse cost impact on their access charges
- section 106 of the QCA Act is not met because Aurizon Network does not receive the revenue from the transferor that was contracted for via the access agreement:
 

*even if a transferor effects a transfer, the transferor must continue to meet its obligations under the access agreement [including financial obligations to pay access charges], except where the transferee and other parties to the access agreement otherwise agree<sup>76</sup>*
- section 168A(a) is not met because the transferee does not pay the full cost of the transferor's contracted TSE and any shortfall in Aurizon Network's annual revenue is socialised across all access holders operating in the coal system.

We are of the view that other users' access charges should not be adversely affected by a transfer. Specifically, we are of the view that a transferee should be liable for the higher cost of access that the transferor would have paid without the transfer, if that is the case. That is, the transferee should pay for its transferred TSEs at a level equivalent to the higher of either the access charges from the transferor's point of origin in its access agreement or the access charges from the transferee's point of origin. For example:

- if a transferor transfers some or all of its TSEs from its origin to a closer-in origin on the same mainline path, then the transferee will be charged for those transferred TSEs at a rate

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<sup>75</sup> For example the transfer of TSEs within a small system may significantly increase the costs of the remaining access holders. An example is the Moura System where there is one major access holder and if the access holder's TSEs were transferred to a mine closer in to the port or to another system (e.g. Blackwater) it would create conditions comparable to the optimisation test under clause 1.2(b)(ii) of Schedule E of the 2014 DAU.

<sup>76</sup> QCA Act 1997, Section 106(5).

equivalent to what the transferor would have paid for those TSEs from the point of origin in the transferor's access agreement. This means all access holders must bear, at a minimum, the full liability of all TSEs that it contracts for in its access agreement<sup>77</sup>

- if a transferor transfers some or all of its TSEs from a closer-in origin to a further-out origin on the same mainline path, then the transferee will be charged for those transferred TSEs at a rate equivalent to what the transferee would have paid for those TSEs from the transferee's point of origin in its access agreement. This means a transferee will continue to bear the full cost of its use of the rail infrastructure required to provide access from the point of origin which is documented in the transferee's access agreement.<sup>78</sup>

This pricing approach will ensure the full cost of the transfer is borne by the transferor and transferee and there is no adverse cost impact on existing access holders unconnected with the transfer. Any adverse cost impact from a transfer is quarantined as between the transferor and transferee. Given the transferor and transferee have full visibility of their own business and production profiles, they are best placed to determine whether a transfer makes commercial sense for each party. We understand that parties may execute side agreements (outside the regulatory framework) to give effect to mutually beneficial transfers and consider this to be a competitive market outcome. It ensures the two parties giving effect to the transfer bear the full cost of the transfer, and keeps existing access holders whole and indifferent as to whether or not the transfers occur.

As a result we consider our proposed pricing approach meets sections 69E, 106(1)-(5), 138(2)(b), (d), (e) and (g) and 168A of the QCA Act because it will:

- ensure the full cost of a transfer of contracted TSEs is borne by the transferor and transferee
- preclude any cost-shifting between access holders in a coal system<sup>79</sup>
- ensure existing access holders, not a party to the capacity transfer, are indifferent to the transfers taking place because their access charges cannot be adversely impacted
- facilitate mutually beneficial capacity transfers between transferors and transferees
- increase the use of TSEs that would not otherwise be consumed and thereby increase the efficiency and productive use of the CQCN
- promote integrity in the access contracting process with a financial disincentive to over-contract access rights.

#### Different generations of access agreements

We consider that Aurizon Network's pricing protections with respect to the different generations of access agreements have merit.<sup>80</sup> We consider Aurizon Network's proposal to

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<sup>77</sup> For illustrative purposes— if a TSE with a contracted origin of say Caval Ridge was transferred to a transferee's origin of Hail Creek, the transferee would pay the access charge as if the coal was dispatched from the Caval Ridge origin.

<sup>78</sup> For illustrative purposes— if a TSE with a contracted origin of say Hail Creek was transferred to the transferee's origin of Caval Ridge, the transferee would pay the access charge as if the coal originated at Caval Ridge.

<sup>79</sup> Ensures access holders cannot game the transfer provisions to reduce their contracted take or pay liability exposure and removes the need for Aurizon Network's proposed pricing protections.

