

# Submission – Queensland Rail’s Draft Access Undertaking 1 (2015)

Response to Queensland Competition Authority’s  
Draft Decision to refuse to approve draft access  
undertaking

December 2015

Commercial-in-Confidence



## Contents

<b>1</b>	<b>Introduction</b>	<b>5</b>
<b>2</b>	<b>Executive summary</b>	<b>5</b>
<b>3</b>	<b>The object of Part 5 and appropriateness of the 2015DAU</b>	<b>7</b>
<b>4</b>	<b>At least efficient costs and a relevant return</b>	<b>8</b>
<b>5</b>	<b>Retroactive effect of reference tariffs</b>	<b>12</b>
5.1	QCA is acting beyond power	12
5.2	Material errors of fact and irrelevant considerations	13
5.3	Reliance	14
5.4	The characterisation of the proposed adjustment	15
5.5	Windfall gain	17
5.6	Transfer notice	17
5.7	Public interest	18
5.8	Methodology for adjustment	19
5.9	Menezes report	20
<b>6</b>	<b>Regulatory asset base</b>	<b>20</b>
6.1	QCA's acceptance of initial asset base value	20
6.2	July 2015 submission	23
6.3	Effect on investment by Queensland Rail	23
6.4	Menezes report	25
6.5	Maintenance of the RAB	25
6.6	Exclusion or zero-valuing of assets	27
<b>7</b>	<b>Volumes and allocation of common network costs for reference tariffs</b>	<b>27</b>
7.1	Application of an allocation methodology	27
7.2	Assumed 87 path constraint	29
7.3	Relevance of ability to recover costs and return	30
7.4	Trading off pricing principles	31
7.5	Inconsistency with section 138A	31
7.6	Losses arising from increased competition	31
7.7	Notional impact of Metropolitan Network on West Moreton Network	31
7.8	Allocation of past common network investments	34
7.9	Categorisation and allocation of costs	39
<b>8</b>	<b>Reference tariff to apply in the Metropolitan Network</b>	<b>43</b>
8.1	General rationale for Metropolitan Network tariff	43
8.2	QCA's concerns about incentives	43
8.3	Industry rebates	45
8.4	Issues with the QCA's approach	46
<b>9</b>	<b>General reference tariff issues</b>	<b>47</b>
9.1	QCA's allowances for maintenance and capital costs	47
9.2	Nature of the West Moreton Network	47
9.3	Operating costs	48
9.4	Form of regulation and take or pay	50
9.5	The reference tariff model	54
<b>10</b>	<b>Pricing Principles</b>	<b>55</b>
10.1	Hierarchy of pricing principles	55

10.2	Revenue adequacy	55
10.3	Limits on price differentiation—non-reference-tariff train services	56
10.4	Pricing limits	62
10.5	Take or pay arrangements	65
10.6	Asset valuation methodology for negotiating access charges	65
10.7	Reference tariffs	67
10.8	Rate review provisions	68
<b>11</b>	<b>Investment, planning and coordination framework</b>	<b>68</b>
11.1	Overarching fitness for purpose	69
11.2	Assessment approach	70
11.3	Appropriateness	72
11.4	Examples of specific drafting issues	73
11.5	Schedule I	79
11.6	Negotiation triggers	81
11.7	SAA maintenance	81
11.8	Standard Funding Agreement	81
11.9	Hybrid funding	82
11.10	Building Queensland	82
11.11	Network planning	82
11.12	Financial effect of QCA's proposal	84
11.13	Application of public interest	85
<b>12</b>	<b>Application and scope</b>	<b>87</b>
12.1	Scope of 2015DAU	87
12.2	Line diagrams	88
12.3	Non-discriminatory treatment	88
12.4	Ring-fencing arrangements	90
<b>13</b>	<b>Standard Access Agreement</b>	<b>91</b>
13.1	Tripartite structure of 2015 SAA	91
13.2	2015 SAA	93
<b>14</b>	<b>Operating requirements</b>	<b>104</b>
14.1	Coordination with adjoining networks	104
14.2	Operating requirements manual	105
14.3	ORM amendment process	107
<b>15</b>	<b>Negotiation process, NMP, reporting and other matters</b>	<b>108</b>
<b>16</b>	<b>Administrative provisions</b>	<b>108</b>
<b>17</b>	<b>Miscellaneous inaccuracies and misleading statements</b>	<b>109</b>
17.1	Tenure of Queensland Rail as railway manager	109
17.2	Withdrawal of past draft access undertakings	109
17.3	Application of 2008AU	110
17.4	Application of a secondary undertaking notice	110
17.5	Promoting competition in upstream and downstream markets	111

<b>Annexure 1 – Assessment of Metropolitan Network Impact</b>	<b>114</b>
<b>Annexure 2 - Response to allowances for maintenance and capital costs</b>	<b>115</b>
<b>Annexure 3 - PwC review of Professor Menezes' reports</b>	<b>116</b>
<b>Annexure 4 - PwC report on recovery of efficient costs</b>	<b>117</b>
<b>Annexure 5 – Necessary changes to the 2015 SAA</b>	<b>118</b>
<b>Annexure 6 - ORM amendments to address statutory requirements</b>	<b>119</b>
<b>Annexure 7 - Responses to negotiation, NMP, reporting and other issues</b>	<b>120</b>
<b>Annexure 8 - Legal advice on absence of 87 train path constraint</b>	<b>121</b>
<b>Annexure 9 – Response to B&amp;H Alternative Assessment of Capacity</b>	<b>122</b>

## 1 Introduction

Queensland Rail makes this submission in response to the QCA's draft decision relating to the 2015DAU.

The matters raised in this submission are consistent with and in addition to matters previously raised by Queensland Rail in earlier submissions in relation to matters relevant to the 2015DAU. Queensland Rail's previous submissions addressed matters which continue to be relevant to issues raised in the draft decision.

## 2 Executive summary

The QCA's Draft Decision is flawed in a number of material respects and, if a final decision were to be made on the same or similar terms as those in the Draft Decision, it would have serious implications for the economic viability of the declared services provided by Queensland Rail. The Draft Decision includes matters which are clearly contrary to the express provisions of the *Queensland Competition Authority Act 1997* (Qld) (**QCA Act**), regulatory precedent and accepted economic theory. The draft decision fails to allow Queensland Rail to recover at least the efficient cost of providing the declared services together with a return on its investment.

The draft decision indicates that the QCA intends to impose what is in effect a ceiling price for access at \$18.88/000 gtk for the West Moreton reference tariff and an actual price significantly below that, currently indicated to be a price lower than \$15.88/000 gtk. Both the ceiling and the actual proposed reference tariff prices proposed in the draft decision are materially below the price of \$19.41/000 gtk proposed by Queensland Rail.

To arrive at its proposed ceiling and actual reference tariff prices for the West Moreton Network, the QCA has significantly departed from past and common regulatory practice and adopted positions which are contrary to express provisions of the QCA Act.

This submission details the significant concerns Queensland Rail has with various aspects of the QCA's draft decision. By way of example, the QCA in its draft decision has:

- purported to change the language and meaning of express requirements and provisions of the QCA Act to justify positions it has taken to reduce the price for access Queensland Rail can recover;
- asserted, and based its decision on the incorrect premise, that it can require Queensland Rail to provide declared services at less than Queensland Rail's efficient cost of providing the service and without a return on its investment;
- proposed an unquantified and incalculable "adjustment" factor to reduce the reference tariffs that would otherwise apply;
- proposed the "adjustment" in a way that retroactively affects Queensland Rail's access price revenue earned in a previous regulatory period, where that revenue was earned in a manner that was consistent with reference tariffs previously approved by the QCA;
- sought to justify the "adjustment" on the basis that it is appropriate in the context of a revenue cap model, failing to recognise that the current Queensland Rail reference tariffs are governed by a price cap model;
- introduced a new, ambiguous concept of lower and upper price limits, on top of other specific price limits, without providing any reasoning or justification and in a way that cannot be determined or applied with any certainty;

- sought to justify a proposed material change in the method for the valuation of assets on an incorrect interpretation of its own draft decision in respect of a previous draft access undertaking and without proper regard to the fact that Queensland Rail has rolled forward the asset base value previously approved by the QCA;
- sought to justify a proposed material change in the method for the valuation of assets in reliance on a consultant's report that contains serious flaws;
- proposed to cap Queensland Rail's right to receive take or pay revenue without any proper basis for doing so;
- proposed to make material changes to the 2015 Draft Access Undertaking (2015 DAU) without providing any reasons for doing so; and
- proposed an unqualified maintenance and other obligations that, contrary to express limitations in the QCA Act, would oblige Queensland Rail to bear the cost of extensions to the rail infrastructure network.

Queensland Rail is also concerned that it has been denied a reasonable opportunity to review and comment on material aspects of the QCA's draft decision by virtue of QCA's refusal to provide Queensland Rail with a copy of, and reasonable access to, the 'model' by which QCA has purported to determine the proposed reference tariffs. The 'model' is critical to the QCA's draft decision and ought to have been disclosed to Queensland Rail in sufficient time prior to the QCA's deadline for submissions to allow Queensland Rail a reasonable opportunity to consider the 'model' prior to lodging this submission.

Despite repeated requests, the QCA has refused to provide Queensland Rail with a copy of the 'model'. Its reasons for refusing to provide the model (which the QCA only articulated recently) relate to the protection of Queensland Rail's own information and are baseless.

The QCA has also failed to provide disclosure of material information relating to asset values adopted by QCA in the draft decision. It is apparent from the draft decision that the QCA's intention is to attribute a 'zero value' to a number of Queensland Rail's assets, thereby affecting the overall asset value and the reference tariffs that flow from it. Despite repeated requests, the QCA has refused to identify the assets it intends to 'zero value' or the specific justification relevant to the assets in question.

The QCA has also heavily relied upon an assumed train path constraint which, if it exists, would operate to limit the number of train paths available for coal train use in the Metropolitan Network (**87 train path constraint**).

In its draft decision, the QCA assumes that the 87 train path constraint is in effect and is relevant to the determination of the reference tariff. In its draft decision, the QCA has allocated costs as between coal and non-coal traffic based on the assumed 87 train path constraint, with the effect that Queensland Rail would be unable to recover a significant proportion of its costs of providing the declared service.

However, the assumed 87 train path constraint is not a legally binding constraint. In the circumstances, the cost allocation between coal and non-coal traffic proposed by the QCA's draft decision is not appropriate and needs to be adjusted to reflect the significantly higher proportion of coal traffic on the West Moreton Network as compared to non-coal users.

The QCA's draft decision if implemented as a final decision would effectively require Queensland Rail to act in a way that is uncommercial and inefficient and potentially in manner inconsistent with its obligations under the QRTA Act.

This submission addresses the above issues in detail and also includes a range of other matters of concern to Queensland Rail. It is Queensland Rail's submission that the draft decision is

materially flawed on economic, factual and legislative grounds and a final decision on consistent terms would materially adversely impact on Queensland Rail's ability to effectively provide the declared service. It is Queensland Rail's submission that the QCA ought properly and reasonably reconsider the draft decision having regard to the matters addressed in this submission.

### 3 The object of Part 5 and appropriateness of the 2015DAU

The QCA has stated that:

*"The object of the QCA Act provides that Queensland Rail should efficiently maintain, operate, use and, if required, extend the network over the long term. As the regulated network service provider, we consider Queensland Rail should be able to demonstrate it is managing the network consistent with its legislative obligation to promote the economically efficient operation of, use of and investment in the network by which access services are provided."*<sup>1</sup>

*"Our role as an access regulator includes the promotion of the efficiency objectives of Part 5 of the QCA Act and we are empowered by statute to set the appropriate arrangements that we consider necessary to achieve these objectives."*<sup>2</sup>

The QCA has significantly and materially misstated both the object of the QCA Act and the QCA's role. The QCA has then compounded these errors by basing many aspects of its draft decision on its misstatement of the object of the QCA Act and its statutory role.

Contrary to the QCA's statement of the QCA Act, the QCA Act does not impose an obligation on Queensland Rail "to maintain, operate, use and, if required, extend the network". Nor does the QCA Act impose an obligation on Queensland Rail to manage the network to any particular end.

The QCA is also incorrect in asserting that it is "empowered by statute to set the appropriate arrangements that we consider necessary to achieve these objectives." The QCA has no legislative power to force Queensland Rail to "maintain, operate, use and, if required, extend the network".

The QCA's role in the context of a proposed access undertaking is to approve or to refuse to approve the access undertaking having regard to all of the criteria in section 138(2) of the QCA Act. One of the criteria mentioned in section 138(2), indeed the first one mentioned, is the object of Part 5 of the QCA Act. That object is not as stated by the QCA in its draft decision.

It is not the QCA's role to approve the 2015DAU only if the QCA is satisfied that it is the most appropriate access undertaking – the access undertaking need only be appropriate having regard to all the criteria in section 138(2) of the QCA Act.

It is not the object of Part 5 of the QCA Act to ensure a particular outcome – Part 5 is only to promote a particular outcome.

The consequences of the QCA's misapplication of the QCA Act and its powers are evident in various aspects of the draft decision. In the draft decision, the QCA has:

- significantly and materially altered its past regulatory practices where there was no evidence to support a conclusion that long-standing past practices would fail to promote, or would be inconsistent with, the object listed in section 69E of the QCA Act;

---

<sup>1</sup> QCA draft decision at 244.

<sup>2</sup> QCA draft decision at 249.

- misstated and misapplied express provisions of the QCA Act with very material adverse consequences for Queensland Rail;
- added unwarranted complexity to the 2015DAU to achieve the QCA's misconstrued and misstated perception of the objects of the QCA Act;
- acted outside of and disregarded statutory powers and rights; and
- misconstrued the 2015DAU and its proposed operation within the statutory scheme.

Queensland Rail also notes the QCA's reference to its regulation of "*Queensland Rail as a declared service*"<sup>3</sup>. The QCA's statutory function is not to regulate access providers; it is to regulate the terms on which third party access is provided to the relevant declared service by the access provider. This is an important distinction.

## 4 At least efficient costs and a relevant return

The QCA has stated that:

*"Whether a DAU allows recovery of at least enough to meet efficient costs and a relevant return is of course relevant and fundamental to our assessment of the 2015 DAU. But we are not required to consider it appropriate to approve a DAU because the price contained in it will generate revenue that is at least enough to meet the efficient costs of the service and a relevant return. Nor are we precluded from considering it appropriate to approve a DAU that contains a price that is not expected to generate revenue that is at least enough to meet the efficient costs of the service and a relevant return, where other relevant factors in section 138(2) lead to such a conclusion.*

*It is open to the QCA to consider that a DAU which provides for a price that allows a service provider to recover at least the efficient costs of providing access to the service and a relevant return on investment, is, including by reference to other factors such as the object of Part 5 of the QCA Act (section 138(2)(a)), the interests of access seekers and holders (sections 138(2)(e) and (h)) and the public interest (section 138(2)(d)), not one which it is appropriate to approve.*

*We therefore do not accept Queensland Rail's contention (that over the regulatory period):*

*... [t]hat reference tariff must deliver to the access provider at least its efficient costs and a return as required by section 168A(a). Anything less should not be approved and cannot be imposed (QR sub. no. 1: 5)"<sup>4</sup>*

The QCA has further stated that:

*The pricing principles are one of a number of factors to be weighed up under section 138(2). Although section 168A(a) states that prices should generate revenue to at least meet the efficient costs of providing access, it is also true that prices above the efficient*

---

<sup>3</sup> QCA draft decision at 249.

<sup>4</sup> QCA draft decision at 216. The QCA went on to say that: "*there may be circumstances where a regulatory model adopted by a regulator may mean that a regulated asset receives less revenue in a given regulatory period. However, over the life of the regulated entity, the intention would be that they would earn sufficient revenue to meet efficient costs plus a return.*" (at 217). A price cap is proposed for the 2015DAU. This statement by the QCA gives rise to its own concerns about: why the QCA is considering assessing costs over the life of the entity? why the QCA is excluding revenue based incentives and price cap forms of regulation? how a regulated entity recovers costs rightfully owed during the regulatory period if it ceases to be regulated?



*cost would not be in the interests of access seekers and holders, nor in the public interest.”<sup>5</sup>*

This is not what the QCA Act requires.

### **No right to trade-off factors**

The quoted statements above reveal that the QCA has proceeded on the basis that it is entitled to trade-off the factors listed in section 138(2) of the QCA Act against one another.

The QCA has unequivocally stated that it can, in effect, trade-off the pricing principles in section 168A against other factors that it considers more important.

This is an error of law and a fundamental flaw in the QCA’s draft decision.

The High Court of Australia<sup>6</sup> has confirmed that a decision maker has discretion in weighting the factors to which it must have regard. However, the High Court has confirmed that this discretion is always subject to any contrary statutory or contextual indication. In the case of the QCA Act there is an unequivocal statutory and contextual indication that the pricing principles and the object of Part 5 of the QCA Act, for example, are to be given priority.

If the QCA is empowered to trade-off the pricing principles referred to in section 138(2), it must also be empowered to trade-off other factors listed in that section. The first factor mentioned in section 138(2) is the object of Part 5.

It cannot be the case that the QCA can apply section 138(2) in a way that is inconsistent with the object of Part 5 of the QCA Act – in any exercise of discretion the QCA must always favour the object of Part 5. It is also the case that the QCA cannot pick and choose which of the factors in section 138(2) can be traded off against others.

In any event, it can certainly not be the case that factors such as the object of Part 5 and the pricing principles are capable of being traded off against other factors.

### **The QCA cannot disregard any of the factors**

The quoted statements from the QCA’s draft decision reveal that the QCA has failed to have proper regard to the pricing principles in favour of other factors in section 138(2). The draft decision states unequivocally that the QCA does not consider itself bound to give Queensland Rail its efficient costs and indeed, that providing Queensland Rail with price for access above its efficient costs should not occur as it “*would not be in the interests of the access seekers and holders, nor in the public interest*”<sup>7</sup>. This directly contradicts the express requirement in the pricing principle in section 168A(a).

To comply with the QCA Act, section 138(2) requires the QCA to have regard to “each” of the factors; it does not empower the QCA to disregard factors. By not ensuring that the price for access gives Queensland Rail revenue at least sufficient for it to recover its efficient costs and the required return, the QCA is effectively disregarding the pricing principle factor referred to in section 138(2).

### **Overriding guidance**

The object of Part 5 and the pricing principles are not original features of the third party access regime under the QCA Act. Those provisions were both inserted under the *Queensland Competition Authority Amendment Act 2008* (Qld) as part of national reforms arising out of

---

<sup>5</sup> QCA’s draft decision at 261.

<sup>6</sup> *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.

<sup>7</sup> QCA’s draft decision at 261.

COAG.<sup>8</sup> It is significant that the relevant explanatory notes, amongst other relevant matters, state:

*“The inclusion of an objects clause and uniform pricing principles will provide **overriding guidance** for the Authority and Ministers in making regulatory decisions under the access regime in the Act.*

*The same clause and principles will be applied to all jurisdictions’ access regimes which will promote national consistency in regulatory practice, contribute to **consistent and transparent regulatory outcomes and increase certainty** for investors, access providers and access seekers which will benefit infrastructure investment.”<sup>9</sup> (emphasis added)*

The QCA’s view of section 138(2) of the QCA Act is inconsistent with the intention of the objects clause and the pricing principles, and results in the objects clause and pricing principles providing no “*overriding guidance*” and no notion of improved consistency, transparency and certainty.

The overriding nature of the pricing principles is also clearly evidenced in the QCA Act – see for example, sections 100(4), 138A(2) and 168C.

It is also relevant that the objects clause and the pricing principles are stand-alone provisions in the QCA Act with a life outside of section 138(2) of the QCA Act.

In addition, the QCA cannot approve an access undertaking (including one prepared by the QCA) that is inconsistent with the QCA Act.

#### **Operation at a loss not consistent with QCA Act**

The QCA’s reasoning expressly contemplates that Queensland Rail (and other access providers for that matter) can be required by the QCA to provide a declared service at a loss – that cannot be the statutory intent.

Clear words would be needed in the QCA Act before it could be given an interpretation that could result in situation where the access provider of a declared service might be forced to provide the service without at least efficient cost recovery and a relevant return – that is, at a loss. Here the QCA Act includes words in the pricing principle in section 168A(a) to the contrary effect.

#### **QCA cannot change the requirements of the QCA Act**

It is also indisputable that the QCA lacks any power to change the language or requirements of the QCA Act in the process of approving or refusing an access undertaking, or otherwise. At page 261 of the draft decision the QCA states:

*“Although section 168A(a) states that prices should generate revenue to at least meet the efficient costs of providing access, it is also true that prices above the efficient cost would not be in the interests of access seekers and holders, nor in the public interest.”*

By giving paramount effect to the purported interests of access seekers, access holders and the public, the QCA is purporting to re-write the QCA Act and expressly stating contrary to the language of section 168A(a), that Queensland Rail should never get more than its efficient costs.

The QCA’s approach also ignores the fact that forcing an access provider to provide a service at below its efficient costs and without an appropriate return will not be in the interests of access

---

<sup>8</sup> As part of reforms “to establish a simpler and consistent national approach to economic regulation of significant infrastructure”, the COAG Competition and Infrastructure Reform Agreement (which is also referred to in the explanatory notes) refers to the national introduction of consistent regulatory principles into third party access regimes in particular objects clauses and pricing principles.

<sup>9</sup> Queensland Competition Authority Amendment Bill 2008 Explanatory Notes at 4.

seekers, access holders and the public, and the consequential and substantial disincentive to invest in the service.

Queensland Rail notes that in the mark up of the 2015DAU proposed by the QCA at clause 3.1.1, the QCA fundamentally alters the statutory requirement in section 168A(a) of the QCA Act.

Section 168A(a) of the QCA Act requires that the price for access should:

*“generate expected revenue for the service that is at least enough to meet the efficient costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved...”*

By contrast the QCA is proposing to amend clause 3.1.1 of the 2015DAU to read as follows:

*“Queensland Rail is entitled to earn revenue from providing Access, including from Access Charges and Transport Service Payments, that:*

- (a) is sufficient to meet the efficient costs of providing Access (having provided for any adjustments determined by the QCA); including*
- (b) a return investment commensurate with the regulatory and commercial risks involved.*

*Where Queensland Rail excess revenue (sic) then Queensland Rail may seek to reduce Transport Service Payments rather than Access Charges.”*

The effect of the QCA’s drafting is to completely re-write and change the meaning of what is required by section 168A(a) of the QCA Act. The QCA drafting proposes:

- (a) to provide Queensland Rail with a revenue that is no more than *“sufficient to meet the efficient costs of providing Access”*;
- (b) to make unspecified, unqualified and non-reviewable *“adjustments”* to either Queensland Rail’s revenue or its efficient costs (it is not clear which based on the drafting); and
- (c) to include the return on investment referred to in section 168A(a) of the QCA Act as part of the efficient costs and therefore, as drafted, subject to *“adjustment”*, rather than a separate return as required by section 168A(a).

Queensland Rail is particularly concerned with this concept of *“adjustments”* referred to in the QCA’s drafting of clause 3.1.1. The QCA has given no indication either in the drafting of that clause or in its draft decision as to key matters including:

- what the QCA will take into account to determine whether there should be an adjustment;
- what the QCA will take into account in calculating the adjustment;
- when it will determine whether there needs to be an adjustment;
- the statutory basis for making an adjustment as proposed – Queensland Rail is not aware of any.

### **Effect of error**

The QCA’s misstatement and misapplication of the requirements of section 138(2) discussed above constitutes a fundamental error of law. That error of law has affected the integrity of the draft decision in its entirety.

The QCA’s incorrect views that:

- it can trade-off the pricing principles against other factors;

- it is not obliged to ensure the price provides Queensland Rail with at least its efficient costs and the required return; and
- in any case, Queensland Rail should not receive more than its efficient costs,

form the foundation for various aspects of the draft decision, including:

- **Retroactivity** – the QCA’s proposal to apply an adjustment factor to the reference tariff has the consequence of giving retroactive effect to the reference tariff. The QCA’s proposal in this regard relies on, amongst other matters, the QCA being able to set the price for access at a level less than that required by the pricing principle under section 168A(a);
- **Cost allocation methodology** – the QCA’s proposed cost allocation methodology results in Queensland Rail being unable to recover the full cost of providing the declared service;
- **Maintenance costs** – the QCA proposes to impose a reference tariff based in part on specific maintenance activities, while at the same time the QCA is seeking to impose an open-ended, unqualified maintenance obligation. The result of this approach is that Queensland Rail could be compelled to undertake maintenance activities at a cost which is not reflected in the price for access; and
- **Extensions** – the QCA’s proposal that Queensland Rail should be subject to an open-ended obligation to undertake “Extensions” of the West Moreton Network – for example, replacing part of the rail infrastructure – at Queensland Rail’s cost without any allowance for that cost in the access price.

#### ***The need for consistency of approach***

On fundamental regulatory issues where there is no material differences between access providers or the circumstances affecting the provision of access, regulatory certainty demands that the QCA adopt a consistent approach. Queensland Rail is concerned that the QCA has taken positions in relation to the 2015DAU that are directly inconsistent with the position that the QCA has adopted with respect to DBCT’s and Aurizon Network’s respective access undertakings in circumstances where there is no apparent basis for the different outcomes.

## **5 Retroactive effect of reference tariffs**

The QCA has proposed that the reference tariffs for coal carrying train services using the West Moreton and Metropolitan Networks be adjusted downwards throughout the regulatory period because of a perceived over-recovery of revenue by Queensland Rail for the 2013/14 and 2014/15 years.

Queensland Rail has numerous concerns regarding the QCA’s proposal; they include the following.

### **5.1 QCA is acting beyond power**

The QCA’s proposal is beyond power because, amongst other reasons:

- its effect is to set a price for access that does not comply with the pricing principle in section 168A(a); and
- it has a retroactive effect, even though it applies through a future price.

The QCA has wrongly applied sections 138(2) and 168A of the QCA Act in developing its proposed decision. This is an inherent flaw across various aspects of the QCA’s draft decision – for further discussion see section 4 above.

However, to be clear, based on the QCA's draft decision to give retroactive effect to reference tariffs, that decision would result in the setting of a price for reference train services that ensures Queensland Rail receives less than its efficient costs and the relevant rate of return for the provision of access to the declared service during the regulatory period of the relevant access undertaking, once approved by the QCA. Queensland Rail also sought independent advice from PwC in part relating to this matter. PwC's report is set in **annexure 4**.

It also results in a situation where the QCA would be approving an access undertaking that is inconsistent with the QCA Act (including the object of Part 5 of the QCA Act), which it cannot do.

The QCA will make an error of law if it makes a final decision on the same terms as proposed in the draft decision on this issue.

## 5.2 Material errors of fact and irrelevant considerations

The QCA seeks to justify the adjustment proposal on numerous grounds which are variously, factually incorrect, ill-founded or irrelevant. In particular:

- (a) **Revenue cap model and price cap model** - The QCA's view that it is appropriate to apply adjustments for under and over recoveries in the context of a revenue cap model fails to recognise that the current Queensland Rail reference tariffs are governed by a price cap model.

In the draft decision the QCA states that:

*“Consistent with this, the QCA presently, and in the past has imposed a revenue cap model on regulated entities. Under this model, a revenue under- or over-recovery in one year is offset by a corresponding revenue under- or over-recovery in a subsequent year, and that subsequent year may be in the next regulatory period. This reflects the regulatory reality that a regulated entity may under- or over-recover regulatory revenues in a given year or regulatory period and there must be an adjustment mechanism to address this.”<sup>10</sup> (footnotes omitted)*

This statement is irrelevant and in any event incorrect.

It is irrelevant because it relates to revenue cap regulatory models and ignores the fact that the 2008AU which applies to Queensland Rail applies reference tariffs for coal carrying train services in relation to the “Western System” (that is, the West Moreton Network under the 2015DAU) under a price cap model – not a revenue cap model.

It is incorrect because it claims that a regulated entity may under-recover or over-recover revenues and that there must be an adjustment mechanism to address this. This is not the case for a price cap regulatory model, particularly in the case of the reference tariffs applying under the 2008AU to coal carrying train services in relation to the “Western System”.

- (b) **Past adjustments** – The QCA has claimed that:

*“Queensland Rail and its predecessors have applied for, and received or paid, adjustment amounts in the past through approved access undertakings to reflect the difference between access charges paid by reference to interim (extended) and approved tariffs.”<sup>11</sup>*

The assertion by the QCA that Queensland Rail has received or paid adjustment amounts is incorrect in relation to adjustment payments because Queensland Rail has never paid an adjustment amount in the past, and is materially inaccurate in respect of adjustment

---

<sup>10</sup>QCA draft decision at 217.

<sup>11</sup> QCA draft decision at 206.

payments received because the only adjustment amount Queensland Rail has received was passed directly through to Aurizon Network as the railway manager at the time to which the adjustment related. Queensland Rail has never retained the benefit of any adjustment payment.

(c) **Past extensions** – The QCA has claimed that:

*“The QCA has approved seven extensions to the existing undertaking on the basis of Queensland Rail's inclusion of an adjustment charge provision in its draft access undertakings proposed and withdrawn, up to the submission of the 2015 DAU.”<sup>12</sup>*

This statement is unsupported by the facts.

While there have been more than seven draft amending access undertakings colloquially referred to as extension DAAUs relating to the 2008AU, the QCA's letters of approval for seven extension DAAUs lodged by Queensland Rail and approved by the QCA give no indication that the approval was on the basis of, or conditional on, any proposed retroactive application of reference tariffs.

### 5.3 Reliance

The QCA's pursuit of some form of retroactive application of reference tariffs is apparently at least in part based on the purported (but not objectively substantiated) reliance and expectation by stakeholders on indications by Queensland Rail in respect of its 2013DAU that it would backdate the reference tariff once approved.

The QCA's claim that stakeholders relied on Queensland Rail's proposals to backdate reference tariffs:

- fails to recognise that Queensland Rail is not legally obliged to provide backdating and made no legally enforceable promise to do so;
- fails to recognise that the QCA has no legal power to impose an adjustment with a retroactive effect, whether or not there was reliance by stakeholders;
- completely discounts the legitimate reason for Queensland Rail's decision not to backdate the reference tariffs – namely the fundamental change by the QCA to its longstanding regulatory precedent for the method of determining the RAB value and the dramatic effect that change in methodology had on the proposed reference tariff;
- is not supported by any evidence of disadvantage to stakeholders even if stakeholders now claim that they relied on that proposal;
- ignores the fact that the backdating proposal by Queensland Rail was part of an integrated package of interdependent measures voluntarily proposed by Queensland Rail as part of its 2013DAU; seeking to select and give effect to the backdating benefit as part of a new 2015DAU in isolation of all other elements of the package of measures present in the 2013DAU is neither reasonable or appropriate; and
- ignores the fact that stakeholders would have been aware that a voluntary draft access undertaking can be withdrawn at any time and, therefore, would have had the knowledge and understanding that any provisions in it could be changed and therefore would not rely on them in making investment decisions; similarly stakeholders would have been aware that the QCA may also refuse to approve a voluntary draft access undertaking with the result that none of the proposed provisions have any regulatory effect.

---

<sup>12</sup> QCA draft decision at 217-218.

Queensland Rail's now superseded draft access undertakings had been prepared with reliance on the QCA's past regulatory treatment of reference tariffs and asset valuations, including the QCA's approval of an asset base for the West Moreton Network as part of the 2008AU. In that context, Queensland Rail had until relatively recently volunteered a backdating of reference tariffs which would be implemented via an adjustment charge mechanism similar to that used by Aurizon Network.

The 2015DAU was preceded by the 2012DAU and the 2013DAU. It was not until October 2014 (approximately two and half years after submitting the 2012DAU), that the QCA first advised that it intended to materially alter its previous methodology for the development of reference tariffs applicable to coal carrying train services on the West Moreton Network and to resile from its approval of the asset base for the West Moreton Network.

The QCA has sought to suggest that Queensland Rail is responsible for alleged pricing uncertainty because of its failure to provide a reference tariff backdating proposal. Queensland Rail does not accept that its 2015DAU creates any pricing uncertainty as claimed by the QCA.

By contrast, the marked change in regulatory approach to the setting of the reference tariff and the setting of the asset base value proposed by the QCA has and will create significant uncertainty. It creates uncertainty because:

- it shows that the QCA may change material aspects of its regulatory approach from access undertaking to access undertaking affecting the ability of Queensland Rail and other stakeholders to invest and operate; and
- there is no certainty in the current regulatory process as to what the price will ultimately be.

The QCA has also claimed that Queensland Rail was not justified in changing its position on the backdating of the reference tariffs because it did so on the basis of the QCA's 2014 draft decision. In particular the QCA states:

*"The QCA does not accept that the QCA's 2014 Draft Decision's approach to asset valuation is an appropriate basis for Queensland Rail to change its approach to the adjustment charge. The 2014 Draft Decision was not a draft version of a final decision and had no force of itself."<sup>13</sup>*

It is difficult to accept that a draft decision by the QCA is "not a draft version of a final decision". A draft decision is a clear indication of the QCA's proposed approach and it is the only document upon which stakeholders can rely to understand and anticipate what the QCA is proposing in its final decision. Natural justice requires that the QCA gives stakeholders a true indication of the QCA's proposed approach to an issue.

Queensland Rail urges the QCA to reconsider its position on the valuation of the West Moreton Network and its proposal to effectively impose a retroactive reference tariff.

#### **5.4 The characterisation of the proposed adjustment**

The QCA has stated that:

*"Queensland Rail does not propose to apply an adjustment charge provision in the 2015 DAU to, in effect, recoup or refund the difference in access charges it has received since 1 July 2013 and the access charges it would have received applying the reference tariff approved by the QCA under this 2015 DAU process. In other words, Queensland*

---

<sup>13</sup> QCA draft decision at 213.

*Rail does not propose an adjustment amount to address any previous over or under recovery of revenues.”<sup>14</sup>*

The QCA has also stated:

*“The QCA does not accept Queensland Rail's position that an adjustment amount is retrospective. The kind of term in question would apply from the date that the 2015 DAU is approved. Such a term would take matters that have occurred in the past as the basis for calculating amounts that are to be paid by or to Queensland Rail after the 2015 DAU is approved. The fact that such a clause would operate by reference to things that have happened in the past would not make it retrospective.”<sup>15</sup>*

The retroactive effect of the proposed reference tariff cannot be avoided by stating that the reference tariff will only apply from the date of the approval of the 2015DAU. One must look to the substance, not the form, of the QCA's proposal to assess its true effect.

The substance of the QCA's proposal is take a financial outcome (a “windfall”) it asserts (but does not substantiate) occurred in a previous regulatory period, and to address the asserted “windfall” (in a way that lacks any clarity – as discussed below) by re-engineering Queensland Rail's financial return for a past regulatory period. The fact that the QCA achieves this result by reducing future reference tariffs (and consequent access charges) does not affect the substance of what it is doing. The clear and undeniable effect of the QCA's proposal is to retroactively alter and set aside Queensland Rail's accrued rights for the past provision of the declared service to users.

Put another way, the QCA's proposal is, in substance, to claw back the amount already lawfully received by way of access charges paid by end users in respect of Queensland Rail's past performance of contractual obligations in circumstances where:

- the QCA itself had previously approved the reference tariffs on which those access charges were based;
- Queensland Rail could not have had any reasonable expectation that the revenue previously received and on which Queensland Rail has made business decisions would be clawed back in a future period; and
- the previously received access charge revenue would (in a manner yet to be clarified) be redistributed to some, but not all, of the end users of the declared service that generated that revenue.<sup>16</sup>

Queensland Rail was lawfully entitled to set access charges based on the reference tariffs in the 2008AU and to be paid access charges under its relevant access agreements for the provision of the relevant services which were provided. Those lawful entitlements were not subject to any ex-post adjustment by the QCA.

Queensland Rail has already made a number of submissions to the QCA in relation to the QCA's statutory ability to impose retroactive reference tariffs on Queensland Rail. All of those submissions remain relevant.

The QCA will be acting outside its statutory powers and unreasonably should it seek to impose reference tariffs that are in substance retroactive. The fact that the QCA has attempted to paint

---

<sup>14</sup> QCA draft decision at 207.

<sup>15</sup> QCA draft decision at 210.

<sup>16</sup> One of the end users that generated the revenue now proposed for redistribution through the adjustment was Peabody Wi kie Creek. That end user is no longer operating so the benefit of its proportion of any adjustment will effectively flow to other end users – New Hope and Yancoak. The QCA's power to make such a redistribution is not evident.



this as an adjustment based on an alleged past over recovery of revenue does not alter the *ultra vires* nature of the decision.

## 5.5 Windfall gain

The QCA has stated that:

*“The effect of Queensland Rail’s change in position is that it will receive a windfall gain in respect of the period since 1 July 2013 when access charges it has collected will exceed access charges that would have been received if calculated in accordance with the reference tariff proposed to be approved by the QCA in this Draft Decision. Such an outcome is not in the public interest.”<sup>17</sup>*

The QCA has provided no details, calculations or evidence of an alleged “windfall gain”.

In any event, no “windfall gain” can have arisen because:

- Queensland Rail was entitled to set access charges based on QCA approved reference tariffs under the 2008AU;
- Queensland Rail was entitled to be paid access charges under relevant access agreements (entered under the 2008AU and the QCA Act) for the provision of the relevant services; and
- neither the 2008AU nor the relevant access agreements provided for an annual adjustment regime based on a revenue capping mechanism or an equivalent mechanism.

Any alleged “windfall gain” is manufactured and has no legal or regulatory basis. Queensland Rail has been paid what it was lawfully entitled to be paid for the performance of its contractual obligation to provide services.

## 5.6 Transfer notice

Queensland Rail’s submissions to the QCA in relation to the application of the transfer notice under the Asset Disposal Act continue to be relevant.

The 2008AU (as amended from time to time) applies to Queensland Rail, with various modifications, until such time as the QCA approves a subsequent access undertaking that replaces it. The transfer notice has effect despite any other law or instrument.

The transfer notice specifically refers to the reference tariffs under the 2008AU continuing to apply to Queensland Rail. Queensland Rail’s access agreements with access charges based on the reference tariffs continue to apply access charges based on those reference tariffs.

Queensland Rail is obliged to comply with the 2008AU even though it was not its access undertaking and to therefore contract for access based on the reference tariffs under the 2008AU.

Queensland Rail is lawfully entitled to be paid, and is obliged to set, access charges based on the 2008AU reference tariffs until a replacement access undertaking is approved by the QCA.

The QCA cannot as a matter of law override, or retroactively alter, the requirements of the transfer notice which gave rise to accrued rights in favour of Queensland Rail to be paid specified access charges for the provision of access prior to the approval of a replacement access undertaking.

---

<sup>17</sup> QCA draft decision at 215.

The effect of the QCA's proposal on reference tariff adjustment is to financially penalise Queensland Rail for complying with its legal obligation to charge in accordance with the 2008AU reference tariff. This clearly cannot be an appropriate regulatory outcome.

## 5.7 Public interest

The QCA has stated that:

*“The QCA maintains an approved access undertaking that delivers regulatory certainty and provides a major stimulus to the Queensland economy and local employment which is an important public interest consideration.”*<sup>18</sup>

It is not clear what the QCA's statement means. Queensland Rail assumes that the QCA is indicating that for an access undertaking to be capable of being approved it must provide regulatory certainty and a major stimulus to the Queensland economy and local employment.

While the 2015DAU provides regulatory certainty, Queensland Rail does not consider that it is necessary for the access undertaking to provide *“a major stimulus to the Queensland economy and local employment”*.

Queensland Rail also submits that it is not up to the 2015DAU to make upstream or downstream businesses competitive. In the case of the West Moreton Network coal mines, it is not up to the 2015DAU to make them competitive with other larger and more developed coal basins around the nation or for Queensland Rail to be compelled to operate its business in a less than commercial manner to achieve that end.

The QCA has also stated that:

*“Proposed development of new, or replacement, coal mines may be at risk if there is material pricing uncertainty for rail access. To the extent that this occurs, there can be flow-on effects in terms of regional economic development.”*<sup>19</sup>

As mentioned above, the 2015DAU does provide pricing certainty.

However and in any event, if the QCA is claiming that pricing uncertainty is the difference between whether a new or replacement coal mine proceeds, the QCA should provide the evidence on which that conclusion is based.

The QCA Act does not require either the QCA or Queensland Rail to make coal mines competitive. To the extent that the QCA is proposing to make a final decision to adjust reference tariffs based on this misconceived public interest requirement, it would be doing so based on an irrelevant consideration.

The QCA has stated that:

*“... the QCA considers that it is in the public interest for there to be regulatory certainty with regard to the inclusion of an adjustment amount in circumstances where stakeholders relied on Queensland Rail's previously stated intention to that effect. It is also in the public interest for there to be efficient investment in the infrastructure, which stakeholders have said may be impacted as a result of lack of confidence in the regulatory process. This would also lead to a lessening of competition which is not in the public interest.*

*The public interest is not served in circumstances where Queensland Rail changes its previously stated intention to include an adjustment amount.”*<sup>20</sup>

---

<sup>18</sup> QCA draft decision at 214.

<sup>19</sup> QCA draft decision at 215.

<sup>20</sup> QCA draft decision at 215.

The QCA's position that Queensland Rail has adversely affected certainty against the public interest by changing its position on the backdating of reference tariffs is ill-founded. In this regard, please see our comments in section 5.3 above.

## 5.8 Methodology for adjustment

For the reasons set out in sections 5.1 to 5.7 above, Queensland Rail submits that there is no legal basis or justification for the QCA's proposed adjustment of reference tariffs referred to in its draft decision.

Without limitation to those submissions, the QCA's proposed adjustment methodology is unclear, lacks transparency and is incapable of objective assessment.

As a statutory economic regulator, the QCA should adopt processes in the setting of reference tariffs, including its proposed adjustment amount methodology, that are rigorous and transparent, use comprehensive and detailed data and offer a degree of certainty about the way in which methodologies apply. Those methodologies should be well articulated, consistent, communicated to parties who may be affected and follow applicable regulatory precedents.

The QCA adjustment amount methodology as referred to in its draft decision fails to meet these criteria and is incapable of being objectively scrutinised. There is no way of calculating the actual adjustment amount by reference to the QCA's draft decision.

For instance, the QCA has stated in its Executive Summary that:

*"While the QCA's proposed indicative ceiling price of \$18.88/000 gtk is not materially different from Queensland Rail's proposed reference tariff of \$19.41/000 gtk, these tariffs are not comparable during the adjustment period as they are based on significantly different volume assumptions. Having regard for this difference, we have estimated the adjustment amount payable by Queensland Rail from 1 July 2013 to 30 June 2015 to be \$26.3 million as at 1 July 2015. Reflected in forward looking prices over the regulatory period, this means an indicative reference tariff equivalent to \$15.88/000 gtk as at 1 July 2015."*<sup>21</sup>

but later in Box 8.2 that:

*"The adjustment amount was calculated as the difference between:*

- *the 'future value' of **actual revenues** charged by Queensland Rail from coal traffic during 2013–14 to 2014–15<sup>659</sup>, and*
- *the 'future value' of **maximum allowable revenues (MAR)** for coal traffic during 2013–14 to 2014–15 estimated by the QCA.<sup>660</sup>*

*The 'future values' are as at the start of new regulatory period on 1 July 2015.*

*The actual revenue data for the two years were provided by Queensland Rail.<sup>661</sup>"*

with the following footnotes:

<sup>659</sup> *Post-tax revenues after taking away calculated tax payments.*

<sup>660</sup> *The calculations for 2013–14 and 2014–15 apply the parameters discussed in this Draft Decision.*

<sup>661</sup> *Provided on 17 July 2015 upon a section 185 information request (QCA Act)."*

The Executive Summary statement and the Box 8.2 statement are inconsistent as to the calculation of the QCA's proposed adjustment amount.

---

<sup>21</sup> QCA draft decision at vi.

In any event, these statements of how the proposed adjustment amount is to be calculated provide such scant detail and such little information on the basis of calculation that it is not possible to assess the quantum of the proposed adjustment or to test the integrity or appropriateness of the calculation.

The QCA's proposed adjustment applies for the entire regulatory period; it does not purport to cease when the alleged "windfall gain" has been recouped and is not otherwise affected by other factors that might justify its cessation.

The QCA proposes to materially adversely affect Queensland Rail's financial interests through the proposed adjustment. Consequently, Queensland Rail is entitled to a clear and detailed announcement by the QCA of the adjustment calculations and an explanation as to the justification and appropriateness of the QCA's decision to apply the adjustment for the entire regulatory period.

## 5.9 Menezes report

PwC has prepared an independent review of Professor Flavio Menezes report entitled: "*A regulatory economics assessment of the proposed Western System asset valuation approaches*". PwC's review is set out in **annexure 3**.

Queensland Rail submits that the QCA cannot rely on Professor Flavio Menezes report as the basis for its proposed decisions given the matters set out in this submission and for the reasons referred to in PwC's review.

# 6 Regulatory asset base

## 6.1 QCA's acceptance of initial asset base value

Queensland Rail has provided detailed submissions to the QCA highlighting the QCA's material departure from its own regulatory decisions including its past approval of an initial asset base for the West Moreton Network. The QCA's rationale for that departure is discussed in detail below.

The matters raised in Queensland Rail's previous submissions on this issue continue to be relevant.

The QCA's draft decision in relation to the asset base valuation contains various errors and misstatements including the following:

- The QCA has incorrectly claimed that because an initial asset base was not established at the time of the declaration of the service relating to the West Moreton Network, no initial asset base has ever been settled for the West Moreton Network. However, an asset base valuation was approved by the QCA subsequent to the declaration of the service.
- It is also incorrect that Queensland Rail derived an initial asset valuation for the West Moreton Network using a DORC methodology. Queensland Rail in fact rolled forward the QCA's asset base DORC valuation for the West Moreton Network (together with a value for some additional assets that were not included in the QCA's valuation).

The QCA has claimed that:

*"...QCA decisions in 2010 did not approve a specific methodology for deriving an initial asset value"*<sup>22</sup>

and

---

<sup>22</sup> QCA draft decision at 159.

*“The QCA specifically stated in its June 2010 pricing decision that ‘the Authority has not achieved its desired objective of finalising a repeatable and transparent methodology for deriving the western system [West Moreton network] tariff’.<sup>525</sup> The June 2010 final decision on QR Network’s June 2010 Extension DAAU approved new prices for the West Moreton network, but did not change the view that the derivation of that price had not been resolved.<sup>526</sup> It certainly did not ‘set the initial asset base’ for the network.”<sup>23</sup>*

A review of the QCA’s Draft Decision on QR Network’s 2010 DAU reveals that the QCA was talking about a methodology for deriving reference tariffs not a methodology for deriving the initial asset value. Whether or not the QCA approved a “specific methodology” for reference tariffs in 2010, the fact is the QCA did approve an initial asset value based on the QCA’s DORC valuation (without zero valuing “life expired assets”).

The full quote of the QCA’s discussion on this issue in its 2010 draft decision supports Queensland Rail’s submission:

*“Authority’s Analysis and Draft Decision*

*QR Network has included in the 2010 DAU the same western system coal tariffs that the Authority proposed in its December 2009 draft decision. While stakeholders have criticised this approach, the Authority does not believe that the issues they have raised are sufficient to alter the Authority’s view that the tariffs that it had proposed, and which QR Network has now adopted, are reasonable. Accordingly, the Authority proposes to accept the western system tariffs included in the 2010 DAU.*

*However, there remains outstanding the question of the most appropriate way of deriving these tariffs.*

*In its December 2009 draft decision, the Authority accepted that it was desirable to have a transparent and repeatable methodology for determining reference tariffs on the western system. The Authority has not changed its view that such an approach will provide access holders and their customers with the ability to plan future rail haulage operations with some degree of certainty. The Authority had sought to do this through its approach to deriving a western system coal tariff.*

*Conversely, QR Network has maintained its view that a reasonable tariff is one that sits below a ceiling tariff.*

*QR Network said it rejected the Authority’s methodology for assessing the tariff in part because it included a pro rata adjustment of the capital expenditure between coal and non-coal services. QR Network said that, in order to recover this capital expenditure in full, this would require it to make an equivalent pro rata reduction in the rebates it paid to western system miners which underwrote the capital expenditure through access facilitation deeds (AFDs).*

*However, the Authority believes that this is a narrow interpretation of the Authority’s development of the western system tariff. Indeed, the Authority gave careful consideration to the treatment of capital expenditure when it developed its methodology for assessing the western system tariff, and thought it had put forward a reasonable view on these matters.*

*In its December 2009 draft decision, the Authority found that it was reasonable to apply a pro rata adjustment to new capital expenditure, as the new investment improved the standard of the track for both coal and non-coal services – it was therefore reasonable that such expenditure be allocated to both coal and non-coal services.*

---

<sup>23</sup> QCA draft decision 174.

*It is worthwhile repeating the point the Authority made in its December 2009 draft decision that, as capacity is expanded and extra train paths are allocated to coal, the pro rata allocation to coal for all existing assets will also increase. This effect will be amplified by the extension of the western system tariff across the metropolitan system. The Authority concluded that, on the basis of its analysis, that it was highly probable that the coal-carrying train services would, in effect, pay for all of these new investments (QCA, December 2009: 87).*

*Moreover, despite its claims about the unreasonableness of the Authority's approach, QR Network has not demonstrated that the new capital expenditure would not have been required in the absence of coal traffics, nor has QR Network demonstrated that the investments, which are almost all on the mainline shared with other traffics, are required only for coal.*

*It is apparent, therefore, that the Authority and QR Network are still quite some distance apart on the appropriateness of the methodology for deriving the western system tariff even if they are in agreement on the quantum of that tariff. It is also apparent that the Authority has not achieved its desired objective of finalising a repeatable and transparent methodology for deriving the western system tariff. However, in order for there to be greater certainty about future tariffs, the Authority is keen to work with QR Network to develop an agreed approach for future undertakings.*

*In addition, as QR Network has proposed a tariff that does not raise the issue of a pro-rata allocation of capital expenditure, the Authority does not consider that this triggers QR Network's ability to make a pro rata adjustment to AFD rebates to the miners.*

*The Authority also notes that QR Network has proposed that the western system tariff in the 2010 DAU will apply for 'Surat Basin mines and Columboola', but has not included Columboola as a loading point in schedule F, part C of the 2010 DAU. The Authority considers that QR Network will need to submit a DAAU in order to introduce a Columboola reference tariff. The Authority therefore requires that QR Network delete the reference to Columboola in clause 3.5 of schedule F, part C in the 2010 DAU."<sup>24</sup>*

It is apparent that the QCA was of the view that there had not been a full meeting of the minds on the way to allocate costs for the purpose of deriving the relevant reference tariff. However, it is also apparent that there is no dispute or disagreement about the initial asset valuation or the methodology used to derive that asset valuation. Any disagreement related to the allocation of the value between different traffics, not the value itself.

The QCA accepted a valuation of the relevant assets as determined by its own independent expert.

The fact that the allocation of the value (and not the valuation itself) was the matter still to be resolved is exemplified by the QCA's statement that:

*"It is worthwhile repeating the point the Authority made in its December 2009 draft decision that, as capacity is expanded and extra train paths are allocated to coal, the pro rata allocation to coal for all existing assets will also increase."*

The QCA was not saying that the assets would be re-valued if extra train paths were allocated to coal. It was saying that the same valuation pie would be allocated differently to reflect the extra trains paths allocated to coal.

What was at issue (and still is today) is how the asset base and operational costs are to be applied for the purpose of setting the reference tariff in the context of a mixed use rail network.

---

<sup>24</sup> QCA Draft Decision QR Network's 2010 DAU – Tariffs and Schedule F June 2010 at 88 to 90.

In any event, the reference tariffs subsequently approved by the QCA for inclusion in the 2008AU were consistent with those originally derived under its draft decision regarding QR Network's (now Aurizon Network) 2009 draft access undertaking. While Aurizon Network may not have agreed with the QCA's allocation methodology, ultimately the QCA did not need Aurizon Network's agreement to proceed with an allocation methodology.

Additionally, even if there was a disagreement between the QCA and Aurizon Network over asset value issues, that disagreement is not relevant to determine the value for Queensland Rail's asset base. Indeed, Queensland Rail accepted the QCA's asset value and rolled it forward.

## 6.2 July 2015 submission

The QCA has downplayed Queensland Rail's submission of July 2015. The QCA has stated that:

*"Queensland Rail subsequently provided a further report in July 2015 that detailed a number of instances where the QCA had applied a DORC approach to valuing assets and argued we should do the same for the West Moreton network."*<sup>25</sup>

*"Queensland Rail provided a further report that listed instances where the QCA had applied DORC valuations."*<sup>26</sup>

The QCA does not otherwise deal with Queensland Rail's July 2015 submission on this issue. The QCA appears to have dismissed the July 2015 submission on the basis that it simply pointed to examples of DORC valuations carried out by the QCA for a range of assets.

In fact, that Queensland Rail submission was focused on the longstanding application of a DORC valuation methodology (without zero valuing of "life expired assets") to the assets comprising the West Moreton Network including the QCA's acceptance of an initial asset value based its own independent consultant's DORC valuation.

The submission did not merely point to other instances where the QCA had applied a DORC approach to valuing assets. It pointed to the QCA's consistent and persistent application and advocacy for a DORC valuation methodology (without the zero valuing of "life expired assets") to the assets in the West Moreton Network which culminated in the QCA approving a reference tariff based on just such a valuation by its own independent consultants.

## 6.3 Effect on investment by Queensland Rail

The QCA has stated (citing Professor Flavio Menezes) that:

*"DORC approaches that value assets whose actual life has exceeded their expected useful life would yield windfall gains to Queensland Rail, whereas either a Post-1995 DAC or QCA 2014 Draft Decision approach is more likely to promote the economically efficient operation of the network, provide incentives for Queensland Rail to efficiently invest, and promote competition in relevant markets."*<sup>27</sup>

The QCA has also stated that:

*"The West Moreton network remains, as it has for the two decades since export mining began, an old network, never designed for heavy-haul coal trains. As a result it provides a substandard service to coal traffic, is expensive to maintain, and requires extensive and ongoing capital upgrades."*<sup>28</sup>

---

<sup>25</sup> QCA draft decision at 162.

<sup>26</sup> QCA draft decision at 171.

<sup>27</sup> QCA draft decision at 166.

<sup>28</sup> QCA draft decision at 162.

*“Coal trains are able to use the West Moreton network only because of the high maintenance spend. The QCA has recognised the critical importance of the very high maintenance costs to the viability of the network by including substantial compensation for these costs in the reference tariff.*

*If the maintenance spend were to be cut, coal trains would no longer be able to use the West Moreton network and therefore the assets could not be used for coal traffic. The value of the network is therefore created by, and reflected in, the high maintenance costs. Without such high levels of maintenance, Queensland Rail could not generate revenue from coal services.”<sup>29</sup>*

The QCA’s proposals give rise to regulatory uncertainty that will affect investment. The QCA has given little regard to its own past regulatory decisions relating to the West Moreton Network. Queensland Rail is concerned that any investment that it and other stakeholders make will be at risk should the QCA ‘change its mind’ again. The investment risk arises from the fact that Queensland Rail and other stakeholders cannot rely on the QCA acting in a manner consistent with its past decisions.

Queensland Rail’s reference tariff proposal under the 2015DAU of \$19.41/’000gtk (well below the ceiling price) was proposed at a level consistent with the status quo as a compromise to provide regulatory certainty. However, the QCA is proposing to reject large parts of that compromise.

The QCA has recognised that for the West Moreton Network to continue to be used for coal carrying trains it requires “*extensive and ongoing capital upgrades*” and a high level of maintenance – which typically involves significant asset replacement programs. That such programs are necessary is not disputed.

However, given the QCA’s proposed rejection of Queensland Rail’s compromise proposal, the QCA should, if it is intending to impose any maintenance obligations of Queensland Rail, ensure that:

- it has the statutory power to do so;
- those obligations are not open-ended (as currently proposed by the QCA) so as to oblige Queensland Rail to potentially undertake maintenance beyond what has been specified in the calculation to the access charges or that requires opex greater than that recoverable through access charges;
- those obligations do not compel Queensland Rail to undertake any Extension including the replacement of any part of the West Moreton Network;
- such an obligation does not:
  - (a) obviate or water-down Queensland Rail’s right to elect (at its discretion) whether or not to fund an “Extension” (bearing in mind that an Extension includes the replacement of any part of the rail transport infrastructure comprising the West Moreton Network);
  - (b) require the provision of access even though an Extension might be required including during the term of an access agreement or for a renewal of access rights;
  - (c) require the provision of access even though unfunded maintenance might be required in order for that access to occur;

---

<sup>29</sup> QCA draft decision at 176.



- if Queensland Rail does not recover sufficient access charges to fund the maintenance specified in the calculation of the reference tariff, then access holders will make up the difference at the end of each year – for example, as the reference tariffs are based on a forecast greater than contract, where access holders rail solely to contract Queensland Rail will receive insufficient money to fund the maintenance specified in the build up of the reference tariff.

Adjustments will be necessary in relation to these and other related matters to ensure the regulatory arrangements strictly comply with the statutory requirements, as it is possible that Queensland Rail may need to re-consider the scope of its maintenance program and the method and funding for the delivery of capital programs once the nature and effect of the QCA's final decision is known.

#### **6.4 Menezes report**

PwC has prepared an independent review of Professor Flavio Menezes report entitled: *“The economic impact of QR’s proposal not to include an adjustment to refund or recoup differences in tariffs: Stage 1 Report”*. PwC’s review is set out in **annexure 3**.

Queensland Rail submits that the QCA cannot rely on Professor Flavio Menezes report as the basis for its proposed decisions given the matters set out in this submission and for the reasons referred to in PwC’s review.

#### **6.5 Maintenance of the RAB**

The 2015DAU proposes a prudency assessment process for capital expenditure (detailed in Schedule E of the 2015DAU) where the prudency of capital expenditure is accepted that capital expenditure is to be included in the RAB and ultimately reflected in the reference tariffs.

The prudency assessment process examines the scope, standard and cost of the capital expenditure works.

The process proposed in the 2015DAU is largely similar to the process under the 2008AU.

The QCA’s proposed drafting largely retains the 2015DAU provisions in respect of the prudency assessment process. However, the QCA has also proposed several changes including:

- replacing the requirement that where additional pre-existing parts of the Network are incorporated into the West Moreton Network they are included based on their DORC value with a requirement that they are included at a value approved by the QCA;
- enabling an “Access Funder” to seek an assessment of the prudency of scope, standard and cost of a capital expenditure project;
- enabling optimisation of assets if there is a possibility of actual bypass; and
- providing for Queensland Rail to maintain separate regulatory asset bases for the three sections of Rosewood to Jondaryan, Jondaryan to Macalister and Macalister to Columboola on the West Moreton network.

While Queensland Rail is generally satisfied with the approach taken by the QCA in relation to Schedule E of the 2015DAU, Queensland Rail’s concerns relating to the abovementioned matters are set out below.

#### ***Inclusion of additional pre-existing parts of the Network***

Queensland Rail has made specific submissions in relation to the QCA’s proposed treatment of the RAB under the 2015DAU as well as the application of valuation methodologies for assets not valued in the RAB for the purpose of setting the Ceiling Revenue Limit for pricing purposes.

Consistent with those submissions, Queensland Rail does not support the QCA's proposal to remove the DORC approach as the valuation method when the inclusion of additional, pre-existing parts of the Network is proposed under clause 1.2(a)(ii), Schedule E of the 2015DAU. To be clear, a DORC valuation approach would not be used for new capital expenditure projects. Clause 1.2(a)(ii) of Schedule E only relates to pre-existing infrastructure.

### **Right for access funder to seek acceptance**

The QCA also provides that an "Access Funder" may seek the QCA's acceptance of the prudence of the scope, standard of works and cost of a capital expenditure project.

Queensland Rail has provided separate submissions in relation to the investment provisions proposed for the 2015DAU including who may be an "Access Funder". Queensland Rail will not repeat those matters here and notes that the outcome of some of those matters may have implications for Schedule E – for example, the adoption of hybrid funding.

While Queensland Rail agrees with the spirit of the QCA's proposal:

- if an "Access Funder" were to exercise those proposed rights, any costs that the QCA incurs during the prudence assessment would not be borne by or passed on to Queensland Rail (including, for clarity, through a QCA fee under the QCA Act);
- the QCA should ensure any decision on the prudence of capital expenditure funded by an "Access Funder" does not negatively affect Queensland Rail – for example, it should not (directly or indirectly) reduce or adjust any amount Queensland Rail is entitled to recover from the "Access Funder" in relation to the capital expenditure project.

Queensland Rail considers the QCA's drafting would need to clearly reflect these issues.

Regarding RAB optimisation where "it becomes clear that there is a possibility of actual (not hypothetical) bypass",<sup>30</sup> Queensland Rail does not consider the possibility of actual bypass to constitute a reason for adjusting the RAB value.

While the QCA has proposed this change, the QCA has provided no reasons for how it has arrived at this position.

In the QCA's draft decision on Aurizon Network's 2014DAU,<sup>31</sup> the QCA stated that:

*"We are of the view that Aurizon Network's position that the threat of actual bypass does not constitute a reason for adjusting the RAB should be considered further. In our view the threat of actual bypass requires there to be a credible competitive alternative to Aurizon Network's transportation service within the CQCN.*

*If such an alternative exists it is not clear why users of Aurizon Network's service could not renegotiate better overall terms and conditions within their access agreements for the service obtained, given there is an alternative supply option. In such circumstances, it would appear to be at Aurizon Network's discretion to consider how it maintains, or otherwise, its competitiveness and customer base. It is not, however, immediately clear why this would require the RAB value to be reduced.*

*Against this background our interim position, as set out in this Draft Decision, is to accept Aurizon Network's proposal to remove the threat of actual bypass as a reason for reducing the RAB."<sup>32</sup>*

---

<sup>30</sup> As the QCA proposes by inserting a new clause 1.2(b)(iii) in Schedule E.

<sup>31</sup> The QCA's draft decision on Aurizon's 2014DAU given prior to December 2015.

<sup>32</sup> QCA at 310-311

Queensland Rail does not consider there to be a credible alternative supply option to Queensland Rail's network or certainly not key network components. However, if such an alternative did originate, negotiation within a floor/ceiling model, as is currently applied, can address the threat of actual bypass. As such, this should not require the RAB value to be reduced.

Indeed, the QCA noted in its draft decision on Aurizon's 2014 DAU that it would be at Aurizon Network's discretion to consider how it maintains its competitiveness. Queensland Rail's circumstances are no different.

For the West Moreton network, if the QCA accepts Queensland Rail's 'de-coupling' of the ceiling revenue limit from the reference tariff that would apply to current and future users, it negates the need for the RAB value to be adjusted.

## **6.6 Exclusion or zero-valuing of assets**

The QCA has also failed to provide disclosure of material information relating to asset values adopted by QCA in the draft decision. It is apparent from the draft decision that the QCA's intention is to attribute a 'zero value' to a number of Queensland Rail's assets, thereby affecting the overall asset value and the reference tariffs that flow from it. Despite repeated requests, the QCA has refused to identify the assets it intends to 'zero value' or the specific justification relevant to the assets in question.

Queensland Rail has real fears that the QCA is proposing to exclude or zero-value assets that had been renewed or replaced – that is, which are not life expired as claimed by the QCA.

Queensland Rail is entitled to know this information. The valuation of assets (including the exclusion or zero-valuing of assets) in relation to the RAB has serious and material financial impacts on Queensland Rail.

The QCA should have provided that information to Queensland Rail – but has failed to do so. Queensland Rail has effectively been denied the ability to make submissions including in relation to whether the excluded/zero-valued assets are actually life expired or have been renewed or replaced.

# **7 Volumes and allocation of common network costs for reference tariffs**

## **7.1 Application of an allocation methodology**

The 2015DAU proposed a methodology for deriving the reference tariff for the West Moreton Network based on an allocation of various costs. The methodology adopted was generally consistent with the QCA's past decisions in relation to the West Moreton Network.

The 2015DAU allocated operating and maintenance costs by reference to forecast volumes (which for coal carrying train services were higher than contracted volumes) and an allocation of the asset base based on assumed constraints to contracting, specified 2015 capex based on forecast volumes and coal-only asset values at 100% to coal carrying train services.

The QCA has rejected that proposal and has instead proposed the following allocation:

Cost	Allocation to coal
“fixed” maintenance costs	68.8%
“variable” maintenance costs	97.2% <sup>33</sup>
“fixed” operating costs	68.8%
“variable” operating costs	97.2% <sup>33</sup>
Pre-1995 assets	57.1%
1995-2015 assets/capex	68.8%
Coal only assets	100%
Specified capex (2015/16 to 2019/20)	68.8%

The QCA’s allocation largely arises because of its differential treatment of fixed and variable costs as outlined section 8.4 of the QCA’s draft decision. In particular, the QCA states:

*“We propose to cap coal traffics’ share of fixed costs (such as common network assets, fixed maintenance and operating costs) based on contracting (sic) restrictions associated with the Metropolitan network. This approach is consistent with Queensland Rail’s proposed approach to allocating the fixed costs associated with West Moreton network initial asset value. But we have taken this principle to apply to all of Queensland Rail’s fixed costs, not just its sunk assets.*

*Generally, regulators support allocating all of a regulated business’s efficient costs to determine ceiling prices, as this provides the business with a reasonable opportunity to recover the efficient costs of investing in and operating the service to provide access. But coal train services should not be required to pay for services that they are not able to contract to use.*

*Queensland Rail’s proposal would result in costs associated with providing access to non-coal services being recovered from coal traffics that cannot access this capacity.*

...

*Coal traffics should only pay for the fixed common network costs of the paths they are able to contract to use. Moreover, we are concerned that Queensland Rail’s approach would result in losses in its non-coal below-rail business arising from increased competition being recovered from coal train services.*

*Our assessment of allocating common network costs has focused on ensuring Queensland Rail receives a reasonable return on its investment in the West Moreton network for coal-carrying train services, and recovers efficient costs of providing the below-rail service in order to develop a reference tariff (s. 138(2)(b) and (g) and 168A(a) of the QCA Act). Queensland Rail’s legitimate business interests to recover its efficient costs and investments relating to the coal-carrying train services provided by the West Moreton network is an important factor in our decision.*

*We have given a greater weighting to the users’ legitimate interest in not paying for network capacity they are unable to contract, whether because those paths are contracted to non-coal traffics or because capacity cannot be contracted due to*

<sup>33</sup> 97.2% is the average with 98.2% Rosewood to Jondaryan and 96.8% for Jondaryan to Columboola.

*government-imposed contracting restrictions (required to maintain passenger services on the metropolitan system or restrictions on preserved train paths that cannot be contracted by coal services).*

*At the same time, we have also given regard to other relevant approval criteria, including the efficient operation, use of and investment in Queensland Rail's infrastructure and the interests of access seekers and holders (s. 138(2)(a), (e) and (h)).”<sup>34</sup>*

*“Constraints on the number of coal services that are able to be contracted to operate through the Metropolitan network (a maximum of 87 paths per week) necessitates an appropriate allocation of common costs. Users of a service should not bear the costs of access that they cannot contract.”<sup>35</sup>*

The QCA ultimately takes the view that costs are divisible into fixed and variable costs with:

- *fixed costs being allocated based on the relative proportion of the network capacity available to coal services to contract—that is, based on coal services' maximum proportion of total available paths*
- *variable costs being allocated based on the relative volume forecast for all train services, as variable costs are directly affected by volumes.”<sup>36</sup>*

Where the QCA applies its approach to the allocation of fixed costs, the QCA takes the view that whether or not Queensland Rail can recover the non-coal share of costs as allocated by the QCA “is not relevant for setting reference tariffs for coal carrying train services on the West Moreton network”.<sup>37</sup>

The effect of the QCA's approach is unambiguously designed to ensure Queensland Rail does not recover its efficient costs (let alone a relevant return).

## **7.2 Assumed 87 path constraint**

The QCA's rationale for its proposed allocation methodology is based on an assumed limitation on the number of train paths available to coal carrying train services through the Metropolitan Network to 87 paths per week (**87 path constraint**).

The QCA's draft decision discusses the 87 path constraint and also raises the possibility that the total number of paths available for contracting in the West Moreton Network was not 112 (as proposed by Queensland Rail) but 135<sup>38</sup> (as proposed by the QCA's consultants). The QCA invited stakeholders to make submissions on the total number of train paths available.<sup>39</sup> The QCA also stated that only 77 of the assumed 87 paths through the Metropolitan Network were relevant to coal trains using the West Moreton Network.<sup>40</sup>

---

<sup>34</sup> QCA draft decision at 143 to 144.

<sup>35</sup> QCA draft decision at 145.

<sup>36</sup> QCA draft decision at 145; see also at 154 to 159 and 185 to 188.

<sup>37</sup> For example, see QCA draft decision at 156, 158 and 187.

<sup>38</sup> QCA draft decision at 156 (footnote 426) and 191.

<sup>39</sup> Now that it is clear that no 87 path constraint exists in relation to coal services using the Metropolitan Network, it is irrelevant for the purposes of approving the 2015DAU whether the West Moreton Network is capable of providing 112 or 135 train paths. In any event, Queensland Rail considers that its assessment of the capability of the West Moreton Network is appropriate.

<sup>40</sup> Now that it is clear that no 87 path constraint exists in relation to coal services using the Metropolitan Network, it is irrelevant for the purposes of approving the 2015DAU whether the assumed constraint manifests in there being only 77 train paths available for coal in the West Moreton Network. Despite that, Queensland Rail considers that the QCA's conclusions regarding its 77 train path calculation were flawed, incorrect and inappropriate.

As a consequence, Queensland Rail has undertaken a detailed review of all matters relevant to the train paths available in the relevant rail networks including in particular the basis of the 87 path constraint.

That detailed review has confirmed that there is no legal requirement constraining the number of available train paths through the Metropolitan Network for coal trains. The 87 path reference was contained in correspondence from DTMR but that correspondence is not a direction from the “responsible Ministers” under section 12 of the QRTA Act (even assuming that such a direction could actually lawfully be given creating such a constraint) and consequently not a legally binding constraint.<sup>41</sup> Queensland Rail has received legal advice confirming that there is no legally binding 87 path constraint – that advice is attached in **annexure 8**.

As a result, the QCA’s rationale for the allocation of fixed costs based on the assumed 87 path constraint is erroneous and not appropriate. All train paths in the Metropolitan Network not allocated to existing train services are available for contracting by coal trains or other services.

Except to the extent that a cost can be clearly attributed solely to a particular type of train service (such as certain capital expenditure that is coal train specific), the only legitimate and rational basis for the allocation of costs (“fixed” and “variable”) is on the basis of forecast volumes. Given that only two passenger services and one non-coal freight service are forecast to run on the West Moreton Network, this would mean that coal services should bear approximately 98% of the cost allocation. Any other cost allocation approach which is based on a train path constraint is flawed.

Despite what past submissions may have been made by Queensland Rail and the QCA’s draft decision, the QCA cannot make a final decision that is based on the existence of the 87 path constraint as there is no such constraint.

### **7.3 Relevance of ability to recover costs and return**

The QCA has stated that whether or not Queensland Rail can recover those costs that have been allocated to non-coal users under the QCA’s proposal is not relevant to the setting of the reference tariff. The QCA cannot simply wash its hands on this issue. The QCA is disregarding a significant relevant consideration.

The QCA is effectively requiring Queensland Rail to recover over 24% of the costs from approximately 4.6% of the trains (that is, from passenger and non-coal freight trains). This would place an unfair cost burden on those other services – even if Queensland Rail could impose or recover such amounts.

The QCA’s proposal must consider and properly address the fact that Queensland Rail will not be able to recover those costs through those non-coal trains. The QCA’s allocation approach based on the purported 87 path constraint fails to set a price for access that is consistent with the pricing principles under the QCA Act – in particular, section 168A(a).

The QCA’s proposal effectively forces Queensland Rail to bear the costs it cannot recover itself (because the price set will not generate revenue that is at least enough to recover the relevant efficient costs and return) and, by doing so, the QCA would be requiring Queensland Rail to subsidise coal trains.

Queensland Rail also sought independent advice from PwC in part relating to the matter of the recovery of efficient costs. PwC’s report is set in **annexure 4**.

The QCA’s approach is beyond power.

---

<sup>41</sup> As the QCA has acknowledged, Queensland Rail updated its submissions on the purported 87 path constraint by confirming that the purported 87 path constraint was not a direction from the “responsible Ministers” under section 12 of the QRTA Act – but rather that it was merely advised by DTMR.

## 7.4 Trading off pricing principles

The QCA has purported to give more weight to the interests of users as compared to Queensland Rail's legitimate business interest in recovering its efficient costs and a return. While it is appropriate to have regard to the interests of users, the QCA cannot prioritise those interests over the pricing principles. Queensland Rail's receipt of at least its efficient costs and a return, while clearly in Queensland Rail's legitimate business interests, is also a fundamental pricing principle which cannot be traded off.

We also refer the QCA to the comments above in section 4.

## 7.5 Inconsistency with section 138A

The effect of the QCA's approach is to treat coal carrying services differently from non-coal carrying services on the West Moreton Network by forcing the non-coal carrying services to bear a high proportion of the costs of providing the declared service as compared to the coal carrying services. This constitutes differential treatment.

Section 138A(1) permits an approved access undertaking to treat access seekers and users differently in relation to access.

However, section 138A(2) of the QCA Act expressly states that any differential treatment permitted by section 138A(1) *"does not authorise an approved access undertaking to require or permit the owner or operator to do anything inconsistent with the pricing principles mentioned in section 168A"*.

The QCA cannot require from Queensland Rail an access undertaking that permits a form of differential treatment that is prohibited by section 138A(2).

## 7.6 Losses arising from increased competition

The QCA has sought to justify its cost allocation approach by stating:

*"Moreover, we are concerned that Queensland Rail's approach would result in losses in its non-coal below-rail business arising from increased competition being recovered from coal train services."*<sup>42</sup>

Queensland Rail struggles to comprehend the meaning of this purported justification for the QCA's view and cannot identify any circumstance where *"increased competition"* for access (if that is what the QCA is referring to) could lead to *"losses in its non-coal below rail business"*.

If as the statement suggests this is a key concern of the QCA upon which it seeks to justify its approach to cost allocation, it is incumbent upon the QCA to clarify its meaning and to ensure that it is factually correct and a relevant consideration.

## 7.7 Notional impact of Metropolitan Network on West Moreton Network

Queensland Rail in the 2015DAU proposed to allocate the value of pre-1995 assets in the RAB by reflecting the impact on the number of train paths that are unavailable in the West Moreton Network due to the impact of the Metropolitan Network – described as *"the Metro Impact"* (**Metro Impact**).

Queensland Rail's analysis in respect of the 2015DAU demonstrated that the Metro Impact was a reduction in available train paths of about 12.1%.<sup>43</sup>

In its Draft Decision the QCA proposes to accept Queensland Rail's approach to the factors making up the Metro Impact, but to adopt a Metro Impact of 17% (rather than the 12.1%

---

<sup>42</sup> QCA draft decision at 143-144.

<sup>43</sup> In Appendix 5 of Volume 2 of the 2015 DAU Submission, Queensland Rail provided a detailed explanation of its analysis, together with detailed supporting information.

calculated by Queensland Rail) in reliance on a report that the QCA commissioned from its consultant, B&H.

The following matters are relevant to how the QCA should assess the Metro Impact and why it should favour the Queensland Rail approach to its calculation over that of B&H.

**(a) Pragmatic approach of 2015DAU**

The inclusion of the Metro Impact as a factor in the allocation of the value of pre-1995 assets was included by Queensland Rail in the 2015DAU to be consistent with the QCA's past application of such a factor in the allocation methodology used to derive the reference tariffs relating to the West Moreton Network. Queensland Rail adopted a pragmatic approach in a spirit of compromise, and against the background of a perception amongst customers that the passenger dominated Metropolitan Network impacted on the capacity available in the West Moreton Network.

Queensland Rail has been, and remains of the view, that including the allowance for a Metro Impact in the allocation methodology for pre-1995 assets is inappropriate and is not justified or required from an economic perspective.<sup>44</sup>

The QCA's approach to the use of the Metro Impact in setting asset values is unjustified. The mere fact:

- that part of the rail network might act as a bottleneck; or
- that different parts of a rail network may have maintenance windows that cannot or do not fully align or which affect the capacity of those parts differently,

should not be relevant to the setting of a reference tariff for another part of the network, the West Moreton Network.

The costs of providing the service (particularly fixed costs) remain the same regardless of the constraint. It is not appropriate that part of those costs be excluded from recovery because of the mere existence of such a constraint.

It is relevant that an allowance for a Metro Impact in the allocation methodology will also result in a price for access that does not generate expected revenue that is at least enough to meet the efficient costs and provide the relevant return required in accordance with the QCA Act.

While Queensland Rail is prepared to volunteer an allowance for the Metro Impact, the QCA has no power to impose such an allowance or an allowance that is more adverse to Queensland Rail.

**(b) B&H assessment**

While the QCA has no power to impose an allowance for a Metro Impact in the allocation methodology for the reference tariffs for the West Moreton Network, Queensland Rail has in any case elected to make some observations relating to the B&H assessment relied on by the QCA.

The B&H assessment fails to take into account relevant information provided by Queensland Rail, is based on various incorrect assumptions and includes conclusions based on the impact of maintenance works on passenger trains.<sup>45</sup> For these reasons, the QCA cannot rely on the B&H report.

---

<sup>44</sup> See the PWC report (at pages 18-19) appended to Queensland Rail's submission dated 18 July 2014 responding to the QCA's consultation paper.

<sup>45</sup> For example, at page 60 the B&H report states that Western System maintenance is mainly conducted through weekday daylight hours, and this is an important input into B&H's estimate that only 25% of maintenance works are aligned. However, Queensland Rail's past submissions included documentation that demonstrates that the majority of West Moreton maintenance works are on weekend daylight hours.



Queensland Rail’s re-examination of the Metro Impact following B&H’s most recent assessment is set out in **annexure 1** and **annexure 9** in this submission. In summary, it shows that:

- Queensland Rail agrees with B&H that, at least notionally, passenger peak periods result in a loss of 3 loaded and 3 unloaded coal paths each weekday, and that there is no loss of coal paths on weekends due to passenger services;
- B&H’s assumption of only 25% alignment in the timing of maintenance on the Metropolitan and West Moreton Networks grossly understates the degree of alignment. In any event, B&H’s assessment does not take into account that Queensland Rail applies (as referred to in **annexure 1**) a comprehensive planning framework not only to maximise maintenance alignment across the Metropolitan and West Moreton Networks but also to ensure that, where alignment is not possible (such as where additional Metropolitan Network maintenance occurs), a line remains open (wherever possible) to allow the operation of coal services. The potential impact of misaligned Metropolitan and West Moreton Network maintenance is, on average, 3 hours per week – which is equivalent to 3 loaded and 3 unloaded paths per week;
- It is proper to address operational variability by applying a ‘reduction factor’ when seeking to assess the capacity of a rail network theoretically available for contracting. This is achieved by setting the scheduling interval between trains to include a margin above the average run time of the longest section, and by keeping a number of paths in reserve for operational contingencies. Doing so is necessary to accommodate variability in Metropolitan Network operations. There is no basis to increase the Metro Impact to reflect suburban system variability and the allowances made for that variability.

Based on this re-examination, a Metro Impact of 12.1% reflects the factors shown in Table 1 and is a fair assessment. Queensland Rail considers that the QCA has no basis to form the view that an adjustment based on that Metro Impact volunteered under the 2015DAU is not appropriate (unless, of course, the QCA feels compelled to refuse that adjustment because it is outside powers to require any adjustment).

**Table 1: Impact of Metropolitan Network constraints on West Moreton Network theoretical capacity**

	One-way paths/week
West Moreton theoretical capacity (after mtce)	298
Unavailable due to Metropolitan Network <sup>46</sup>	36
Total available paths (after metro impact)	262
% Unavailable due to metro impact	12.1%
Maximum contracting capacity <sup>47</sup>	224
Reserve paths (total available less maximum contracting capacity)	38

<sup>46</sup> Comprised of 36 for peak period restrictions and 6 for additional metropolitan maintenance.

<sup>47</sup> As discussed in Queensland Rail’s past submissions relating to the West Moreton reference tariff, Queensland Rail’s maximum contracting capacity on the West Moreton Network is 112 return paths per week or 224 one way paths per week.

## 7.8 Allocation of past common network investments

The asset valuation for the West Moreton Network is based on a valuation undertaken for, and approved by, the QCA as part of approving (in 2010) the current reference tariffs applying to the “Western System” under the 2008AU. That valuation formed the basis of the RAB used for the setting and approval of the current reference tariffs by the QCA.

For the 2015DAU, Queensland Rail rolled that valuation forward to 1 July 2015 in accordance with standard regulatory principles, involving the addition of new capital investments and asset appreciation, and the deduction of depreciation.

The allocation of the 1 July 2015 opening asset value can, arguably, be considered in relation to a number of component parts:

- the 2010 opening asset value, which reflected an assessment of the value of the assets that existed at the relevant time, and which are allocated between coal and non-coal services to reflect their share of West Moreton Network capacity, as discussed above;
- capital projects from 2010 to 2015 that are used solely by either coal or non-coal services and therefore fully attributed to coal or non coal services; and
- capital projects from 2010 to 2015 that relate to rail infrastructure that is used in common by both coal and non-coal services, which must be allocated between coal and non-coal services for the purpose of preparing reference tariffs and access charges.

It is in respect of the third of these that Queensland Rail has concerns with the QCA’s proposed approach.

There are two general approaches that may be used in allocating past common network investments to coal or non-coal users:

- investments can be directly attributed to coal or non-coal services based on the identity of the users triggering the investment – this was the approach proposed by Queensland Rail in relation to the 2013DAU; or
- all investments in the common use network can be treated as ‘common network investments’, and allocated between coal and non-coal users based on their relative share of network capacity – this was the approach proposed in the 2015DAU on the basis of the QCA’s 2014 Draft Decision.

However, the QCA has proposed in its current draft decision that:

- common network investments triggered by coal users be allocated between coal and non-coal users based on their relative share of network capacity; and
- common network investments triggered by non-coal users be attributed solely to non-coal users.

The QCA has rationalised its recommendation as being necessary to prevent Queensland Rail from earning windfall gains, given that the non-coal triggered investments were financially underpinned by Queensland Rail’s Transport Services Contract (**TSC**) with the Queensland Government. The QCA’s proposed approach is effectively a mix of the two general approaches referred to above. Contrary to the QCA’s statements, the QCA’s approach results in a skewed allocation of investments to non-coal users, resulting in Queensland Rail being prevented from fully recovering the costs of its investments.

This is demonstrated by the following assessment of the implications of each of the approaches.

**Method 1: Attribute investments to user group that triggered investments – 2013DAU approach**

The approach to these common network investments as proposed in the 2013DAU was to allocate them based on the identity of the users that triggered the investment. This approach was adopted as it was consistent with the original business cases supporting those investments and was also supported by the commercial arrangements that Queensland Rail negotiated with the various users to underpin the investment decisions, including:

- coal users, whose charges included a return on and of 'coal investments' via their operator's access agreements and several access facilitation deed arrangements; and
- the Queensland Government, with the TSC including a return on and of 'TSC investments' that were triggered by the Government's needs for freight and passenger users.

In neither case did Queensland Rail commercially secure a contribution from one user group to a share of the return on and of investments triggered by the another user group.

In accordance with this approach, the amount of investments attributed to coal and non-coal users over this period (excluding capitalised interest) is set out in Table 2.