<sup>80</sup> In the 2014 DAU process, Aurizon Network and stakeholders supported streamlining the take or pay provisions in SAAs so they remain consistent with the take or pay arrangements in the undertaking, as approved from time to time.

deal differently with capacity transfers dependent on the generation of access agreement is consistent with sections 138(2)(d) and (e) because it increases transparency and accountability in the application of the transfer provisions and ensures access holders and access seekers are being treated in a non-discriminatory manner in accordance with the regulatory provisions of the undertaking, as approved from time to time.

#### Draft decision

**4.1 Our draft decision is that Aurizon Network's proposal, in respect of the pricing arrangements to underpin the capacity transfer provisions (including the short-term transfer mechanism), is not an acceptable basis for an amendment to the 2014 DAU following our refusal to approve the 2014 DAU. Instead we consider it appropriate for Aurizon Network to amend the 2014 DAU in the manner indicated in our proposed draft so that:**

- (a) the access charges applying to transferred TSEs will be the higher of the access charges set for the origin of the TSEs in the transferor's access agreement and the access charges set for the origin of the TSEs in the transferee's access agreement.**
- (b) the differential treatment of the generation of access agreements in a capacity transfer will be retained.**

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## 5 IMPLEMENTATION OF CAPACITY TRANSFER PROVISIONS

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### 5.1 Aurizon Network proposal

Aurizon Network identified that its preferred approach for implementing the short-term transfer mechanism is to include the provisions in the SAAs because it is a variation to its contractual rights. Aurizon Network advised that under this approach, it would be left whole in terms of its SAA contractual limitations on liability.

Aurizon Network, however, recognised that the coal industry's preference is for the short-term transfer mechanism to be included in the 2014 DAU. To address industry's preference and resolve its contractual exposure in the SAAs, Aurizon Network has proposed to implement the short-term transfer mechanism through amendments to Part 7 of the 2014 DAU and consequential amendments to SAAs and executed access agreements. Aurizon Network provided a mark up to the 2014 DAU and the amendments required to the EUAA in the 2014 DAU.

#### 2014 DAU amendments

Aurizon Network's proposed insertion of a new clause in Part 7 of the 2014 DAU gives effect to the short-term transfer mechanism identified in Section 3.1 above. Its proposed drafting elements include:

- short-term transfers must be treated outside the access application process in Part 4 and the capacity transfer process in Part 7
- a short-term transfer notice must be lodged with Aurizon Network to trigger a short-term transfer
- a transferee's access agreement must satisfy all the access related obligations required to accommodate the short-term transfer of TSEs, including operating plan, interface risk management plan, access interface deeds (if applicable) and, where access rights are held in an EUAA, a train operations agreement (TOA)
- the transferee must specify if the transferee proposes to use a different rail operator in the Access Holder Agreement or TOA
- a short-term refusal notice may be issued to the transferee if the transferee does not meet all the short-term notice requirements or Aurizon Network is not satisfied that:
  - sufficient load out capability exists at the transferee's mine
  - the transfer will not adversely affect existing access holders
  - there is a genuine intention or ability to use the transferred TSEs
  - it will not be adversely affected in relation to any Commercial Terms that apply to the nominated TSEs
- existing access agreements must be amended where access holders want the short-term trading mechanism to apply to contracted TSEs
- amendments to existing access agreements and SAAs must include an indemnity clause to protect Aurizon Network where it has made a good faith and reasonable attempt to comply with the short-term trading mechanism

- the MTP and ITP would be amended to give effect to short-term transfers and amendments to the number of TSEs applying in each access agreement.

### 2014 EUAA amendments

Aurizon Network's proposed insertion of a new clause in the EUAA would allow an end user to transfer all or part of its access rights for a train service type to itself or another access holder. It also includes additional clauses which reference:

- the short-term transfer notice
- the short-term transfer refusal notice
- that a variation to the monthly TSEs can occur for the train service specified in the EUAA
- that access charges and take or pay liabilities would be amended to reflect any variation in monthly TSEs for the train service specified in the EUAA
- that consequential amendments could be made to the EUAA if the short-term transfer provisions in the undertaking (approved by the QCA from time to time) are varied during the term of the EUAA.

### Existing access agreement and other SAA amendments

Aurizon Network advised that the short-term transfer drafting provisions to be included in existing access agreements and other SAAs<sup>81</sup> would mirror the proposed EUAA amendments.

#### 5.1.1 Stakeholders' position

All stakeholders supported Aurizon Network's proposal to implement the short-term transfer mechanism through amendments to the undertaking. Stakeholders were primarily concerned that any short-term mechanism be applied consistently and transparently across all access holders. Their issues with respect to implementation and liability provisions are detailed in the table below.

**Table 5: Stakeholder issues with implementation and the proposed liability provisions**

<i>Issue</i>	<i>Stakeholders' comments</i>
Implementation via the undertaking	Will allow regulatory oversight of the transfer provisions and limit Aurizon Network's discretion to negotiate away from the transfer provisions in the SAA. <sup>82</sup> If the short-term transfer mechanism was implemented in individual access agreements then Aurizon Network would have the potential to treat access holders differently and this could disadvantage some access holders. <sup>83</sup>
Transfer indemnity clause	This indemnity clause is unnecessary as the core pre-condition of the short-term transfer is that it will only occur if it does not adversely impact Aurizon Network, access holders and rail operators. <sup>84</sup> The short-term transfer will have no impact on Aurizon Network's financial position. <sup>85</sup> Regulation should not protect Aurizon Network from all risk and all liability. Such protections are not appropriate in the SAAs or in the undertaking. <sup>86</sup>

<sup>81</sup> Aurizon Network's standard Operator Access Holder Agreement and Access Holder Agreement.

<sup>82</sup> Anglo American, 2014 DAU sub. no. 65:2-3; Asciano, 2014 DAU sub. no. 63:10-11; Vale, 2014 DAU sub. no. 64:3

<sup>83</sup> Asciano, 2014 DAU sub. no. 63:11

<sup>84</sup> Anglo American, 2014 DAU sub. no. 65:9

<sup>85</sup> Anglo American, 2014 DAU sub. no. 65:9

<sup>86</sup> Anglo American, 2014 DAU sub. no. 65:9

### 5.1.2 QCA analysis and draft decision

We note that it is not open for Aurizon Network to amend the 2014 DAU after it has been submitted to QCA. Accordingly, we are considering Aurizon Network's proposal as a submission on the existing form of the 2014 DAU.

Based on the analysis set out above and in our 2014 DAU draft decision, we would refuse to approve the 2014 DAU and we are therefore required to identify the amendments that we consider should be made to the 2014 DAU. We have therefore considered Aurizon Network's discussion paper in the context of the additional amendments that we consider should be made to our 2014 DAU draft decision.

#### Implementation via the undertaking

We consider the relevant interests under section 138(2) are best balanced when the capacity transfer framework is implemented via the 2014 DAU with consequential amendments to be made to the SAAs and existing access agreements. This approach provides clarity, transparency and certainty around the application and use of the transfer provisions by all access holders and access seekers.

We consider short-term transfers can be incorporated by amending the transfer provisions in section 7.4 of the 2014 DAU draft decision mark up of the 2014 DAU and do not require inclusion as a separate section. Indeed, as identified in Section 3.3.4 of this draft decision, we have proposed amendments to the transfer provisions so Aurizon Network's notice response timeframes depend on the nature and scope of the transfer and its effect on capacity.

In proposing these amendments to the transfer provisions, all transfers will be streamlined into a one-step process which must be followed by Aurizon Network, access holders and access seekers.

In consolidating all the capacity transfer provisions within Part 7.4 of the 2014 DAU draft decision, any future changes to the transfer provisions in subsequent regulatory periods will automatically flow through to access agreements. This outcome will remove future barriers to transferring access rights between different access agreements, encourage operational flexibility and efficiency within the CQCN and ensure potentially unused TSEs can be transferred to those that can use the TSEs.

Our proposed amendments to Part 7.4.2 in the 2014 DAU draft decision will ensure the new transfer provisions apply prospectively. We are aware that existing access agreements may not allow for our proposed transfer flexibility. We have provided for a process to amend existing access agreements. We consider the parties can agree to amend an existing access agreement to incorporate these proposed amendments within three months of being requested to do so by an access holder.

#### Transfer indemnity clause

We do not consider Aurizon Network's proposed transfer indemnity clause is required to protect its legitimate business interests under section 138.2(b) of the QCA Act.

We acknowledge that our approach to managing the costs of transfers may result in a greater credit risk to Aurizon Network under the transferee's access agreement. We are therefore willing to consider amendments to the SAA to clarify that the provision of security (or the amount of security) may be reviewed by Aurizon Network where a transferee is taking on greater obligations as a result of the transfer. However, we would expect that the SAA would provide that where a transferor's obligations are reduced as a result of the transfer, its security would also be reduced.