**Table 2: Method 1: attribution of common network investments based on investment trigger**

	Allocation		Total
	Coal	Non-coal	
User specific investment (\$m)	13.720		13.720
Common network investments (\$m)	61.008 <sup>48</sup>	17.439	78.447
Common network investments – allocation (%)	77.8%	22.2%	
Total investment \$m	74.728	17.439	92.167

This approach was supported by New Hope, the major user of coal services on the West Moreton Network, which stated that it accepted that investments incurred specifically for coal services should be fully allocated to coal services in the tariff and that similarly investments incurred specifically for non-coal services should be fully allocated to those services.<sup>49</sup>

**Method 2: Allocate investments based on share of capacity – 2015 DAU approach**

In its 2014 Draft Decision, the QCA took a different view, namely that investment in the common network assets would benefit all users, and should therefore be allocated on a consistent basis between those users. The QCA stated:

*"In its December 2009 draft decision, the QCA proposed to assess coal reference tariffs on the basis that all traffics paid the same price, so each user's train service covered an equal proportion of the common network asset base (QCA, December 2009: 80). The QCA considers that this cost-sharing principle should apply regardless of who underwrote those assets.*

<sup>48</sup> This figure replaces the \$74.358m contained in the 2013DAU as actual costs for the Western System Asset Replacement Project were \$0.37m higher than the May 2013 Forecast on which the 2013DAU was based.

<sup>49</sup> New Hope Group (2013), Queensland Rail's proposed Reference Tariff Reset - New Hope Corporation submission, at 14.

*The QCA also considers that any anticipated shortfall in non-coal revenue is a commercial matter for Queensland Rail and that tariffs charged to coal services should not subsidise the non-coal services.*

*Moreover, the QCA considers that a pro rata allocation of the incremental common network spending will create incentives for Queensland Rail to increase the number of train paths allocated to coal and promote efficient use of the network, as more capacity will be allocated to the highest and best possible use (i.e. coal train services).*

*Taking all this into account, the QCA proposes to apply a pro rata allocation based on coal's share of train paths to all incremental capital expenditure on the common network.”<sup>50</sup>*

The asset value roll-forward that the QCA prepared supporting the 2014 Draft Decision reflected this methodology, with both coal and non-coal triggered investments on the common network included in the common network assets, and then allocated between each user group based on each user group's share of train paths.

This approach creates a disconnection between the commercial agreements and revenue streams underpinning the relevant investments and the value ultimately allocated to the different user groups. To the extent that the allocation of investment value differs significantly from the assumptions on which the relevant commercial agreements are based, there is the potential for Queensland Rail to earn either windfall gains or losses. Queensland Rail brought this issue to the QCA's attention in its response to the QCA's 2014 Consultation Paper where the QCA first suggested its preference for allocating common network investments based on capacity shares.

However, on the basis that the two approaches result in similar outcomes in the relevant circumstances, Queensland Rail was prepared to compromise and accept the 'swings and roundabouts' resulting from this approach in its 2015DAU in order to resolve the matter.

Therefore, Queensland Rail implemented the approach proposed by the QCA in its 2014 Draft Decision, resulting in the allocations to coal and non-coal users as set out in Table 3.

**Table 3: Method 2: allocation of common network investments based on share of capacity**

	Allocation		Total
	Coal	Non-coal	
User specific investment (\$m)	13.720		13.720
Common network investments (\$m)	60.953	17.494	78.447
Common network investments – allocation (%)	77.7%	22.3%	
Total investment \$m	74.673	17.494	92.167

As noted above, the resulting allocations to coal and non-coal users are similar to method 1, with the proportion of common network investments allocated to coal reducing from 77.8% to 77.7%. Therefore, while the methodology does not fully align with the assumptions underpinning existing commercial agreements, on this occasion the practical outcome is similar, resulting in neither a windfall gain nor a windfall loss.

<sup>50</sup> Queensland Competition Authority (2014), Draft Decision on Queensland Rail's 2013 Draft Access Undertaking at 146.

**Method 3: Different approach for coal and TSC triggered investments – 2015 Draft Decision**

In its current draft decision, the QCA has (departing from its 2014 draft decision) taken an entirely different view, namely that:

- investments triggered by coal users should be treated as common network investments and allocated between coal and non-coal users on the basis that all users will ultimately benefit from, for example, the increased standard of the track; and
- investments triggered by non-coal users should be fully attributed to non-coal users, as to allocate a share of these investments to coal users would create a windfall gain to Queensland Rail, on the basis that the TSC agreement already provides for the full recovery of these investments.<sup>51</sup>

The outcome of the approach recommended by the QCA in its 2014 Draft Decision is set out in Table 4.

**Table 4: Method 3: different approach for coal and TSC triggered investment – 2015 Draft Decision**

	Allocation		Total
	Coal	Non-coal	
User specific investment (\$m)	13.720		13.720
Common network investments – coal triggered (\$m)	41.974 <sup>52</sup>	19.034	61.008
Common network investments – non-coal triggered (\$m)		17.439	17.439
Common network investments – allocation (%)	53.5%	46.5%	
Total investment \$m	55.694	36.473	92.167

The QCA's claim that Queensland Rail's proposal will create a windfall gain to Queensland Rail is incorrect, as the analysis illustrated in Table 2 and Table 3 clearly show, the total investment allocated to non-coal users is similar under the 2015DAU proposal (which is based on the QCA's proposal under its 2014 Draft Decision) to what was actually proposed by Queensland Rail in relation to the 2013DAU.

The QCA's new proposed approach is a mix of approaches that results in a highly skewed allocation of common network investments to non-coal users.

While the QCA has explained this approach as a reiteration of its 2014 Draft Decision, this is not borne out by a close analysis of the 2014 Draft Decision. In the 2014 Draft Decision, the QCA clearly took the view that all common network investments should be allocated between coal and non-coal users based on their share of capacity allocation, regardless of who underwrote the investment.

Not only is the QCA's proposed total investment allocated to non-coal users grossly out of proportion to non-coal users' share of capacity allocation, but this approach will also prevent Queensland Rail from fully recovering the costs of these investments, as the revenue negotiated

<sup>51</sup> QCA draft decision at 182.

<sup>52</sup> 68.8% of coal triggered common network investment, based on the QCA's recommended coal services contracting cap of 77/112 paths.

from non-coal users together with the TSC funding was only ever intended to recover \$17.439m of investment, (regardless of whether this amount was calculated as an attribution of the investment triggered by non-coal services, or as an allocation of a share of overall common network investment to non-coal services).

By allocating to non-coal services a share of common network investments that is:

- in excess of their share of capacity allocation;
- in excess of the investment that was triggered by those services; and
- in excess of the amount that can be recovered from the access charges/TSC funding related to those services,

the QCA's proposal is inconsistent with section 168A(a) of the QCA Act, because the proposal will result in a price for access that will not *“generate expected revenue for the service that is at least enough to meet the efficient costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved”*.

### **Preferred approach**

The most appropriate approach for the relevant capital investments is to allocate them to the users that triggered the need for the investment.

Requiring a proportion of investments to be allocated to users who may not require the improved track standard, and who may not be prepared to pay for that improved track standard, will undermine the development of business cases to support future investments.

Attributing the costs of investments to the users triggering the need for the investment allows investment risk to be managed by ensuring that the investments are underpinned by commercial arrangements, whether this be through access agreements, access facilitation deeds, the TSC or some other arrangement.

This methodology is also consistent with the QCA's approach in establishing principles for the pricing for expansions of rail and port infrastructure, where the QCA has considered it inappropriate to allocate to existing users the costs associated with capital investments that have been triggered by subsequent users if this would result in an increased charge for existing users. For example, in considering the impact of investments made in the Newlands system triggered by GAPE/NAPE users, the QCA has rejected the allocation of investment costs to existing Newlands system users given:

- the inclusion of these investment costs would result in an increased reference tariff for existing Newlands system users; and
- Aurizon Network does not appear to have provided any evidence that the asset renewal would have been required in the event that the GAPE/NAPE project did not proceed.<sup>53</sup>

Finally this methodology is also the approach that is most consistent with the QCA's concern to ensure that there are no windfall gains (or losses) to Queensland Rail resulting from the allocation approach. This reflects that the allocation of investments will be fully consistent with the commercial arrangements that underpinned Queensland Rail's decision to invest in the various projects.

Despite this, Queensland Rail agrees that an allocation of common network investments from 2007-08 to 2013-14 between different user groups based on each user group's share of train paths (whether on a contracted or forecast basis) could also be appropriate and consistent with

---

<sup>53</sup> Queensland Competition Authority (2014), Aurizon 2014 Draft Access Undertaking – Draft Decision Volume III – Pricing and Tariffs, at p.401.

the pricing principles under the QCA Act. However, if this approach were adopted it would need to be applied in a consistent way for all common network investments regardless of who underwrote the investment, as recommended by the QCA in its 2014 Draft Decision.

In any event, Queensland Rail would also point out that it should not be the QCA's aim to allow for Government to subsidise industry, where there is a mechanism such as a reference tariff which will facilitate payment from commercial activities to properly account for their commercial activities.

## 7.9 Categorisation and allocation of costs

The QCA's draft decision included various proposals in relation to the categorisation and allocation of forward looking costs. Forward looking costs is a collective term referring to ongoing costs associated with providing a service, and includes maintenance, operating and capital costs.

Capital costs can include both:

- asset renewal costs – renewals are necessary to maintain serviceability; and
- expansion costs – expansions are needed where there is an increase in demand.

For the purpose of this section 7.9, the forward looking capital costs that are referred to are asset renewal costs. This section 7.9 does not relate to forward looking expansion capital costs.

In general terms, the 2015DAU allocated the forward looking costs associated with the West Moreton Network as follows:

- maintenance costs to be allocated according to forecast gtk;
- operating costs to be allocated according to forecast train paths; and
- future asset renewal capex costs to be allocated according to forecast train paths,

This allocation approach for maintenance and operating costs is consistent with the QCA's methodology used in approving the current reference tariffs, and with the QCA's approach in its 2014 Draft Decision on the 2013DAU.

However, in its 2015 draft decision, the QCA proposes a significantly changed approach, so that:

- Each cost category is separated into fixed and variable elements;
- The variable costs are allocated based on forecast gtk;
- The fixed costs are allocated based on the capacity that is available for contracting by that group of services, reflecting the QCA's assessment of the impact of an assumed Queensland Government imposed cap on coal services. As a result, the QCA has recommended that coal be allocated 68.8% of fixed forward looking costs, based on coal only being able to contract 77 out of a maximum 112 train paths.

Queensland Rail has made separate submissions on the issue of the assumed constraint on coal services through the Metropolitan Network – see, for example, section 7.2 above. It is now clear that no such constraint exists. Consequently and in any event, the QCA has no basis to conclude that only 68.8% of West Moreton Network capacity is available for coal services or that costs should be allocated on such a basis.

The QCA's re-categorisation and allocation of forward looking costs arose out of the assumed constraint which has now been shown not to exist. As such, the QCA needs to completely reconsider those matters – as it must any other matters directly or indirectly based on that assumed constraint.

In this regard, the QCA should note that any aspects of the 2015DAU which also were based on such an assumed constraint will also need to be revisited.

Despite this, Queensland Rail has undertaken an analysis of the QCA's proposed fixed and variable categorisation of costs. The QCA's approach to cost categorisation is seriously flawed.

Any proposed categorisation of costs as fixed or variable is in a broad sense to enable the development of a cost allocation methodology for the build up of a price that more closely reflects and responds to the drivers of cost causation. As such, it is of crucial importance that the service requirements of coal and non coal services are quite different. This difference should also be reflected in the efficient allocation of costs to each group. For example:

- Non-coal services are forecast to run around three return services per week leading to a total average gross tonnage across the route<sup>54</sup> of less than 300,000tpa; however
- Coal services are forecast to run 62.8 return services per week with a total net tonnes of 6.3mtpa and an average gross tonnage across the route of greater than 11mtpa.

The standard to which the infrastructure must be maintained in order to reliably operate the forecast coal services will be extremely different to that which would be acceptable if only the non-coal services were operated.

Queensland Rail submits that any categorisation of costs (if any) would need to be into three, rather than two, categories:

- Common fixed costs (being those costs that are not attributable to a single user of the system, or would be incurred even if only a minimal number of services were to utilise the network) – these costs are essentially the base fixed costs that would be incurred for any train service;
- Coal fixed costs (being fixed costs that are triggered by the need for the network to be able to operate coal services); and
- Variable costs (being costs that vary directly with tonnage that operates on the network).

These three categories would be needed for a robust attribution of costs that has, as far as possible, a direct link between the costs being incurred and the relevant user.<sup>55</sup>

Queensland Rail submits that this categorisation of costs better reflects the pricing principles under the QCA Act, and (as the QCA is interested in 'fairness') fairer to non-coal services as it better reflects the efficient costs associated with those non-coal services. The allocation methodology under the 2015DAU could be adjusted to reflect this cost categorisation and thereby better reflect the efficient costs of providing access for the different train services.

Having said that, if the QCA ultimately approves the 2015DAU, Queensland Rail is still prepared to accept and comply with the 2015DAU as proposed by Queensland Rail for the relevant regulatory period.

#### *Application to three categories to West Moreton Network*

For the purposes of this submission, Queensland Rail has revisited its forecast forward looking costs in order to re-cut those costs into the above three categories for illustrative purposes. The QCA's recommended categorisation of operating costs into their fixed and variable components

---

<sup>54</sup> Average gross tonnage is determined as route gtk/route km. Actual gross tonnage will be higher on the more heavily utilised section of track from Rosewood to Toowoomba, and lower on the lesser utilised sections of track to the west of Toowoomba.

<sup>55</sup> For clarity, Queensland Rail accepts that all operating costs are common costs. Therefore, a third category would not be needed for operating costs at this time.



is reasonable and Queensland Rail agrees all fixed operating costs are, in fact, common costs in this instance.

Queensland Rail has reviewed its forward looking maintenance and asset renewal costs, in order to categorise those costs into the common, fixed coal and variable cost categories. In the time available to respond to the Draft Decision, it has not been possible to complete this analysis to the level of detailed considered to be appropriate, however, initial estimates indicate the following categorisation of maintenance and asset renewal costs. The outcomes of that analysis are set out in Table 5 and Table 6.

**Table 5: Queensland Rail Forecast Maintenance Costs by category (\$,000)**

Cost category	FY16	FY17	FY18	FY19	FY20	Average
Common costs	\$24,506	\$10,351	\$16,256	\$10,608	\$11,154	\$14,575
Coal fixed costs	\$8,990	\$4,617	\$4,784	\$4,208	\$5,936	\$5,707
Variable costs	\$6,027	\$5,740	\$5,300	\$4,940	\$4,880	\$5,377
Total	\$39,523	\$20,708	\$26,340	\$19,756	\$21,970	\$25,659

**Table 6: Queensland Rail Forecast Asset Renewal Costs by category (\$,000)**

Cost category	FY16	FY17	FY18	FY19	FY20	Average
Common costs	\$8,028	\$6,330	\$8,979	\$7,426	\$6,789	\$7,510
Coal fixed costs	\$17,013	\$21,198	\$18,174	\$14,976	\$13,388	\$16,950
Variable costs	-	-	-	-	-	-
Total	\$25,041	\$27,528	\$27,153	\$22,402	\$20,177	\$24,460

**(a) Allocation methodology**

*Service specific incremental costs*

Queensland Rail agrees with the QCA that service specific incremental costs should be allocated directly to the relevant user. In this regard:

- Queensland Rail agrees that the QCA's recommended approach of allocating forward looking variable costs (both maintenance and operating costs) based on forecast usage, using gtk as the measure of usage, is reasonable; and
- while the QCA did not specifically consider the issue of coal fixed costs, to the extent that these fixed costs are triggered as a result of the standard to which the network must be maintained and renewed for the operation of coal services, Queensland Rail expects that the QCA would agree that those costs should be allocated fully to coal users.

*Allocation of common costs*

There is no justification (economic or otherwise) for the QCA requiring that common costs be allocated between coal and non-coal users on the basis of their potential share of maximum installed capacity. This approach would be inconsistent with the efficient operation of, use of and investment in the rail network, and inconsistent with economic concepts associated with efficient prices and efficient price discrimination.

The QCA's view appears to be based more on a concept of fairness rather than on economic principles, as it indicated by stating, in relation to Queensland Rail's proposed allocation of operating costs:

*"Our view is that coal services would then have paid more than their fair share of operating costs."*<sup>56</sup>

This approach would have major negative consequences on incentives for the efficient operation of, use of and investment in the rail network as well as being highly detrimental to Queensland Rail's legitimate business interests in being able to recover the costs incurred in the provision of access – not to mention compliance with the pricing principles under the QCA Act. In particular:

- it does not recognise the nature of cost drivers in an industry that exhibits a decreasing marginal cost such as rail infrastructure, as it effectively treats common future costs as if, in the long term, they are fully variable according to installed paths;
- recognising that this cost allocation approach is directly used to set prices, it does not reflect the principles of economic theory in relation to setting efficient prices in a declining cost business, and the requirements that must be met to ensure cross subsidies do not occur;
- given only three of the allocated 35 non-coal paths are used by non-coal services, this effectively prevents Queensland Rail from recovering the assessed efficient costs of providing the infrastructure by allocating 28.5% of Queensland Rail's future costs to unused capacity;
- it prevents efficient signals being given to Queensland Rail in relation to the future maintenance and renewal of the infrastructure that is essential for the ongoing provision of coal services, as it will not have a business case that anticipates full recovery of these future costs;
- it does not comply with the QCA Act's pricing principles which entitle Queensland Rail to *"generate expected revenue for the service that is at least enough to meet the efficient costs of providing access to the service"* and the relevant return on investment.

In any event, the fact that the assumed 87 path constraint is not actually a constraint renders this somewhat of a moot point as it was that assumed constraint which underlay the QCA's proposed approach on this. In the absence of that assumed constraint, the QCA does not even get to the starting line with its rationale.

It would be entirely consistent with the pricing principles under the QCA Act, for Queensland Rail to fully recover the common network costs from coal users on the basis that these costs are necessarily incurred in providing access to the coal users.

Despite this, Queensland Rail remains willing to allocate the common forward looking costs of the network to all users of the network based on their forecast usage. This approach is consistent with the established regulatory precedent developed by the QCA in relation to the assumed charging arrangements for coal and non-coal services.

Specifically, Queensland Rail proposes that:

- common maintenance costs;
- common operating costs; and
- common asset renewal costs,

---

<sup>56</sup> QCA (October 2014), Draft Decision on Queensland Rail's 2015 Draft Access Undertaking, p158

based on the number of train services forecast to be operated by coal and non-coal services.

## **8 Reference tariff to apply in the Metropolitan Network**

### **8.1 General rationale for Metropolitan Network tariff**

Coal carrying train services that originate in the West Moreton Network utilise the West Moreton Network west of Rosewood as well as the Brisbane Metropolitan Network from Rosewood to the port at Fisherman Islands. Train services traverse a number of passenger lines as well as dedicated freight and coal lines within the Metropolitan Network.

The process of establishing a reference tariff for coal services in the Metropolitan Network is complicated, in part because of the nature of the Metropolitan Network. While it is possible to develop a modified building block method to assess the costs of providing access for coal services on the West Moreton Network, in the past stakeholders have acknowledged and accepted that this exercise would be time consuming for the Metropolitan Network, with potential uncertainty around the allocation of existing costs and other complexities.

In recognition of this, since reference tariffs were first established in 2006, the West Moreton tariff has been extended through the Metropolitan Network as a proxy for the costs of coal services using the Metropolitan Network.

As Queensland Rail noted in its 2013 DAU submission, assessing a cost for coal carrying train services in relation to the Metropolitan Network would be a sizeable task requiring a valuation and allocation (in relation to traffic type). Such a valuation exercise would require a considerable amount of time and incur significant costs and, as Queensland Rail noted at the time, with the likely outcome of an appraisal appreciably more than that for assets west of Rosewood. Additionally, any optimisation and allocation process would not only be complex, but would also potentially be highly subjective.<sup>57</sup>

In recognition of this, the practice to date, as approved by the QCA under past voluntary access undertakings, has been to extend the West Moreton tariff (as determined for Rosewood west) to also apply in the Metropolitan Network. This approach is based on the assumption that the access charge associated with providing access west of Rosewood will form a reasonable proxy for the access charge for a rail network of a hypothetically similar service standard from Rosewood to the port. Both the QCA 2009 Draft Decision and the 2010 Final Decision in relation to QR Network applied the West Moreton reference tariff as a proxy for the Metropolitan Network.

### **8.2 QCA's concerns about incentives**

However, in the QCA's 2014 Draft Decision, the QCA raised a concern that this approach runs the risk of distorting Queensland Rail's investment incentives where it has a choice of whether to expand capacity through investing in either the West Moreton or Metropolitan Networks, creating a preference to invest in the West Moreton Network.

Queensland Rail considers this to be a theoretical concern as Queensland Rail's expansion investments are made with regard to where an investment is most required, and not by seeking to 'game' the regulatory process.

In any event, the ability to distort efficient investments in the way envisaged by the QCA is quite limited, given that, notwithstanding that there is currently surplus capacity (in terms of train paths) in the West Moreton Network, the main factor constraining the availability of additional paths for the West Moreton Network is the Toowoomba range. If there was a need to increase capacity,

---

<sup>57</sup> Queensland Rail (2013). AU1 West Moreton Reference Tariff Reset Overall Submission, 14 June 2013, p.7-8.

Queensland Rail would have only limited opportunities to expand capacity without addressing that bottleneck.

Moreover, the potential investment distortions claimed by the QCA do not apply in relation to asset renewal investments, including investments that are required to increase the reliability of the track in order to cater for increased traffic volume. These investments are triggered by the condition of the track in its specific location, and as a result the optionality of trading-off asset renewal investments in one location for another is not realistic.

There are also several mitigating factors in place that would restrict an ability to act as theorised by the QCA:

- There are mechanisms proposed in the 2015 DAU to ensure that Queensland Rail does not over-invest in Rosewood west, including obligations to demonstrate prudence in scope, standard and cost. Assuming that these requirements are effective, this will act as a significant constraint from electing to direct capacity enhancing capital expenditure west of Rosewood, if there are more efficient investment options in the Metropolitan Network;
- Regardless of the regulatory obligations to demonstrate prudence of investments, the long-term future of the West Moreton Network for the operation of coal services is uncertain for various reasons including the marginal nature of the coal deposits, the limited number of mines using the rail network, the market factors applicable to coal, the fact that coal trains traverse the Metropolitan Network through Brisbane and the potential for bypass by the Inland Standard Gauge railway – Queensland Rail has no incentive to ‘over invest’ in its assets (wherever they may be) given that they remain subject to a significant stranding risk.

Queensland Rail does have an incentive to invest in capacity enhancements for coal services in the Metropolitan Network, provided that the application of the tariff to the incremental volume creates sufficient incremental revenue to support the investment.

Notwithstanding the above, the QCA’s 2014 Draft Decision stated:

*“Accordingly, the QCA proposes to set the metropolitan tariff so that it gives Queensland Rail an incentive to make efficient investments in the metropolitan system by:*

- (a) maintaining an asset base for future investment to support coal and freight traffic in the metropolitan system and using it to derive an annual revenue requirement*
- (b) using all metropolitan coal services, including paths used by services to the Ebenezer loading point, to calculate the component of the access price that recovers the metropolitan asset base*
- (c) fixing the remainder of the tariff for crossing the metropolitan system at the level derived in approving the 2013 DAU, and then increasing it annually by CPI.”<sup>58</sup>*

In proposing to apply the West Moreton tariff as a proxy for the Metropolitan Network at the level derived in approving the 2013 DAU, the 2014 Draft Decision included a Metropolitan Network opening asset value of \$12.28M, largely reflecting the spending on new coal-only holding tracks at Fisherman Islands.

---

<sup>58</sup> QCA’s 2014 Draft Decision on Queensland Rail’s 2013 DAU, p.150.

While not accepting that Queensland Rail would steer investment towards the West Moreton Network despite the existence more efficient investments in the Metropolitan Network, Queensland Rail proposed to address the QCA's concerns by adopting the QCA's 2014 Draft Decision recommendation in its 2015 DAU by:

- separately identifying the tariff components for the West Moreton and Metropolitan Networks; and
- developing and maintaining, for each network, an incremental capacity expansion RAB, which would include capital expenditure that was incurred for the purpose of expanding capacity for coal services in that network. These incremental capacity expansion costs would be incorporated into the AT<sub>2</sub> tariff component for the network in which the expansion occurred.

Queensland Rail proposed an initial value of \$21.245M for the Metropolitan Network incremental RAB to reflect specified incremental capital expenditure in that network.

### 8.3 Industry rebates

Queensland Rail included the \$21.245M in the Metropolitan Network incremental RAB, in part because the relevant capital expenditure is subject to AFDs, with 100% of access charges attributable to this to be rebated back to end users through those AFDs via a reduction in their nominee operator's access charges.

Queensland Rail proposed to charge a Metropolitan Network incremental capex charge of \$230.50 per path (\$2015/16) and thus effectively would receive returns on and of specified coal specific investments in Metropolitan Network (\$21.245m as at 1 July 2015), which it would rebate to end users via a reduction in their nominee operator's access charges.

While this was a greater amount than included in the QCA's 2014 Draft Decision, which made provision for a subset of these investments (largely reflecting Columboola to Fisherman Islands project spending on new coal holding roads at Fisherman Islands, \$12.280m as at 1 July 2013) in their calculation of a Brisbane Metro incremental capex charge of \$98.18 per path (\$2013/14), it was to facilitate a 100% rebate.

In its submission on the 2015 DAU, New Hope raised a concern, and the QCA agreed, that the approach proposed by Queensland Rail in the 2015 DAU (and by default the QCA's 2014 Draft Decision approach), resulted in 'double counting'. In response to this, the QCA's 2015 Draft Decision, 'recalculated' the West Moreton tariff for the purpose of assessing the charge for coal services in the Metropolitan Network by:

- deducting coal's full allocation of all capital expenditure incurred in the West Moreton Network since 2002 from the opening asset value; and
- adding incremental capital expenditure for coal projects incurred in the Metropolitan Network (excluding components that the QCA assessed should be allocated to other freight services) to the opening asset value.

The above approach is a dramatic move away from the QCA's consistent approach since 2006 of using the West Moreton Network as a proxy for Metropolitan Network and is a significant move away from the approach adopted by the QCA in its 2014 DAU.

Therefore, in the 2014 Draft Decision the West Moreton Network would serve as proxy by fixing the remainder of the tariff for crossing the Metropolitan Network at the level derived in approving the 2013 DAU, and then increasing it annually by CPI. To be consistent with the 2014 Draft Decision, in the 2015 DAU the West Moreton Network would serve as proxy by fixing the remainder of the tariff for crossing the Metropolitan Network at the level derived in approving the 2015 DAU, and then increasing it annually by CPI.

However, the issue of ‘double counting’ must be considered within the context of the 100% rebates. If properly considered in that context, any alleged double-counting does not exist in any practical sense.

#### **8.4 Issues with the QCA’s approach**

The QCA’s recommended adjustment for the Metropolitan Network tariff is based on flawed logic. There is no internal consistency between the approach that the QCA has used to assess the West Moreton Network ‘capex deduction’ (where capital expenditure is attributed based on coal’s full allocation of costs) and the Metropolitan Network ‘capex addition’ (where capital expenditure is attributed based on an allocated component of incremental expenditure).

The QCA’s proposed approach results in a Metropolitan Network reference tariff that bears no reasonable resemblance to a proxy for the efficient costs of providing a coal service – which is the accepted purpose of extending the West Moreton tariff to the Metropolitan Network. In essence, the QCA has assessed the ‘proxy access charge’ for coal services traversing the Metropolitan Network on the basis of:

- the efficient costs of a hypothetical system that has the underlying asset base that existed in the West Moreton Network in 2002 – a system which is widely acknowledged to be aged and under-specified for the traffic, resulting in the need for high ongoing maintenance and substantial asset renewal; and
- the maintenance and operating costs associated with this same aged and underspecified asset; but
- excluding the essential asset renewal costs which have been used to progressively replace assets as they are life expired, and to improve asset quality sufficiently to allow the continued operation of these coal services.

By assessing the deduction of investments in the West Moreton Network on an entirely different basis to what is used for assessing the additional investments in the Metropolitan Network, the resulting charge bears no resemblance to any verified cost structure for the operation of coal services on the Metropolitan Network. The QCA has inappropriately skewed the allocation of costs away from coal services in a way that is not at all related to the identified concern of “double counting”. And in any event, as previously highlighted, from a practical perspective there is no double counting.

By way of summary, assessing the ‘capex addition’ by only including coal’s allocated share of incremental capital expenditure, fails to provide an internally consistent approach. The resulting proxy cost build-up for the Metropolitan Network mixes an opening asset value and maintenance costs based on an aged and underspecified network with a capital expenditure estimate that reflects an allocation of incremental coal triggered capital expenditure on a much newer and much higher standard network. As such, the Metropolitan Network tariff will no longer bear any real resemblance to a verified efficient cost structure for providing West Moreton coal services.

The QCA identified an alternate option for determining the Metropolitan Network tariff, involving carrying over the adjusted West Moreton Network asset base (after the ‘capex deduction’ based on all of coal’s allocated share of capital expenditure being removed) to the Metropolitan Network on a pro-rata distance basis, and rolling this value forward to reflect asset appreciation and incremental capital expenditure. However, this option suffers the same problems as the QCA’s recommended approach, by mixing an opening asset value and maintenance costs based on an aged and underspecified network with a capital expenditure estimate that reflects an allocation of incremental coal triggered capital expenditure on a much newer and much higher standard network.

The QCA is attempting to apply a ‘science’ to a ‘proxy’ that is not created through a Metropolitan Network building block approach resulting in something that is no longer a suitable proxy for coal services using the Metropolitan Network.

The purpose of using the West Moreton Network as a proxy for the Metropolitan Network was to avoid the difficulties in determining a reference tariff that is based on a more accurate building block approach. This will result in swings and roundabouts in terms of individual elements. As such, it is not appropriate to cherry pick individual items in the way that the QCA has sought to do, and which, for example, did not include renewal capital.

An opening Metropolitan RAB of \$74.8M (closing RAB of \$73M) compared to an opening West Moreton RAB of \$190M (closing RAB of \$279.6M) as included in the 2015 Draft decision is no way a reflection of the true value of the Metropolitan Network and consequently the efficient cost of providing access in respect of the Metropolitan Network.

Queensland Rail proposes to remove the \$21.245M from the Metropolitan Network incremental RAB and to retain the other elements of the 2014 Draft decision requirements. However, if the QCA is not willing to remain consistent with its past methodology, then a full building block approach must be applied for the Metropolitan Network consistent with appropriate regulatory practice and the QCA Act. However, Queensland Rail considers that this would result in a significantly higher Metropolitan Network reference tariff.

## 9 General reference tariff issues

### 9.1 QCA’s allowances for maintenance and capital costs

Queensland Rail has undertaken a detailed review of B&H’s assessment of Queensland Rail’s maintenance and capital expenditure costs proposed under the 2015DAU. B&H’s assessment is relied upon and accepted by the QCA in proposing allowances for those costs for the purpose of the reference tariff under the 2015DAU.

Queensland Rail has significant concerns about the appropriateness and adequacy of the B&H assessment. Queensland Rail’s detailed responses are set out in **annexure 2**.

Queensland Rail notes that it appears on several occasions that B&H has apparently misunderstood what was involved in various maintenance and capital activities essential to the declared service – despite Queensland Rail having provided relevant information and making itself available to assist B&H.

In addition, Queensland Rail notes that there are various projects that it considers are necessary for the ongoing provision of the declared service. If Queensland Rail is prevented from recovering the costs for those projects through the reference tariff, the QCA’s proposals will not comply with the pricing principle under section 168A(a) of the QCA Act because those projects are required in order to provide the declared service.

### 9.2 Nature of the West Moreton Network

The West Moreton Network is different from other coal based networks in Queensland and Australia. The QCA is right to point out that:

*“The West Moreton network was constructed in the 19th century for regional traffic (e.g. livestock, grain and other agricultural commodities, passenger and general freight). It does not provide the service potential of a modern engineering equivalent asset as it was not designed for coal transport. Particular attributes of the West Moreton network are:*

- a maximum length of 675 metres for coal trains, with an axle load of 15.75 tonnes. In contrast, in the central Queensland coal network, coal trains are two kilometres long with an axle load of 26 tonnes or more
- train speeds limited by sharp curves and steep grades on the range east of Toowoomba
- trains carrying less than 2,000 tonnes, compared with about 10,000 tonnes in central Queensland.

*The old, idiosyncratic West Moreton network has a standard and configuration that would never be replicated in a competitive market. The significant disparity from the modern equivalent means that standard valuation methodologies including a brownfields DORC can only be applied with significant adjustments.”<sup>59</sup>*

However, it is relevant that the nature and limitations of the West Moreton Network have always been known or, at least, reasonably foreseeable.

They were known at the time that the use of the West Moreton Network for transportation by rail became a declared service under the QCA Act. They were also known at the time of material investment decisions for coal mines were taken. Indeed, where those investment decisions were taken after the use of the West Moreton Network became a declared service, those investment decisions were also taken against the backdrop of the regulatory environment.

To be clear, any prudent investor with a sunk investment in a coal mine using the West Moreton Network must always have known the limitations of the West Moreton Network and the difficulties of shipping coal through a major capital city. Those investors made decisions to invest in those coal mines based on an “old, idiosyncratic” West Moreton Network and, depending on the timing of their investment, either based on the absence of a regulated third party access regime or the regulatory regime in place at the time.

These factors are all relevant and, in the context of the QCA’s proposed decision, Queensland Rail should not be penalised for, or disadvantaged due to, the nature of the West Moreton Network or because of the business challenges faced by coal mines that have freely chosen to use the West Moreton Network.

### **9.3 Operating costs**

The QCA has accepted Queensland Rail’s proposed inclusion of a forecast total operating cost allowance of \$37.2M, which is consistent with the QCA’s 2014 Draft Decision approach.

The 2015 DAU proposed allocating the operating cost allowance to coal services based on the ratio of forecast train paths (i.e. usage), meaning those that are using the service pay for the service, resulting in allocating about 94 per cent (i.e. \$34.9 million) of the costs to coal services.

However, the QCA responded by introducing a new methodology for the allocation of costs which results in Queensland Rail being unable to recover its efficient costs. In particular, the QCA states:

*“The operating costs we assessed as acceptable in our 2014 Draft Decision were based on a higher volume task. Although the 2015 DAU proposes operating costs consistent with our 2014 Draft Decision, we note the traffic task is expected to be substantially lower. Stakeholders have also raised concerns about the relation between volumes and operating costs.*

---

<sup>59</sup> QCA draft decision at 166.



*Given these considerations, we engaged B&H to independently assess the operating costs in the 2015 DAU on the basis of fixed and variable components. B&H assessed that about 82 per cent of the operating costs in the 2015 DAU related to fixed operating activities and the remainder (18 per cent) displayed variable activities.*

*We accept B&H's assessment and consider that of the \$37.2 million total operating costs that we consider acceptable, about \$30.3 million is fixed and \$6.9 million is variable.*

*We consider the fixed and variable components of the operating costs should be allocated on the same basis as the maintenance costs (see Section 8.5.2 of this Draft Decision). Thus:*

- variable operating costs should be allocated based on the relative forecast volume of coal services and on that basis 98 per cent of the variable cost is allocated to coal services, which amounts to \$6.7 million.*
- fixed operating costs should be allocated based on the relative proportion of the network capacity available for contracting to coal services and on that basis about 69 per cent of the fixed operating cost is allocated to coal services, which amounts to \$20.9 million.*

*Therefore, we consider it is appropriate to allocate \$27.6 million of the operating costs to coal services. In comparison, Queensland Rail proposed allocating \$34.9 million costs to coal services, but this also includes paying for fixed operating costs that they are unable to contract to use. Our view is that coal services would then have paid more than their fair share of operating costs. ”<sup>60</sup>*

Why “a change in volume” in itself would be the catalyst for a change in methodology is unclear, as the QCA produces no evidence or examples as to why an established methodology is no longer appropriate when the share of costs to coal services rises. If the methodology is valid in the first place, and it is an accepted QCA allocation methodology, then it shouldn't be replaced simply because relative volumes change. This, in itself, is not a valid reason to discount a methodology and to provide no evidence as to why it doesn't continue to be effective is a concern. The QCA goes on to state:

*“However, whether Queensland Rail recovers the non-coal share of operating costs from non-coal services is not relevant for setting reference tariffs for coal-carrying train services on the West Moreton network.”<sup>61</sup>*

To this amount, Queensland Rail added a working capital allowance of about \$1.2 million and worked out a total coal-allocated operating cost allowance of \$36.1 million for the purposes of deriving the West Moreton network reference tariff.

The QCA proposed to cap coal traffics' share of fixed costs (such as common network assets, fixed maintenance and operating costs) based on the idea that there is a contracting restriction of coal being only able to contract 87 return paths through the Metropolitan Network. However, as stated earlier in this submission<sup>62</sup>, such a restriction does not exist (and, in any event, is not relevant) and so should not be a factor in the determination of the allocation of costs to coal reference tariff services. The removal of the contracting restriction results in an allocation to coal services which is similar to the allocation of 94% proposed in the 2015 DAU. Both

---

<sup>60</sup> QCA draft decision at 158.

<sup>61</sup> QCA draft decision at 158.

<sup>62</sup> The matters raised in this submission in relation to the purported 87 train path constraint are as equally relevant to operating costs as they are to other costs such as maintenance and specified capital costs.

methodologies result in a higher proportion of costs being allocated to coal than as proposed by the QCA in its 2015 Draft Decision.

While Queensland Rail remains of the view that an overall operating cost allowance of \$37.2M is appropriate, Queensland Rail does not support the QCA's allocation methodology. The QCA's proposal effectively forces Queensland Rail to bear the costs it cannot recover itself (because the price set will not generate revenue that is at least enough to recover the relevant efficient costs and return). By doing so, the QCA would effectively be requiring Queensland Rail to subsidise coal trains. The QCA's proposed approach is beyond power.

Unless costs were allocated based on forecast usage Queensland Rail will be unable to achieve revenue adequacy and be prevented from recovering all of the efficient costs of providing access to the rail infrastructure. Queensland Rail's 2015 DAU approach is appropriate as it permits Queensland Rail to recover its efficient operating costs.

#### **9.4 Form of regulation and take or pay**

In the 2015 DAU, Queensland Rail proposed to continue to adopt a price cap form of regulation, which involved Queensland Rail accepting volume risk on the West Moreton network. This approach was consistent with the methodology that has historically been used for the West Moreton reference tariff.

While the QCA states that it has accepted a price cap approach, it has recommended some major modifications to this, including:

- Applying take or pay capping, where Queensland Rail would not be able to charge take or pay to the extent that this resulted in it earning above the Approved Ceiling Revenue Limit in a year for Reference Train Services;
- Requiring a reference tariff review in the event that contracted tonnage exceeds forecast for any loading point in the West Moreton network; and
- Increasing take or pay from 80% to 100% of the reference tariff.

The result of these modifications is to severely limit Queensland Rail's ability to earn above forecast revenue, while doing little to address its downside risk.

There are some unique characteristics of the West Moreton Network that underpin Queensland Rail's exposure to volume risk, especially when compared to other coal networks, such as the Central Queensland and Hunter Valley coal networks. The West Moreton Network only services a very small number of mines (currently two) with comparatively low volumes. This magnifies Queensland Rail's exposure to changes in industry conditions, noting the closure of the Wilkie Creek mine in 2013. As Queensland Rail has previously submitted, the longer term outlook for thermal coal remains uncertain, although at least at the current time the fundamentals underpinning the industry remain sound.

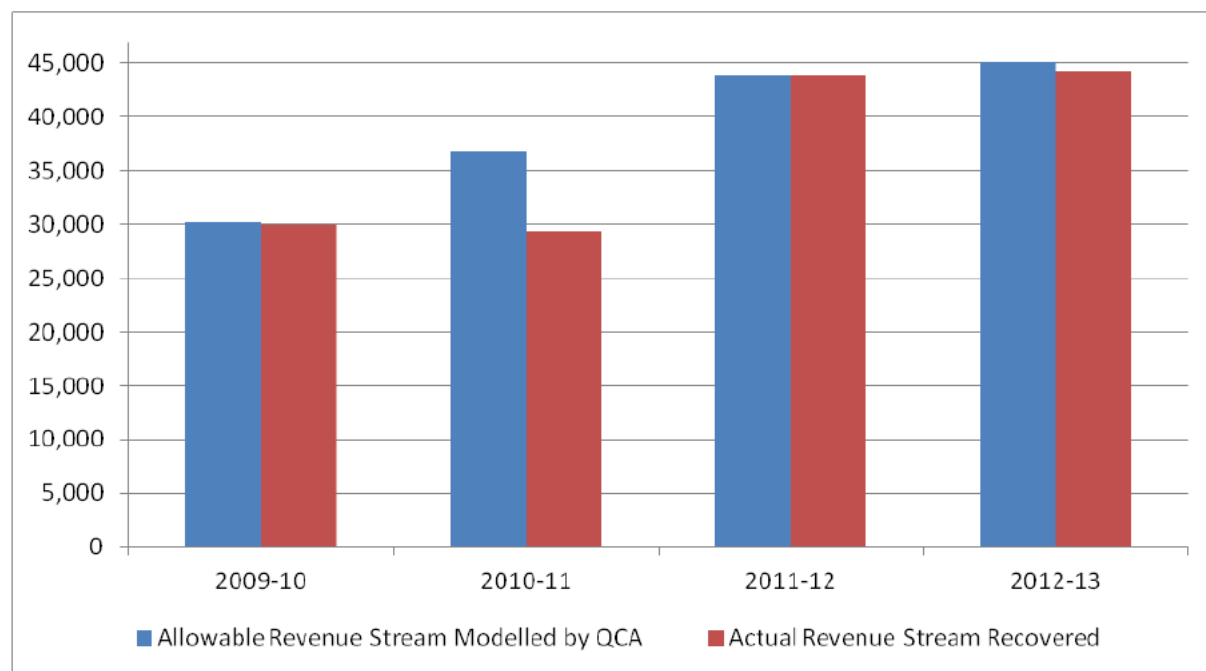
The more significant issues impacting Queensland Rail's longer term exposure to volume risk are specific to the West Moreton system.

First, coal paths are not fully contracted. This available capacity materially reduces the incentive for users to contract. Noting that the annual volumes here are comparatively small, unless system capacity is constrained or close to fully contracted, users can retain more flexibility by contracting paths on an ad hoc basis (particularly as the tariff for a contracted and ad hoc path are the same).

Second, to the extent that contracts are entered into, more recently they have only been done so for short periods and are extended on an incremental basis. This is different to the contracting practices in other coal networks and also reflects the different incentives that users have to enter into long term contracts for capacity. [REDACTED]

Figure 1 below demonstrates the extent of the downside risk to Queensland Rail.

**Figure 1: Actual Revenue vs MAR 2009-13 (\$,000)**



Third, the small number of end users means that the withdrawal of one will have a material impact (as demonstrated in the case of Wilkie Creek). This contrasts with the situation in the Central Queensland Coal Network, for example, where the closure of one mine will have less of an impact and revenue under-recoveries can be 'socialised' over a greater number of users.

Finally, and most significantly from a stranding risk perspective, there are longer term threats to the demand for coal paths on the West Moreton Network. Most significant of these is the potential for bypass via the new proposed inland rail network. Reconsideration of the Surat Basin railway also could not be ruled out, particularly if market conditions improve.

The form of regulation and take or pay are both mechanisms for addressing the allocation of volume risk in the short to medium term. Queensland Rail faces significant and a comparatively unique exposure to volume risk in the long run, which it currently has no real ability to mitigate. Queensland Rail is exposed to a materially higher risk in the event of a sustained market downturn and consequent reduction in the demand for coal services because of the existence of only two mines on the West Moreton Network. In addition, Queensland Rail is exposed to the risk of bypass via the inland rail.

Queensland Rail has major concerns with the QCA's approach, including the following:

***No acknowledgement of asset stranding risk***

First is that the QCA's analysis of this issue only takes a short term view and has not given any broader consideration to Queensland Rail's longer term exposure to stranding risk. Much of the short term focus of the Draft Decision has been on Queensland Rail's ability to recover and retain additional revenue (above its approved Maximum Allowable Revenue (MAR)), including from payments such as relinquishment fees).

In relation to take or pay revenue a very short term view has been taken. The QCA's proposal is that any take or pay revenue above the Approved Ceiling Revenue Limit is deemed to be an 'over recovery' of revenue in respect of that year.

The QCA Act entitles Queensland Rail to recover *at least* its efficient costs and a relevant return. Where the costs and return relate to a capital investment, the requirement that Queensland Rail recover at least its efficient costs and a return can only be assessed over the longer term.

Capping take or pay in the way proposed by the QCA removes Queensland Rail's ability to recover revenue that goes some way to addressing the asset stranding risk.

### ***No balance in allocation of volume risk within the regulatory period***

Second, even putting aside the major uncompensated asset stranding risk that Queensland Rail faces, the QCA's recommended approach does not provide a balanced allocation of volume risk within the regulatory period. In effect, the QCA's proposals would have the effect of largely mimicking a revenue cap in relation to their treatment of above forecast revenues (by requiring Queensland Rail to cease collection of take or pay if its revenue from relevant train services exceeds the total revenue cap or to review the reference tariff for any sustained increase in volume), while leaving Queensland Rail heavily exposed to downside volume risk consistent with the price cap form of regulation.

At the same time, the QCA has rejected, without explanation, Queensland Rail's proposal for a more effective mechanism to mitigate its significant downside volume risk, which is to remove force majeure from being treated as a "Queensland Rail Cause" under the standard access agreement, which means that take or pay would continue to be payable during a force majeure event. Force majeure is a risk that cannot in any way be controlled by Queensland Rail. Recognising the inability of infrastructure providers to control force majeure risk, the standard access agreements that the QCA has approved for DBCT Management, and that the QCA has recommended in its most recent Draft Decision for Aurizon Network, both exclude force majeure from the circumstances in which access charges are not required to be paid. It is difficult to understand why the QCA has accepted that force majeure should not cause a loss in take or pay revenue for these other transport infrastructure providers, but has not accepted the same approach for Queensland Rail. This is particularly concerning given Queensland Rail's comparatively higher risk profile with only two mines on the West Moreton Network.

### ***Relevance where the reference tariff is 'de-coupled' from the ceiling price***

The QCA's recommended approach to form of regulation and take or pay capping is based on its view that the reference tariff will be constrained by the price ceiling. However, as noted elsewhere in this submission, Queensland Rail considers that many of the approaches that the QCA has adopted in assessing the price ceiling are incorrect or inconsistent with the requirements of the QCA Act.

To the extent that, as proposed by Queensland Rail in the 2015 DAU, the setting of the reference tariff is decoupled from the ceiling price, it is difficult to see any justification for any requirement by the QCA to limit Queensland Rail's upside revenue opportunities. In these circumstances, an increase in revenue above that forecast would correctly be retained by Queensland Rail in order to assist it in meeting the full efficient cost of providing the service, consistent with the requirements of the QCA Act pricing principles.

### ***Evaluation of QCA recommended approach against QCA Act requirements***

Queensland Rail has reviewed the proposed options against criteria that reflect the following appropriate regulatory and commercial objectives:

1. promoting efficient investment in, and utilisation of, the network infrastructure;
2. maximising the likelihood that Queensland Rail can recover its efficient costs, including a return on and of capital, over the longer term; and
3. promoting an appropriate allocation of risk between Queensland Rail and users.

It is clear from Queensland Rail's review that the QCA's recommended approach fails to achieve these objectives.

- While 100% take or pay does provide increased downside revenue protection, the impact of this strengthening of take or pay would be relatively minor in the context of Queensland Rail's overall exposure to volume risk. There is still significant downside revenue exposure:
  - current forecast includes significant uncontracted tonnes, for which take or pay doesn't apply. Queensland Rail's volume risk will be greater because if those tonnes are not contracted the approved Reference Tariffs will not compensate Queensland Rail for at least its efficient costs;
  - the reference tariff is also based upon a forecast that includes ad hoc services. If the reference tariff had been calculated based on the lower contracted tonnages, the reference tariff would have been higher. If ad hoc services don't run Queensland will under recover its revenue, as ad hoc services are currently not subject to take or pay provisions. Therefore Queensland Rail has significant uncompensated risk that it won't recover its efficient costs – because that recovery is in part dependent on ad hoc services that may or may not eventuate; and
  - under the QCA's proposal take or pay is not paid during a force majeure event (as discussed above), which can cause significant loss in revenue;
- The QCA's proposal eliminates most opportunities for Queensland Rail to generate and retain revenue that is materially in excess of forecast, while still exposing Queensland Rail to significant downside volume risk.

A price cap form of regulation, together with take or pay obligations in contracts, remains the most effective means of meeting the objectives of the QCA Act and the requirements of the QCA Act pricing principles. The QCA has correctly recognised this in the past.

Queensland Rail does not support the QCA's proposals in respect of the form of regulation and take or pay. The QCA has developed an inappropriate "hybrid" price cap/revenue cap approach, which leaves Queensland Rail with downside risk, whilst constraining its capacity to offset this with any revenue out-performance.

We also ask the QCA to note the following points:

**Incentive to make more train paths available** - stakeholders and the QCA both have indicated that an incentive for Queensland Rail to make more paths available (or to otherwise allow for the shipping of more tonnes) is important for the West Moreton Network. However, the QCA's proposed capping mechanism works against this objective. By accepting ad hoc traffics, Queensland Rail is increasing the likelihood that revenue will exceed the take-or-pay cap. Queensland Rail's strong incentive would be to remove the option of ad hoc railings, and require all shippers to agree to take-or-pay terms for the full (potential) demand they may require from the West Moreton Network. This would protect Queensland Rail's revenue (to the level permitted by the QCA), but result also in there being less available capacity to support the entry of any new users into the system.

**Increase in regulatory risk** - current contracts and traffic forecasts were developed in accordance with the framework of the 2008 approved access undertaking, and with the expectation of the proposals as submitted in Queensland Rail's 2015 DAU would be retained as a package that is consistent with the 2008AU. The QCA is now proposing to apply a significantly different risk-allocation framework, but *after* these parameters have been determined. In respect to demand forecasts, Queensland Rail has provided a forecast including significant ad hoc railings, based on both these being allowable under current agreements, and resulting in a reasonable allocation of costs as between contracted and non-contracted demands. Importantly, though, Queensland Rail made these forecasts with the expectation of how changes in demand - either higher or lower ad hoc railings, for instance - would impact on its revenue profile. Had

Queensland Rail known the QCA intended to change its approach, then this may have caused Queensland Rail to approach the demand forecast differently. Given the QCA's proposed approach, a forecast based on contracted tonnes would be appropriate.

**Queensland Rail's legitimate business interests & recovery of efficient costs** - as constructed, the QCA's mechanism provides that Queensland Rail has an opportunity to earn what the regulator determines is a sufficient revenue amount for coal traffics on the West Moreton Network, but only if Queensland Rail correctly estimates demand (both in aggregate and for each origin/destination pair). Where demand falls short of Queensland Rail's forecast, then the business' revenue will be reduced. However, where demand is higher, Queensland Rail will need to adjust Reference Tariffs and/or cap the application of take-or-pay. Given any probability of distribution around demand, this means that Queensland Rail's *expected* revenue must be less than that determined as efficient by the QCA.

**Asymmetric adjustment mechanism** - Reference Tariffs would be adjusted only where contracted volumes are higher than those forecast by Queensland Rail. Queensland Rail retains the risk of total volumes under-performing against forecast, and specifically non-contracted demand. Queensland Rail does not accept that application of a one-sided adjustment mechanism is an appropriate balancing of the QCA's obligations under the Act. For other regulated businesses, the QCA has tended to apply regulatory mechanisms which completely insulate the service provider from volume risk (as for Dalrymple Bay Coal Terminal, where terminal charges are determined with a revenue cap/100% take-or-pay framework) or where volume risk remains, this is relatively minor and symmetrically applied (as for Aurizon Network, where the 2014 DAU draft decision proposes to retain the incremental maintenance charge AT1 tariff outside the revenue cap arrangement, but otherwise retaining a revenue cap mechanism for other tariff components).

**Force majeure** - Take or pay obligations relating to reference tariff services are subject to an adjustment where train services are interrupted for "*Queensland Rail Cause*". The term "*Queensland Rail Cause*" is defined under the 2015DAU as not including circumstances where Queensland Rail cannot provide access because of a force majeure event.

This approach is consistent with other access providers for declared services. For example, under DBCT Management Pty Limited's (**DBCTM's**) QCA approved regulatory arrangements, DBCTM is still paid access charges by the access holder even if DBCTM's obligation to provide the relevant services is suspended because of a force majeure event. Additionally, the access holder's Annual Contract Tonnage is not reduced due to circumstances such as a force majeure event or if tonnage is not able to be handled due to the Terminal Regulations.

The QCA is proposing to treat Queensland Rail on a different basis on this issue as compared to other access providers for declared services. The QCA has provided no justification for doing so.

The QCA is effectively requiring Queensland Rail to bear a greater exposure for force majeure events than other access providers for declared services within the QCA's jurisdiction.

## 9.5 The reference tariff model

Queensland Rail is also concerned that it has been denied a reasonable opportunity to review and comment on material aspects of the QCA's draft decision by virtue of QCA's refusal to provide Queensland Rail with a copy of, and reasonable access to, the 'model' by which QCA has purported to determine the proposed reference tariffs. The 'model' is critical to the QCA's draft decision and ought to have been disclosed to Queensland Rail in sufficient time prior to the QCA's deadline for submissions to allow Queensland Rail a reasonable opportunity to consider the 'model' prior to lodging this submission.

Despite repeated requests, the QCA has refused to provide Queensland Rail with a copy of the 'model'. Its reasons for refusing to provide the model (which the QCA only articulated recently) relate to the protection of Queensland Rail's own information and are baseless.

## 10 Pricing Principles

### 10.1 Hierarchy of pricing principles

The 2012DAU, 2013DAU and 2015DAU each set out a list of obligations relating to the setting of access charges referred to as "pricing principles". These pricing principles perform a different function to those described in section 168A of the QCA Act.

The QCA considers that there is potential for a conflict to arise as between the pricing principles and therefore requested that Queensland Rail propose a hierarchy in its 2015DAU to give certainty in circumstances where such a conflict arises.

In response, Queensland Rail proposed the following hierarchy:

- Revenue adequacy – clause 3.1.1 of the 2015DAU;
- Limits on price differentiation – clause 3.3 of the 2015DAU;
- Pricing limits – clause 3.2 of the 2015DAU;
- Network utilisation – clause 3.1.2 of the 2015DAU,

in order of precedence (from highest to lowest) to the extent of the relevant conflict.

In its draft decision the QCA has foreshadowed that it intends to reject the proposed hierarchy and to require one which places Queensland Rail's revenue adequacy last in that hierarchy.

However, it is inappropriate and beyond power to require that Queensland Rail's revenue adequacy be placed at jeopardy by being placed last in hierarchy.

The QCA's proposal to rank revenue adequacy last in a hierarchy of pricing principles obliges Queensland Rail to potentially set a price that does not achieve revenue adequacy. This is fundamentally inconsistent with the pricing principles set out in section 168A(a) of the QCA Act – which cannot be traded-off against other matters as proposed by the QCA. The QCA cannot require amendments to the 2015DAU which would or could result in a price for access not meeting the requirements under section 168A(a) of the QCA Act.<sup>63</sup>

The QCA cannot approve an access undertaking that is inconsistent with the QCA Act.

Queensland Rail also notes various other errors in the QCA's draft decision in respect of this issue. For example, section 168A(a) of the QCA Act does not permit "*the extraction of inefficient monopoly profits*"<sup>64</sup> as suggested but the QCA. Section 168A(a) does not permit an access provider to charge whatever it likes.

### 10.2 Revenue adequacy

The comments in this section 10.2 are in addition to Queensland Rail's comments above in section 4.

The QCA has stated that:

*"We do not accept Queensland Rail's proposal as it goes beyond the requirements of the s. 168A(a) statutory pricing principle by seeking a minimum return not just on*

---

<sup>63</sup> Section 168A of the QCA Act has a stand-alone and overriding operation under the QCA Act. This is true not only of section 168A itself but is also reflected in other provisions such as sections 100(4)(b), 138A(2), 168C(3) of the QCA Act.

<sup>64</sup> QCA draft decision at 46.

*investments, but also on assets which it proposes are valued universally using its preferred DORC valuation approach.”<sup>65</sup>*

Queensland Rail retained the reference to “*the value of assets*” which has been consistently approved by the QCA for every rail access undertaking in Queensland since 2001. The QCA’s rationale for the change in its position is apparently its draft view that the wording in question “*goes beyond the requirements of section 168A*”. A return on investment (as required by section 168A) necessarily involves a consideration of the value of the investment – relevantly the investment represented by the value of the assets. This is consistent with section 101(2)(c) of the QCA Act which requires an access provider to provide an access seeker with “*information about the value of the access provider’s assets*”.

For these reasons, Queensland Rail submits that the QCA has not been acting inconsistently with the QCA Act when it has been approving past rail access undertakings with those words included in the revenue adequacy provisions. The QCA would be acting inconsistently with the QCA Act if it deletes those words now.

The QCA’s reference to Queensland Rail’s “*preferred DORC valuation approach*” is also misleading. Queensland Rail’s use of a DORC valuation methodology is completely consistent with the QCA’s treatment, since 2001, of the asset valuation methodology to apply in the pricing principles under rail access undertakings. The 2015DAU is entirely reflective of the QCA’s past decisions to apply a DORC valuation methodology to assets comprised in Queensland Rail’s rail network used for the declared service. The DORC valuation methodology is not Queensland Rail’s “*preference*”; it is the QCA’s longstanding practice.

### **10.3 Limits on price differentiation—non-reference-tariff train services**

The QCA has proposed various changes to the 2015DAU price differentiation provisions.

The 2015DAU price differentiation provisions were based on the price differentiation provisions under the 2008AU. Similar versions of those price differentiation provisions have been approved by the QCA prior to and since the 2008AU was originally approved.

Queensland Rail has various concerns with the QCA’s proposed changes, including the following.

#### **Clause 3.3(b)**

The QCA has stated that, despite various relevant obligations under the QCA Act:

*“Nonetheless, we consider that the inclusion of an express prohibition on unfair price discrimination in Part 3 in the 2015 DAU will clarify Queensland Rail’s obligations in relation to access pricing.”<sup>66</sup>*

The QCA proposes a new clause 3.3(b) which requires that:

- (a) Queensland Rail must not establish Access Charges that discriminate in favour of its downstream operations or the downstream operations of a Related Party;
- (b) Queensland Rail’s Access Charges must comply with this Part 3; and
- (c) Queensland Rail’s Access Charges cannot have the purpose of preventing or hindering an Access Seeker’s or Access Holder’s Access (without derogating in any way from Queensland Rail’s obligations under sections 104 or 125 of the QCA Act).

The provision referred to in paragraph (a) above is unnecessary as the QCA Act already addresses the type of discrimination that is prohibited (see, for example, sections 100(2) and 104

---

<sup>65</sup> QCA draft decision at 50.

<sup>66</sup> QCA draft decision at 53.



of the QCA Act). The QCA's proposal to include a different provision in the 2015DAU creates an entirely new obligation on Queensland Rail which goes beyond that imposed under the QCA Act and is therefore beyond power.

The QCA's drafting referred to in paragraph (a) above creates an absolute prohibition on discrimination. The QCA Act does not prohibit discrimination absolutely, the prohibition is subject to important and rational qualifications. It is not open to the QCA to create a different and unqualified prohibition to that which is prescribed by the QCA Act.

The drafting referred to in paragraph (a) above is also ambiguous. For instance, what are Queensland Rail's "downstream operations" to which the provision relates? What are the "Access Charges" relating to those "downstream operations"? Queensland Rail does not charge itself any Access Charges for use of its own network.

The provision referred to in paragraph (b) above is unnecessary and in any event has "no real effect or consequence" within the meaning of section 138(6) of the QCA Act. Under section 150A of the QCA Act, Queensland Rail is required to comply with an approved access undertaking given by or applicable to Queensland Rail.

The provision referred to in paragraph (c) above is unnecessary as Queensland Rail's obligations relating to preventing and hindering access are set out in detail under sections 104 and 125 of the QCA Act. The QCA's drafting creates an absolute prohibition when the QCA Act does not. The QCA is acting outside its powers to impose different or modified obligations to those in the QCA Act.

Rather than an absolute prohibition of the kind proposed by the QCA, the QCA Act expressly contemplates that an access undertaking may in fact permit certain conduct that would otherwise offend the prohibition – section 104(6)(a). This reinforces the fact that the QCA is acting beyond its powers in seeking to impose an absolute prohibition.

Queensland Rail does not accept that the QCA's proposal "clarifies" Queensland Rail's obligations or that there is any need to, or that the QCA has any power to, "clarify" Queensland Rail's statutory obligations in the way proposed by the QCA. The QCA's drafting does not "clarify Queensland Rail's obligations", it seeks to impose different obligation altogether.

The QCA has also claimed, by way of some form of justification, that:

*"While Queensland Rail is vertically integrated, its above-rail operations relate to passenger services for which there are no current direct competitors. However, that is not to say that Queensland Rail could not quote excessively high access charges to deter non-passenger services from interrupting Queensland Rail's passenger operations or, at some point in the future, enter into above-rail operations in competition with other above-rail operators."*<sup>67</sup>

Queensland Rail does not accept the correctness or relevance of the QCA's comments.

The QCA's claim that Queensland Rail might apply "excessively high access charges to deter non-passenger services from interrupting Queensland Rail's passenger operations" is baseless. The QCA's claim is ill-founded because it wrongly assumes that there is potential competition between passenger and non-passenger service on the network and that Queensland Rail is economically incentivised to favour passenger services. The factual position is that train paths for passenger train services are statutorily reserved for those passenger train services under the TIA. Queensland Rail must comply with its obligations to allocate train paths to those passenger services as required under statute.

---

<sup>67</sup> QCA draft decision at 53.

There is no advantage to Queensland Rail in seeking to increase access charges for non-passenger service to favour passenger services.

This claim is also ill-founded because the QCA is suggesting that Queensland Rail will act in a way that is uncommercial and inefficient (and potentially in breach of its obligations under the QRTA Act to carry out functions “as a commercial enterprise” and its obligations under the QCA Act including to negotiate in good faith) by deterring commercially valuable traffic.

The QCA’s speculation that at some future point in time Queensland Rail might enter into above-rail operations in competition with other above-rail freight operators ignores the fact that:

- Queensland Rail’s constitution prevents it from doing so;
- even if it elected to do so, there are significant barriers to entering that market not the least of which being that Queensland Rail does not have any above rail freight capability or rollingstock; and
- there are still significant protections under the QCA Act and the 2015DAU, as well as under other legislation such as the *Competition and Consumer Act 2010* (Cth), which would prevent unfair discriminatory pricing.

There is no realistic prospect of Queensland Rail entering the above rail freight market during the regulatory period of the 2015DAU and if by some chance this did occur sufficient protections exist to address any realistic risk of unfair discriminatory pricing.

Queensland Rail also addresses similar claims by the QCA in section 12.3 below and will not repeat those matters here even though they are equally relevant.

### **Clause 3.3(c) – over time**

The QCA has inserted the words “to reasonably reflect, over time” as a relevant criteria to determine access charges where there is no applicable reference tariff.

Queensland Rail did not apply the “over time” characterisation to the differences in cost or risk but only to the change in cost or risk. There is a subtle difference between the two. One is looking at the difference in cost or risk in the present moment between different train services. This is effectively looking at the nature of the costs and risks. The other is assessing changes in the cost or risk over time, even if the nature of the costs and risks are the same in the present moment.

It is possible therefore that there may be no difference in the nature of the costs and risks of the train services in the present moment, but that the cost or risk for the existing train services have changed over time such that the access charges applicable to those train services no longer properly reflects the current costs and risks. While access agreements have some built in flexibility to adjust access charges over time, it is likely that the access charges under an access agreement will not keep pace with changes in cost or risk over time. Without a regular re-opening of access charges under access agreements or a higher degree of flexibility to re-open access charges, this situation cannot be avoided, particularly were those arrangements run for long periods of time.

### **Clause 3.3(c) – Transport Service Payments**

The QCA has deleted clause 3.3(b)(ii)(B)(1) of the 2015DAU which related to the circumstance when changes over time result in Queensland Rail no longer being able to commercially provide Access to Train Services in a geographic area at the current Access Charges – for example, because of changes in Transport Services Payments.

This provision was based on previous provisions approved by the QCA in relation to Transport Service Payments since 2001. Queensland Rail acknowledges that it modified this provision to

make it more generic in effect than more recent provisions approved by the QCA and accepts that it should be limited to circumstances that relate only to a reduction or removal of a Transport Service Payment.

In any case, Queensland Rail does not consider that it is appropriate to delete an express reference to a change in Transport Service Payments as a trigger for differentiating access charges.

If the QCA excludes this ability to vary the way in which an access charge is calculated from the access undertaking (even where there is a right to vary under the standard access agreement), it will have the unintended effect of Queensland Rail not receiving at least its efficient cost of providing the service and the relevant return as required by section 168A(a) of the QCA Act.

The other triggers for a variation (e.g. the cost or risk trigger) will not apply to address this issue. In the case of the cost or risk trigger, a removal or reduction in Transport Service Payments will not constitute a difference in cost or risk.

The QCA's response to the issue is that changes in Transport Service Payments should be factored into access agreements as a material change event triggering a review of the access charges under that contract rather than as a matter to be expressly addressed under the 2015DAU. Queensland Rail agrees that it is appropriate for the standard access agreement to include a material change event covering a reduction or removal of Transport Service Payments (**TSP Event**). The 2015DAU standard access agreement does just that.

However, the QCA's proposal that this issue be addressed solely via the contract does not provide a complete solution to the issue because the consequences of a TSP Event may not have taken effect under an existing contract, which is being used as a comparator, at the time Queensland Rail is negotiating a new access agreement with an access seeker. In those circumstances, the TSP Event under the existing contract will not be relevant to the new access agreement being negotiated and therefore the access charge under the existing contract will not be an appropriate comparator as contemplated under clause 3.3(c) of the 2015DAU.

The only way to effectively address the risk in the preceding paragraph is to include a Transport Service Payment reduction or removal event in the 2015DAU as an appropriate matter to take into account in setting an access charge where there is no reference tariff.

By way of background, Transport Service Payments are made to Queensland Rail by the State Government under a Transport Service Contract (**TSC**). The payments made to Queensland Rail under the TSC relate to below rail and above rail services and are broadly broken down into the following products:

- Citytrain (above rail)
- Regional Network (below rail)
- Travel and tourism (above rail)

At its most basic, the TSC is a net cost funding instrument. It has positive obligations on Queensland Rail to maximise its non-TSC revenue. Queensland Rail receives an annual funding envelop, evenly spread on each month.

Future investment in the regional network is predicated on freight demand, and supported, where applicable, by the TSC to ensure the network meets the track condition index necessary to be compliant with rail safety legislation.

It is important to note that the current TSC is for a three year term. During that term the funding profile is fixed (except for growth services). However, if a change event occurs and Queensland Rail suffers a material loss of non-TSC revenues in the Regional Network, variation provisions

come into effect to either impair the asset base or increase funding under the TSC after due consideration and decision by Government.

**Clause 3.3(c) – changes in cost or risk**

The QCA has deleted the reference to change in the cost or risk to Queensland Rail of providing access over time. As discussed above (under heading clause 3.3 – over time), the original 2015DAU drafting (and past rail access undertakings approved by the QCA) distinguished between a difference in the cost or risk and a change (over time) in the cost or risk of providing access.

The QCA's proposed amendments expose Queensland Rail to substantial risk of being unable to differentiate to reflect changes in cost or risk over time.

Alternatively, if the QCA is of the opinion that its reference to the difference in cost or risk is the same as the deleted reference to the change in cost or risk, then Queensland Rail is exposed to a situation where differences in the nature of the costs or risks will not be a valid basis for pricing differently.

If this issue is not resolved it will result in Queensland Rail being at risk of not receiving at least its efficient costs and return on investment in accordance with section 168A(a) of the QCA Act.

**Clause 3.3(c) – changed circumstances materially affecting ability to pay**

Since 2001, the QCA has approved a Change in Market Circumstances trigger that permitted price differentiation. The 2015DAU proposes a provision equivalent to rail access undertakings recently approved by the QCA.

Queensland Rail considers a change in market circumstances provision (as previously approved by the QCA) remains relevant. As with the various other aspects of the price differentiation provisions previously approved by the QCA but now proposed for change by the QCA, the QCA has provided no evidence of circumstances where this or other provisions have resulted in improper pricing outcomes as a result of Queensland Rail's conduct.

Including a right to price differentiate for "*changes in circumstances that have had or may have a material affect on the ability of Access Holders to pay Access Charges*" is important for both Queensland Rail and access seekers.

For instance, the price differentiation provision proposed by Queensland Rail (where no reference tariff applies) requires Queensland Rail to compare the access charges payable by existing access holders and proposed for an access seeker where they both have train services for the same commodity in the same area. If the economic circumstances prevailing at the time when the access charges are being determined have materially deteriorated as compared to those prevailing when the existing access holder's access charges were set, the access seeker would be materially disadvantaged if Queensland Rail could not take that into account. The result of the QCA's proposal is to force Queensland Rail to charge the access seeker the same access charges as existing access holders even though the access seeker's ability to pay is comparatively significantly less due to the prevailing economic circumstances. This approach also benefits Queensland Rail and existing access holders as it allows for an increase of traffic on the network.

Where economic circumstances have improved, it is within Queensland Rail's legitimate business interests to seek to maximise access charges payable between the floor and ceiling price.

An ability to differentiate for a change in market circumstances does not permit Queensland Rail to consider the profitability of an individual access seeker's operations. Indeed, Queensland Rail does not have the information to enable it to do that. The change in market circumstances is

about economic changes affecting commodity and market prices that have a direct impact on access holders and access seekers.

**Clause 3.3(f), (g) and (h)**

The QCA's proposed clauses 3.3(f), (g) and (h) are materially different from clause 3.3(c) under the 2015DAU.

Queensland Rail's proposal under the 2015DAU was aimed at giving a greater degree of price certainty to a Renewal Application through a modified application of the price differentiation principles.

The pricing certainty of applying the price differentiation principles to a Renewal Application arises naturally where there are other access seekers or, under the QCA's proposal, access holders with train services for the same commodity in the same geographic area as the Renewal Application. However, where there are no other access seekers or access holders for the train services for the same commodity in the same geographic area, the price differentiation principles provide little pricing certainty for the Renewal Access Seeker.

For that reason, Queensland Rail proposed clause 3.3(c) of the 2015DAU, so that in those circumstances the comparison necessary for the application of the price differentiation principles occurs by reference to the existing access agreement and the Renewal Application. In effect the Renewal Access Seeker becomes the relevant access holder (in the QCA's proposal) under the existing access agreement for the purpose of applying the price differentiation provisions despite the impending expiry of the existing access agreement. This was intended to give price certainty by the application of clear and longstanding principles governing the circumstances when price differentiation could occur.

Queensland Rail has several concerns regarding the QCA proposal including the following:

- Clause 3.3(f)(i) requires that, in respect of a Renewal Application, *“there has not been a Renewal Application submitted after the Approval Date of this Undertaking”*. Queensland Rail assumes the QCA does not mean that the process only applies to the first Renewal Application under the new access undertaking but to no others. In any case, the drafting is unclear and needs to be clarified.
- The only basis for differentiation relates to the *“differences in the cost or risk to Queensland Rail of providing Access to the proposed Train Service under the renewed Access Agreement”*. The effect of this drafting is that Queensland Rail would be locked into the same price for an access holder who keeps renewing their access. This occurs because the renewing access holder is by definition renewing the existing access rights and therefore there is no *“differences in the cost or risk to Queensland Rail”*. As mentioned above in relation to clause 3.3(c), the QCA should cater for differences in the nature of the costs and risks as well as changes in the actual costs and risks. A change in the actual cost or risk is arguably not covered by the QCA's proposed drafting and therefore would not allow for a different price to be set for the renewal period. Additionally, the price set for access would not permit Queensland Rail to recover at least its efficient costs of providing access in which case the drafting is inconsistent with the pricing principles in section 168A(a) of the QCA Act.
- The QCA's proposal in relation to renewals fails to address the issue of any limitation that may exist on Available Capacity. The QCA's drafting incorrectly assumes that simply because there is an existing access agreement that there will continue to be Available Capacity that can be used to satisfy a Renewal Access Application. There is a need to also include another trigger so that the renewal price may vary from the existing price to reflect limitations in Available Capacity.

- Queensland Rail has also made several submissions regarding the circumstances where differentiation relating to the setting of access charges is permitted under clause 3.3(c)(ii). Those submissions are equally relevant in the context of a Renewal Access Application, as the same circumstances should be applied in respect of a Renewal Access Application.
- Clause 3.3(g) provides an exception to the requirement in clause 3.3(f)(ii). However, it is unclear whether the “*change in that description*” refers to the commodity transported, the number of train services, or the characteristics or description of the train service.
- Clause 3.3(g) refers to “*operational or supply change improvements*”. It is not clear what this refers to.

## 10.4 Pricing limits

### ***New clause 3.2.1***

The QCA has proposed a new clause 3.2.1 that obliges Queensland Rail to set “*upper and lower limits for Access Charges*” to prevent “Cross Subsidy” between individual train services or between combinations of train services.

The QCA’s draft decision does not discuss in any way the need for, or purpose of, clause 3.2.1. In section 3.4 of the draft decision headed “Pricing and revenue limits”, there is a discussion about why it would be appropriate to restrict Queensland Rail’s discretion to price below floor limits and how that might “*result in inefficient price differentiation by shifting costs to other traffics*”. That section does not discuss the need to set a price between an upper and lower limit as referred to in clause 3.2.1.

In the absence of a justification for clause 3.2.1, or an explanation of the way in which the clause is to operate, Queensland Rail is denied the ability to properly assess and comment on the QCA proposal.

The QCA’s drafting of the clause itself in the marked up 2015DAU does not shed any further light on the issue and raises significant concerns.

The QCA’s drafting does not give the reader any idea by what it means by an “*upper and lower limits for Access Charges*” or when or how that is to be determined. The QCA’s drafting does not give any indication as to the difference between its “*upper and lower limits for Access Charges*” and the existing Ceiling Revenue Limit and Floor Revenue Limit. Is there a difference? If there is, what is that difference? If there is not a difference, why is there a need for clause 3.2.1?

The QCA’s provision would create an obligation, the breach of which would expose Queensland Rail to liability. In such circumstances, it is incumbent on the QCA to ensure that the obligation is capable of being understood and applied.

In any event, if the Ceiling Revenue Limit and the Floor Revenue Limit are set in accordance with the 2015DAU, Queensland Rail does not see in what circumstance that would result in a “Cross Subsidy”. Indeed, the QCA has stated that:

“...we propose to maintain revenue floor and ceiling limits (that is, **constraints on cross-subsidisation**)...”<sup>68</sup> (emphasis added).

In the circumstances, the QCA cannot require its proposed clause 3.2.1.

### ***Clause 3.2.2***

The QCA has proposed amendments to clause 3.2.1 of the 2015DAU (renumbered by the QCA as clause 3.2.2). The relevant provision under the 2015DAU sets out a requirement that the

---

<sup>68</sup> QCA draft decision at 55.

Expected Access Revenue for a Train Service or combination of Train Services not exceed the Ceiling Revenue Limit for that Train Service or combination of Train Services, as applicable. The QCA proposes to add *“or, where applicable, the Approved Ceiling Revenue Limit”* after *“the Ceiling Revenue Limit”*.

The QCA’s draft decision does not discuss in any way the need or purpose for the introduction of an additional pricing limit, the *“Approved Ceiling Revenue Limit”* in clause 3.2.2. In section 3.4 of the draft decision headed “Pricing and revenue limits” there is a discussion about why it would be appropriate to restrict Queensland Rail’s discretion to price below floor limits and how that might *“result in inefficient price differentiation by shifting costs to other traffics”*. That section does not discuss the need for an additional pricing limit in the form of the “Approved Ceiling Revenue Limit”.

In the absence of a justification for this new additional pricing limit, or an explanation of the way in which that new pricing limit is to operate, Queensland Rail is denied the ability to properly assess and comment on the QCA proposal.

The QCA’s drafting of the clause itself in the marked up 2015DAU does not shed any further light on the issue and raises significant concerns.

Based on the drafting alone, Queensland Rail has a number of concerns.

Firstly, the “Approved Ceiling Revenue Limit” of \$47,169,313 (in 2015-16 dollars), which appears to apply to Reference Train Services but not other train services (although that is not entirely clear), seems to be an entirely arbitrary number selected by the QCA. The QCA provides no rationale or substantiation for that number or any indication as to how it was derived.

Secondly, the drafting suggests that there is to be an Approved Ceiling Revenue Limit set by the QCA for the purposes of setting Reference Tariffs. The QCA’s drafting gives no guidance at all as to what the QCA will take into account in determining what the “Approved Ceiling Revenue Limit” will be.

Thirdly, the application of the “Approved Ceiling Revenue Limit” as drafted could operate to prevent Queensland Rail recovering at least its efficient costs. Where volumes increase beyond the forecast used for the relevant reference tariff and an access charge to reflect those costs can not be set because of the “Approved Ceiling Revenue Limit”, the consequence of the QCA’s drafting is that the price for access would fail to comply with the pricing principles set out in the QCA Act – in particular, clause 168A(a). In direct contrast to the Ceiling Revenue Limit, the “Approved Ceiling Revenue Limit” applies as a fixed number without any regard to the efficient costs and relevant return relating to providing the access in question. At the same time as the QCA is seeking to incentivise Queensland Rail to increase volumes, it is potentially penalising Queensland Rail for doing so through this “Approved Ceiling Revenue Limit”.

Fourthly, the term “Evaluation Period” is used throughout clause 3.2 including clause 3.2.2 where the “Approved Ceiling Revenue Limit” is mentioned. Changes made by the QCA to the definition of “Evaluation Period” suggest that the QCA applies that term in setting reference tariffs.

However, there are no operative provisions in the 2015DAU that use the term – “Evaluation Period” – in that context. In any case, the QCA does not have power to set reference tariffs of its own volition during the life of an approved access undertaking.

#### **Clause 3.2.4(a)**

The 2015DAU proposed that the Ceiling Revenue Limit be calculated in a manner consistent with the QCA’s longstanding treatment of the calculation of that pricing limit.

However, the QCA proposes to amend that calculation to include the subtraction of an additional factor from “ $CRL_t$ ”. The additional factor is referred to as “ $AA_t$ ” being “any adjustment amount as agreed by Queensland Rail and the QCA or, failing such agreement, as determined by the QCA”.

The QCA’s draft decision does not discuss the need for or purpose of  $AA_t$ . In the absence of a justification for introducing  $AA_t$ , or an explanation of the way in which  $AA_t$  is to operate, Queensland Rail is denied the ability to properly assess and comment on the QCA proposal.

The QCA’s drafting of the clause itself in the marked up 2015DAU does not shed any further light on the issue and raises significant concerns.

While the QCA’s introduction of  $AA_t$  is inherently uncertain and unsupported by the draft decision, it also runs counter to the QCA’s view that the Ceiling Revenue Limit should permit Queensland Rail to recover the stand-alone costs of providing access. The application of  $AA_t$  could well result in Queensland Rail recovering less than its stand-alone costs as well as adversely affecting the return which is required by section 168A(a) of the QCA Act.

Clause 3.2.2 obliges Queensland Rail to apply a Ceiling Revenue Limit in calculating the access charges for each access seeker’s proposed train services. A Ceiling Revenue Limit is to be determined for each access seeker – it is access seeker specific. The QCA’s drafting of  $AA_t$  requires Queensland Rail to seek to agree the adjustment with, or failing agreement to have it determined by, the QCA in order to calculate a Ceiling Revenue Limit each time Queensland Rail seeks to negotiate with an access seeker other than where a reference tariff applies. This is completely impractical and will result in substantial delays to the negotiation process.

The introduction of  $AA_t$  amends the longstanding formula by which Ceiling Revenue Limits have been calculated under past and current access undertakings and effectively allows the QCA to change the Ceiling Revenue Limit at will. The result is the removal of certainty as to the calculation of Ceiling Revenue Limits.

It is also outside power as the QCA has no power to agree or determine  $AA_t$  in the absence of an access dispute.

The QCA’s drafting of  $AA_t$  effectively gives the QCA a unilateral right to amend the access undertaking from time to time. This is because it permits the QCA to alter the Ceiling Revenue Limit otherwise determined by the specific formula in clause 3.2.4(a). Again the QCA’s proposal is beyond power – the QCA cannot give itself a right to effectively amend the access undertaking.

The QCA’s drafting of  $AA_t$  gives no guidance as to how it will be determined and what factors will be relevant to its determination by the QCA.

By seeking to give itself an unqualified power to determine the Ceiling Revenue Limit through the adjustment factor, the QCA potentially removes Queensland Rail’s and the access seeker’s rights to challenge that decision.

### **Clause 3.2.4(c)**

Queensland Rail accepts that the use of a RAB is appropriate (although it does not agree with the QCA’s proposed re-valuation of that asset base). Queensland Rail did not intend to re-value the assets which are included in its roll forward of the RAB merely because a non-coal carrying train service might be using those assets.

However, the QCA’s proposal is also that if the value cannot be determined by reference to the RAB (because there is no value for those assets in the RAB – for example, the Mt Isa line and the North Coast line), then the value is to be as agreed by Queensland Rail and the access seeker or failing agreement as determined by the QCA.



Queensland Rail has several concerns with this proposal:

- As Queensland Rail has already submitted, the QCA has consistently approved a DORC methodology for the valuation of assets for setting the Ceiling Revenue Limit for the assets in the Queensland Rail network since 2001. It has never deviated from this approach and no circumstances have changed that justify its decision to depart from that long held position.
- The QCA's proposal potentially results in considerable uncertainty as there will be no settled valuation methodology for assets outside the RAB – which are the bulk of Queensland Rail's assets.
- The QCA's proposal makes it impossible to comply with the obligations in section 101(2) of the QCA Act. That section requires Queensland Rail to give information about the value of assets including the way in which the value is calculated to an access seeker. Section 101(2) clearly contemplates that Queensland Rail would determine the asset value.
- As proposed by the QCA, the valuation of assets may vary from access seeker to access seeker. This cannot be efficient and will lead to significant uncertainty as to price and possible price distortions and adverse effects in upstream and downstream markets. Queensland Rail does not understand how this promotes the object of Part 5 of the QCA Act. A case by case valuation requirement also creates additional valuation related costs for Queensland Rail which are likely to be substantial. There is no apparent basis by which these costs will be recoverable by Queensland Rail.
- In its Draft Decision on Aurizon Network's 2014 DAU, the QCA notes its supports a 'stable and predictable' regulatory environment. It is difficult to see how the QCA's proposal necessarily supports a stable and predictable environment for Queensland Rail and other relevant stakeholders, where there is no certainty on the valuation approach for determining ceiling revenue limits.

If users are unable to rely on regulatory arrangements to provide certainty and transparency, they will be less willing to make future investments. In fact, the QCA mentions that "pricing certainty for rail access is an important underpinning of investments made in long-lived infrastructure investments and expenditure on exploration activities". The lack of transparency and predictability regarding pricing arrangements is unlikely to encourage efficient investment in Queensland Rail's network. This does not satisfy sections 138(2)(a) and (d) of the QCA Act, which relate to the object clause in Part 5 (section 69E of the QCA Act) and the public interest.

Queensland Rail, therefore, does not consider that leaving the valuation approach open provides an appropriate balance of all the section 138(2) matters in the QCA Act, which is what the QCA aims to achieve in forming its decisions.

## **10.5 Take or pay arrangements**

Queensland Rail welcomes the QCA's support for take or pay charges. However, Queensland Rail does have specific submissions in relation to the take or pay arrangements associated with the reference tariffs – see section 9.4 of this submission.

## **10.6 Asset valuation methodology for negotiating access charges**

Queensland Rail has included submissions relating to the valuation methodology to be used in relation to the calculation of the Ceiling Revenue Limit in relation to the QCA's proposed clause 3.2.4(c) – see section 10.4 above.

Queensland Rail has also made submissions in section 6 above that are relevant to the issue of the RAB for the 2015DAU and the West Moreton Network reference tariff.

The submissions in this section 10.6 are in addition to those submissions and respond to various matters raised in section 3.6 of the QCA's Draft Decision.

The QCA has stated that:

*"Queensland Rail proposed that the value of assets and investments be determined using a DORC methodology (cls. 3.2.3(a) and (c)).<sup>69</sup> Queensland Rail also proposed to include additional sections into the West Moreton network asset base at DORC value (Schedule E, cl. 1.2(a)(ii))."*<sup>69</sup>

To be clear:

- Queensland Rail's 2015DAU is based on a continued use of the same valuation methodology that has been approved, applied and advocated for consistently by the QCA for the relevant assets since at least 2001; and
- The inclusion of additional pre-existing elements of the rail network into the existing RAB for the West Moreton Network was done on the same valuation basis as used by the QCA when originally approving that RAB. Queensland Rail acknowledges that the inclusion of assets constructed since the original setting of the RAB is based on the QCA's usual practice of including prudent capital expenditure relating to new assets.

The QCA has stated that:

*"We consider that given the diverse nature of Queensland Rail's network, it is not appropriate to prescribe a single asset valuation approach to apply to Queensland Rail's entire network of declared infrastructure."*<sup>70</sup>

The QCA goes on to further emphasize the inappropriateness of a single valuation approach.

The nature of the assets comprising Queensland Rail's network, and the types of train services operating on it, have not changed in any material respects since 2001. The network and types of train services are at least as diverse today as in 2001 – if anything they are arguably less diverse after the Central Queensland Coal Region privatisation.

A single valuation methodology has been applied by the QCA since at least 2001. The QCA's quoted comment above suggests that the valuation methodologies it has approved in multiple past and current access undertakings (and presumably, as a result, that those past and current access undertakings) were not appropriate and that it was wrong to approve them.

The QCA has stated that:

*"... there is no legislated approach to establishing the amount of investment on which access charges should be calculated."*<sup>71</sup>

The QCA Act does prescribe an approach based on efficient cost for establishing the investment on which a return can be recovered. The QCA appears to be suggesting that it may prevent the access provider from receiving a return on part of its investment that it is legitimately entitled to receive a return on. The QCA's view is consistent with its opinion that the pricing principle under section 168A(a) of the QCA Act can simply be traded away or overridden in favour of other interests. If this is what the QCA is foreshadowing, it is a serious error.

---

<sup>69</sup> QCA draft decision at 58.

<sup>70</sup> QCA draft decision at 58.

<sup>71</sup> QCA draft decision at 58.

The QCA has made claims about various distortions that could potentially occur as a result of inappropriate asset valuations. However, the QCA has provided no evidence that any such distortions have occurred since 2001.

The QCA has stated that:

*“In order to perform our statutory functions, consistent with the QCA Act, we require flexibility to choose the appropriate way to value assets in each case.”<sup>72</sup>*

Queensland Rail submits that the QCA Act does not require the flexibility to which the QCA refers and indeed such flexibility would be contrary to good regulatory practice as well as the QCA’s own past practice. Good regulatory practice requires consistency and certainty of approach. Where an asset value has been attributed and approved by the regulator rolling that asset value forward provides the level of consistency and certainty required. Where an asset value has not been determined, consistency and certainty demand the setting and consistent application of a specific valuation methodology.

Queensland Rail submits the type of flexibility to which the QCA refers is contrary to the object of Part 5 of the QCA Act. An ever-changing asset valuation approach for assets used to provide a declared service fails to promote the economically efficient investment in those assets.

It is an incontrovertible fact that a single valuation methodology has applied since at least 2001. The QCA has claimed that it cannot perform its statutory functions consistent with the QCA Act unless it has the flexibility to choose the appropriate way to value assets on a case by case basis. Given that the QCA has consistently applied a single valuation methodology – a normal DORC methodology (without the zero valuing of assets) – since at least 2001, by suggesting now that it needs flexibility to choose the appropriate valuation methodology on a case by case it is suggesting that it has performed its statutory functions in a manner inconsistent with the QCA Act. Queensland Rail does not believe that that is the case.

The QCA has never once sought to require any past or current approved access undertaking to be amended to provide it with the “flexibility” that it now advocates is essential. If a lack of flexibility in the valuation of assets is inconsistent with the QCA Act as claimed, the QCA would have had an obligation to seek that flexibility prior to the 2015DAU.

## **10.7 Reference tariffs**

The QCA has proposed a new clause 3.5(a) for the 2015DAU which gives Queensland Rail discretion to develop “Reference Tariffs” for certain types of train services *“to assist in the facilitation of an efficient Access negotiation process”*. Clause 3.5(a) does not have any legal effect because by definition the Reference Tariffs are those in the schedule to the 2015DAU and the only way to create new Reference Tariffs is through a voluntary draft amending access undertaking.

The QCA cannot through an amendment to the 2015DAU vest Queensland Rail with the power to create new Reference Tariffs.

It follows for the same reasons, the QCA’s amendments to clause 3.5(b) for the 2015DAU are unnecessary.

The QCA’s new clause 3.5(c) for the 2015DAU is also unnecessary. A “Reference Tariff” by definition is a “prescribed Access Charge” that relates to a particular “Reference Train Service”.

The QCA’s new clause 3.5(d) for the 2015DAU is both unnecessary and outside power. As mentioned above, all of the Reference Tariffs are prescribed under the approved access undertaking and, as such, are approved by the QCA. An access agreement (including the

---

<sup>72</sup> QCA draft decision at 59.

access charges under it) is not required to be consistent with an approved access undertaking and is not invalid merely because it is not.<sup>73</sup> Therefore the provision's reference to "Reference Tariffs" not needing to be consistent with access charges under an access agreement is unnecessary.

The provision is outside the QCA's power as the QCA has no power to require access agreements to be amended in the way that it proposes.

## **10.8 Rate review provisions**

The QCA has proposed amendments to clause 3.6 of the 2015DAU. It is concerning that the QCA is seeking to prevent Queensland Rail and an access seeker from including in a proposed access agreement provisions that allow a review of the methodology, rates and other inputs for calculating access charges where the cost or risk to Queensland Rail of providing access changes over time.

The consequence of this is that where Queensland Rail achieves cost efficiencies or does not incur costs at the rate anticipated, none of those savings will be passed through.

Conversely, where Queensland Rail's costs or risk change from those reasonably anticipated when the price for access was set, Queensland Rail is prevented from adjusting the price to compensate for those changes.

While Queensland Rail is concerned with both of these consequences, the later consequence is of greater regulatory significance as the QCA is proposing to approve a standard access agreement that has broad based, expanded and open ended obligations which may require Queensland Rail to incur capital and operating costs that were not and cannot be reasonably allowed for in the build up of the relevant access charge (even, and perhaps particularly, where the access charge is based on a Reference Tariff).

Not allowing Queensland Rail to adjust for cost and risk factors denies Queensland Rail the opportunity to recover at least its efficient costs and a relevant return in accordance with section 168A of the QCA Act.

## **11 Investment, planning and coordination framework**

In the 2015DAU, Queensland Rail proposed to include a more detailed investment framework than currently applies to it but which was still relatively light-handed in its approach. This was consistent with the view, amongst other matters, that:

- it is unlikely capacity augmentation/extensions will be contemplated during the 2015DAU's term and, therefore, significant effort in devising policy positions and governance models are likely to deliver little tangible regulatory benefit;
- the development of a Standard User Funding Agreement (or equivalent) and the development and maintaining of "master plans" (assuming these were lawful requirements) would cause Queensland Rail to incur significant costs, yet deliver little net benefit to access seekers and unnecessarily put upwards pressure on access charges; and
- it is desirable to avoid prescriptive, detailed and potentially inflexible approaches, when the characteristics of future extensions are uncertain (and also where the characteristics of Queensland Rail's main networks vary so greatly).

---

<sup>73</sup> See section 168 of the QCA Act.

Chapter 9 of the QCA's Draft Decision sets out a proposed position on Queensland Rail's investment framework. The QCA proposes to refuse to approve those investment framework provisions. In doing so, the QCA proposes significant changes to the 2015DAU investment framework.

### 11.1 Overarching fitness for purpose

Queensland Rail's overarching position is that the QCA's proposed investment framework arrangements are unwarranted, particularly considering the upcoming undertaking period is highly unlikely to require capacity augmentation/extensions to the network.

Queensland Rail considers the Council of Australian Governments Best Practice Regulation guideline may be a useful framework from which to consider the proposed investment framework. In particular, the guideline highlights the need to identify the problem, and consider the costs and benefits of reform to address that problem. This involves, amongst other matters, considering a range of feasible policy options and adopting the option that generates the greatest net benefit for the community.

The QCA does not substantiate how the benefits (if any) of having prescriptive user-funding arrangements and detailed master-planning processes outweigh the costs involved including those imposed on Queensland Rail and, consequently, the access holders that will have to bear higher access charges and potentially Government.

The QCA has no visibility of (and has not enquired as to) the additional costs that will have to be passed on should Queensland Rail accept the QCA's proposed positions on the investment framework. It is not evident from the QCA's draft decision that the QCA has properly undertaken an assessment of, and fully considered, the costs and benefits of its proposal.

The QCA should use evidence-based arguments, not regulatory principles alone, to support its proposed policy positions. The lack of evidence suggests that the QCA's policy positions impose costs on access holders that outweigh the benefits.

The QCA's draft decision, and the language used by the QCA, assume or imply the pre-existence of a significant regulatory problem. Generally, the presumption (based largely on submissions, not Queensland Rail's actual behaviour) is that without a more detailed and prescriptive investment framework, Queensland Rail would: *"exploit its market power"*, *"frustrate an access seeker's efforts to develop an extension project..."*, *"delay project negotiations ..."*, and *"extract additional financial benefits ..."*.

The QCA has effectively conjured a significant problem, and presented this as the expected outcome of Queensland Rail's proposals under the 2015DAU. It has then used this as a basis for arguing for a significantly augmented regulatory response. This is counter to best-practice regulation principles, where onerous regulatory instruments are applied only where other options (including no regulatory response) have proven, or are inherently likely to be, ineffective.

The prescriptive investment framework and associated requirements proposed by the QCA will give rise to significant costs, with little or no value to access seekers, thereby unnecessarily raising access charges or resulting in an increased funding requirement from Government. To be clear, the relevant costs including matters such as investment delays, increased cost of investment and regulatory dysfunction – assuming that investments are even contemplated during the 2015DAU term. In addition, while Queensland Rail supports balanced commercial negotiations, the QCA's proposed changes undermine Queensland Rail's legitimate role as the owner and manager of the rail infrastructure and are inconsistent with the statutory rights and obligations under the QCA Act and other laws.

## 11.2 Assessment approach

### *Fundamental principles*

Queensland Rail's submission in support of its 2013DAU included the following background information relating to 'extensions':

#### **Background information**

##### **QCA powers under the QCA Act relating to extensions**

An access undertaking may include provisions "relating to extending the facility".<sup>15</sup> However, the QCA's powers are limited when making access determinations under the QCA Act relating to the extending of a facility.

For example, under section 119 of the QCA Act, the QCA must not make an access determination:

- that is inconsistent with an approved access undertaking;<sup>16</sup>
- that, in effect, results in the access seeker, or someone else, becoming the owner, or one of the owners, of the facility, without the existing owner's agreement;<sup>17</sup>
- that, in effect, requires an access provider to pay some or all of the costs of extending the facility;<sup>18</sup>
- that requires an access provider to extend a facility unless:
  - if an approved voluntary access undertaking applies, the requirement is consistent with a requirement imposed under a voluntary access undertaking;<sup>19</sup>
  - the QCA is satisfied that the extension will be technically and economically feasible and consistent with the safe and reliable operation of the facility;<sup>20</sup>
  - the QCA is satisfied that the legitimate business interests of the owner and operator of the facility are protected;<sup>21</sup> and
- that requires an access provider to pay all or some of the costs of extending a facility except to the extent that such a requirement is consistent with a requirement imposed under an approved voluntary access undertaking.<sup>22</sup>

(footnotes not included) – Queensland Rail's *Explanatory Submission – Queensland Rail's Draft Access Undertaking 1 (February 2013)* at 30.

The 2013DAU submission also noted that:

*"The Authority must not make an access determination that will reduce the amount of service able to be obtained by the access provider."*<sup>74</sup> (footnotes omitted)

and that:

*"AU1 drafting also has regard to the QCA Final Decision on the former QR Network's 2010AU where the Authority determined:*

- *QR Network will own and operate the rail transport infrastructure utilised to provide the declared service, including extensions which are wholly funded by users; and*
- *QR Network must construct all Expansions because of operational/safety concerns."*<sup>75</sup> (footnotes omitted)

Queensland Rail is not aware that the QCA has rejected these principles. As such, Queensland Rail was surprised and concerned that the QCA's draft decisions relating to "Extensions" were not consistent with these principles.

The problems with the QCA's approach to sections 138(2) and 168A of the QCA Act also affect the QCA's draft decisions in relation to Extensions.

### ***Protection of Queensland Rail's legitimate business interests***

Consistent with the QCA's general approach to the draft decision, the QCA appears to have again engaged in an exercise of trading off Queensland Rail's legitimate business interests against other interests in regard to extensions of the network.

<sup>74</sup> Queensland Rail's *Explanatory Submission – Queensland Rail's Draft Access Undertaking 1 (February 2013)* at 10.

<sup>75</sup> Queensland Rail's *Explanatory Submission – Queensland Rail's Draft Access Undertaking 1 (February 2013)* at 11.

This is exemplified at the outset by the QCA's position that an appropriate "investment framework", amongst other things:

*"balances Queensland Rail's legitimate business interests with the rights and legitimate business interests of access seekers"*<sup>76</sup>

The QCA subsequently trades-off the protection of Queensland Rail's legitimate business interests against other interests in its decision.

Importantly, the QCA also claims that Queensland Rail's legitimate business interests are protected in relation to the Extension provisions if:

*"... the 2015 DAU provides for Queensland Rail to:*

- recover the efficient costs incurred in negotiating an extension project and providing access services to the access seeker*
- deliver contracted access rights to all access holders."*<sup>77</sup>

However, Queensland Rail's legitimate business interests in relation to Extensions are significantly wider than as portrayed by the QCA.

### **Maintenance of an Extension**

The QCA has claimed in setting the approach for its assessment that:

*"We accept the ownership proposal that Queensland Rail will own, operate, manage and maintain the extension project as an integrated component of its network. We consider this to be consistent with the QCA Act."*<sup>78</sup>

The 2015DAU provides that:

*"Unless otherwise agreed by Queensland Rail, an Extension which is funded by an entity other than Queensland Rail must only be constructed, owned, operated and managed by Queensland Rail."*<sup>79</sup>

Queensland Rail has not expressly made a proposal to maintain an Extension. The QCA is therefore seeking to impose on Queensland Rail an obligation that it did not volunteer. To compound the problem, in changes made to the 2015 SAA the QCA has proposed to amend Queensland Rail's maintenance obligations so that they require Queensland Rail to undertake and fund the cost of "Maintenance Work" which is defined as:

*"...any works, involving maintenance, repairs to, renewal, replacement and associated alterations or removal of, the whole or any part of the Network and includes any inspections or investigations of the Network."*

An "extension" under the QCA Act is defined as including:

*"... an enhancement, expansion, augmentation, duplication or replacement of all or part of the facility."*

Consequently, the QCA's proposal is beyond power and in direct conflict with section 119 of the QCA Act.

### **Other assessment criteria**

The QCA sets out a variety of QCA assessment criteria which it says it has applied in performing its statutory function in relation to the approval or rejection of the Extension provisions in the

---

<sup>76</sup> QCA draft decision at 224.

<sup>77</sup> QCA draft decision at 225.

<sup>78</sup> QCA draft decision at 224.

<sup>79</sup> Clause 1.4.4 of the 2015DAU.

2015DAU in Table 9.2 of the draft decision. Queensland Rail has already made submissions on the proper application of section 138(2) of the QCA Act and will not repeat those matters here.

Queensland Rail has concerns that the assessment criteria relied on by the QCA do not reflect those in the QCA Act. Queensland Rail is also concerned about the weighting of those criteria against Queensland Rail.

For instance, in Table 9.2 (which “provides more detail on how [the QCA] consider the section 138(2) factors should be addressed to enable [it] to approve the investment framework”) the QCA states:

*“... access holders' interests will be protected if the 2015 DAU provides reliability and security on the delivery of access rights over the life of all access agreements and beyond”<sup>80</sup>*

The QCA Act does not require the QCA to ensure the interests of access holders are “protected”. Indeed, section 138(2) does not mention access holders’ interests. The QCA Act is littered with references to “users”; if Parliament had intended that the protection of users was to be a relevant criterion under section 138(2) it would have said so. By contrast, section 138(2) expressly obliges the QCA to have regard to the legitimate business interests of the operator of the service and, in relation to Extensions, section 119 of the QCA Act specifically requires the QCA to ensure Queensland Rail’s legitimate business interests are protected.

In any event, it is not clear what the access holder criterion relied on by the QCA means or how it applies in the context of an Extension process – for example:

- how does it relate, and how is it relevant, to the negotiation of access rights which require an Extension?
- what is meant by “reliability and security on the delivery of access rights”?
- how and why can it be relevant over “the life of all access agreements and beyond”?
- why is the QCA applying a criterion that seeks to protect access holders “beyond” the term of their access agreements?

The QCA also specifically refers to Queensland Rail’s rail accreditation obligations as a matter to be considered under section 138(2)(h) of the QCA Act. The QCA considers that:

*“... Queensland Rail's legitimate safety and accreditation responsibilities will be addressed if the 2015 DAU enables an extension project to be designed, constructed and commissioned consistent with the objective technical, safety and environment standards applying to the existing network.”<sup>81</sup>*

The matters referred to in this quote are properly part of Queensland Rail’s legitimate business interests and not merely “any other issue the [QCA] considers relevant”. The QCA’s view that Queensland Rail’s safety and accreditation responsibilities are not within the ambit of its legitimate business interests reinforces the fact that the QCA has adopted an unduly narrow view of Queensland Rail’s legitimate business interests throughout its draft decision.

### **11.3 Appropriateness**

The 2015DAU proposes Extension provisions which are to have effect in conjunction with the QCA Act and other provisions of the 2015DAU. Those provisions are appropriate and fit for purpose in Queensland Rail’s circumstances.

---

<sup>80</sup> QCA draft decision at 225.

<sup>81</sup> QCA draft decision at 225.



The provisions proposed in clause 1.4 of the 2015DAU, as proposed by Queensland Rail, do not operate on a stand-alone basis – but rather are part of a wider third party access regime.

However, the QCA appears to have ignored the fact that clause 1.4 of the 2015DAU operates as part of a wider regime – not as a stand-alone provision. This has resulted in the QCA forming the view that the provisions are inappropriate and require substantial amendment. The consequence has been amendments by the QCA which make the 2015DAU drafting more regimented, rigid and complex than is appropriate and, in some instances, which are ‘minor and inconsequential’ because they have no real effect or consequence.

Queensland Rail is concerned that the QCA’s drafting does not achieve the object of promoting investment in the network and will have the opposite effect of frustrating Extension proposals.

The QCA has made various overarching claims as to deficiencies with the 2015DAU and the hypothetical consequences of those deficiencies. The QCA’s claims reflect a lack of understanding of the 2015DAU and the interconnectivity with the regulatory regime. The QCA’s comments also seem based on an assumption that Queensland Rail will act in any number of ways that constitute a breach of the QCA Act and the 2015DAU.

The QCA should also bear in mind that any significant Extensions to create more capacity in the rail network are highly unlikely during the regulatory period planned for the 2015DAU. Even if such an Extension was to arise, the 2015DAU would provide an appropriate regulatory response when applied together with the other aspects of the regulatory regime.

In addition to the above matters, Queensland Rail observes that since June 2010 the 2008AU has and continues to apply to Queensland Rail. The provisions in the 2008AU regarding extensions including the negotiation process and access seeker funding are streamlined compared to the QCA’s proposals. Indeed, provisions similar to those in the 2008AU were also included in two previous approved access undertakings.

It is relevant that significantly less complex and detailed provisions have applied since 2001, and continue to currently apply, in relation to the rail network. The QCA has not pointed to any instances where the hypothetical effects being advanced by the QCA have arisen in relation to the rail network, particularly while Queensland Rail has been the railway manager (or, for that matter, under predecessor railway managers for that rail network) and why the 2015DAU does not sufficiently address those instances.

#### **11.4 Examples of specific drafting issues**

The serious overarching issues with the QCA’s approach that adversely affect its draft decision are sufficient to render that draft decision inappropriate and outside of power. However, without wishing to detract from those issues, Queensland Rail has, in any event, also identified various examples of deficiencies with the QCA’s proposed drafting. Queensland Rail has endeavoured to summarise those examples, in general terms, below.

QCA clause reference	Concern
“Extension Costs”	<ul style="list-style-type: none"> <li data-bbox="395 1711 1414 1899">• The term “Extension Costs” is a pivotal term under clause 1.4 of the 2015DAU. The effect of the QCA’s proposed definition is to cause Queensland Rail to bear part of the cost of Extending the Network. The QCA’s construction and application of the term is outside its powers. The term cannot be limited in the ways proposed by the QCA.</li> <li data-bbox="395 1906 1414 2007">• Every clause that refers to the term in the QCA drafting, and every clause that expressly or impliedly requires Queensland Rail to bear some or all of the cost of an Extension, is outside the QCA’s powers.</li> </ul>

QCA clause reference	Concern
	<p>This has serious consequences for the entirety of the QCA's proposed provisions. For the purpose of this submission, Queensland Rail has not sought to identify every instance in the QCA's drafting where this issue arises.</p>
1.4.1(a)	<ul style="list-style-type: none"> <li>• The application of clause 1.4 is unduly restricted. Consistent with the QCA Act the Extension provisions should apply in all cases where an access seeker is seeking access rights that cannot be accommodated without an Extension.</li> <li>• The matter referred to as being notified under clause 2.7.2(d) is inconsistent with clause 2.7.2(d).</li> <li>• The clause is outside power as it implies that Queensland Rail must bear the indirect costs of developing, constructing and owning the relevant Extension or costs that are not Extension Costs.</li> </ul>
1.4.1(b)	<ul style="list-style-type: none"> <li>• The concept of an Access Funder is outside power to the extent that the Access Funder is not an access seeker. The QCA cannot regulate Queensland Rail's relationships with persons who are not access seekers. All references to a person other than an access seeker being an Access Funder must be removed.</li> <li>• The clause is outside power as it purports to oblige Queensland Rail to Extend the Network. The QCA Act does not permit the QCA to impose an obligation to undertake or fund an Extension.</li> <li>• Queensland Rail also notes that the effect of the QCA's drafting is to expose Queensland Rail to Extension related liability both under the approved access undertaking and under contractual arrangements with access seekers and their funders. This is not a reasonable or appropriate regulatory outcome.</li> </ul>

QCA clause reference	Concern
1.4.1(b)(ii)	<ul style="list-style-type: none"> <li>• This clause is unnecessary as the Extension Conditions seem to address this matter.</li> <li>• While Queensland Rail does not accept that it can be obliged to Extend the Network under an approved access undertaking, the QCA's proposal is inappropriate as it may result in Queensland Rail having an obligation to Extend the Network when it would otherwise have good legal and commercial reasons for not doing so. This is particularly the case where compliance with the relevant agreements is at issue – for example there is no relief from the undertaking obligations even though: <ul style="list-style-type: none"> <li>▪ the access seeker/funder may be in breach of relevant agreements;</li> <li>▪ while the agreement may be unconditional, its terms may mean no obligation has crystallised;</li> <li>▪ the agreement may have excused or suspended Queensland Rail's obligations;</li> <li>▪ the relevant agreements may have expired, be void or have been terminated.</li> </ul> </li> </ul>
1.4.1(b)(iii)	<ul style="list-style-type: none"> <li>• Queensland Rail does not accept that any decisions on waiver of security or selection of another form of security should be disputable.</li> <li>• As the QCA requires certainty, the QCA must specify the nature of and requirements for the bank guarantee. Similar requirements to those in the 2015 SAA should be sufficient, although Queensland Rail requires no less than an A- S&amp;P rating as a suitable minimum. Queensland Rail's legitimate business interests are not protected unless it is provided with real and effective security.</li> <li>• Queensland Rail accepts that security should not be required to the extent that Queensland Rail's costs are paid in advance including in response to cash calls, <u>provided that</u> Queensland Rail has no risk of making safe costs, demobilisation costs or other similar costs.</li> </ul>
1.4.1(c)	<ul style="list-style-type: none"> <li>• Clause 1.4.1(c) should not be subject to clause 1.4.1(d) as doing so is not appropriate and is outside power. The QCA Act does not require that an access provider can only extend its facility under the QCA Act or an approved access undertaking.</li> <li>• It is outside power for the QCA to impose obligations on Queensland Rail in relation to Extensions that may require Queensland Rail to act in a way that results in its legitimate business interests not being protected. The deletion of clause 1.4.1(c)(iii), as shown in the QCA's mark up, is inappropriate and must be reinstated.</li> </ul>
1.4.1(d)	<p>Clause 1.4.1(d) is outside power. The QCA Act does not require that an access provider can only extend its facility under the QCA Act or an approved access undertaking. How Queensland Rail invests in the Network is not regulated by the QCA and is a commercial matter for Queensland Rail.</p>

QCA clause reference	Concern
1.4.2(a)	The clause refers to a notification of Queensland Rail under clause 2.7.2(c) – but Queensland Rail is not notified of anything under that clause.
1.4.2(a)(i)	<ul style="list-style-type: none"> <li>• Clause 1.4.2(a)(i) requires Queensland Rail to provide information that can only reasonably be identified and provided during or, most likely, after the various studies that the QCA requires have been completed.</li> <li>• Clause 1.4.2(a)(i)(E) refers to “<i>the operational integrity of the relevant corridor that is to be extended</i>”. It is unclear what this means and, as such, whether this is appropriate.</li> <li>• The clause frequently refers to “<i>reasonably required</i>”. It is not clear what this phrase means or is intended to achieve. Queensland Rail is concerned that it may mean that it could have rail safety, engineering, operational or other requirements watered down, disputed or replaced. Queensland Rail cannot be placed in a situation where it is wedged on liability because third parties dictate safety, engineering, operational and other requirements relating to its rail network.</li> <li>• In any event, the provision is unnecessary. The 2015DAU already contains provisions which provide for the provision of that and other information to the access seeker.</li> </ul>
1.4.2(a)(ii), (iii) and (iv)	<ul style="list-style-type: none"> <li>• These provisions (including the closing words for clause 1.4.2) are unnecessary. The 2015DAU already addressed those matters. In any event, Queensland Rail’s obligation to negotiate in good faith would require it to address those matters.</li> <li>• The QCA requires four stages for an Extension – Concept Study, Prefeasibility Study, Feasibility Study and construction and commissioning of the Extension. Firstly, there is no design stage. Secondly, the rigid mandating of these stages is liable to be inefficient and unnecessarily rigid. For example, a relatively uncontroversial or minor Extension may not require all of these stages or might require different studies – Would a program of sleeper and ballast replacement require the studies the QCA refers to? Would the various studies be required if other equivalent studies had already been prepared?</li> <li>• Queensland Rail will make separate comments on the QCA’s proposed Schedule I.</li> </ul>
1.4.2(b)	<ul style="list-style-type: none"> <li>• The QCA’s provision is unnecessary.</li> <li>• There is no need for the parties to agree anything, as the access seeker can act unilaterally. In any event, the conduct of the studies is essentially part of the negotiation of access and both parties are obliged to act in good faith.</li> </ul>
1.4.2(c)(iii)	Paragraph (F) should be reinstated. There is statutory requirement that Queensland Rail’s legitimate business interests must be protected.
1.4.2(c)(iv)	The words “ <i>on terms and conditions consistent with this Undertaking unless otherwise agreed</i> ” are minor and inconsequential. The 2015DAU is clear on the requirements for access agreements.

QCA clause reference	Concern
1.4.2(c)(vi)	The QCA's rewording of the 2015DAU is minor and inconsequential.
1.4.2(d)	The clause is unnecessary even if only because both Queensland Rail and the access seeker are obliged to negotiate in good faith.
1.4.2(e)	<ul style="list-style-type: none"> <li>• The clause is outside power as it appears to be addressing matters that are post execution of the Funding Agreement. The matters to which clause 1.4.2(e) relate are properly matters for the contractual arrangements between Queensland Rail and the funding entity/access holder. The QCA Act is not designed to and does not generally regulate conduct between an access provider and users or persons funding an Extension. There are specified instances where the QCA Act does regulate elements of the relationship between an access provider and a user but the subject matter of Extensions is not one of those instances.</li> <li>• In any event, it is not reasonable for Queensland Rail to be subject to both contractual and regulatory obligations and remedies on the same subject matter.</li> <li>• In any event, the QCA's drafting imposes obligations when there may be no equivalent or active obligations under the relevant agreement. By way of an example, if the Funding Agreement had been terminated, Queensland Rail would still have to comply with the QCA's proposed obligations. Less obvious examples might involve the agreement being conditional, the access seeker being in breach of the agreement, a force majeure event suspending obligations or others.</li> <li>• It is presumably not intended, but it is open on the plain words that the execution of a Funding Agreement relating to a Feasibility Study, for instance, might trigger the QCA's provision.</li> </ul>
1.4.2(e)(i)	<ul style="list-style-type: none"> <li>• It is unclear: <ul style="list-style-type: none"> <li>▪ what is meant by "<i>project assistance</i>" and why would Queensland Rail need to provide it when it is the constructing entity?</li> <li>▪ why the "Access Funder" is identified by the QCA as the developer of the Extension when this is Queensland Rail's role?</li> <li>▪ what is meant by "<i>to comply with clause 1.4.2(c) at the required study standard</i>"?</li> </ul> </li> <li>• This clause potentially gives rise to tenure and accreditation issues that would need to be resolved. The access seeker would likely need to be an accredited rail infrastructure manager if it is to develop the Extension and Queensland Rail is merely providing "<i>project assistance</i>".</li> </ul>
1.4.2(e)(iii)	<ul style="list-style-type: none"> <li>• It is not clear how an Extension "<i>complies with clause 1.4.1.(b)</i>".</li> <li>• The clause is outside power as it purports to oblige Queensland Rail to Extend the Network. Any obligation to Extend the Network must arise under an access agreement, a Funding Agreement or some other agreement with the relevant access seeker.</li> </ul>

QCA clause reference	Concern
	<ul style="list-style-type: none"> <li>The provision is silent on the design of the Extension. For a comparison see clause 1.4.4.</li> </ul>
1.4.2(f)	<ul style="list-style-type: none"> <li>This provision purports to give someone who is not an access seeker a right to have the QCA arbitrate disputes involving Queensland Rail. As a matter of law the QCA cannot invest itself with arbitral powers – its power to arbitrate is codified by the QCA Act.</li> <li>The provision is also inconsistent with clause 6.1 of the 2015DAU. Disputes under the 2015DAU are not automatically referred to directly to the QCA.</li> <li>Clause 1.4.7 of the 2015DAU deals with disputes in relation to Extensions. Consequently, the QCA's provisions are unnecessary.</li> </ul>
1.4.3(b)	<p>The QCA's drafting is inappropriate as it does not allow for the fact that a Funding Agreement may, for example, be for a Concept Study – rather than for the design, construction and commissioning of an Extension. The result is that the Funding Agreement will be required to include provisions which are potentially highly inappropriate depending upon the project stage that the Funding Agreement relates to.</p>
1.4.3(b)(i)(A)	<p>The bracketed proviso in clause 1.4.3(b)(i)(A) is minor and inconsequential, as the 2015DAU addresses this issue. Queensland Rail makes separate comments on Schedule I.</p>
Deleted 1.4.3(b)(iii)	<p>If Extension related provisions are included in the 2015DAU, they must ensure Queensland Rail's legitimate business interests are protected. It follows that a Funding Agreement required under an approved access undertaking must also be required to do so. The deleted provision must be reinstated.</p>
1.4.3(b)(iv)	<p>While Queensland Rail was prepared to use reasonable endeavours to achieve various outcomes, the QCA has switched this to an absolute obligation. In many respects Queensland Rail will not know whether it is complying, or has complied, with the obligations until after it has successfully or unsuccessfully defended a claim against it. In fact, some matters may not even be fully within Queensland Rail's control. This creates a substantial risk (for which it is unlikely to be rewarded) and also potentially exposes Queensland Rail to unforeseen contingent costs, even though Queensland Rail may have been acting in good faith. The QCA is effectively lumbering Queensland Rail with all of the downside risks associated with an Extension. This is an entirely unacceptable position for Queensland Rail to be placed in.</p>
1.4.3(b)(iv)(B)	<p>In addition to the matter raised above, this provision requires Queensland Rail to ensure that an Extension is consistent with its obligations under Schedule E. Schedule E contains no obligations on Queensland Rail in that regard.</p>
1.4.4	<ul style="list-style-type: none"> <li>The changes the QCA has proposed for clause 1.4.4 convert that provision from one which is consistent with Queensland Rail's rights under the QCA Act to own an Extension into a right of ownership that is conditional on compliance with the access undertaking and various agreements. Doing so is beyond the QCA's power. Queensland Rail's rights of ownership are absolute under the QCA Act.</li> </ul>

QCA clause reference	Concern
	<ul style="list-style-type: none"> <li>Queensland Rail is the accredited rail infrastructure manager in respect of the declared service. The QCA's drafting contemplates the possibility that another party (without accreditation) might be given the role of constructing, operating and managing a part of the network, namely the Extension. That simply will not work.</li> <li>In any event, it is unclear how an Extension can be "owned" by Queensland Rail <i>"in accordance with this Undertaking and the relevant Funding Agreement and Access Agreement"</i>.</li> </ul>

## 11.5 Schedule I

The QCA proposes to insert a new Schedule I. Schedule I is referred to by the QCA in clauses 1.4.2(a)(iv), 1.4.3(b)(i)(A) and 2.9.4(b)(i) as well as in clause 3, Schedule A. In summary, these provisions proposed by the QCA purport to require the following:

- **clause 1.4.2(a)(iv)** – the negotiating and entering into arrangements in relation to the funding of the relevant stage of an Extension is to be in accordance with the principles outlined in Schedule I;
- **clause 1.4.3(b)(i)(A)** – a Funding Agreement must be consistent with the approved access undertaking including the principles outlined in Schedule I;
- **clause 2.9.4(b)(i)** – a Standard Funding Agreement should be consistent with the principles outlined in Schedule I;
- **clause 3, Schedule A** – the QCA's proposed "Capacity Information for an Extension" that is to be provided by Queensland Rail includes a "first draft funding agreement" consistent with the principles outlined in Schedule I.

### ***Overlap and inconsistency***

Under the 2015DAU if Schedule I is inconsistent with a provision in Parts 1 to 7 of the 2015DAU, the provision in Parts 1 to 7 of the 2015DAU will override Schedule I to the extent of the inconsistency.

Schedule I gives rise to a litany of inconsistencies with Parts 1 to 7 of the 2015DAU.

### ***Appropriateness of Schedule I***

The QCA's Schedule I is not appropriate and should not be approved by the QCA. As with the QCA's proposed amendments to clause 1.4 of the 2015DAU, most provisions under the QCA's Schedule I give rise to concerns – many of which are significant.

Schedule I needs to be completely revisited by the QCA. As such Queensland Rail considers it inefficient to respond on a provision by provision basis to Schedule I, although almost every proposed provision of Schedule I gives rise to concern. Queensland Rail provides the following comments in respect of Schedule I:

- Schedule I is internally inconsistent, as well as being inconsistent with Parts 1 to 7 of the proposed access undertaking and the QCA Act.
- Various provisions under Schedule I are one or more of the following:
  - outside of the QCA's powers under the QCA Act (including, for example, requiring Queensland Rail to bear part of the cost of an Extension, resolving disputes with

access holders and under funding agreements, permitting funding agreements to arise other than with access seekers, and imposing obligations to operate and maintain an Extension or the rail network);

- minor and inconsequential because they do not have any real effect or consequence in relation to Schedule I or the proposed access undertaking as whole;
  - irrelevant, ambiguous or uncertain;
  - promote inappropriate contracting in a form that creates conflicts with the QCA Act or the approved access undertaking;
  - so broad and open-ended that it is not possible to ascertain their meaning with certainty during the QCA's consultation on the draft decision or if approved in that form;
  - so broad and open-ended that the QCA may effectively be able to use the provisions to change the regulatory risk matrix under the access undertaking after approval;
  - incorrect or inaccurate (including errors of law and statements that are fundamentally wrong on basic issues such as whether Queensland Rail can be required to pay any of the cost of an Extension);
  - outside the scope of the proposed operation of Schedule I under the access undertaking;
  - provisions that do not protect Queensland Rail's legitimate business interests or which may have that effect;
  - purport to create legal relationships between Queensland Rail and the access seeker that are unclear but could potentially have material implications for Queensland Rail and other access seekers;
  - provisions that purport to impose obligations which are not appropriate under an access undertaking; and
  - provisions that will not or are unlikely to result in a practical and implementable commercial relationships.
- Schedule I is jumbled as to the operation of funding agreements. It appears to provide that there will be a single funding agreement and has provisions that are explicitly structured along those lines. However, it also recognises that there could be a separate funding agreement for each stage of an Extension, but without any adjustments to provisions that contemplate a single funding agreement. This is highly problematic.
  - Schedule I adopts various inappropriate risk positions.
  - Schedule I requires the Additional Capacity to be created by an Extension to effectively be pro-rated between the funders. This is neither practical nor efficient (as an Extension may potentially provide more Additional Capacity than is required by the funders or because Queensland Rail may require part of that Additional Capacity for activities such as operational activities) and potentially encourages capacity banking with implications for any secondary market.
  - Schedule I requires Queensland Rail to *“transfer to the Access Funder the full economic benefit that Queensland Rail derives from the Extension over the economic life of the Extension in accordance with Contributions AASB 1004 standard”*. That standard is



applicable for not-for-profit organisations and is completely inappropriate for a commercial organisation such as Queensland Rail.

## 11.6 Negotiation triggers

The QCA has stated that it has proposed:

*“regulatory triggers in clause 2.7 to enable an access seeker to commence extension negotiations under clause 1.4 of the 2015 DAU concurrently with access negotiations under Part 2 of the DAU”*<sup>82</sup>

Under the 2015DAU as proposed by Queensland Rail, the processes would always have been pursued concurrently. At a relevant point in the negotiation process the issue of funding of an Extension would be addressed by the parties in good faith in their negotiations as necessary. This provided flexibility for the parties while still being squarely within the oversight of regulatory process.

The QCA’s proposed process involves Queensland Rail notifying the access seeker, as soon as reasonably practicable during the Negotiation Period, whether Queensland Rail is willing to fund the Extension required to provide the Additional Capacity to accommodate the Access Application.

It is extraordinary that the QCA is requiring Queensland Rail to make a decision on whether it is willing to commit to fund an Extension in the advance of a Concept Study, Prefeasibility Study or Feasibility Study – bearing in mind that the QCA’s process will not trigger clause 1.4 until Queensland Rail notifies that it is not willing to fund the Extension and the access seeker has notified that it is willing to.

The QCA’s proposal is not appropriate and should not be pursued.

## 11.7 SAA maintenance

The QCA has stated that it has proposed amendments to: *“clarify Queensland Rail’s network maintenance obligations”*.<sup>83</sup>

It has purported to do so in the context of the 2015 SAA – but also appears to have included such matters in the context of its proposed drafting for clause 1.4 and Schedule I.

Queensland Rail has made specific submissions in relation to the QCA’s proposed amendments to the 2015 SAA.

Queensland Rail is concerned at the QCA’s attempt, under the guise of maintenance, to impose an obligation on Queensland Rail to undertake an Extension. To be clear, an Extension (under the 2015DAU and the QCA Act) includes, amongst other things, an enhancement or replacement of all or part of the relevant rail transport infrastructure.

## 11.8 Standard Funding Agreement

The QCA’s proposed clauses 2.9.4(b) to (d) include a requirement for Queensland Rail to develop standard funding agreements which are intended to form the basis for negotiations in relation to a *“relevant stage of an Extension”*. The QCA’s proposal is outside of power.

For a regime of standard funding agreements to apply under the approved access undertaking, those standard funding agreements need to form part of the approved access undertaking. A standard funding agreement cannot be ‘tacked-on’ after the approval of the access undertaking by the QCA (other than by the approval of a voluntary draft amending access undertaking).

---

<sup>82</sup> QCA draft decision at 231.

<sup>83</sup> QCA draft decision at 232.

Queensland Rail, as a matter of business, may choose to develop a pro forma funding agreement to assist it in promptly responding to relevant queries from access seekers. However, at this time, Queensland Rail does not consider that it would be prudent or efficient for it to do so given the likely costs involved and lack of demand for such arrangements.

### 11.9 Hybrid funding

The QCA's proposed Extensions regime prevents hybrid funding (that is, funding for an Extension partly by an access seeker and partly by Queensland Rail).

Queensland Rail considers that hybrid funding is a valid funding option and could have the potential to be a significant funding option because of its ability to spread financial impact and to ensure both Queensland Rail and access seekers have the interests of a funder in the performance of the relevant Extension.

The prohibition of hybrid funding inappropriately restricts funding options and reduces the regime to 'all-or-nothing' funding.

### 11.10 Building Queensland

The *Building Queensland Act 2015* recently commenced and applies to Queensland Rail as a "government agency".

The 2015DAU was not drafted taking into account the operation of the *Building Queensland Act 2015*. However, the provisions and processes under the Act (including the roles, functions and powers of Building Queensland and Queensland Rail's obligations) will affect provisions relating to Extensions ranging from matters such as timing and business cases to the entity who is responsible for the procurement and delivery of the relevant infrastructure project (which, in Queensland Rail's case, may potentially be Building Queensland).

The effect of the *Building Queensland Act 2015* needs to be taken into account. At present, the QCA has not done so and the QCA's drafting makes no allowance for the inconsistencies that arise with that Act.

### 11.11 Network planning

Queensland Rail offered a planning related provision in a spirit of compromise as part of the 2015DAU. The QCA has rejected that position and sought to impose its own regime which Queensland Rail considers is inappropriate and outside of power.

#### ***A key component of the regulated service***

The QCA has stated that:

*"We are of the view that system planning is a key component in Queensland Rail's provision of a regulated service."*<sup>84</sup>

The QCA's statement is incorrect.

Queensland Rail agrees that as part of its business planning, Queensland Rail may engage in planning activities in preparation for future demand for the service. But those planning activities are solely within Queensland Rail's discretion and are completely outside the scope of the QCA's power to regulate.

"System planning" is not part of the "regulated service". Nothing in the QCA Act relates to planning for possible future access seekers or possible future demand for capacity. The 2015DAU already addresses the issue of what occurs where an access seeker's proposed access requires an Extension.

---

<sup>84</sup> QCA draft decision at 244.

Queensland Rail cannot be made subject to an access undertaking obligation for something that is not governed by the QCA Act.

### **The object**

As noted in section 3 above of this submission, the QCA has incorrectly stated that:

*“The object of the QCA Act provides that Queensland Rail should efficiently maintain, operate, use and, if required, extend the network over the long term. As the regulated network service provider, we consider Queensland Rail should be able to demonstrate it is managing the network consistent with its legislative obligation to promote the economically efficient operation of, use of and investment in the network by which access services are provided.”<sup>85</sup>*

Firstly, the only express object of the QCA Act is that set out in the preamble as follows:

*“An Act to establish the Queensland Competition Authority, give it powers and functions about pricing practices relating to monopoly business activities, competitive neutrality and access to services, and for other purposes”*

This would not seem to have any relevance to the QCA’s remarks. Queensland Rail assumes that the QCA must be referring to the object of Part 5 of the QCA Act set out in section 69E of the QCA Act.

Secondly, the QCA claims that the object creates an obligation that applies to Queensland Rail. The object set out in section 69E does nothing of the sort.

Thirdly, as such, Queensland Rail is not required to demonstrate anything of the kind suggested by the QCA and certainly not in the context of an approved access undertaking.

Fourthly, the object set out in section 69E relates to Part 5. In effect it is Part 5 and the implementation of Part 5 that is intended to “to promote” the matters referred to section 69E of the QCA Act and not Queensland Rail. Importantly, even in relation to Part 5, that part of the QCA Act is only intended to promote the relevant matters. Part 5 is therefore not intended to achieve them or ensure them.

### **Application of the QCA Act**

The QCA has stated that:

*“Queensland Rail has been subject to the QCA Act since 1997, so we consider the lack of evidence that Queensland Rail is managing and maintaining its network within the context of a visible and transparent long-term strategic plan is concerning.”<sup>86</sup>*

As Queensland Rail has said time and again, Queensland Rail became the access provider for the declared service on 30 June 2010. It is patently false to claim that Queensland Rail has been the subject of the QCA Act “since 1997”.

Indeed, even taking a broad view, the assets comprised in Queensland Rail’s rail network were not the subject of a declared service until about March 1998. Prior to that time the use of the assets were expressly excluded from being a service to which the relevant provisions of the QCA Act applied.

---

<sup>85</sup> QCA draft decision at 244.

<sup>86</sup> QCA draft decision at 244.

In any event, it is completely inappropriate for the QCA to apply the conduct and activities of past access providers in forming a view on Queensland Rail. However, even if it was doing so, it is notable that:

- the planning regimes approved in the past by the QCA under voluntary access undertakings (when such regimes were included in approved access undertakings) only related (at best) to coal carrying train services;
- those regimes only first appeared in June 2006.

It is not clear why, now that Queensland Rail is the access provider, the QCA perceives a critical or key need for network planning across the whole of the network and for all traffics.

Additionally, Queensland Rail has complied with its statutory reporting obligations and its obligations to prepare and implement strategic and operational plans. Queensland Rail's business is managed within the context of those statutory obligations including most recently as required under the QRTA Act.

Queensland Rail rejects the notion:

- that its business is being operated without a “long-term strategic plan”;
- that its day to day business activities are not subject to any planning or the application of any foresight; and
- that the QCA has any role or power to regulate those activities as it proposes.

### **Market engineering**

In the section of its draft decision relating to network planning, the QCA has stated that:

*“In the absence of the information identified above, access seekers, access holders, rail operators and end customers will not have the confidence to make informed decisions on their own business operations (i.e. whether to expand operations or invest in aligned infrastructure). They will also lack certainty that Queensland Rail's management, control and operation of the network will support such business decisions. We consider that a lack of consumer confidence in the security and reliability of access services will adversely impact on the level of competition in upstream and downstream markets. This is because existing access holders and access seekers/funders require long-term investment security on the access services to be delivered by Queensland Rail to support their own long-term investment decisions in their respective markets.”<sup>87</sup>*

An approved access undertaking is not a mechanism by which the QCA can seek to address every competition issue related to markets upstream and downstream of the declared service. The QCA Act does not contemplate that the QCA should interfere with an access providers network or business planning to achieve any particular outcomes; in the context of Part 5 of the QCA Act it is solely concerned with the negotiation and provision of access to a declared service.

The QCA has no statutory power to seek to impose its proposed network planning regime on Queensland Rail.

### **11.12 Financial effect of QCA's proposal**

A number of the QCA's proposals have the effect of increasing Queensland Rail's costs relative to what is proposed in the 2015DAU. For Queensland Rail's legitimate business interests to be preserved and for compliance with the QCA Act, access charges need to be able to rise to accommodate that increase in costs.

---

<sup>87</sup> QCA draft decision at 245.

Queensland Rail is concerned that the QCA has:

- not considered whether Queensland Rail is able to lawfully increase access charges to reflect these additional costs;
- not attempted to allow for the additional costs that will be incurred by Queensland Rail in the build up of the reference tariffs; and
- not given any consideration as to what additional costs will or are likely to be incurred by Queensland Rail.

In any event, in the current economic climate it is likely an increase in access charges would be unwelcomed by stakeholders, in light of the limited benefit (if any) that might hypothetically arise from the QCA's proposals.

The QCA has not adequately considered the cost-benefit trade-off associated with its proposed arrangements. Key examples include:

- QCA's proposal obliges Queensland Rail to provide information to an access seeker as reasonably requested. It appears there is no mechanism to recover these information-provision costs until (at best) a Funding Agreement is established, at some later date. Consequently, if negotiations do not culminate in a Funding Agreement, then Queensland Rail is likely to be left out of pocket in relation to any information-provision costs. Accordingly, Queensland Rail's ability to recover its information-provision costs, even when no Funding Agreement exists, needs to be maintained. This is consistent with protecting Queensland Rail's legitimate business interests.

- The QCA has also proposed creating an entirely new governance structure in which Queensland Rail would need to establish multiple Regional Network Capacity Groups, which would be involved in developing Regional Network Master Plans. The Capacity Groups would involve existing access holders, access seekers, and customers of access holders. The QCA's Draft Decision<sup>88</sup> on Aurizon Network's 2014 DAU allowed Aurizon Network to recover its costs in participating in supply chain groups.

Extending this logic, if Queensland Rail is required to initiate and participate in Regional Network Capacity Groups, then its participation costs should be recoverable under the undertaking. If that cost is not fully recoverable through access charges, then the QCA should not impose such obligations on Queensland Rail.

- The QCA proposes to require Queensland Rail to develop a Regional Master Plan for each Regional Network. The drafting includes detailed requirements as to what these Master Plans need to cover. These obligations are not just once-off. They would require both significant costs to establish, and then ongoing costs to maintain and update (noting the governance process mentioned above). There is a requirement that the Plans would consider "capital expenditure growth options to increase the operating capacity of the corridor". The cost of preparing such a Plan would be substantial and involve a number of Queensland Rail resources. For corridors where no expansion is considered likely, this means that Queensland Rail would be incurring costs, without delivering any meaningful value to Queensland Rail, or to any access seekers.

### 11.13 Application of public interest

There are several important areas where the QCA has indicated it agrees with Queensland Rail's proposals, including that Queensland Rail: may exercise its discretion to extend, but not to fund, an extension to the network; will own, operate and manage the extension project as an

---

<sup>88</sup> QCA Draft Decision on Aurizon Network's 2014 DAU, Vol II, p.199, January 2015.

integrated component of its network; and will construct the extension project, unless otherwise agreed by Queensland Rail.

However, material points of difference remain, which must be addressed to achieve a regulatory regime that is appropriate in respect of access seekers' and Queensland Rail's interests. The QCA's proposed provisions unduly favour access seekers, over Queensland Rail, amounting to the QCA's proposals being inappropriate having regard to the matters referred to in section 138(2) of the QCA Act and otherwise inconsistent with the QCA Act.

The QCA's drafting significantly expands and prescribes obligations and processes – which almost exclusively relate to Queensland Rail – while at the same time removing the flexibility and responsiveness of the proposals under the 2015DAU. For instance, a degree of flexibility existing under the 2015DAU in relation to: the nature and scope of information that Queensland Rail may provide; how Queensland Rail would support the process of progressing an Extension; and determining the scope of the Extension itself – although any flexibility was not absolute under the 2015DAU and other generic provisions under the 2015DAU and the QCA Act provided the relevant regulatory protection.

Under the QCA's proposal, the flexibility and responsiveness of the 2015DAU is largely removed creating the risk that Queensland Rail will have no option but to act in a prescribed way, even if this is counter to its legitimate interests, is not commercially justifiable, is completely inappropriate in the relevant circumstances or results in Queensland Rail being obliged to exclude access seekers from accessing the service.

The QCA's proposed approach wrongly moves the starting point from being Queensland Rail's legitimate business interests in managing risks arising from network extension towards ostensibly the primacy on access seeker requests triggering actions from Queensland Rail.

Additionally, the QCA has not made a convincing case for why its drafting is consistent with the public interest. The QCA's position on the public interest, in the context of the investment framework, is as follows:

*“We consider the public interest will be served if the 2015 DAU promotes economically efficient extensions to the network and facilitates competition in markets”<sup>89</sup>*

Queensland Rail supports the need for efficient network extensions. Queensland Rail understands this can promote competition because extensions enable more access holders to use Queensland Rail's network, lifting throughput and, in doing so, potentially leading to more competitive prices in downstream markets. However, and importantly, the QCA's interpretation of the public interest is too narrow and limited. The QCA should look at the public interest issue, in relation to infrastructure extensions, more broadly.

In this regard, Queensland Rail notes the QCA's Draft Decision on Aurizon Network's UT4 MAR said, *“the need for costs to be minimised is also particularly important in light of the current adverse economic climate in the Queensland mining industry”<sup>90</sup>*. This was seen to be consistent with the public interest.

Given the likelihood of substantial costs and time involved in the QCA's proposed investment framework (without an analysis by the QCA of cost/benefit trade-offs), it is not clear how the QCA's proposed process could lead to efficient investment, and consequently, a cost-efficient outcome for the coal industry and its participants or any other users or upstream or downstream business in relevant supply chains. In this context, the QCA's proposal does not properly consider the public interest and the QCA cannot reasonably be satisfied that its proposals are

---

<sup>89</sup> QCA draft decision at 225.

<sup>90</sup> QCA Draft Decision on Aurizon Network's on the 2014 DAU: Maximum Allowable Revenue, p.46, September 2014.

appropriate having regard to the public interest – or, indeed, other matters referred to in section 138(2) of the QCA Act.

## 12 Application and scope

### 12.1 Scope of 2015DAU

#### **Application of 2015DAU to related bodies corporate of Queensland Rail**

The QCA has claimed that:

*“Queensland Rail proposed that its 2015 DAU apply to Queensland Rail (or a related body of Queensland Rail) where it is a railway manager...”<sup>91</sup>*

This claim is not correct.

In any case, the 2015DAU does not, and cannot legally be made to apply to a “related body of Queensland Rail”.

#### **Application of 2015DAU where Queensland Rail is not the owner and cannot provide access**

The QCA has claimed that:

*“Given the Act defines the declared service by reference to rail transport infrastructure for which Queensland Rail or a related party is the railway manager, we consider that the access undertaking should also apply to all rail transport infrastructure for which Queensland Rail (or its related party) is the railway manager. To do otherwise reduces clarity for both access holders and access seekers and represents a potential 'hold-up' opportunity whereby a third party operator may be unnecessarily prevented from accessing a declared service. This is not consistent with section 138(2)(e) and (h) of the QCA Act.*

*The test for the undertaking's application should be based on the concept of the railway manager, as that is the person who has effective management and control of the infrastructure. Indeed, this is consistent with the Transport (Rail Safety) Act 2010, which defines this concept as:*

*Rail infrastructure manager means a person who has effective management and control of rail infrastructure or proposed rail infrastructure, whether or not the person—*

*(a) Owns or will own the rail infrastructure*

*(b) Has or will have a statutory or contractual right to use the rail infrastructure or to control, or provide, access to it.”<sup>92</sup>*

The QCA also considers that:

*“... it is appropriate that the scope of access should be amended to include all the rail transport infrastructure for which Queensland Rail (or Queensland Rail's successor, assign or subsidiary) is the railway manager.”<sup>93</sup>*

The QCA therefore proposes that the “Network” as defined under the 2015DAU not be limited to only those parts of the declared service for which Queensland Rail is the railway manager.

---

<sup>91</sup> QCA draft decision at 2.

<sup>92</sup> QCA draft decision at 3.

<sup>93</sup> QCA draft decision at 4.

It is concerning that the QCA is claiming that Queensland Rail can be required to give an access undertaking for a service of which it is neither the owner nor the operator. The QCA has no legal right to require Queensland Rail to give an access undertaking in those circumstances.

The QCA has no statutory power to seek to regulate future successors, assigns or subsidiaries of Queensland Rail through the 2015DAU. Such regulation is a matter to be addressed in the future if those circumstances arise.

## 12.2 Line diagrams

The QCA requires that:

- Queensland Rail notify all access seekers and access holders in relation to any proposed amendments to the line diagrams;
- if an access holder or access seeker disputes the accuracy of the line diagrams that the matter can be referred to dispute resolution under Part 6 of the 2015DAU; and
- subject to the outcome of any dispute resolution process, promptly update the line diagrams and notify all access holders and access seekers as soon as the line diagrams have been updated.

The QCA rationale for this is based on a belief that:

*“Line diagrams should be sufficiently accurate to allow access seekers and access holders to rely on the information which the diagrams provide. The accuracy of line diagrams is important for promoting competition in above-rail markets.”<sup>94</sup>*

and that the 2015DAU, on this issue:

*“... does not adequately balance the interests of access holders and seekers (s.138(2)(e) and (h)) to have clarity on the scope of the declared infrastructure, with the interests of Queensland Rail, to minimise administration costs (s.138(2)(b)).”<sup>95</sup>*

There are several issues with the QCA’s proposals in relation to line diagrams including the following:

- The QCA has no statutory power to extend the dispute process under the access undertaking to an access holder.
- The line diagrams do not define the scope of the declared service or the Network to which the access undertaking relates.
- The accuracy of the line diagrams could not reasonably be regarded as affecting competition in above-rail markets and it is unclear why access seekers or, in particular, access holders would ever need to rely on the line diagrams as heavily as suggested by the QCA.

## 12.3 Non-discriminatory treatment

The QCA’s draft decision is beyond powers. It goes beyond what is required under the QCA Act and distorts and extends the application of the relevant provisions of the QCA Act including by removing various statutory safeguards and limitations.

The QCA has claimed that the 2015DAU does not set out how it will comply with its obligations under sections 100, 104, 125 and 168C of the QCA Act.

It is unnecessary to recite the relevant provisions from the QCA Act in the 2015DAU – Queensland Rail is obliged by law to comply with these provisions; the access undertaking adds

---

<sup>94</sup> QCA draft decision 5.

<sup>95</sup> QCA draft decision 5.



nothing in that regard. The 2015DAU expressly acknowledges those obligations simply to provide guidance to the reader that those obligations exist.

The QCA in purporting to restate the relevant obligations under the QCA Act has distorted and changed those obligations typically by removing safeguards and restrictions on the scope of those obligations and by extending the obligations to new circumstances outside those addressed under the QCA Act. The QCA should not seek to re-write the QCA Act for Queensland Rail through the 2015DAU.

Queensland Rail submits that much, if not all, of the 2015DAU directly or indirectly has a bearing on how Queensland Rail is complying with its obligations under the QCA Act relating to not unfairly differentiating or preventing or hindering access. There are numerous examples of this in the 2015DAU such as the Network Management Principles, principles relating to price differentiation, the negotiation framework, the reporting requirements and the standard access agreement (amongst others).

The QCA has claimed that:

*“Queensland Rail has the potential and power to favour its own passenger service in scheduling trains beyond the priority requirements in the Transport Infrastructure Act 1994 (the TI Act) (ss.266 and 266A), for operational convenience.*

*Given this, we do not consider it appropriate to accept Queensland Rail's proposal in respect of non-discriminatory treatment as it is inconsistent with the interests of access seekers and holders, who may face discrimination due to favourable treatment of Queensland Rail's passenger services which use the same network (s.138(2)(e) and (h)).*

*We accept that Queensland Rail has a legitimate business interest in managing its passenger business efficiently and complying with its obligations under the TI Act. Specifically, the TI Act (ss.266 and 266A) requires Queensland Rail to preserve train paths for regularly scheduled passenger train services and obliges Queensland Rail to give priority to those services in allocating available train paths.*

*However, the TI Act's requirements should not excuse Queensland Rail from all its obligations under the QCA Act not to discriminate against third party access seekers and holders (ss.138(2)(b), 100, 104, 125, 137(1A) and 168A(c)).”<sup>96</sup>*

The QCA does not appear to understand how passenger priority obligations and preserved train path obligations work under the TIA. Queensland Rail's passenger priority obligations and preserved train path obligations under the TIA effectively do require it to favour passenger services in the circumstance where those provisions apply. Any such favouring of passenger services required by law is fair and therefore cannot be in breach of the provisions of the QCA Act relating to discrimination as they only operate where the discrimination is material and unfair.

The QCA continues throughout its draft decision to change the wording, meaning and effect of provisions of the QCA Act.

In any event, it cannot reasonably be regarded as affecting the ability of an access seeker or access holder to compete with another access seeker or access holder, as the relevant capacity in the service is effectively quarantined for specified passenger services which are funded by Government and there is effectively no competition for those train paths.

The QCA must be aware that the passenger priority obligations give the Government a first right to train paths that are available for the purpose of passenger services and, effectively, to renew

---

<sup>96</sup> QCA draft decision at 6 to 7.

the allocation of train paths for passenger services. The passenger priority obligations relate specifically to train paths which are allocated for regularly scheduled passenger services in accordance with Government requirements.

All of those passenger services are timetabled services and all are scheduled accordingly. If the train paths required for passenger services are allocated in accordance with Government requirements and if the passenger services are timetabled services, it is unclear how Queensland Rail would be “*scheduling trains beyond the priority requirements*” in TIA for “*operational convenience*” (although it is far from clear what the QCA means by “*operational convenience*”).

In the context of train paths required to be allocated (under TIA passenger priority obligations) to passenger services operated by Queensland Rail, the QCA Act does not empower the QCA to impose requirements on Queensland Rail that would reduce the amount of the service that Queensland Rail is able to obtain in relation to those train paths. Queensland Rail’s requirements for those train paths are clearly reasonably anticipated having been prioritised by Government for passenger trains and given that Queensland Rail has a contract with the Government to provide those services as a community service obligation.

The QCA cannot impose obligations on Queensland Rail which reduce its right to access the service for its own legitimate use in satisfying its statutory obligations.

The QCA is stating that the QCA Act and TIA are in conflict and that the QCA Act override the TIA. The TIA and the QCA Act are not in conflict. In any event, if the QCA Act was intended to override other legislation it would need to expressly provide for that outcome; it does not.

In addition to the above matters, the QCA should be aware that where Queensland Rail fails to comply with its passenger priority and preserved path obligations under TIA it is exposed to a civil penalty regime that could result in substantial penalties. The QCA cannot place Queensland Rail in a position where it is exposed to such penalties.

Queensland Rail also addresses similar claims by the QCA in section 10.3 above of this submission and will not repeat those matters even though they are equally relevant here.

## **12.4 Ring-fencing arrangements**

As Queensland Rail has previously submitted, it does not have interests in upstream or downstream markets in competition with third parties and there is no realistic expectation that such interests would come into existence during the regulatory period for the 2015DAU. Consequently there is no need for ring-fencing provisions at this time.

Queensland Rail voluntarily included clause 2.2.3 of the 2015DAU to address a hypothetical situation where during the regulatory period Queensland Rail comes to have interests in upstream or downstream markets in competition with third parties. Queensland Rail based that provision on a previous provision approved by the QCA for DBCT Management Pty Ltd.

Queensland Rail’s clause 2.2.3 undertook to inform the QCA if Queensland Rail acquired an interest in markets upstream or downstream of the declared service in competition with third parties and to submit a draft amending access undertaking dealing with ring-fencing obligations if requested to do so by the QCA.

The QCA proposes to reject Queensland Rail’s proposed clause 2.2.3 and replace it with entirely different provisions.

The QCA’s proposed provisions (in clause 6.5) are ambiguous, uncertain, outside power and inappropriate. For instance, the QCA cannot require an amendment to the 2015DAU in order to give itself power to require Queensland Rail to amend the access undertaking or to give itself a right to draft a new or amended access undertaking. There is no power in the QCA Act upon

which the QCA can rely in order to do the things the QCA proposed in clause 6.5 of the QCA's drafting.

During the QCA's discussion on this issue in the draft decision, it indicated that one of the problems with clause 2.2.3 was that it lacked a timeframe in respect of Queensland Rail informing of the QCA of the relevant interest arising. Queensland Rail is happy to amend its proposed clause 2.2.3 to include an obligation to advise the QCA within a reasonable timeframe specified by the QCA.

In addition, although it is unclear from the drafting of the QCA's proposed clause 6.5, the clause arguably gives the QCA the right to require amendments or to draft its own undertaking to "accommodate requests from Access Seekers or Access Holders" without qualification. Those requests may not relate to ring-fencing requirements. A clause that has this effect is clearly beyond power.

## 13 Standard Access Agreement

### 13.1 Tripartite structure of 2015 SAA

The QCA states that:

*"We do not consider it appropriate to approve the tripartite structure as currently drafted in the 2015 SAA. In applying our assessment approach we do not consider the 2015 SAA has appropriate regard to section 138(2) of the QCA Act. In particular, we consider the failure of the 2015 SAA to provide a genuine contracting option for the end customer to be the access holder and principal contractor under the agreement is inconsistent with section 138(2)(a), (d), (e) and (h) of the QCA Act.*

*We acknowledge the efforts made by Queensland Rail to streamline the 2015 SAA and allow, if required, an end customer to co-sign the access agreement. However, our clause by clause review of the 2015 SAA has identified that, in practice, the 2015 SAA does not afford the end customer any real rights in relation to owning and controlling the use of access rights held pursuant to the agreement. In only allowing a rail operator to be an access holder, the 2015 SAA gives the rail operator full control of the access rights and the bulk of the rights and responsibilities as the principal contractor with Queensland Rail."*<sup>97</sup>

The QCA then outlines the changes it considers necessary to make the 2015 SAA appropriate.

Since Queensland Rail has been the owner and operator of the relevant declared service, Queensland Rail has not entered into any access agreements in the circumstances, or with the contractual outcome, proposed by the QCA. Queensland Rail, being aware of activities in the Central Queensland Coal Region, has been ready and willing to negotiate such access agreements.

The predominant form of access agreement that has been, and continues to be, executed by Queensland Rail is with the actual operator of train services. It is therefore entirely appropriate that the 2015 SAA reflect the most commonly executed form of access agreement.

It became apparent, during past consultation with stakeholders, that there were some issues with the old form of operator access agreement. While those issues could potentially be addressed in the rail haulage arrangements, Queensland Rail acknowledged that there might be a benefit to end users to address them in the access agreement. This led to the development of the tripartite form for the 2015 SAA. In Queensland Rail's assessment, allowing the end user to hold the

---

<sup>97</sup> QCA draft decision at 118.

access rights was not necessary to address the issues with the old form of operator access agreement as it understood them.

The QCA's draft view is that the 2015 SAA does not have appropriate regard to section 138(2) of the QCA Act (at least in respect of the form of the agreement) because of "*the failure of the 2015 SAA to provide a genuine contracting option for the end customer to be the access holder and principal contractor under the agreement*". However, the fact that the 2015 SAA does not reflect some other form of contractual arrangement desired by the QCA does not result in the 2015 SAA being inappropriate.

The 2015 SAA cannot be applied for every type of contracting scenario. Queensland Rail did not attempt to achieve such an outcome in the time available to it, and neither is it necessary for it to do so.

The 2015 SAA expressly acknowledges that:

*"[Note: This agreement is a standard access agreement and is based on the following assumptions, that:*

- the grant of Access Rights only involves the allocation of Available Capacity;*
- no provisions relating to the provision of Additional Capacity in respect of an Extension are required;*
- no conditions precedent are necessary; and*
- the Access Holder is the rolling stock operator for the relevant Train Services.*

*Without limiting the ability of the parties to negotiate terms, if any of these assumptions are not true, then the parties will need to seek to negotiate amendments.*

*This standard access agreement contains various notes in respect of alternative clauses (for example, in relation to Dangerous Goods or where the Operator's Customer is also a party) and in respect of adjustments that are needed where the Reference Tariff does not apply to the setting of the Access Charges.]"*

Clause 2.9.4 of the 2015DAU provides that:

*"Unless otherwise agreed between Queensland Rail and the Access Seeker, an Access Agreement must be consistent with:*

- (a) this Undertaking; and*
- (b) the terms of a Standard Access Agreement applicable to the relevant type of Train Service."*

Queensland Rail and an access seeker are obliged to negotiate in good faith for the provision of access in respect of the declared service.

As has been the case in the past, the 2015 SAA does not seek (and is not legally required) to address every different contracting scenario that could potentially arise. It addresses the most common contracting scenario – which is appropriate. The fact that it does not address a particular contractual scenario does not result in the 2015 SAA being inconsistent with section 138(2) of the QCA Act.

There is no requirement under the QCA Act that the 2015DAU provide a standard access agreement or one or more standard access agreements that address multiple different contracting scenarios. Having said that, Queensland Rail proposed the 2015 SAA as part of the 2015DAU and submits that the contractual form of the 2015 SAA is appropriate.

The 2015 SAA does not prevent other forms of access agreements from being negotiated. No objective interpretation of the QCA Act and the 2015DAU could result in:

- the 2015 SAA being the only form of access agreement capable of negotiation; or
- a position where, in the absence of agreement between Queensland Rail and an access seeker, the access agreement was required to be in the form of the 2015 SAA.

In fact, the 2015 SAA expressly acknowledges the potential need for such negotiations and for different forms of access agreements.

The form of the 2015 SAA does not alter the operation of the QCA Act, including the obligations of parties in relation to negotiations and the powers of the QCA to determine access disputes.

The QCA cannot refuse to approve the 2015 SAA merely because the QCA considers another form of standard access agreement might be more appropriate or considers that a hypothetical contractual scenario should be addressed.

There is no objective basis for the QCA to conclude that the form of the 2015 SAA is not appropriate.

### 13.2 2015 SAA

The QCA's proposed draft SAA does not enable the creation of a legally effective agreement between Queensland Rail, the Access Holder and the Operator.

It appears to be intended that a contract be formed between Queensland Rail and the Access Holder, and at some later time the Access Holder nominates an Operator (or Operators) in accordance with the terms of that contract, following which the Operator (or Operators) sign the same document. At law, this will not create a contract with the Operator.

It is even less clear how the proposed amended draft is intended to operate if the Access Holder wishes to appoint more than one Operator. For example, the QCA's draft does not include any mechanism to amend the relevant schedules to provide for the allocation of Access Rights to more than one Operator, or to deal with issues such as the calculation of take or pay charges if two or more Operators are appointed.

If the QCA proceeds to approve its proposed SAA, there will be no approved standard agreement which is capable of being used by parties to form a valid, legally binding contract.

The QCA has identified the previously approved 2008 SAA and the previously approved split form access agreement in Aurizon Network's 2010 undertaking (**2010 regulatory precedents**) as relevant in its consideration of the 2015 SAA.

The QCA says that each of those regulatory precedents provide:

- *a considered and balanced approach to contract risk management approach;*
- *a contracting framework that is well understood by all freight traffics operating on the network; and*
- *a level playing field in negotiating access rights with a monopoly service provider."*

The QCA goes on to say:

*"We consider the number of executed access agreements that are currently held by access holders demonstrates the practical efficacy of the 2008 regulatory precedents in facilitating access to the network, maximising freight throughput and promoting competition in markets reliant on access to the network.*

*We also consider it appropriate for the purposes of section 138(2)(h) to consider the terms, industry practice in relation to, and previous reviews of the 2008 regulatory precedent.*

*On this basis, we have considered afresh the 2008 regulatory precedents and are of the view that the balanced risk position underlying the 2008 regulatory precedents is relevant in considering each of the stated matters in section 138(2) of the QCA Act. In particular, we consider the symmetrical risk position combined with a clear assignment of accountabilities between the contracting parties facilitates access to the network and an efficient total cost of access.”<sup>98</sup>*

The QCA makes the same comments to those in the first two paragraphs above in relation to the 2010 regulatory precedents. It goes on to say:

*“... we have considered afresh the split form SAA and are of the view that the balanced risk position underlying the split form SAA is still current and provides for an appropriate balancing of each of the stated matters in section 138(2) of the QCA Act. In particular, we consider the symmetrical risk position combined with a clear assignment of accountabilities between the three contracting parties facilitates access to the network and an efficient total cost of access.”<sup>99</sup>*

Despite this, the QCA proposes to depart from these regulatory precedents in a number of instances, in a manner adverse to Queensland Rail’s legitimate business interests. The QCA has advanced no reason why it should depart from regulatory precedents which it has specifically identified as appropriate.

While Queensland Rail has provided some more detailed comments, by way of example, on aspects of the QCA’s proposed amendments to the 2015 SAA in Table 7 below, it is necessary to highlight one matter here.

The QCA’s proposed definition of ‘Maintenance Work’ in the SAA is ‘*any works, involving maintenance, repairs to, renewal, replacement and associated alterations or removal of, the whole or any part of the Network and includes any inspections of investigations of the Network*’. This broad definition means the obligation to maintain the Network could result in Queensland Rail bearing the cost of ‘replacement’ for parts of the infrastructure (for example sleeper or ballast replacement). A ‘replacement’ falls within the definition of an ‘extension’ of the rail infrastructure under the QCA Act. The QCA cannot impose an obligation on Queensland Rail to fund some or all of the costs of extending the Network.

Since submitting the 2015 DAU, it has become apparent that changes to the 2015 SAA are required to include the provision of ad hoc services, amend the definition of Consequential Loss consistent with common commercial practice and other amendments required for consistency with Queensland Rail’s commercial practices. Those changes are set out at **annexure 5**.

**Table 7: Queensland Rail comments on aspects of the proposed 2015 SAA**

Proposed clause	Concern
2.2(b)	Having the Operator execute a copy of the agreement subsequent to execution by the Access Holder and Queensland Rail will not create a legally valid contract with the Operator.

<sup>98</sup> QCA draft decision at 117.

<sup>99</sup> QCA draft decision at 118.

Proposed clause	Concern
2.2(e)	<p>These provisions are vague and uncertain as to Queensland Rail's obligations. What is Queensland Rail required to do to 'facilitate the resolution of any matter the subject of its reasons for rejection'? Queensland Rail cannot unilaterally amend the agreement. What happens if these things do not occur?</p> <p>The proposed draft does not make clear what is to happen if Queensland Rail rejects the nomination of an Operator. The provisions appear intended to limit any right Queensland Rail has to reject the nomination of an Operator. Queensland Rail must be in a position to reject a nomination in certain circumstances (for example, if the Operator is not accredited).</p> <p>Ten Business Days is an unreasonable and insufficient time for Queensland Rail to assess and respond to a nomination.</p>
3.1	<p>The clause introduces a new term 'Train Service Expiry Date' which is not defined. The correct term is 'End Date'.</p>
4.1	<p>It is not clear what happens if Queensland Rail rejects the nomination.</p>
4.1(v)	<p>This is vague and unclear. Amendments to the contract are a matter between the parties.</p>
4.2(a)(iii)	<p>The effect of this clause is to potentially allow an Access Holder to avoid the relinquishment provisions.</p>
4.5 (and generally)	<p>The clause refers to "the Parties". The Operator is not a "Party". This comment is relevant throughout the proposed SAA.</p>
4.6	<p>The intention of the QCA's proposed amendments is that the Access Holder control the Access Rights. On that basis, it is not appropriate that the Access Holder not participate in resolution of Disputes.</p>
6	<p>The QCA proposes to delete the requirement for payment of take or pay charges. The reason for this amendment is not clear and is not explained.</p> <p>In order to minimise the prospect of disputes, one party should be responsible for take or pay charges. The agreement is unclear as to the method of calculating take or pay if more than one Operator is nominated.</p>
6.7	<p>Queensland Rail supports measures to improve transparency, and reporting where such measures provide clear benefit to all parties to the agreement. However, mandating a weekly reporting regime on inconsequential measures imposes significant administrative and cost burden on Queensland Rail, without net benefit to the Access Holder/Operator. Some of the measures imposed are irrelevant to informed decision making by Access Holders/Operators.</p> <p>In addition, weekly reporting may provide a distorted view of Queensland Rail's performance, as it does not account for seasonality, maintenance regimes and Access Holder operations. Some proposed measures such as GTK performance may not be relevant.</p> <p>The requirement for weekly and monthly reporting is unduly onerous and does</p>

Proposed clause	Concern
	<p>not take account of Queensland Rail's legitimate business interests, as required by section 138(2).</p> <p>The requirement is also one-sided, as the Operator is not subject to a mandatory performance regime. Any KPI's should be symmetrical, and the subject of negotiation on a case-by-case basis.</p> <p>Queensland Rail also notes that while the 2008 SAA included a provision for the parties to agree a KPI regime, no customer has ever sought to raise the issue.</p>
7.1(a) and (b)	<p>This proposed clause, together with the proposed definition of 'Maintenance Work', materially broadens Queensland Rail's maintenance obligations, such that Queensland Rail is potentially liable to the Access Holder for maintenance obligations beyond the scope of that required to meet its obligations under the agreement.</p> <p>The QCA proposes to amend Queensland Rail's maintenance obligations so that Queensland Rail is required to undertake and fund the cost of "Maintenance Work" which is defined as:</p> <p style="padding-left: 40px;"><i>"... any works, involving maintenance, repairs to, renewal, replacement and associated alterations or removal of, the whole or any part of the Network and includes any inspections or investigations of the Network."</i></p> <p>An "extension" under the QCA Act is defined as including:</p> <p style="padding-left: 40px;"><i>"... an enhancement, expansion, augmentation, duplication or replacement of all or part of the facility."</i></p> <p>Consequently, the maintenance obligation is extended in a manner which may require Queensland Rail to fund an extension. The QCA's proposal is beyond power and in direct conflict with section 119 of the QCA Act.</p>
7.1(d)	<p>Queensland Rail may not have control over Third Party Works (as defined) on the corridor and therefore should not bear this additional risk.</p>
7.2(e)	<p>The QCA proposes to delete clause 7.2(e) which reflects Queensland Rail's passenger priority obligations under the TIA. The agreement should be clear that Queensland Rail does not assume any liability for acting in accordance with its statutory obligations.</p> <p>The QCA should be aware that where Queensland Rail fails to comply with its passenger priority and preserved path obligations under TIA it is exposed to a civil penalty regime that could result in substantial penalties. The QCA cannot, having regard to Queensland Rail's legitimate business interests, place Queensland Rail in a position where it is exposed to such penalties.</p>



Proposed clause	Concern
7.3	<p>In its Appendix B, the QCA complains that, when read with the indemnity for Dangerous Goods and insurance provisions, liability for Environmental Harm appears to rest primarily with the Operator. This ignores clauses 7.3(a)(i) and (ii), which require Queensland Rail to comply with Laws and the lawful requirements of relevant Authorities. In any event, this concern is inconsistent with the QCA's proposal to delete the indemnity for carriage of Dangerous Goods.</p>
2015 SAA clause 8	<p>The QCA proposes to delete the provisions dealing with amendments of the ORM, and instead include an amended version of these provisions in the Access Undertaking, with the result that Queensland Rail has no ability under the SAA to amend the ORM.</p> <p>The effect of the amendments to the access undertaking are that Queensland Rail has no ability to amend the ORM, without submitting a DAU for approval, except in the limited cases of Safety Matters (which is defined narrowly) or to correct typographic or other minor matters, or to update references to, or details for, persons or positions. Queensland Rail cannot amend the ORM in the case of a Change of Law (unless the required amendments fit within the definition of 'Safety Matters'). Under the QCA's proposed draft, matters that, for example, arise from a change to the capability of the Network, will not necessarily fall within the definition of 'Safety Matters'. The QCA's proposed draft provisions therefore do not permit Queensland Rail to deal with amendments required for the safety of the network in a timely manner, and do not take adequate account of sections 138(2)(b), (d) and (e) of the QCA Act.</p> <p>In addition, the QCA's views that under the 2015 DAU proposal Queensland Rail was amending the access undertaking by amending the ORM are incorrect. Under the 2015DAU, the QCA approves the initial ORM but therefore Queensland Rail's rights to amend it are contractual and directly linked to a proposed compensation that is generally consistent with past rail SAAs approved by the QCA. The inclusion of the ORM in the 2015 DAU only ever had regulatory effect by setting the starting point of the ORM over the regulatory period – that is, effectively a snap shot.</p>
8.3(b)(viii)	<p>An act or omission having the effect described in the clause may be neither in breach of the agreement or a negligent act or omission. The QCA's proposed amendment unnecessarily limits Queensland Rail's contractual rights.</p>
8.4(c)(iv)	<p>A right to reduce the right to operate Train Services is not sufficient to remedy non-compliance with the requirements of clause 8.4(a). For example, the requirement to affect Insurances will not be specific to certain Train Services only.</p>
8.8(d)	<p>The QCA's proposed clause is not commercially practical. It will not be feasible or possible for the Operator to retain intellectual property in data collected by Queensland Rail's train control systems.</p> <p>The proposed intellectual property provisions may also limit the use of Supplied Data by Queensland Rail for billing and/or reporting purposes.</p>

Proposed clause	Concern
8.12	<p>The QCA proposes to move the provisions relating to amendments to the ORM to the Access Undertaking, but leave the compensation provisions contained in clause 8.12 in the SAA.</p> <p>However, the QCA has deleted clause 8.4(b) of the 2015 SAA, which provided that Queensland Rail would not, for the purposes of the agreement, be taken to have amended the ORM if it did so by submitting a draft access undertaking or draft amending undertaking.</p> <p>The effect of the QCA's proposed changes is that Queensland Rail incurs a contractual obligation to pay compensation, in a context where Queensland Rail is exercising its rights in accordance with the QCA Act and the QCA subsequently approves amendments to an approved access undertaking. The QCA's proposed amendments are not permitted by the QCA Act – as the QCA cannot lawfully impose a compensation process on Queensland Rail for the exercise of its statutory rights. It is also relevant that the QCA's proposals are a material departure from its approach to these issues in the past.</p> <p>In any event, the QCA's proposed changes also give rise to timing risks with the potential that the QCA might approve amendments to the ORM prior to Queensland Rail understanding what its compensation liability (if any) might be. Where Queensland Rail is proposing amendments to the ORM that may attract compensation liability, it is inappropriate to disconnect the making of amendments from the compensation process as it potentially leads to inefficient decision making – as the costs for the decision cannot be factored into the making of the decision. For example, if a substantial compensation liability was to arise, Queensland Rail should have the ability to choose to alter the amendments to reduce or remove the liability or to not proceed to make the amendments. This could occur for any number of reasons, but a process which removes the potential feedback between compensation and amendments seem likely to give rise to decisions that are not efficient.</p> <p>The QCA has also amended the compensation provisions to require Queensland Rail to account to an “affected Party”. This is intended to expose Queensland Rail to liability for compensation to both the end user and Operator (although it is not clear how the provisions would operate, given the Operator is not a “Party”). Queensland Rail should not be exposed to additional liability because an Access Holder elects to hold Access Rights. Compensation for end users should be a matter for their above-rail contracts.</p>
9.6(d)(iv)	<p>The scope of the obligation to ‘use all reasonable endeavours to mitigate any loss or damage arising from the conduct of an inspection or audit’ is unclear, and in any event the clause is unnecessary having regard to the preceding items.</p>
10.1	<p>The clause frequently refers to “<i>acting reasonably</i>”. It is not clear what this phrase means or is intended to achieve in the context it is used.</p> <p>Queensland Rail is concerned that it may mean that it could have rail safety, engineering, operational or other requirements watered down, disputed or replaced. Queensland Rail cannot be placed in a position where it incurs</p>

Proposed clause	Concern
	<p>additional liability because third parties dictate safety, engineering, operational or other requirements relating to its rail network. Queensland Rail must be in a position to perform its statutory duties in a manner satisfactory to the Queensland Rail Board – the QCA cannot effectively delegate control of those functions to a counterparty to an access agreement.</p> <p>The QCA itself acknowledges that the ‘no objection’ requirement may be justified from a safety/operational perspective.</p>
10.5	<p>In its Appendix B, the QCA states that Queensland Rail should not benefit from an indemnity in relation to incidents involving dangerous goods if the incidents are caused by Queensland Rail’s failure to maintain the network. The QCA has gone further than this in its proposed amendments, by deleting the indemnity for carriage of Dangerous Goods in its entirety.</p> <p>If the indemnity for carriage of Dangerous Goods is to be deleted, then the ‘reasonableness’ requirement should be deleted, because Queensland Rail cannot have any certainty in what circumstances it would be reasonable to withhold consent.</p> <p>Allocating responsibility for carriage of Dangerous Goods to Queensland Rail will have pricing implications, as Queensland Rail will have to price that risk.</p>
12.2(b)	<p>The QCA’s proposed addition of the words ‘in circumstances where the Operator is excluded from making any such Claim’, undermine the intent of the provision, which is to make clear that Queensland Rail has no liability to an Operator’s Customer which is not a party to the agreement.</p>
2015 SAA clause 12.2(d)	<p>Queensland Rail cannot address the QCA’s reason for deletion of this clause, as none have been advanced.</p>
2015 SAA clause 12.3	<p>The QCA proposes to delete the indemnity for carriage of Dangerous Goods. In that case, Queensland Rail will be obliged to factor into Access Charges the risk of carriage of Dangerous Goods. The risk of carriage of Dangerous Goods is under the primary control of the Operator.</p>
12.5(a), (b) and (c)	<p>Queensland Rail will not be in a position to have Associates perform its obligations under the agreement. The QCA states in Appendix B that it considers Queensland Rail should have reciprocal obligations of responsibility for its Associates, <i>including</i> any Third Party works. Third Party works on the corridor may not be carried out by Queensland Rail’s Associates, but by third parties engaged by the State. Queensland Rail will not have control over those works and should not be liable for them.</p>
2015 SAA clause 12.5(d)	<p>Queensland Rail cannot address the QCA’s reason for deletion of this clause, as none have been advanced. Queensland Rail must be in a position to authorise any agent or contractor appointed by the Operator, so that it can be satisfied that the agent/contractor is appropriately qualified to operate on the network.</p>

Proposed clause	Concern
13.1(b)	The QCA proposes to delete references to the indemnities contained in clauses 12.2 to 12.3, and clause 27.18. Losses under those clauses will by their nature fall within the definition of Consequential Loss. The proposed deletions render the subject clauses ineffective and limit Queensland Rail's contractual rights
2015 SAA clause 13.1(b)(i) and (ii)	Losses under the deleted clauses will by their nature fall within the definition of Consequential Loss. The proposed deletions render the subject clauses ineffective.
13.4(b)	This clause changes the liability position in the 2008 SAA, in a manner adverse to Queensland Rail. The QCA has not explained why it is appropriate to depart from the 2008 SAA position, which it has identified as a considered and balanced approach to contract risk management.
2015 SAA clause 13.4(c)	The QCA proposes to delete the cap on liability, on the basis that such a restriction will 'adversely impact on an Access Holder's contract rights'. This creates significant downside systemic risk to Queensland Rail. Inclusion of a maximum claims cap is standard commercial practice. In this case the cap proposed is substantial. Failure to include a liability cap exposes Queensland Rail to unlimited damages, and reflects a failure to take into account Queensland Rail's legitimate business interests as required by section 138(2).
13.6(b)	The QCA's amendment changes the liability position from the 2008 SAA, and is also inconsistent with the 2010 regulatory precedent. The QCA has not explained why it is appropriate to depart from regulatory precedents which it has identified as a considered and balanced approach to contract risk management.
15.9(a)	The QCA's amendments to this clause are minor and inconsequential within the meaning of section 138(6) of the QCA Act.
14.1(ii)	If the rights of the Access Holder are suspended, then the rights of the Operator must also be suspended, otherwise the Operator may continue to exercise suspended Access Rights.
14.1 & 15	<p>The inclusion of a requirement for Queensland Rail to act reasonably in exercising suspension or termination rights is inconsistent with the 2008 SAA. The meaning of this requirement is vague and uncertain.</p> <p>By introducing this requirement, the QCA is changing the position set out in the 2008 SAA. The QCA has not explained why it is appropriate to depart from the position in the 2008 SA, which it has identified as a considered and balanced approach to contract risk management.</p> <p>In addition, the QCA's proposed 'reasonableness' obligation is not symmetrical. The QCA does not propose to apply a reasonableness test to the suspension and termination rights of the Access Holder and Operator.</p>

Proposed clause	Concern
15.2	Access Rights should terminate where no Operator is nominated.
15.6	Change in Control provisions should also apply to the Operator.
16.11	<p>It is not clear how these provisions would operate in practice. There are no circumstances where the Access Holder and Operator would have insurance which would 'cover the same risks'.</p> <p>'Joint insurance policies', if such a thing is possible to obtain, would result in uncertainty (for example, who owns the asset being insured?).</p>
17.1(a)	<p>The addition of the words (in appropriate cases and having regard to the Parties' financial capability) add unnecessary uncertainty to the agreement. What is an 'appropriate case'?</p>
2015 SAA clause 19.5	<p>The QCA proposes to delete this clause, on the basis that it is not appropriate to allow Queensland Rail to determine the outcome of the nominated safety disputes without reference to the Rail Safety Regulator.</p> <p>This is an incorrect reading of the clause, which refers to disputes not otherwise resolved by the parties or the Rail Safety Regulator.</p> <p>The effect of this amendment is that Queensland Rail's safety requirements could be watered down, disputed or replaced. Queensland Rail cannot be placed in a position where it incurs additional liability because third parties dictate safety requirements relating to its rail network.</p>
20	<p>The QCA proposes to suspend payment obligations when there is a Force Majeure Event, regardless of which party is subject to that event. This will have implications for Queensland Rail's ability to collect take or pay charges, further reducing Queensland Rail's ability to earn its efficient costs. This is inappropriate in a price cap regulatory model.</p> <p>Neither clause 18 of the 2008 SAA or clause 12 of the 2010 regulatory precedents relieve an access holder from the requirement to pay Access Charges if there is a Force Majeure Event.</p> <p>The QCA has identified both of these regulatory precedents as relevant to its consideration under section 138(2)(h) of the QCA Act.</p> <p>Queensland Rail cannot be forced to make a claim on its insurance where the cost of repairing or replacing part of the Network is not economic on the basis of then and future utilisation. In any event, there may be material consequences if Queensland Rail is required to do so – for example, Queensland Rail being liable to pay a deductible or otherwise suffering commercial damage.</p> <p>The 2010 regulatory precedents do not require Aurizon Network to call on insurance in those circumstances (or even make such a suggestion) – the access holder is required to pay the whole, or that part requested by Aurizon Network, of the cost of repairs or replacement.</p>

Proposed clause	Concern
2015 SAA 23(a)(ix)	<p>The QCA proposes to delete the warranty that the Operator has satisfied itself as to the standard and suitability of the Network and the ability of the Operator's Rolling Stock to safely interface with and operate on the Network, but retain clause 23(c) giving the operator the right to inspect the Network.</p> <p>The QCA's proposed amendments do not make clear the purposes of the inspection permitted by clause 23(c). The right to inspect must have some purpose, and if the Operator exercises that right, it should accept some responsibility for satisfying itself as to the condition of the Network – the Operator cannot be put in a position where it makes itself aware of a matter, but retains the ability to claim as a result of that matter. This introduces significant risk to Queensland Rail.</p>
25.4	Queensland Rail does not accept service of notices by email. This amendment is of a minor and inconsequential nature, as defined in section 138(6) of the QCA Act.
27.4	This clause is not legally effective. An amendment to an agreement cannot take effect only between some parties to the agreement.
Definition of 'Acceptable Credit Rating	<p>The QCA has not advanced any reason for the proposed amendments to the definition. A BBB- S&amp;P rating is not a suitable minimum and does not meet Queensland Rail's Board approved policies. Queensland Rail's legitimate business interests are not protected unless it is provided with real and effective security.</p> <p>The 2010 regulatory precedents only require a bank guarantee issued by a bank with a credit rating acceptable to Aurizon Network. There is no valid reason to depart from this precedent.</p>
Definition of 'Alternative Schedule time'	This definition refers to the definition of 'Useable Schedule Time', which does not balance the interests of all parties. The obligation is placed on Queensland Rail to seek to balance the interests of individual Operators against the efficiency of the supply chain.
Definition of 'Force Majeure Event'	The QCA proposes to delete the words at the end of the clause. This is inconsistent with clause 8.10, and allocates the risk to Queensland Rail for matters which are solely within the control of the Operator. This is inconsistent with the QCA's own view expressed in Appendix B, that it is appropriate for the Access Seeker/Access Holder to bear the risk of access to private Infrastructure as this is a matter for the Access Holder and generally outside the control of Queensland Rail.
Definition of 'Maintenance Work'	The QCA does not have power to impose the use of this term as proposed, as it operates to impose on Queensland Rail an obligation to fund Extensions, which is not permitted by the QCA Act.