We consider this approach balances both section 138(2)(b) and (e) and ensures Aurizon Network reviews the security provisions of both the transferor and transferee when it gives effect to a transfer.

#### Draft decision

**5.1 Our draft decision is that Aurizon Network's proposal in respect of the implementation of the short-term transfer mechanism is not an acceptable basis for an amendment to 2014 DAU following our refusal to approve 2014 DAU. Instead we consider it appropriate for Aurizon Network to amend the 2014 DAU in the manner indicated in our proposed draft so that**

- (a) Clause 7.4.2 is amended to include specified access criteria, timeframes and governance processes in which Aurizon Network should administer transfers**
- (b) if agreed by both parties, Aurizon Network will amend existing access agreements to incorporate the new transfer provisions**
- (c) the SAA is amended to permit Aurizon Network to address any increased or decreased credit risk arising from a transfer.**



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## GLOSSARY

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2010 AU	Aurizon Network's current Access Undertaking, approved by the QCA on 1 October 2010, together with any subsequent changes approved by the QCA
2013 DAU	Aurizon Network's 2013 Draft Access Undertaking, submitted on 30 April 2013, withdrawn on 11 August 2014
2013 SUFA DAAU	Aurizon Network's 2013 Standard User Funding Agreement (SUFA) Draft Amending Access Undertaking, submitted on 22 July 2013
2014 DAU	Aurizon Network's 2014 Draft Access Undertaking, submitted on 11 August 2014 and replacing the 2013 DAU

### A

Aurizon Network	The below-rail infrastructure business (formerly known as QR Network Pty Ltd) which owns and operates the below rail network in the CQCR and is responsible for negotiating access with parties seeking to use its rail network
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### B

### C

CQCN	Central Queensland Coal Network
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### D

### E

EUAA	End User Access Agreement
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### F

### G

gtk	gross tonne kilometre
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### H

### I

ITP	Intermediate Train Plan
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### J

### K

### L

### M

MAR	Maximum allowable revenue
MTP	Master Train Plan

**N**

**O**

**P**

**Q**

QCA	Queensland Competition Authority
QCA Act	Queensland Competition Authority Act 1997
QRC	Queensland Resources Council

**R**

**S**

SAA	the Standard Access Agreement set out in Volume 3 of the 2014 DAU
SUFA	Standard User Funding Agreement

**T**

TSE	Train Service Entitlement
TOA	Train Operations Agreement

**U**

UT1	the period from 2001 to 2006, being the term of QR's first access undertaking covering the CQCN
UT2	the period from 2006 to 2010, being the term of QR's second access undertaking covering the CQCN
UT3	the period from 2010 to 2015, being the term of the 2010 Access Undertaking (as extended), being the third access undertaking covering the CQCN
UT4	the four year period commencing 1 July 2013, being the proposed term of the 2014 Access Undertaking, which will be the fourth access undertaking covering the CQCN
UT5	the undertaking period following the conclusion of UT4, noting UT5 has yet to be proposed by Aurizon Network

**V**

**W**

**X**

**Y**

**Z**

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- *The 2014 Access Undertaking Explanatory Material – Wiggins Island Rail Project Proposed Revenue and Pricing Treatment, August 2014*. (sub. no. 6)
- *October 2014, Feedback on the consultation guideline issued by the QCA, and endorsement for a number of comments raised by stakeholders in submissions to the QCA on the 2014 DAU*. (sub. no. 48)
- *October 2014, Letter from Aurizon regarding Aurizon Network Pty Ltd 2014 Draft Access Undertaking (2014 DAU) Consultation*. (sub. no. 49)
- *October 2014, Support of other stakeholder submissions to the QCA*. (sub. no. 51)
- *December 2014, Response to the QCA's Draft Decision on Aurizon Network's 2014 Draft Access Undertaking – Maximum Allowable Revenue*. (sub. no. 59)

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- *October 2014, Submission Annexure A - Part 4 Negotiation Framework*. (sub. no. 8)
- *October 2014, Submission Annexure B - Part 7 Available Capacity allocation and management*. (sub. no. 9)
- *October 2014, Submission Annexure C - Part 8 Network development and Expansions*. (sub. no. 10)
- *October 2014, Submission Annexure D - Part 9 Connecting Private Infrastructure*. (sub. no. 11)
- *October 2014, Submission Annexure E - Schedule A Preliminary, Additional and Capacity Information* (sub. no. 12)
- *October 2014, Submission Annexure F - Schedule B Access Application information requirements*. (sub. no. 13)
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