Proposed clause	Concern
Definition of 'Operational Constraint'	<p>The QCA proposes to include a reasonableness requirement, the effect of which is vague and uncertain, but may have the effect of limiting Queensland Rail's ability to impose an operational constraint, including for safety reasons. Queensland Rail has statutory obligations to maintain safe operation and management of the Network, and cannot be subject to a requirement ceding control of those obligations to third parties.</p> <p>The 2010 regulatory precedents permit Aurizon Network to impose such Operational Constraints (which are not subject to a reasonableness requirement) as it considers necessary for the protection of any person or any property or to facilitate the performance of Maintenance Work or Enhancements provided it uses reasonable endeavours to minimise disruption to Train Services and complies with procedures specified in the Interface Coordination Plan (clause 7.2(b))</p> <p>The QCA has not explained why it should depart from the 2010 regulatory precedents.</p>
Definition of 'Queensland Rail Cause'	<p>The QCA's proposed treatment is different to that adopted in the 2010 regulatory precedents, in that the QCA proposes reinsert Force Majeure Event into the definition. The QCA has not explained why the allocation of risk should be different in the case of Queensland Rail, and why it should depart from the 2010 regulatory precedents, which it has identified as a considered and balanced approach to contract risk management. Reinserting the definition effectively allocates risk for Force Majeure Events to Queensland Rail, when such events are by their nature and definition events beyond the control of Queensland Rail.</p> <p>By deleting the words at the end of the definition, the QCA proposes to allocate risk for the actions of other Network Participants to Queensland Rail, in a manner which is inconsistent with the 2008 SAA, when it has otherwise indicated that the risk profile should not change.</p>
2015 SAA clause 28.2(j)(ii)	<p>The QCA proposes to delete the subclause giving precedence to the agreement if it is inconsistent with the Access Undertaking. The QCA has not advanced any reason for this deletion or how it is required by reference to the factors in s.138(2) of the QCA Act. The clause is required for contractual certainty between the parties.</p> <p>An access agreement is not required to be consistent with an approved access undertaking and is not invalid merely because it is not.<sup>100</sup> This provision reflects section 167 of the QCA Act, and the QCA cannot override that provision in an approved access undertaking.</p>

<sup>100</sup> Section 168 of the QCA Act.

Proposed clause	Concern
Schedule 1 – Security Amount	<p>The QCA proposes to set the Security Amount as being equal to the deductible for any one Loss, an amount equal to 12 weeks access charges. This requirement is unclear, and it should be amended. Queensland Rail has interpreted this proposal to mean an amount either: (i) equal to the deductible for any one Loss; or (ii) an amount equal to 12 weeks access charges.</p> <p>The QCA’s proposal for the calculation of the Security Amount does not place Queensland Rail in a position where it can protect its commercial interests. The Standard Access Agreement is typically a long term agreement. If an Access Holder is not able to perform its obligations for the duration of the Standard Access Agreement, 12 weeks of Access Charges will not compensate Queensland Rail for additional amounts that it would have received, such as Take or Pay liabilities.</p>
Schedule 2 – Stowage	<p>Queensland Rail is amenable to providing assistance to Operators if the Network is unavailable. However, Queensland Rail must consider the wider impacts to the Network of stowage for individual Operators. This is sufficiently dealt with in the provisions for Storage.</p> <p>Neither the 2008 SAA nor the 2010 regulatory precedents include this requirement.</p>

## 14 Operating requirements

### 14.1 Coordination with adjoining networks

While Queensland Rail was of the view that it was not a matter that could or should be regulated by the QCA, Queensland Rail proposed under the 2015DAU to use reasonable endeavours to consult with other Railway Managers as relevant from time to time in relation to:

- the coordination of maintenance activities;
- the development of MTPs; and
- proposed amendments to the Operating Requirements Manual,

with a view to minimising adverse effects in relation to Through-Running Trains.

The QCA proposes to reject Queensland Rail’s proposal. The QCA has stated that:

*“We consider this is too weak a level of obligation for such an important matter given that a large proportion of freight services contracted to use Queensland Rail’s network use track managed by other operators for part of their journey. This includes all services travelling along the North Coast line between Gladstone and Rockhampton.”*<sup>101</sup>

Under the QCA’s proposal Queensland Rail is required:

- to consult with relevant Railway Managers in relation to the specified matters; and
- if any of Queensland Rail’s proposed changes or activities might affect other Railway Managers, to use reasonable endeavours to minimise adverse effects in relation to Through-Running Trains.

<sup>101</sup> QCA draft decision at 80.



Firstly, the QCA's proposal is outside the scope of its powers under the QCA Act. Queensland Rail provides access to the declared service for which it is responsible. Coordination and communication with other railway managers is an activity that Queensland Rail regularly engages in. However, the inclusion of an obligation to do so as expressed in the QCA's drafting is problematic because it places Queensland Rail at risk of breaching the undertaking for an obligation that cannot be legally imposed. The QCA has no authority to require Queensland Rail to coordinate any of its activities with other participants in the supply chain or to consult or otherwise communicate with other railway managers.

The QCA has taken something volunteered by Queensland Rail and converted it into a more onerous obligation in circumstances where the QCA has no authority to require what was volunteered in the first place.

Secondly, Queensland Rail is not aware of any other railway manager who is subject to the same obligation as proposed by the QCA.

Queensland Rail considers that the 2015DAU is appropriate in relation to this issue.

## 14.2 Operating requirements manual

The QCA has made extensive amendments to the ORM, making it unnecessarily prescriptive and limiting Queensland Rail's ability to adequately plan and respond to demand on the network, including in relation to the matters set out in Table 8 below.

In addition, it has become apparent since submission of the 2015 DAU that amendments to the ORM are necessary to update the ORM as necessary to comply with the *Transport (Rail Safety) Act 2010* and Queensland Rail's systems and procedures. Those amendments are detailed in **annexure 6**.

**Table 8: Queensland Rail comments on aspects of the proposed ORM amendments**

QCA Clause Reference	Concern
1	See Queensland Rail's comments on the ORM amendment process in section 14.3 below.
2.2(b)	Queensland Rail cannot update its safety management system to accommodate the requirements of individual Operators.
2.4	<p>The QCA's proposed amendment is simply uncommercial. The QCA appears to proceed on the basis that appropriate environmental data <i>will</i> be available. It should be obvious this may not be the case for the whole of the network, particularly given Queensland Rail has only been the network operator since 2010. The effect of the required amendment will potentially be to require Queensland Rail to undertake baseline studies of the whole of the network. This is clearly unbalanced and an unwarranted commercial and administrative burden on Queensland Rail.</p> <p>Without the deleted provision, there is no purpose to Queensland Rail offering the Operator the opportunity to undertake baseline monitoring for a particular section of the network.</p> <p>In addition, obligations within this clause have been made reciprocal, when the risks concerned are solely within the control of the Operator. The network does not create noise, or environmental harm. These are risks of operating trains, and properly matters for the Operator. Queensland Rail will not be in a position to comply with the revised provisions.</p>

QCA Clause Reference	Concern
2.6	Inclusion of the environmental risk management process as a stand-alone provision is unnecessary, as identification and management of environmental risks is specifically dealt with in the IRMP process. This clause duplicates obligations.
2.6(j)	The QCA is not appropriately qualified and is not the appropriate party to deal with disputes about environmental risk. Disputes that are unresolved between the parties should be referred to an appropriately qualified expert, consistent with the 2008 SAA.
3.1	The QCA proposes to limit Queensland Rail's ability to issue instructions in relation to safety or environmental protection. It is not clear what the term "reasonable" is intended to mean in practice. Queensland Rail is concerned that it may mean that it could have rail safety or environmental protection requirements watered down, disputed or replaced. Queensland Rail cannot be placed in a position where it is unable to comply (in a manner satisfactory to Queensland Rail) with its statutory obligations or incurs additional liability because third parties dictate safety or environmental requirements relating to its rail network.
4.3	The QCA proposes to limit Queensland Rail's ability to issue directions in the case of a Network Emergency. It is not clear what the term "reasonable" is intended to mean. Please see Queensland Rail's comments in relation to clause 4.3, which are particularly pertinent in the case of a Network Emergency.
6.5(c)	It is unduly onerous to require Queensland Rail to update all Operators in the case of change to the Network Control Radio Channel Coverage Maps. This defeats the purpose of making those maps available on the website.
6.8	Queensland Rail's comments in relation to clause 6.5(c) are also relevant here.
6.9	Queensland Rail's comments in relation to clause 6.5(c) are also relevant here.
7.1.1	The QCA proposes to limit Queensland Rail's ability to issue a Safety Alert. It is not clear what the term "reasonable" is intended to mean in practice.  Queensland Rail's comments in relation to clause 3.1 are also relevant here.
Definition of 'Safety Standards'	The definition of Safety Standards should be limited to those standards relevant to the Operator's activities on the network.  Queensland Rail should only be required to provide the Operator with its own internal standards, not published guidelines or industry practice, of which the Operator should make itself aware.
Definition of "Safeworking Procedures"	The definition of "Safeworking Procedures" should be limited to QR's internal procedures which are relevant to the Operator's activities on the network.

### 14.3 ORM amendment process

Despite the fact that stakeholders did not comment on the issue, the QCA proposes to require Queensland Rail to remove any mechanisms in the SAA for changing the ORM, as it considers an access agreement cannot be used to amend a schedule to an access undertaking.

The QCA has fundamentally misunderstood Queensland Rail's proposal in relation to the ORM. The ORM to be included as a schedule to the access undertaking is the ORM at the date of approval. It was not intended that the ORM attached as a schedule to the access undertaking be updated from time to time, and as the ORM is primarily a technical document, this should not be of concern to the QCA. The definition of ORM in the 2015 DAU made this clear.

The QCA Act does not prevent the adoption of this approach.

The 2015 SAA included provisions intended to balance the rights of the Operator against Queensland Rail's legitimate need to amend the ORM from time to time, by providing for compensation in certain circumstances.

Despite its statement that the QCA's proposed amendments to the ORM amendment provisions at clause 4.3.1 of the 2015 DAU are "*largely consistent with Queensland Rail's proposal in the 2015 DAU SAAs*",<sup>102</sup> the effect of the proposed amendments are that Queensland Rail has no ability to amend the ORM, without submitting a DAU for approval, except in the limited cases of Safety Matters, or to correct typographical errors or other minor matters, or to update references, or details for, persons or positions. 'Safety Matters' is defined as:

*".... matters which could potentially be hazardous to life and/or property if not addressed promptly"*

Queensland Rail cannot amend the ORM in the case of Change of Law (which will not fall within the definition of 'Safety Matters'). In addition, matters that, for example, arise from a change to the capability of the Network, will not necessarily fall within the definition of 'Safety Matters'. The QCA's proposed draft provisions therefore do not permit Queensland Rail to deal with amendments required for the safety of the network in a timely manner, and do not take adequate account of sections 138(2)(b), (d) and (e) of the QCA Act.

The QCA's proposed amendments impact on Queensland Rail's ability to operate the network efficiently, and to deal with matters affecting safety in a timely manner.

As Queensland Rail has stated a number of times in these submissions, Queensland Rail cannot be placed in a position where compliance with its obligations in relation to safety, environmental and engineering matters can be disputed by third parties.

The QCA also proposes to delete clause 8.4(b) of the 2015 SAA, which provided that Queensland Rail would not, for the purposes of the agreement, be taken to have amended the ORM if it did so by submitting a draft access undertaking or draft amending undertaking.

The effect of the QCA's proposed revisions is that Queensland Rail incurs a contractual obligation to pay compensation in the context where Queensland Rail is exercising its rights in accordance with the QCA Act and the QCA subsequently approves amendments to an approved access undertaking. The QCA's proposed amendments are not permitted by the QCA Act – as the QCA cannot lawfully impose a compensation process on Queensland Rail for the exercise of its statutory rights. It is also relevant that the QCA's proposals are a material departure from its approach to these issues in the past.

The QCA's proposed amendments also give rise to timing risks with the potential that the QCA might approve amendments to the ORM prior to Queensland Rail understanding what its

---

<sup>102</sup> QCA draft decision at 87

compensation liability (if any) might be. Where Queensland Rail is proposing amendments to the ORM that may attract compensation liability, it is inappropriate to disconnect the making of amendments from the compensation process as it potentially leads to inefficient decision making – as the costs for the decision cannot be factored into the making of the decision. For example, if a substantial compensation liability was to arise, Queensland Rail should have the ability to alter the amendments to reduce or remove the liability or to not proceed to make the amendments. This could occur for any number of reasons, but a process which removes the potential feedback between compensation and amendments seem likely to give rise to decisions that are not efficient.

## 15 Negotiation process, NMP, reporting and other matters

The QCA's draft decision sets out various proposals in relation to other elements of the 2015 DAU not otherwise specifically addressed in this submission. As those matters were comparatively less controversial than other aspects of the QCA draft decision, Queensland Rail has sought to briefly summarise the QCA proposals and its response in the table in **annexure 7**.

## 16 Administrative provisions

### **Clause 6.4(b)**

The QCA has proposed to include a new clause 6.4(b). Clause 6.4(b) is a transitional provision modelled on clause 6.4(a), but only relating to "Access Applications" and "Renewal Access Applications" and with no reference to the 2008AU.

It is unclear why such a provision is needed when clause 6.4(a) already addresses the relevant matter.

The QCA's drafting is ambiguous and uncertain including because it relates to "Access Applications" and "Renewal Access Applications". Those terms are specific to the 2015DAU and arguably there cannot be an "Access Application" or a "Renewal Access Application" prior to the Approval Date.

The QCA's proposed provision is of no real effect or consequence and is therefore minor and inconsequential and as a result outside of its powers.

Queensland Rail is not aware of any justification for the proposed provision.

### **Clause 6.4(f)**

The QCA has proposed a reporting provision that purports to oblige Queensland Rail to provide reports under clause 5.2.2(i) by reference to a period prior to the Approval Date commencing on 1 July 2013.

Queensland Rail has complied, and is prepared to comply, with its obligations under the 2008AU in relation to the period prior to the Approval Date. However, the QCA cannot change those reporting requirements after the fact or require Queensland Rail to report on a period prior to the Approval Date that is not directly relevant to the approved access undertaking.

The QCA's proposed reporting requirement is unreasonable and outside of power.

## 17 Miscellaneous inaccuracies and misleading statements

Queensland Rail has set out various basic facts relevant to the 2015DAU and observations regarding the law over the past few years.

Despite this, the QCA's draft decision includes various inaccurate statements of basic facts and of law. Given the complexities around some of the matters being addressed in the draft decision, it is concerning to see such inaccurate statements of fact and law – particularly where these are used to directly or indirectly justify a decision.

Queensland Rail invites the QCA to review its previous submission to ensure that the matters contained in its final decision accurately reflect matters of fact and law.

Set out below are some matters that should be corrected in the final decision.

### 17.1 Tenure of Queensland Rail as railway manager

Queensland Rail became the railway manager for its current rail network from 30 June 2010. Prior to that time, Queensland Rail's business was an above rail passenger train business and it did not own or operate any part of the rail network the use of which is comprised in the declared service.

Since becoming the railway manager, the 2008AU applies to Queensland Rail under and in accordance with a transfer notice given under the Asset Disposal Act.

Therefore statements such as:

*"This is reasonably basic information and the obligation to provide it is unlikely to be onerous to Queensland Rail as the obligation has existed for over 17 years."<sup>103</sup>*

are incorrect and should not form the basis of any aspect of the final decision.

### 17.2 Withdrawal of past draft access undertakings

Queensland Rail's 2012DAU was submitted in March 2012 and was withdrawn in February 2013. The withdrawal allowed Queensland Rail to submit a new draft access undertaking that included various changes following feedback from stakeholders.

Queensland Rail's 2013DAU was submitted in February 2013 and was withdrawn in December 2014. The withdrawal allowed Queensland Rail to seek to address significant changes in the QCA's regulatory approach.

Contrary to the QCA's statement in its draft decision, Queensland Rail never submitted a draft access undertaking in June 2013. However, Queensland Rail did make a submission in June 2013 relating to reference tariffs. That submission following the QCA's request in its letter of 3 June 2013 where it stated:

*"The Authority would welcome Queensland Rail considering approaches, including those proposed by stakeholders, to expedite the assessment of the tariff proposal or develop interim prices. In the event Queensland Rail does not provide its proposal by 30 June 2013, the Authority will proceed to develop a replacement West Moreton coal reference tariff as part of the assessment of the 2013 draft access undertaking."*

Queensland Rail's June 2013 submission in relation to reference tariffs was a response to the QCA's request for submissions in relation to the 2013DAU.

---

<sup>103</sup> QCA draft decision at 20.

The QCA's persistent claims that Queensland Rail has withdrawn three draft access undertakings prior to submitting the 2015DAU have been, and continue to be, incorrect.

### 17.3 Application of 2008AU

The 2008AU, as amended from time to time, applies to Queensland Rail (with various modifications) through the operation of the Asset Disposal Act and a transfer notice lawfully given under that Act. Under the transfer notice, the 2008AU (including the relevant reference tariffs) applies to Queensland Rail:

*“for the period from 30 June 2010 to the date the QCA approves a subsequent access undertaking for Queensland Rail, under the QCA Act that replaces the [2008AU] in so far as it relates to Queensland Rail”.*

It is misleading for the QCA to say that the 2008AU has lapsed or expired, as this suggests that the 2008AU no longer applies to Queensland Rail – which is clearly not the case.

Queensland Rail continues to comply with the 2008AU in accordance with its statutory obligations to do so.

### 17.4 Application of a secondary undertaking notice

The QCA has stated that:

*“If Queensland Rail complies with the secondary undertaking notice, we may approve the amended 2015 DAU. If Queensland Rail does not comply with secondary undertaking notice, we may prepare and approve an amended 2015 DAU to apply to Queensland Rail in relation to the provision of the declared service.”<sup>104</sup>*

While Queensland Rail does not understand the relevance of the proposed statement in the context of a decision relating to the 2015DAU, the QCA statement is incorrect. Assuming that:

- the QCA refuses to approve the 2015DAU;
- the QCA gives a secondary undertaking notice; and
- Queensland Rail does not submit a new draft access undertaking that complies with the secondary undertaking notice,

the QCA has a discretion to *“prepare, and approve, a draft access undertaking for the declared service”*.

The QCA's suggestion that it can simply approve an amended version of the 2015DAU is not accurate. In the circumstances described by the QCA, the QCA will actually be responsible for preparing a fresh draft access undertaking – not merely amendments to the 2015DAU. That fresh draft access undertaking must be fully compliant with the QCA Act. It is not open to the QCA to make amendments to the 2015DAU if those amendments are beyond power and nor can the QCA simply adopt elements of the 2015DAU which are not required or authorised by the QCA Act.

There were positions adopted in the 2015DAU which Queensland Rail offered in the spirit of compromise or for regulatory convenience. Queensland Rail regards the 2015DAU as an integrated, fit for purpose regulatory undertaking. The 2015DAU is not a selection of separate stand-alone regulatory undertakings. The QCA's rejection of the 2015DAU is a rejection of that integrated undertaking.

---

<sup>104</sup> QCA draft decision at 247.

## 17.5 Promoting competition in upstream and downstream markets

The QCA, when opining on the operation of section 138(2)(d) of the QCA Act, stated that:

*“We consider that Queensland Rail continues to have the ability and incentive to use its market power to adversely affect competition in a number of dependent markets including:*

- *the market for above-rail services*
- *the market for certain products that are transported on Queensland Rail's network*
- *the market for resource tenements from which those products are produced.*

*Competition in the above mentioned markets can be affected by the operation of the contracting and operating requirements embodied in the 2015 DAU. While we accept the passenger services and freight markets are distinct markets, we have a statutory obligation under sections 137(1A) and 168A(c) to address the potential for Queensland Rail to favour its above-rail passenger operations to the detriment of above-rail freight business.*

*We therefore consider that an access undertaking should seek to:*

- *minimise any barriers for access to the declared service*
- *improve the conditions for competition in upstream and downstream markets by providing tangible evidence of the economically efficient provision of access to the declared service and by promoting regulatory certainty to enable confidence in decision-making*
- *improve the conditions for competition in upstream and downstream markets.”*<sup>105</sup>

Queensland Rail does not accept that it has the ability or the incentive to “use its market power” in the manner suggested by the QCA.

The QCA has provided no explanation of Queensland Rail’s alleged incentive to act in the way suggested by the QCA.

The QCA has also ignored the fact that Queensland Rail is subject to various provisions under the *Competition and Consumer Act 2010* (Cth) and other legislation that would prevent a misuse of market power.

The QCA also makes observations about what an access undertaking should seek to achieve. Those observations are mistaken. By definition under the QCA Act, an access undertaking: “...sets out details of the terms on which an owner or operator of the service undertakes to provide access to the service whether or not it sets out other information about the provision of access to the service”. That is the prime purpose of an access undertaking.

Nowhere under the QCA Act does it say that an access undertaking must, for example, seek to improve the conditions for competition. An access undertaking does not and cannot set about improving conditions for competition in upstream or downstream markets.

The QCA has provided some summaries of the 2015DAU and its draft decision approach relating to the application of section 138(2)(d) of the QCA Act. Queensland Rail considers that these summaries are misleading and in any case not supported by any facts or evidence. If the QCA

---

<sup>105</sup> QCA draft decision at 254 to 255.

proposes to use such summaries in its final decision it should be careful that they are accurate and objective.

To take one example of the West Moreton Network reference tariff, the QCA states that:

*“The proposed West Moreton network tariffs are not in the public interest as they create uncertainty about future prices, reducing competition in downstream markets and discouraging long-term growth in the mining industry served by the network.”<sup>106</sup>*

However, the QCA has provided no objective evidence supporting any of those proposed conclusions. The reference tariffs proposed in the 2015DAU have none of the effects attributed to them by the QCA.

---

<sup>106</sup> QCA draft decision at 256.



## Glossary

2008AU	QR Network's 2008 access undertaking
2012DAU	Queensland Rail's 2012 draft access undertaking
2013DAU	Queensland Rail's 2013 draft access undertaking
2015DAU	Queensland Rail's 2015 draft access undertaking
2015 SAA	The Standard Access Agreement that forms part of the 2015DAU
AFD	Access Facilitation Deed
Aurizon Network	Aurizon Network Pty Ltd
Aurizon's 2014DAU	Aurizon Network's 2014 draft access undertaking
Asset Disposal Act	<i>Infrastructure Investment (Asset Restructuring and Disposal) Act 2009 (Qld)</i>
B&H	B&H Strategic Services
DBCT	DBCT Management Pty Ltd
DTMR	The Queensland Department of Transport and Main Roads
ORM	Operating Requirements Manual
PwC	PricewaterhouseCoopers Australia
QR Network	QR Network Pty Ltd (now Aurizon Network)
QCA	Queensland Competition Authority
QCA Act	<i>Queensland Competition Authority Act 1997 (Qld)</i>
QRTA Act	<i>Queensland Rail Transit Authority Act 2013 (Qld)</i>
Queensland Rail	Queensland Rail Limited
RAB	Regulatory Asset Base
TIA	<i>Transport Infrastructure Act 1994 (Qld)</i>
TSC	Transport Service Contract

# Annexure 1

## Assessment of Metropolitan Network Impact

## Annexure 2

### Response to allowances for maintenance and capital costs

# Queensland Rail's Response to the QCA's allowances for maintenance and capital costs for West Moreton Coal Carrying Services (December 2015)



## Table of Contents

---

<b>BACKGROUND.....</b>	<b>3</b>
<b>MAINTENANCE PLAN .....</b>	<b>4</b>
<i>Steel Bridge Painting (B&amp;H Ref. 2.3.3).....</i>	<i>4</i>
<i>Ballast Undercutting (B&amp;H Ref. 2.3.4.1).....</i>	<i>5</i>
<i>Minor Yard Maintenance (B&amp;H Ref. 2.3.4.11).....</i>	<i>5</i>
<i>Rail Renewal (B&amp;H Ref. 2.3.4.5).....</i>	<i>6</i>
<i>Maintenance Ballast (B&amp;H Ref. 2.3.4.15).....</i>	<i>7</i>
<i>Rail Stress Adjustment (B&amp;H Ref. 2.3.4.18).....</i>	<i>8</i>
<i>Mechanised Resurfacing (B&amp;H Ref. 2.3.4.7).....</i>	<i>8</i>
<i>Level Crossing Maintenance (B&amp;H Ref. 2.3.4.24).....</i>	<i>9</i>
<i>Level Crossing Construction/Recon (B&amp;H Ref. 2.3.4.25).....</i>	<i>9</i>
<i>Mechanised Resleepering (B&amp;H Ref. 2.3.5).....</i>	<i>10</i>
<i>Summary of Maintenance Costs.....</i>	<i>11</i>
<b>CAPITAL PLAN .....</b>	<b>12</b>
<i>Formation Strengthening (B&amp;H Ref. 6.3.1).....</i>	<i>12</i>
<i>Steel Bridge Strengthening (B&amp;H Ref. 6.3.2).....</i>	<i>12</i>
<i>Toowoomba Range Slope Stabilisation (B&amp;H Ref. 6.3.3).....</i>	<i>13</i>
<i>Toowoomba Plant Maintenance Depot (B&amp;H Ref. 6.3.6).....</i>	<i>13</i>
<i>Check Rail Curves (B&amp;H Ref. 6.3.7).....</i>	<i>14</i>
<i>Rerailing Rosewood to Hellidon (B&amp;H Ref. 6.3.8).....</i>	<i>14</i>
<i>Level Crossing Reconditioning (B&amp;H Ref. 6.3.10).....</i>	<i>14</i>
<i>Summary of Capital Costs .....</i>	<i>15</i>
<i>Attachment 1 – Golder Associates - 137632080-012-R-Rev0_Ch 144.7 Stability .....</i>	<i>16</i>
<i>Attachment 2 - Golder Associates - 137632080-011-R-Rev0_Ch 142-7 Stability .....</i>	<i>17</i>
<i>Attachment 3 - Golder Associates - 137632080-015-TM-Rev0_Toowoomba Slope Remediation18</i>	<i>18</i>

## Background

---

As part of the Queensland Competition Authority's (QCA's) assessment of Queensland Rail's draft access undertaking of 5 May 2015 (2015 DAU), the QCA sought that its consultant B&H Strategic Services Pty Ltd (B&H) undertake a review of the 2015 DAU allowances for:

- maintenance costs;
- capital costs; and
- operational costs,

for the West Moreton Network reference tariff for coal carrying train services.

In its 2015 draft decision the QCA indicated its proposal to accept B&H's recommendations in relation to these allowances. In the following document, Queensland Rail responds to B&H's assessment of allowances for maintenance and capital expenditure.

Unless otherwise stated, all dollars noted in this document are shown as current dollars.

## MAINTENANCE PLAN

---

This section of Queensland Rail's submission is in response to B&H's assessment of the following maintenance products:

- Steel Bridge Painting (B&H Ref. 2.3.3)
- Ballast Undercutting (B&H Ref. 2.3.4.1)
- Minor Yard Maintenance (B&H Ref. 2.3.4.11)
- Rail Renewal (B&H Ref. 2.3.4.5)
- Maintenance Ballast (B&H Ref. 2.3.4.15)
- Rail Stress Adjustment (B&H Ref. 2.3.4.18)
- Mechanised Resurfacing (B&H Ref. 2.3.4.7)
- Level Crossing Maintenance (B&H Ref. 2.3.4.24)
- Level Crossing Construction/Recon (B&H Ref. 2.3.4.25)
- Mechanised Resleepering (B&H Ref. 2.3.5)

### Steel Bridge Painting (B&H Ref. 2.3.3)

#### B&H Position

B&H stated that Queensland Rail's maintenance program for steel bridge painting was based upon a large single expenditure year 2017/18 with \$5.7M (real \$) and a smaller \$0.5M in 2019/20. B&H considered this to be a 'lumpy' profile and recommended that the program be extended over three years 2016/17 to 2017/18 which would then run into 2019/20. This would result in a program of \$1.9M (real \$) in each of the three years.

B&H's reasoning was its view that *"a program of painting is more likely to attract large premiums for peak contract workforce attendance. A contractor that has no programs either side of a peak is likely to charge more because they must train and demobilise the workforce."*

B&H went on to conclude that *"this is the way a stand-alone evaluation would conclude this type of transaction but it is possible Queensland Rail have had this program driven, not from need but because the contractor is involved in other Queensland Rail work and this is the only time or most convenient time for the broader Queensland Rail program. In any event, the more moderate program is a better outcome for this network."*

#### Queensland Rail's Response

B&H does not appear to have understood the task at hand. The majority of the \$5.7m expenditure in 2017/18 is in relation to the repainting of the Lockyer Creek Bridge in Gatton (with estimates for painting this structure, based on similar works done around the State, of about \$4.9m). The remaining expenditure is for spot painting works on other structures. Additionally, the \$0.5M in 2019/20 is for a further package of spot painting within the district.

As such, it would not be practical or efficient for Queensland Rail to paint the Lockyer Creek Bridge over a three year period, which would incur significant set up and demobilisation costs and higher labour costs due to the loss of economies of scale of doing the work in the same year.

The expenditure proposed is the efficient cost of the work as it is based upon similar works undertaken by Queensland Rail. Queensland Rail contracts out all steel bridge painting through a competitive tendering process, thereby assuring the best value for money is achieved.

## **Ballast Undercutting (B&H Ref. 2.3.4.1)**

### B&H Position

B&H stated that it considers that Ballast Undercutting in the 2015 DAU appears to have replaced Track Reconditioning, which was an activity in Queensland Rail's 2013 Draft Access Undertaking (2013 DAU).

B&H further state that *"While undercutting is an activity generally associated with replacement of ballast and the capping, if it existed, it can also be a substitute for formation repair where the damage is not deep. The inspection and criteria for carrying out the work is very similar, that is, excessive track geometry subsidence and differential settlement and loss of ballast stability through contamination by the formation. **Ballast undercutting also typically replaces all of the ballast which contrasts with ballast cleaning which reconditions existing ballast while adding some top up.**"* [Emphasis added].

B&H surmise that the purpose of Ballast Undercutting and Formation Repair (the latter of which is a capital project included in the 2015 DAU) has the same effect, to prolong the life of the formation and that the two programs are essentially the same activity even though one activity requires more intervention than the other. Therefore B&H conclude that both programs should be combined into one activity under the capital program which would mean that the Ballast Undercutting project would be treated as capital rather than as a maintenance activity.

### Queensland Rail's Response

B&H does not appear to have understood the task at hand in relation to this maintenance activity. The scope for the Ballast Undercutting program is for track lowering activities. This work is associated with the lowering of track in locations of excessive ballast depth, where track stability and vertical alignment is difficult to maintain.

This program is not proposed as a substitute for formation repairs. This activity reuses existing ballast and removes excessive ballast depth to regain stability of the track structure. Hence there is no replacement with new ballast and there is not an extension of the ballast life, just reductions in top and line and improved track stability.

As such, Ballast Undercutting is not a capital activity and is not part of the Formation Strengthening program. It is a maintenance activity and should be treated as such.

## **Minor Yard Maintenance (B&H Ref. 2.3.4.11)**

### B&H Position

B&H recommended to the QCA that the allowance for Minor Yard Maintenance not be allowed. Its reasoning was that:

*"It is unclear as to what "minor yards" would now be used with the rapid reduction in non-coal activity and the reduction in coal train frequency. In fact an emphasis should be placed on putting yards and other sidings out of service as quickly as possible. We cannot identify any reason to have a budget in this area and have reduced it accordingly."*

### Queensland Rail's Response

The rails yards and other infrastructure (Minor Yards) which require Minor Yard Maintenance play a critical role in the provision of the declared service.



Minor Yard Maintenance entails routine maintenance activities in rail yards. Rail yards used by coal trains in the West Moreton Network include: Willowburn Yard, Toowoomba Yard and Dalby Yard. Minor Yard Maintenance also includes routine maintenance activities in Angles and Maintenance Siding which are required for stowing of track machines that maintain the network. During maintenance closures coal trains are stowed in these locations on the network.

The allowance for Minor Yard Maintenance relates to the declared service and is an activity required for the provision of the declared service. The need for Minor Yards is not diminished as suggested by B&H; they continue to be relevant and needed and they must be maintained. As such, the allowance should be included in the maintenance task for the West Moreton Network coal reference tariff.

## **Rail Renewal (B&H Ref. 2.3.4.5)**

### B&H Position

B&H consider that the Rail Renewal project carries out the same work as in the project APR 12545 RELAYING (Rerailing) PROGRAM ROSEWOOD – HELIDON in Queensland Rail's capital program.

B&H state that the proposed works in Queensland Rail's capital program are on the basis of replacing 41kg/m rail with 50 kg/m rail, while the works in this maintenance program are based upon the replacement of like for like which will be 50 kg/m.

*B&H conclude that "since the functionality of the existing 41 kg/m rail is the same as the proposed 50 kg/m rail in that no increased speed or axle load will result, the replacement of either rail has the same purpose, to ensure safety and to maintain reliability. The quantum of the program is also significant (\$1m per year) and warrants capitalisation. Therefore it is proposed to combine programs into the Capital Plan."*

B&H additionally consider that the proposed rate by Queensland Rail is based on the capital program of replacing both rails of 41kg/m rail with 50kg/m rail. B&H states *"Where only one rail is replaced such as in curves the rate would not be one half because the manpower resource is not as efficient but it would be a significant reduction because the cost of the rail material is a significant component."*

*B&H state "Therefore we propose that the maintenance estimates be reduced to a rate of \$350/m which will on average permit a mixture of curve worn single rail replacement and some double rail replacement. This would result in a reduction of expenditure to \$700,000 (real \$) for each year."*

### Queensland Rail's Response

Queensland Rail accepts the reduction in expenditure to [REDACTED] for each year. However, Queensland Rail does not agree with B&H that this is a capital project.

Queensland Rail's Specification MD-12-376 Capitalisation of Expenditure evidences that the task at hand is a maintenance task rather than capital expenditure stating:

*"Where a section of track is replaced, the following rules apply:....."*

- *Where only the dual rail lines are replaced, the replacement costs, including demolition costs are to be capitalised where the track is at least 110 metres in length. Any replacement costs of track shorter than 110 metres must be expensed as incurred and the existing track is not disposed of.*
- *Where only a single rail line is replaced due to wear and tear, the entire costs of replacement are expensed as incurred."<sup>1</sup>*

<sup>1</sup> MD-12-376 Specification Capitalisation of Expenditure 2.2.3.3 Replacement of railway track p15

Accordingly, where one rail only is renewed for any length, or both rails for a length less than 110 metres, this is a maintenance expense. Where both rails are renewed for a length greater than 110metres, then this is a capital expense.

The scope of the Rail Renewal program in the Maintenance Plan is replacing life expired 50kg/m rail with new 50kg/m head-hardened rail, predominantly in curves with radius less than 300 metres between Rosewood and Jondaryan.

There is 36.4km of these curves in this area, and the average life of the rail based on wear is 15 to 18 years, therefore approximately 2km of these curves require rail renewal per year.

The wear rate is based on the high leg rail on the curves, which would wear faster than the low leg, and the scope is in relation to concentrate on the high leg only, for this assessment period.

The unit rate for renewal of single rail in a curve is approximately [REDACTED]. The unit rate for renewal of both rails in a curve is approximately \$0.484M per track km. The reason this rate is slightly higher than in the Capital Plan, which is approximately \$0.468M is because it will occur on multiple discrete curve, whereas in the Capital Plan there is more opportunity for Rail Renewals on a face.

Therefore, Queensland Rail accepts B&H's assessment of the quantum and value of the work, being 2km per annum of single rail renewal only for a value of [REDACTED]. However Queensland Rail, in accordance with its accounting principles consider that this cost is a maintenance activity.

## **Maintenance Ballast (B&H Ref. 2.3.4.15)**

### B&H Position

B&H note that there is an expenditure of, on average, \$811,000 per year on Maintenance Ballast. B&H state that this cost is the cost of material for routine maintenance associated with resurfacing, and not that associated with ballast undercutting which consumes much more ballast on a pro-rata basis and is separately accounted.

B&H outlines that the costs for maintenance ballast look as if they have been estimated around the reconstruction of track every 20 years. They also note that maintenance ballast needs to go hand in hand with mechanised resurfacing and that it seems that both programs don't seem to be coordinated. B&H have retained the 2015/16 expenditure but have reduced the claimed expenditure for the following four years.

### Queensland Rail's Response

Queensland Rail has reviewed the maintenance costs and will reduce the number of ballast trains for the first three years in response to the B&H report.

The highest expenditure program for maintenance ballast coincides with the resleepering program in 2015/16 because ballast is lost in the resleepering process from the sleeper removal and cleaning out of sleeper beds with rotary drum scarifier, which can displace ballast to beyond where a ballast regulator can recover it. With the increase of ballast and improved sleeper condition for 2015/16 a small decrease can be expected for the following two years.

For 2018/19 and 2019/20 Queensland Rail's original proposed numbers are accurate. As the track starts to deteriorate and defective sleepers increase, additional resurfacing will be required to hold top and line. Hence, there will be the need to increase ballast requirements. Queensland Rail maintains that the ballast program, as submitted, is commensurate with the task in 2018/19 and 2019/20 and is required to provide the declared service.

## Rail Stress Adjustment (B&H Ref. 2.3.4.18)

### B&H Position

Queensland Rail has proposed an allowance of \$790,000 (real \$) for this project. However, B&H consider this to be too high, instead recommending an allowance of \$500,000 (real \$).

B&H note that Queensland Rail's reasoning for the Rail Stress Adjustment requirements is that *"The costs included in this product include restressing of sections where track works and modifications have occurred"*, B&H considers that these costs should have been included in the cost of the track works. B&H further notes that *"Rail stress adjustment should occur as a normal part of a completed works and the only specific rail stress adjustment as a separate activity such as where rail creep or curve movement occur."*

B&H considers that an allowance of \$790,000 (real \$) is excessive and recommends a reduction to \$500,000 (real \$).

### Queensland Rail's Response

The scope of the Rail Stress Adjustment program comprises stress testing and restoring the Design Neutral Temperature (DNT) where the Rail Stress Free Temperature has deviated from that of the DNT as a result of rail creep; pulling-in of curves; rolling out of rail<sup>2</sup>; and where vertical and/or lateral track movements from resurfacing affect the rail stress. Rail Stress Adjustment is a normal part of maintaining rail track.

Further refinement of the scope during recent budgeting process has produced a requirement to \$630,000 p.a. expenditure on the rail stress adjustment program for this regulatory period.

## Mechanised Resurfacing (B&H Ref. 2.3.4.7)

### B&H Position

B&H state that the scope of Queensland Rail's mechanised resurfacing program is enough to resurface the whole district each year. B&H believe this would require a resurfacing crew to work every day and resurface approximately 1km of track per day. B&H believe that this is fairly excessive considering the number of trains per day.

B&H also discuss the annual track tonnages and note that sections only receive 2 to 3 million gross tonnes per annum. B&H continue on to outline that this is an excessive amount of resurfacing and is not good practice.

B&H outline that because of the extensive resurfacing work being done in the 15/16 year with resleepering, and the ongoing capital works extending resurfacing intervals, the program is not regarded as realistic.

B&H recommend a reduction of resurfacing in 15/16 to \$1.8m and a reduction in the remaining regulatory period *"in order to better reflect the trend of spending previously achieved and in the context of the reduction in traffic levels."*

### Queensland Rail's Response

Queensland Rail agrees in principle with B&H's assessment that the Mechanised Resurfacing Program can be reduced in 2015/16, based on the philosophy of the resleepering works, however strongly disagrees with the quantum of the proposed reduction.

---

<sup>2</sup> Rolling out of rail is the elongation and plastic deformation of the top layer of the rail head caused by traffic. Rolling out of rail caused the residual tensile stresses in new rail to change to compression due to the rolling contact and this can reduce the neutral temperature of the rail. Rolling out is a phenomenon observed in new rail, up to a year old, and is only a concern for newly constructed or re-railed track.

Queensland Rail proposes a \$500,000 reduction, in the Mechanised Resurfacing programme for 2015/16. This is representative of the influence that the Resleeping with Resurfacing Capacity will have on the resurfacing programme. The projected figure for 2015/16 is now \$2,500,000.

Although significant expenditure has/is being spent on formation and relay works the vast majority of the network is still founded on heaped up natural material as formation. This material naturally shrinks/swells resulting in a loss of top and line on the network, especially during rain events. During the last three years there has been a reduction in the expenditure spent on resurfacing and this trend is predominately continuing during the 2015 DAU term. For these reasons Queensland Rail maintains that the Mechanised Resurfacing program for 2016/17 to 2019/20 as submitted is commensurate with the task.

## **Level Crossing Maintenance (B&H Ref. 2.3.4.24)**

### B&H Position

B&H considers that level crossing maintenance is required and states that \$100,000 (real \$) is a normal program of maintenance and have added this into the program.

### Queensland Rail's Response

Queensland Rail accepts the inclusion of \$100,000 in 2015/16.

## **Level Crossing Construction/Recon (B&H Ref. 2.3.4.25)**

### B&H Position

This product task includes all costs associated with the renewal of all level crossings. This includes the renewal of any track components such as rail, sleepers, plates, track resurfacing, signage, ballast & the renewal/repair of the road surface.

B&H noted that only one year of this project was in the maintenance program, while the other four years is in the capital program. B&H require that the entire program be included in the capital program.

B&H additionally believe that due to the lower tonnages now running on the West Moreton Network, less expenditure should be required for level crossing reconditioning, recommending a reduction in funding from \$0.4M (real \$) to \$0.2M (real \$) for 2015/16 onwards. B&H recommend that in the face of dropping tonnages and with far less trains to disrupt transit time, there may be adequate opportunity to lower train speed to avoid damage on particular crossings and avoid early reconditioning.

### Queensland Rail's Response

Queensland Rail agrees in principle that the Level Crossing Construction / Reconditioning program should be capitalised, including in 2015/16. Queensland Rail does not agree that the allowance should be reduced from \$0.4M to \$0.2M per annum as this is not sufficient to undertake the task.

The typical cost of a level crossing reconditioning is approximately \$0.1M - \$0.3M per level crossing, depending on the size of the traffic management requirements. Larger crossings which require temporary roads to be built beside them, e.g. highways, can be up to \$0.4M depending on length of crossing and temporary access road. This is a function required to provide the declared service and the full allocation is required to complete the task.

## Mechanised Resleepering (B&H Ref. 2.3.5)

### B&H Position

B&H states that *“There are two matters relating to unit costs that require some analysis.”* These are the use of double shouldered sleeper plates and *“much lower coal and non-coal paths now being forecast and the improvement in productivity that could be expected from that situation”*.

B&H argues that due to the amount of attention previously given to the Rosewood to Helidon section B&H doubt that there would be many sleepers remaining unplated.

B&H also discusses that the requirement of double shoulder sleeper plates in Queensland Rail Standard CETS3 which shows the standard for Plating Requirements for speed less than or equal to 80 kmph is a requirement only for Double Shouldered Sleeper Plates (DSSP) on curves with a radius of less than or equal to 400m. B&H indicates that there are only 731m of curves less than 400m to the west of Jondaryan and note that the majority would not require double shouldered sleeper plates.

B&H state that *“a small number of double shouldered sleeper plates may be required for a small number of timber sleepers and allocate the equivalent of \$█ per sleeper in place of \$█ for that purpose. The unit rate for resleepering with this adjustment is therefore \$245.33.”* B&H then goes on to conclude that due to the reduction in traffic *“that labour productivity should be much higher and which accounts for approximately one third of the total cost (including resurfacing) and therefore with a 15% improvement in productivity translates to 5% unit cost reduction or approximately \$12 per sleeper to bring the unit rate to \$233.33. At this rate the expenditure is \$13,794,510 (nominal) in 2015/16 or \$13,249,080 (real \$)”* and this is their recommended cost for mechanised resleepering.

### Queensland Rail's Response

Queensland Rail maintains that the expenditure on the Mechanised Resleepering Program included in the submission is the efficient cost of undertaking the task – Queensland Rail's reasoning follows.

In response to the QCA's request for information, Queensland Rail provided the detailed assessment of the sleepers, which showed the quantity of timbers sleepers per kilometre planned for renewal. The presumption that the majority of the work is from Jondaryan to Columboola is correct, but the resleepering program comprises Rosewood to Columboola.

With respect the first matter – the inclusion of Double Shouldered Sleeper Plates in the timber sleeper renewal cycle – below is an excerpt from the relevant Queensland Rail Civil Engineering Track Standard CETS 2.D.4.2 West Moreton System – Oakey to Miles:

*“220 m lengths have been approved on the West Moreton System between Oakey and Miles, Track consists of 41 kg rail on 1 in 2 interspersed steel tangent and curved track of radius 400 m or greater on timber sleepers without double should sleeper plates (DSSP). Traffic is 15.75 tal coal trains. The following conditions apply:*

- 1. Increased creep monitoring*
- 2. More rigorous stress testing and restressing program*
- 3. More Stringent hot weather response procedures in areas with 220 m rail lengths*
- 4. Ensure half rail stagger is maintained during welding of rails*
- 5. Ensure all joints have angle plates, or that joints with bar plates also have DSSP on the sleepers.*
- 6. In areas where track disturbing works have occurred, investigate the suitability of increasing the tonnage required to traverse track before removing speed restriction*

*As part of the resleeping program, all replacement timber sleepers shall have DSSP installed.”*

Hence, it is a requirement of the standard that DSS plates are installed in the resleeping program, and therefore Queensland Rail maintains that the unit rate for resleeping included in the submission is appropriate.

With respect the second matter, B&H suggested that a 5% reduction in the unit rate for resleeping should result from the reduction in forecast tonnage in this assessment period from that of the 2013 DAU. However, the unit rate for resleeping in the 2015 DAU is based on the current forecast tonnage in this assessment period. The resleeping program expenditure in the 2015 DAU is \$16,334,000 in 2015/16 as compared to expenditure of \$23,881,000 (2015/16 and 2016/17) which was included in the 2013 DAU. The resleeping program in the current submission is already appropriately discounted. Therefore Queensland Rail maintains resleeping program included in the submission is efficient.

## Summary of Maintenance Costs

West Moreton Maintenance Plan 2015/2016 Budget	FY16 (\$'000)			FY17 (\$'000)			FY18 (\$'000)			FY19 (\$'000)			FY20 (\$'000)		
	QR	B&H	NEW QR	QR	B&H	NEW QR	QR	B&H	NEW QR	QR	B&H	NEW QR	QR	B&H	NEW QR
Steel Bridge Paint (Contract)	0	0	0	0	1900	0	5700	1900	5700	0	1900	0	500	0	500
Ballast Undercutting Other	1170	0	1170	1400	0	1400	1400	0	1400	1400	0	1400	1400	0	1400
Minor Yard Maintenance	230	0	230	230	0	230	230	0	230	230	0	230	230	0	230
Rail Renewal	931	0	■	931	0	■	931	0	■	931	0	■	931	0	■
Maintenance Ballast	1035	1035	1035	690	600	600	660	550	550	630	500	630	620	500	620
Rail Stress Adjustment	794	500	630	790	500	630	790	500	630	790	500	630	790	500	630
Mechanised Resurfacing	3000	1800	2500	2950	2500	2950	2900	2250	2900	2850	2000	2850	2800	2000	2800
Level crossing maintenance	0	100	100	100	100	100	100	100	100	100	100	100	100	100	100
Level crossing constr/recond	569	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Mechanised Resleeping	16334	13249	16334	0	0	0	0	0	0	0	0	0	0	0	0

## CAPITAL PLAN

---

This section of Queensland Rail's submission is in response to B&H's assessment of the following capital products:

- Formation Strengthening (B&H Ref. 6.3.1)
- Steel Bridge Strengthening (B&H Ref. 6.3.2)
- Toowoomba Range Slope Stabilisation (B&H Ref. 6.3.3)
- Toowoomba Plant Maintenance Depot (B&H Ref. 6.3.6)
- Check Rail Curves (B&H Ref. 6.3.7)
- Rerailing Rosewood to Hellidon (B&H Ref. 6.3.8)
- Level Crossing Reconditioning (B&H Ref. 6.3.10)

This review is of 2015 DAU Capital Cost Estimates without a "2032 Embargo".

### Formation Strengthening (B&H Ref. 6.3.1)

#### B&H Position

B&H included Queensland Rail's Ballast Undercutting, which is a maintenance item, in this capital plan category on the basis that *"it is a highly invasive activity, is a large expenditure and it provides a similar result to formation repairs."*

#### Queensland Rail's Response

Queensland Rail does not support the B&H treatment. Ballast undercutting (or track lowering as explained in the maintenance section of this document) is a maintenance activity only. Refer to comments in the 'Ballast Undercutting (B&H Ref. 2.3.4.1)' section in this paper for a full response.

### Steel Bridge Strengthening (B&H Ref. 6.3.2)

#### B&H Position

B&H accepts that the bridges in the system need attention and hence have not modified the expenditure, rather only modifying the timing of the program. B&H state, however, that as there has been no data supplied by Queensland Rail and that *"with appropriate bridge inspection data and the prospect of perpetual coal transport, a larger program of replacements may be justified, but that data is not available to the authors to make that judgement."*

#### Queensland Rail's Response

The steel bridge program is based around fatigue related issues in major steel truss spans of the Lockyer Creek Bridge on the main line. This bridge has shown signs of stresses and defects such as broken rivets in stringers and connections. These defects require an upgrade to these stringers and connections to ensure there is no ongoing issues with this large, heritage listed, steel structure.

Design and investigation works have been completed by an engineering consultant and are based on current coal traffic. The fatigue issues have been brought on by the increase of traffic i.e. coal trains. Hence the capital plan for the product must remain as per Queensland Rail's original submission to ensure the safety and efficiency of the network.

### **Toowoomba Range Slope Stabilisation (B&H Ref. 6.3.3)**

#### B&H Position

B&H states *“This activity is sensible and is supported but there are issues about the level of expenditure based on previous budget outcomes. We note that it is an allowance of \$1.5m per year (real \$) and the actual scope quanta is unknown. It would be prudent for Queensland Rail to provide an estimate based on the advice of the technical expert and to press the technical expert for prioritisation and probability of remedial work required so that scope quanta can be forecast.*

*It assumed that the only reason that this program is capitalised is that it involves large expenditure because as noted in the Capital Plan document “This project involves monitoring and repairing locations” and there is no objective to improve the functionality or train capacity of the network except by way of reliability.*

*We also note that recent years’ expenditure has been less than \$1m per year and therefore we suggest \$1m as being a more appropriate allowance.”*

#### Queensland Rail’s Response

Attached are the reports obtained from Golder Associates with respect to the two main sites causing geotechnical issues on the Toowoomba Range. These sites are the 142.700km and the 144.700km on the Main Line. These reports are:

- 137632080-012-R-Rev0\_Ch 144.7 Stability
- 137632080-011-R-Rev0\_Ch 142-7 Stability
- 137632080-015-TM-Rev0\_Toowoomba Slope Remediation

These reports outline an initial concept for the remediation of these sites. The cost estimates that Golder Associates have outlined for this work total approximately [REDACTED]. Queensland Rail believes this figure to be excessive and that the concept designs require extensive amounts of railway line closure, and hence are not in the best interests for the business or its customers.

A recent tender has been called for a further consultancy for separate detailed design works. This tender unequivocally emphasises the need to keep the railway operational, as much as possible, and to seek cost effective solutions.

To this end Queensland Rail is remaining with its initial estimate of \$7.5m over the five year 2015 DAU period until further detailed information is received.

### **Toowoomba Plant Maintenance Depot (B&H Ref. 6.3.6)**

#### B&H Position

B&H state that as there were no details of the proposal provided in the submission and the expenditure is not included in Queensland Rail’s tariff model, this item has not been considered and no Capex is shown in the B&H assessment of the AMP.

#### Queensland Rail’s Response

Queensland Rail agrees that this project does not relate to the declared service and will be removed from the submission.



### **Check Rail Curves (B&H Ref. 6.3.7)**

#### B&H Position

B&H state that the estimate for the check rail curves *“is that at least 10% reduction in cost (from the prototype costs used) and moderate extension of the program is justified and we have made the adjustments accordingly. Our view is that the prototype cost could be expected to be higher than the “production” cost.”*

#### Queensland Rail's Response

At the time of submission approximately 10 curves had already been completed. The costings put forward within the submission are efficient costs based on experience from the original installations. These costings provide value for money and the phasing of the project is appropriate.

### **Rerailing Rosewood to Hellidon (B&H Ref. 6.3.8)**

#### B&H Position

B&H state that *“Rerailing for head wear reasons is unavoidable. We have included the maintenance item “Rail Renewal” in this category because it better reflects the type of work, extension to asset life and magnitude in cost. This is discussed in section 2.3.4.5.”*

#### Queensland Rail's Response

Queensland Rail does not agree with B&H's assessment. Refer to comments in Rail Renewal (B&H Ref. 2.3.4.5) for an explanation of Queensland Rail's treatment of this item.

### **Level Crossing Reconditioning (B&H Ref. 6.3.10)**

#### B&H Position

B&H noted that only one year of this project was in the maintenance program, while the other four years is in the capital program. B&H required that the entire program be included in the capital program.

B&H additionally believes that due to the lower tonnages now running on the West Moreton Network, less expenditure should be required for level crossing reconditioning, recommending a reduction in funding from \$0.4M to \$0.2M (real \$) for 2015/16. B&H recommend that in the face of dropping tonnages and with far less trains to disrupt transit time, there may be adequate opportunity to lower train speed to avoid damage on particular crossings and avoid early reconditioning.

Overall B&H has recommended that the program be halved and that instead of the expenditure, operational alternatives such as temporary speed restrictions be used.

#### Queensland Rail's Response

Queensland Rail agrees in principle that the Level Crossing Construction / Reconditioning program should be capitalised, including in 2015/16. However the proposed figure of \$0.2M per annum is not adequate for the task at hand. The typical cost of a level crossing reconditioning is approximately \$100,000 - \$300,000 per level crossing depending on size traffic management requirements. Larger crossings which require temporary roads to be built beside them, e.g. highways, can cost up to \$0.4M, depending on length or crossing and temporary road.

The failure of these crossings is not solely attributed to rail traffic, and given to a large extent that the damage at these crossing has already occurred, all of the works need to be completed. These crossings currently predominately have timber sleepers will 41kg/m rail. The proposed reconditionings will provide for 50kg/m rail on concrete sleepers. Queensland Rail believes that the program should remain as per the 2015 DAU.

## Summary of Capital Costs

West Moreton Capital	FY16			FY17			FY18			FY19			FY20		
Plan 2015/2016 Budget	(\$'000)			(\$'000)			(\$'000)			(\$'000)			(\$'000)		
Product Description (\$'000)	QR	B&H	NEW QR	QR	B&H	NEW QR	QR	B&H	NEW QR	QR	B&H	NEW QR	QR	B&H	NEW QR
Formation Strengthening	3006	4176	3006	3112	4512	3112	3006	4406	3006	3006	4406	3006	3006	4406	3006
Steel Bridge Strengthening	2000	0	2000	0	2000	0	0	0	0	0	0	0	0	0	0
Toowoomba Range Slope Stabilisation	1500	1000	1500	1500	1000	1500	1500	1000	1500	1500	1000	1500	1500	1000	1500
Toowoomba Plant Maintenance Depot	500	0	0	3500	0	0	1000	0	0	0	0	0	0	0	0
Check Rail Curves	3642	3278	3642	4805	3210	4805	4911	3200	4911	1899	3200	1899	0	843	0
Rerailing Rosewood to Helidon	0	700	0	2022	2722	2002	2059	2759	2059	2059	2759	2059	2059	2759	2059
Level Crossing Reconditioning	0	200	569	400	200	400	400	200	400	400	200	400	400	200	400

**Attachment 1 – Golder Associates - 137632080-012-R-Rev0\_Ch 144.7 Stability**

**Attachment 2 - Golder Associates - 137632080-011-R-Rev0\_Ch 142-7 Stability**

**Attachment 3 - Golder Associates - 137632080-015-TM-Rev0\_Toowoomba  
Slope Remediation**

## Annexure 3

PwC review of Professor Menezes' reports

# *Queensland Rail*

## Response to Professor Menezes' reports

*Queensland Rail*

*Response to Professor  
Menezes' reports*

*17 December 2015*





---

# *Contents*

1	Introduction	1
2	Response to the second Menezes report	3
3	Response to the third Menezes report	9



---

# 1 Introduction

## *Background*

On 5 May 2015 Queensland Rail submitted to the Queensland Competition Authority (QCA) a draft access undertaking (the **2015 DAU**). The QCA released its draft decision on the 2015 DAU on 8 October 2015

The QCA commissioned a report from Professor Flavio Menezes of the University of Queensland, titled *A preliminary view – Regulatory economics assessment of the proposed Western System asset valuation approaches* (the **first Menezes report**). Queensland Rail's 2015 DAU included accompanying reports from PricewaterhouseCoopers Australia (PwC) (the **PwC report**) and Frontier Economics (the **Frontier report**) responding to the first Menezes report.

The PwC and Frontier reports identified a number of concerns with the first Menezes report. Both PwC and Frontier argued that first Menezes report did not provide a sufficient basis on which to favour a depreciated actual cost (DAC) valuation approach over a depreciated optimised replacement cost (DORC) approach. Both PwC and Frontier also identified concerns with the proposal to exclude certain 'life expired' assets from the regulatory valuation.

Subsequently, the QCA commissioned two further reports from Professor Menezes:

- *A regulatory economics assessment of the proposed Western System asset valuation approaches* (the **second Menezes report**), and
- *The economic impact of QR's proposal not to include an adjustment to refund or recoup differences in tariffs: Stage 1 Report* (the **third Menezes report**).

Each of these reports are available on the QCA's website.

Queensland Rail has asked PwC to independently review and respond to the second and third Menezes Reports, with our review to be provided to the QCA as part of Queensland Rail's response to the QCA's draft decision.

## *This report*

In chapter 2 we review the core findings of the second Menezes report, and in particular its claim of a 'windfall gain' to Queensland Rail. We show how that report fails to articulate a compelling differentiation between the alternative valuation approaches on efficiency grounds, and indeed understates significant concerns with the QCA's proposed valuation method.

Chapter 3 responds to the third Menezes report. It explains how the conceptual model developed by Professor Menezes does not properly represent the circumstances of Queensland Rail's 2015 draft access undertaking. As a result the conclusions of the third Menezes report are not supported by evidence reliably reflecting the circumstances of the West Moreton network and its catchment of coal mines.

## ***Disclaimer***

This Report has been prepared for Queensland Rail under the terms of our Engagement Contract with Queensland Rail. As an independent report, it has been prepared for Queensland Rail but does not necessarily reflect the views of Queensland Rail.

In preparing this Report we have only considered the circumstances of Queensland Rail. Our Report is not appropriate for use by persons other than Queensland Rail, and we do not accept or assume responsibility to anyone other than Queensland Rail in respect of our Report.

The information, statements, statistics and commentary (together the 'Information') contained in this report have been prepared by PwC from material provided by Queensland Rail, and from other industry data sources external to Queensland Rail. PwC may at its absolute discretion, but without being under any obligation to do so, update, amend or supplement this document.

PwC does not express an opinion as to the accuracy or completeness of the information provided, the assumptions made by the parties that provided the information. PwC disclaims any and all liability arising from actions taken in response to this Report. This Report does not constitute legal advice.

The Information contained in this Report has not been subjected to an Audit or otherwise verified. The information must not be copied, reproduced, distributed, or used, in whole or in part, for any purpose other than as detailed in our Engagement Contract without the written permission of Queensland Rail and PwC.

---

## **2 Response to the second Menezes report**

### ***Efficiency as a regulatory objective***

Part 5 of the *Queensland Competition Authority Act 1997* establishes as a core regulatory objective the promotion of efficiency in the operation of, use of and investment in certain regulated infrastructure services.<sup>1</sup> Broadly these concepts correlate to the economic concepts of productive, allocative and dynamic efficiency.

The second Menezes report identifies that its focus is ‘how the different proposed asset valuations best meet the economic principles of allocative, productive and dynamic efficiency.’<sup>2</sup> To do this Professor Menezes develops a conceptual model of efficiency in the investment in and use of an infrastructure facility, and uses this to articulate how the different valuation approaches – either a DAC or DORC valuation, with the exclusion of certain ‘life expired’ assets – perform against this conceptual model. The report also considers the DORC valuation approach as proposed by Queensland Rail, though finds this valuation option to be ‘inappropriate’.<sup>3</sup>

Professor Menezes’ second report also responds to the key conclusions of each of the PwC and Frontier Reports, largely repeating the same arguments and conceptual framework as established in the first Menezes Report.

Despite acknowledging that ‘both [valuation] approaches may satisfy the QCA’s statutory obligations to ensure the economically efficient operation of the Western System ...’ and ‘there is no clear cut way to choose between them based only on economic efficiency criteria’, the conclusion of the second Menezes report is that a DAC valuation approach is superior to DORC, in the form as proposed by Queensland Rail.

Fundamental to Professor Menezes’ conclusion is the assertion, repeated throughout the reports, that an unequivocal outcome of the QCA adopting a DORC valuation approach, as proposed by Queensland Rail, is that Queensland Rail will receive a ‘windfall gain’. Extending from this, the second Menezes report notes:

*... allowing QR to earn windfall gains is not necessary for ensuring that it has incentives to invest in the network and could potentially impact competition in relevant markets.*<sup>4</sup>

---

<sup>1</sup> Section 69E of the *Queensland Competition Authority Act 1997* refers: ‘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.’

<sup>2</sup> Menezes, Prof. F., (2015) *A regulatory economics assessment of the proposed Western System asset valuation approaches*, Report for the Queensland Competition Authority, UniQuest File Reference Co2173, page 6.

<sup>3</sup> Menezes, Prof. F., (2015) *A preliminary review: Regulatory economics assessment of the proposed Western System asset valuation approaches*, Report for the Queensland Competition Authority, UniQuest File Reference Co2173, page 2.

<sup>4</sup> Menezes, Prof. F., (2015) *A regulatory economics assessment of the proposed Western System asset valuation approaches*, Report for the Queensland Competition Authority, UniQuest File Reference Co2173, page 9.

Returning to the efficiency argument, Professor Menezes claims that:

- dynamic efficiency is not harmed by the exclusion of certain ‘life expired’ assets from the DORC valuation, as Queensland Rail could not reasonably have anticipated at the time it made its investment decision that this return would have been allowed, and
- without excluding these assets there is a risk that allocative efficiency will be adversely impacted (potentially impacting competition in upstream or downstream markets).

Collectively, these positions support his conclusion that application of the QCA’s proposed valuation approach – excluding certain ‘life expired’ assets – is the preferred course.

In the discussion that follows we demonstrate, by reference to the arguments and statements made in Professor Menezes’ reports, that his finding of a ‘windfall gain’ is based on a flawed premise – the application of a current-day interpretation of investors’ expectations for assets that were developed under entirely different circumstances. We also show that the suggestion of an impact on competition/allocative efficiency has not been evidenced.

### ***No evidence of windfall gains***

Professor Menezes claims that a ‘windfall gain’ arises because the original investment in Queensland Rail’s network would have been made with certain expectations regarding future cost recovery.

To illustrate, statements and observations from the second Menezes report include:

*... in my view the DORC approaches put forward in the Consultation Paper and in [Queensland Rail’s] 2015 DAU, which value assets whose actual life has exceeded their expected useful life, would yield QR windfall gains.<sup>5</sup>*

*These are windfall gains as the firm could not have anticipated that there would be other uses for the asset at the time of construction, when its useful life was determined for the purpose of calculating depreciation and expected returns.<sup>6</sup>*

*... I argue that since the firm’s expected return from the initial investment placed no value on the life of the assets being extended, not allowing the firm to earn these windfall gains cannot increase regulatory risk.<sup>7</sup>*

*These are windfall gains as they could not have been anticipated at the time of the investment decision.<sup>8</sup>*

*... it is expected that a rational investor will continue to make investments under the assumption that she will not be able to earn a return on an asset beyond its expected useful life (once it has expired).<sup>9</sup>*

*... at the time of the investment, the access provider could not have foreseen the additional opportunity for cost recovery provided by the extension of useful asset life beyond the expected life.<sup>10</sup>*

---

<sup>5</sup> *Ibid*, page 3.

<sup>6</sup> *Ibid*, pages 8-9.

<sup>7</sup> *Ibid*, page 9.

<sup>8</sup> *Ibid*, page 10.

<sup>9</sup> *Ibid*, page 10.

<sup>10</sup> *Ibid*, page 15.

*The key issue is that when making the investment, an investor could not have anticipated the extended life of these assets and, therefore, could not reasonably have expected to recover their investment beyond the original expected life.<sup>11</sup>*

The fundamental premise of Professor Menezes' argument is that an investor would have:

- made efficient investments only on the basis of a clear commercial motivation to earn a return on and recover its invested capital
- known with precision the useful life and technical performance of the relevant assets, and
- factored this knowledge into setting a cost-recovery arrangement which, based on forecasts at that time, would have allowed for full recovery of incurred costs, including a risk-based return on investment, over the asset's then-expected useful life.

If any of these conditions is not met, then Professor Menezes' conceptual model breaks down, and the claim of a 'windfall gain' cannot be supported.

### Basis on which original investments were made

In the PwC review of Professor Menezes' first report, we noted that the mindset of the investor at the time of the investment, which for some assets may be decades ago, cannot reliably be known. In response, the second Menezes report noted that:

*... it is **neither possible nor necessary** to consider the mindset of the investor at the time of the investment.<sup>12</sup>*

This statement directly contradicts the excerpts reproduced above. From the statements made in the second Menezes report it is clear that the investor's expectation is key to Professor Menezes' conceptual model.

Even if these expectations could be evidenced, they are irrelevant to determining the value of an asset today, owned by an entity different to that making the original investment decision. Indeed, a logical extension of Professor Menezes' argument is that if a past investment was made without *any expectation* of a return, then allowing today a return on this asset would yield the current owner a 'windfall gain' as this return 'could not have been anticipated at the time of the investment decision'.

Professor Menezes' conceptual model applies a current-day interpretation of investors' expectations for assets that were developed under entirely different circumstances. In our view, the current owner of an asset cannot and should not be held responsible for the perceived expectations of some earlier entity that made the initial investment decision.

### Original framework for cost recovery

The third limb of Professor Menezes' conceptual model requires that the original developer of the assets would have adopted a cost recovery profile informed by the asset's original cost and its then expected useful life and utilisation. Subsequent extensions of this useful life would therefore extend the period of cost recovery, and all things being equal, increase returns to the asset owner.

---

<sup>11</sup> *Ibid*, page 34.

<sup>12</sup> *Ibid*, page 13, emphasis added.

Our concern with this position is, again, it applies a current-day interpretation to past decisions, which may have been made in very different circumstances. For Queensland Rail to definitively and certainly be held to earn a 'windfall gain', it needs to be shown that previous charging arrangements were clearly premised on the basis of a cost recovery/useful life assumption consistent with Professor Menezes' conceptual model. No such information has been provided by Professor Menezes. Yet, the second Menezes report is absolute in its conclusion; the suggestion is not that a 'windfall gain' *may* have occurred, subject to certain assumptions, but that this outcome is certain and unambiguous.

We reiterate our view that the key question a regulator ought to consider is the value of the service potential delivered by the existing assets, not the historic basis on which the relevant assets were developed. Without knowing the investor's expectation, or how this may have been factored into original cost-recovery arrangements, it is impossible to claim that 'windfall gains' exist'.

### ***Excluding assets from the DORC valuation may contribute to regulatory risk***

The second Menezes report points out that allowing 'windfall gain' on prior investments is not necessary to provide sufficient and efficient incentives for future investment. At no stage do we claim in the PwC report that a 'windfall gain' is necessary to support dynamic efficiency. Holding the view that no 'windfall gain' has occurred, it follows that we do not believe that such a gain is needed to achieve efficient incentives for investment.

However, we do consider that Professor Menezes' proposition may lead to an increase in Queensland Rail's regulatory risk. Professor Menezes' third report further considers the impact of regulatory risk, observing that: '... any unanticipated change in regime could be translated into greater regulatory risk'.<sup>13</sup> The context of the term 'regime' we take to include any material facet of the regulatory model, including the manner in which assets are valued for regulatory purposes.

Professor Menezes' second report indeed acknowledges this risk specifically in respect to the choice of asset valuation:

*... if QR reasonably expected a DORC valuation to set initial asset values, then a different asset valuation may indeed create the perception of an increase in the instability of the regulatory system and an increase in regulatory risk.*<sup>14</sup>

The report then qualifies this outcome by stating that Queensland Rail's expectation 'is not a matter that I can comment on as an economist' and as such 'it is not factored into my analysis, which assumes that no such expectation existed.'<sup>15</sup>

Our previous reports for Queensland Rail demonstrated the overwhelming preference of regulators, including the QCA, toward the application of DORC valuation methodologies. Indeed, we understand from Queensland Rail that a DORC valuation approach has formed the basis for the access charges applied on the West Moreton system since at least 2001. Moreover, the 2008 access undertaking, approved by the QCA, includes specific provisions to

---

<sup>13</sup> Menezes, Prof. F., (2015) *The economic impact of QR's proposal not to include an adjustment to refund or recoup differences in tariffs: Stage 1 Report*, UniQuest Project No. Co2344, page 7.

<sup>14</sup> Menezes, Prof. F., (2015) *A regulatory economics assessment of the proposed Western System asset valuation approaches*, Report for the Queensland Competition Authority, UniQuest File Reference Co2173, page 14.

<sup>15</sup> *Ibid*, page 14. We observe an inconsistency between the second and third Menezes reports. In the second Menezes report, Queensland Rail's reasonable expectations are set aside as a matter on which Professor Menezes, as an economist, cannot comment upon nor factor into his analysis. However, in the third Menezes report, the reasonable expectations of access seekers in respect to Queensland Rail's prior proposal to adjust Reference Tariffs are core to that report's claim that access seekers are now exposed to greater regulatory uncertainty, and hence risk.



the effect that the asset value used to determine ceiling revenue limits will reference a DORC valuation.<sup>16</sup>

The valuation approach proposed by the QCA, and supported by Professor Menezes, in effect changes the ‘rules of the game’. It is a material departure from the valuation approach that had been both approved and applied by the regulator in previous access undertakings. Confronted with this change in regulatory approach, Queensland Rail might reasonably perceive that the regulatory framework has become less stable and predictable, contributing to an increase in regulatory risk.

### ***No impact on allocative efficiency or competition in other markets***

Allocative efficiency considerations capture how the setting of access charges (and non-financial terms of access) may encourage the efficient use of the relevant infrastructure service. Setting access charges too low or too high may unduly encourage/discourage use of the service, and potentially impact on competition in downstream or upstream markets.

The second Menezes report repeats claims from Professor Menezes’ earlier report, that:

*...a DORC valuation that values assets with expired expected lives increases the risk that allocative efficiency may be adversely impacted.<sup>17</sup>*

*... competition in the output market may be distorted if DORC-based prices are too high.<sup>18</sup>*

*... a DORC approach that places a positive value on longstanding assets with expired expected lives ... increases the risks that access prices are sufficiently high to distort competition in relevant markets and impact adversely on investment in coal exploration and production.<sup>19</sup>*

*Removing assets with expired expected useful lives from the asset base mitigates the risk that DORC-based prices will adversely impact competition in relevant markets.<sup>20</sup>*

The clear inference is that Queensland Rail’s proposal would have a meaningful risk of impacting investment or operational decisions of coal mines which use the West Moreton network. If the risk were trivial, we would challenge why it would be afforded such attention in Professor Menezes’ reports.

However, at no point does Professor Menezes offer any evidence to justify these claims. No data is presented on the economics of coal production, transport or export, either in general terms, or for the mines operating in the West Moreton network catchment. Nor is data presented specifically addressing Queensland Rail’s valuation proposal and how it may impact access charges/reference tariffs, relative to any alternative valuation approach.

---

<sup>16</sup> Section 6.2.4(c)(ii) of the approved 2008 Access Undertaking states (emphasis added):

The value of assets used in Paragraph 6.2.4(a) will be determined using:

- (i) where applicable, the value of the assets for the relevant area of the network contained in the Regulatory Asset Base, where the value of those assets is maintained in accordance with Schedule FB; or
- (ii) where there is no value for the assets for the relevant area of the network contained in the Regulatory Asset Base, the **Depreciated Optimised Replacement Cost methodology**.

<sup>17</sup> *Ibid*, page 11.

<sup>18</sup> *Ibid*, page 26.

<sup>19</sup> *Ibid*, page 34.

<sup>20</sup> *Ibid*, page 35.

Indeed, Professor Menezes ignores Queensland Rail's proposal to de-couple the setting of reference tariffs for the West Moreton network from the 'ceiling' revenue limit that otherwise would be determined using a properly-determined DORC valuation. This de-coupling approach would result in Queensland Rail setting reference tariffs for coal traffic on the West Moreton network at a level below ceiling, and broadly equivalent to the current reference tariff.

Without this evidence/consideration, we contest the finding of the second Menezes report that allocative efficiency is at risk should the QCA adopt Queensland Rail's proposed valuation approach.

### ***Conclusion on the second Menezes report***

Professor Menezes' second report explains that its '... task is to assess different valuation approaches in terms of the economic principles of allocative, productive and dynamic efficiency'.<sup>21</sup> In our view, and having regard to this objective, Professor Menezes' report does not provide a compelling basis to support its preferred valuation approach:

- no data or evidence is presented on the extent to which *allocative efficiency* would be adversely affected by Queensland Rail's proposed DORC valuation approach, with the report instead relying on unsubstantiated assertions of access charges being 'too high' and which may 'adversely impact on coal exploration and production'.
- *dynamic efficiency* primarily considers the forward-looking incentives for future investment – yet the main argument in the second Menezes report is that excluding certain existing and still-functioning assets is necessary to avoid Queensland Rail receiving 'windfall gains', based on a conceptual model which relies on judgements about the expectations of past investors – not Queensland Rail. We make no claim that a windfall gain is necessary to support dynamic efficiency. We do, however, consider that the valuation approach proposed by the QCA (and supported by Professor Menezes) represents a significant departure from both that regulator's past valuation practice and that which could reasonably have been anticipated by Queensland Rail. This impacts the credibility of the regulator's assurances for recovery of future investments, potentially impacting on Queensland Rail's regulatory risk.
- provided the same mechanisms are applied to assure that future investments are prudent and efficient, and that the West Moreton network is operated efficiently, the different valuation approaches are equivalent in terms of *productive efficiency*.

---

<sup>21</sup> Menezes, Prof. F., (2015) *A regulatory economics assessment of the proposed Western System asset valuation approaches*, Report for the Queensland Competition Authority, UniQuest File Reference Co2173, page 5.

---

## 3 *Response to the third Menezes report*

### *Conceptual model misrepresents the circumstances of the 2015 DAU*

Queensland Rail proposes in its 2015 DAU that new reference tariffs would take effect from the date upon which these are approved by the QCA.

The QCA's draft decision is to refuse to approve this approach. The QCA has instead sought to require Queensland Rail make an adjustment for any over- or under-recovery of revenues from 1 July 2013, the date access charges under the 2008 access undertaking were originally scheduled to expire. The QCA has (provisionally) estimated that this would require a downwards adjustment of \$3.00/ '000 gross tonne kilometres (gtk) for existing coal Access Holders on the West Moreton network, representing around \$26.3 million in present value terms over the period of the 2015 undertaking.

The QCA refused to approve Queensland Rail's current approach because it is considered Queensland Rail's proposal would 'create regulatory uncertainty, which would, among other things, adversely impact on investment'.<sup>22</sup> Previously, in its 2013 DAU, Queensland Rail had proposed to include an adjustment, wherein approved reference tariffs would effectively be back-dated to 1 July 2013. The QCA's draft decision is that this change in approach – from the 2013 DAU to the 2015 DAU – has created uncertainty for access seekers/holders, which has the potential to negatively affect investment by them. The QCA commissioned Professor Menezes to consider this issue.

The third Menezes report makes several assertions regarding Queensland Rail's approach in the 2015 DAU:

- that it would 'create asymmetric risk', including a 'perception that the regulatory process favours QR ...'
- this perception 'may be translated into an increase in regulatory risk' such that that investment incentives for access seekers would be diminished.<sup>23</sup> An extreme scenario is constructed wherein an access seeker makes an investment which, because of the withdrawal of the refund mechanism, then proves to be commercially unviable.

Professor Menezes' claims are based on a conceptual model which seeks to characterise the investment incentives confronting an access seeker. The report uses this model to show, purportedly, that 'there will be projects that would have gone ahead under a recoupment/refund regime, but that will not go ahead under the 'heads you win, tails I lose' scenario'.<sup>24</sup>

---

<sup>22</sup> Queensland Competition Authority (2015), *Draft decision: Queensland Rail's 2015 Draft Access Undertaking*, October, page. vi

<sup>23</sup> Menezes, Prof. F., (2015) *The economic impact of QR's proposal not to include an adjustment to refund or recoup differences in tariffs: Stage 1 Report*, UniQuest Project No. C02344, page 12.

<sup>24</sup> *Ibid*, page 6.

The conceptual model relies on there being an interim tariff and then a final tariff. Access seekers would make their investment decisions based on the interim tariff, but with an understanding that the access provider would provide either reimbursement or recoupment once the final tariff is determined. Critically, the access provider (in this case, Queensland Rail) is assumed to have unilateral discretion to choose whether to maintain or rescind the offer of a final-tariff adjustment.

The fundamental failing in Professor Menezes' conceptual model is that:

- the 2013 DAU was not an 'interim' tariff, in the sense that the tariffs proposed in the 2015 DAU are 'final' tariffs – these are two completely separate regulatory instruments, one replacing the other and changed in several material ways, not just by the omission of a tariff adjustment provision
- Queensland Rail cannot simply 'choose its policy'<sup>25</sup> as suggested by Professor Menezes; the QCA remains the jurisdictional regulator with power to approve or refuse to approve access undertakings.

Relevant too is whether the adverse outcomes suggested in the third Menezes report have actually occurred. Looking at the specific circumstances of Queensland Rail and the West Moreton network, the third Menezes report presents no information to suggest that:

- any access seekers have investment proposals that they have 'delayed or cancelled' on account of Queensland Rail's 2015 DAU, and specifically its omission of any adjustment provision, and
- any access seeker investments were made with an expectation of a tariff adjustment, which have then proven to be uncommercial without this adjustment.

The conclusions of regulatory risk posited in the third Menezes report are therefore academic, and not grounded in any factual analysis. As with the second Menezes report, no data or analysis is presented on the economics of coal mining and rail transport, to evidence whether the risks as theorised are material, or trivial.

Whether access seekers had a reasonable expectation of a refund/recoupment is subjective. Whilst it is correct that Queensland Rail did propose in the 2013 DAU an adjustment mechanism, this was part of a package of financial and non-financial access terms. Queensland Rail's withdrawal and resubmission of its 2015 DAU introduced a raft of other changes, and to consider one component in isolation is misleading.

In the context of assessing a change in asset valuation approach for Queensland Rail, Professor Menezes is dismissive of Queensland Rail's expectations, yet for access seekers he accepts unequivocally the same premise for access seekers in the context of a tariff adjustment. We find these two positions inconsistent.

### ***Conclusion on the third Menezes report***

The third Menezes report relies on a conceptual model that fails to properly reflect the circumstances of the tariff proposal incorporated in Queensland Rail's 2015 DAU. The 2015 DAU is a stand-alone proposition, which will be approved or otherwise by the regulator in accordance with its powers and duties under the Act. The 2015 DAU tariff proposal is materially different to that in both the 2008 access undertaking as currently in effect, and that proposed in earlier DAUs.

---

<sup>25</sup> *Ibid*, page 7.

The report constructs a scenario of increased risk for access seekers, which is argued to adversely affect the incentives for them to invest in otherwise commercial projects. But no data is presented to suggest that these risks actually materialised, or contributed to any change in investment outcomes.

In our view the conclusions of the third Menezes report are not supported by evidence reliably reflecting the circumstances of the West Moreton network and its catchment of coal mines.



## Annexure 4

PwC report on recovery of efficient costs

# *Queensland Rail*

## Recovery of efficient costs

*Queensland Rail*

*Recovery of efficient  
costs*

*23 December 2015*





---

# *Contents*

1	Introduction	1
2	Determining efficient costs	3
3	Allocating efficient costs	8
4	Adjustment amount	14



---

# 1 Introduction

## *Background*

On 5 May 2015, Queensland Rail submitted a draft access undertaking (the **2015 DAU**) to the Queensland Competition Authority (**QCA**). The QCA released its draft decision on the 2015 DAU on 8 October 2015.

Queensland Rail has requested an independent report from PricewaterhouseCoopers Australia (**PwC**) considering the basis on which the regulator has determined Queensland Rail's efficient costs for the West Moreton network, and specifically the interaction with the QCA's cost-allocation approach and proposed adjustment amount in its draft decision. Our review is intended to form part of Queensland Rail's submission in response to that draft decision.

The concept of efficient costs is core to the pricing principles set out in section 168A of the *Queensland Competition Authority Act 1997* (**the QCA Act**). Specifically, the Act requires that the price for access be such that the expected revenue is at least sufficient to allow Queensland Rail to recover its efficient costs, including a return on investment.

Where there are common network costs, shared between different access seekers or services, the basis on which these costs are allocated between them will directly impact on Queensland Rail's ability to recover those efficient costs. The QCA's proposed approach will not allow Queensland Rail to recover its efficient costs (as determined by the QCA) because:

- certain costs are allocated on the basis of the QCA's assessment of available network capacity, creating an artificial constraint on the share of costs allocated to coal users for the purposes of determining Reference Tariffs (and leaving a residual of 'unallocated' costs which Queensland Rail has no reasonable prospect of recovering from non-coal traffics), and
- the proposed adjustment amount further reduces the 'expected revenue' from access charges such that this is below even what QCA has determined as efficient costs.

## *This report*

In chapter 2, we provide background and context for Queensland Rail's proposed ceiling price and reference tariff. We then compare these with the QCA's recommended reference tariff for the West Moreton system. In contemplating the QCA's position, we also investigate the definition of 'efficient cost', insofar as how the QCA has applied or interpreted this for Queensland Rail and other sectors.

We then provide our views on the cost-allocation approach the QCA has adopted in deriving the 2015-16 West Moreton system ceiling price and the QCA's philosophy of applying an adjustment amount in setting the 2015-16 reference tariff. We discuss how the QCA's proposals fail to allow Queensland Rail a reasonable opportunity to recover its efficient cost, and does support the QCA Act's pricing principles or Queensland Rail's legitimate business interests (sections 138(2)(g) and (b)).

## ***Disclaimer***

This Report has been prepared for Queensland Rail under the terms of our Engagement Contract with Queensland Rail. As an independent report, it has been prepared for Queensland Rail but does not necessarily reflect the views of Queensland Rail. In preparing this Report we have only considered the circumstances of Queensland Rail. Our Report is not appropriate for use by persons other than Queensland Rail, and we do not accept or assume responsibility to anyone other than Queensland Rail in respect of our Report.

The information, statements, statistics and commentary (together the 'Information') contained in this report have been prepared by PwC from material provided by Queensland Rail, and from other industry data sources external to Queensland Rail. PwC may at its absolute discretion, but without being under any obligation to do so, update, amend or supplement this document.

PwC does not express an opinion as to the accuracy or completeness of the information provided, or the assumptions made by the parties that provided the information. PwC disclaims any and all liability arising from actions taken in response to this Report. This Report does not constitute legal advice.

The Information contained in this Report has not been subjected to an Audit or otherwise verified. The information must not be copied, reproduced, distributed, or used, in whole or in part, for any purpose other than as detailed in our Engagement Contract without the written permission of Queensland Rail and PwC.

---

## 2 Determining efficient costs

### Introduction

In its draft decision on Queensland Rail's 2015 DAU, the QCA proposed a 2015-16 reference tariff of \$18.88/'000 gtk<sup>1</sup> for the West Moreton network. The QCA also proposed an 'adjustment amount' (provisionally \$3.00/'000 gtk), bringing the reference tariff to be applied to \$15.88/'000 gtk.<sup>2</sup> The adjustment amount reflected Queensland Rail's purported over-recovery of revenue in 2013-14 and 2014-15, which the QCA calculated at \$26.3 million.

The QCA's draft decision notes that the ceiling price of \$18.88/'000 gtk (for 2015-16) allows Queensland Rail to generate expected revenue for the service that, in its view, is sufficient to meet the efficient costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved.<sup>3</sup> A key element of the QCA's derivation of this ceiling price is how the QCA has allocated certain shared costs between coal and other traffics using the West Moreton network.

In contemplating the QCA's draft decision, we consider it important to clarify what is meant by 'efficient costs', specifically by considering how the QCA has applied (or interpreted) this definition to its decisions on Queensland Rail and other regulated entities.

### Definition of efficient cost

Efficient cost is not a defined term in the QCA Act, but it is an important consideration for the QCA in making a decision on draft access undertakings, including proposed reference tariffs.

The QCA Act provides that the pricing principles (section 138(2) and 168A(a)) in relation to the price of access to a service are that the price should:

*generate expected revenue for the service that is at least enough to meet the efficient costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved*

Our interpretation of this pricing principle is that QCA needs to ensure that the revenue generated is 'at least enough' to recover the 'efficient costs'. How efficient costs are determined directly influences how the reference tariff is set, which then signals how much revenue would be generated (given the forecast utilisation of the service) by that regulated entity.

Despite the significance of efficient cost in the QCA's decision making process, the definition of efficient cost has, generally, not been approached prescriptively. To assess whether the proposed costs are efficient, the QCA generally uses benchmarks, including costs incurred by comparable entities, but considering also the characteristics of the relevant facility/service.

---

<sup>1</sup> Gross tonne kilometres

<sup>2</sup> QCA (2015), *Draft Decision on Queensland Rail's 2015 DAU*, page 216.

<sup>3</sup> *Ibid*, page 216.

For example, the QCA's draft decision on Aurizon Network's 2014 DAU used the concept of 'reasonable costs' as a proxy for 'efficient costs' when assessing operating and maintenance costs. By 'reasonable', and without commenting on the validity of such an approach, the QCA meant the costs were:

- consistent with the costs of other relevant businesses (and would be therefore be reflective of efficient costs to the extent such organisations were exposed to competition),
- justifiable, given the scale and nature of Aurizon Network's operations, and
- escalated in a manner consistent with relevant cost indices.<sup>4</sup>

Similarly, in assessing DBCT Management's 2004 and 2005 DAUs, the QCA sought to benchmark DBCT Management's claims for corporate overheads against what would be expected for a stand-alone coal terminal manager.<sup>5</sup>

## **Queensland Rail's 2015 DAU**

Part 7 of the 2015 DAU sets out Queensland Rail's proposed definition of 'Efficient Costs', which has been accepted by the QCA for the declared service:

*Efficient Costs means, for each Year during the Evaluation Period, the costs that would be reasonably expected to be incurred by a Railway Manager adopting efficient work practices to provide, operate and maintain the Network at the required service standard and meet its obligations under Access Agreements, having regard to the circumstances in which Queensland Rail operates its business (including any transitional arrangements agreed between Queensland Rail and the QCA) and including business and corporate overheads and QCA Levy.*

The QCA's draft decision did not seek to challenge Queensland Rail's definition of 'Efficient Costs'. We interpret this to mean that the QCA has considered it appropriate to approve Queensland Rail's proposed definition. Accordingly, for this report, we refer to the definition included in Queensland Rail's 2015 DAU. A key aspect of this definition is that it refers to the 'costs that would reasonably be expected to be incurred', and its specific acknowledgement of Queensland Rail's circumstances.

In its draft decision on the 2015 DAU the QCA has accepted certain costs proposed by Queensland Rail, and recommended adjustments to others.<sup>6</sup>

For maintenance costs, for instance, the QCA's draft decision was influenced by its consultant's assessment that certain of Queensland Rail's maintenance costs were reasonable, some were considered 'excessive in scope' (and downwards adjustments proposed) and various other adjustments suggested to capitalise (rather than expense) costs for certain maintenance activities.<sup>7</sup>

For operating costs, the QCA accepted Queensland Rail's forecast cost base of \$37.2 million over the period of the 2015 DAU.

---

<sup>4</sup> QCA (2014), *Draft Decision: Aurizon Network 2014 Draft Access Undertaking, Maximum Allowable Revenue*, September 2014, pages 26-27. QCA (2015), *Consolidated Draft Decision: Aurizon Network 2014 Draft Access Undertaking, Vol IV, Maximum Allowable Revenue*, page 4.

<sup>5</sup> QCA (2004), *Draft Decision: Dalrymple Bay Coal Terminal Draft Access Undertaking*, October 2004, page xiv. QCA (2005), *Final Decision: Dalrymple Bay Coal Terminal Draft Access Undertaking*, April 2005, page 156.

<sup>6</sup> We understand Queensland Rail will respond to these proposed cost adjustments, and therefore we restrict our analysis to on matters relating to cost-allocation methods and the adjustment amount.

<sup>7</sup> QCA (2014), *Draft Decision: Queensland Rail's 2013 Draft Access Undertaking*, October 2014, pages 122-123.

Our general observation is that Queensland Rail's proposed operating and maintenance costs have been assessed by the QCA to be 'efficient' at the aggregate level, or require relatively minor adjustment such that the regulator has considered these to be efficient.<sup>8</sup>

For the purpose of this report, we assume that the QCA's estimate of costs for the West Moreton system, at the aggregate level, represents a suitable proxy for efficient costs.

Subsequently, the QCA allocated these costs to determine the share of costs to be recovered from coal traffics through the West Moreton reference tariff. This means not all QCA-proposed efficient costs are allocated to coal services.

## ***2015 DAU Reference Tariff derivation***

Queensland Rail proposed a 2015-16 ceiling price of \$34.92/'000 gtk for the West Moreton network, based on a depreciated optimised replacement cost (DORC) valuation of existing assets and forecasts of network utilisation, operating and maintenance costs and other relevant parameters.

Queensland Rail adopted the DORC asset valuation prepared by Everything Infrastructure for the QCA in 2008 (with minor adjustments and exclusions), and upon which the current Reference Tariffs are based. Queensland Rail rolled forward the 2007-08 asset valuation to 2014-15 dollars, accounting for depreciation, inflation and capex over that period. This yielded an opening asset value of \$487.6 million for the West Moreton network. Queensland Rail allocated \$354.0 million of that value to coal services.

Although this approach resulted in a 2015-16 West Moreton system ceiling price of \$34.92/'000 gtk, Queensland Rail proposed a West Moreton system reference tariff of \$19.41/'000 gtk.

Queensland Rail noted in its initial 2015 DAU submission that setting the reference tariff below the ceiling price accommodates current market conditions and provides Queensland Rail the flexibility to preserve its customer base. Without this flexibility, Queensland Rail said its network assets could become stranded. This would not be in the interests of Queensland Rail, current access holders and future access seekers.

Queensland Rail's proposed West Moreton network reference tariff was otherwise determined based on forecast capex, maintenance and operating costs, and other parameters as described in its 2015 DAU submission. Queensland Rail assigned shares of those forecast costs between coal and non-coal traffics, reflecting the mixed use of the network.

Table 1 compares Queensland Rail's proposal with the QCA's draft decision.

---

<sup>8</sup> We understand Queensland Rail intends to respond to certain aspects of how the QCA and its consultant have determined efficient costs for certain functions/activities, and also the omission of certain planned capital expenditure projects. Also, a key point of difference remains the basis on which the QCA has proposed to value the West Moreton network. On this, we understand Queensland Rail will respond separately to the QCA's proposal to exclude certain "life expired" assets from the West Moreton network valuation, and also other elements of this valuation.



**Table 1 Queensland Rail and QCA positions**

Parameter for coal	Queensland Rail Position (Total) \$m	Queensland Rail Position (Coal) \$m	Reasoning	QCA Position (Total) \$m	QCA Position (Coal) \$m	Reasoning
Opening asset value	487.6	354.0	73% weighted average allocation to coal	288.3	190.0	66% weighted average allocation to coal
Common network assets – post-95	169.9	132.0	77.7% allocation to coal (87 out of 112 contracted paths are for coal)	158.8	109.3	68.8% (77 paths use West Moreton network, and 10 paths are for non-West Moreton services): 77 (not 87)/112
Common network assets – pre-95	301.8	206.1	68.3% (= 77.7% x (100%-12.1% (metro blackout)))	113.4	64.7	57.1% (= 68.8% x (100%-17% (metro blackout)))
Coal-specific infrastructure	16.0	16.0	100% allocation	16.1	16.1	100%
Capex (five years)	141.9	133.0	94% - train paths basis - forecast coal share	144.2	99.2	68.8% (77/112)
Maintenance costs (five years)	143.0	139.9	98% - gtk basis – forecast coal share	114.6	89.6	98% of \$37.2 m variable costs + 68.8% of \$77.4 m fixed costs
Operating costs (five years)	37.2	34.9	94% - train paths basis – forecast coal share	37.2	28.2	98% of \$6.9 m variable costs + 68.8% of \$30.3 m fixed costs

Source: QCA (2015), Draft Decision on Queensland Rail’s 2015 DAU and Queensland Rail (2015), Explanatory Submission: Queensland Rail’s Draft Access Undertaking 1, volume 2. QCA’s proposed operating costs of \$28.2 million include \$0.6 million working capital allowance.

Table 1 highlights that the QCA’s and Queensland Rail’s cost-allocation methods differ markedly. Importantly, it shows that the QCA’s allocation method has reduced the opening asset value and allocated future costs for coal traffics. As expected, this reduces significantly the ceiling price for coal services.

For the opening asset value, this difference is a function of both the regulator’s exclusion of certain assets from the DORC valuation, and the lower allocated share to coal. For maintenance and operating costs, the difference reflects largely the way in which these costs are allocated, and specifically the QCA’s allocation of ‘fixed’ maintenance or operating costs on a train-path/available capacity basis.

Queensland Rail had previously proposed that the allocation of the opening asset value reflect an assumed constraint on the number of train paths that could be contracted by coal services. The QCA has adopted this allocator, but then extended it to apply to all fixed costs (both maintenance and operating).

## Determining efficient costs

We understand Queensland Rail intends to provide further information to the QCA regarding this assumed constraint, which Queensland Rail considers diminishes its relevance as an allocator for the West Moreton opening asset base, and indeed for other cost categories.

For forward-looking costs, Queensland Rail proposed the allocation should reflect forecast usage, as represented by relative contracted volumes. By contrast, the QCA has allocated the forward looking costs based on the contracting constraint and 'available capacity'.

## 3 *Allocating efficient costs*

### *Cost allocation and the QCA's 2015 draft decision*

Queensland Rail proposed that coal traffic pay for 94 per cent of future (common network) capital expenditure over the term of the 2015 DAU. This was based on the ratio of the forecast number of West Moreton network train paths coal traffics would use to the forecast total number of train paths used.

The QCA proposed that coal traffics pay for 68.8 per cent of Queensland Rail's capex on the West Moreton system. The QCA determined this figure by considering the number of train paths that coal services could contract for on the West Moreton network (i.e. 77), based on an assumed contracting constraint, and then dividing that figure by the number of train paths available to be contracted generally (i.e. 112). As noted above, we understand Queensland Rail intends to provide further information to the QCA concerning this 87 (or 77, excluding 10 coal paths which originate on the Metropolitan network) train path constraint.

Setting aside the basis of the assumed 87-train path constraint for now, a core characteristic of any cost allocation approach is that it should afford the regulated business an opportunity to recover its (efficient) costs, given the circumstances that are expected to prevail over the relevant regulatory period. The allocation method may not guarantee this outcome – for instance, it may be premised on risky factors, such as actual network utilisation or actual cost performance – but the *expected* outcome upon initialisation should be that all efficient costs would be recovered.

However, the QCA's allocation approach operates in such a way that Queensland Rail cannot generate expected revenue for the service that is at least enough to meet the efficient costs of providing the service and include a return on investment commensurate with the regulatory and commercial risks involved.

The QCA's allocation approach does not allow Queensland Rail to recover the full efficient costs of new capital, and we demonstrate this by way of the following example (refer Box 1, below).

The QCA's cost-allocation method for fixed costs related to maintenance and operations incurs the same deficiency. A portion of those costs remains unassigned under the QCA's methodology.

Queensland Rail's proposed approach allocates all future costs across forecast users. In this way, the 'expected revenue' from the combined coal and non-coal access charges is sufficient to recover these costs.

### **Box 1: Illustration of cost allocation ‘gap’**

The following illustration demonstrates how the QCA’s proposed allocation approach creates a ‘gap’ in Queensland Rail’s ability to recover its efficient costs.

Suppose Queensland Rail spends \$112 million on a capital project necessary to maintain services on the West Moreton network (and that the QCA approves this expenditure as efficient). There are 112 available paths to be contracted on the West Moreton network. Assume, in the absence of any contracting arrangements, that:

- 87 paths are available for coal-train services
- 25 paths are available to passenger/freight traffic

In this scenario, and applying the QCA’s allocation approach, \$87 million of the capex is allocated to coal traffic and \$25 million is assigned to non-coal traffic.

However, suppose a customer then contracts for 10 coal-train services but originating in the Metropolitan network. Effectively, this means:

- 77 (instead of 87) paths are available for West Moreton coal-train services
- 25 paths remain available to passenger/freight traffic

Under the QCA’s proposal, coal traffic will be assigned \$77 million of the \$112 million cost. Passenger/freight traffic would be assigned \$25 million. However, \$10 million is not assigned to any party. Efficient capital costs are \$112 million but only \$102 million can be recovered. The QCA’s proposal effectively creates a \$10 million shortfall for Queensland Rail.

A further concern emerges where the assumption of sufficient demand for the non-coal paths is challenged. The QCA’s allocation approach assumes that demand both exists for any non-coal train paths, and that the users of these train paths will pay an access charge sufficient to recover that allocated share of costs. Assuming a future scenario of no non-coal traffic whatsoever, then Queensland Rail would be allowed only to recover 68.75% (77/112 paths) of future costs, despite there being no other network users other than coal.

In our view, the QCA’s cost-allocation method for future costs is inconsistent with the statutory pricing principle (s. 168A(a) of the QCA Act). The only way that Queensland Rail could recover its efficient costs would be for actual system performance over the term of the 2015 DAU to be dramatically different to current forecasts,<sup>9</sup> noting also that these forecasts have been accepted by the QCA.

### ***Basis of the QCA’s allocation approach***

The QCA argues that its cost allocation approach is reasonable as ‘coal traffics should only pay for the paths they can contract to use’.<sup>10</sup>

Accepting this raises some interesting parallels with other regulated networks. Many regulated assets operate as part of a combined system, and are reliant on supply chains either upstream or downstream, which may be owned/operated by a different entity. Examples include bulk water and water distribution/retailing, and other rail systems connecting to export shipping terminals.

---

<sup>9</sup> Specifically, non-coal traffic would need to increase to be exactly equal to the forecast implied by the QCA’s allocation approach, and the revenue generated by this traffic equal to the cost-base unallocated to coal. Increases in coal traffics generally would not contribute to Queensland Rail recovering its efficient costs, as this would either trigger a reset of coal Reference Tariffs, or enact the QCA’s proposed take-of-pay capping mechanism.

<sup>10</sup> *Ibid*, page vi

The nature of these assets is such that capacity in different parts of the network will vary, and ultimately *system* capacity is limited by the most constrained system component. A framework which uses 'available capacity' for a particular group of users to allocate costs may create an outcome where the service provider either cannot recover a share of its costs, or the unit cost allocated to one user-group may be inappropriate.

**Box 2: Bulk water supply system with downstream channel constraint**

Consider a bulk water supply network with a nominal annual supply capacity of 10,000ML. The system provides water to two groups of irrigators – one group in a channel system, and another group which access water directly from the river system.

The channel system has a limited capacity and can distribute only 9,000ML. The irrigators in this system tend to grow high-value horticultural products, which require water in each year. The river irrigators are mostly dry-land crop farmers, with a seasonal and variable demand for water.

Demand is forecast at 8,000ML for channel irrigators. Given prevailing weather and commodity market conditions, river irrigators expect to use only a negligible amount of water for the foreseeable future. The bulk water provider needs to spend \$10m on a dam safety upgrade; an initiative which is unrelated to any one group of users.

Based on the concept of 'available capacity', channel irrigators argue that they should be allocated only 90 per cent of cost of the dam safety works – given that they cannot contract for more than 9,000 of the 10,000ML of capacity. But this approach leaves the bulk water provider with the challenge of recovering 10 per cent of the upgrade costs from a customer base with only ad hoc demand, and little to no immediate likelihood of using water.

By accepting an external, assumed capacity constraint as a basis for allocating West Moreton network costs, the QCA is effectively creating a similar situation for Queensland Rail. Although there clearly is excess capacity in the existing network, no smaller rail solution is possible – this otherwise would be captured in an optimised valuation - yet only a fraction of network costs are able to be recovered from current and reasonably prospective users.

The QCA goes on to assert that Queensland Rail's allocation method would:

*... allow inefficient price discrimination as it allocates costs to coal-carrying trains for services they are unable to contract, which would be inconsistent with the statutory pricing principles.<sup>11</sup>*

*[and could result in Queensland Rail seeking] compensation (in the form of cross-subsidisation) for losses result from increased competition<sup>12</sup>*

The basis of the QCA's claims is not clear.

On the first matter, the QCA seems to infer that *any* price discrimination is inefficient. To be inefficient, price discrimination would need to bias the operational or investment decisions of system users, or indeed those of Queensland Rail itself. Price discrimination can in fact be efficient, if it is structured in such a way as to recover system costs with the least distortion to demand. The statement ignores also that cost allocation is not the only one driver of how prices are determined. The QCA's analysis does not demonstrate how its cost allocation method either avoids price discrimination (for instance, by showing that the prices for non-coal services would be the same as for coal) or that this would be inefficient.

---

<sup>11</sup> *Ibid*, page 138

<sup>12</sup> *Ibid*, page 140

On the second, how the QCA has assessed the existence of cross-subsidisation is not apparent. Typically, a cross-subsidy would be held to exist where one user pays more than the stand-alone cost of providing the relevant service, whilst another pays less than the incremental cost of their demand.<sup>13</sup> Given that coal traffics are paying a less-than-100 per cent share of West Moreton network costs, which would indicate an access charge below stand-alone costs, we do not accept a *prima facie* claim of cross-subsidisation.

### ***Inconsistency with allocation approach for Aurizon Network***

The approach proposed by the QCA for Queensland Rail is inconsistent with how the QCA addresses cost recovery for Aurizon Network.

Even though a small proportion of traffic on Aurizon Network's Central Queensland Coal Network are non-coal services, the QCA allows Aurizon Network to recover 100 per cent of capital expenditure through reference tariffs for coal traffic.

For some maintenance and operating costs (e.g. train operations management), Aurizon Network's draft costing manual identifies that 98 per cent of these costs are allocated for the purposes of setting the coal reference tariff.<sup>14</sup> The draft costing manual does not provide detail on how the 2 per cent allocation to non-coal traffics is determined; it simply notes a notional percentage of Full Time Equivalents (FTEs) are assigned to non-coal traffics.

Train-path splits between coal and non-coal traffics (or at least those reflecting theoretically available train paths) are not used in allocating Aurizon Network's below-rail costs for coal and other traffics.

### ***Allocation will result in Queensland Rail not recovering its efficient costs***

The QCA's draft decision<sup>15</sup> considers legitimate business interests to refer to the access provider's commercial interests in recovering its efficient costs in providing the relevant service and to earn a normal (regulated) return on its invested capital in supplying the relevant service. As the QCA is only allowing Queensland Rail to recover a proportion (being less than 100 per cent) of its future West Moreton costs Queensland Rail's legitimate business interests are not being preserved.

The QCA rationalises this outcome, noting that:

*...any anticipated shortfall in non-coal revenue is a commercial matter for Queensland Rail ...*<sup>16</sup>

In our view this is an inappropriate interpretation of how risks on a shared network ought to be managed. Stakeholders have claimed, and the QCA seems largely to have accepted, that allocating costs based on forecast network utilisation results in:

---

<sup>13</sup> Refer, for instance, QCA (2013), *Statement of Regulatory Pricing Principles*, August, page 38: "The Authority agrees that application of the cross-subsidy test requires the use of the appropriate incremental and stand-alone cost measures."

<sup>14</sup> See page 16 of Aurizon Network's draft Costing Manual, available at: [http://www.qca.org.au/getattachment/cf010d79-aafe-481e-b119-19d5a70c14e2/AN-Revised-Costing-Manual-2014-\(tracked\).aspx](http://www.qca.org.au/getattachment/cf010d79-aafe-481e-b119-19d5a70c14e2/AN-Revised-Costing-Manual-2014-(tracked).aspx)

<sup>15</sup> *Ibid*, page 251.

<sup>16</sup> *Ibid*, page 139.

...coal services being required to compensate Queensland Rail for reductions in demand for non-coal traffics.

[and]

... Queensland Rail's proposed allocation [has] the effect of transferring Queensland Rail's risk to coal producers.<sup>17</sup>

What this ignores is that *any* allocation of costs is beneficial to coal users, over the alternative where they are solely responsible for the (stand-alone) costs of the West Moreton network. It also dismisses the reality of the shared utilisation of the network, insofar as non-coal traffics have unequivocally declined. The cost allocation methodology needs to reflect this, as to do otherwise will create an outcome where Queensland Rail cannot recover its efficient costs.

To illustrate this, Table 2, below, presents Queensland Rail's implied pre-tax return on its West Moreton network, under the parameters and forecasts as set by the QCA in its draft decision on the 2015 DAU. This pre-tax return is then compared to the (equivalent pre-tax<sup>18</sup>) regulated return of 7.6 per cent.

Included in this example is all of Queensland Rail's West Moreton network costs and revenues, including for coal and other traffics. The coal revenue is based on the Reference Tariff as proposed by the QCA (but adding back the \$3.00/000 gtk adjustment amount). Costs are similarly based on QCA-accepted amounts.

**Table 2 Financial implication of cost allocation**

		2015-16	2016-17	2017-18	2018-19	2019-20
		\$000's	\$000's	\$000's	\$000's	\$000's
Revenue		████	████	████	████	████
Operating and maintenance costs		████	████	████	████	████
EBIT		████	████	████	████	████
Average assets		████	████	████	████	████
ROA	(%)	(████)	██	██	██	██
<b>ROA (5-year average)</b>				██		

Source: Queensland Rail

Even accepting all of the QCA's determinations on costs for the purposes of this illustration – including the significant reduction in opening asset value – Queensland Rail's average pre-tax return is only █████. For Queensland Rail to earn a full commercial return would require an implausibly large increase in network utilisation, or a significant and unanticipated increase in the level of Transport Service Payments from the Queensland Government.

<sup>17</sup> *Ibid*, page 142.

<sup>18</sup> We have applied a pre-tax WACC of 7.6%, which Queensland Rail advises is equivalent to the QCA's proposed post-tax nominal vanilla WACC of 6.93%.

The QCA's draft decision does not provide Queensland Rail a reasonable opportunity to earn normal regulated return on its invested capital in supplying the relevant service, which is inconsistent with Queensland Rail's legitimate business interests.



## 4 Adjustment amount

### *Adjustment amount and the QCA's 2015 draft decision*

The QCA's draft decision proposes a 2015-16 West Moreton system ceiling price/reference tariff of \$18.88/'000 gtk. In doing so, the QCA proposes a (provisional) adjustment amount of \$3.00/'000 gtk, resulting in the proposed West Moreton system tariff being \$15.88/'000 gtk. The adjustment amount is noted as provisional as the QCA intends to recalculate the exact adjustment at the time of its final decision, which would be influenced by the date that this decision takes effect.

The adjustment amount appears to be an attempt by the QCA to retrospectively adjust for access charge revenue earned in previous periods. We understand that Queensland Rail will separately respond to this approach, and its permissibility under the QCA Act.

The QCA's draft decision<sup>19</sup> argues that an adjustment amount provision in an access undertaking that refers to a date before that undertaking's commencement is not retrospective. We do not comment on whether we agree with this interpretation, as the focus of our argument is on how the QCA Act directs the QCA to consider the application of the pricing principles. In our view, whether Queensland Rail's past revenues exceeded its efficient costs are irrelevant to the QCA's application of the pricing principles, and in any case that it not what the adjustment amount is seeking to achieve.

For the purposes of this analysis, we focus on the effect of the proposed adjustment in terms of Queensland Rail's recovery of its efficient costs.

Section 168A(a) of QCA Act provides that the pricing principles in relation to the price of access to a service are that the price should (emphasis added):

*generate **expected revenue** for the service that is at least enough to meet the efficient costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved.*

The words 'generate **expected revenue**' indicate the access provider has not yet earned the revenue. In particular, the reference to 'expected' makes it clear the concept is of a forward-looking view of the revenue anticipated to be earned under the parameters approved by the regulator. The QCA Act's pricing principles direct the QCA to adopt a forward-looking view on the price of access.

The practical and certain effect of the QCA's proposed adjustment is that, even accepting the way in which the QCA has determined 'efficient costs' (including adjustments to the Queensland Rail asset value and allocation of these costs as between coal and other users), Queensland Rail cannot generate 'expected revenue' sufficient to recover its efficient costs. Indeed, this outcome is acknowledged categorically by the QCA:

*This price of access is less than the \$18.88/'000 gtk as at 1 July 2015 which the QCA considers would otherwise generate expected revenue for the service that is at least sufficient to meet the efficient costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved.<sup>20</sup>*

---

<sup>19</sup> QCA (2015), *Draft Decision on Queensland Rail's 2015 DAU*, page 210.

<sup>20</sup> *Ibid*, page 216.

## ***Allocation will result in Queensland Rail not recovering efficient costs***

Incorporating the adjustment amount (\$3.00/'000 gtk) within the framework of QCA's cost allocation proposal, would result in Queensland Rail being unable to recover its efficient costs.

Table 3 presents a stylised operating statement for Queensland Rail's West Moreton network coal functions. Revenue and costs reflect only those determined/allocated by the QCA for Queensland Rail's coal functions, and the implied pre-tax return is estimated, applying the QCA's proposed adjustment charge, to the QCA-determined regulatory asset base in each period. This pre-tax return is then compared to the (equivalent pre-tax<sup>21</sup>) regulated return of 7.6%.

**Table 3 Financial implication of adjustment amount**

	2015-16	2016-17	2017-18	2018-19	2019-20
	\$000's	\$000's	\$000's	\$000's	\$000's
Revenue	38,373	39,659	41,007	42,350	43,665
Operating and maintenance costs	38,052	28,793	29,871	30,254	31,450
EBIT	321	10,866	11,136	12,096	12,214
Average assets	193,592	211,421	230,817	249,152	265,472
ROA (%)	0.2	5.1	4.8	4.9	4.6
<b>ROA (5-year average)</b>			<b>4.1</b>		

Source: Queensland Rail

This analysis shows that Queensland Rail's average pre-tax return is 4.1% - materially below the equivalent pre-tax return of 7.6% as applied for this scenario. The QCA's draft decision does not provide Queensland Rail a normal regulated return on its invested capital and to generate sufficient revenue to cover its 'efficient costs'.

Our view is that this is inconsistent with the intended application of the statutory pricing principles, and is contrary to Queensland Rail's legitimate business interests (section 138(2)(b)) in recovering its efficient costs in providing the relevant service and to earn a normal (regulated) return on its invested capital in supplying the relevant service. Accordingly, we do not consider it appropriate for the QCA's draft decision to employ a retrospective adjustment amount to the 2015-16 West Moreton network reference tariff.

<sup>21</sup> We have applied a pre-tax WACC of 7.6%, which Queensland Rail advises is equivalent to the QCA's proposed post-tax nominal vanilla WACC of 6.93%.



## Annexure 5

### Necessary changes to the 2015 SAA

---

Queensland Rail Limited

---

[Insert name of Operator]

---

[Insert name of Operator's Customer] [Note: Complete only if the Operator's Customer is a party to this agreement – otherwise delete.]

---

# Access Agreement

[Note: This agreement is a standard access agreement and is based on the following assumptions, that:

- the grant of Access Rights only involves the allocation of Available Capacity;
- no provisions relating to the provision of Additional Capacity in respect of an Extension are required;
- no conditions precedent are necessary; and
- the Access Holder is the rolling stock operator for the relevant Train Services.

Without limiting the ability of the parties to negotiate terms, if any of these assumptions are not true, then the parties will need to seek to negotiate amendments.

This standard access agreement contains various notes in respect of alternative clauses (for example, in relation to Dangerous Goods or where the Operator's Customer is also a party) and in respect of adjustments that are needed where the Reference Tariff does not apply to the setting of the Access Charges.]

Version: 1

Date Approved: [insert date]

# Contents

<b>1</b>	<b>Term and renewal</b>	<b>1</b>
1.1	Term	1
1.2	Right to renewal	1
<b>2</b>	<b>Grant</b>	<b>2</b>
<b>3</b>	<b>Accreditation</b>	<b>2</b>
<b>4</b>	<b>Payment obligations</b>	<b>5</b>
4.1	Access Charges	5
4.2	Obligation to make payments	6
4.3	Method of payment	6
4.4	Disputing payments	6
4.5	Interest on overdue payments	7
4.6	Adjustments	7
4.7	Interim take or pay notices	8
<b>5</b>	<b>Network management</b>	<b>9</b>
5.1	Maintenance	9
5.2	Network Control	9
5.3	Compliance	10
<b>6</b>	<b>Train operations</b>	<b>11</b>
6.1	Operation of Train Services	11
6.2	Additional Train Services	11
6.3	Compliance	12
6.4	Compliance before commencing to operate a Train Service	15
6.5	Compliance with Scheduled Time	16
6.6	Alterations to Train Services	16
6.7	Operator to supply information	17
6.8	Queensland Rail may supply Data	17
6.9	Authorisation of Rolling Stock and Train Configurations	18
6.10	Entering and exiting the Network	19
6.11	Notification of damage or disrepair	19
<b>7</b>	<b>Operating Requirements Manual</b>	<b>19</b>
7.1	Amendments for safety matters and Material Changes	19
7.2	Amendments for matters where clause 7.1 does not apply	20
7.3	Compensation	21
7.4	Replacement of Operating Requirements Manual	24
<b>8</b>	<b>Interface risk management</b>	<b>24</b>
8.1	Compliance with IRMP	24
8.2	Review of IRMP	24
8.3	Application of TRSA	25
8.4	Rights for Inspection or Audit	26
8.5	Notice of Inspection or Audit	26

8.6	Conduct of Inspection or Audit	27
8.7	Cooperation for Inspection or Audit	28
8.8	Costs for Inspection or Audit	29
8.9	Results of Inspection or Audit and general compliance	29
8.10	Cooperation for rail safety investigation	29
<b>9</b>	<b>Incident, environmental and emergency management plan requirements</b>	<b>30</b>
9.1	Operator's Emergency Management Plan	30
9.2	Obstructions	32
9.3	Notification	33
9.4	Management and response	34
9.5	Dangerous Goods	34
9.6	Intervention to prevent or mitigate damage	35
9.7	Noise mitigation	36
<b>10</b>	<b>Inspection of Trains and Rolling Stock</b>	<b>37</b>
<b>11</b>	<b>Risk and indemnities</b>	<b>38</b>
11.1	Indemnities for personal injury and property damage	38
11.2	Operator's carriage indemnity	39
11.3	Indemnity for Dangerous Goods	40
11.4	Conditions of carriage exclusions and limitations of liability	40
11.5	Assistance in defence of Claims arising from Network Incidents	40
11.6	Operator responsible for Operator's Associates	41
11.7	Benefit of indemnities in favour of Associates	41
<b>12</b>	<b>Limitations on liability</b>	<b>42</b>
12.1	No liability for Consequential Loss	42
12.2	Limitation on Claims	42
12.3	Failure to pay amounts	42
12.4	Liability for Network	42
12.5	Claims in respect of delays to Train Movements	43
12.6	Claims in respect of non-provision of access	44
<b>13</b>	<b>Suspension</b>	<b>45</b>
13.1	Right of suspension	45
13.2	Details of suspension	45
13.3	Effect of suspension	45
<b>14</b>	<b>Default and termination</b>	<b>46</b>
14.1	Termination by Queensland Rail	46
14.2	Termination by the Operator	47
14.3	Remedy	47
14.4	Termination for Change in Control	48
14.5	Obligations and other rights upon termination or expiration	48
14.6	Removal of Rolling Stock following termination	48
<b>15</b>	<b>Insurance</b>	<b>49</b>
15.1	Obligation to obtain and maintain Insurance	49

15.2	Insurer	50
15.3	Essential terms and conditions	50
15.4	Payment of premium and deductibles	50
15.5	No prejudicial action by the Operator	51
15.6	Disclosure of Insurance	51
15.7	Compliance	51
15.8	Claims	51
15.9	Insurance not a limit of Operator's liability	52
<b>16</b>	<b>Security</b>	<b>52</b>
16.1	Obligation to provide Security	52
16.2	Recourse to Security	53
16.3	Review of Security	53
16.4	Return of Security	54
<b>17</b>	<b>Adjustment for changes</b>	<b>55</b>
17.1	Review of schedule 3	55
17.2	Adjustment for a Material Change	56
<b>18</b>	<b>Disputes</b>	<b>56</b>
18.1	Application of Dispute resolution process	56
18.2	Resolution by escalation	57
18.3	Resolution by Expert	57
18.4	Resolution of Disputes by Rail Safety Regulator	59
18.5	Resolution of Disputes by Queensland Rail	60
18.6	Determination by court	60
18.7	Injunctive Relief	60
18.8	Dispute not to affect performance of obligations	60
18.9	Extension of time frames	60
<b>19</b>	<b>Force majeure</b>	<b>60</b>
19.1	Force Majeure Event occurrence	60
19.2	Termination	62
<b>20</b>	<b>Reduction and relinquishment of Access Rights</b>	<b>62</b>
20.1	Reduction of Access Rights	62
20.2	Relinquishment of Access Rights	62
<b>21</b>	<b>Assignment</b>	<b>64</b>
21.1	Assignment by Queensland Rail	64
21.2	Assignment by the Operator	64
21.3	Charging	65
21.4	Effect of Assignment or Charge	65
<b>22</b>	<b>Representations and warranties</b>	<b>65</b>
<b>23</b>	<b>Confidentiality</b>	<b>67</b>
23.1	Confidentiality obligation	67
23.2	Exceptions	68



<b>24</b>	<b>Notices</b>	<b>68</b>
	24.1 Form of Notice	68
	24.2 Method of giving a Notice	68
	24.3 Particulars for the giving of Notices	68
	24.4 Effect and receipt of Notices	69
	24.5 Process service	69
	24.6 Representatives of the Operator	69
<b>25</b>	<b>GST</b>	<b>70</b>
	25.1 Definitions	70
	25.2 Sums exclude GST	70
	25.3 Responsibility for GST	70
	25.4 Reimbursement of expenses	70
	25.5 Tax invoice	70
	25.6 Adjustment	70
<b>26</b>	<b>General</b>	<b>71</b>
	26.1 Duty	71
	26.2 Legal costs	71
	26.3 Waiver and exercise of rights	71
	26.4 Amendments	71
	26.5 Rights cumulative	71
	26.6 Consents	71
	26.7 Further steps	72
	26.8 Governing law and jurisdiction	72
	26.9 Liability	72
	26.10 Counterparts	72
	26.11 Entire understanding	72
	26.12 Relationship of Parties	73
	26.13 Severability	73
	26.14 Survival	73
	26.15 Benefit	73
	26.16 No merger	73
	26.17 Enforcement of indemnities	74
	26.18 Sublease	74
	26.19 Most favoured nation status	75
<b>27</b>	<b>Interpretation</b>	<b>77</b>
	27.1 Definitions	77
	27.2 Construction	95
	27.3 Headings	97

<b>Schedule 1 - Reference schedule</b>	<b>98</b>
<b>Schedule 2 - Train Service Description</b>	<b>100</b>
<b>Schedule 3 - Calculation of Access Charges and other charges</b>	<b>105</b>
<b>Schedule 4 - Interface Risk Management Plan</b>	<b>113</b>
<b>Schedule 4 - Interface Risk Management Plan</b>	Error! Bookmark not defined.

## Date

# Parties

**Queensland Rail Limited** ABN 71 132 181 090 of Level ~~15, 295 Ann~~[14, Railcentre 1, 305 Edward](#) Street, Brisbane, Queensland (**Queensland Rail**)

and

The person set out in **item 1 of schedule 1 (Operator)**

and

The person set out in **item 3 of schedule 1**

---

# Background

- A Queensland Rail operates, and is the Railway Manager for, the Network.
  - B The Operator is seeking, and Queensland Rail has agreed to provide to the Operator, access to the Network for the purposes of the Train Services.
  - C This agreement sets out the terms agreed by the Parties in accordance with which the Operator is granted non-exclusive access to the Network for the Train Services.
- 

# Agreed terms

## 1 Term and renewal

### 1.1 Term

This agreement:

- (a) commences on the Commencement Date; and
- (b) terminates on the Termination Date (except to the extent that any provisions of this agreement are expressed or implied to survive the expiry or termination of this agreement).

### 1.2 Right to renewal

- (a) The Parties acknowledge that any rights which the Operator may have in relation to the renewal of this agreement will be as expressly provided in the Access Undertaking.

- (b) Where the Operator seeks a renewal of this agreement, each Party acknowledges that:
  - (i) negotiations in respect of renewal must occur in good faith as required by and subject to the QCA Act and the Access Undertaking; and
  - (ii) the negotiations and any renewal are subject to compliance with all applicable Laws including section 266 and 266A of the TIA as they apply to Queensland Rail.
- (c) In this **clause 4.21.2** a reference to a renewal is a reference to the execution of a new access agreement that has the effect of continuing all or some of the Train Services under this agreement for a further term.

## 2 Grant

- (a) Queensland Rail grants to the Operator the non-exclusive right to operate the Train Services on the Network commencing on the Commitment Date for those Train Services until the End Date for those Train Services (unless this agreement terminates earlier in accordance with its provisions (including **clauses 15 and 20.215 and 20.2**, as applicable) or any Law) subject to, and in accordance with, this agreement (**Access Rights**).
- (b) The Access Rights create a non-exclusive contractual right and do not give the Operator any right, title or interest of any proprietary nature in the Network.
- (c) The Operator must not:
  - (i) operate on or use any part of the Network that is not expressly permitted in accordance with the Access Rights; or
  - (ii) use the Network for carrying out any provisioning, inspection, testing, maintenance of Rolling Stock, any marshalling, shunting or other relocation of Rolling Stock or storage of Rolling Stock or for any other purpose other than the operation of Train Services, unless as expressly permitted or required in accordance with this agreement (including as directed by Queensland Rail in accordance with this agreement).

## 3 Relationship with Operator's Customer

### 3.1 Application

- (a) This **clause 3** only applies where the Operator's Customer is a Party.
- (b) If this **clause 3** applies but is inconsistent with any other provision of this agreement, then this **clause 3** prevails over that other provision to the extent of the inconsistency.

### **3.2 Transfer of Access Rights**

- (a) The Operator's Customer may, by giving notice to the other Parties, request that a Transfer occur under **clause 21.2** in respect of a Transferee nominated by the Operator's Customer (**Customer Initiated Transfer**).
- (b) Where the Operator's Customer requests a Customer Initiated Transfer, the Parties must do all things necessary to give effect to that Transfer in accordance with **clause 21.2**.
- (c) Where the Operator's Customer considers that the Operator has failed to do anything or to act promptly in complying with **clause 21.2** for the purpose of the Customer Initiated Transfer, then:
  - (i) the Operator's Customer may step in and do anything that the Operator is required to do to comply with **clause 21.2** in relation to that Customer Initiated Transfer; and
  - (ii) any costs or expenses incurred by the Operator's Customer in doing so will be recoverable from the Operator as debt due and owing from the Operator to the Operator's Customer.
- (d) If the Operator's Customer steps in under **clause 3.2(c)**, then Queensland Rail:
  - (i) must accept the Operator's Customer's exercise of rights and compliance with obligations under **clause 21.2** in relation to the Customer Initiated Transfer as if exercised or performed by the Operator; and
  - (ii) does not breach this agreement by doing so.

### **3.3 Information**

- (a) Nothing in **clause 24** prevents or otherwise restricts the Parties from disclosing to one another information in relation to or in connection with this agreement.
- (b) If requested by the Operator's Customer, the Operator and Queensland Rail (as applicable) must promptly provide to the Operator's Customer any information in relation to the exercise of rights or performance of obligations under this agreement.
- (c) Without limitation to **clause 3.3(b)**, where either Queensland Rail or the Operator gives a Notice (including an invoice) under this agreement to the other of them, then that Party must also give a copy of that Notice (including an invoice) to the Operator's Customer.

### **3.4 Participation in Disputes**

- (a) Despite **clause 19**, where:
  - (i) a Dispute Notice is given to the Operator's Customer under **clause 19.1(b)**; and

- (ii) the Dispute is solely between the Operator and Queensland Rail and does not require the Operator's Customer's participation to resolve the Dispute,

the Operator's Customer may elect not to participate in the dispute resolution process under **clause 19** by giving notice to that effect to the other Parties.

- (b) Where the Operator's Customer gives a notice under **clause 3.4(a)**, **clause 19** will apply as though a reference to the Parties does not include the Operator's Customer in relation to that Dispute.

### **3.5 Representations and warranties**

- (a) In addition to any other express or implied representations and warranties in this agreement, the Operator's Customer represents, warrants and undertakes to Queensland Rail that:
  - (i) it is a corporation validly existing under the laws applicable to it;
  - (ii) it has the power to enter into and perform all of its obligations under this agreement and has obtained all necessary consents and approvals to enable it to do so;
  - (iii) its obligations under this agreement are enforceable in accordance with their terms and are fully binding on it;
  - (iv) it is not in breach or default under any agreement to which it is a party to an extent or in a manner which would have a material adverse effect on its ability to perform its obligations under this agreement;
  - (v) there is:
    - (A) no litigation, arbitration or administrative proceeding taking place, pending, commenced or, to its knowledge, threatened against it; and
    - (B) no judgment or award has been given or made by, any court, arbitrator, other tribunal or governmental agency against it, which would or could have a material adverse effect on its ability to perform its obligations under this agreement;
  - (vi) it will as soon as practicable notify Queensland Rail of the occurrence of, or pending or threatened occurrence of, any event that may cause or constitute a material breach of any of the acknowledgments, representations, warranties or covenants of the Operator's Customer under this agreement and any event that could have a material adverse effect on its ability to perform its obligations under this agreement; and
  - (vii) all information provided by the Operator to Queensland Rail, whether pursuant to this agreement or otherwise, in relation to or in connection with the Train Services, the Operator's rights or

obligations under this agreement or the negotiation of this agreement, is correct and complete in all material respects and is not, whether by omission or otherwise, misleading or deceptive.

- (b) The representations and warranties set out in **clause 3.5(a)** are taken to be given and made on the Commencement Date and on each day during the Term.

## 4 Accreditation

- (a) The Operator must, on the Commitment Date for Train Services and then until the End Date for those Train Services, hold the Accreditation necessary for it to operate those Train Services in accordance with this agreement.
- (b) The Operator must:
  - (i) at least 20 Business Days prior to the Commitment Date, satisfy Queensland Rail (acting reasonably) of its compliance with **clause 4(a)**; and
  - (ii) ensure that Queensland Rail is and continues to be provided with a copy of the Operator's Accreditation, including:
    - (A) all notices from any Authority affecting or likely to affect the Operator's Accreditation;
    - (B) the relevant details of any renewal, suspension, amendment, restriction or termination of that Accreditation; and
    - (C) all accreditation conditions and accreditation notices (as those terms are defined under the TRSA) relating to that Accreditation.
- (c) The Operator must not operate Rolling Stock on the Network unless the Operator holds the Accreditation necessary to do so and then must do so in accordance with that Accreditation and this agreement.

## 5 Payment obligations

### 5.1 Access Charges

- (a) The Operator must pay to Queensland Rail the Access Charges at the times and in the manner set out in this agreement and any other charges or amounts payable in accordance with this agreement.
- (b) The Access Charges include amounts payable in relation to:
  - (i) the reservation of capacity in the Network for the Train Services; and
  - (ii) the utilisation of the Access Rights for the Train Services.
- (c) Where a Train Service does not operate, the Operator is still obliged to pay Access Charges in relation to the reservation of capacity for that

Train Service and in this regard the relevant component of the Access Charges is the Take or Pay Charge.

- (d) (i) After the last day of each calendar month during the Term; and
- (ii) where this agreement has expired or terminated, after that expiration or termination,

Queensland Rail will provide to the Operator an invoice for the Access Charges and any other charges or amounts payable by the Operator under this agreement (if any such amounts are payable) for that month or on or after the expiry or termination of this agreement (as applicable).

- (e) For clarity, Queensland Rail will review and amend **schedule 3** (including to vary or escalate Access Charges Inputs) from time to time in accordance with this agreement.

## 5.2 Obligation to make payments

- (a) Unless this agreement provides otherwise, the due date for the payment of an amount payable by a Party under this agreement is that date which is ten Business Days from the invoice date (as shown on the invoice for that amount from the other Party).
- (b) After a Party receives an invoice from another Party for an amount payable in accordance with this agreement, the paying Party must, on or prior to the due date for the payment of that amount, either:
  - (i) pay the other Party an amount equal to the amount payable as shown on the invoice; or
  - (ii) if the paying Party disputes on a bona fide basis all or part of the amount payable as shown on the invoice:
    - (A) pay by the due date the amount not in dispute and 50% of the amount in dispute; and
    - (B) give notice in writing to the other Party that it disputes the amount payable as shown on the invoice and a detailed statement as to the reasons for disputing the amount payable.

## 5.3 Method of payment

A Party must pay any amounts payable to another Party in accordance with this agreement in Australian currency by:

- (a) direct deposit into an account nominated by the invoicing Party for that purpose; or
- (b) such other method as the invoicing Party may reasonably require from time to time.

## 5.4 Disputing payments

- (a) If a Party has paid the amounts and given a notice in accordance with **clause 5.2(b)(i)5.2(b)(ii)** then, unless the Parties resolve the dispute in



accordance with **clause 19.2**, the dispute must be referred for determination by an Expert under **clause 19.3**.

- (b) Upon resolution of any dispute between the Parties about the calculation of an amount payable as shown on an invoice, if the amount payable as agreed by the Parties or determined by an Expert or a court is more or less than the amount that was paid, then the difference must be paid or refunded by the relevant Party to the other Party within five Business Days after the resolution of the dispute together with interest on that amount calculated in accordance with **clause 5.5** (provided that for the purpose of calculating that interest, the due date for payment is deemed to be the date when the amount in dispute would have been due and payable but for the dispute).

### **5.5 Interest on overdue payments**

- (a) If any amount which a Party is required to pay to another Party under this agreement is not paid on or before the due date for payment, interest will accrue on the outstanding amount from the due date for payment until that amount, together with the interest thereon, has been paid.
- (b) Interest will be calculated at the Interest Rate and must be paid monthly. Any interest accrued but unpaid at the end of each month will be capitalised and will thereafter itself bear interest.

### **5.6 Adjustments**

- (a) If any change, escalation or variation in the Access Charges is backdated, or otherwise relates, to a date on or before the date on which particular Train Services were operated in accordance with this agreement, then the Access Charges paid or payable in respect of those Train Services must be adjusted by Queensland Rail and the Operator to pass through that change, escalation or variation.
- (b) After taking account of the adjustment referred to under **clause 5.6(a)**:
  - (i) if there has been an under-recovery of Access Charges by Queensland Rail, then the Operator must pay the amount of that under-recovery to Queensland Rail; and
  - (ii) if there has been an over-recovery of Access Charges by Queensland Rail, then Queensland Rail must refund the amount of that over-recovery to the Operator.
- (c) For clarity, if Queensland Rail has issued an invoice for Train Services but the Operator has not yet paid that invoice, then Queensland Rail may issue a replacement or additional invoice for the purposes of giving effect to **clauses 5.6(a)** and **(b)**.
- (d) Any adjustment of an Access Charge in accordance with this **clause 5.6** will include interest calculated in accordance with **clause 5.5** as though the adjustment was due and payable on the date when the

original invoice for the Access Charge to which the adjustment relates was due and payable.

- (e) This **clause 5.65.6** does not apply in relation to an Adjustment Charge (as defined in the Access Undertaking) which is incorporated in any Access Charge in accordance with **schedule 3** and the Access Undertaking.

## **5.7 Interim take or pay notices**

- (a) Queensland Rail may, from time to time, give the Operator a statement of the accrued Take or Pay Charge liability in respect of a particular period. If such a statement is given, Queensland Rail and the Operator will meet, or otherwise discuss that statement, in good faith to seek to agree the accrued Take or Pay Charge liability in respect of that period.
- (b) Queensland Rail may, from time to time, give the Operator a notice under this **clause 5.7(b)5.7(b)** that states the accrued Take or Pay Charge liability in respect of a particular period (**Interim Take or Pay Notice**).
- (c) An Interim Take or Pay Notice is taken to be conclusive evidence of the accrued Take or Pay Charge liability in respect of the relevant period, subject to the resolution of any dispute raised by the Operator in respect of that Interim Take or Pay Notice.
- (d) If the Operator wishes to dispute any matter set out in an Interim Take or Pay Notice, then any Dispute Notice to be given by the Operator under **clause 1919** must be given within ten Business Days (or such longer period as agreed by Queensland Rail) after the relevant Interim Take or Pay Notice was given to the Operator. Where the Operator does not give a Dispute Notice within that time period, the Operator is taken to agree that the matters in the relevant Interim Take or Pay Notice are correct.
- (e) Where an Interim Take or Pay Notice is disputed under **clause 5.7(d)5.7(d)** and that dispute has been finally resolved in a way that requires amendments to that Interim Take or Pay Notice, then Queensland Rail will give the Operator an amended Interim Take or Pay Notice (to replace the original Interim Take or Pay Notice) that is consistent with the resolution of the dispute.
- (f) Where two or more Interim Take or Pay Notices relate in whole or part to the same period:
  - (i) if there is any inconsistency between those Interim Take or Pay Notices in respect of that period, then the most recent Interim Take or Pay Notice prevails to the extent of that inconsistency; and
  - (ii) if there is no inconsistency between those Interim Take or Pay Notices in respect of that period, then the Operator has no right to dispute the accrued Take or Pay Charge liability for that period under any of those Interim Take or Pay Notices except to the

extent that the Operator still has a right to dispute the earliest of those Interim Take or Pay Notices under **clause 5.7(d)** (including where the Operator has already commenced such a dispute).

- (g) Despite any other provision in this agreement to the contrary and without limitation to **clause 5.7(d)**, the Operator has no right to, and must not, dispute the calculation of a Take or Pay Charge in respect of a Year to the extent that the Take or Pay Charge has been calculated in a manner consistent with the relevant Interim Take or Pay Notices relating to that Year.

## 6 Network management

### 6.1 Maintenance

- (a) Queensland Rail will maintain the Network in a condition such that the Operator can operate Train Services in accordance with this agreement.
- (b) Nothing in this agreement obliges Queensland Rail to fund or construct any Extension.
- (c) Queensland Rail reserves the right to permit third parties to carry out Third Party Works on, under or over the land on which the Network is located. Queensland Rail has no liability to any other Party nor will any other Party make a Claim against Queensland Rail for any costs, expenses, losses or damages incurred by that other Party in relation to or as a consequence of Third Party Works.

### 6.2 Network Control

- (a) Queensland Rail will provide, and has exclusive responsibility for, Network Control in respect of the Network.
- (b) Queensland Rail may exercise Network Control by issuing Network Control Directions to the Operator and the Operator's Associates.
- (c) In exercising Network Control, Queensland Rail may:
  - (i) delay, alter, add, cancel, re-route or re-schedule a Train Service; and
  - (ii) alter the Scheduled Times for Train Services in the Train Schedule.
- (d) The Operator must:
  - (i) comply with Network Control Directions;
  - (ii) ensure that:
    - (A) Train drivers are contactable by the Network Controller to receive Network Control Directions using communications systems which comply with the Operating Requirements Manual; and

- (B) all of the Operator's Trains are equipped with means of communication to permit the Operator's Associates to comply with this agreement;
- (iii) notify the Network Controller as soon as the Operator becomes aware that it is not possible for the Operator (or the Operator's Associates) to comply with a Network Control Direction or the Operator (or the Operator's Associates) has not complied with a Network Control Direction; and
- (iv) notify the Network Controller as soon as the Operator becomes aware of any changes or delays in Train Services or any circumstances which have affected or may affect Network Control including the ability of any Train Service to conform to its Scheduled Times.
- (e) Without limitation to **clause 6.2(c)** and despite any other provision of this agreement, Queensland Rail may treat other train services preferentially to the Train Services for the purpose of seeking to:
  - (i) bring a passenger train service back to its scheduled running time;
  - (ii) minimise any delay experienced by a passenger train service; or
  - (iii) avoid a passenger train service that is operating, is scheduled to operate, or will be scheduled to operate in the Metropolitan Network during any Peak Period becoming delayed.

### 6.3 Compliance

Queensland Rail must observe and comply with:

- (a) all applicable Laws and Authorisations including Queensland Rail's Accreditation, to the extent that the Laws and Authorisations relate to Queensland Rail's performance of its obligations or exercise of its rights under this agreement;
- (b) the lawful requirements of relevant Authorities, to the extent that those requirements relate to Queensland Rail's performance of its obligations or exercise of its rights under this agreement;
- (c) this agreement;
- (d) the IRMP including any safety [and environment](#) standards identified in the IRMP as applicable to Queensland Rail;
- (e) the Network Management Principles;
- (f) the Operating Requirements Manual; and
- (g) the Access Undertaking, to the extent that the Access Undertaking relates to Queensland Rail's performance of its obligations or exercise of its rights under this agreement,

and, where observance or compliance with the matters in **paragraphs (a)(a) to (g)(g)** cannot occur because of an inconsistency between those matters, then:

- (h) for the purpose of observance and compliance those matters must be prioritised in the above order (with a matter earlier in the list having a higher priority for observance and compliance to a matter later in the list); and
- (i) Queensland Rail's obligation under this **clause 6.36.3** is to observe and comply with those matters in that order of priority,  
to the extent of the inconsistency.

## 7 Train operations

### 7.1 Operation of Train Services

The Operator must only operate Train Services in accordance with this agreement (including the Train Service Description and any Network Control Directions) **unless** if the Operator has obtained the prior written approval of Queensland Rail (for example, an authority to travel) including any terms and conditions of that approval in addition to or varying this agreement in respect of those Train Services (including in respect of the Access Charges applicable) and complies with that approval and those terms and conditions in operating the Train Services.

### 7.2 Additional Train Services

If the Operator notifies Queensland Rail that it wishes to operate an Additional Train Service, then:

- (a) Queensland Rail must use reasonable endeavours to schedule the Additional Train Service in accordance with the Network Management Principles; and
- (b) on and from the Additional Train Service being scheduled in the relevant Daily Train Plan ~~(as defined under the Access Undertaking)~~,<sup>1</sup> the Additional Train Service will be treated as though it was a Train Service for the purpose of this agreement including in relation to the payment of Access Charges.

### 7.3 Ad Hoc Train Services

- (a) If the Operator notifies Queensland Rail that it wishes to operate an Ad Hoc Train Service, then Queensland Rail may, but is not obliged to, schedule the Ad Hoc Train Service in the Daily Train plan.
- (b) If Queensland Rail schedules the Ad Hoc Train Service in the Daily Train Plan then, on and from the Ad Hoc Train Service being scheduled in the relevant Daily Train Plan, the Ad Hoc Train Service will be treated as though it was a Train Service for the purpose of this agreement, except that Ad Hoc Train Services will not be counted as Train Services for the purpose of calculation of Take or Pay Charges.
- (c) If Queensland Rail schedules an Ad Hoc Train Service in the Daily Train Plan then, despite any other provision of this Agreement:

- (i) the Operator must, in operating the Ad Hoc Train Service, comply with the Train Service Description subject to any derogations permitted by Queensland Rail; and
- (ii) the Operator will have no Claim against Queensland Rail, its directors or staff in respect of any failure by Queensland Rail, for any reason (including breach or negligence by Queensland Rail), to make Infrastructure available for the Operator to operate the Ad Hoc Train Service.

#### **7.37.4 Compliance**

- (a) The Operator must observe and comply with:
  - (i) all applicable Laws and Authorisations including the Operator's Accreditation and the Operator's Emergency Management Plan, to the extent that the Laws and Authorisations relate to the Operator's performance of its obligations or exercise of its rights under this agreement;
  - (ii) the lawful requirements of relevant Authorities, to the extent that those requirements relate to the Operator's performance of its obligations or exercise of its rights under this agreement;
  - (iii) this agreement;
  - (iv) the IRMP including any safety and environment standards identified in the IRMP as applicable to the Operator;
  - (v) the Network Management Principles;
  - (vi) the Operating Requirements Manual;
  - (vii) all Network Control Directions;
  - (viii) the relevant requirements of:
    - (A) any Authorisation; and
    - (B) any other consent, approval, lease, licence or other authority,
 

held by or applying to Queensland Rail, or to which Queensland Rail is a party, from time to time in relation to the Network, other relevant facilities (if any) or land to which the Operator is provided access by Queensland Rail in accordance with this agreement (provided Queensland Rail has notified the Operator of those relevant requirements); and
  - (ix) the Access Undertaking, to the extent that the Access Undertaking relates to the Operator's performance of its obligations or exercise of its rights under this agreement,

and, where observance or compliance with the matters in **paragraphs (i)(i) to (ix)(ix)** cannot occur because of an inconsistency between those matters, then:

- (x) for the purpose of observance and compliance those matters must be prioritised in the above order (with a matter earlier in the list having a high priority for observance and compliance to a matter later in the list); and
  - (xi) the Operator's obligation under this **clause 7.4(a)** is to observe and comply with those matters in that order of priority, to the extent of the inconsistency.
- (b) Without limitation to **clause 7.4(a)**, the Operator must:
- (i) not access or be upon the Network (or the land on which the Network is located) for any purpose other than to exercise its rights and to comply with its obligations in accordance with this agreement;
  - (ii) at all times act in accordance with Prudent Practices;
  - (iii) do everything necessary in accordance with Prudent Practices to avoid causing or contributing to any nuisance, annoyance or disturbance to Queensland Rail or the occupiers or users of the Network, or land adjacent to the Network;
  - (iv) not do or omit to do anything that would cause or contribute to the Network (or the land on which the Network is located) not being clean, presentable, well maintained and in good repair, appearance and condition;
  - (v) not cause or allow any rubbish, debris, freight, substance or thing<sup>1</sup> to be deposited or released on or about the Network (or the land on which the Network is located) except as expressly required by the Operating Requirements Manual or any Network Control Directions;
  - (vi) obtain and maintain all necessary Authorisations required for the Operator to exercise the Operator's rights or comply with the Operator's obligations under this agreement;
  - (vii) not interfere with, hinder or prejudice:
    - (A) Queensland Rail's conduct of its operations;
    - (B) Queensland Rail's or any other Network Participant's use of the Network; or
    - (C) the functions and obligations of Queensland Rail as a Railway Manager (including under Queensland Rail's Accreditation);

---

<sup>1</sup> But excluding exhaust gases and other substances required to be released in accordance with Prudent Practices for the purposes of operating the Operator's Rolling Stock.

- (viii) not:
  - (A) cause, permit or contribute to any act or omission that may result in Queensland Rail:
    - (1) failing to comply with any Law; or
    - (2) incurring (for clarity, directly or indirectly) any costs or expenses in complying with any Law that Queensland Rail would not otherwise have incurred; or
  - (B) fail to promptly comply with a direction given by Queensland Rail for the purpose of Queensland Rail's compliance with any Law relating to the Network, Queensland Rail's Rail Infrastructure Operations or this agreement (including the Train Services).
- (ix) ensure that its Rolling Stock operate safely, and otherwise be responsible for the operation of its Rolling Stock, on the Network (including ensuring that its Rolling Stock are accompanied at all times while on the Network by a member of the Operator's Associates who has authority to manage, and to keep secure, that Rolling Stock and anything on, or being transported by, that Rolling Stock); and
- (x) without limitation to **clause 7.3(b)(ix)7.4(b)(ix)**, ensure that the operation of its Rolling Stock (including the loading, unloading and cleaning of its Rolling Stock) is undertaken in a manner that:
  - (A) does not affect:
    - (1) the safe operation of the Rolling Stock or the Network; or
    - (2) the operations or activities of Queensland Rail or other Network Participants; and
  - (B) ensures that all things on or in the Operator's Rolling Stock remain on or in the Operator's Rolling Stock (and, if applicable, are secured in position) during transit.
- (c) Where the Operator fails to comply with **clause 7.3(b)(v)7.4(b)(v)**, Queensland Rail may remove and dispose of the relevant rubbish, debris, freight, substance or thing and the Operator must pay Queensland Rail's costs and expenses incurred by Queensland Rail in doing so and those costs and expenses will be a debt due and owing by the Operator to Queensland Rail.
- (d) The Operator must notify Queensland Rail of any failure, or likely failure, by the Operator to comply with this agreement as soon as practicable after the Operator becomes aware of that failure or likely failure.



#### **7.47.5 Compliance before commencing to operate a Train Service**

- (a) Without limiting any other provisions of this agreement, the Operator must only commence operating Train Services under this agreement if in respect of those Train Services:
- (i) the Operator has provided all Security as required in accordance with **clause 17.17**;
  - ~~(ii)~~ an Operating Plan has been prepared by the Operator and a copy provided to Queensland Rail;
  - ~~(iii)~~ an EIRMR has been prepared by the Operator and a copy provided to Queensland Rail so that any environmental risks and associated controls identified in the EIRMR can be addressed as part of the IRMP process under clause 9;
  - ~~(iv)~~ an IRMP has been agreed, determined or reviewed in relation to those Train Services in accordance with **clause 99** (except to the extent that **clauses 9.1 to 9.2** do not apply in accordance with **clause 9.3(c)**);
  - ~~(v)~~ the Operator has done all things necessary in relation to the Operator's Emergency Management Plan to comply with **clause 10.1**;
  - ~~(vi)~~ the Operator has effected all Insurances in accordance with **clause 16.6** and provided evidence of those Insurances to Queensland Rail in accordance with **clause 16.6(a)**;
  - ~~(vii)~~ the Operator holds the Accreditation necessary for it to operate the Train Services and has provided to Queensland Rail all things relating to that Accreditation in accordance with **clause 4(b)(ii)**;
  - ~~(viii)~~ the Operator has observed, complied with or implemented, all aspects of the Operator's **Emergency Response Management** Plan, the Operator's Accreditation and the IRMP that are required to be complied with prior to Train Services commencing;
  - ~~(ix)~~ the Operator has satisfied the requirements in **clause 7.97.10** which relate to the authorisation of Rolling Stock and Train Configurations; and
  - ~~(x)~~ the Operator has done all things that are necessary, and which can reasonably be done prior to operating the Train Services, to ensure the Operator's compliance with this agreement including the IRMP.
- (b) Queensland Rail must use reasonable endeavours to cooperate with the Operator to facilitate the Operator's compliance with **clause 7.4(a)7.5(a)**.
- (c) If the Operator has not complied with **clause 7.4(a)7.5(a)** for the relevant Train Services:

(i) by the Compliance Date and Queensland Rail does not reasonably expect that the Operator can do so before the Commitment Date for those Train Services; or

(ii) by the Commitment Date for those Train Services,

then:

(iii) provided that Queensland Rail has complied with **clause 7.4(b)7.5(b)**, Queensland Rail may notify the Operator requiring the Operator to comply with **clause 7.4(a)7.5(a)** in respect of those Train Services by a date which is 20 Business Days after the date of that notice; and

(iv) where the Operator does not comply with **clause 7.4(a)7.5(a)** by that date (**Failure**), Queensland Rail may, by notice to the Operator:

(A) terminate the Operator's Access Rights under this agreement in relation to the relevant Train Services relating to the Failure, but that termination will not affect any Access Rights (if any) under this agreement relating to other Train Services; or

(B) where a termination referred to under **clause 7.4(c)(iv)(A)7.5(c)(iv)(A)** would result in there being no Train Services under this agreement, terminate this agreement.

#### **7.57.6 Compliance with Scheduled Time**

The Operator must only operate Train Services in accordance with the applicable Scheduled Times and the relevant Train Schedule unless:

- (a) the Operator is expressly permitted or required to do otherwise in accordance with this agreement, the Operating Requirements Manual, the Network Management Principles or a Network Control Direction; or
- (b) the Parties agree otherwise.

#### **7.67.7 Alterations to Train Services**

(a) If the Operator is not able to operate a Train Service in accordance with its Scheduled Time, then:

(i) the Operator must, as soon as practicable prior to the time when that Train Service was scheduled for operation, notify Queensland Rail that it is not able to operate that Train Service and the reason for its inability; and

(ii) if the Operator has complied with **clause 7.6(a)(i)7.7(a)(i)**, then Queensland Rail will use reasonable endeavours to provide an alternative Scheduled Time for the relevant Train Service unless this would:

(A) alter the Scheduled Times for other Train Movements; or

- (B) result in Queensland Rail incurring additional costs or expenses.
- (b) If Queensland Rail provides an alternative Scheduled Time for a Train Service in accordance with **clause 7.6(a)(ii)7.7(a)(ii)**, the Operator must notify Queensland Rail immediately whether the Operator accepts that alternative Scheduled Time. If the Operator accepts that alternative Scheduled Time, then the Operator must operate the Train Service in accordance with that alternative Scheduled Time. For clarity, **clause 7.6(a)(ii)7.7(a)(ii)** does not apply to that alternative Scheduled Time.
- (c) If the Operator is not able to operate a Train Service in accordance with its Scheduled Time or an alternative Scheduled Time made available in accordance with **clause 7.6(a)(ii)7.7(a)(ii)** (or has not immediately notified Queensland Rail accepting such an alternative Scheduled Time), Queensland Rail may authorise the operation of another Train Movement at that Scheduled Time.

#### **7.77.8 Operator to supply information**

- (a) The Operator must provide and maintain all software, hardware and associated communication links necessary to ensure, to Queensland Rail's satisfaction, an effective interface between the Operator's and Queensland Rail's information systems as nominated by Queensland Rail. The interface with Queensland Rail's information systems will be subject to any requirements and controls specified by Queensland Rail (in its absolute discretion) including to protect the integrity and confidentiality of those information systems and the information contained in them.
- (b) The Operator must provide information to Queensland Rail as required in accordance with the Operating Requirements Manual (including any details in relation to Train Services or contact and other details for interface coordination).

#### **7.87.9 Queensland Rail may supply Data**

- (a) The Parties acknowledge that Queensland Rail may from time to time collect data in respect of the Operator's Rolling Stock (**Data**).
- (b) Queensland Rail may from time to time, in its absolute discretion, provide the Operator with access to the Data. The Operator will be responsible for all costs related to the transfer, conversion, modification and storage of any Data made available to the Operator by Queensland Rail.
- (c) Despite any other provision in this agreement, if the Operator receives any data from Queensland Rail that is not in respect of the Operator's Rolling Stock, then the Operator must:
- (i) immediately notify Queensland Rail, providing details of the relevant data;
  - (ii) not use the data for any purpose;

- (iii) not disclose the data to any person; and
  - (iv) comply with all directions given by Queensland Rail in relation to that data including the deletion, redirection or return of that data.
- (d) Any intellectual property rights in relation to the Operator's business or Train Services that are discovered or developed, or otherwise come into existence, in connection with the Data are assigned to and vest in Queensland Rail or its nominee on creation.
- (e) The Operator must undertake its own due diligence and investigations in relation to any Data made available by Queensland Rail under this **clause 7.8-7.9**. Queensland Rail does not represent or warrant the accuracy or completeness or the standard of care taken in the collection of Data. The Operator acknowledges that Queensland Rail does not owe it any duty of care and that it must independently satisfy itself (without reliance on Queensland Rail) as to the accuracy, completeness or veracity of the Data which Queensland Rail makes available to it.

#### **7.97.10 Authorisation of Rolling Stock and Train Configurations**

- (a) The Operator must only operate a Train Service using Rolling Stock or a Train Configuration in respect of which the Operator has:
- (i) provided to Queensland Rail:
    - (A) a certificate by a suitably qualified person, approved by Queensland Rail and appointed by and at the cost of the Operator, that the Operator's Rolling Stock and Train Configurations comply with the ~~IRMP~~[interface standards described in clause 8.3\(a\)\(ii\)\(C\), other than exceptions or unverified/unknown characteristics listed on the certificate](#); and
    - (B) relevant documentation (including reports on trials and/or commissioning tests) ~~demonstrating and load tables~~ [if required to demonstrate](#) to the satisfaction of Queensland Rail that the Operator's Rolling Stock and Train Configurations comply with the ~~IRMP~~[interface standards described in clause 8.3\(a\)\(ii\)\(C\), \(other than exceptions or unverified/unknown characteristics listed on the certificate\)](#).
  - (Certification); and
  - (ii) obtained from Queensland Rail a notice indicating that Queensland Rail is satisfied with that Certification for the purposes of those Train Services.

If the Operator obtains a notice referred to in **paragraph (ii)(ii)** that is subject to conditions (including conditions relating to the period for which that notice will apply), then the Operator must comply with those conditions and must only operate a Train Service in accordance with those conditions and while that notice applies.

- (b) During the Term, if the Operator wishes to modify any of the Rolling Stock or Train Configurations used for Train Services [or add new or additional Rolling Stock or Train Configurations](#), then the Operator must not use any such Rolling Stock or Train Configurations [for those Train Services](#) unless and until:
  - (i) the IRMP has been reviewed in accordance with **clause 9.2** in relation the modified Rolling Stock or Train Configurations;
  - (ii) the Operator has complied with **clause ~~7.9(a)~~7.10(a)** in relation to the modified Rolling Stock or Train Configurations, as applicable; and
  - (iii) the Parties have agreed any amendments to this agreement (including varying the methodology, rates or other inputs for calculating Access Charges) [and any necessary changes to the IRMP or the notice given in clause 7.10\(a\)\(ii\)](#) reasonably necessary to reflect the authorisation and use of the modified Rolling Stock or Train Configurations on the Network.

#### **~~7.10~~7.11 Entering and exiting the Network**

- (a) The Operator is solely responsible for, and bears the cost and risk of, obtaining and maintaining any rights to access or use Private Infrastructure that are necessary in order to enter or exit the Network or otherwise operate the Train Services in accordance with this agreement.
- (b) Despite any other provision in this agreement, the Operator is not relieved of any obligations under this agreement (and must continue to comply with all of its obligations under this agreement) even if the Operator cannot or does not obtain or maintain any such rights.

#### **~~7.11~~7.12 Notification of damage or disrepair**

The Operator must notify Queensland Rail as soon as practicable of any damage to, disrepair of or failure in the operation or function of any part of the Network of which the Operator becomes aware.

## **8 Operating Requirements Manual**

### **8.1 Amendments for safety matters and Material Changes**

- (a) Queensland Rail may amend the Operating Requirements Manual from time to time:
  - (i) in relation to safety [or environmental](#) matters or a Material Change;
  - (ii) to correct typographic or other minor errors; or
  - (iii) to update references to, or details for, persons or positions,in accordance with this **clause ~~8.18~~8.1**.
- (b) If amendments to the Operating Requirements Manual only partially relate to safety [or environmental](#) matters or a Material Change, then

those amendments that do relate to safety [or environmental](#) matters or a Material Change are made under this **clause 8.18.1**.

- (c) For the purpose of this **clause 8.18.1**, amendments are in relation to a safety [or environmental](#) matter even though that safety [or environmental](#) matter arises because of another matter that is not a safety [or environmental](#) matter – including for example, a change to the capability of the Network or to the way the Network operates to improve the Network's efficiency.
- (d) Where Queensland Rail amends the Operating Requirements Manual under this **clause 8.18.1**, it must notify the Operator of the amendments made including the date on which those amendments take effect.
- (e) Except where Queensland Rail requires immediate or urgent compliance for safety [or environmental](#) reasons or to comply with any Law, the date specified in a notice under **clause 8.1(d)** must be set so as to allow a reasonable period as determined by Queensland Rail (being no less than ten Business Days where the amendment relates to a safety [or environmental](#) matter or a Material Change) for the Operator to amend its processes, procedures and plans to comply with the amended Operating Requirements Manual.
- (f) Where Queensland Rail amends the Operating Requirements Manual in accordance with this **clause 8.18.1**, the Operator must bear its own costs of complying with and otherwise implementing the amendments (including the equipping of Rolling Stock with new or additional equipment or making any other modification to Rolling Stock).

## **8.2 Amendments for matters where clause 8.18.1 does not apply**

- (a) Where **clause 8.18.1** does not apply in respect of proposed amendments to the Operating Requirements Manual, Queensland Rail may make those amendments from time to time subject to this **clause 8.28.2** and **clause 8.38.3**.
- (b) If, where this **clause 8.28.2** applies, Queensland Rail considers that a proposed amendment to the Operating Requirements Manual may directly affect the Operator, then Queensland Rail must not make that proposed amendment before notifying the Operator of the proposed amendment and giving the Operator a reasonable period to make submissions on the proposed amendment to Queensland Rail.
- (c) A notice given by Queensland Rail under **clause 8.2(b)** must include details of:
  - (i) the proposed amendment (including the proposed date on which the amendment is to take effect); and
  - (ii) the date by which the Operator may make submissions to Queensland Rail in respect of the proposed amendment.

- (d) Without limiting Queensland Rail's considerations when deciding whether to proceed with any proposed amendment, Queensland Rail must consider any submissions from the Operator.
- (e) Queensland Rail may elect not to proceed with proposed amendments at any time including following a determination by an Expert as referred to in **clause 8.3(d)**.
- (f) If Queensland Rail amends the Operating Requirements Manual it must notify the Operator of the amendments made including, subject to **clause 8.2(g)**, the date on which those amendments take effect.
- (g) Except where Queensland Rail requires immediate or urgent compliance for safety reasons or to comply with any Law, the date specified in a notice under **clause 8.2(f)** must be set so as to allow a reasonable period as determined by Queensland Rail (being no less than ten Business Days) for the Operator to amend its processes, procedures and plans to comply with the amended Operating Requirements Manual.
- (h) Subject to **clause 8.38.3**, where Queensland Rail amends the Operating Requirements Manual in accordance with this **clause 8.28.2** the Operator must bear its own costs of complying with and otherwise implementing the amendments (including the equipping of Rolling Stock with new or additional equipment or making any other modification to Rolling Stock).

### 8.3 Compensation

- (a) This **clause 8.38.3** only applies:
  - (i) to the extent that the Access Rights under this agreement are within the scope of the Access Undertaking; and
  - (ii) where Queensland Rail's proposed amendments to the Operating Requirements Manual are made under **clause 8.28.2** (and not **clause 8.18.1**) in respect of:
    - (A) **(possession protocols)** Queensland Rail's protocols from time to time for managing and scheduling track possessions for the Network (but, for clarity, excluding the Network Management Principles);
    - (B) **(interface coordination)** Queensland Rail's procedures and requirements in respect of the day-to-day operational interactions and exchange of information between Queensland Rail and Network Participants associated with the operation of Trains on the Network including for Network Control, the operation of Trains and entering and exiting all or part of the Network;
    - (C) **(interface standards)** Queensland Rail's minimum requirements or standards relating to the interface between a Train and the Network (including to maintain agreed

operating parameters – for example, axle load) with which the applicable Rolling Stock and Train Configurations must comply in order to operate on the Network; or

(D) **(emergency and investigation procedures)** the Queensland Rail Emergency Procedures or Queensland Rail's procedures and requirements for the investigation of and response to Network Incidents.

(b) Where the Operator has given a written submission to Queensland Rail in respect of the proposed amendments that:

(i) expressly states that implementing the proposed amendment would directly result in the Operator suffering an average annual net cost over the remaining term of this agreement in connection with its exercise of rights and compliance with obligations under this agreement that is equivalent to 1% or more of the annual Access Charges (calculated assuming a gtk determined in accordance with **clause 5.2 Part 75.2** of **schedule 3** and assuming that rtp equals the number of Train Services that the Operator was entitled to operate for the Year under this agreement) (**Net Material Financial Impact**); and

(ii) provides details specifying the anticipated Net Material Financial Impact sufficiently to allow Queensland Rail to consider and assess the anticipated Net Material Financial Impact including:

(A) estimates of any additional costs, savings, benefits or detriments to be obtained or suffered (or reasonably expected to be obtained or suffered) by the Operator directly as a result of implementing the proposed amendment; and

(B) what (if any) adjustments to the proposed amendments would result in no or a reduced Net Material Financial Impact,

then:

(iii) the Operator represents and warrants that any estimates and other information given by it in its submission are, in all material respects, true, complete, accurate and not misleading; and

(iv) the Operator and Queensland Rail must negotiate in good faith to seek to agree:

(A) whether and to what extent the Operator may reasonably be anticipated to experience a Net Material Financial Impact; and

(B) where a Net Material Financial Impact is anticipated, either:

(1) compensation to address the actual Net Material Financial Impact; or



- (2) variations to the proposed amendments to minimise, or avoid there being, a Net Material Financial Impact.
- (c) For the purpose of ~~clause 8.3(b)(iv)~~**8.3(b)(iv)**, Queensland Rail must not be taken to have failed to act in good faith merely because it may take steps and time to coordinate negotiations with its negotiations with other Network Participants in relation to the proposed amendments.
- (d) Where Queensland Rail and the Operator do not agree the relevant matters under ~~clause 8.3(b)(iv)~~**8.3(b)(iv)** within 20 Business Days after the date referred to in ~~clause 8.2(c)(ii)~~**8.2(c)(ii)** (or such longer period as agreed by Queensland Rail and the Operator), Queensland Rail may refer the matter of whether there is a Net Material Financial Impact and the compensation (but not any variations to the proposed amendments) to an Expert for determination in accordance with ~~clause 19.3~~**19.3**.
- (e) For the purpose of ~~clause 8.3(d)~~**8.3(d)**, an Expert may (if requested by either or both of Queensland Rail and the Operator):
- (i) first make a determination in relation to the existence or extent of any Net Material Financial Impact; and
  - (ii) defer making a determination on the compensation for a specified period of time (determined by the Expert) to allow Queensland Rail and the Operator the opportunity to reach agreement on the compensation taking into account that preliminary determination.
- (f) Where Queensland Rail and the Operator agree variations to the proposed amendments under ~~clause 8.3(b)(iv)(B)(2)~~**8.3(b)(iv)(B)(2)** (even if compensation has not been agreed), Queensland Rail must only proceed with any varied proposed amendments to the Operating Requirements Manual by recommencing the process under ~~clauses 8.2 and 8.38.2~~ **and 8.3** (as applicable) (as well as under access agreements with all other relevant Network Participants) in respect of that new proposal.
- (g) The Operator must use all reasonable endeavours to minimise the Net Material Financial Impact suffered by it as a result of any amendments to the Operating Requirements Manual (including for the purpose of considering proposed amendments).
- (h) Subject to ~~clause 8.2(e)~~**8.2(e)**, Queensland Rail must account to the Operator in respect of the compensation (if any) agreed or determined under this ~~clause 8.38.3~~ only after:
- (i) Queensland Rail gives a notice under ~~clause 8.2(f)~~**8.2(f)** making the relevant proposed amendments; and
  - (ii) implementation of the relevant proposed amendments is complete, to Queensland Rail's satisfaction (acting reasonably), including with any modifications to the Operator's systems, equipment or Rolling Stock as required by the amendments having been made.

## 8.4 Replacement of Operating Requirements Manual

- (a) Nothing in ~~clauses 8.1 to 8.38.1~~ to 8.3 restricts or limits Queensland Rail's right to amend or replace the Operating Requirements Manual through the submission of a draft access undertaking or a draft amending access undertaking to the QCA in accordance with the QCA Act.
- (b) For clarity, Queensland Rail must not be taken to have amended the Operating Requirements Manual under either **clause 8.1** or **8.2** where it submits a draft access undertaking or draft amending access undertaking to the QCA in accordance with the QCA Act amending or replacing the Operating Requirements Manual in the Access Undertaking.

## 9 Interface risk management

### 9.1 Compliance with IRMP

- (a) The Operator and Queensland Rail must observe and comply with their respective responsibilities and obligations set out in the IRMP.
- (b) The Operator must use reasonable endeavours to not cause, permit or contribute to any act or omission which may give rise to Interface Risks that are not addressed in the IRMP. If the Operator does cause, permit or contribute to any act or omission that gives rise to, or is likely to give rise to, Interface Risks that are not addressed in the IRMP, the Operator must notify Queensland Rail as soon as practicable of the act or omission (as applicable) and the relevant Interface Risk.
- (c) If either Queensland Rail or the Operator (as applicable) fails to comply with the IRMP it must notify the Operator or Queensland Rail (as applicable) of the non-compliance as and when it becomes aware of such non-compliance. The notice must include details of the nature of the non-compliance and how the non-complying Party has rectified or intends to rectify the non-compliance.

### 9.2 Review of IRMP

- (a) The Operator and Queensland Rail must:
  - (i) upon the reasonable request at any time by either of them; **and**
  - (ii) if the Operator changes its Operating Plan (in which case the Operator must provide a copy of the amended Operating Plan to Queensland Rail); and
  - ~~(ii)(iii)~~ (iii) for any new or varied Train Services or Ad Hoc Train Services from time to time,

~~but no less than once in any 12 month period,~~ jointly review the IRMP, and amend it (including by replacing it) as necessary, to ensure that the Operator and Queensland Rail continue to agree that the Interface Risk

Assessment is still applicable and all Interface Risks are effectively managed under the IRMP.

- (b) For the purposes of a review referred to in **clause 9.2(a)**:
- (i) if either Queensland Rail or the Operator is not satisfied that the Interface Risk Assessment is still applicable and all Interface Risks are effectively managed under the IRMP, then ~~these Parties~~ they will undertake a joint Interface Risk Assessment (including, if ~~these Parties~~ they agree that it is appropriate, only in relation to specific matters or activities) as part of such a review; ~~and~~
  - (ii) Queensland Rail may request that the Operator review and update its EIRMR and provide Queensland Rail with a copy of its updated EIRMR prior to and for the purposes of the Parties undertaking a joint Interface Risk Assessment under clause 9.2(b)(i) above and reviewing and updating the IRMP; and
  - ~~(iii)~~ (iii) if Queensland Rail and the Operator are not able to agree any matter in relation to such a review, either of ~~these Parties~~ them may treat that inability to agree as a Dispute for the purposes of **clause 19**.
- (c) Where the IRMP identifies that training of the Operator's Associates is required and the Operator can only obtain that training from Queensland Rail, then:
- (i) Queensland Rail will provide the Operator with that training; and
  - (ii) the Operator must pay to Queensland Rail a reasonable commercial charge, as determined by Queensland Rail, for doing so.
- (d) For clarity, the Operator must not:
- (i) operate any new or varied Train Services under this agreement unless the IRMP has been reviewed in accordance with this **clause 9.2** in relation to those new or varied Train Services (as applicable); and
  - (ii) use any Rolling Stock or Train Configuration in operating a Train Service unless the IRMP has either been:
    - (A) prepared on the basis of the Train Services being operated using that Rolling Stock or Train Configuration (as applicable); or
    - (B) reviewed in accordance with this **clause 9.2** in relation to that Rolling Stock or Train Configuration (as applicable).

### 9.3 Application of TRSA

- (a) To the extent that anything under this **clause 9.3** is inconsistent with the TRSA, the TRSA prevails to the extent of the inconsistency.

- (b) The IRMP and the provisions under this agreement relating to the IRMP (including in relation to compliance with it and its review):
  - (i) together comprise an interface agreement (as defined under the TRSA) between the Operator and Queensland Rail; and
  - (ii) despite any other provision to the contrary in this agreement, may be disclosed to the Rail Safety Regulator to the extent that it is reasonably necessary to do so to comply with this agreement or the TRSA or any other Law.
- (c) Without limiting ~~clause 9.3(a)~~**9.3(a)**, to the extent that the Rail Safety Regulator has:
  - (i) decided under section 78 of the TRSA an arrangement that is to apply as between the Operator and Queensland Rail; and
  - (ii) stated that arrangement in an interface direction (as defined under the TRSA),
    - ~~clauses 9.1 to 9.2~~ **to 9.2** (including any IRMP) are subject to and must be consistent with that arrangement.

#### 9.4 Rights for Inspection or Audit

- (a) Subject to ~~clause 9.4(b)~~**9.4(b)**, if either the Operator or Queensland Rail has reasonable grounds to believe that the other has not complied, or is not complying, with any aspect of the IRMP or any obligation or duty under the TRSA, then that Party may conduct, or require the conduct of, an inspection or audit in respect of that compliance.
- (b) Prior to exercising a right under ~~clause 9.4(a)~~**9.4(a)**, a Party must:
  - (i) notify the other ~~of those Parties~~**Party** of that belief (including the grounds supporting that belief) and requiring that other Party to demonstrate that they are compliant; and
  - (ii) only proceed to an inspection or audit if that other Party fails to demonstrate compliance to the first Party's satisfaction (acting reasonably).
- (c) Without limiting ~~clause 9.4(a)~~**9.4(a)**, each of Queensland Rail and the Operator may conduct or require the conduct of an inspection or audit to assess the other's compliance with the IRMP periodically as specified in the IRMP.

#### 9.5 Notice of Inspection or Audit

The Party (**Inspecting Party**) conducting or requiring the conduct of an inspection or audit referred to in ~~clause 9.49.4~~ **(Inspection or Audit)** must give the other Party reasonable prior notice of that Inspection or Audit (except in the case of emergencies or if an event or circumstance referred to in ~~clauses 14 or 15~~**14 or 15** has occurred) and that notice must include the following:

- (a) details of the Inspection or Audit to be carried out;

- (b) the name of the person conducting the Inspection or Audit;
- (c) the timing and expected duration of the Inspection or Audit;
- (d) the location of the Inspection or Audit;
- (e) the grounds on which the Inspecting Party requires the Inspection or Audit; and
- (f) the Inspecting Party's requirements (acting reasonably) of the other Party in relation to the Inspection or Audit.

## 9.6 Conduct of Inspection or Audit

- (a) Subject to ~~clause 9.6(b)~~**9.6(b)**, any Inspection or Audit may be conducted by:
    - (i) the Inspecting Party or its appointed representative; or
    - (ii) by a suitably qualified person acceptable to Queensland Rail and the Operator (each acting reasonably).
  - (b) If an Inspection or Audit requires access to commercially sensitive information, then:
    - (i) the Inspection or Audit must only be conducted by a person referred to in ~~clause 9.6(a)(ii)~~**9.6(a)(ii)**; and
    - (ii) that person must:
      - (A) prior to being provided with the commercially sensitive information, execute a confidentiality deed:
        - (1) in favour of the Party who is subject to the Inspection or Audit;
        - (2) on terms satisfactory to that Party (acting reasonably); and
        - (3) that requires the person:
          - to keep that information confidential;
          - to use it only for the purpose of the Inspection or Audit;
          - to not disclose that information to the Inspecting Party or any other person (or another Party); and
          - to return (or, if applicable, destroy any copy of) that information after completion of the Inspection or Audit,
- subject to reasonable exceptions including except to the extent:
- required or compelled by, or necessary to observe, administer or comply with, any Law;

- consistent with a person's right to disclosure under any Law; and
  - necessary for the conduct of any legal proceedings (including any dispute resolution process under this agreement); and
- (B) be given access to the commercially sensitive information, once they have executed that confidentiality deed and delivered it to the Party who it is in favour of.
- (c) Each Party must use reasonable endeavours to ensure that an Inspecting Party, its appointed representative or the person appointed to conduct an Inspection or Audit are entitled to enter and be on its land and premises (whether or not owned or leased) [and to access and inspect any other of its relevant property, including in the case of the Operator its Rolling Stock](#), for the purposes of carrying out any Inspection or Audit.
- (d) An Inspecting Party, in exercising any right of Inspection or Audit, must:
- (i) not interfere unreasonably with another Party's Trains and Rolling Stock or the Network;
  - (ii) ensure that the Inspection or Audit does not adversely affect any other Network Participant's Train services or Train Movements;
  - (iii) not cause or contribute to any damage to property, [any Environmental Harm](#) or any injury or death of persons;
  - (iv) comply with the health, safety, [environment](#) and other requirements as required by another relevant Party (acting reasonably); and
  - (v) use reasonable endeavours to minimise any disruption to the Party who is subject to the Inspection or Audit.
- (e) An Inspecting Party is not liable for:
- (i) any delays or cancellation of Train Services; or
  - (ii) Claims suffered or incurred by or made or brought by or against another Party,
- as a result of the Inspecting Party exercising its rights under this **clause 9.4** provided that the Inspecting Party complies with **clause ~~9.6(d)~~9.6(d)**.

## 9.7 Cooperation for Inspection or Audit

- (a) Each Party must provide all reasonable assistance required by the Inspecting Party in conducting any Inspection or Audit, including allowing the Inspecting Party, its appointed representative or a person appointed to conduct an Inspection or Audit to discuss any relevant matter with that Party's Associates. A member of the Associates of the Party who is

subject to the Inspection or Audit may be present at the Inspection or Audit.

- (b) Nothing in **clauses 9.49.4 to 9.7(a)9.7(a)**:
- (i) obliges Queensland Rail (as a Party subject to Inspection or Audit), or entitles the Operator (as the Inspecting Party), to do anything that may adversely affect:
    - (A) the operation of Train services by another Network Participant; or
    - (B) Queensland Rail's compliance with another Network Participant's access agreement or, if applicable, the Access Undertaking; or
  - (ii) obliges a Party who is subject to an Inspection or Audit, or entitles the Inspecting Party, to do anything that:
    - (A) would result in the Party who is subject to the Inspection or Audit not complying with any Law; or
    - (B) adversely affects the safe operation of the Network including the safety of any person.

## **9.8 Costs for Inspection or Audit**

- (a) For an Inspection or Audit under **clause 9.4(c)9.4(c)**, the Inspecting Party must bear the costs of conducting the Inspection or Audit.
- (b) For an Inspection or Audit under **clause 9.4(a)9.4(a)**:
- (i) the Party whose operations are Inspected or Audited must bear the reasonable costs of the conduct of the Inspection or Audit to the extent that the stated grounds for requiring the Inspection or Audit are demonstrated to exist; or
  - (ii) the Inspecting Party must bear the costs of conducting such inspection or audit to the extent that the stated grounds for requiring the Inspection or Audit are not demonstrated to exist, as a result of the Inspection or Audit.

## **9.9 Results of Inspection or Audit and general compliance**

- (a) The Inspecting Party must provide the other Party with a copy of the report for the relevant Inspection or Audit.
- (b) An Inspection or Audit by a Party does not relieve either Party of its obligations under this agreement or at Law.

## **9.10 Cooperation for rail safety investigation**

If a rail safety officer, the rail safety regulator, a board of inquiry (as those terms are defined under the TRSA) or other Authority is undertaking an investigation, inquiry or other review in relation to a Party's compliance with its obligations or duties under the TRSA, then the Parties will provide such

cooperation and assistance to each other, as is reasonable in the circumstances, in relation to that investigation, inquiry or other review.

## 10 Incident, environmental and emergency management plan requirements

### 10.1 Operator's Emergency Management Plan

- (a) Prior to commencing to operate any Train Services (including any new or varied Train Services) the Operator must develop a proposed Operator's Emergency Management Plan which:
- (i) complies with the TRSA's requirements for an emergency management plan; and
  - (ii) except to the extent inconsistent with those requirements:
    - (A) details procedures that are adequate to manage an Incident including all actions to be taken to prevent, minimise or mitigate any threat or danger to any person or property including:
      - (1) the matters outlined in the Operating Requirements Manual, from time to time, relevant to the management of Network Incidents – for example, safety and environment matters; and
      - (2) any matters otherwise referred to in this agreement for inclusion in such a plan;
    - (B) at all times during the Term is compatible with this agreement and the Queensland Rail Emergency Procedures and with Queensland Rail's emergency management plan; and
    - (C) is consistent with:
      - (1) Prudent Practices, all relevant Laws and all applicable Australian or other industry standards; and
      - (2) this agreement including the Network Management Principles, the IRMP and the Operating Requirements Manual,
- and obtain a notice from Queensland Rail that it has no objection to that plan.
- (b) As soon as practicable after receiving the proposed Operator's Emergency Management Plan, Queensland Rail must either notify the Operator that it:
- (i) has no objections; or
  - (ii) has objections (including details of those objections),



to the proposed Operator's Emergency Management Plan.

- (c) If Queensland Rail notifies the Operator, under **clause ~~10.1(b)~~10.1(b)**, that Queensland Rail has objections, then:
  - (i) the Operator must develop an amended plan in accordance with **clause ~~10.1(a)~~10.1(a)**; and
  - (ii) **clause ~~10.1(b)~~10.1(b)** and this **clause ~~10.1(e)~~10.1(c)** will apply in respect of that amended plan.
- (d) If the Operator intends to amend the Operator's Emergency Management Plan, then:
  - (i) the Operator must notify Queensland Rail and provide Queensland Rail with details of the proposed amendments and the reasons for them;
  - (ii) **clauses 10.1(a) to (c)** will also apply in respect of those amendments as if they were a proposed Operator's Emergency Management Plan; and
  - (iii) those amendments will not be effective unless and until the Operator has obtained a notice from Queensland Rail that it has no objection to those amendments.
- (e) The Operator must ensure procedures are in place, and are implemented, which ensure compliance by the Operator with any reporting requirements in the Operator's Emergency Management Plan and, to the extent relevant, the Queensland Rail Emergency Procedures and Queensland Rail's emergency management plan.
- (f) Without limitation to Queensland Rail's right to object to a proposed Operator's Emergency Management Plan (or an amendment to the Operator's Emergency Management Plan) under this **clause ~~10.1~~10.1**, Queensland Rail may raise an objection if Queensland Rail considers that the proposed Operator's Emergency Management Plan (or the relevant amendment) is inconsistent with Queensland Rail's or another Network Participant's emergency management plan or would adversely affect a coordinated response to a Network Incident or other event or incident that is preventing or affecting, or is likely to prevent or affect, the operation of Train services on the Network.
- (g) Queensland Rail may request the Operator to coordinate and cooperate with Queensland Rail or another Network Participant to ensure that the Operator, Queensland Rail and other Network Participants have emergency management plans that are not inconsistent and allow a coordinated response to Network Incidents or other emergencies.
- (h) Without limitation to the Operator's obligations under section 82(3)(c) of the TRSA, if requested by Queensland Rail, the Operator must assist and participate in exercises with Queensland Rail and, if applicable, other Network Participants, to test the effectiveness of the emergency

management plans of Queensland Rail, the Operator and, if applicable, other Network Participants including whether those emergency management plans are inconsistent and allow for a coordinated response to Network Incidents or other emergencies.

- (i) Despite ~~clauses 10.1(f) to (h)~~ **10.1(f) to (h)** or any other provision of this agreement, Queensland Rail is not obliged to ensure, and does not assume any responsibility for ensuring, that the Operator's Emergency Management Plan:
  - (i) is consistent with Queensland Rail's or any other Network Participant's emergency management plan; or
  - (ii) will allow for a coordinated response to Network Incidents or other emergencies.
- (j) For the purpose of this ~~clause 10.1~~ **10.1**, a reference to an **emergency management plan** is a reference to an emergency management plan as referred to under section 82 of the TRSA and, in the case of the Operator, the Operator's Emergency Management Plan.

## 10.2 Obstructions

- (a) The Operator must not cause or contribute to any Obstruction or permit to continue any Obstruction to the extent caused or contributed to by the Operator.
- (b) Queensland Rail may do anything that it considers necessary:
  - (i) to remove, rectify, mitigate or otherwise deal with any Obstruction; or
  - (ii) to recommence Train Movements where there is or was an Obstruction,

including to move, or remove from the Network, any of the Operator's Rolling Stock (including any freight) that is causing or contributing to an Obstruction or preventing or hindering Train Movements. To the extent that an Obstruction is caused or contributed to by the Operator, the Operator must pay Queensland Rail's costs and expenses incurred by Queensland Rail in relation to that Obstruction (including costs and expenses for doing anything under this ~~clause 10.2(b)~~ **10.2(b)**) and those costs and expenses will be a debt due and owing by the Operator to Queensland Rail.

- (c) Queensland Rail will use reasonable endeavours to consult with the Operator, prior to exercising any right under ~~clause 10.2(b)~~ **10.2(b)**, where Queensland Rail intends to interfere with the Operator's Rolling Stock or any other thing for which the Operator is responsible. A failure by Queensland Rail to consult with the Operator does not affect the validity of anything done by Queensland Rail under ~~clause 10.2(b)~~ **10.2(b)**.

- (d) If Queensland Rail gives a Network Control Direction to the Operator to assist Queensland Rail to remove, rectify, mitigate or otherwise deal with an Obstruction caused or contributed to by another Network Participant (including to use any of the Operator's Rolling Stock to move, or remove from the Network, any Rolling Stock of another Network Participant), Queensland Rail will reimburse to the Operator its reasonable direct costs and expenses of providing such assistance.

### 10.3 Notification

- (a) Queensland Rail will notify the Operator of any Network Incident (other than an Incident) that may reasonably be expected to materially adversely affect the Train Services as soon as practicable after the Network Incident comes to Queensland Rail's attention.
- (b) As soon as practicable after the Operator or the Operator's Associates become aware of:
  - (i) any Incident;
  - (ii) any Environmental Harm;
  - (iii) any event, circumstance, condition, operation or activity which it is reasonably foreseeable is likely to result in:
    - (A) Environmental Harm; or
    - (B) a category A notifiable occurrence (as defined under the TRSA) or any other requirement for Queensland Rail to notify an Authority in accordance any Law;
  - (iv) any Obstruction;
  - (v) any breach or suspected breach of any safeworking procedures, safety standards or other safety requirements set out in the Operating Requirements Manual; or
  - (vi) anything which the Operator observes may cause or contribute to the occurrence of any matter referred to in **clauses ~~10.3(b)(i)~~10.3(b)(i) to (v)**, **(Notifiable Events)**, the Operator must notify Queensland Rail of that Notifiable Event (including any action or intervention taken or being taken by the Operator).
- (c) Where:
  - (i) the Operator is required to give a notice under **clause ~~10.3(b)~~10.3(b)**; and
  - (ii) a Train Service is affected by, involved with or has caused or contributed to the relevant event,the Operator's notice must specify the Train Service and provide details of:

- (iii) any substance or thing carried by that Train Service that could potentially cause or contribute to any:
  - (A) Environmental Harm;
  - (B) loss of, damage to or destruction of real or personal property (including property of the other Party); or
  - (C) personal injury to or death of any person; and
- (iv) any Dangerous Goods (if any) carried by the Train Service.
- (d) Without limitation to **clauses 10.3(b)10.3(b)** and **(e)(c)**, where any substance or thing referred to in **clause 10.3(e)10.3(c)** (including any Dangerous Goods carried by that Train Service) have escaped or been released or discharged or there is a material or imminent risk of such an escape, release or discharge, the Operator must immediately notify Queensland Rail and provide all relevant details of the release, discharge or risk (including as requested by Queensland Rail) ~~relevant to Queensland Rail's Rail Infrastructure Operations.~~
- (e) For clarity, **clauses 10.3(e)(iv)10.3(c)(iv)** or **(e)(d)** apply without limitation to **clause 10.510.5**.

#### 10.4 Management and response

- (a) If an Incident occurs:
  - (i) the Operator and Queensland Rail must coordinate and manage the response to that Incident in accordance with this agreement and the relevant requirements in the Operating Requirements Manual; and
  - (ii) an investigation into that Incident will be conducted where required, and in accordance with, the relevant provisions of the Operating Requirements Manual and the Operator and Queensland Rail must cooperate, and ensure their Associates cooperate, fully with any such investigation.

#### 10.5 Dangerous Goods

**[Option A: Where the Train Service is not to carry Dangerous Goods:**

The Operator must ensure that the Train Services do not carry Dangerous Goods. ]

**[Option B: Where the Train Service will or may carry Dangerous Goods:**

- (a) The Operator must ensure that the Train Services do not carry Dangerous Goods, except:
  - (i) as expressly provided in this agreement; or
  - (ii) with the prior permission of Queensland Rail given in accordance with this agreement.

- (b) If the Operator wishes to obtain Queensland Rail's permission to carry any Dangerous Goods, the Operator must first satisfy Queensland Rail (acting reasonably) that:
  - (i) carrying the relevant Dangerous Goods in the manner proposed by the Operator is permitted under all relevant Laws and Authorities and any applicable Dangerous Goods Code;
  - (ii) any Authorisations required under any applicable Law or Dangerous Goods Code have been, or will be, obtained and maintained and are, or will be, available for inspection by Queensland Rail if requested; and
  - (iii) all Laws, including Authorisations, applicable in relation to those Dangerous Goods and all requirements of any applicable Dangerous Goods Code are, or will be, complied with.
- (c) Unless otherwise expressly provided in this agreement, where either ~~clause 10.5(a)(i) or (ii)~~ 10.5(a)(i) or (ii) are satisfied and the relevant Train Service will carry Dangerous Goods, the Operator must ensure that:
  - (i) any Authorisations required under any applicable Law or the applicable Dangerous Goods Code have been obtained prior to the operation of that Train Service and are available for inspection by, or for copies to be provided to, Queensland Rail if requested;
  - (ii) all Laws, including Authorisations, applicable in relation to those Dangerous Goods and all requirements of any applicable Dangerous Goods Code are complied with;
  - (iii) Queensland Rail is notified of the details of the Dangerous Goods (including an accurate description of the Dangerous Goods and the applicable Dangerous Goods United Nations (UN) Number) as soon as practicable prior to the operation of that Train Service; and
  - (iv) before any Dangerous Goods are carried on that Train Service, the Operator's Emergency Management Plan includes procedures for responding to an Incident involving those Dangerous Goods, or any other event or circumstance that gives rise to a material or imminent risk of an escape, release or discharge of those Dangerous Goods.]

## 10.6 Intervention to prevent or mitigate damage

Where Queensland Rail becomes aware of:

- (a) any event, circumstance, condition, operation, activity or omission in connection with the Network, the Train Services or any other related activity of the Operator which has caused or contributed to or is likely to cause or contribute to:
  - (i) any Environmental Harm;
  - (ii) any failure by Queensland Rail to comply with or observe any Law;

- (iii) Queensland Rail being subject to a lawful direction, order or other requirement by any Authority;
  - (iv) any loss of, damage to or destruction of real or personal property (including property of the other Party); or
  - (v) any personal injury to or death of any person; and
- (b) Queensland Rail:
- (i) considers that action or intervention is required; or
  - (ii) is given a direction by an Authority that action or intervention is required,

to prevent, mitigate or remedy the matter referred to in **clause ~~10.6(a)~~10.6(a)**,

then:

- (c) Queensland Rail may notify the Operator of that requirement and, where practicable, any action or intervention that Queensland Rail or, if applicable, the relevant Authority considers necessary to prevent, mitigate or remedy the matter referred to in **clause ~~10.6(a)~~10.6(a)**; and
- (d) as soon as practicable after receiving such a notice, the Operator will:
  - (i) comply with the requirements of the applicable Authority and any other requirements specified by Queensland Rail in that notice; and
  - (ii) take whatever other action or intervention is required to prevent, mitigate or remedy the matter referred to in **clause ~~10.6(a)~~10.6(a)**.

## 10.7 Noise mitigation

- (a) In addition to any noise mitigation or management requirements under the IRMP or as otherwise agreed between the Parties, the Operator must pay to Queensland Rail a contribution, as determined by Queensland Rail (acting reasonably), to the costs and expenses incurred by Queensland Rail in relation to any noise mitigation or management measures on the Network, or land adjacent to the Network, that are considered necessary by Queensland Rail (acting reasonably) to comply with noise levels, limits, standards, guidelines or other requirements that Queensland Rail is required to comply with or ~~observe under~~which are required in order for Queensland Rail to comply with any applicable Law (**Noise Mitigation Requirements**).
- (b) Queensland Rail will (acting reasonably):
  - (i) consult with the Operator prior to Queensland Rail electing to implement noise mitigation or management measures on the Network, or land adjacent to the Network, to comply with any applicable Noise Mitigation Requirements from time to time; and

- (ii) notify the Operator of how it will determine the Operator's contribution to its costs and expenses in relation to any noise mitigation or management measures.

## 11 Inspection of Trains and Rolling Stock

(a) Where:

- (i) Queensland Rail believes (acting reasonably) that the Operator's Rolling Stock or Train Configurations do not comply with:
  - (A) the authorised Rolling Stock and Train Configurations applicable to the Train Services;
  - (B) any applicable Laws relevant to the Train Services; and
- (ii) Queensland Rail cannot otherwise reasonably confirm that compliance,

Queensland Rail may:

- (iii) notify the Operator of its belief (including the grounds supporting that belief) and require the Operator to demonstrate that the Rolling Stock or Train Configurations are compliant; and
  - (iv) where the Operator fails to demonstrate compliance:
    - (A) inspect any Trains or Rolling Stock utilised or intended to be utilised for the Train Services; or
    - (B) require the Operator to have an inspection conducted, after giving notice of that inspection or requirement to the Operator and for this purpose Queensland Rail or Queensland Rail's Associates will be entitled at any time to enter and ride on the Operator's Trains or Rolling Stock.
- (b) Queensland Rail may require any of the Operator's Rolling Stock (either loaded or empty) to be available at such location on the Network as Queensland Rail may require (acting reasonably) for weighing, measuring or other inspection at any time specified by Queensland Rail (acting reasonably), provided that Queensland Rail must endeavour to minimise any diversion or delay to a Train Service.
- (c) If any of the Operator's Rolling Stock is reasonably considered by Queensland Rail to be loaded:
- (i) in excess of its rated carrying capacity; or
  - (ii) in an unsafe or insecure manner,
- then Queensland Rail may:
- (iii) at any time require the Operator to discontinue the Train Service or to remove the excess or adjust the load at the Operator's expense; or

- (iv) where the Operator fails to immediately remove the excess or adjust the load, arrange for its removal or adjustment and Queensland Rail's costs and expenses of doing so will be a debt due and owing by the Operator to Queensland Rail.
- (d) The Operator must provide all reasonable assistance required by Queensland Rail in conducting any inspection, including allowing Queensland Rail, its appointed representative or a person appointed to conduct an inspection to discuss any relevant matter with the Operator's Associates. A member of the Operator's Associates may be present at the inspection.
- (e) Nothing in this **clause 4.11** obliges the Operator, or entitles Queensland Rail, to do anything that would result in the Operator not complying with any Law.
- (f) The Operator must bear the reasonable costs of the conduct of the inspection to the extent that the inspection demonstrates that a relevant non-compliance exists.
- (g) Queensland Rail must bear the costs of conducting the inspection to the extent that the inspection demonstrates that no relevant non-compliance exists.
- (h) An inspection by Queensland Rail under this **clause 4.11** does not relieve the Operator of its obligations under this agreement or at Law.

## 12 Risk and indemnities

### 12.1 Indemnities for personal injury and property damage

- (a) Subject to **clause 13** (and without limitation to **clause 12.1(c)**), the Operator indemnifies and will keep indemnified each other Party and that other Party's Associates against all Losses suffered or incurred by, or Claims brought against or made upon, that other Party or its Associates (as applicable) in respect of:
  - (i) any loss of, damage to or destruction of real or personal property (including property of any Party); or
  - (ii) personal injury to or death of any person,in each case to the extent caused or contributed to by:
  - (iii) a breach of this agreement by the Operator; or
  - (iv) any negligent act or omission of the Operator or the Operator's Associates in the performance of obligations, in the exercise of rights or otherwise in connection with this agreement.
- (b) Subject to **clause 13** (and without limitation to **clause 12.1(c)**), Queensland Rail indemnifies and will keep indemnified each other Party and that other Party's Associates against all Losses suffered or incurred



by, or Claims brought against or made upon, that other Party or its Associates (as applicable) in respect of:

- (i) any loss of, damage to or destruction of real or personal property (including property of any Party); or
- (ii) personal injury to or death of any person,

in each case to the extent caused or contributed to by:

- (iii) a breach of this agreement by Queensland Rail; or
- (iv) any negligent act or omission of Queensland Rail or Queensland Rail's Associates in the performance of obligations, in the exercise of rights or otherwise in connection with this agreement.

- (c) Where the Operator's Customer is a Party, and subject to **clause 13**, the Operator's Customer indemnifies and will keep indemnified each other Party and that other Party's Associates against all Losses suffered or incurred by, or Claims brought against or made upon, that other Party or its Associates (as applicable) in respect of:

- (i) any loss of, damage to or destruction of real or personal property (including property of any Party); or
- (ii) personal injury to or death of any person,

in each case to the extent caused or contributed to by:

- (iii) a breach of this agreement by the Operator's Customer; or
- (iv) any negligent act or omission of the Operator's Customer or the Operator's Customer's Associates in the performance of obligations, in the exercise of rights or otherwise in connection with this agreement.

## 12.2 Operator's carriage indemnity

- (a) This **clause 12.1(c)** only applies where the Operator's Customer is not a Party.
- (b) The Parties acknowledge and agree that if the Operator's Customer were a Party [to this Agreement](#), then **clause 13** should and would apply as if a reference to the Operator in **clause 13** included a reference to the Operator's Customer with the effect of limiting and excluding Claims and liability for Losses as between the Operator's Customer and Queensland Rail – for example, excluding Claims by the Operator's Customer against Queensland Rail for Consequential Loss.
- (c) As there is no contract between Queensland Rail and the Operator's Customer addressing the matters referred to under **clause 12.2(b)**, the Operator indemnifies and will keep indemnified Queensland Rail and its Associates from all Claims by the Operator's Customer (including any Loss arising out of Claims) in a way that gives effect to **clause 13 as if clause 13 as if clause 13** did apply as between Queensland Rail and the Operator's Customer (with any

reference to the Operator in **clause 13.13** being a reference to the Operator's Customer). For example, if the Operator's Customer is not a Party and commences a Claim against Queensland Rail for Consequential Loss, then the Operator will indemnify Queensland Rail for that Consequential Loss.

- (d) For clarity, the indemnity in **clause 12.2(e)12.2(c)** applies in relation to Claims by the Operator's Customer whether or not caused, or contributed to, by any act or omission (including negligence) of Queensland Rail or its Associates.
- (e) The Operator is responsible for all conduct of the Operator's Customer relating to this agreement (including the Train Services). Any act or omission of the Operator's Customer is deemed to be an act or omission by the Operator for the purposes of this agreement.

### **12.3 Indemnity for Dangerous Goods**

(a) This **clause 12.312.3** only applies to the extent that the Train Services carry Dangerous Goods.

(b) Without limitation to **clauses 12.1(a)** and **12.212.1(c)**, the Operator indemnifies and will keep indemnified Queensland Rail and its Associates against all:

- (i) Losses suffered or incurred by; or
- (ii) Claims brought against or made upon,

Queensland Rail or its Associates (as applicable) arising out of, or in any way associated with Dangerous Goods (including their handling, loading, unloading, transportation, escape, release or discharge and any other acts or omissions relating to them) in connection with or relating to any ~~Mixed Goods~~-Train Service, whether or not caused, or contributed to, by any act or omission (including negligence) of Queensland Rail or its Associates.

### **12.4 Conditions of carriage exclusions and limitations of liability**

Without limiting **clauses 12.1(c)** to **12.312.3**, the Operator (and where the Operator's Customer is a Party, the Operator's Customer) must:

- (a) ensure Queensland Rail has the benefit of any exclusion or limitation of liability in favour of, or for the benefit of, the Operator under the Operator's conditions of carriage in relation to any person, or any person whose property is, being transported on Train Services including the Operator's Customer; and
- (b) provide to Queensland Rail details of those conditions of carriage in place from time to time relevant to those exclusions and limitations of liability.

## 12.5 Assistance in defence of Claims arising from Network Incidents

Each Party must provide reasonable assistance to the other Party in the defence of any Claim made against that other Party by a third party arising out of any event in connection with a Network Incident.

## 12.6 Operator responsible for Operator's Associates

- (a) The Operator may allow any of the Operator's Associates to exercise any of the Operator's rights or to comply with any of the Operator's obligations under this agreement.
- (b) The Operator is responsible for the conduct of the Operator's Associates in exercising any of the Operator's rights or complying with any of the Operator's obligations as if that conduct was the conduct of the Operator itself.
- (c) If the Operator delegates or subcontracts the exercise or performance of any of its rights or obligations under this agreement to any person, then:
  - (i) the Operator remains fully responsible for the exercise or performance of the delegated or subcontracted (as applicable) rights or obligations; and
  - (ii) any conduct of any delegate or subcontractor (as applicable) will be taken to be the conduct of the Operator.
- (d) If the Operator authorises an agent or contractor to exercise its rights or perform its obligations under this agreement, then that authorisation will only have effect for the purpose of this agreement where:
  - (i) the Operator has notified Queensland Rail of that authorisation, including providing details of the authorisation; and
  - (ii) if the authorisation relates to the driving, control or other operation of Rolling Stock for Train Services, Queensland Rail has consented to that authorisation.

## 12.7 Benefit of indemnities in favour of Associates

- (a) Each Party acknowledges and agrees that its obligation to indemnify the other Party's Associates under this **clause 12.12** is for the benefit of the other Party's Associates.
- (b) For the purpose of section 55 of the *Property Law Act 1974* (Qld) (and without limiting the operation of that section), each Party acknowledges that any person who is comprised in the other Party's Associates may accept that benefit.
- (c) Each of the Parties acknowledge that valuable consideration was received for the grant of the benefit referred to in **clause 12.7(a)** and that benefit may be enforced by its Associates (as applicable) in accordance with section 55 of the *Property Law Act 1974* (Qld).
- (d) Without limiting **clauses 12.7(a) to (c)**, each Party hereby gives notice, for and on behalf of that Party's Associates, to the other

Party accepting the benefit of the indemnities under this **clause 12.12** that are in favour of that Party's Associates. The notice under this **clause 12.7(d)** is taken to be given on each day during the Term (including the Commencement Date and the Termination Date) and on each day after the Termination Date while those indemnities survive the expiry or termination of this agreement.

## 13 Limitations on liability

### 13.1 No liability for Consequential Loss

- (a) Subject to **clause 13.1(b)**, despite any other provision in this agreement no Party is liable to another Party for any Consequential Loss suffered or incurred by, or Claimed against, the other Party.
- (b) **Clause 13.1(a)** does not apply in relation to:
  - (i) the indemnities in **clauses 12.1(c) to 12.3**; or
  - (ii) any Loss suffered or incurred by, or Claimed against:
    - (A) a Party to the extent caused or contributed to by an Inspecting Party failing to comply with its obligations under **clauses 9.4 to 9.10** in relation to conducting that inspection or audit; or
    - (B) Queensland Rail to the extent caused or contributed to by the Operator failing to comply with its obligations under **clause 27.18**.

### 13.2 Limitation on Claims

A Party must not make any Claim against the other Party under, in relation to or arising out of this agreement or its subject matter including any breach of this agreement by, or any act or omission of, the other Party **unless:**

~~(a) —notice and full details of the Claim have been given to the other Party within one year after the occurrence of the event or circumstance out of which such Claim arises; and~~

~~(b)~~ (a) the unless the amount of the Claim exceeds \$100,000 in respect of any one event or cause of action or series of related events or causes of action (and, for clarity, the amount of any Claim is not limited to the amount exceeding that threshold).

**[Queensland Rail note – it may not be possible to provide full details of a Claim within the period of 12 months.]**

### 13.3 Failure to pay amounts

No exclusion or limitation of liability, or restriction on the existence of or ability to make any Claim, in this **clause 13** applies to Claims made by a Party against the other Party for monies due and payable in accordance with this agreement including, for example, under **clause 5**.

### 13.4 Liability for Network

- (a) Subject to ~~clause 13.4(b)~~ **13.4(b)**, without limiting any other provisions of this agreement and to the extent permitted by law Queensland Rail and its Associates are not liable to another Party for any Losses, and the other Party must not make any Claim against either Queensland Rail or its Associates, including in respect of any damage to or loss or destruction of any property (including that other Party's property) or any injury to or death of any person, arising out of or in connection with:
  - (i) the standard, capability or condition of the Network; or
  - (ii) any failure of or defect in the Network; or
  - (iii) maintenance of the Network.
- (b) Despite ~~clause 13.4(a)~~ **13.4(a)**, another Party may bring a Claim against Queensland Rail to the extent that Queensland Rail has been negligent in maintaining the Network in a condition such that the Operator can operate Train Services in accordance with this agreement.
- (c) Where Queensland Rail is liable to another Party for a Loss or in respect of a Claim referred to in **clause 13.4(b)**, Queensland Rail's liability is capped at \$50 million in aggregate per any one event or cause of action or series of related events or causes of action.

### 13.5 Claims in respect of delays to Train Movements

No Party (**Affected Party**) will have or make any Claim against another Party (**Defaulting Party**) in respect of delays to Train Movements unless, and will only have a Claim to the extent that:

- (a) the delay was a result of a breach of this agreement by the Defaulting Party, or negligence on the part of the Defaulting Party; and
- (b) the delay is not attributable to:
  - (i) the Affected Party;
  - (ii) another Network Participant or Party (other than the Defaulting Party);
  - (iii) a Force Majeure Event;
  - (iv) a Planned Possession, Urgent Possession or Emergency Possession of the Network in a manner consistent with the Network Management Principles;
  - (v) Rail Infrastructure Operations scheduled in a manner consistent with the Network Management Principles;
  - (vi) an event, incident or circumstance on Private Infrastructure; or

- (vii) any action taken by Queensland Rail (acting reasonably) or by an Authority in response to, or as a consequence of, an emergency<sup>2</sup> or a genuine safety risk (including a Network Incident), or any personal injury to or the death of any person on or near the Network, any Rolling Stock or any land or other thing on or near the Network.

### 13.6 Claims in respect of non-provision of access

Another Party will not have, and must not make, any Claim against Queensland Rail in respect of the non-provision of access or the cancellation of any Train Service (**Claim Event**) unless, and will only have a Claim to the extent that each of the following is satisfied:

- (a) the Claim Event was a result of a breach of this agreement by, or the negligence of, Queensland Rail;
- (b) the Claim Event is not attributable (in whole or part) to:
  - (i) a Party other than Queensland Rail;
  - (ii) another Network Participant (other than Queensland Rail);
  - (iii) a Force Majeure Event;
  - (iv) a Planned Possession, Urgent Possession, Emergency Possession or Rail Infrastructure Operations or other works related to such a Possession;
  - (v) Rail Infrastructure Operations scheduled in a manner consistent with the Network Management Principles;
  - (vi) an event, incident or circumstance on Private Infrastructure; or
  - (vii) any action taken by Queensland Rail (acting reasonably) or by an Authority in response to, or as a consequence of, an emergency<sup>3</sup> or a genuine safety risk (including a Network Incident), or any personal injury to or the death of any person on or near the Network, any Rolling Stock or any land or other thing on or near the Network;

---

<sup>2</sup> An emergency includes any actual or impending circumstance that poses a threat of causing or contributing to:

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

<sup>3</sup> An emergency includes any actual or impending circumstance that poses a threat of causing or contributing to:

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

- (c) a Train Service is cancelled due to Queensland Rail failing to make the Network available for the Operator to operate the Train Service at the Scheduled Time and Queensland Rail was not able to offer a reasonable alternative Scheduled Time; and
- (d) the total number of Train Services cancelled in the relevant month as a result of a failure by Queensland Rail to make the Network available exceeds 10% of the total number of Train Services that the Operator was entitled to operate during that month in accordance with this agreement.

## 14 Suspension

### 14.1 Right of suspension

- (a) Queensland Rail may, by notice in writing to the Operator, immediately suspend the right of the Operator to operate some or all of the Train Services upon the occurrence of any one or more of the following events or circumstances:
  - (i) any event or circumstance described in **clauses 15.1(a) to 15.1(k)** occurs;
  - (ii) the Operator fails to comply with a notice given by Queensland Rail requiring the Operator (within the reasonable time specified in that notice) to cease conduct that Queensland Rail considers (acting reasonably) is causing or threatening to cause serious environmental harm or material environmental harm (as those terms are defined in the *Environmental Protection Act 1994* (Qld)); or
  - (iii) the Operator has failed, or in Queensland Rail's opinion the Operator will, or intends to fail, to comply with:
    - (A) any Law or Network Control Direction or the Operating Requirements Manual relating to the operation of Train Services; or
    - (B) any obligation of the Operator under this agreement.
- (b) Such a suspension will continue until such time as the Operator has satisfied Queensland Rail that:
  - (i) the relevant event or circumstance has been remedied or, if applicable, has been avoided and will not re-occur; and
  - (ii) where appropriate, that the Operator has taken action to prevent the recurrence of that event or circumstance.

### 14.2 Details of suspension

A notice of suspension given by Queensland Rail to the Operator in accordance with this **clause 14.14** must set out:

- (a) the rights of the Operator which are affected by the suspension;

- (b) the reasons for the suspension; and
- (c) the actions the Operator must take to have the suspension lifted.

### **14.3 Effect of suspension**

The suspension of any rights by Queensland Rail in accordance with this **clause 14.14**:

- (a) is revocable at any time by Queensland Rail;
- (b) has no effect upon obligations, debts or liabilities which have accrued before that suspension took effect;
- (c) does not affect or suspend any other obligation of the Operator, including the obligation to pay Access Charges relating to the period of the suspension; and
- (d) is without prejudice to Queensland Rail's other rights and remedies in respect of the relevant default, event or circumstance.

## **15 Default and termination**

### **15.1 Termination by Queensland Rail**

Subject to **clause 15.3**, without limiting any other rights of termination in this agreement or otherwise existing at Law, Queensland Rail may, by notice in writing to the other Parties, immediately terminate this agreement upon the occurrence of any one or more of the following events or circumstances:

- (a) the Operator fails, in any material respect, to perform or comply with this agreement;
- (b) the Operator fails to pay when due any amount payable, or to provide and maintain Security, in accordance with this agreement;
- (c) an Insolvency Event occurs in relation to the Operator;
- (d) Queensland Rail ceases to hold the Sublease, any other Land Tenure or any other right or interest that authorises, permits or otherwise entitles Queensland Rail:
  - (i) to grant or otherwise confer on the Operator all or any of the rights referred to in this agreement; or
  - (ii) to enter into or perform this agreement;
- (e) there are no Access Rights under this agreement including as a result of reductions or relinquishments in accordance with **clause 2.21**;
- (f) a Repeated Breach exists;
- (g) the Operator fails to comply with a notice given by Queensland Rail requiring the Operator (within the reasonable time specified in that notice) to cease conduct that Queensland Rail considers (acting reasonably) is causing or threatening to cause serious environmental



harm or material environmental harm (as those terms are defined in the *Environmental Protection Act 1994* (Qld));

- (h) the Operator purports to Assign or Charge its rights or interest in this agreement other than in accordance with **clause 2222**;
- (i) the Operator fails to comply with the Train Service Description without first obtaining the prior written consent of Queensland Rail;
- (j) the Operator fails to comply with the IRMP or any other safety or environment related obligation under this agreement; or
- (k) the Operator's Accreditation is suspended, cancelled or amended so that it cannot perform its obligations or exercise its rights under this agreement.

## 15.2 Termination by the Operator

Subject to **clause 15.3**, without limiting any other rights of termination in this agreement or otherwise existing at Law, the Operator may, by notice in writing to the other Parties, immediately terminate this agreement upon the occurrence of any one or more of the following events or circumstances:

- (a) an Insolvency Event occurs in relation to Queensland Rail;
- (b) Queensland Rail fails to pay when due any amount payable under this agreement; or
- (c) Queensland Rail fails, in any material respect, to perform or comply with this agreement other than where this agreement excludes Queensland Rail's liability for that failure, or where Queensland Rail is not otherwise liable under this agreement for that failure.

## 15.3 Remedy

If an event or circumstance set out in **clause 15.1** or **15.2** (except **clauses 15.1(c) to (f)** and **clause 15.2(a)**) (**Event**) occurs then the relevant Party (**Terminating Party**) may only terminate this agreement if:

- (a) the Terminating Party serves a notice (**Notice to Remedy**) on each other Party (**Defaulting Party**) notifying the Defaulting Party of the Event, providing details of the Event and requiring the Defaulting Party:
  - (i) to remedy the Event (if the Event is capable of being remedied); or
  - (ii) to take action to ensure such an Event does not recur (if the Event is not capable of being remedied),  
  
and specifying a reasonable period in which to do the things in **paragraph (i)** or **(ii)**, as applicable having regard to the nature of the Event (**Relevant Period**) – however, if the Event is one in:
    - (iii) ~~clause 15.1(b)~~ **15.1(b)** or ~~15.2(b)~~ **15.2(b)**, then the Relevant Period must be ten Business Days; or
    - (iv) ~~clause 15.1(a) or 15.2(c)~~ **clause 15.1(a) or 15.2(c)**, then the Relevant Period must be 20 Business Days; and

- (b) no Defaulting Party:
  - (i) remedies the Event, if the Event is capable of being remedied; or
  - (ii) takes action to ensure such an Event does not recur and pays, if applicable, reasonable compensation to the Terminating Party in respect of the Event (subject to any relevant exclusions or limitations of liability under this agreement including **clause 1313**), if the Event is not capable of being remedied,within the Relevant Period.

#### **15.4 Termination for Change in Control**

Queensland Rail may terminate this agreement immediately if:

- (a) there is a Change in Control; and
- (b) the Operator has not obtained Queensland Rail's prior consent to that Change in Control.

#### **15.5 Obligations and other rights upon termination or expiration**

- (a) A Party's right:
  - (i) to make a Claim or recover damages or avail itself of other remedies under this agreement or at Law; or
  - (ii) to recover monies due to it under this agreement, including Access Charges,is not prejudiced by:
  - (iii) the termination or expiry of this agreement (including any termination under this **clause 1515**); or
  - (iv) the forbearance by a Party in exercising any rights under this **clause 1515**.
- (b) The expiry or termination of this agreement:
  - (i) does not affect the provisions expressed or implied to operate, survive or have effect after such expiry or termination; and
  - (ii) is without prejudice to any Claim or right of action already accrued to any Party in respect of any breach of this agreement.

#### **15.6 Removal of Rolling Stock following termination**

- (a) Immediately on expiration of the Term, and as soon as practicable after termination of this agreement for any other reason, the Operator must, at the Operator's cost and risk, remove from the Network (or the land on which the Network is located) all of the Operator's Rolling Stock and all vehicles, equipment, freight, debris, rubbish and other substances or things brought onto the Network (or the land on which the Network is located) by, for or on behalf of the Operator relating to the Train Services.

- (b) If the Operator fails to remove the Operator's Rolling Stock from the Network:
  - (i) Queensland Rail may give a notice to the Operator demanding the removal of Rolling Stock by a time specified by Queensland Rail; and
  - (ii) if the Operator fails to remove that Rolling Stock by that time, Queensland Rail may remove that Rolling Stock and recover the reasonable costs of doing so from the Operator.
- (c) The Operator is liable, and indemnifies Queensland Rail, for all costs and expenses incurred by Queensland Rail in relation to any damage caused to the Network by the Operator in removing any Rolling Stock.
- (d) The Operator must comply with all Network Control Directions, and all other directions issued by Queensland Rail (acting reasonably), in relation to the removal of the Rolling Stock in accordance with this **clause 15.615.6**.

## 16 Insurance

### 16.1 Obligation to obtain and maintain Insurance

The Operator must:

- (a) effect, or cause to be effected, before the Commitment Date (or, if applicable, the earliest Commitment Date); and
- (b) maintain, or cause to be maintained, until both the expiry of the Term and the Operator having fully complied with **clause 15.615.6**, ~~insurance~~[insurances](#) in accordance with Prudent Practices having regard to the Operator's activities, works, obligations and responsibilities under this agreement (including insurances covering all risks of an insurable nature in respect of which the Operator is obliged to indemnify Queensland Rail under this agreement) provided that such insurances must include (without limitation):
  - (c) a public liability policy of insurance:
    - (i) that covers the Operator and each of the Operator's agents, consultants, contractors and their sub-contractors (each an **Insured Party**);
    - (ii) for an amount of not less than \$350 million per occurrence;
    - (iii) the coverage of which includes (without limitation):
      - (A) the rights, interests and liability in respect of any Claim against an Insured Party arising out of:
        - (1) any damage or loss occurring to any property; and
        - (2) injury (including death) to any person,

arising out of or in connection with any thing done or omitted to be done in the performance or purported performance of this agreement<sup>4</sup>; and

- (B) the Operator's operations and activities on the Network; and
- (iv) that has a maximum deductible for any one claim of \$500,000;
- (d) a carrier liability policy of insurance:
  - (i) that covers the Operator's liability in relation to goods being transported by Train Services;
  - (ii) for an amount of not less than \$10 million per occurrence; and
  - (iii) that has a maximum deductible for any one claim of \$500,000; and
- (e) all other insurances that the Operator or the Operator's agents, consultants, contractors and their sub-contractors are required by Law to hold in relation to or in connection with the exercise of rights or the performance of obligations under this agreement.

## 16.2 Insurer

The Operator must ensure that any Insurance effected and maintained in accordance with **clause 16.116.1** is with an insurer having an insurance financial strength rating of "A" or better by Standard & Poor's or, if Standard & Poor's ceases to exist or to provide such ratings, the rating which most closely corresponds to that rating by another agency or person which is recognised in global financial markets as a major ratings agency.

## 16.3 Essential terms and conditions

The Operator must ensure that, to the extent permitted by Law, all Insurances effected and maintained in accordance with **clause 16.116.1** must:

- (a) note the interests of Queensland Rail; and
- (b) not contain any exclusions, endorsements or alterations to the accepted policy wording that adversely amends the cover provided without the written consent of Queensland Rail (which consent must not be unreasonably withheld or delayed).

## 16.4 Payment of premium and deductibles

The Operator:

- (a) must pay when due all premiums, charges and other expenses necessary for effecting and maintaining in force the Insurances; and

---

<sup>4</sup> Including, without limitation, Claims arising out of or in relation to the discharge, dispersal, release or escape of smoke, vapours, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water where such discharge, dispersal, release or escape is caused by a sudden, unexpected, unintended and accidental happening.

- (b) is responsible for the payment of all policy deductibles or excesses for Insurances.

### **16.5 No prejudicial action by the Operator**

The Operator must not do or permit anything to be done (including any omission) which:

- (a) may result in any Insurance being vitiated or rendered void or voidable; or
- (b) would give rise to an entitlement by the insurer to avoid payment of any claim in whole or in part.

### **16.6 Disclosure of Insurance**

- (a) The Operator must provide to Queensland Rail evidence of the insurance policies effected pursuant to this **clause 16.16** or, if requested by Queensland Rail, copies of such Insurances, to Queensland Rail's reasonable satisfaction:
  - (i) at least ten Business Days prior to the initial Commitment Date;
  - (ii) upon renewal of each Insurance during the Term; and
  - (iii) whenever requested to do so in writing by Queensland Rail.
- (b) If the Operator, whenever required to do so under this agreement, fails to produce to Queensland Rail evidence to the satisfaction of Queensland Rail (acting reasonably) of Insurances that have been effected or maintained by it, Queensland Rail may:
  - (i) effect and maintain the Insurance and pay the premiums and any amount so paid will be a debt due from the Operator to Queensland Rail; or
  - (ii) suspend or terminate this agreement under **clause 14.1(a)(i) or 15.1(a)**.

### **16.7 Compliance**

The Operator must at all times comply with the terms of all Insurances effected under this **clause 16.16**.

### **16.8 Claims**

- (a) In addition to any other obligation on the Operator, the Operator must:
  - (i) notify Queensland Rail as soon as practicable after the occurrence of any claim under any Insurance (including providing reasonable details of the claim); and
  - (ii) keep Queensland Rail informed of subsequent developments concerning any claim.
- (b) Upon settlement of a claim under any Insurance covering damage to the Network the monies received must be paid to Queensland Rail unless the Operator has already partially or totally indemnified Queensland Rail

for the relevant damage (including in respect of the amount of any deductible), in which case the monies will be paid to the Operator but only to the extent that Queensland Rail has been indemnified.

## **16.9 Insurance not a limit of Operator's liability**

The Operator's compliance with any Insurances does not limit the Operator's liabilities or obligations under this agreement.

## **17 Security**

### **17.1 Obligation to provide Security**

(a) The Operator must:

- (i) on or before the Commitment Date, provide to Queensland Rail security in the form set out in **clause ~~17.1(b)~~ 17.1(b)** for the Security Amount; and
- (ii) thereafter maintain that security (including for any increased or decreased amount or any top up) in accordance with this **clause ~~17.1~~ 17,**

**(Security).**

(b) Security must be in the form of:

- (i) a bank guarantee that:
  - (A) is unconditional and irrevocable and in favour of Queensland Rail;
  - (B) is issued by an Australian institution:
    - (1) authorised to carry on a banking business and entitled to call itself a 'bank' pursuant to the *Banking Act 1959* (Cth); and
    - (2) which has a credit rating of "A" or better by Standard & Poor's or, if Standard and Poor's ceases to exist or to provide such credit ratings, the credit rating which most closely corresponds to that credit rating by another agency or person which is recognised in global financial markets as a major ratings agency;
  - (C) requires the issuing bank to pay on demand by Queensland Rail:
    - (1) without recourse to the Operator or any other person;
    - (2) irrespective of the performance or non-performance of the Operator or Queensland Rail under this agreement; and
    - (3) despite any notice or other communication from the Operator or any other person,

- an amount or amounts up to the amount specified in the bank guarantee;
- (D) has no expiry date; and
- (E) is otherwise in a form acceptable to Queensland Rail; or
- (ii) any other form acceptable to Queensland Rail (in its absolute discretion).

## **17.2 Recourse to Security**

- (a) A Security may be called upon by Queensland Rail in any circumstance where:
  - (i) the Operator fails to pay, on or before the due date, any amount that is payable by the Operator to Queensland Rail under this agreement; or
  - (ii) Queensland Rail otherwise suffers or incurs a Loss in respect of which the Operator is required to indemnify Queensland Rail in accordance with this agreement.
- (b) If Queensland Rail calls on a Security, the Operator must deliver to Queensland Rail a further Security for the amount called upon, or a replacement Security for the remaining amount of the existing Security plus the amount called upon in exchange for the existing Security, within five Business Days after Queensland Rail calls on the Security so that the Security held by Queensland Rail is equal to the Security Amount.
- (c) If an Insolvency Event occurs, or Queensland Rail (acting reasonably) suspects that an Insolvency Event has occurred, in relation to the Operator, Queensland Rail may:
  - (i) in respect of any amounts due but unpaid by the Operator under this agreement:
    - (A) decline payment from the Operator of all or part of those amounts; and
    - (B) immediately call upon the Security for those amounts for which payment was so declined; or
  - (ii) in respect of any amounts paid by the Operator under this agreement after the time when the Insolvency Event occurred or Queensland Rail (acting reasonably) suspects that an Insolvency Event occurred:
    - (A) refund all or part of those amounts to the Operator; and
    - (B) immediately call upon the Security for the amounts so refunded.

## **17.3 Review of Security**

- (a) Queensland Rail may:

- (i) at any time, from time to time, review the amount of the Security Amount, taking into consideration all of the matters that Queensland Rail considers relevant including:
    - (A) the financial performance of the Operator;
    - (B) the Operator's past performance under this agreement (whether in relation to payments or otherwise); and
    - (C) expected future payment obligations under this agreement; and
  - (ii) acting reasonably, determine that the amount of the Security Amount should be increased or decreased.
- (b) If Queensland Rail determines under **clause 17.3(a)** that the amount of the Security Amount should be:
- (i) increased, the Operator must deliver to Queensland Rail further Security for the amount of the increase, or a replacement Security for the revised amount in exchange for the existing Security; or
  - (ii) decreased, the Operator must deliver to Queensland Rail a replacement Security for the revised amount in exchange for the existing Security,

within ten Business Days after Queensland Rail gives notice of its determination so that the Security held by Queensland Rail is equal to the Security Amount as determined by Queensland Rail.

#### **17.4 Return of Security**

Queensland Rail must, subject to the rights of recourse to the Security under this **clause 17.17**, return the Security to the Operator as soon as practicable after both of the following occur:

- (a) this agreement has expired or terminated; and
- (b) in Queensland Rail's opinion (acting reasonably) there is no prospect that:
  - (i) money or damages will become owing (whether actually or contingently) by the Operator to Queensland Rail in connection with this agreement; and
  - (ii) any payment towards the satisfaction of the Operator's obligation to pay any amount to Queensland Rail under this agreement will be void, voidable or refundable under any Law (including any Law relating to insolvency),

provided that, in any event, Queensland Rail has no obligation to return the Security to the Operator earlier than three months after the expiry or termination of this agreement.



## 18 Adjustment for changes

### 18.1 Review of schedule 3

- (a) This **clause 18.1**:
  - (i) applies to the extent that a Reference Tariff applies to the Train Services (including where a relevant Reference Tariff is approved by the QCA after the Commencement Date); and
  - (ii) does not apply where there is no Reference Tariff that is applicable to the relevant Train Services.
- (b) **Schedule 3** must be reviewed by Queensland Rail as soon as practicable after a Reference Tariff Provision, or any change in a Reference Tariff Provision, is approved by the QCA from time to time. For clarity, Queensland Rail is not obliged to conduct such a review where there ceases to be a Reference Tariff that is relevant to the Train Services.
- (c) The purpose of the review under this **clause 18.1** is to determine the amendments to **schedule 3** that are necessary to ensure **schedule 3** remains consistent with the Reference Tariff Provisions—to the extent that **schedule 3** was consistent with those Reference Tariff Provisions at the Commencement Date (and always subject to any differences referred to in **clause 18.1(d)(ii)**).
- (d) Without limiting the matters that Queensland Rail must consider in a review under **clause 18.1(b)**, any review of **schedule 3** must have regard to the following:
  - (i) any relevant new or varied Reference Tariff;
  - (ii) the differences between the relevant Train Service and the Reference Train Service defined in the relevant Reference Tariff Provision; and
  - (iii) any other relevant provisions of the Access Undertaking.
- (e) After Queensland Rail's review of **schedule 3**, Queensland Rail must notify the other Parties of the amendments to **schedule 3** that will apply and the date from which those amendments take effect (**Amendment Notice**). For clarity, the amendments may take effect retrospectively, but must not take effect prior to the time when the relevant Reference Tariff Provision, or amendments to the relevant Reference Tariff Provision, take effect as approved by the QCA.
- (f) If the Operator does not accept some or all of the amendments in the Amendment Notice, then:
  - (i) the Operator may only give Queensland Rail a Dispute Notice within ten Business Days after being given that Amendment Notice; and

- (ii) if the Operator gives such a Dispute Notice and the Parties do not resolve the Dispute in accordance with **clause 19.219.2**, the Dispute must be referred for determination by an Expert under **clause 19.319.3**.
- (g) For clarity, in this **clause 18.118.1** a reference to **schedule 3** includes each other provisions (including defined terms) of this agreement relevant to **schedule 3** but only to the extent that they are directly necessary for the application, or interpretation, of **schedule 3**.
- (h) For clarity, **clause 2.22.2** of **schedule 3** and **clause 18.118.1** must not be applied in a manner that will result in any part of an Access Charge Input being escalated twice for the same period based on the change in CPI over that period.

## 18.2 Adjustment for a Material Change

- (a) This **clause 18.218.2** does not apply in relation to a Material Change to the extent that the Net Financial Effect of that Material Change has been, or will be, removed as a result of:
  - (i) amendments to **schedule 3** in accordance with **clause 18.1**; or
  - (ii) the escalation or variation of Access Charge Inputs in accordance with this agreement.
- (b) If a Material Change occurs, then Queensland Rail may notify the Operator giving details of the Net Financial Effect of that Material Change.
- (c) Within five Business Days after Queensland Rail gives a notice under **clause 18.2(b)18.2(b)**, the Parties must meet and negotiate, in good faith, adjustments to this agreement, including adjustments to the Access Charges, in order to remove as far as practicable the relevant Net Financial Effect and to put Queensland Rail in the position it would have been in had there been no Material Change.
- (d) If the Parties do not reach agreement within 15 Business Days after Queensland Rail's notice under **clause 18.2(b)18.2(b)** or otherwise resolve the matter in accordance with **clause 19.219.2**, then the matter must be referred to an Expert for determination in accordance with **clause 19.319.3**.
- (e) Each Party's obligations under this agreement will continue despite the existence of a Material Change.

## 19 Disputes

### 19.1 Application of Dispute resolution process

If any dispute, complaint or question arises between the Parties in relation to this agreement (**Dispute**), then:

- (a) that Dispute must be resolved in accordance with this **clause 1919**; and

- (b) either Party may give the other Parties a notice in writing (**Dispute Notice**) setting out details of the Dispute and requiring that it be dealt with in the manner set out in this **clause 19.19**.

## **19.2 Resolution by escalation**

- (a) Within five Business Days after the date on which a Party gives the other Parties a Dispute Notice (**Dispute Notice Date**), representatives of the Parties must meet and use reasonable endeavours to resolve the Dispute.
- (b) If the Dispute is not resolved under **clause 19.2(a)19.2(a)**, senior management representatives of the Parties (who, for a Party, are senior to that Party's representative(s) referred to in **clause 19.2(a)19.2(a)**) must, within ten Business Days after the Dispute Notice Date, meet and use reasonable endeavours to resolve the Dispute.
- (c) If the Dispute is not resolved under **clause 19.2(b)19.2(b)**, the Dispute must be referred to each Party's chief executive officer (or his or her nominee – who, for a Party, must be more senior than that Party's representative(s) referred to in **clauses 19.2(a)19.2(a)** and **(b)(b)**) for resolution.
- (d) Subject to **clauses 19.419.4** and **19.519.5**, if the Dispute is not resolved under **clause 19.2(c)19.2(c)** within 20 Business Days after the Dispute Notice Date (or such other time as agreed between the Parties), the relevant Dispute:
  - (i) must, where this agreement requires referral to an Expert; and
  - (ii) may, by agreement of the Parties (in each Party's absolute discretion) in any other case,be referred for resolution by an Expert in accordance with **clause 19.319.3**.
- (e) If a Party's representative under **clause 19.2(a)19.2(a)** or **19.2(b)19.2(b)** is not authorised:
  - (i) to act on behalf of that Party in relation to the Dispute; or
  - (ii) to resolve the Dispute with immediate binding effect on that Party,the Dispute is deemed to have not been resolved under **clause 19.2(a)19.2(a)** or **19.2(b)19.2(b)** (as applicable).

## **19.3 Resolution by Expert**

- (a) This **clause 19.319.3** is subject to **clauses 19.419.4** and **19.519.5**.
- (b) If a Dispute, or any other matter, is required to be referred to, or determined by, an Expert in accordance with this agreement (including under **clause 19.2(d)**):
  - (i) the Expert must be appointed by agreement between the Parties or, in default of such appointment within ten Business Days after

the need to refer the Dispute to an Expert, will be that person nominated, at either Party's request, by:

- (A) where the Parties agree the Dispute is primarily of a technical nature, the President (for the time being) of Engineers Australia – Queensland Division;
  - (B) where the Parties agree the Dispute is primarily of a financial or accounting nature, the President (for the time being) of The Institute of Chartered Accountants in Australia – Queensland Branch; or
  - (C) in any other case, the President (for the time being) of the Queensland Law Society Inc;
- (ii) the Expert must:
- (A) have appropriate qualifications and practical experience having regard to the nature of the Dispute;
  - (B) have no interest or duty which conflicts or may conflict with his or her function as Expert, he or she being required to fully disclose any such interest or duty by written notice to the Parties before his or her appointment;
  - (C) not be an employee of a Party or of a Related Party of a Party;
  - (D) not be permitted to act until he or she has given written notice to each Party that he or she is willing and able to accept the appointment;
  - (E) have regard to the provisions of this agreement and consider all submissions (including oral submissions by each Party provided that such oral submissions are made in the presence of the Parties), supporting documentation, information and data with respect to the matter submitted by the Parties;
  - (F) for clarity, only make a determination in a way that is consistent with this agreement;
  - (G) provide the Parties with a copy of his or her determination in the form of a report within a reasonable time after his or her appointment;
  - (H) be required to undertake to keep confidential all matters coming to his or her knowledge by reason of his or her appointment and performance of his or her duties; and
  - (I) be deemed to be and act as an expert and not an arbitrator and the law relating to arbitration including the *Commercial Arbitration Act 2013* (Qld), will not apply to him or her or the

determination or the procedures by which he or she may reach a determination; and

- (iii) if the Expert is to be nominated by a person referred to in **clause 19.3(b)(i)**, the Parties must comply with and do all things necessary to satisfy and to give effect to the reasonable requirements of that person (including providing relevant indemnities and paying any charges or fees (which charges or fees will be borne equally by the Parties)) that must be satisfied or complied with as a condition of that person agreeing to nominate an Expert; and
  - (iv) the Parties must comply with, and do all things necessary to satisfy and to give effect to, the reasonable requirements of an agreed or nominated Expert (including providing relevant indemnities and paying any charges or fees (which charges or fees will be borne equally by the Parties)) that must be satisfied or complied with as a condition of that person accepting appointment as the Expert.
- (c) The Parties must do everything reasonably requested by the Expert to assist the Expert including producing information and materials as requested by the Expert and attending any hearing convened by the Expert.
  - (d) In the absence of manifest error, a decision of the Expert is final and binding upon the Parties.
  - (e) The costs of the Expert (and any advisers engaged by the Expert) will be borne in equal shares by the Parties. Each Party must bear its own costs of participating in the dispute resolution process (unless otherwise agreed by the Parties).

#### **19.4 Resolution of Disputes by Rail Safety Regulator**

- (a) Nothing in this **clause 19.19** prevents the Operator or Queensland Rail from, at any time, referring any relevant Dispute to the Rail Safety Regulator for resolution in accordance with the TRSA.
- (b) To the extent that any Dispute is referred to the Rail Safety Regulator for resolution in accordance with the TRSA, the process under the TRSA prevails to the extent of any inconsistency with this **clause 19.19**.
- (c) Without limitation to **clause 19.4(b)19.4(b)**:
  - (i) each Party will:
    - (A) do all things reasonably necessary to inform the Rail Safety Regulator about the matter in dispute; and
    - (B) participate in the dispute resolution process in good faith; and
  - (ii) the Parties agree that it is reasonable for the Rail Safety Regulator to determine the dispute including, if applicable, by giving a safety matter direction or interface direction.

## 19.5 Resolution of Disputes by Queensland Rail

If:

- (a) any Dispute is in relation to:
  - (i) proposed amendments to the IRMP; or
  - (ii) the safety of any persons or property, or the environment, on or in relation to the Network or the land on which the Network is located or in relation to the use of the Network;
- (b) that Dispute is not otherwise resolved by the Parties in accordance with **clause 19.2 or 19.3** ~~19.2 or 19.3~~ or by the Rail Safety Regulator; and
- (c) Queensland Rail considers that the failure to resolve that Dispute may have a material adverse ~~affect~~ effect on Queensland Rail's ability to comply with (or its cost or risk of, or liability for, complying with):
  - (i) this agreement (including any obligation to provide the Operator with access to the Network);
  - (ii) any Laws, Authorisations (including its Accreditation) or Land Tenure; or
  - (iii) any obligations in relation to other Network Participants,

then that Dispute may be determined by Queensland Rail, at its election (acting reasonably), after considering any relevant matters raised by the Operator.

## 19.6 Determination by court

If any Dispute is not resolved in accordance with this **clause 19.19**, then the Dispute may be referred to one of the courts of the State having jurisdiction, and sitting in Brisbane.

## 19.7 Injunctive Relief

Nothing in this agreement prevents a Party from seeking urgent injunctive relief from a court.

## 19.8 Dispute not to affect performance of obligations

The Parties are not relieved from performing their obligations under this agreement because of the existence of a Dispute.

## 19.9 Extension of time frames

Where a timeframe applies under this **clause 19.19** in relation to a Dispute, the Parties may (acting reasonably) agree to vary that timeframe and if the Parties do agree a varied timeframe then this **clause 19.19** will apply in relation to that Dispute subject to that varied timeframe.

## 20 Force majeure

### 20.1 Force Majeure Event occurrence

- (a) If a Party (**Affected Party**) is prevented or hindered by a Force Majeure Event from fully or partly complying with any obligation (except for any

obligation to pay money) under this agreement, that obligation is suspended during the time and to the extent that the performance of that obligation is prevented or hindered by the Force Majeure Event.

- (b) If the Affected Party wishes to claim the benefit of this clause, it must, as soon as practicable, give notice of the Force Majeure Event to the other Party including reasonable details of:
  - (i) the Force Majeure Event;
  - (ii) the effect of the Force Majeure Event on the performance of the Affected Party's obligations; and
  - (iii) the likely duration of the delay in performance of those obligations.
- (c) Subject to ~~clause 20.1(d)~~**20.1(d)**, the Affected Party must use reasonable endeavours to remove the effect of the Force Majeure Event as soon as practicable and to identify alternative means to viably perform the relevant obligations or mitigate the effect of the Force Majeure Event, but is not obliged to settle any strike or other labour dispute contrary to its best judgment.
- (d) For the purposes of ~~clause 20.1(e)~~**20.1(c)**:
  - (i) Queensland Rail is not obliged to fund the repair or replacement of any part of the Network that:
    - (A) is necessary for the Train Services; and
    - (B) is damaged or destroyed by a Force Majeure Event;
  - (ii) if Queensland Rail is not prepared to fund any such repair or replacement, Queensland Rail will notify the Operator of:
    - (A) the repairs or replacement that Queensland Rail is not prepared to undertake unless a Network Participant agrees to pay to Queensland Rail (in advance) the cost of those repairs or that replacement (as applicable); and
    - (B) the estimated cost of those repairs or that replacement (as applicable);
  - (iii) if a Network Participant agrees (on terms satisfactory to Queensland Rail (in its absolute discretion)) to pay to Queensland Rail the cost of those repairs or that replacement (as applicable) in advance of Queensland Rail incurring those costs, or liability for those costs, then Queensland Rail will undertake those repairs or that replacement (as applicable) to a standard consistent with Prudent Practices, but only to the extent that the Network Participant has paid those costs to Queensland Rail; and
  - (iv) if the total cost of the repairs or replacement (as applicable) undertaken by Queensland Rail is less than the amount that the Network Participant paid to Queensland Rail under ~~clause 20.1(d)(iii)~~**20.1(d)(iii)**, Queensland Rail will refund the

difference to the Network Participant as soon as reasonably practicable after the total costs of the repairs or replacement (as applicable) have been finally determined by Queensland Rail.

- (e) The Affected Party must keep the other Party informed in relation to the Force Majeure Event, any material change in the Affected Party's ability to perform its obligations and any matters relating to **clause 20.1(c)**.

## 20.2 Termination

If a delay caused by a Force Majeure Event continues for more than three consecutive months, then either Party may terminate this agreement by giving 20 Business Days notice to the other Party.

# 21 Reduction and relinquishment of Access Rights

## 21.1 Reduction of Access Rights

- (a) If the Operator fails to operate all Train Services on Scheduled Train Paths for seven or more (not necessarily consecutive) weeks out of any 12 consecutive weeks when such Train Services are scheduled, Queensland Rail may, within ten Business Days after the last of those seven occasions, give a notice to the Operator deleting the relevant Train Path from the Train Service Description.
- (b) A Train Service has not been operated on a Scheduled Train Path if the Operator has failed:
  - (i) to present the relevant Train at the scheduled entry point onto the Network; or
  - (ii) to operate the relevant Train so that it completes its full journey, in conformance with the locations and days set out in the Scheduled Train Paths applicable to such Train Service except:
    - (iii) where the prior agreement of Queensland Rail and the Operator has resulted in the Operator using an alternative Train Path for that Train service; and
    - (iv) where the reason for that failure is:
      - (A) a Force Majeure Event; or
      - (B) the failure of Queensland Rail to make the Network available.

## 21.2 Relinquishment of Access Rights

- (a) If the Operator intends to relinquish all or part of the Access Rights, the Operator must give Queensland Rail reasonable notice of its intention to do so specifying:
  - (i) the Access Rights that the Operator intends to relinquish (**Nominated Access Rights**);



- (ii) if the Operator intends that all or part of the Relinquished Access Rights be used so Queensland Rail can grant specific access rights to a specified Access Seeker (as defined in the Access Undertaking) (**Transfer**), the identity of that Access Seeker (**Transferee**) – and, for clarity, the Operator may itself be that Access Seeker; and
  - (iii) subject to **clause 21.2(b)**21.2(b), the date (**Relinquishment Date**) on which and the period for which the Nominated Access Rights are to be relinquished.
- (b) The period from the giving of the notice under **clause 21.2(a)**21.2(a) until the Relinquishment Date must not exceed six months.
  - (c) The relinquishment of any Nominated Access Rights in accordance with this **clause 21.2**21.2 is subject to and conditional on the Operator paying to Queensland Rail the Relinquishment Fee on or before the Relinquishment Date.
  - (d) If the Operator pays the Relinquishment Fee to Queensland Rail on or before the Relinquishment Date, then the terms of this agreement will cease to apply in respect of the Nominated Access Rights on the Relinquishment Date.
  - (e) Queensland Rail must facilitate a Transfer in respect of a Transferee if:
    - (i) the relevant access rights to be granted to the Transferee are included in a new or varied access agreement with the Transferee on terms satisfactory to Queensland Rail;
    - (ii) Queensland Rail is satisfied that the new or varied access agreement with the Transferee has been developed in accordance with the requirements of the Access Undertaking;
    - (iii) the Operator has complied with **clauses 21.2(a)**21.2(a) and paid the Relinquishment Fee to Queensland Rail on or before the Relinquishment Date; and
    - (iv) Queensland Rail has sufficient Available Capacity (as defined in the Access Undertaking) so that it can grant all of the relevant access rights to the Transferee without adversely affecting any other third party.
  - (f) If the Relinquishment Fee is not paid on or prior to the Relinquishment Date, then the Operator is taken to have withdrawn the notice given under **clause 21.2(a)**21.2(a) and Queensland Rail has no further obligations under this **clause 21.2** in relation to the relevant relinquishment.

## 22 Assignment

### 22.1 Assignment by Queensland Rail

- (a) Queensland Rail may Assign all or part of its rights or obligations under this agreement without the prior consent of the Operator provided that Queensland Rail procures the Assignee to covenant with the Operator by deed to be bound by and to perform the obligations of Queensland Rail under this agreement to the extent of the rights and obligations Assigned to the Assignee.
- (b) On the Assignee entering into that deed, Queensland Rail is released and discharged from further liability under this agreement in respect of the obligations which the Assignee has undertaken to be bound by and to perform.

### 22.2 Assignment by the Operator

- (a) The Operator may only Assign all or part of its rights and obligations under this agreement in accordance with this **clause 22.222.2**.
- (b) The Operator may, provided it is not in default in the performance or observance of any of its obligations under this agreement, Assign the whole of its rights and obligations under this agreement to:
  - (i) subject to **clause 22.2(e)22.2(c)**, a Related Party who is:
    - (A) Accredited to operate Train Services; and
    - (B) otherwise capable of performing the obligations of the Operator under this agreement; or
  - ~~(ii)~~ a person who is not a Related Party with the prior written consent of Queensland Rail and, where the Operator's Customer is a Party, the Operator's Customer, provided that such consent will not be unreasonably withheld:
    - ~~(A)~~(ii) if Queensland Rail is satisfied that such person:
      - ~~(1)~~(A) has the financial resources and capability to perform the Operator's obligations under this agreement; and
      - ~~(2)~~(B) is Accredited to operate the Train Services and otherwise capable of performing the Operator's obligations under this agreement; and
      - ~~(B)~~(C) in relation to the Operator's Customer, if the Assignee has entered into a rail haulage agreement with the Operator's Customer in relation to the Train Services.
- (c) Where **clause 22.2(b)(i)22.2(b)(i)** applies:
  - (i) the Operator remains liable for the performance of the duties, responsibilities and obligations assumed by the Assignee (**Assigned Obligations**); and

- (ii) the Assignee's performance of the Assigned Obligations will (to the extent of such performance) discharge the Operator's liability for performance of those Assigned Obligations.
- (d) Any Assignment by the Operator of its rights or obligations under this agreement is conditional on and does not take effect until:
  - (i) the Assignee covenants with Queensland Rail by deed, in such terms as Queensland Rail may reasonably require, to be bound by and to perform the obligations of the Operator under this agreement; and
  - (ii) the Assignee provides to Queensland Rail any Security that is required to be provided and maintained in accordance with **clause 4717**.

### 22.3 Charging

The Operator may only mortgage, charge, encumber or otherwise grant any security over (**Charge**) all or any of its rights and obligations under this agreement in whole or in part, in favour of any person (**Chargee**), if the Operator, the Chargee and Queensland Rail execute a covenant by deed on terms satisfactory to Queensland Rail (acting reasonably), including terms that the Chargee, and any person (including any receiver or receiver and manager or agent) claiming through the Chargee, must comply with the provisions of this agreement including this **clause 2222** in the exercise of its rights in relation to the Charge (including in exercising any power of sale) as if it were originally a Party to this agreement in the position of the Operator.

### 22.4 Effect of Assignment or Charge

Any purported Assignment or Charge in breach of this **clause 2222** is of no effect.

## 23 Representations and warranties

- (a) In addition to any other express or implied representations and warranties in this agreement, the Operator represents, warrants and undertakes to Queensland Rail that:
  - (i) it is a corporation validly existing under the laws applicable to it;
  - (ii) it has the power to enter into and perform all of its obligations under this agreement and has obtained all necessary consents and approvals to enable it to do so;
  - (iii) it has the resources and capability to perform all of its obligations under this agreement and is able to pay its debts as and when they fall due;
  - (iv) its obligations under this agreement are enforceable in accordance with their terms and are fully binding on it;

- (v) it is not in breach or default under any agreement to which it is a party to an extent or in a manner which would have a material adverse effect on its ability to perform its obligations under this agreement;
- (vi) there is:
  - (A) no litigation, arbitration or administrative proceeding taking place, pending, commenced or, to its knowledge, threatened against it; and
  - (B) no judgment or award has been given or made by, any court, arbitrator, other tribunal or governmental agency against it, which would or could have a material adverse effect on its ability to perform its obligations under this agreement;
- (vii) it will as soon as practicable notify Queensland Rail of the occurrence of, or pending or threatened occurrence of, any event that may cause or constitute a material breach of any of the acknowledgments, representations, warranties or covenants of the Operator under this agreement and any event that could have a material adverse effect on its ability to perform its obligations under this agreement;
- (viii) it and its Associates have all of the necessary competencies, skills and experience to exercise its rights (including to operate the Train Services) and perform its obligations, under this agreement in accordance with Prudent Practices;
- (ix) it has assessed the quality and standard of the Network and has satisfied itself as to:
  - (A) the standard and suitability of the Network for the purposes of operating the Train Services; and
  - (B) the ability of the Operator's Rolling Stock to safely interface with, and to operate on, the Network (including the cost, expense and risk of doing so); and
- (x) all information provided by the Operator to Queensland Rail, whether pursuant to this agreement or otherwise, in relation to or in connection with the Train Services, the Operator's rights or obligations under this agreement or the negotiation of this agreement, is correct and complete in all material respects and is not, whether by omission or otherwise, misleading or deceptive.

- (b) The representations and warranties set out in **clause 23(a)** are taken to be given and made on the Commencement Date and on each day during the Term.
- (c) The Operator has the right, at its cost and risk, to inspect the Network (including circumstances of the Network such as fencing and level

crossing protection) to satisfy itself for the purpose of **clause ~~23(a)(ix)~~23(a)(ix)** subject to:

- (i) the Operator giving written notice to Queensland Rail of its request to inspect the Network a reasonable time prior to the date of the intended inspection;
- (ii) the Operator receiving from Queensland Rail a notice (not to be unreasonably withheld) confirming that the inspection may occur and setting out the requirements for that inspection including in relation to any of the matters referred to in **clauses ~~23(e)(iii)~~23(c)(iii) to ~~(v)~~(v)**;
- (iii) that inspection being conducted:
  - (A) in the presence of a nominated representative of Queensland Rail;
  - (B) at a time satisfactory to Queensland Rail; and
  - (C) in a manner that does not cause or contribute to any disruption of, or other adverse ~~effect~~effect to, any Train Movements or Rail Infrastructure Operations;
- (iv) the Operator paying, or if paid by Queensland Rail reimbursing, to Queensland Rail the costs and expenses incurred by Queensland Rail in relation to the Operator's inspection (including the costs and expenses of a representative of Queensland Rail attending the inspection and, if relevant, for any track protection officers) and those costs and expenses will be a debt due and owing by the Operator to Queensland Rail; and
- (v) such other conditions as may be required by Queensland Rail in relation to the inspection including compliance with Queensland Rail's safeworking procedures and safety standards.

## 24 Confidentiality

### 24.1 Confidentiality obligation

Subject to **clause ~~24.2~~24.2**, a Party (**Recipient**), in respect of the Confidential Information of the other Party (**Disclosing Party**) that is provided to the Recipient by or on behalf of the Disclosing Party, must:

- (a) treat that Confidential Information as (and keep it) confidential;
- (b) only use that Confidential Information for the purposes of this agreement or for which it was disclosed; and
- (c) treat that Confidential Information as the property of the Disclosing Party.

## 24.2 Exceptions

A Recipient of Confidential Information is not required to comply with **clause 24.1** to the extent that:

- (a) the Disclosing Party has given its written consent (which must not be unreasonably withheld) to the relevant disclosure or use; or
- (b) another Confidentiality Exception applies to the relevant disclosure or use.

## 25 Notices

### 25.1 Form of Notice

A notice, demand, certification, process or other communication (**Notice**) relating to this agreement ([other than Network Control Directions](#)) must be in writing in English and may be given by an agent of the sender.

### 25.2 Method of giving a Notice

In addition to any other lawful means, a Notice may be given by being:

- (a) personally delivered;
- (b) left at the Party's current delivery address for Notices;
- (c) sent to the Party's current postal address for Notices by pre-paid ordinary mail or, if the address is outside Australia, by pre-paid airmail; or
- (d) sent by facsimile to the Party's current facsimile number for Notices.

### 25.3 Particulars for the giving of Notices

- (a) The particulars for the giving of Notices are initially:

#### **Queensland Rail**

Delivery address: Floor 14, 305 Edward Street, Brisbane Qld 4000

Postal address: GPO Box 1429, Brisbane Qld 4001

Facsimile: (07) 3072 8389

Attention: General Counsel

#### **Operator**

As set out in **item 2 of schedule 1**.

*[Note: If the Operator's Customer is not a party to this agreement, then delete the table below.]*

#### **Operator's Customer**

As set out in **item 4** of **schedule 1**.

- (b) Each Party may change its particulars for delivery of Notices by notice to each other Party.

#### **25.4 Effect and receipt of Notices**

- (a) Subject to **clause 25.4(b)**, a Notice is given:
  - (i) if personally delivered, at the time of delivery;
  - (ii) if posted, on the third day after the date of posting; and
  - (iii) if sent by facsimile, when the machine from which the facsimile was sent produces a report that the facsimile was sent in full to the facsimile number of the recipient (and that report is conclusive evidence that the addressee received the facsimile in full at the time indicated on that report).
- (b) If a Notice is given:
  - (i) after 5:00pm in the place of receipt; or
  - (ii) on a day which is a Saturday, Sunday or public holiday in the place of receipt,

it is taken to have been given on the next day which is not a Saturday, Sunday or public holiday in the place of receipt.

#### **25.5 Process service**

Any process or other document relating to litigation, administrative or arbitral proceedings relating to this agreement may be served by any method contemplated by this **clause 25** or in accordance with any applicable law.

#### **25.6 Representatives of the Operator**

- (a) The persons referred to in **item 4010** of **schedule 1** are the Operator's representatives in relation to the relevant matters for which they have been nominated in respect of this agreement or the Train Services.
- (b) The initial contact details for those persons are as set out in **item 4010** of **schedule 1**.
- (c) The Operator:
  - (i) must notify Queensland Rail of any changes to those representatives or their contact details on or prior to that change occurring (subject to **clause 25.6(c)(ii)**); and
  - (ii) must ensure that any person ceasing to be such a representative is replaced on or prior to (or, if this is not possible, as soon as practicable after) the time when that person ceases to be a representative.
- (d) Nothing in this **clause 25.6** limits the requirements that may be set out in the Operating Requirements Manual in relation to the nomination of representatives or the provision of contact details for nominated

representatives (including, for example, the nomination of persons as incident response coordinators or for the recovery of Rolling Stock).

## 26 GST

### 26.1 Definitions

In this agreement the expressions **adjustment note**, **consideration**, **GST**, **input tax credit**, **supply**, **tax invoice**, **recipient** and **taxable supply** have the meanings given to those expressions in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

### 26.2 Sums exclude GST

Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under this agreement are exclusive of GST.

### 26.3 Responsibility for GST

- (a) Despite any other provisions in this agreement, if GST is imposed on any supply made by a Party (or any entity through which that Party acts) (**Supplier**) under or in connection with this agreement, the recipient must pay to the Supplier an amount equal to the GST payable on the supply.
- (b) Subject to **clause 26.5**, the recipient must pay the amount referred to in **clause 26.3(a)** in addition to and at the same time as payment for the supply is required to be made under this agreement.

### 26.4 Reimbursement of expenses

If this agreement requires a Party to reimburse or indemnify any other Party for any expense, loss or outgoing (**reimbursable expense**) incurred by another Party, the amount required to be reimbursed or indemnified by the first Party will be the sum of:

- (a) the amount of the reimbursable expense net of input tax credits (if any) to which the other Party (or the representative member of the GST group of which the other Party is a member) is entitled in respect of the reimbursable expense; and
- (b) if the other Party's recovery from the first Party is a taxable supply, any GST payable in respect of that supply.

### 26.5 Tax invoice

If an amount on account of GST or a GST inclusive price is charged or varied under this agreement, the Supplier must provide the recipient of the supply a valid tax invoice or adjustment note at or before the time of payment or variation.

### 26.6 Adjustment

If the amount of GST paid or payable by the Supplier (or the representative member of the GST group of which the Supplier is a member) on any supply made under this agreement differs from the amount on account of GST paid by the recipient, because the Commissioner of Taxation lawfully adjusts the value



of the taxable supply for the purpose of calculating GST, then the amount of GST paid by the recipient will be adjusted accordingly by a further payment by the recipient to the Supplier or the Supplier to the recipient, as the case requires.

## **27 General**

### **27.1 Duty**

- (a) The Operator as between the Parties is liable for and must pay all duty (including any fine, interest or penalty except where it arises from default by Queensland Rail) on or relating to this agreement, any document executed under it or any dutiable transaction evidenced or effected by it.
- (b) If Queensland Rail pays any duty (including any fine, interest or penalty) on or relating to this agreement, any document executed under it or any dutiable transaction evidenced or effected by it, the Operator must pay that amount to Queensland Rail on demand.

### **27.2 Legal costs**

Except as expressly stated otherwise in this agreement, each Party must pay its own legal and other costs and expenses of negotiating, preparing, executing and performing its obligations under this agreement.

### **27.3 Waiver and exercise of rights**

- (a) Waiver of any right arising in relation to a failure to comply with this agreement must be in writing and signed by the Party granting the waiver.
- (b) A single or partial exercise or waiver by a Party of a right relating to this agreement does not prevent any other exercise of that right or the exercise of any other right.
- (c) A Party is not liable for any Loss of any other Party caused or contributed to by the waiver, exercise, attempted exercise, failure to exercise or delay in the exercise of a right.
- (d) A failure or delay in the exercise, or partial exercise, of a right arising from a breach of this agreement does not result in a waiver of that right.

### **27.4 Amendments**

Except as otherwise provided in this agreement, an amendment of this agreement will only be effective if it is in writing and executed by all Parties.

### **27.5 Rights cumulative**

Except as expressly stated otherwise in this agreement, the rights of a Party under this agreement are cumulative and are in addition to any other rights of that Party.

### **27.6 Consents**

Except as expressly stated otherwise in this agreement, a Party may conditionally or unconditionally give or withhold any consent, approval,

acceptance or notice of no objection to be given under this agreement and is not obliged to give its reasons for doing so.

### **27.7 Further steps**

Each Party must promptly do whatever any other Party reasonably requires of it to give effect to this agreement and to perform its obligations under it.

### **27.8 Governing law and jurisdiction**

- (a) This agreement is governed by and is to be construed in accordance with the laws applicable in the State of Queensland.
- (b) Each Party irrevocably and unconditionally:
  - (i) agrees that the courts of the State of Queensland and any courts which have jurisdiction to hear appeals from any of those courts are to have exclusive jurisdiction to settle disputes which may arise out of or in connection with this agreement and that accordingly any suit, action or proceeding (**Proceedings**) arising out of or in connection with this agreement may be brought in, and only in, such courts;
  - (ii) waives any objection which it may have now or in the future to the laying of the venue of any Proceedings in such courts and any claim that any such Proceedings have been brought in an inconvenient forum; and
  - (iii) agrees that a final judgment in any Proceedings brought in such courts are conclusive and binding upon such Party and may be enforced in the courts of any other jurisdiction.

### **27.9 Liability**

An obligation of two or more persons binds them separately and together.

### **27.10 Counterparts**

This agreement may consist of a number of counterparts and, if so, the counterparts taken together constitute one document.

### **27.11 Entire understanding**

- (a) This agreement contains the entire understanding between the Parties as to the subject matter of this agreement.
- (b) All previous negotiations, understandings, representations, warranties, memoranda or commitments concerning the subject matter of this agreement are merged in and superseded by this agreement and are of no effect.
- (c) No oral explanation or information provided by any Party to another:
  - (i) affects the meaning or interpretation of this agreement; or
  - (ii) constitutes any collateral agreement, warranty or understanding between any of the Parties.

## 27.12 Relationship of Parties

This agreement is not intended to create a partnership, joint venture or agency relationship between the Parties.

## 27.13 Severability

- (a) Subject to ~~clause 27.13(b)~~27.13(b), if a provision of this agreement is illegal or unenforceable in any relevant jurisdiction, it may be severed for the purposes of that jurisdiction without affecting the enforceability of the other provisions of this agreement.
- (b) ~~Clause 27.13(a)~~27.13(a) does not apply if severing the provision:
  - (i) materially alters:
    - (A) the scope and nature of this agreement; or
    - (B) the relative commercial or financial positions of the Parties;  
or
  - (ii) would be contrary to public policy.

## 27.14 Survival

- (a) ~~Clauses 3.3, 3.4, 5, 6.1(c), 7.9(c) to (e), 12, 13, 15.5, 15.6, 16.8, 17.2, 16.8, 17.4, 17.2, 17.4, 18, 19 and 24 to 28~~ remain in full force and effect and survive the expiry or termination of this agreement.
- (b) ~~Clause 15.6~~15.6 remains in full force and effect and survives the expiry or termination of this agreement until the Operator has fully complied with it.
- (c) All indemnities and exclusions, limitations and other restrictions on liability contained in this agreement survive the expiration or termination of this agreement.
- (d) All representations and warranties in this agreement survive the execution and delivery of this agreement and the completion of the transactions contemplated by it.

## 27.15 Benefit

The provisions of this agreement will, subject as otherwise provided in this agreement, continue for the benefit of and be binding on the Parties and their respective successors and permitted novatees and assigns.

## 27.16 No merger

The rights and obligations of the Parties:

- (a) continue until satisfied in full;
- (b) do not merge on the completion of any transaction contemplated by this agreement; and
- (c) survive the execution and delivery of any assignment or other document entered into for the purpose of implementing a transaction.

## 27.17 Enforcement of indemnities

It is not necessary for a Party to incur expense or make a payment before enforcing an indemnity contained in this agreement.

## 27.18 Sublease

- (a) The Parties acknowledges that:
  - (i) Queensland Rail's interest in all or part of the land on which the Network is located and over which the Train Services will operate is or will be held under:
    - (A) the Sublease; or
    - (B) a lease, easement, licence, statutory right or other arrangement or right other than the Sublease, **(Land Tenure)**; and
  - (ii) this agreement is subject to the terms and conditions (including all reservations), whether express or implied, of the Sublease (or the Head Lease) and any other Land Tenure.
- (b) Queensland Rail may, from time to time, do either or both of the following:
  - (i) give the Operator a copy of any Land Tenure (together with any relevant amendments from time to time); or
  - (ii) notify the Operator of any requirements that the Operator must comply with in relation to that Land Tenure (together with any amendments from time to time) **(Tenure Requirements)**.
- (c) Despite any other clause in this agreement and to the extent that the Operator operates Train Services on any part of the Network on land, or otherwise accesses land, that is the subject of any Land Tenure, the Operator must:
  - (i) observe and comply with all relevant obligations of Queensland Rail under that Land Tenure and the Tenure Requirements; and
  - (ii) not act, omit to act or permit, cause or contribute to any act or omission that may result in Queensland Rail:
    - (A) breaching a term of any Land Tenure; or
    - (B) incurring (directly or indirectly) any costs or expenses in complying with a Land Tenure that Queensland Rail would not otherwise have incurred.
- (d) Without limitation to the circumstances where the Operator may fail to comply with **clause 27.18(c)**, the Operator must be taken to fail to comply with **clause 27.18(c)** if the Operator, by act or omission, fails to comply (or permits any non-compliance) with any Tenure Requirements.
- (e) If there is an inconsistency between the terms of this agreement and the terms of any Land Tenure or Tenure Requirements which means that

Queensland Rail or the Operator cannot comply with both this agreement and that Land Tenure or those Tenure Requirements, then the terms of that Land Tenure or those Tenure Requirements (as applicable) prevail to the extent of the inconsistency and the provisions of this agreement will be construed accordingly.

- (f) Queensland Rail does not warrant or represent:
  - (i) that it will not surrender all or part of any Land Tenure; or
  - (ii) that any Land Tenure will not be terminated or determined for any reason.
- (g) Queensland Rail will not be liable to the Operator for any Claims which may be brought against or made upon the Operator, or any Losses which the Operator suffers or incurs, in connection with any amendment, replacement, surrender, termination, expiry or determination of any Land Tenure.

#### **27.19 Most favoured nation status**

- (a) The Operator may (acting reasonably) notify Queensland Rail that it believes that:
  - (i) Queensland Rail has entered into an access agreement with another Network Participant for a Train service that transports the same commodity in the same geographic area as a Train Service (**Like Train Service**); and
  - (ii) the access charges applicable to the Like Train Service have been developed in contravention of the price differentiation provisions under the relevant Access Undertaking's pricing principles that applied to the development of those access charges (**Price Differentiation Provisions**),and provide Queensland Rail with reasons why the Operator considers this to be the case.
- (b) Within 20 Business Days after receiving such a notice, Queensland Rail must notify the Operator:
  - (i) whether it agrees that the access agreement with the other Network Participant is for a Like Train Service including, if it does not agree, its reasons; and
  - (ii) where it does agree with the matter in **clause ~~27.19(b)(i)~~27.19(b)(i)**, whether it agrees that the access charges applicable to the Like Train Service have been developed in contravention of the Price Differentiation Provisions including, if it does not agree, its reasons.
- (c) Within 40 Business Days after giving a notice under **clause ~~27.19(b)~~27.19(b)** agreeing to the matter in **clause ~~27.19(b)(i)~~27.19(b)(ii)**, Queensland Rail must notify the Operator:

- (i) whether Queensland Rail has been able to vary the access charges applicable to the Like Train Service to rectify the contravention of the Price Differentiation Provisions; or
  - (ii) where Queensland Rail has not been able to vary those access charges, that Queensland Rail agrees to vary the Access Charge to rectify the contravention of the Price Differentiation Provisions including how the Access Charge will be varied.
- (d) If the Operator (acting reasonably) is not satisfied with Queensland Rail's responses under ~~clauses 27.19(b) or (c)~~27.19(b) or (c), the dispute must be referred to an Expert for resolution in accordance with **clause 19.3**.
- (e) If:
- (i) another Network Participant notifies Queensland Rail that it believes:
    - (A) that some or all of the Train Services transport the same commodity in the same geographic area as a Train service operated by that other Network Participant; and
    - (B) that the Access Charges for those Train Services have been developed in contravention of the price differentiation provisions under the relevant Access Undertaking's pricing principles that applied to the development of the Access Charges; and
  - (ii) Queensland Rail agrees with the matters referred to in ~~clauses 27.19(e)(i)(A) and (B)~~27.19(e)(i)(A) and (B),  
then Queensland Rail may notify the Operator varying the Access Charge to rectify the relevant contravention.
- (f) In this ~~clause 27.19~~27.19, a reference to the Access Charges, or the access charges applicable to another Network Participant's Train service, includes the methodology, rates and other inputs used to calculate those Access Charges or access charges, as applicable.
- (g) This ~~clause 27.19~~27.19 only applies in relation to an access agreement or access charges for a Like Train Service where that access agreement was entered into by the relevant parties after the date of this agreement.

## 28 Interpretation

### 28.1 Definitions

In this agreement:

**Access Charge Input** means a rate or other input, used for the purpose of calculating Access Charges, as specified in **clause 41 of schedule 3** (including as varied, escalated or replaced from time to time in accordance with this agreement).

**Access Charges** means the charges determined in accordance with schedule 3.

**Access Rights** has the meaning given in **clause 2(a)**.

**Access Undertaking** means Queensland Rail's access undertaking as approved by the QCA under the QCA Act, from time to time.

**Accreditation** means accreditation (including any exemption from the requirement for such accreditation and any conditions applying to that accreditation or exemption) in accordance with Part 5 of the TRSA and

**Accredited** means to have Accreditation.

**Ad Hoc Train Service** means a train service additional to the number of Train Services permitted under this agreement and varying from the Train Service Description, but agreed to by Queensland Rail;

**Additional Train Service** means the operation of a Train in accordance with this agreement that would be a Train Service but for it being in addition to the Train Service Levels set out in the Train Service Description.

**Affected Party** has the meaning given in **clause 20.1(a)**.

**Assign** means assign, novate, transfer or otherwise deal with, and **Assignment** and **Assignee** have a corresponding meaning.

**Associates** means, for a Party:

- (a) directors, officers, employees, contractors, agents or consultants of that Party; and
- (b) where the Party is:
  - (i) the Operator, any other person under the control or supervision of, or acting for or on behalf of, the Operator in connection or relating to the Train Services; or
  - (ii) Queensland Rail, and any other person under the control or supervision of, or acting for or on behalf of, Queensland Rail in connection with or relating to the provision of the Access Rights,

including any worker (as defined under the *Work Health and Safety Act 2011* (Qld)) who carries out work for that Party.

**Authorisation** means any consent, accreditation, authorisation, registration, filing, lodgement, notification, agreement, licence, certification, commission, permit, approval, exemption, ruling or other permission from, by or with an Authority required by any Law or lawfully required by any Authority;

**Authority** means:

- (a) the Crown or any minister of the Crown;
- (b) any government, federal, state or local government department or other governmental, semi-governmental or judicial body or authority including local government, a court or a tribunal;

- (c) any corporation, authority, body or force constituted for a public purpose (including any police service or force);
- (d) any holder of an office for a public purpose;
- (e) any governmental, semi-governmental or judicial person; and
- (f) any person (whether autonomous or not) who is charged with the administration or enforcement of a Law,

including any officer or agent of the foregoing acting in that capacity but excluding the Rail Authority.

**Business Day** means a day which is not a Saturday, Sunday or public holiday in Brisbane.

**Certification** has the meaning given in **clause 7.10(a)(i)**.

**Change in Control** means:

- (a) a change in the entity that controls the Operator;
- (b) an entity that controls the Operator ceases to control the Operator; or
- (c) if the Operator is not controlled, another entity acquires control of the Operator,

except where:

- (d) the Operator is listed on the Australian Securities Exchange before, and remains listed after, the relevant change;
- (e) the relevant change relates directly to the initial listing of the Operator on the Australian Securities Exchange; or
- (f) for paragraphs (a) and (b), the ultimate holding company of the Operator remains the same following the relevant change.

For the purposes of this definition “control”, “controls”, “controlled” and “ultimate holding company” have the meaning given to those terms in the Corporations Act.

**Change in Law** means:

- (a) any amendment, repeal, modification or enactment of any Law;
- (b) any change in the interpretation or application, including by the exercise of delegated authority, of any Law resulting from a decision of a court or Authority;
- (c) the making of any new directive, or any change in an existing directive, of any Authority;
- (d) the imposition of a requirement for Authorisations not required as at the Commencement Date;
- (e) after the date of grant of any Authorisation, a change in the terms, conditions or requirements relating to that Authorisation including any new terms, conditions or requirements;



- (f) any such Authorisation as has been granted ceasing to remain in full force and effect or, if granted for a limited period, not being renewed on a timely basis on application therefore being duly made, or being renewed on a basis that is materially less favourable than the original Authorisation;
- (g) an amendment to or replacement of the Access Undertaking; or
- (h) a change in the application or interpretation of the Access Undertaking resulting from a decision of a court or other Authority.

**Change to Credit** means:

- (a) (i) a change in the rate, or basis of calculation, of; or
  - (ii) the introduction or cessation of,
    - a credit, rebate, deduction, refund, exemption, concession or any other benefit or allowance (whether or not relating to an Impost), including, without limitation, a fuel tax credit, diesel fuel rebate or similar credit to which Queensland Rail is or was entitled; or
- (b) any change in the funding or other support received by Queensland Rail from any Authority in relation to the Network.

**Charge** has the meaning given in **clause 22.3**.

**Chargee** has the meaning given in **clause 22.3**.

**Claim** means any claim, cause of action, proceeding, liability, suit or demand (including by way of contribution or indemnity) whether:

- (a) arising in contract, in tort (including negligence), under any Law or otherwise; or
- (b) present or future, fixed or unascertained, actual or contingent.

**Claim Event** has the meaning given in **clause 13.6**.

**Commitment Date**, for a Train Service, has the meaning given in **item 8 of schedule 1** for that Train Service.

**Commencement Date** has the meaning given in **item 53 of schedule 1**.

**Compliance Date**, for a Train Service, has the meaning given in **item 7 of schedule 1** for that Train Service.

**Confidential Information** means:

- (a) the terms of this agreement; and
- (b) any information, data or other matter (in this definition, **information**) disclosed to a Recipient by, or on behalf of, a Disclosing Party where:
  - (i) the disclosure of the information by the Recipient would reasonably be expected to adversely affect the commercial interests of the Disclosing Party; or

- (ii) the information is marked or otherwise indicated as confidential at the time of the disclosure to the Recipient,

excluding information that:

- (iii) was in the Recipient's lawful possession prior to the disclosure; or
- (iv) whether before or after the disclosure:
  - (A) is in the public domain through means other than a breach of confidentiality by the Recipient (or anyone to whom the Recipient has disclosed it); or
  - (B) is received by the Recipient independently from a third party who is free to disclose such information.

**Confidentiality Exception** means:

- (a) any disclosure or use of Confidential Information consented to by the Disclosing Party under **clause ~~24.2(a);24.2(a)~~**;
- (b) any disclosure of Confidential Information to another Party, provided that the confidentiality obligations under this agreement continue to apply to that Confidential Information as if the disclosure was made directly by the Disclosing Party to that other Party; or
- (c) any disclosure or use of Confidential Information:
  - (i) to the extent necessary to:
    - (A) the Recipient's directors, officers or employees; or
    - (B) without limiting **paragraph ~~(e)(xii)(c)(xii)~~** of this definition, the directors, officers or employees of a Related Party of the Recipient;
  - (ii) to the extent required or compelled by, or necessary to observe, administer or comply with, any Law (other than section 275(1) of the *Personal Property Securities Act 2009* (Cth));
  - (iii) to the extent consistent with a person's right to disclosure under any Law;
  - (iv) without limiting **paragraphs ~~(c)(ii) or (iii)(c)(ii) or (iii)~~** of this definition, in accordance with the Access Undertaking (including the Network Management Principles) including:
    - (A) in publishing or providing MTPs and DTPs; and
    - (B) for the purpose of consultations or negotiations relating to a modification of a MTP or the scheduling of a DTP in variation from an MTP<sub>1</sub>;

~~where, in this definition, MTP and DTP have the meanings given to those terms in the Access Undertaking or the Network Management Principles, as applicable;~~

- (v) to the extent necessary for the conduct of any legal proceedings (including any dispute resolution process under the Access Undertaking or the QCA Act);
- (vi) to the extent required under any stock exchange listing requirement or rule;
- (vii) to the Rail Safety Regulator or the QCA;
- (viii) to the Recipient's solicitors, barristers, or accountants under a duty of confidentiality (which is not waived by the Recipient without the prior written consent of the Disclosing Party);
- (ix) to the Recipient's engineering or other technical consultants and advisers to the extent necessary for the provision of advice to the Recipient (provided they are under a legal obligation not to disclose the Confidential Information to any third party);
- (x) to the Recipient's banker, financier or other financial institution, to the extent required for the purpose of raising funds or maintaining compliance with credit arrangements, if such banker or financial institution has executed a legally enforceable confidentiality deed in favour of the Disclosing Party under which they are obliged to keep the Confidential Information confidential;
- (xi) if Queensland Rail is the Recipient, to any responsible Minister (as defined in the Rail Authority Act);
- (xii) if Queensland Rail is the Recipient, to the extent necessary to:
  - (A) the Rail Authority; and
  - (B) the Rail Authority's board members;
  - (C) the Rail Authority's:
    - (1) chief executive officer, chief finance officer and other senior executives (as those terms are defined under the Rail Authority Act); and
    - (2) other officers and employees;
- (xiii) for the purpose of facilitating Network Control Directions where the disclosure of information is by Queensland Rail in the usual course of undertaking Network Control;
- (xiv) by any person involved in clearing a Network Incident or other event or incident that is preventing or affecting the operation of Train services on the Network; or
- (xv) by Queensland Rail for the purpose of responding to, managing or clearing a Network Incident or other event or incident that is preventing or affecting, or is likely to prevent or affect, the operation of Train services on the Network.

**Consequential Loss** means, subject to paragraphs (e) and (f) of this definition:

- (a) any special, indirect or consequential loss;
- (b) any economic loss in respect of any claim in tort;
- (c) any loss of profits, loss of production, loss of use, loss of contract, loss of opportunity, loss of reputation, loss of goodwill, wasted overheads or any damage to credit rating whatsoever; and
- (d) any loss arising out of any Claim by a third party,

whether arising in contract, in tort (including negligence), under any law or otherwise and whether present or future, fixed or unascertained, actual or contingent, but does not include:

- (e) a loss (including a loss arising out of a Claim by a third party) in respect of:
  - (i) the cost of repairing, replacing or reinstating any real or personal property owned or leased by any person (including a Party) that has been lost, damaged or destroyed; or
  - (ii) personal injury to or death of any person; or
- (f) in respect of any personal injury claim, special loss or economic loss as those terms are used in the context of personal injury claims.

**Corporations Act** means the *Corporations Act 2001* (Cth).

**CPI** means the Consumer Price Index: All Groups – Brisbane (Australian Bureau of Statistics Publication No.6401.0) as published by the Australian Bureau of Statistics (or other successor, authority or instrumentality having jurisdiction in the matter) as varied from time to time in accordance with this agreement.

**Daily Train Plan or DTP** means [a plan that details the scheduled times for all Train Services and any Planned Possessions, Urgent Possessions and Emergency Possessions for a particular day on a specified part of the Network.](#)

**Dangerous Goods** means any substance or thing defined as dangerous goods, explosives or radioactive material under a Dangerous Goods Code and includes any substance or thing specifically identified as such in **schedule 2**.

**Dangerous Goods Code** means:

- (a) the Australian Code for the Transport of Dangerous Goods by Road and Rail;
- (b) the Australian Code for the Transport of Explosives by Road and Rail; or
- (c) the Code of Practice for the Safe Transport of Radioactive Material, as published and in force from time to time and as amended or replaced.

**Data** has the meaning given in **clause 7.8(a)7.9(a)**.

**Disclosing Party** has the meaning given in **clause 24.124.1**.

**Dispute** has the meaning given in **clause 19.1**.

**Dispute Notice** has the meaning given in **clause 19.1(b)**.

**Dispute Notice Date** has the meaning given in **clause 19.2(a)**.

**Emergency Possession** means a Possession:

- (a) that is required to rectify a fault with the Network:
  - (i) that is considered by Queensland Rail to be dangerous or potentially dangerous to any person; or
  - (ii) where severe speed restrictions have been imposed that affect the scheduled Train services of Network Participants; and
- (b) that Queensland Rail intends to carry out within five Business Days after the detection of the fault.

**End Date** means, for a Train Service, the date specified in **item 6 of schedule 1**.

**Environmental Harm** means environmental harm as defined in the *Environmental Protection Act 1994* (Qld).

[EIRMR means the environmental investigation and risk management report developed by the Operator to identify and assess the environmental risks associated with the proposed Train Services and to identify applicable control measures to effectively manage those risks. For the avoidance of doubt, the EIRMR is used to inform the Interface Risk Assessment and the development of the IRMP.](#)

**Expert** means an expert appointed in accordance with **clause 19.3**.

**Extension** includes an enhancement, expansion, augmentation, duplication or replacement of all or part of the Network (excluding Private Infrastructure).

**Force Majeure Event** means any cause, event or circumstance or combination of causes, events or circumstances which:

- (a) is beyond the reasonable control of the Affected Party; and
- (b) by the exercise of due diligence the Affected Party was not reasonably able to prevent or is not reasonably able to overcome,

and includes:

- (c) compliance with a lawful requirement, order, demand or direction of an Authority or an order of any court having jurisdiction other than where that requirement, order, demand or direction results from any act or omission of the Affected Party;
- (d) a strike, lockout, stoppage, go slow, labour disturbance or other such industrial action, whether or not the Affected Party is a party to such industrial action or would be able to influence or procure the settlement of such industrial action;

- (e) an act of God;
- (f) war, invasion, act of terrorists, act of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, military or usurped power, blockade, civil disturbance or public disorder;
- (g) equipment failure or breakdown where such failure or breakdown could not have been prevented by Prudent Practices or accident or accidental damage to any thing;
- (h) malicious damage or sabotage;
- (i) ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste;
- (j) failure of electricity supply from the electricity grid;
- (k) delay, restraint, restriction, embargo or other material adverse effect arising from any act or omission of any Authority;
- (l) fire, flood, storm surge, cyclone, tornado, tsunami, earthquake, washaway, landslide, explosion, hail, lightning, severe weather conditions or other catastrophe or natural calamity;
- (m) any act or omission of any third party (including any third party's presence on or near the Network), without the express authorisation of Queensland Rail, that results in damage to the Network or the use or operation of the Network being prevented or impeded;
- (n) epidemic or quarantine restriction; and
- (o) delay of a supplier due to any of the foregoing whenever arising,

and, where the Operator is the Affected Party, excludes any cause, event or circumstance in connection with any right referred to in **clause 7-107.11** (including any failure by the Operator to obtain and maintain such rights, any exercise or performance of such rights and any inconsistency between such rights and this agreement).

**GST** has the meaning given in **clause 26-126.1**.

**Head Lease** means the lease from the Governor in Council to the State of Queensland (represented by the Department of Transport and Main Roads) of land on which all or part of the Network is located, granted in accordance with section 240(2) of the TIA.

**Impost** means a tax, excise, charge, levy, duty, fee, impost, rate, royalty, imposition, withholding, fee for any Authorisation or other licence or approval fee or any other charge which is imposed, applied or administered by, or payable to or by, any Authority but excluding any income tax, fringe benefits tax, capital gains tax or any tax that replaces any of those taxes.

**Impost Change** means:

- (a) the introduction or imposition of a new Impost;
- (b) a change in the rate, amount or application of an Impost; or

- (c) a change in the basis of calculation of an Impost.

**Incident** means any Network Incident involving the activities of the Operator.

**Insolvency Event** means, in relation to a Party, any one or more of the following events:

- (a) the Party is not able to pay all its debts from the Party's own money as and when they become due or has stated that it is unable to do so;
- (b) the Party has been presumed to be insolvent or unable to pay its debts under any applicable legislation;
- (c) a resolution is passed that the Party be wound up or placed in liquidation voluntarily or that an administrator be appointed;
- (d) an application or order has been made for the winding up or dissolution of the Party (other than an application which is dismissed or withdrawn within ten Business Days after such proceedings were commenced);
- (e) a controller, administrator, receiver, liquidator or provisional liquidator has been appointed to the Party or in respect of any of its property;
- (f) the Party has entered into or taken any action to enter into (whether formally or informally) an arrangement (including a scheme of arrangement or deed of company arrangement), composition or compromise with, or assignment for the benefit of, all or any class of its creditors or members or a moratorium involving any of them;
- (g) a mortgagee has entered into possession of any of the Party's assets or undertakings; or
- (h) anything analogous to or of a similar effect to anything described above under the law of any relevant jurisdiction has occurred in respect of the Party,

provided that, for the purposes of this definition, a reference to the Party includes any Related Party of the Party.

**Inspection or Audit** has the meaning given in **clause 9.5**.

**Insurance** means those insurances to be effected and maintained in accordance with **clause 16.16**.

**Interest Rate** means the rate which is the aggregate of:

- (a) 2% per annum; and
- (b) the Commonwealth Bank of Australia's reference rate being the "Reference Rate" quoted by the Commonwealth Bank of Australia (or any successor bank) for borrowers with overdrafts of \$100,000 or more on any relevant date as published in the Australian Financial Review (or in the event that such a rate is not so quoted or published at or in respect of any relevant date, such other similar rate to the "Reference Rate" specified by a major commercial bank agreed between the Parties or, if

not agreed, a rate determined by an Expert in accordance with **clause 19.319.3**).

**Interface Risk** means a risk to the safety of persons or property or to the environment<sup>5</sup> arising from the interaction between the Operator's proposed operations and any one or more of:

- (a) the Network;
- (b) operations on the Network (including those of other Network Participants and Queensland Rail); and
- (c) persons using the Network, persons on or near the Network or members of the public (including any activities on the Network that may affect those matters),

including risks of Environmental Harm arising out of the Operator's proposed operations on the Network, provided that a reference to operations in this definition includes railway operations as defined in the TRSA.

**Interface Risk Assessment** means an assessment to:

- (a) identify all reasonably foreseeable Interface Risks;
- (b) evaluate the possibility of the Interface Risks occurring and the safety, commercial and other consequences of those Interface Risks;
- (c) identify appropriate controls and measures to adequately manage all Interface Risks (including any training required for the Operator's Associates);
- (d) identify the Party responsible for implementing such controls and measures and ensuring their on-going effectiveness;
- (e) identify the applicable safeworking procedures and safety standards to be adhered to including Queensland Rail's safety policies and procedures and the Operating Requirements Manual;
- (f) identify the minimum standards relating to the interface between Rolling Stock and the Network with which the Rolling Stock and Train Configurations must comply in order for them to be able to be operated on the relevant parts of the Network (or, if already agreed, agree variations (if any) to those standards);
- (g) identify:
  - (i) any relevant Laws and the controls, standards and procedures developed from time to time by Queensland Rail to comply with such Laws; and

---

<sup>5</sup> Environmental risks include:

- risks in relation to water quality, pollution, contaminated land, nature conservation, hazardous substances and dangerous goods, waste and **noise**; and
- risks of serious environmental harm, material environmental harm and environmental nuisance as defined in the *Environmental Protection Act 1994* (Qld).



- (ii) any relevant elements of Queensland Rail's environmental management system and the Operating Requirements Manual, to be adhered to;
- (h) satisfy the requirements under the TRSA (including for an interface agreement (as defined in the TRSA)) or under any other relevant Laws relating to health or safety; and
- (i) satisfy the relevant requirements under the Operating Requirements Manual for such an assessment.

**IRMP** ~~mean~~**means** the interface risk management plan set out in **schedule 4**, as amended from time to time in accordance with **clause 9.2**.

**Land Tenure** has the meaning given in **clause 27.18(a)(i)**.

**Law** includes:

- (a) any statute, ordinance, code, law, by-law, proclamation, rule or regulation or any other subordinate legislation, whether State, Commonwealth or otherwise;
- (b) the terms of any Authorisation;
- (c) common law and equity; and
- (d) any order, circular, requirement, condition, notice, decree, decision, direction or guidelines of any Authority with which the Operator or Queensland Rail (as the case may be) is legally required to comply including any requirement to pay fees and charges,

whether now, or at any time in the future, in effect.

**Loss** means loss, damage, cost or expense including the costs and expenses of defending or settling any Claim (including legal costs and expenses on a full indemnity basis) whether:

- (a) arising in contract, in tort (including negligence), under any Law or otherwise; or
- (b) present or future, fixed or unascertained, actual or contingent.

**Material Change** means:

- (a) an Impost Change;
- (b) a Change in Law; or
- (c) a Change to Credit.

**Metropolitan Network** means that part of the Network bounded to the north by (and including) Nambour station and to the west by (and including) Rosewood and including all branch lines comprised in that part of the Network.

~~**Mixed Goods Train Service** means any Train Service that is not a Unit Train Service.~~

[Master Train Plan or MTP means a plan detailing the scheduled times as advised by Queensland Rail from time to time for all Train Services and any Planned Possessions on a specified part of the Network, where such scheduled times remain unchanged from week to week.](#)

**Net Financial Effect** means the net adverse effect in financial terms of a Material Change on Queensland Rail in relation to performing its obligations or exercising its rights under this agreement including any offsetting benefits or adverse effects directly or indirectly connected to the Material Change.

**Net Material Financial Impact** has the meaning in **clause 8.3(b)(i)**.

**Network** means the rail transport infrastructure (as defined in the TIA):

- (a) for which Queensland Rail is the Railway Manager; and
- (b) the use of which is taken, pursuant to section 250(1)(b) of the QCA Act, to be a service declared under Part 5, Division 2 of the QCA Act (but excluding any rail transport infrastructure (as defined in the TIA) the use of which is referred to in section 249(2) of the QCA Act).

**Network Control** means the control, management and monitoring (including, as applicable, scheduling) of:

- (a) all Train Movements;
- (b) all other operations of Rolling Stock on the Network; and
- (c) any activities affecting or potentially affecting such Train Movements or Rolling Stock operation or the proper, efficient and safe operation and management of the Network.

**Network Control Directions** means instructions, directions and notifications from time to time issued by Queensland Rail for the purpose of Network Control (including preventing or minimising the effect of a material breach of this agreement).

**Network Controller** means a person appointed by Queensland Rail from time to time to perform Network Control for a relevant part of the Network.

**Network Control System** means the software, databases and systems used from time to time by Queensland Rail in connection with Network Control.

**Network Incident** means any Rolling Stock derailment, Rolling Stock disablement or breakdown, accident, collision or any other unplanned occurrence on the Network which causes or could cause death or injury to any person, damage to property or Environmental Harm or a disruption to or cancellation by Queensland Rail of any Train Movement.

**Network Management Principles** has the meaning given to that term in the Access Undertaking (from time to time) or, if the Access Undertaking ceases to define that term, the network management principles included in the Operating Requirements Manual from time to time.

**Network Participant** means:

- (a) any person who holds, or uses any other person's, rights of access to any part of the Network in relation to Train services; and
- (b) any Accredited rail transport operator (as defined in the TRSA) who uses the Network,

including:

- (c) the Operator; and
- (d) any person in control of, or operating, any Private Infrastructure that is connected to the Network.

**Nominated Access Rights** has the meaning given in **clause 21.2(a)(i)**.

**Notice** has the meaning given in **clause 25.1**.

**Obstruction** means any thing or circumstance (including debris or other things on the Network), which has the potential to cause a disruption to or cancellation by Queensland Rail of Train Services or Train Movements and includes any Network Incident but does not include an Operational Constraint imposed by Queensland Rail.

[Operating Plan](#) has the meaning given in the [Access Undertaking](#).

**Operating Requirements Manual** has the meaning given in the Access Undertaking, as amended from time to time by Queensland Rail under **clauses 8.1** or **8.28.2**.

**Operational Constraint** means any temporary or permanent constraint on the operation or use of any part of the Network imposed by Queensland Rail as it considers necessary in relation to the proper, efficient or safe operation or management of the Network (including speed restrictions, load restrictions, Planned Possessions, Urgent Possessions, Emergency Possessions and signalling or overhead restrictions).

**Operator's Customer** means:

- (a) any person that has a rail haulage agreement or arrangement with the Operator in relation to the Access Rights;
- (b) any consignor of goods to be transported by the Operator;
- (c) any person with title to, or an interest in, any thing to be transported by the Operator; and
- (d) any other person directly or indirectly benefitting from, or for whom the Operator operates, the Train Services.

provided that if **items 3** and **4** of **schedule 1** have been completed and the person whose details are set out in **items 3** and **4** of **schedule 1** has executed this agreement, then that person is the "Operator's Customer".

**Operator's Emergency Management Plan** means the emergency management plan, including as amended or replaced from time to time,:

- (a) that is developed and maintained by the Operator under **clause 10.1;**  
~~and~~**10.1; and**
- (b) for which the Operator has obtained a notice from Queensland Rail, in accordance with **clause 10.1(a)** (and, if applicable, **clause 10.1(d)(iii)**), that Queensland Rail has no objection to that plan (including any amendments).

**Parties** means collectively the parties to this agreement, and **Party** means one of them.

**Peak Periods** means the time periods:

- (a) from 6:00am to 9:00am; and
- (b) from 3:30pm to 6:30pm,

on Business Days or as otherwise notified by Queensland Rail (acting reasonably) from time to time.

**Planned Possession** means a Possession (other than an Urgent Possession or an Emergency Possession) where such Possession is entered into the Train Schedule and adversely affects the operation of Train Services.

**Possession** means the temporary closure or occupation by Queensland Rail of part of the Network (including closure of Track or isolation of any electrical overhead traction system) for the purpose of carrying out Rail Infrastructure Operations, other work or other activities on or in the proximity of the Network.

**Present Value** means the present value calculated at a discount rate equal to the Weighted Average Cost of Capital (WACC) (as defined in the Access Undertaking from time to time).

**Private Infrastructure** means rail transport infrastructure (as defined in the TIA), including but not limited to the track, signalling and electrical overhead traction system (if applicable) for which Queensland Rail is not the Railway Manager.

**Proceedings** has the meaning given in **clause 27.8(b)(i)**.

**Prudent Practices** means the exercise of that degree of diligence, care, foresight, prudence and skill that would reasonably be expected from a competent, skilled and experienced person in the same type of undertaking in the same or similar circumstances.

**QCA** means the Queensland Competition Authority established under the QCA Act.

**QCA Act** means the *Queensland Competition Authority Act 1997* (Qld).

**Quarter** means a period of three consecutive months commencing 1 July, 1 October, 1 January or 1 April.

**Queensland Rail Cause** means, subject to the exceptions set out below, Queensland Rail's inability to make the Network available for the operation of Train Services in accordance with this agreement as a result of:

- (a) a Planned Possession, Urgent Possession or Emergency Possession;
- (b) the derailment of any Train caused solely by an act or omission of Queensland Rail; or
- (c) any other action by Queensland Rail other than Queensland Rail complying with an obligation in accordance with this agreement, the Access Undertaking or any applicable Law,

except where Queensland Rail's inability to make the Network available for the operation of Train Services in accordance with this agreement is in any way attributable to the Operator, another Network Participant (other than Queensland Rail) or any other person, or a Force Majeure Event.

**Queensland Rail Emergency Procedures** means Queensland Rail's emergency procedures as set out in the Operating Requirements Manual.

**Rail Authority** means the authority established under section 6 of the Rail Authority Act.

**Rail Authority Act** means the *Queensland Rail Transit Authority Act 2013* (Qld).

**Rail Infrastructure Operations** means:

- (a) the construction of any rail transport infrastructure (as defined in the TIA) to improve, upgrade, expand, extend, replace or vary the whole or any part of the Network;
- (b) any management, maintenance or operational activities relating to the Network, including the improvement, maintenance, repair, modification, installation, removal, renewal or decommissioning of the whole or any part of the Network; and
- (c) any inspections or investigations of the Network.

**Railway Manager** has means an Accredited rail infrastructure manager (as defined in the TRSA).

**Rail Safety Regulator** means the chief executive referred to in the TRSA.

**Recipient** has the meaning given in **clause 24.124.1**.

**Reference Tariff** means a prescribed access charge applicable for a specified Reference Train Service as set out in the Access Undertaking.

**Reference Tariff Provisions** means, to the extent that a Reference Tariff applies to the Train Services, the provisions in the Access Undertaking that either set out that Reference Tariff or are directly or indirectly related to the application or interpretation of that Reference Tariff.

**Reference Train Service** means a notional Train service described in the Access Undertaking in respect of a Reference Tariff and conforming to certain criteria, including carrying a specified commodity type, operating between specified geographical areas and conforming to specified technical characteristics, operational characteristics and contract terms and conditions.

**Related Party** means a related body corporate as defined in the Corporations Act and, for Queensland Rail, includes the Rail Authority.

**Relinquished Access Rights** means the Available Capacity (as defined in the Access Undertaking) that is created as a result of a relinquishment by the Operator of Nominated Access Rights in accordance with **clause 21.21.2**.

**Relinquishment Date** has the meaning given in **clause 21.2(a)(iii)**.

**Relinquishment Fee** means a fee:

- (a) equivalent to the Present Value of the aggregate of the Take or Pay Charges that would have been payable on and from the Relinquishment Date until the end of the Term if the relevant Access Rights were not relinquished and the Operator did not use those Access Rights; and
- (b) if, prior to the Relinquishment Date, Queensland Rail has granted access rights (with effect on or after the Relinquishment Date) to a third party (including a Transferee) (**New Access Holder**) under an access agreement using the Relinquished Access Rights, adjusted to offset an amount equivalent to the Present Value of the aggregate of the take or pay charges, under that access agreement, payable by the New Access Holder:
  - (i) that are directly attributable to that part of the access rights granted to the New Access Holder derived solely from the Relinquished Access Rights;
  - (ii) for all or part of the same period as that used to calculate the amount under **paragraph (a)**; and
  - (iii) calculated assuming the New Access Holder does not use the relevant access rights,

provided that if this calculation would result in an amount less than zero, then the fee equals zero.

**Repeated Breach** means an event or circumstance where:

- (a) Queensland Rail has given to the Operator at least two notices to remedy a breach of a particular provision of this agreement;
- (b) each notice referred to in **paragraph (a)** relates to a separate breach of the particular provision;
- (c) the Operator commits a further breach of the particular provision; and
- (d) all of the breaches happened within a period of 12 months.

**Rolling Stock** means rolling stock (as defined under the TRSA) that operates on or uses Track.

**Scheduled Time** means the time at which a Train Service has been scheduled by Queensland Rail to operate on the Network as detailed in the Train Schedule or as modified or varied by Queensland Rail from time to time on the day of operation in accordance with the Network Management Principles.

**Scheduled Train Path** means a Train Path that has been scheduled by Queensland Rail in a Train Schedule.

**Security** has the meaning given in **clause 17.1(a)**.

**Security Amount** has, subject to **clause 17.3**, the meaning given in **item 99 of schedule 1**.

**Standard and Poor's** means Standard and Poor's Financial Services LLC and its Related Parties.

**Sublease** means:

- (a) the sublease of the Head Lease between the State of Queensland (represented by the Department of Transport and Main Roads) (as sublessor) and Queensland Rail (as sublessee) for all or part of the land on which the Network is located; and
- (b) any tenure or other right to that land which replaces all or part of that sublease from time to time and entitles Queensland Rail to operate, and provide access to, the Network.

**Take or Pay Charges** means that part of the Access Charges calculated as "TP" in accordance with **schedule 3**. *[Note: Where a Reference Tariff does not apply to the setting of Access Charges, this definition must be checked against what the parties agree to include in **schedule 3**.]*

**Tenure Requirements** has the meaning given in **clause 27.18(b)(ii)**.

**Term** means the term of this agreement as determined in accordance with **clause 1**.

**Termination Date** means the earlier of:

- (a) the latest End Date; and
- (b) the termination of this agreement in accordance with its provisions (including **clauses 15.15, 7.4(c)(iv)(B) 7.5(c)(iv)(B) and 20.20.2**, as applicable) or any Law.

**Third Party Works** means any works, maintenance of any thing or other activities (including design, construction, testing and commissioning activities) undertaken or required to be undertaken on, over or under the land on which the Network is located:

- (a) by or on behalf of an Authority;
- (b) which Queensland Rail must permit in accordance with any Law or direction from an Authority;
- (c) by or on behalf of a third party who wants and is entitled to install and operate services or other infrastructure on, over or under that land; or
- (d) which Queensland Rail is required to permit either in accordance with the Sublease or because Queensland Rail's rights under the Sublease are subject to the rights of a third party to install and operate services or other infrastructure on, over or under that land.

**TIA** means the *Transport Infrastructure Act 1994* (Qld).

**Track** means that part of the Network comprising the rail, ballast, sleepers and associated fittings.

**Train** means any self-propelled configuration of Rolling Stock operating as a unit on Track.

**Train Configuration** means the description of the combination of Rolling Stock comprising a Train including the identification number, gross mass and tare mass of individual items of Rolling Stock and the order in which those Rolling Stock items are placed in the Train.

**Train Movement** means the operation of a Train on the Network by the Operator or any other Network Participant.

**Train Path** means the use of a specified portion of the Network, which may include multiple sections in sequential order, at a specified time.

**Train Schedule** means the train diagrams, yard schedules, terminal schedules and any other form of train timetable, plan or schedule prepared by Queensland Rail in accordance with the Network Management Principles showing the programmed times of arrival or departure for Train Movements at specified locations on the Network.

**Train Service** means a Train operating on the Network in accordance with this agreement (including the Train Service Description) and, in **schedule 3**, a Train Service is a one way Train Service – that is, the journey from the origin to the destination is one Train Service, and the return journey from the destination to the origin is a second Train Service.

**Train Service Description** means the details set out in **schedule 2**.

**Transfer** has the meaning given in **clause 21.2(a)(iii)** **21.2(a)(ii)**.

**Transferee** has the meaning given in **clause 21.2(a)(iii)** **21.2(a)(ii)**.

**TRSA** means the *Transport (Rail Safety) Act 2010* (Qld).

~~**Unit Train Service** means a Train Service where the Train Service Description limits that Train Service to only carrying a single specified commodity.<sup>6</sup>~~

**Urgent Possession** means a Possession:

- (a) that is required to correct problems in relation to the Network that are considered by Queensland Rail to be potentially dangerous to persons or property; and
- (b) that Queensland Rail intends to carry out within less than three months after the detection of the problem,

other than an Emergency Possession.

---

<sup>6</sup> ~~For example, if a Train Service only carried coal or only carried passengers, then that Train Service would be a Unit Train Service.~~



**Year** means, as applicable:

- (a) the period from the Commencement Date to the next 30 June;
- (b) a 12 month period during the Term subsequent to the period in **paragraph (a)** of this definition (subject to **paragraph (c)** of this definition); and
- (c) if the Termination Date is not 30 June, the period from (and including) 1 July immediately preceding the Termination Date and ending on the Termination Date.

## **28.2 Construction**

Unless expressed to the contrary, in this agreement:

- (a) words in the singular include the plural and vice versa;
- (b) any gender includes the other genders;
- (c) if a word or phrase is defined its other grammatical forms have corresponding meanings;
- (d) “include”, “includes” and “including” must be read as if followed by the words “without limitation”;
- (e) no rule of construction will apply to a clause to the disadvantage of a Party merely because that Party put forward the clause or would otherwise benefit from it;
- (f) a reference to:
  - (i) a person includes a partnership, joint venture, unincorporated association, corporation, a government or statutory body or authority and any other entity recognised by law;
  - (ii) a person includes the person’s legal personal representatives, successors, permitted assignees and persons substituted by novation;
  - (iii) any legislation includes subordinate legislation under it and includes that legislation and subordinate legislation as modified or replaced;
  - (iv) an obligation includes a warranty or representation and a reference to a failure to comply with an obligation includes a breach of warranty or representation;
  - (v) a right includes a benefit, remedy, discretion or power;
  - (vi) conduct includes:
    - (A) a benefit, remedy, discretion, authority or power; and
    - (B) any omission and any representation, statement or undertaking, whether or not in writing;
  - (vii) time is to local time in Brisbane;

- (viii) a month is a reference to a calendar month;
- (ix) "\$" or "dollars" is a reference to Australian currency;
- (x) this or any other document includes this agreement or that other document, as applicable, as novated, varied or replaced and despite any change in the identity of the Parties or, for another document, the parties to that document;
- (xi) writing includes any mode of representing or reproducing words in tangible and permanently visible form, and includes facsimile transmissions;
- (xii) this agreement includes all schedules and annexures to it;
- (xiii) a clause, schedule or annexure is a reference to a clause, schedule or annexure, as the case may be, of this agreement; and
- (xiv) an Authority includes:
  - (A) any successor to, or replacement of, that Authority;
  - (B) any re-constitution or re-naming of that Authority; and
  - (C) any other Authority who is transferred any of the powers of functions of that Authority;
- (g) if the date on or by which any act must be done under this agreement is not a Business Day, the act must be done on or by the next Business Day;
- (h) where time is to be calculated by reference to a day or event, that day or the day of that event is excluded;
- (i) if a term used in this agreement has the meaning given to that term, or as defined, under any legislation, then:
  - (i) that term has the meaning given, or as defined, under that legislation from time to time; and
  - (ii) where that legislation ceases to define that term, the meaning given to that term in this agreement is the last meaning given to that term under the relevant legislation; and
- (j) if there is any inconsistency:
  - (i) between matters contained in a schedule to this agreement and other provisions of this agreement that are not contained in a schedule, then those other provisions of this agreement prevail; or
  - (ii) between matters contained in the Access Undertaking and this agreement, the provisions of this agreement prevail.

### **28.3 Headings**

Headings do not affect the interpretation of this agreement.



# Schedule 1

## Reference schedule

1	<b>Operator</b>	[insert name] ABN [insert] of [insert]
2	<b>Operator's particulars for Notices</b>	Delivery address: [insert] Postal address: [insert] Facsimile: [insert] Attention: [insert]
3	<b>Operator's Customer</b>	[Note: If the Operator's Customer is a party to this agreement, then complete items 3 and 4 in the same format as for Items 1 and 2. If the Operator's Customer is not a party to this agreement, then do not insert details in items 3 and 4.]
4	<b>Operator's Customer's particulars for Notices</b>	
5	<b>Commencement Date</b>	[insert date of execution by Parties]
6	<b>End Date</b>	[insert date when access will cease to be available]
7	<b>Compliance Date</b>	[insert date when compliance with clause 7.4(a) should be completed]
8	<b>Commitment Date</b>	[insert date when access is to be available]
9	<b>Security Amount</b>	[insert]
10	<b>Initial details for the Operator's representatives</b>	<b>Representative for Obstructions</b> Name: Position: Phone: Mobile: Facsimile: Email: <b>Representative for loading of Train Services</b> Name:

		<p>Position:</p> <p>Phone:</p> <p>Mobile:</p> <p>Facsimile:</p> <p>Email:</p> <p><b>Representative for Operational Meetings</b></p> <p>Name:</p> <p>Position:</p> <p>Phone:</p> <p>Mobile:</p> <p>Facsimile:</p> <p>Email:</p> <p><b>Representative for Contractual Meetings</b></p> <p>Name:</p> <p>Position:</p> <p>Phone:</p> <p>Mobile:</p> <p>Facsimile:</p> <p>Email:</p> <p><b>Representative for Document Control</b></p> <p>Name:</p> <p>Position:</p> <p>Phone:</p> <p>Mobile:</p> <p>Facsimile:</p> <p>Email:</p>
--	--	--

# Schedule 2

## Train Service Description

The details for the Train Service Description are as follows:

<b>Origin</b>	
<b>Destination</b>	
<b>Average Haul Distance</b>	
<b>Traffic Task / Commodity</b>	
<b>Dwell Times<sup>7</sup></b>	
<b>Applicable Network</b>	The part of the Network to be used by the Train Services is described in the train route acceptance in Attachment 3 of this <b>schedule 2</b> .
<b>Rolling Stock and Train Configuration</b>	The details for the Rolling Stock and Train Configuration to be used for the Train Services are set out in the train route acceptance in Attachment 3 of this <b>schedule 2</b> .
<b>Train Service Levels</b>	The description of the Train Service levels is set out in Attachment 1 of this <b>schedule 2</b> .
<b>Special Operating Requirements</b>	The special operating requirements of the Train Service are set out in Attachment 2 of this <b>schedule 2</b> .
<b>Storage</b>	The Train Services do not include the storage of Trains (whether short or long term) on the Network except short term storage as agreed, from time to time, between the Parties (in each Party's absolute discretion).

<sup>7</sup> A dwell time is the time period from when the Train Service arrives at a specified point on its journey until it has completed all relevant activities and is ready to depart from that point and has advised the relevant Network Controller accordingly.

<p><b>Differences from the relevant Reference Train Service</b></p>	<p>The Train Services must only differ from the Reference Train Service as follows:</p> <ul style="list-style-type: none"> <li>• [insert];</li> <li>• [insert]; and</li> <li>• in accordance with any other differences as expressly set out in this agreement.</li> </ul> <p><i>[Note: Only use where a Reference Tariff applies to set the Access Charges. In all other circumstances this row can be deleted or the words above can be replaced with "Not Applicable".]</i></p>
<p><b>Dangerous Goods</b></p>	<p>[insert]</p>

## (A) Attachment 1 – Train Service levels

*[insert relevant Train Services levels including daily, weekly, monthly and/or annual description of Train Services and other details relevant to the preparation of the Master Train Plan, including section run times.]*

*[Note: If a Train Service is only a one way Train Service for the purposes of this description, then this should be specifically referred to in the description.]*



## (B) Attachment 2 – Special operating requirements

### 1 Provisioning locations

The provisioning locations for Train Services are:

- (a) [insert]; and
- (b) any other locations as agreed with Queensland Rail (in its absolute discretion),

except that if a Network Incident or delay occurs that affects more than one Train Service, the provisioning locations will be as agreed between the Parties (acting reasonably) for agreed Train Services and an agreed time period.

### 2 [insert]

*[insert other requirements – for example, exit and entry points, shunting areas]*

## (C) Attachment 3 – Train route acceptance

### 1 Applicable Network

[insert]

### 2 Rolling Stock and Train Configuration

[insert]

|

# Schedule 3

## Calculation of Access Charges and other charges

[Note: The contents of this schedule 3 are only applicable where the Reference Tariff applies to set the Access Charges. Where the Reference Tariff does not apply in relation to the Access Charges, the contents of this schedule 3 will need to be replaced with terms negotiated by the parties.]

### 1 Access Charge Inputs

- (a) The Access Charge Inputs (as at the Commencement Date) to apply for specific Train Services are as set out below.

	Origin			
	Destination			
Access Charge Inputs	Variable rate (\$/1000gtk)	AT <sub>1(W)</sub>		
	Fixed rate (\$/Train Path)	AT <sub>2(W)</sub>		
	Variable rate (\$/1000gtk)	AT <sub>1(M)</sub>		
	Fixed rate (\$/Train Path)	AT <sub>2(M)</sub>		
	QCA Levy <sup>8</sup> (\$/Net Tonne)	QL		
	Locomotive Weight (t)		94.5	
Wagon Weight (Unloaded) (t)		15.2		
Wagon Weight (Loaded) (t)		63		

<sup>8</sup> The QCA Levy is a fee imposed by the QCA on the beneficiaries of the QCA's regulatory services. This levy will be reviewed and endorsed by the QCA annually.

*[Note: The Locomotive Weight and Wagon Weights shown above are based on the Reference Train Service. If the relevant Train Service differs from the Reference Train Services those number may be different too.]*

Miscellaneous services <sup>9</sup>	Access Charge Input
	Miscellaneous service rate (\$/tkm <sup>10</sup> )
<b>Unscheduled repositioning of Rolling Stock within the Applicable Network described in schedule 2.</b>	
<b>All other such relocations and movements</b>	

- (b) The Access Charge Inputs will be varied or escalated in accordance with **clauses 2 and 3 of this schedule 3 and clause 18**, as applicable.

## 2 CPI escalation

### 2.1 Calculation of CPI escalation where a Reference Tariff applies

Where a Reference Tariff continues to apply to the Train Services after the Commencement Date, the Access Charges will be escalated under this agreement in the same manner as that Reference Tariff is escalated from time to time under the Access Undertaking.

### 2.2 Calculation of CPI escalation where no Reference Tariff applies

- (a) This **clause 2.2** only applies where a Reference Tariff ceases to apply in relation to the Train Services.
- (b) The Access Charge Inputs (other than the QCA Levy), and any other charges or rates expressed in this agreement as being subject to escalation, will escalate on each 1 July during the Term (**Escalation Date**), in accordance with the following formula:

<sup>9</sup> For clarity, a miscellaneous service to which the miscellaneous service rates apply will be treated as a special type of ad hoc train service for the purposes of this agreement including the application of the Network Management Principles and are comprised in 'Ad Hoc Train Services' as referred to under the Network Management Principles.

<sup>10</sup> Where tkm is a reference to train kilometre – that is, each kilometre or part thereof travelled on the Network by the Train(s) or Rolling Stock involved. For example, if the relevant miscellaneous service rate is \$X/tkm and the total tkm for in respect of those miscellaneous services is 1000, then the relevant charge will be X multiplied by 1000.

$$ACI_n = ACI_{n-1} \times \left( \frac{CPI_n}{CPI_{n-1}} \right)$$

where:

**ACI<sub>n</sub>** means the amount of the relevant Access Charge Input (or other charge or rate) that commences to apply on the relevant Escalation Date;

**ACI<sub>n-1</sub>** means the amount of the relevant Access Charge Input (or other charge or rate) applicable immediately prior to the relevant Escalation Date;

**CPI<sub>n</sub>** means the CPI for the Quarter which commenced six months prior to the relevant Escalation Date;

**CPI<sub>n-1</sub>** means the CPI for the Quarter which commenced 18 months prior to the relevant Escalation Date.

- (c) If:
- (i) the basis of assessment of the CPI is altered in a material way; or
  - (ii) the CPI ceases (or is likely to cease) to be:
    - (A) published; or
    - (B) published at sufficiently regular intervals for the purpose of the calculation in **clause 2.2** of this **schedule 3**,
- then a Party may notify the other Parties that the CPI is required to be replaced.
- (d) After a notice is given in accordance with **clause 2.2(c)** of this **schedule 3**:
- (i) the Parties will negotiate in good faith for the purpose of agreeing to vary or replace the CPI; and
  - (ii) if the Parties fail to agree within 30 days after that notice is given, then the matter must be referred to an Expert for determination in accordance with **clause 19.3**.
- (e) For clarity, if the Parties reach agreement, or the Dispute is resolved, after the relevant Escalation Date, the Parties agree to retrospectively adjust any Access Charges (or other relevant amounts) invoiced since that date to be consistent with that agreement, or the resolution of the Dispute, in accordance with **clause 5.6**.

### 3 Variation of QCA Levy

Queensland Rail may, from time to time, vary the Access Charge Input for the QCA Levy by giving notice in writing to the Operator of that variation. However, that Access Charge Input must only be varied by Queensland Rail if the QCA:

- (a) requires a change in the QCA Levy;
- (b) has approved a different allocation of the QCA Levy amongst different types of train services; or
- (c) otherwise approves that variation.

### 4 Calculation of invoice for access

#### 4.1 Invoice calculations

The amount of the invoice for charges payable by the Operator to Queensland Rail under this agreement for a relevant month is calculated in accordance with the following formula:

$$TC = AC \times (1 + GST) + G$$

where:

- TC** is the total amount of charges payable by the Operator for the relevant month;
- AC** is the sum of VCM, FCM, VCW, FCW and QCAL for each Train Service for the relevant month and, if the relevant month is:
- (a) the last month of the Year; or
  - (b) the month in which this agreement has expired or terminated,
- TP;
- FCM** is the fixed charge component for the relevant Train Service calculated by the formula:

$$AT_{2(M)} \times rtp_{(M)}$$

where:

- rtp<sub>(M)</sub>** has the meaning given to that term in the Access Undertaking in relation to the relevant Train Service (or, where a Reference Tariff ceases to apply in relation to the Train Services, as last defined in the Access Undertaking); and
- AT<sub>2(M)</sub>** is the amount specified as such in **clause 1** of this **schedule 3** for the relevant Train Service applicable for the relevant month as escalated, or varied, from time to time in accordance with this agreement;

**VCM** is the variable charge component for the relevant Train Service calculated by the formula:

$$AT_{1(M)} \times \frac{gtk_{(M)}}{1000}$$

where:

**gtk<sub>(M)</sub>** is the gross tonne kilometres for the relevant Train Service calculated in accordance with **clause 5.2** of this **schedule 3** relating to the Metropolitan Network; and

**AT<sub>1(M)</sub>** is the amount specified as such in **clause 1** of this **schedule 3** for the relevant Train Service applicable for the relevant month as escalated, or varied, from time to time in accordance with this agreement;

**FCW** is the fixed charge component for the relevant Train Service calculated by the formula:

$$AT_{2(W)} \times rtp_{(W)}$$

where:

**rtp<sub>(W)</sub>** has the meaning given to that term in the Access Undertaking in relation to the relevant Train Service (or, where a Reference Tariff ceases to apply in relation to the Train Services, as last defined in the Access Undertaking); and

**AT<sub>2(W)</sub>** is the amount specified as such in **clause 1** of this **schedule 3** for the relevant Train Service applicable for the relevant month as escalated, or varied, from time to time in accordance with this agreement;

**VCW** is the variable charge component for the relevant Train Service calculated by the formula:

$$AT_{1(W)} \times \frac{gtk_{(W)}}{1000}$$

where:

**gtk<sub>(W)</sub>** is the gross tonne kilometres for the relevant Train Service calculated in accordance with **clause 5.2** of this **schedule 3** relating to the West Moreton Network (as defined under the Access Undertaking or, where that term ceases to be defined in the Access Undertaking, as last defined in the Access Undertaking); and

**AT<sub>1(W)</sub>** is the amount specified as such in **clause 1** of this **schedule 3** for the relevant Train Service applicable for the

relevant month as escalated, or varied, from time to time in accordance with this agreement;

**QCAL** is the QCA Levy component for the relevant Train Service which is calculated by the formula:

$$QL \times nt$$

where:

**QL** is the amount specified as such in **clause 1** of this **schedule 3** for the relevant Train Service applicable for the relevant month as varied from time to time in accordance with this agreement; and

**nt** is the net tonnes for the relevant Train Service calculated in accordance with **clause 5.3** of this **schedule 3**;

**TP** is the take or pay charge for the relevant Year which is the greater of zero and the amount calculated by the formula:

$$\left( \left( AT_{1(W)} \times \frac{gtk_{(W)}}{1000} \right) + AT_{2(W)} + \left( AT_{1(M)} \times \frac{gtk_{(M)}}{1000} \right) + AT_{2(M)} \right) \times NTNO \times 0.8$$

where:

**AT<sub>1(M)</sub>**, **AT<sub>2(M)</sub>**, **AT<sub>1(W)</sub>** and **AT<sub>2(W)</sub>** are the amounts specified as such in **clause 1** of this **schedule 3**, as escalated, or varied, from time to time in accordance with this agreement, for the relevant Train Service as applicable on the last day of the relevant Year;

**gtk<sub>(M)</sub>** and **gtk<sub>(W)</sub>** are the average gross tonne kilometres for the relevant Train Services calculated in accordance with **clause 5.2** of this **schedule 3** in relation to the Metropolitan Network and West Moreton Network (as defined under the Access Undertaking or, where that term ceases to be defined in the Access Undertaking, as last defined in the Access Undertaking) respectively; and

**NTNO** is the amount calculated by the formula:

$$NTNO = TSEY - TSOY - TSQRCY$$

where:

**TSEY** is the number of Train Services that the Operator was entitled to operate for the Year under this agreement;

**TSOY** is the number of Train Services that the Operator operated for the Year under this agreement; and



- TSQRCY** is the number of relevant Train Services which failed to operate for the Year under this agreement due to a Queensland Rail Cause;
- GST** is the rate of GST (expressed as a decimal) applicable at the time the supply is made; and
- G** is the sum of any other amount due and payable under this agreement not calculated in AC above including, but not limited to:
- (A) charges for any additional GST;
  - (B) payments for interest (if any is payable);
  - (C) payments for ad-hoc train services and miscellaneous services; and
  - (D) any Adjustment Charges (as defined in the Access Undertaking) and any other adjustments (positive or negative).

## 5 Interpretation

### 5.1 Train Services operate in the period in which they commence to operate

For the purposes of **clause 4.1** of this **schedule 3**, a Train Service is taken to have operated in the month or a Year in which it commenced operation from its origin even if that Train Service does not reach its destination until the next month or Year.

### 5.2 Gross tonne kilometres

- (a) The gross tonnes (**gt**) for a Train Service is calculated as the sum of:
- (i) where g<sub>tk</sub> is being calculated under **clause 4.1** for the purpose of:
    - (A) VCW or VCM, the maximum gross mass as specified in the Network Control System for each locomotive comprised in the Train Service; or
    - (B) TP, the Locomotive Weight (as set out in **clause 1(a)** for the Train Service) multiplied by the number of locomotives comprised in the Train Service;
  - (ii) except where **clause 5.2(a)(iii)** applies, the Wagon Weight (Loaded) (as set out in **clause 1(a)** for the Train Service) multiplied by the number of wagons comprised in the Train Service (for clarity, an empty or partly loaded wagon in a Train Service will be treated as a loaded wagon);
  - (iii) if the Train Service is operated empty (after unloading at its destination), the Wagon Weight (Unloaded) (as set out in **clause 1(a)** for the Train Service) multiplied by the number of empty wagons comprised in the Train Service; and

- (iv) for all other Rolling Stock, the maximum gross mass specified in the Network Control System for each item of such Rolling Stock comprised in the Train Service.
- (b) For the purpose of **clause 5.2(a)**, the number of wagons comprising a Train Service will be no less than the number of wagons:
  - (i) set out in the Train Service Description for that Train Service; or
  - (ii) where no number of wagons is set out in the Train Service Description, for the Reference Train Service relating to the relevant Reference Tariff as set out in the Access Undertaking.
- (c) The gross tonne kilometres (**gtk**) for a Train Service is determined as the multiple of the gt for the Train Service and the distance travelled in kilometres by the Train Service.

*[Note: This standard access agreement is based on a train loading at an origin and travelling to a destination where it is unloaded. Modified provisions will be needed in circumstances where, for example, a train loads at its origin and then travels to an intermediate destination where it is either partially unloaded or further loaded before travelling on to its final destination and unloading.]*

### **5.3 Net tonnes**

The net tonnes (**nt**) for a Train Service is equal to the gt for the Train Service calculated in **clause 5.2(a)** of this **schedule 3** less the sum of:

- (a) the Locomotive Weight (as set out in **clause 1(a)** for the Train Service) multiplied by the number of locomotives comprised in the Train Service;
- (b) the difference between Wagon Weight (loaded) and the Wagon Weight (unloaded) (each as set out in **clause 1(a)** for the Train Service) multiplied by the number of wagons comprised in the Train Service and expressed as a positive number; and
- (c) for all other Rolling Stock, the tare mass specified in the Network Control System for each item of such Rolling Stock comprised in the Train Service.

# Schedule 4

## Interface Risk Management Plan

*[Note: Insert initial IRMP as agreed during the negotiation process with the access seeker.]*

|

**Executed** as an agreement.

**Executed by Queensland Rail** )  
**Limited** by its duly authorised officer in )  
the presence of: )

.....  
Witness

.....  
Officer

.....  
Name of Witness (print)

.....  
Name of Officer (print)

**Executed by [Insert name of** )  
**Operator]** )

.....  
Company Secretary/Director

.....  
Director

.....  
Name of Company Secretary/Director  
(print)

.....  
Name of Director (print)

**Executed by [Insert name of** )  
**Operator' Customer]** )

.....  
Company Secretary/Director

.....  
Director

.....  
Name of Company Secretary/Director  
(print)

.....  
Name of Director (print)

**[Note: If the Operator's Customer is not a party to the agreement, then the execution block above should be deleted.]**

|

## Annexure 6

ORM amendments to address statutory requirements

# Operating Requirements Manual May 2015

Version 1

 QueenslandRail



## Contents

<b>1</b>	<b>Introduction</b>	<b>2</b>
<b>2</b>	<b>Interface Risk Management</b>	<b>3</b>
2.1	Interface Risk Assessment	3
2.2	Interface Risk Management Plan	5
2.3	Specific Risks	7
<b>3</b>	<b>Safeworking Procedures and Safety Standards</b>	<b>8</b>
3.1	Interface Standards and Safeworking Procedures	8
3.2	Safeworking Forms	8
3.3	Operations in electrified railway corridors	8
3.4	Network Security	8
<b>4</b>	<b>Emergency Response</b>	<b>10</b>
4.1	Emergency Management Plan	10
4.2	Incident/Emergency Management	10
4.3	Emergency Responses	11
4.4	Investigation of Notifiable Occurrences	12
<b>5</b>	<b>Train Route Acceptance</b>	<b>16</b>
<b>6</b>	<b>Network Control and Network Planning</b>	<b>17</b>
6.1	Responsibility for compliance	17
6.2	Operator Requirements for Controller	17
6.3	Consultation between Queensland Rail Network Controller and the Operator's Train crew	17
6.4	Procedures for entering and exiting the Network	18
6.5	Network Control Radio Channel	18
6.6	Operator's notifications to Queensland Rail Network Controller	19
6.7	Provision of information by Queensland Rail Network Controller	21
6.8	Network Control Centres	22
6.9	Network Interface Points between Aurizon and Queensland Rail	22
6.10	Network Control Boards - Rail Centre 1 Network Control Centre and Townsville Network Control Centre	22
6.11	Network Control Boards – Mayne Network Control Centre	24
<b>7</b>	<b>Communication</b>	<b>24</b>
7.1	Safety Notices	24
7.2	Document Control Procedures	25
7.3	Cooperation between Parties	26
7.4	Government Supported Infrastructure	27
<b>8</b>	<b>Further information</b>	<b>30</b>
<b>9</b>	<b>Glossary</b>	<b>31</b>
9.1	Defined terms	31
9.2	Construction	34

## 1 Introduction

This document sets out practices, standards, systems, protocols, requirements, rules, policies and other information in relation to or in connection with Network Control and the access to and use of the Network by Operators. It also includes interface management and coordination requirements, safeworking procedures, safety standards (including electrical safety requirements), emergency and investigation procedures, requirements for the management of Network Incidents and environmental requirements.

The Glossary in **section 9** sets out how this document should be interpreted and the meaning of certain terms and acronyms.

Where this document refers to standards or other documents that belong to Queensland Rail, Queensland Rail will make the relevant standard or document available to Operators.

This document will be updated by Queensland Rail from time to time. Operators should always refer to the current version of this document. Queensland Rail will maintain the current version of this document on its website.



## 2 Interface Risk Management

### 2.1 Interface Risk Management Assessment

Queensland Rail, as the accredited Rail Infrastructure Manager, and the Operator will jointly conduct an Interface Risk Assessment (IRA) to identify, assess and appropriately manage the safety and environmental risks associated with the Operator's nominated access to Queensland Rail's Network.

For the purposes of developing, reviewing or amending an Interface Risk Assessment:

- (a) Queensland Rail and the Operator will:
  - (i) adhere to Queensland Rail's published risk management framework;
  - (ii) each nominate appropriately qualified and experienced representatives for this purpose;
  - (iii) make relevant information available to each other on a timely basis; and
  - (iv) use reasonable endeavours to ensure that information which the parties provide to one another is accurate and up to date.
- (b) Queensland Rail and the Operator will:
  - (i) establish the context of the interface(s) to be assessed;
  - (ii) identify the Interface Risks associated with the Operator's proposed operations on Queensland Rail's Network;
  - (iii) analyse and evaluate the identified risks;
  - (iv) identify the standards, procedures and systems relevant to the management of the identified interface risks;
  - (v) specify the control measures agreed between Queensland Rail and the Operator to manage those Interface Risks as far as reasonably practicable, including:
    - (A) the relevant standards, procedures and systems of each party;
    - (B) the relevant Interface Standards;
    - (C) the measures outlined in the Operator's Environmental Investigation and Risk Management Report (**EIRMR**);
    - (D) requirements for training, monitoring, awareness, competence and complaint handling; **and**
    - (E) the audit, inspection and review regime; and

- (vi) identify the party responsible for implementing each control measure.
- (c) Prior to any Interface Risk Assessment or any other activities associated with the preparation of an Interface Risk Management Plan (IRMP) being conducted, Queensland Rail and the Operator will each provide relevant information to the other to assist with the identification of environmental risks. ~~For example including, as a minimum, the following:~~
  - (i) Queensland Rail will provide the Operator with:
    - (A) a copy of any relevant environmental authorities held by Queensland Rail;
    - (B) a copy of any relevant environmental reports;
    - ~~(C) particulars of any enforcement actions relevant to the interface between the parties within one business day of receiving notification of such action;~~
    - ~~(D)~~(C) any currently applicable noise levels or limits;
    - ~~(E)~~(D) particulars a summary of noise complaints and enforcement actions and any relevant stakeholder complaints ~~and~~ concerns, including details of any enforcement actions relevant to the interface between the parties; and
    - ~~(F)~~(E) any other information including any documents from Queensland Rail's Environmental Management System that Queensland Rail considers relevant to the management of environmental risks; and
  - (ii) ~~prior to any Interface Risk Assessment workshop or any other activities associated with the preparation of an Interface Risk Management Plan (IRMP), the~~ The Operator will provide Queensland Rail with:
    - ~~(A) details of any additional hazards, risks and non-compliances with respect to the Operator's railway operations;~~
    - (A) a copy of the Operator's EIRMR produced specifically for the nominated access. The EIRMR must, as applicable to the Operator's nominated access to Queensland Rail's Network:
      - ~~(B)~~(1) describe the types and general volumes of products or commodities to be transported on Queensland Rail's Network, including a description of the Rolling Stock to be used;
      - (2) an EIRMR describing detail any approved or proposed environmental authorities and approvals held by the anticipated Operator;

(3) identify and assess actual and potential environmental risks ~~and~~;

(4) specify proposed controls and management actions ~~associated with~~ to effectively mitigate identified environmental risks; and

(5) describe monitoring, audit, review and reporting activities proposed by the Operator to provide assurance of effective environmental risk management and drive continual improvement.

~~(C)~~(B) a draft copy of the Operator's ~~planned activities;~~ proposed Operating Plan.

~~(D)~~ any approved or proposed environmentally relevant activities (as defined under the *Environmental Protection Act 1994 (Qld)*); and

~~(E)~~ any information in relation to anything referred to in section 5.

## 2.2 Interface Risk Management Plan

The IRMP is an agreed plan between Queensland Rail and the Operator which is to be developed from the outcome of an Interface Risk Assessment. The IRMP ~~formally documents where both parties will:~~

- (a) documents how each party will implement and maintain measures for managing the safety and environmental risks identified ~~in~~ from the Interface Risk Assessment;
- (b) documents how each party will evaluate, test and, if necessary, revise the measures mentioned in **paragraph (a)**;
- (c) ~~assign~~ assigns the roles and responsibilities of each party to the IRMP in relation to the measures mentioned in **paragraph (a)**;
- (d) ~~identify~~ identifies the procedures by which each party will monitor compliance with the obligations under the IRMP; and
- (e) ~~provide~~ provides for a process for keeping the IRMP under review and how any review will be conducted and implemented.

The IRMP will satisfy the requirements for an interface agreement between two Rail Transport Operators for the purposes of the ~~TRSA~~ Transport (Rail Safety) Act 2010 (TRSA) and will address the requirements under relevant Laws in relation to the management of Interface Risks.

~~Typically, an~~ An Interface Risk Assessment will be undertaken, and an IRMP will be developed, as part of the negotiation of an Access Agreement. The Standard Access Agreement, ~~for example,~~ assumes this position.

## 2.3 Environmental Risks

Without ~~limitation to~~ limiting the matters that must be considered and addressed in any Interface Risk Assessment, EIRMR and ~~any~~ IRMP, an Interface Risk Assessment, EIRMR and an IRMP must, in relation to risks to the environment:

- (a) ~~comply with~~ consider all relevant ~~noise~~ environmental management Laws, including where applicable noise management standards, ~~and regulations and all other relevant Laws including any currently applicable noise levels or limits;~~
- (b) ~~where noise from the Operator's Train Services may cause or contribute to applicable noise levels being exceeded, specify~~ include provisions requiring the Operator to consider and address noise, including specifying measures that the Operator ~~must~~ will put in place to ~~prevent that occurring~~ minimise noise and, if applicable, other relevant measures agreed to by the parties;
- ~~(c)~~ include provisions requiring the Operator to comply with any community liaison requirements of any Law or Authority or of Queensland Rail;
- ~~(d)~~ (c) include provisions requiring each of Queensland Rail and the Operator to:
  - (i) notify each other of any noise or other complaints pertaining to the environment in relation to or in connection with the Operator's Train Services as soon as practicable after such a complaint is received;
  - (ii) cooperate with each other in investigating and responding to such complaints; and
  - (iii) invite each other to any community meetings relating to those complaints;
- ~~(e)~~ (d) include provisions requiring the Operator to consider and address Contamination, including:
  - ~~(i) an assessment of the impact of the Operator's operations on Contamination;~~
  - ~~(ii)~~ (i) detailed control measures to prevent and respond to Contamination; and
  - ~~(iii)~~ (ii) a requirement to comply with all relevant Contamination standards and relevant Laws; and
- ~~(f)~~ include provisions requiring the Operator to have ~~an Environmental Management System~~ in place prior to commencing Train Services, ~~which:~~
  - ~~(i) provides~~ suitable systems and/or processes for the effective management of ~~the~~ risks identified within the ~~relevant~~ applicable EIRMR;

~~(ii)(e) addresses the issues raised in the IRMP and contains processes and/or procedures for implementing the control measures set out in the IRMP; IRMP.~~

~~(iii) — addresses all relevant Laws including the requirements of all Authorisations held by Queensland Rail that are relevant to the Operator's Train Services; and~~

~~(iv) — identifies systems (including audit and review systems) and procedures to address all relevant risks to the environment and compliance with all relevant Laws.~~

Where Baseline Environmental Data is available, Queensland Rail can provide this data to the Operator upon request, prior to the commencement of the Train Services. Where Queensland Rail does not have access to Baseline Environmental Data, the Operator may choose to undertake baseline monitoring for a particular section of the Network. If access to Queensland Rail property is required to support the collection of Baseline Environmental Data, Queensland Rail shall endeavour to provide safe access. When accessing Queensland Rail property, the Operator and/or their representative must comply with all requirements, including but not limited to those outlined in Queensland Rail's Standard (SAF/STD/0144/SWK) in relation to Accessing the Rail Corridor and such other requirements, directions or conditions of access imposed by Queensland Rail, acting reasonably.

To the extent that no Baseline Environmental Data is available, the Network will be taken to meet all ~~environmental standards~~ Environmental Standards for the purpose of assessing any future environmental impacts.

### 2.42.3 **Specific Risks**

Without limiting the matters that must be considered and addressed in any Interface Risk Assessment and IRMP, an Interface Risk Assessment and an IRMP must address:

(a) electrical safety risks associated with Queensland Rail's electrical assets;

(b) rail safety risks; ~~and~~

(c) risks to the work, health and safety of all persons; and

~~(e)~~(d) risks to the environment,

that are impacted by the Operator's access to Queensland Rail's Network, as far as is reasonably practicable .

## 3 Safeworking Procedures and Safety Standards

### 3.1 Interface Standards and Safeworking Procedures

In addition to the safeworking procedures, safety standards and other requirements identified in any IRMP agreed with the Operator, the Operator must comply with all instructions and authorities issued by Queensland Rail from time to time in relation to the safety of any person or property or protection to the environment.

Queensland Rail's safeworking procedures and safety standards form part of Queensland Rail's safety management system and may be altered by Queensland Rail from time to time in accordance with document control procedures in **section 7.2** below and the terms of the Access Agreement.

### 3.2 Safeworking Forms

After execution of an Access Agreement with an Operator, Queensland Rail will provide that Operator with copies of all safeworking forms that must be completed and lodged with Queensland Rail from time to time in order for the Operator to operate on the Network.

If the Operator requires additional copies of safeworking forms, electronic copies can be downloaded from Queensland Rail's customer portal.

### 3.3 Operations in electrified railway corridors

Infrastructure and systems associated with Queensland Rail's 25 kV railway electrification network is identified as the works of a prescribed electrical entity under the *Electrical Safety Act 2002* (Qld).

Implementation and ongoing review of Queensland Rail's electrical entity Safety Management System is a legislative requirement for 25 kV railway electrification systems (electrical entity works) to ensure Queensland Rail's works are:

- electrically safe, and,
- operated in a manner that is electrically safe.

A map showing the extent of Queensland Rail's network electrification is available on the Queensland Rail customer portal.

### 3.4 Network Security

- (a) The Operator must report any security Incident of which it becomes aware that either has occurred or is occurring on the Queensland Rail Network, to Queensland Rail in a timely manner.
- (b) Where the Operator operates Train Services which carry Dangerous Goods, it must have in place a security plan that complies with all applicable Laws and Dangerous Goods Codes.
- (c) The Operator must provide a security plan to Queensland Rail prior to the Operator commencing any Train Services and thereafter on an annual basis throughout the term of the Access Agreement. Where the

Train Services involve the carriage of Security Sensitive Ammonium Nitrate, the security plan must include:

- (i) evidence that the Operator and the Operator's Train crew are licensed to transport Security Sensitive Ammonium Nitrate;
  - (ii) control measures to ensure that any Security Sensitive Ammonium Nitrate is secure for the duration of the rail journey;
  - (iii) procedures for ensuring only authorised persons have unsupervised access to Security Sensitive Ammonium Nitrate whilst it is being transported on Queensland Rail's Network;
  - (iv) procedures for reporting to Queensland Rail and the appropriate authorities for any incident involving the Security Sensitive Ammonium Nitrate during its journey on Queensland Rail's Network.
- (d) The Operator must clearly identify and list all High Consequence Dangerous Goods ("HCDG") on freight consists relating to Train Services operating or to be operated on the Queensland Rail Network.
- (e) The Operator is to ensure where practicable that no Trains carrying HCDG are delayed or held in the Queensland Rail Network.
- (f) The Operator must ensure that all Trains carrying Dangerous Goods are supervised at all times.
- (g) If for any reason beyond the Operator's control, a Train carrying Dangerous Goods is required to be stowed at an unattended location or isolated siding at any time, then the Operator must arrange for at least one person to remain with the Train at all times.
- (h) The Operator must ensure that if for any reason a Train carrying Security Sensitive Ammonium Nitrate stops on the Queensland Rail Network at any time and for any period of time, a person who is authorised for the purposes of the *Explosives Act 1999* (Qld) and Information Bulletin 53 - Storage requirements for Security Sensitive Ammonium Nitrate remains with the Train at all times. Under no circumstances is the Operator to leave a Train carrying Security Sensitive Ammonium Nitrate on Queensland Rail's Network unattended.
- (i) Where a Train carrying HCDG other than Security Sensitive Ammonium Nitrate stops on the Queensland Rail's Network at any time and for any period of time, the Operator must liaise with Queensland Rail in relation to the securing of the Train. The Operator's Train crew must remain with the Train and maintain communication with Network Control until such time as the Operator has made arrangements with Queensland Rail for the provision and attendance at the relevant location of private security guards for the purposes of securing the Train. Where Queensland Rail provides private security guards, this will be at the Operator's cost. The Operator must provide Queensland Rail with an indication of the length of time that private security guards must be provided. The Operator's

Train crew must continue to remain with the Train until the arrival of the private security guards and until it has been established the private security guards have the ability to maintain two way communications with Network Control.

- (j) In the event that the National Terrorism Public Alert Level is raised with a threat specific to mass passenger transport, the Operator will be required to have all Trains carrying HCDG checked at a practical location prior to the Train entering the Metropolitan Network.

## **4 Emergency Response**

### **4.1 Emergency Management Plan**

The Operator must have an Emergency Management Plan that complies with the requirements of the TRSA.

The Operator must provide a copy of its Emergency Management Plan to Queensland Rail prior to it commencing any Train Services. Operators must work cooperatively with Queensland Rail to ensure Network Incidents and other Emergencies are managed effectively to mitigate the severity and magnitude of any Network Incident. The parties will work together to ensure the risks to the safety of persons arising from the Network Incident or other Emergency are minimised as far as is reasonably practicable.

The Operator must be familiar with, and adhere to, Queensland Rail's Emergency Management Plan as set out in Queensland Rail Standard MD-12-208 and Queensland Rail's emergency response procedures when managing any Network Incident or an Emergency on Queensland Rail's Network. Clear roles and responsibilities will be identified and allocated to the parties within the plan.

Queensland Rail will consult with Operators on the review and amendment of Queensland Rail's Emergency Management Plan and Queensland Rail's emergency response procedures. Where a Network Incident or other Emergency occurs on the Network that impacts both Queensland Rail and the Operator, Queensland Rail's Emergency Management Plan will outline clear roles and responsibilities for the parties in jointly managing the Emergency.

Operators must test their Emergency Management Plan in so far as it relates to the Queensland Rail Network and the Train Services on an annual basis throughout the term of their Access Agreement and must ensure that both Queensland Rail and Emergency Services are provided with an opportunity to participate in the testing process.

### **4.2 Incident/Emergency Management**

The Operator must comply with the requirements outlined in Queensland Rail's Emergency Management Plan MD-12-208. The Operator must not, by act or omission, do or fail to do anything inconsistent with or that would cause or



contribute to Queensland Rail failing to comply with its Emergency Management Plan and its obligations under the TRSA.

The Operator's Emergency Management Plan must be consistent with Queensland Rail's Emergency Management Plan and must include:

- (a) detailed procedures for the management of emergencies, including all actions that must be taken to prevent, minimise or mitigate any threat or danger to any person, property or the environment;
- (b) specific action plans for preventing or, if not preventable, minimising and mitigating Environmental Harm caused or contributed to by a Incident or other Emergency;
- (c) requirements for immediate and appropriate action to prevent or, if not preventable, minimise and mitigate the adverse effects caused or contributed to by any Incident or other Emergency;
- (d) requirements for relevant Authorities to be informed immediately of any Incident or other Emergency;
- (e) the method for the clean-up of any substance or thing the release of which is caused or contributed to by an Incident or other Emergency such that there is no longer an immediate risk of adverse effects to any person, property or the environment (including Environmental Harm);
- (f) requirements for ensuring that there is not unreasonable Obstruction to Queensland Rail's operations or its Network;
- (g) procedures to ensure compliance by the Operator with all requirements of Laws pertaining to Contamination and/or to ensure compliance with directions of any relevant Authority; and
- (h) requirements for the handling of all Incidents and other Emergencies and procedures for ensuring that all measures taken in response to Incidents and other Emergencies are recorded on a central incident register for the post Incident or other Emergency investigation and debrief process.

### 4.3 Emergency Responses

Queensland Rail is responsible for the overall coordination and management of the response to a Network Incident or other Emergency (**Network Emergency**) (including notifying all relevant Emergency Services) so that Recovery and Restoration are effected as soon as practicable. For clarity, the Operator must comply with all directions given by Queensland Rail during the Recovery and Restoration phase of a Network Emergency.

Where required, the Operator must appoint a controller (**Operator's Controller**), who will work in collaboration with the Queensland Rail Commander to manage the onsite Network Emergency response.

Without limiting the terms of the Operator's Access Agreement, the Operator must:

- (a) ensure the timely Recovery in accordance with the Operator's Emergency Management Plan; and
- (b) assist Queensland Rail with Recovery and Restoration.

During Recovery and Restoration, the Operator must do everything necessary to prevent or, if not preventable, minimise and mitigate, any potential or actual damage or injury to persons, property or the environment or delays to the recommencement of Train Movements.

## 4.4 Investigation of Notifiable Occurrences

### 4.4.1 Establishment of Joint Investigation Protocols between Queensland Rail and Operators

Queensland Rail and Operators are required to report Category A and Category B Notifiable Occurrences and their ~~categorisation~~classification types. The ~~categorisation~~classification of an occurrence will dictate the level of investigation and response required by the Operator and/or Queensland Rail.

The Chief Executive of the Department of Transport and Main Roads (the Rail Safety Regulator (**RSR**)) will advise Queensland Rail and the Operator of requirements for ~~investigation~~investigations and reports into Notifiable Occurrences, specifically Category A occurrences.

#### Category A Notifiable Occurrence (Detailed Investigation)

- (a) Detailed investigations into Category A Notifiable Occurrences may be undertaken jointly by Queensland Rail and the Operator.
- (b) The lead agent in the investigation, either Queensland Rail ~~will initiate the investigation by~~ or the ~~issue of an~~ Operator, will develop the Instrument of Appointment (IOA) which will specify the lead agent and the lead investigator. ~~The Operator will be consulted in the development of~~
- (~~a~~)(c) The lead agent is to consult with the other party prior to developing the IOA, which will include the Terms of Reference (ToR) relevant to the scope of the investigation and investigation outcomes; ~~i~~ investigation ~~timelines~~timeframes; and the make-up of the investigation team.
- (~~b~~)(d) The commencement and conduct of the investigation must not be delayed while awaiting provision of the IOA.
- (e) A ~~detailed investigation~~Detailed Investigation will be commenced as soon as possible following a Category A Notifiable Occurrence.
- (~~e~~)(f) The parties will ensure the incident site of the Notifiable Occurrence remains undisturbed, except as required to make the site safe, and until the arrival on site of Queensland Rail ~~Associates and Operator~~ investigators.
- (~~d~~)(g) Queensland Rail and the Operator are required to preserve evidence and share information relevant to Notifiable Occurrences in accordance with the Law and this ORM.

- (e)(h) Queensland Rail and the Operator will have a representative [and investigators](#) at the site of the Notifiable Occurrence within four (4) hours, or as soon as practicable, after notification to Queensland Rail of the Notifiable Occurrence.
- (f)(i) If it is determined that Queensland Rail will be the lead agent for a joint ~~detailed investigation~~ [Detailed Investigation](#), the conduct of the investigation will be in accordance with the requirements of the Queensland Rail *Detailed Investigation Business Instruction* and the *Joint Investigation Protocols*.
- (g)(j) These documents, including any updated versions will be provided to the Operator ~~on~~ [via](#) the [Queensland Rail](#) customer portal.
- (k) When the Operator is the lead agent for a joint ~~detailed investigation~~ [Detailed Investigation](#), the Operator's investigation process will apply, subject to the requirements of the Access Agreement and the ORM.
- (h)(l) Where the RSR requests the final ~~detailed investigation report~~ [Detailed Investigation Report](#) of a Category A Notifiable Occurrence, the report will be provided to the RSR within the required timeframes, or as negotiated with the RSR by the lead agent.
- (i)(m) Queensland Rail and the Operator may conduct ~~detailed investigations~~ [Detailed Investigations](#) without being required by the RSR to do so. In those instances, unless specifically requested later, the RSR will not be supplied with a copy of the investigation report.
- (j)(n) The nominated lead agent will provide a copy of the final investigation report into the Notifiable Occurrence to the other party within a reasonable time after it has been ~~prepared~~ [finalised](#).
- (k)(o) Queensland Rail and the Operator will co-operate in the implementation of all recommendations reasonably made, as part of an investigation report.

#### **Category B Notifiable Occurrences (Routine Investigations)**

- (a) Routine investigations into Category B Notifiable Occurrences ~~will be initiated by Queensland Rail by way of issue of an Instrument of Appointment (IOA). The IOA will include the Terms of Reference (ToR), relevant to the scope of the investigation and investigation outcomes; investigation timelines; and the make-up of the investigation team.~~ [may be undertaken jointly by Queensland Rail and the Operator.](#)
- (b) ~~When the Operator is the~~ [The](#) lead agent, ~~they will conduct the investigation in accordance with the~~ [a Routine Investigation, either Queensland Rail or the Operator, will furnish the Instrument of Appointment \(IOA\) which will specify the lead agent and ToR, through the](#) ~~nominated~~ lead investigator.
- (c) [The lead agent is to consult with the other party prior to developing the IOA, which is to include the Terms of Reference \(ToR\) relevant to the](#)

scope of the investigation and investigation outcomes; investigation timeframes; and the make-up of the investigation team~~members~~.

- (d) Commencement and conduct of the investigation must not be delayed while awaiting the provision of the IOA.
- ~~(b)~~(e) The party nominated as the lead agent will provide the other party with a copy of ~~anya~~ report produced as a result of a ~~routine investigation~~Routine Investigation into the Notifiable Occurrence.
- ~~(e)~~(f) Queensland Rail and the Operator will co-operate in the implementation of all reasonable recommendations made in the investigation report.

#### 4.4.2 Membership of Investigating Teams for Category A and Category B investigations

- (a) The membership of the investigation team will be consistent with the provisions, principles and intent of the TRSA, which will include an appropriate response level to a Notifiable Occurrence that involves initiating the investigation process. ~~All~~
- ~~(a)~~(b) In respect of Category A Detailed Investigations only, all outcomes, including the reporting of safety issues, risk control measures, systemic factors, findings, and any recommendations for action, are to be reported to the RSR.
- (c) There is no requirement for Category B ~~investigation reports~~Routine Investigation Reports to be supplied to the RSR, unless specifically requested by the RSR.
- ~~(b)~~(d) Investigation teams will ensure an appropriate level of independence when conducting their investigations and, where practicable, will not include any persons directly involved in the relevant Notifiable Occurrence in any Recovery or Restoration process.
- ~~(e)~~(e) Where a joint investigation is conducted, Queensland Rail and the Operator will nominate at least one representative each and make reasonable efforts to ensure the members of the investigation team have the collective knowledge, skills, and expertise to address the range of operational, administrative, and infrastructure issues likely to be encountered and/or requiring action.
- (f) Queensland Rail and the Operator may agree to the inclusion of additional members in the investigation team for this purpose.
- ~~(d)~~(g) The lead investigator for ~~detailed investigations~~Detailed Investigations must have appropriate qualifications and/or skills and experience, as an investigator in conducting high level, complex and serious safety investigations.

#### 4.4.3 Terms of Reference for Investigations

- (a) The ToR issued by Queensland Rail for any investigation will be consistent with Queensland Rail's *Detailed Investigation Business*

*Instruction* and ~~will~~ Routine Investigation Business Instruction and must be relevant to the intended scope of the investigation requirements and outcomes.

- (b) The ToR issued by Queensland Rail for any investigation in accordance with this section 4.4.4 will be relevant to the intended scope of the investigation and will be designed to determine the ~~cause~~ causes(s) and contributing factors of the Notifiable Occurrence. ~~The ToR will stipulate what action(s) have been, or will be taken to prevent a recurrence, including minimising the opportunity for such recurrence.~~
- (c) The ToR will stipulate what action(s) have been, or will be taken to prevent a recurrence, or to reduce the risk of such recurrence.
- (d) The ToR issued by Operators for any investigation will be consistent with the Operator's investigation processes and must be relevant to the intended scope of the investigation requirements and outcomes.
- ~~(e)~~(e) Additional ~~terms of reference~~ or amended ToR may be added or deleted depending on the ongoing requirements of the investigation and the continuing relevance of the ToRs. This must be agreed to jointly by Queensland Rail and the Operator.

#### 4.4.4 Providing resources to an Investigation

- (a) For ~~detailed~~ Detailed Investigations and ~~routine investigations~~ Routine Investigations Queensland Rail and the Operator must provide appropriate personnel to assist in providing relevant expertise with respect to equipment and / or infrastructure, and the operation of that equipment and / or infrastructure.
- (b) ~~The~~ Queensland Rail and the Operator must also co-operate in the provision of any assessment ~~requirement~~ requirements for the investigation report in accordance with relevant legislative requirements.

#### 4.4.5 Sharing of Information and Evidence Relevant to an Investigation

- ~~(e)~~(a) For ~~detailed~~ Detailed and ~~routine investigations~~ Routine Investigations, the Operator will provide evidence, supporting documentation, and reports to Queensland Rail in a timely manner to ensure compliance with the relevant legislation, including (where relevant) RSR timeframes under the TRSA.
- (b) ~~Reports~~ For Detailed and Routine Investigations Queensland Rail will provide evidence, supporting documentation and reports to the Operator in a timely manner to ensure compliance with the relevant legislation, including (where relevant) RSR timeframes under the TRSA.
- ~~(d)~~(c) Evidence, documentation, detailed or routine investigation reports, and any visual images contained within those reports are to be handled in accordance with the confidentiality requirements under the relevant Access Agreement between Queensland Rail and the Operator.

#### 4.4.6 ~~Detailed Investigations~~ Investigation Reports

A copy of all final ~~detailed investigation reports~~ Detailed Investigation Reports will be supplied to Queensland Rail and the Operator. Each party will be responsible for consideration of, and action on recommendations that are under the control of that party.

~~Queensland Rail~~ The lead agent will send a copy of the final ~~detailed investigation report~~ Detailed Investigation Report for a Category A occurrence to the RSR ~~on request~~.

#### 4.4.7 Routine Investigation Reports

A copy of all final Routine Investigation Reports will be supplied to Queensland Rail and the Operator. Each party will be responsible for considering and actioning any recommendations arising out of the Routine Investigation Reports which are relevant to and under the control of, that party.

The lead agent will send a copy of the final Routine Investigation Report to the RSR on request.

#### 4.4.8 Inconsistencies/Disagreement

Queensland Rail and the Operator will conduct investigations in accordance with **section 4.4**. However, to the extent of any inconsistency, actual or perceived, the provisions of the TRSA and its Regulations will apply.

In the event that agreement cannot be reached between Queensland Rail and the Operator about the cause or causes ~~of~~ contributing to a Category A Notifiable Occurrence, or how the investigation is to be conducted, including who the lead agency will be, ~~Queensland Rail~~ both parties will write to the RSR highlighting the differing opinions ~~and the RSR will then consult with Queensland Rail and the Operator after the submission of their respective reports, with a view to establishing concurrence about the progress and outcome of the relevant investigation.~~

Separate investigation reports and/or submissions may be provided by Queensland Rail or the Operator to RSR for their consideration in these circumstances.

## 5 **Train Route Acceptance**

The Operator must ensure that any Certification provided to Queensland Rail complies with the requirements set out in Queensland Rail's Train Route Acceptance Standard MD-10-170. Queensland Rail may take into account any matters referred to in this standard in deciding whether Queensland Rail is satisfied with any Certification provided to Queensland Rail by an Operator for the purpose of seeking Queensland Rail's authorisation of Rolling Stock or a Train Configuration.

## 6 Network Control and Network Planning

### 6.1 Responsibility for compliance

The Operator must ensure the Operator's Controller and the Operator's Train crew comply with this paragraph 6.

### 6.2 Operator Requirements for Controller

- (a) The Operator must provide to Queensland Rail (and keep current at all times) the details for the Operator's Controller including that person's name, position and contact details. The contact details:
  - (i) must include primary mobile and after hours contact details; and
  - (ii) must include additional alternative contact details to be used in circumstances where the Operator's Controller is not contactable via its primary mobile or after hours contact details.
- (b) The Operator must not operate Train Services unless Queensland Rail has current details for the Operator's Controller.
- (c) The Operator must ensure, and not operate Train Services unless, the Operator's Controller is:
  - (i) contactable by Queensland Rail Network Controllers at all times when any of the Operator's Trains are on the Network; and
  - (ii) contactable at least 2 hours prior to any of the Operator's Trains entering the Network; and
  - (iii) able to fully comply with this **section 6**.

### 6.3 Consultation between Queensland Rail Network Controller and the Operator's Train crew

- (a) The relevant Queensland Rail Network Controller and the Operator's Train crew must consult and agree upon the location of meal breaks and personal needs breaks for the Train crew.
- (b) If the Operator's Train crew requires relief from operating the Train, the Train crew must only request relief from the Operator's Controller.
- (c) Prior to a Train reaching its destination, the Operator's Controller must:
  - (i) determine whether the Train crew on the Train requires relief;
  - (ii) consult with the relevant Queensland Rail Network Controller to determine an appropriate time and location for relief;
  - (iii) arrange relief for the Train crew; and
  - (iv) advise the Train crew of the relief arrangements.
- (d) If members of an Operator's Train crew:

- (i) are rostered on “change jobs”;<sup>1</sup> or
- (ii) need to change during a Train Service,

then the Train crew must notify the relevant Queensland Rail Network Controller of this requirement prior to the Train entering the Network. The Queensland Rail Network Controller must notify the Train crew of the time and location for that change.

- (e) If the Operator’s Controller or the Train crew is unable to contact the other directly, a Queensland Rail Network Controller may (but is not obliged to) relay a message from one to the other.

#### **6.4 Procedures for entering and exiting the Network**

- (a) The Operator’s Controller must notify the relevant Queensland Rail Network Controller of the anticipated departure time of the Operator’s Train at least two hours before the scheduled departure time of that Train. If the anticipated departure time changes, the Operator’s Controller must, immediately on becoming aware of the change, notify the Queensland Rail Network Controller of the revised anticipated departure time.
- (b) The Operator’s Train crew must notify the relevant Queensland Rail Network Controller when the Operator’s Train is ready to enter the Network.
- (c) Prior to the Train entering the Network, the Operator’s Controller must give the Train crew:
  - (i) the scheduled times for that Train Service for that day; and
  - (ii) any Train Notices relevant to that Train Service.
- (d) The Operator must comply with the procedures for shunting, entering and exiting yards and any other terminating yard procedures provided to the Operator by Queensland Rail from time to time.

#### **6.5 Network Control Radio Channel**

- (a) Queensland Rail will make the Network Control Radio Channel Coverage Maps listed below available to the Operator on the Queensland Rail’s website:
  - (i) <https://portal.qr.com.au/Partners/RadioMaps/Radio%20Channels%20for%20hand%20portable%20Radios%20-%20Brisbane%20Suburban%20Area.pdf>;
  - (ii) <https://portal.qr.com.au/Partners/RadioMaps/TCR%20System%20Southern%20Region.pdf>;

---

<sup>1</sup> A Train crew is rostered on “change jobs” where, for example, the Train crew of Train A (which is travelling from X to Z) swaps Trains with the Train crew of Train B (which is travelling from Z to X) at some appropriate point between X and Z, with the result that the relevant Train crews start and end their shifts at the same location.



- (iii) <https://portal.qr.com.au/Partners/RadioMaps/TCR%20System%20Central%20Region.pdf>; and
  - (iv) <https://portal.qr.com.au/Partners/RadioMaps/TCR%20System%20Northern%20Region.pdf>.
- (b) For the purposes of the Operator ensuring that its Train drivers are contactable by Queensland Rail Network Controllers, the Operator must ensure that the relevant communications system used by its Train drivers complies with the relevant requirements set out in the relevant IRMP.

## 6.6 Operator's notifications to Queensland Rail Network Controller

- (a) If the Operator's Controller or the Train crew become aware of any event or circumstance that may affect the performance of the Operator's Train, regardless of whether the Train has entered the Network, the Operator's Controller or the Train crew must notify the relevant Queensland Rail Network Controller of the event or circumstance, including the following details:
- (i) the Train number;
  - (ii) the nature of the event or circumstance; and
  - (iii) the likely impact on the Train's performance.
- (b) At least 15 minutes prior to the departure of the Operator's Train, the Operator's Controller must:
- (i) provide the relevant Queensland Rail Network Controller with the following information:
    - (A) information regarding the Train crew, including planned relief locations and details of any mandatory breaks;
    - (B) any En Route Locomotive Provisioning requirements, but only if those requirements have previously been agreed in writing with Queensland Rail; and
    - (C) if the Train will be in Direct Traffic Control Territory, the start-up code<sup>2</sup> of the leading locomotive;
  - (ii) enter the following information about the Train (**Train List**) into Queensland Rail's nominated information system in accordance with any procedures specified by Queensland Rail from time to time:
    - (A) the Operator for the Train Service who is accredited under the TRSA;
    - (B) the Access Agreement under which the Train is operating;

---

<sup>2</sup> The start-up code for a locomotive that is subject to Direct Traffic Control is a unique code determined and allocated by Queensland Rail for the purposes of Direct Traffic Control.

- (C) the identification number for the applicable Train Route Acceptance TRA or Authority To Travel ATT;
  - (D) the number of the Train;
  - (E) the origin of the Train;
  - (F) the comparison Train length in metres (including locomotives);
  - (G) the number of items of Rolling Stock in the Train;
  - (H) the gross mass of the Train in tonnes;
  - (I) the gross trailing load of the Train in tonnes; and
  - (J) the motive power employed by the Train; and
  - (K) the following information on each item of Rolling Stock in the Train (in the order in which the items of Rolling Stock will be placed, leading end first):
    - (1) the Rolling Stock classification;
    - (2) the Rolling Stock number;
    - (3) the Rolling Stock type (if a locomotive, whether hauling or otherwise);
    - (4) the gross mass of the Rolling Stock in tonnes;
    - (5) a description of the goods carried in the Rolling Stock (including any Dangerous Goods) by class and location on the Train;
    - (6) the destination of each item of Rolling Stock; and
    - (7) any known issues or defects, for example Rolling Stock that is 'out-of-gauge' or that has had its brakes cut out.
- (c) If the Operator's Controller cannot comply with **paragraph (b)** because the nominated information system is not accessible by the Operator's Controller, then the Operator's Controller must:
- (i) at least 15 minutes prior to the departure of the Operator's Train, notify the relevant Queensland Rail Network Controller of at least the following information:
    - (A) the Operator for the Train Service who is accredited under the TRSA;
    - (B) the Access Agreement under which the Train is operating;
    - (C) the identification number for the applicable TRA or ATT;
    - (D) the number of the Train;

- (E) the comparison Train length in metres (including locomotives);
  - (F) the gross trailing load of the Train in tonnes;
  - (G) the following information on each item of Rolling Stock in the Train (in the order in which the items of Rolling Stock will be placed, leading end first);
    - (1) the Rolling Stock classification; and
    - (2) the Rolling Stock number;
  - (H) any known issues or defects, for example Rolling Stock that is 'out-of-gauge' or that has had its brakes cut out; and
  - (I) details of any Dangerous Goods; and
- (i) as soon as possible after the nominated information system becomes accessible by the Operator's Controller, enter the Train List for the relevant Train into Queensland Rail's nominated information system in accordance with any procedures specified by Queensland Rail from time to time.
- (d) If the mass, length or configuration of the Train alters during the course of a journey, the Operator's Controller must notify the relevant Queensland Rail Network Controller of the new mass, length and configuration. The Operator's Controller must ensure any changes in a Train List are updated in Queensland Rail's nominated information system in accordance with any procedures specified by Queensland Rail from time to time.

## **6.7 Provision of information by Queensland Rail Network Controller**

- (a) If a Queensland Rail Network Controller becomes aware of any event or circumstance that will materially adversely affect the performance of the Operator's Train, the Queensland Rail Network Controller must notify the Operator's Controller of the event or circumstance, including the following details:
  - (i) the Train number;
  - (ii) the nature of the event or circumstance; and
  - (iii) the likely impact on the Train's performance.
- (b) The Queensland Rail Network Controllers located in Brisbane and Townsville must provide the Operator's Controller with a current estimated time of arrival, for each of the Operator's Train Services, at the relevant Operator's depot station or destination, as applicable, in that Queensland Rail Network Controller's relevant Network Control Region:
  - (i) every two hours; and

- (ii) at additional points in time, when reasonably requested by the Operator or an Operator's Associate (including the Operator's Controller).
- (c) If, for whatever reason, the ETA of a Train Service varies by more than 20 minutes during a two hourly interval between notifications given under **section 6.7(b)**, the relevant Queensland Rail Network Controller must inform the Operator's Controller of the variation as soon as reasonably practicable.
- (d) Whenever reasonably requested by the Operator's Train crew or the Operator's Controller, the relevant Queensland Rail Network Controller must provide information to the Operator regarding events that will materially adversely impact on the performance of the Operator's Train to the extent that such information is known and available to the Queensland Rail Network Controller.

## 6.8 Network Control Centres

Queensland Rail will provide Network Control for the Operator's Trains through the Network Control Centres and Network Control Regions. A map showing the Network Control Centres and Network Control Regions can be viewed at

<https://portal.qr.com.au/ResourceCentre/BusinessProcess/NetworkSystems/Maps%20%20Schema/Network%20Management/Network%20Information%20Booklet.pdf>.

## 6.9 Network Interface Points between Aurizon and Queensland Rail

A map showing the Network interface points between the Aurizon and the Queensland Rail networks can be viewed at

<https://portal.qr.com.au/ResourceCentre/BusinessProcess/NetworkSystems/Maps%20%20Schema/Network%20Management/Network%20Information%20Booklet.pdf>.

## 6.10 Network Control Boards - Rail Centre 1 Network Control Centre and Townsville Network Control Centre

### 6.10.1 Train Operations, Traffic Management or Incident Management

Enquiries by Operators regarding train operations, traffic management or Network Incident management in relation to line sections [referred to in Section 6.8](#) that are controlled by Rail Centre 1 Network Control Centre must be directed to:

Business Operations Shift Supervisor Brisbane

Queensland Rail, GPO Box 1492, Brisbane Qld 4001

Phone: 81-1662 (Rail)

External: (07) 3072 1662

Emergency Mobile Contact: 0409 499 829

Enquiries by Operators regarding train operations, traffic management or Network Incident management in relation to line sections [referred to in Section 6.8](#) that are controlled by Townsville Network Control Centre must be directed to:

Regional Transit Manager Townsville

Phone: (07) 4772 8207

Emergency Mobile Contact: 0428 878 545

### 6.10.2 Scheduling & Infrastructure Planning

Scheduling and infrastructure planning requirements for line sections [referred to in Section 6.8](#) that are controlled by Rail Centre 1 Network Control Centre or Townsville Network Control Centre are set out in the following documents:

- (a) Master Train Plan Protocols MD-11-945
- (b) Daily Train Plan Protocols MD-11-947; and
- (c) Possession Planning Protocols MD-11-038.

The Operator must comply with the above documents.

Enquiries by Operators regarding scheduling or infrastructure planning in relation to line sections [referred to in Section 6.8](#) that are controlled by Rail Centre 1 Network Control Centre must be directed to:

Manager Business Operations South

-Supply Chain South,

Queensland Rail, GPO Box 1492, Brisbane Qld 4001

Phone: (07) 3072 5076

Enquiries by Operators regarding scheduling or infrastructure planning in relation to line sections [referred to in Section 6.8](#) that are controlled by Townsville Network Control Centre must be directed to:

Manager Business Operations

Supply Chain South

Queensland Rail, GPO Box 1492, Brisbane Qld 4001

Phone: (07) 3072 5076

and

Regional Manager Strategic Planning

Supply Chain North

Townsville Station, Flinders Street

Phone (07) 47 728 324

## 6.11 Network Control Boards – Mayne Network Control Centre

### 6.11.1 Train Operations, Traffic Management or Incident Management

Enquiries by Operator regarding train operations, traffic management or Network Incident management in relation to line sections [referred to in Section 6.8](#) that are controlled by Mayne Network Control Centre should be directed to:

Network Control Train Control Supervisor, Mayne

Phone: (07) 3606 5970

Emergency Mobile Contact: 0408 703 227

### 6.11.2 Scheduling

Scheduling requirements for line sections [referred to in Section 6.8](#) that are controlled by Mayne Network Control Centre are described in the following documents:

- (a) Master Train Plan Protocols MD-11-945; and
- (b) Daily Train Plan Protocols NA-PRO-002.MD-11-947.

The Operator must comply with the above documents.

Enquiries by Operators regarding scheduling in relation to line sections [referred to in Section 6.8](#) that are controlled by Mayne Network Control Centre must be directed:

- (c) for scheduling enquiries relating to MTPs, DTPs and infrastructure maintenance:

Manager, Operations Planning

Queensland Rail, GPO Box 1492, Brisbane Qld 4001

Phone: (07) 3072 0196

- (d) for all other scheduling enquiries:

Manager, Business Operations South Network,

Supply Chain South

Queensland Rail, GPO Box 1492, Brisbane Qld 4001

Phone: (07) 3072 0196 or 3072 5076

## 7 Communication

### 7.1 Safety Notices

#### 7.1.1 Safety Alerts

If, in Queensland Rail's opinion, a safety Incident has or may occur that affects, or may affect, Queensland Rail or any Operator, then Queensland Rail may give the relevant Operator(s) notice of that incident (**Safety Alert**).

A Safety Alert will provide details of the relevant safety Incident and indicate any requirements that must be complied with by the Operator(s).

On receipt of a Safety Alert, the Operator must ensure that all relevant Operator's Associates are made aware of the contents of the Safety Alert.

### 7.1.2 Weekly Notices

Queensland Rail gives Weekly Notices to its employees. Amongst the information set out in those Weekly Notices is information about permanent or temporary changes to safety requirements (including information relevant to safety Incidents. Such a change is published in a Weekly Notice prior to the date on which the change takes effect.

However, if Queensland Rail is not issuing a Weekly Notice prior to a time when Queensland Rail considers that a relevant change needs to take effect, then Queensland Rail will include that change in the relevant Train Notice(s) (as required under **section 7.1.3** below) and will subsequently publish the change in the next Weekly Notice.

On the same day that a Weekly Notice is given to Queensland Rail's employees, Queensland Rail will also make available to the Operator an abridged Weekly Notice that extracts information about permanent or temporary changes to safety requirements (including information relevant to safety matters).

The Operator must ensure that each Operator's Associate is aware of, and complies with, the information in each abridged Weekly Notice relevant to that Operator's Associate's responsibilities and activities.

### 7.1.3 Train Notices

Queensland Rail may issue operational and safety instructions, information, requirements and messages to Operators (**Train Notices**). Typically Train Notices will be issued daily, but can be issued as determined by Queensland Rail.

The Operator must ensure as far as is reasonably practicable that each Operator's Associate is aware of, and complies with, the information in each Train Notice relevant to that Operator's Associate's responsibilities and activities.

## 7.2 Document Control Procedures

Each Operator must notify Queensland Rail of the name, position and contact details for the Operator's Associate who, on behalf of the Operator, is responsible for document control in connection with the Operator's Access Agreement.

The Operator must ensure the ongoing distribution of this document, and all documents referred to in this document, to the relevant Operator's Associates.

## 7.3 Cooperation between Parties

### 7.3.1 Operational Meetings

Each Operator must notify Queensland Rail of the name, position and contact details of the Operator's Associate who, on behalf of the Operator, will be the Operator's representative for operational meetings.

The Queensland Rail representative for an operational meeting is either or both of the following persons, as applicable:

- (a) GM Customer Service South

Ph: (07) 3072 7679

Fax: (07) 3235 7634

- (b) GM Customer Service North

Ph: (07) 4772 8872

Fax: (07) 4772 8495

The Operator's representative and Queensland Rail's representative for operational meetings are required to meet, at a time and place agreed between the Operator and Queensland Rail, for the purposes of:

- (c) reviewing matters relating to the performance of the Operator's Train Services to identify any remedial actions to prevent, minimise or mitigate any problems;
- (d) reviewing the reliability of the Operator's Trains;
- (e) reviewing any relevant Operational Constraints;
- (f) investigating or reviewing breaches of any relevant safeworking procedures or safety standards (including those referred to in either the relevant IRMP or **section 3** of this document); and
- (g) reviewing any other relevant operational matters in relation to the exercise of rights or compliance with obligations under the Operator's Access Agreement.

Either the Operator or Queensland Rail may, with the prior consent of the other (which consent is not to be unreasonably withheld), invite a guest to an operational meeting.

### 7.3.2 Contractual Meetings

The Operator must notify Queensland Rail of the name, position and contact details of the Operator's Associate who, on behalf of the Operator, will be the Operator's representative for contractual meetings.

The Queensland Rail representative for contractual meetings is:

General Manager Access Revenue

Ph: (07) 3072 3609

Fax: (07) 3072 8248



The Operator’s representative and Queensland Rail’s representative for contractual meetings are required to meet, at a time and place agreed between the Operator and Queensland Rail, for the purposes of discussing or reviewing commercial and contractual matters.

Either the Operator or Queensland Rail may, with the prior consent of the other (which consent is not to be unreasonably withheld), invite a guest to a contractual meeting.

### 7.4 Government Supported Infrastructure

The parts of the Network that are highlighted in red in Diagrams 1 and 2 below are supported by government funding.

Diagram 1:

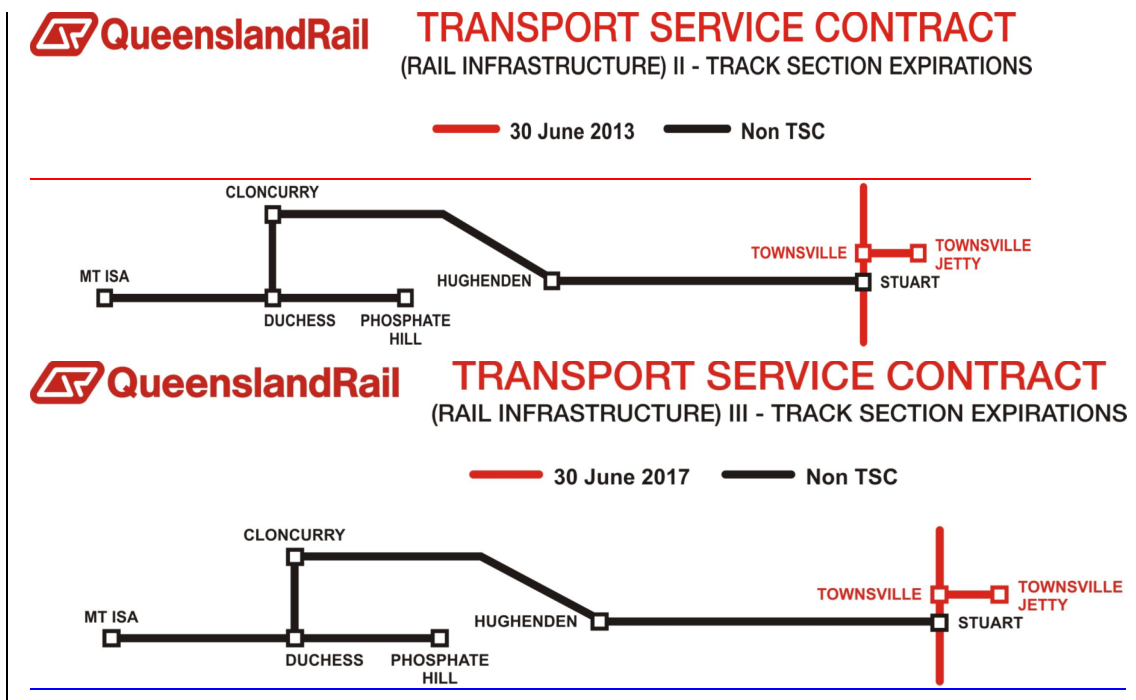
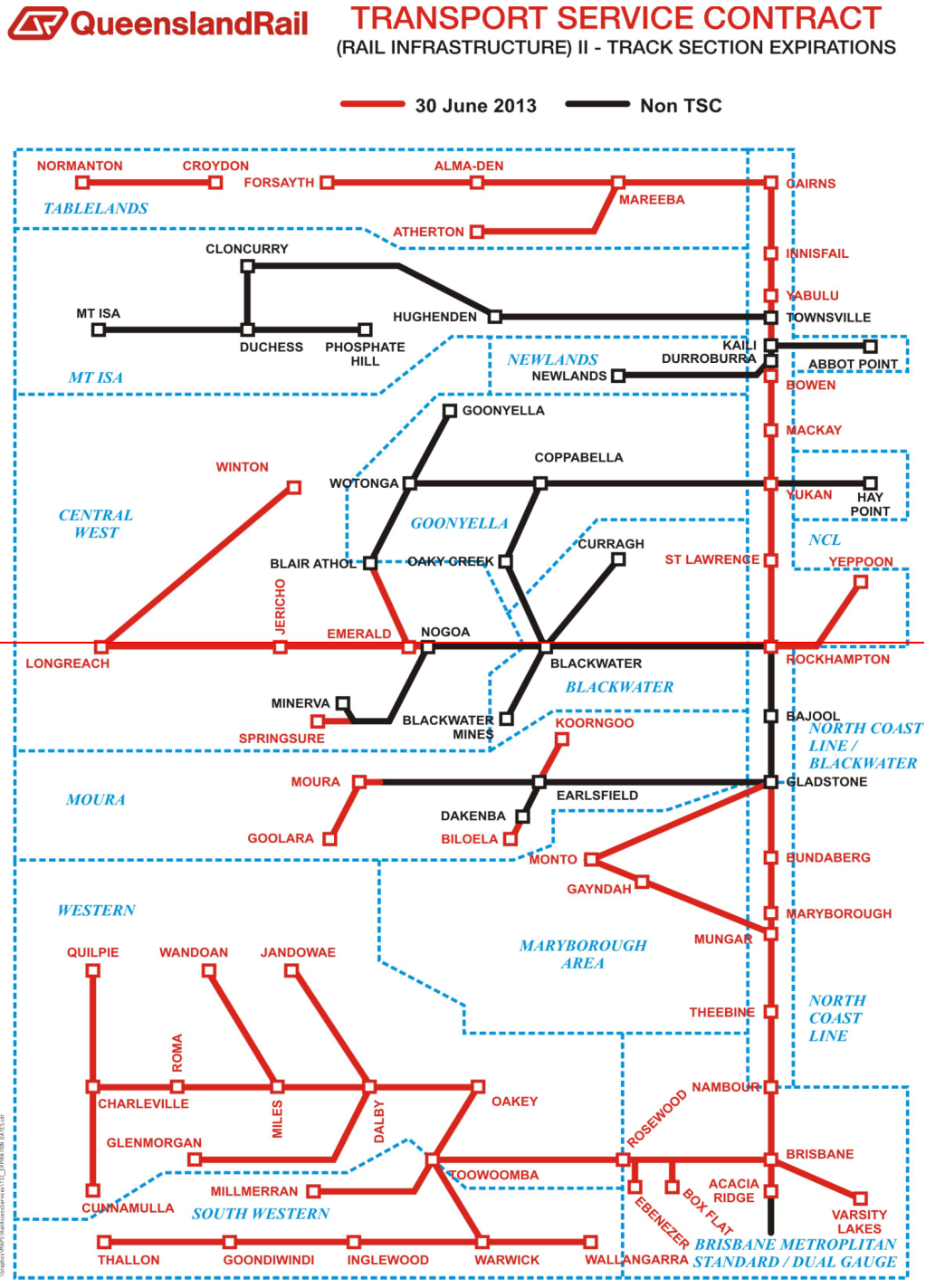


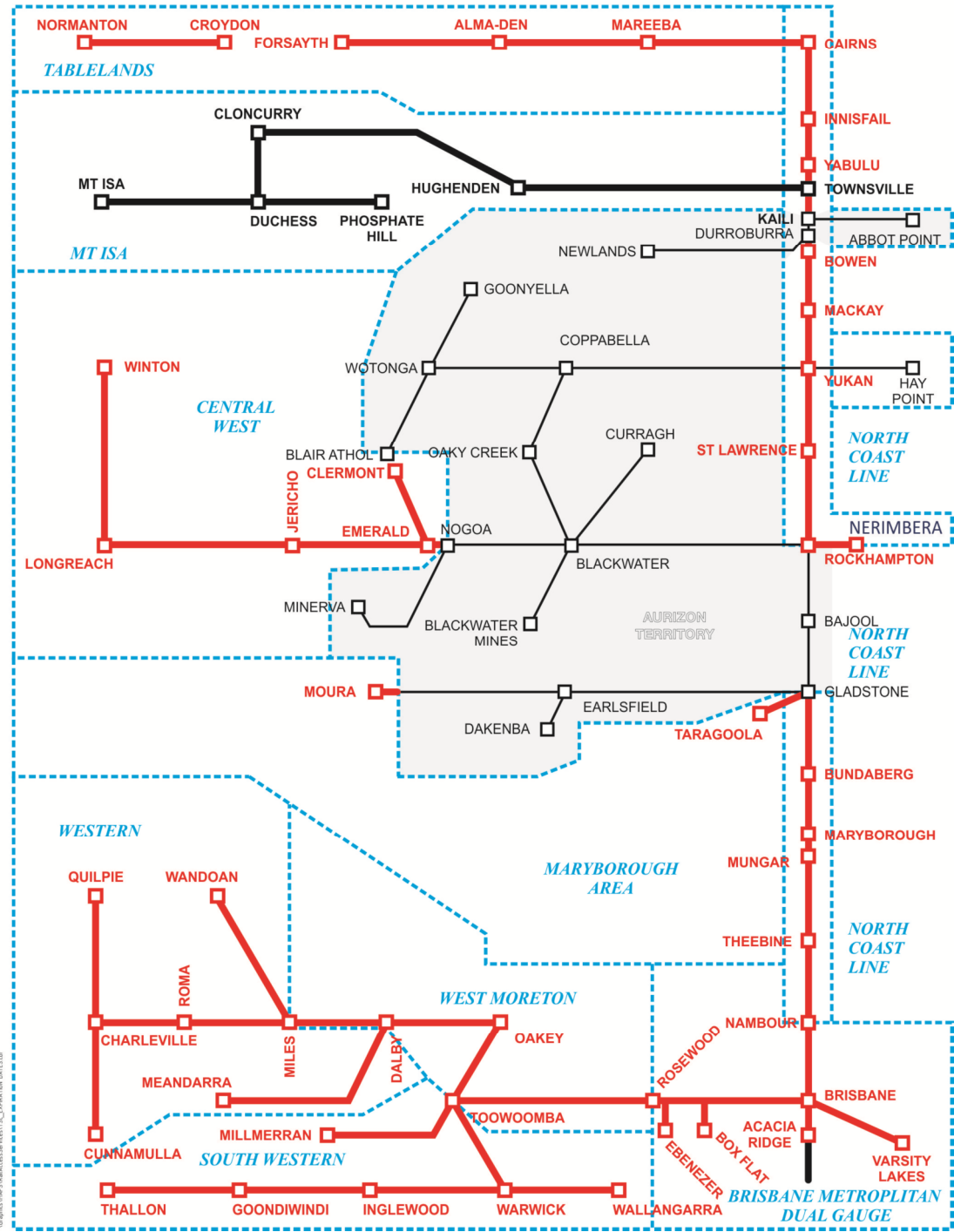
Diagram 2:





# TRANSPORT SERVICE CONTRACT (RAIL INFRASTRUCTURE) III - TRACK SECTION EXPIRATIONS

— 30 June 2017 — Non TSC



## **8 Further information**

If you would like further information on, or have queries regarding the information in, this manual, please contact the General Manager Access Revenue of Queensland Rail on (07) 3072 3609.

## 9 Glossary

### 9.1 Defined terms

Unless the context requires otherwise, terms used but not defined in this document shall have the meanings set out in the Standard Access Agreement.

<b>Access Agreement</b>	As defined in the Access Undertaking.
<b>ATT</b>	Authority to Travel.
<b>Baseline Environmental Data</b>	Data or information pertaining to the environmental management status of, or ongoing environmental risk related to, a particular section of the Queensland Rail Network prior to the execution of an access agreement (e.g. historical contaminated land, air quality, water quality, noise or biosecurity/pest management data).
<b>Comparison Train Length</b>	The calculated train length, for comparison with the loop length, to determine if the train can effectively utilise the loop to cross another train. It is defined as the static train length plus: <ul style="list-style-type: none"> <li>• 2% of the static train length for train handling allowance; and</li> <li>• 125mm per vehicle for coupler and drawgear tolerances.</li> </ul>
<b>Contamination</b>	Contamination as defined by the <i>Environmental Protection Act 1994</i> (Qld) where such contamination is likely to cause or does cause material environmental harm, serious environmental harm or environmental nuisance as those terms are defined in the <i>Environmental Protection Act 1994</i> (Qld).
<b>Direct Traffic Control Territory</b>	That part of the Network for which Direct Traffic Control – MD-10-113 applies as set out in Operational Route Manual – MD-10-533.
<b>DTMR</b>	Queensland Department of Transport and Main Roads.
<b>DTP</b>	Daily Train Plan.
<b>Emergency</b>	An actual or impending situation that may cause injury, loss of life, the destruction of property, harm to the environment or cause the interference, loss or disruption of an organisation's normal business operations, to such an extent that it poses a threat.

**Emergency Management Plan**

A plan (including any amendments from time to time) developed and maintained by Queensland Rail or the Operator which:

- (a) details procedures that are adequate to manage an Emergency, including all actions to be taken to prevent, minimise or mitigate any threat or danger to any person, property or the environment including:
  - (i) the matters outlined in this document that are relevant to the management of Emergencies; and
  - (ii) any matters otherwise referred to in the Access Agreement for inclusion in a plan that details procedures to manage an Emergency (whether or not referred to as an Emergency Management Plan);
- (b) is, at all times, compatible with the relevant Access Agreement and this document; and
- (c) is consistent with the degree of diligence, care, foresight, prudence and skill that would reasonably be expected from a competent, skilled and experienced person in the same type of undertaking in the same or similar circumstances.

**En Route Locomotive Provisioning**

The provisioning of a Train on the Network.

**Environmental Management System**

A management system that addresses all environmental risks and ensures compliance with all environmental Laws.

**Environmental Standards**

[Any environmental requirement defined by Law, Queensland Rail's Safety and Environment Management System \(SEMS\) and/or the Operator's environmental management systems.](#)

**ETA**

Estimated Time of Arrival.

**High Consequence Dangerous Goods**

As defined in Table 1.4.1 of the 18th Revised Edition of the United Nations Recommendations on the Transport of Dangerous Goods - Model Regulations, 2013.

<b>Interface Standards</b>	Queensland Rail's minimum requirements or standards relating to the interface between a Train and the Network (including to maintain agreed operating parameters – for example, axle load) with which the applicable Rolling Stock and Train Configurations must comply in order to operate on the Network. This includes the Interface Standards (MD-10-194), unless otherwise agreed or specified by Queensland Rail.
<b>MTP</b>	Master Train Plan.
<b>Notifiable Occurrence</b>	A notifiable occurrence as defined in the TRSA.
<b><u>Operating Plan</u></b>	<u><a href="#">As defined in the Access Undertaking</a></u>
<b>Operator</b>	Any person who holds, or uses any other person's, rights of access to any part of the Network in relation to Train services and any Accredited rail transport operator (as defined in the TRSA).
<b>Operator's Controller</b>	The person nominated by the Operator from time to time to perform Network Control duties on its behalf, including as set out in this ORM.
<b>Recovery</b>	The action to be taken in respect of any derailed, malfunctioning or immobilised Train for which the Operator is responsible for ensuring the prompt recommencement of Train Movements, including the subsequent retrieval of any such Train.
<b>Restoration</b>	The removal of any Obstruction, the rectification of any Network Incident and the prompt recommencement of Train Movements including all requisite repairs to the Network but excluding Recovery.
<b>Security Sensitive Ammonium Nitrate</b>	As defined in the <i>Explosives Information Bulletin Number 53, 21 November 2008, Version 3</i> available at:  <u><a href="https://www.dnrm.qld.gov.au/mining/safety-and-health/alerts-bulletins-search/alerts-bulletins/explosives/storage-req-security-sensitive-ammonium-nitrate-ssan">https://www.dnrm.qld.gov.au/mining/safety-and-health/alerts-bulletins-search/alerts-bulletins/explosives/storage-req-security-sensitive-ammonium-nitrate-ssan</a></u>
<b>Standard Access Agreement</b>	The pro forma access agreement attached to the Access Undertaking.
<b>TPO</b>	Track Protection Officer.

<b>TRA</b>	Train Route Acceptance.
<b>Train Notice</b>	A notice referred to in <b>section 7.1.3</b> .
<b><u>TRSA</u></b>	<u><a href="#">Transport (Rail Safety) Act 2010</a></u> .
<b>Weekly Notice</b>	a Queensland Rail internal weekly communication to its employees published on its intranet.

## 9.2 Construction

Unless expressed to the contrary, in this document:

- (a) “includes” means includes without limitation, and “including” means including without limitation;
- (b) a reference to:
  - (i) a person includes a partnership, joint venture, unincorporated association, corporation and a government or statutory body or authority;
  - (ii) any legislation includes subordinate legislation under it and includes that legislation and subordinate legislation as modified or replaced; and
  - (iii) this or any other document includes the document as varied or replaced; and
- (c) where time is to be calculated by reference to a day or event, that day or the day of that event is excluded.



## Annexure 7

Responses to negotiation, NMP, reporting and other issues

## Draft Decision Summary – Queensland Rail

	Draft Decision	Summary of Draft Decision position	Summary of the Queensland Rail Response
Term of 2015 DAU	1.13 After considering Queensland Rail's proposed term of the new access undertaking to start from the date of the approval (commencement date) and end on 30 June 2020 (termination date), our Draft Decision is to approve Queensland Rail's proposal.		<b>Accept in principle</b>
	Miscellaneous Matters regarding Draft Decision 2.2	<p>The QCA notes that Queensland Rail's DAU requires the access seeker both:</p> <ul style="list-style-type: none"> <li>• Evidence that they are reasonably likely to have an end Customer; and</li> <li>• Will be reasonably likely to attract a Customer in the future.</li> </ul> <p>The QCA wants the second point above deleted and the drafting to say the access seeker is 'reasonably likely to have such a customer at the commencement date of the Access Agreement.'</p>	<b>Accept in principle</b>
Capacity Information MTP	<p>2.5 The QCA requires Queensland Rail to amend its 2015 DAU to:</p> <p>(c) provide appropriate capacity information to an Access Seeker. This includes providing a DTP which contains sufficient information about possibly relevant train services and also an MTP. The required amendments are set out in Schedule A in Appendix C.</p>	<p>(c) The 2015DAU included an obligation to provide to Access Seekers an unredacted DTP and the Network Control diagrams, indicating actual running of Train Services against the relevant Daily Train Plan.</p> <p>The QCA is seeking to extend this to include providing an Access Seeker a copy of the MTP unredacted and including all train services that may impact the Access Seekers operations.</p>	<b>Accept in principle</b>

	Draft Decision	Summary of Draft Decision position	Summary of the Queensland Rail Response
	<p>2.5 The QCA requires Queensland Rail to amend its 2015 DAU to:</p> <p>(a) specify, for systems where no reference tariffs apply, cost and pricing information that Queensland Rail will provide in an Indicative Access Proposal, consistent with its obligations under s. 101(2) of the QCA Act. The required amendments are set out in cls.2.4.2 and 2.7.2 in Appendix C.</p>	<p><b>QCA View – Pricing Information</b></p> <p>(a) s. 101(1) of the QCA Act requires “<i>In negotiations between an access provider and access seeker for an access agreement, the access provider must make all reasonable efforts to try to satisfy the reasonable requirements of the access seeker.</i>”</p> <p>s. 101(2) of the QCA Act requires an access provider to provide (among other information) specified cost information to access seekers being:</p> <ul style="list-style-type: none"> <li>• “<i>access provider provides the service, including the way in which the price is calculated;</i></li> <li>• <i>information about the costs of providing the service, including the capital, operation and maintenance costs;</i></li> <li>• <i>information about the value of the access provider’s assets, including the way in which the value is calculated;</i>”</li> </ul> <p>The QCA is seeking that where there is no Reference Tariff Queensland Rail provide as part of an Indicative Access proposal (IAP)</p> <p>(a) “<i>the cost of providing the Access, including the capital, operating and maintenance costs, consistent with s101(2)(b) of the QCA Act; and</i></p> <p>(b) <i>asset value including the valuation methodology, consistent with s101(2)(c) of the QCA Act.</i>”</p>	<p><b>Accept In part</b></p> <p>Queensland Rail accepts that there is an obligation under the QCA Act to provide the cost information prescribed under the Act. However, the information required under the QCA Act should only be provided upon request. Most access applications don’t require this information (e.g. heritage services, renewals etc). Queensland Rail to provide as part of the IAP:</p> <ul style="list-style-type: none"> <li>• Price of a Service</li> <li>• Cost of a service (and elements of those costs)</li> <li>• Asset Value</li> <li>• Assumed operating plan and rollingstock configuration.</li> <li>• Capacity information (MTP/DTP)</li> </ul> <p>The other information is to be provided upon request. To do otherwise is inefficient and on the large part would provide information that is not required by the access seeker.</p>
Indicative Access Proposal	<p>2.8 The QCA requires Queensland Rail to amend its 2015 DAU so that the party seeking an extension to a timeframe (relating to providing an Indicative Access Proposal and intent to negotiate, a negotiation period and an execution of access agreement) can reasonably justify the extension and the other party cannot unreasonably withhold its</p>	<p>Both under the current Access Undertaking (2008AU) and the 2015 DAU there are prescribed timeframes in which Queensland Rail is to provide an indicative access proposal (IAP) and in which an Access Seeker must accept the IAP.</p> <p>Under both the 2008AU and the 2015DAU Queensland Rail may extend the timeframe for providing the IAP (e.g. if the access request is complex). The 2015DAU does not</p>	<p><b>Accept In principle</b></p> <p>Practically Queensland Rail would usually extend the timeframe if an Access Seeker had a valid reason for doing so.</p> <p>Queensland Rail would provide a reason where it sought to extend a timeframe. The drafting will</p>

	<b>Draft Decision</b>	<b>Summary of Draft Decision position</b>	<b>Summary of the Queensland Rail Response</b>
	consent to the extension request. The required amendments are set out in Part 2 in Appendix C.	<p>specifically state that Queensland Rail has to give the reasons for the extension of time, however it does specify the circumstances under which Queensland Rail can extend the time (i.e. It also does not provide that the Access Seeker has a right to extend the time in which to accept an IAP, thereby giving intent to negotiate.</p> <p>The QCA is seeking that Queensland Rail include a right for a party to extend a timeframe (relating to providing an Indicative Access Proposal and an intent to negotiate, a negotiation period and an execution of access agreement provided it can reasonably justify the extension.</p>	reflect that the Access Seeker is to apply to Queensland Rail for the extension.
Concurrent Access Requests	<p>2.11 The QCA requires Queensland Rail to amend its 2015 DAU so that:</p> <p>(a) refusal to provide access on the grounds of concurrent requests is limited to duplicate access requests, provided the access seeker is given a reasonable opportunity to respond, before Queensland Rail considers refusing to deal with the access seeker in respect of those duplicate requests. The required amendments are set out in cl.2.8.1 in Appendix C.</p>	<p>(a) The 2015 DAU allows Queensland Rail to cease negotiations where an Access Seeker has multiple requests which conflict with each other where they cannot all be satisfied.</p> <p>This is helpful to Queensland Rail because on occasions Access Seekers will use the Access Application process to test scenarios at no cost using Queensland Rail resources. Subsequently, based upon this analysis; they will decide which access request to progress. This means that only one of the access requests was genuine as all of the access requests couldn't have been satisfied.</p> <p>The QCA has accepted this 'in principle'. The QCA requires Queensland Rail to amend the 2015 DAU to provide an Access Seeker with an obligation to justify the multiple access requests prior to cessation.</p>	<b>Accept in principle</b>
Passenger Safety	<p>2.11 The QCA requires Queensland Rail to amend its 2015 DAU so that:</p> <p>(b) refusal to provide access on the grounds of passenger safety is subject to Queensland Rail acting reasonably in assessing the impact on passenger safety and complying with the non-discriminatory provisions. The</p>	<p>(b) The 2015DAU sets out the process for Queensland Rail to cease negotiations if the use of any proposed Access Rights sought by an Access Seeker may adversely affect the safety of any persons using or intending to use a passenger train service. The QCA is seeking that when forming the above opinion, Queensland Rail does so by "acting "reasonably".</p>	<p><b>Does not accept</b></p> <p>It is not clear what the term 'acting reasonably' is intended to mean.</p> <p>For reasons set out elsewhere in this submission, it is not appropriate that Queensland Rail's rail safety requirements be</p>

	<b>Draft Decision</b>	<b>Summary of Draft Decision position</b>	<b>Summary of the Queensland Rail Response</b>
	required amendments are set out in cl.2.8.2 in Appendix C.		watered down, disputed or replaced. Queensland Rail cannot be placed in a position where it is unable to comply (in a manner satisfactory to Queensland Rail) with its statutory obligations or incurs additional liability because third parties dictate safety or environmental requirements relating to its rail network.
Prudential Requirements Timeframes	<p>2.11 The QCA requires Queensland Rail to amend its 2015 DAU so that:</p> <p>(c) an access seeker can seek to extend the time to demonstrate satisfaction with the prudential requirements by reasonably justifying the extension, and Queensland Rail, acting reasonably, agrees to the extended time. The required amendments are set out in cl.2.8.3 in Appendix C.</p>	<p>(c) The 2015DAU allows Queensland Rail to require an Access Seeker to demonstrate within a period of no more than 10 Business Days, that they satisfy the 2015DAU prudential requirements.</p> <p>The QCA has accepted this but is seeking that Access Seekers be able to extend the timeframe through reasonable justification of an extension (subject to a reasonable acceptance by Queensland Rail).</p>	<b>Accept in principle</b>
Access Application Cost Recovery	<p>2.11 The QCA requires Queensland Rail to amend its 2015 DAU so that:</p> <p>(d) the cost recovery proposal is deleted. The QCA invites Queensland Rail to submit an alternative proposal which seeks to recover efficient incremental costs and addresses concerns regarding double-counting</p>	<p>(d) Queensland Rail has included the ability to recover costs for Access Applications that cease before becoming an agreement. The QCA agrees with this 'in principle', The QCA wants the costs to be limited to incremental costs.</p> <p>The QCA has invited Queensland Rail to submit an alternative proposal that demonstrates proposed recovery costs are efficient, transparent and not already captured in identified overhead costs (specifically in relation to West Moreton coal).</p>	<b>Accept in part</b> Queensland Rail considers that the QCA has accepted in principle that Queensland Rail has the right to recover its costs. On this basis this general principle should be reflected in the 2015 DAU.

	<b>Draft Decision</b>	<b>Summary of Draft Decision position</b>	<b>Summary of the Queensland Rail Response</b>
Renewal Access Requests and Queuing	2.20 The QCA requires Queensland Rail to amend its 2015 DAU so that: (a) Queensland Rail gives priority to a renewing access holder for coal-carrying or other bulk-mineral-carrying train services that satisfy the conditions in the undertaking (e.g. those relating to contract period, nature of access rights sought and timeframes for submitting renewal application). The required amendments are set out in cl.2.9.3 in Appendix C	(a) The 2015 DAU includes provisions for Access Holders whose access relates to coal and bulk mineral carrying services a one off right to renew an existing access agreement at expiry. The QCA claims that this is to ensure that the sunk costs of end users (e.g. the cost of developing a mine) aren't stranded. The QCA has accepted most of Queensland Rail's proposal. The QCA is seeking that renewal Access Seekers be placed at the front of the queue.	<b>Accept in principle</b>
Renewal Access Requests	2.20 The QCA requires Queensland Rail to amend its 2015 DAU so that:  (b) it reflects the amendments summarised in Table 2.7 (e.g. Queensland Rail is obliged to offer terms consistent with the undertaking and the standard access agreement, unless parties agree otherwise) including setting out the process that will apply to a renewal application, when there is no competing access application and the mechanism for the calculation of access charges for a renewal access seeker where no reference tariff applies. The required amendments are set out in cls.2.7.2, 2.9.3, 2.9.4 and 7.1 in Appendix C	Queensland Rail to make the following amendments: <ol style="list-style-type: none"> <li>1. That a renewal Access Seeker be placed first in the queue</li> <li>2. Renewal access agreement terms and conditions be consistent with the Access Undertaking and the standard access agreement that is in place at the time of the negotiations.</li> <li>3. The 2015 DAU requires nomination of a train operator by a Customer for renewing access rights if customer does not itself seek access rights. The QCA wants this requirement removed.</li> <li>4. The timeframes applying to a renewal Access Seeker for negotiating are tighter than for a competing Access Seeker (where there is insufficient capacity for all Access Seekers). The QCA wants the timeframes to be aligned.</li> <li>5. The 2008AU doesn't talk about a process for a renewal access seeker where there is no competing access seeker. The QCA wants the 2015DAU to provide that when there is no competing Access Seeker, an existing Access Holder submits a renewal application within a window of no more than three years and no less than two years before its existing agreement expires and that application is subject to the same negotiation process as any other application.</li> </ol>	<b>Accept in principle</b>

	<b>Draft Decision</b>	<b>Summary of Draft Decision position</b>	<b>Summary of the Queensland Rail Response</b>
MTP & DTP Consulting With Non-Contracted Parties	4.2 The QCA requires Queensland Rail to amend the NMPs in its 2015 DAU to provide for notifying a broader range of parties about changes to its train plans. The required amendments are set out in Schedule F, cls. 2.1(d) and 2.2(c) in Appendix C.	<p>The QCA is seeking that Queensland Rail be obliged to notify any other affected parties (e.g. non-contracted end users, ports) of:</p> <ul style="list-style-type: none"> <li>• modifications to the MTP, at least 20 business days prior to the commencement of the modification (except for Urgent or Emergency possessions); and</li> <li>• modifications to the DTP, at least 1 Business Day prior to the day of operation.</li> </ul> <p>The Draft Decision states that the notification could be done by Queensland Rail on its website. Interested parties to nominate if they want to be notified.</p>	<p><b>Accept in part</b> The drafting should be amended so that the non-contracted end users can opt in and attend the meetings with Access Holders and Queensland Rail.</p> <p>However, there should not be an obligation to notify those who do not opt in. Alternatively, information delivery could be achieved either by the portal, website or in meetings as determined by Queensland Rail. All options should remain available in the 2015AU.</p> <p>Additionally, this should not be open everyone who calls themselves an end user, but to bona-fide end users.</p>
Scheduling a DTP in variation from a MTP	The QCA proposes to delete the subclause permitting Queensland Rail to vary a DTP in variation to a MTP without consultation where Queensland Rail modifies the times at which any of its passenger Train Services, as scheduled in the MTP, operate.		<p><b>Does not accept</b> This provision is included to ensure Queensland Rail is in a position to comply with its passenger priority obligations.</p>
Consulting on DTP Modifications	4.5 The QCA requires Queensland Rail to amend the NMPs in its 2015 DAU to provide for consulting access holders for all operational constraints that affect the access holder's scheduled paths on the DTP, except that it need only make reasonable endeavours to consult in the case of urgent or emergency possessions and pressing safety issues. The required amendments are set out in	<p>The 2015 DAU states that Queensland Rail can make variations to the MTP and DTP for a:</p> <ol style="list-style-type: none"> <li>a) a modification to a planned possession;</li> <li>b) the creation of an Urgent Possession;</li> <li>c) changes to accommodate other operational constraints;</li> </ol> <p>and where a train service entitlement is not met, Queensland Rail must have consulted with the affected Access Holder.</p>	<p><b>Does not accept</b> Queensland Rail believes this provision is impracticable given the large number of changes and short planning windows leading up to the day of operations.</p> <p>For reasons set out elsewhere in this submission, it is not appropriate that Queensland</p>

	<b>Draft Decision</b>	<b>Summary of Draft Decision position</b>	<b>Summary of the Queensland Rail Response</b>
	Schedule F, cls 2.2(f) and 2.2(j)(iii) in Appendix C.	<p>The QCA is seeking that the above be amended so that Queensland Rail must consult with Access Holders for all operational constraints that affect an Access Holder's scheduled paths on the DTP.</p> <p>Queensland Rail will however be largely excluded from this requirement in the event of urgent/ emergency possessions or pressing safety issues.</p>	Rail's rail safety requirements be watered down, disputed or replaced. Queensland Rail cannot be placed in a position where it is unable to comply (in a manner satisfactory to Queensland Rail) with its statutory obligations or incurs additional liability because third parties dictate safety or environmental requirements relating to its rail network.
Changes from MTP to DTP (Planned Possessions)	4.8 The QCA requires Queensland Rail to amend the NMPs in its 2015 DAU to provide for making reasonable endeavours to seek agreement from access holders where it varies the DTP from the MTP, except for emergency possessions and pressing safety issues. We also require Queensland Rail to report on its adherence to timings of planned possessions in the MTP. The required amendments are set out in cl. 5.1.2(a)(x) and Schedule F, cl. 2.2(f) in Appendix C.	<p>The QCA require Queensland Rail to seek agreement with Access Holders about changes to planned possessions in the DTP compared to the MTP.</p> <p>There is a further requirement for Queensland Rail to report on whether it has adhered to timings of planned possessions.</p>	<p><b>Does not accept</b> In conjunction with other reporting obligations proposed by the Authority, Queensland Rail believes there will be significant administrative burden on the organisation to comply.</p> <p>Seeking agreement from parties that may not be affected by changes to DTP adds to existing regulatory burden, provides no perceivable benefit and as a result should not be a requirement.</p> <p>As Network manager, Queensland Rail already ensures that it consults with affected parties on changes.</p>
Delays to MTP/DTP when under Dispute	4.11 The QCA requires Queensland Rail to amend its 2015 DAU to provide for delaying changes to the MTP until related disputes are resolved. The required amendments are set out in	Queensland Rail is to delay any changes (other than emergency or urgent possessions) to the MTP or DTP until all disputes by Access Holders are resolved.	<p><b>Does not accept</b> Queensland Rail plans the MTP approximately three months prior to any train operation.</p>



	<b>Draft Decision</b>	<b>Summary of Draft Decision position</b>	<b>Summary of the Queensland Rail Response</b>
	Schedule F, cl. 2.4 in Appendix C.		<p>The MTP is an integrated process across multiple stakeholders. Queensland Rail places considerable emphasis on consultation with its stakeholders through the supply chain to balance ranging views on its formation and eventual running.</p> <p>As network manager, Queensland Rail has an existing obligation to ensure that the optimal MTP is created for each specified part of the network.</p> <p>Queensland Rail has no objection to the dispute process, but must be able to run the network in an efficient manner and have discretion to make decisions relevant to the safe operation of the network. The QCA proposal will lead to inefficiencies and disruptions to the running of the network in some cases.</p> <p>Additionally, it is possible for stakeholders to use the process frivolously to compromise train running at the expense of or frustration to other parties.</p> <p>This may not be possible if there is a major program of works being undertaken. This may also not be possible given train crew and train consist constraints from Rail Operators</p>

	<b>Draft Decision</b>	<b>Summary of Draft Decision position</b>	<b>Summary of the Queensland Rail Response</b>
Usable Scheduled Time	4.14 The QCA requires Queensland Rail to amend its proposal to require that it make reasonable endeavours to minimise the material adverse effects of all operational constraints and offer usable replacement train paths. The required amendments are set out in Schedule F, cls. 2.3(a) and 2.3(c) and definitions of 'Alternative Schedule Time' and 'Usable Schedule Time' in Appendix C.	Queensland Rail should use reasonable endeavours to provide an alternative train path that is considered usable/premium by the Access Holder where there may a change to the MTP/DTP.	<p><b>Does not accept</b> Queensland Rail rejects the definitions for Alternative Schedule Time and Usable Scheduled Time.</p> <p>The amended provisions do not balance the interests of all parties appropriately.</p> <p>Currently, Queensland Rail will offer a train path according to contractual obligations and use reasonable endeavours to ensure this is usable. However, Queensland Rail contend that it is not reasonable for alternative paths to be provided in response to operational changes implemented by the operator, for example, a train operator may be decreasing staff and may not have train drivers available at an alternative time even though that time is appropriate through the Train Service Entitlement. In these instances, and given the holistic nature of network management (e.g. impact of closures etc), Queensland Rail consider it would be more equitable and practical from an operational perspective to provide a contracted alternative time with the onus on the Access Holder to consider operational changes required to make the train path useable.</p>

	Draft Decision	Summary of Draft Decision position	Summary of the Queensland Rail Response
			Queensland Rail also has concerns relating to the integrity of its maintenance regime with this limitation on its ability to schedule programs at the expense of Rail operator convenience.
Usable Scheduled Time	4.14 The QCA requires Queensland Rail to amend its proposal to require that it make reasonable endeavours to minimise the material adverse effects of all operational constraints and offer usable replacement train paths. The required amendments are set out in Schedule F, cls. 2.3(a) and 2.3(c) and definitions of 'Alternative Schedule Time' and 'Usable Schedule Time' in Appendix C.	Queensland Rail should use reasonable endeavours to provide an alternative train path that is considered usable/premium by the Access Holder where there may a change to the MTP/DTP.	<p><b>Does not accept</b> Queensland Rail rejects the definitions for Alternative Schedule Time and Usable Scheduled Time.</p> <p>The amended provisions do not balance the interests of all parties appropriately.</p> <p>Currently, Queensland Rail will offer a train path according to contractual obligations and use reasonable endeavours to ensure this is usable. However, Queensland Rail contends that it is not reasonable for alternative paths to be provided in response to operational changes implemented by the operator.</p> <p>For example, if a train operator decreased staff and they may not have train drivers available at an alternative time even though that time is appropriate through the Train Service Entitlement. In these instances, and given the holistic nature of Network management (e.g. impact of closures etc.), Queensland Rail</p>

	Draft Decision	Summary of Draft Decision position	Summary of the Queensland Rail Response
			<p>consider it would be more equitable and practical from an operational perspective to provide a contracted alternative time with the onus on the Access Holder to consider operational changes required to make the train path useable.</p> <p>Queensland Rail also has concerns relating to the integrity of its maintenance regime with this limitation on its ability to schedule programs at the expense of Rail operator convenience.</p>
Consult with Rail Managers Through Running Trains	4.17 The QCA requires Queensland Rail to amend its proposal so that Queensland Rail is required to consult with other railway managers on scheduling and other matters affecting both networks, and use reasonable endeavours to minimise the effect on through-running trains. The required amendments are set out in Clause 4.2 in Appendix C.	Queensland Rail to consult with other Rail Managers in relation to MTP, maintenance activities, and operating requirement changes.	<p><b>Does not accept</b></p> <p>The QCA has no authority to require Queensland Rail to coordinate any of its activities with other participants in the supply chain, or to consult or otherwise communicate with other railway managers. Queensland Rail is not aware of any other railway manager which is subject to the same obligations as proposed by the QCA.</p>
Consulting on DTP Modifications	4.20 The QCA requires Queensland Rail to amend its proposal to specify that a network controller be 'acting reasonably' when forming a belief that it is necessary to give priority to passenger train services. The required amendments are set out in Schedule F, cls. 3(i)(i) and 3(i)(ii) in Appendix C.	<p>The Network Management Principles outline the way Queensland Rail train controllers will treat differing types of train services on the Network.</p> <p>The QCA is seeking an amendment such that train controllers must 'act reasonably' in performing these functions.</p>	<p><b>Does not accept</b></p> <p>It is not clear what is meant by the term 'acting reasonably' in this context.</p> <p>In any event, the TIA contains obligations on Queensland Rail that it must endeavour to bring a passenger service that is delayed back to its scheduled running</p>

	Draft Decision	Summary of Draft Decision position	Summary of the Queensland Rail Response
			<p>time. The TIA does not impose an obligation to act 'reasonably'. The QCA Act does not override the TIA.</p> <p>In addition, the QCA should be aware that where Queensland Rail fails to comply with its passenger priority and preserved path obligations under TIA it is exposed to a civil penalty regime that could result in substantial penalties. The QCA cannot place Queensland Rail in a position where it is exposed to such penalties.</p>
Performance and Access Reporting	<p>5.2 The QCA requires Queensland Rail to amend its 2015 DAU to report annually on the time taken to issue IAPs to access seekers, and on the time taken by access seekers to provide their intent to negotiate, in the following categories:</p> <ul style="list-style-type: none"> <li>(a) less than 10 business days</li> <li>(b) 10 to 20 business days</li> <li>(c) 21 to 40 business days</li> <li>(d) more than 40 business days.</li> </ul> <p>The required amendments are set out in Clause 5.2.2(d) in Appendix C.</p>	<p>Queensland Rail to report annually on the time taken to issue IAPs to Access Seekers, and on the time taken by Access Seekers to provide their intent to negotiate under a range of categories.</p>	<p><b>Accept in part</b> Queensland Rail supports a more transparent measure on IAP acceptance. However, Queensland Rail has concerns that there may be the potential for greater administrative burden and further downside regulatory risk to the organisation.</p> <p>Queensland Rail questions the purpose of the timeframe categories for Intent to Negotiate as these remain unclear.</p> <p>Queensland Rail proposes a reduction to two categories:</p> <ul style="list-style-type: none"> <li>(a) Within 20 Days or</li> <li>(b) Greater Than 20 Days.</li> </ul>

	<b>Draft Decision</b>	<b>Summary of Draft Decision position</b>	<b>Summary of the Queensland Rail Response</b>
Annual Reporting – Reference Tariff Services	<p>5.5 The QCA requires Queensland Rail to amend its 2015 DAU so that for systems with reference tariffs, it reports annually for the relevant financial year on:</p> <ul style="list-style-type: none"> <li>(a) maintenance costs of its system and scope of maintenance, compared with the maintenance forecasts used to develop the tariff</li> <li>(b) operating expenditure, compared with the forecasts used to develop the tariff</li> <li>(c) capital investment and a roll-forward of its regulatory asset base</li> <li>(d) system volumes (broken down by type of tariff).</li> </ul> <p>The required amendments are set out in Clause 5.2.2(i) in Appendix C.</p>	<p>The QCA is seeking additional annual reporting obligations in relation to:</p> <ul style="list-style-type: none"> <li>• maintenance costs</li> <li>• operational costs</li> <li>• capital investment</li> <li>• system volumes</li> </ul>	<p><b>Accept in principle</b> Queensland Rail intends to accept this Draft Decision requirement. Queensland Rail will do this either through its annual performance reporting as suggested by the QCA or in its publicly released audited Below Rail Financial Statements.</p>
Annual Reporting – Non-reference Tariff Services	<p>5.8 The QCA requires Queensland Rail to amend its 2015 DAU to report certain information in relation to non-reference tariff train services that includes capital investment over the previous financial year and expected capital investments over one and five years as well as:</p> <ul style="list-style-type: none"> <li>(a) maintenance costs of its system and scope of maintenance performed</li> <li>(b) operating costs of the Regional Network</li> <li>(c) system volumes.</li> </ul> <p>The required amendments are set out in Clause 5.2.2(j) in Appendix C.</p>	<p>The QCA is seeking additional annual reporting obligations in relation systems that do not have a Reference Tariff:</p> <ul style="list-style-type: none"> <li>(a) maintenance costs</li> <li>(b) operational costs</li> <li>(c) capital and system volumes</li> <li>(d)</li> </ul>	<p><b>Accept in principle</b> Queensland Rail intends to accept this Draft Decision requirement. Queensland Rail will do this either through its annual performance reporting as suggested by the QCA or in its publicly released audited Below Rail Financial Statements.</p>

	<b>Draft Decision</b>	<b>Summary of Draft Decision position</b>	<b>Summary of the Queensland Rail Response</b>
Below Rail Financial Statements	5.11 The QCA requires Queensland Rail to amend its proposal so that Queensland Rail is required to publicly release audited financial statements for its declared services, consistent with the requirements in the QCA Act, within six months of the relevant financial year. The required amendments are set out in Clause 5.3.1 in Appendix C.	The QCA requires Queensland Rail to have an obligation to produce Below Rail Financial statements in accordance with the requirements of the QCA Act.	<b>Accept in principle</b> Queensland Rail accepts this requirement as the obligation is the same as the 2008AU, and the QCA Act provides the QCA with the authority to seek below rail financial statements.

	<b>Draft Decision</b>	<b>Summary of Draft Decision position</b>	<b>Summary of the Queensland Rail Response</b>
Audit Requirements	5.14 The QCA requires Queensland Rail to amend its proposal so that the regulatory audit requirements allow the QCA, acting reasonably, to require an audit of compliance with any aspect of the undertaking or the QCA Act. The required amendments are set out in Clause 5.4.4 in Appendix C.	The QCA requires Queensland Rail to amend the 2015DAU to provide it with the right to Audit any aspect of Queensland Rail's compliance with the 2015DAU.	<p><b>Does not accept</b></p> <p>The QCA Act does not include an explicit right for the QCA to undertake audits. Rather it has strong information gathering rights.</p> <p>The 2008AU allows the QCA to audit Queensland Rail's compliance with its reporting obligations (Annual/Quarterly performance report, Below Rail Financial Statements) and Queensland Rail's treatment of third parties. The QCA is extending this to be a right to audit all aspects of Queensland Rail's 2015 DAU.</p> <p>The 2008AU includes a right for the QCA to require an external of reporting and treatment of third parties, a right that the QCA has exercised every year. The QCA has agreed with Queensland Rail's approach that this be replaced by the Queensland Rail CEO signing a responsibility statement.</p> <p>Queensland Rail included a right for the QCA to require an audit, if the QCA believes, acting reasonably, the quarterly or annual reports are incorrect. The QCA has extended this to any part of the Access Undertaking</p>



	<b>Draft Decision</b>	<b>Summary of Draft Decision position</b>	<b>Summary of the Queensland Rail Response</b>
Audit Requirements	6.2 The QCA requires Queensland Rail to amend its proposal so that it will provide tariff related reports for the West Moreton network to access seekers, as set out in the 2015 undertaking, from 1 July 2013. The required amendments are set out in Clause 6.4 in Appendix C.	The QCA is seeking public reporting of its proposed Annual Reporting measures such as maintenance costs retrospectively from 1 July 2013.	<b>Accept in principle</b> .

## Annexure 8

Legal advice on absence of 87 train path constraint

## Advice for Queensland Rail

Prepared for: Bronwyn Fursey, Senior Legal Counsel - Corporate Advisory,  
Regulatory & Major Projects

Prepared by: Eddie Scuderi

**CORRS  
CHAMBERS  
WESTGARTH**  
lawyers

23 December 2015

*Privileged and confidential*

# 87 Train Paths - Ministerial Direction

---

## Question

You have asked whether certain correspondence constitutes a legally binding Ministerial Direction which would operate to limit the number of train paths available for coal train use in the Metropolitan Network (**87 train path constraint**).

---

## Answer

The correspondence does not constitute a Ministerial Direction and there is no legally binding 87 train path constraint.

---

## Next steps

Please let us know if you require any discussion of the issues addressed in this advice.

# West Moreton Network – Response to B&H Alternative Assessment of Capacity

## Response to B&H Report

December 2015



## Table of Contents

---

1.	B&H Alternate assessment of West Moreton capacity .....	3
3.1	Operational variability .....	3
3.2	Implications of B&H approach .....	7

## 1. B&H Alternate assessment of West Moreton capacity

In the B&H report and in the Draft Decision, there are a number of references to alternate estimates of both maximum theoretical capacity and maximum contracting capacity. In particular, B&H indicates a view that maximum contracting capacity could be as high as 271 one way paths.<sup>1</sup> Notwithstanding that the QCA has not adopted this as the maximum contracting capacity, Queensland Rail is concerned about the methodology used by B&H in reaching this view and, as such, provides the following response.

Queensland Rail's key concerns are essentially:

- in contrast to the views expressed by B&H, Queensland Rail considers that operational capacity (and therefore maximum contracting capacity) must be assessed taking into account reasonably expected operational variability, including above rail variability; and
- B&H's assessment has not taken into account its conclusions regarding the impact of the Metropolitan Network on West Moreton capacity, which is discussed above.

Queensland Rail has a further concern. B&H state in their report:

*"In 2000 QR (now Aurizon) submitted capacity calculations indicating a "reduction factor" due to infrastructure requirements, including planned maintenance of 85%. Modelling at the time, performed by Maunsell (now AECOM) assumed a reduction factor of 95% due to unplanned maintenance."<sup>2</sup>*

B&H rely in part on the above reports, however, they have not been provided to Queensland Rail for review, which limits Queensland Rail's ability to make a proper assessment of the B&H claims. Queensland Rail believes that these reports *may* be specific to the central Queensland coal system, and not the West Moreton Network (however is unable to verify this without the reports being made available). Queensland Rail notes that different systems have vastly different characteristics (e.g. West Moreton Network, central Queensland coal, ARTC's network). Reduction factors would be expected to vary between systems to reflect their varying characteristics and as such the reports may have little relevance to the West Moreton Network. .

### 3.1 Operational variability

Operational variability refers to the potential for a train to operate outside its planned schedule, due to unplanned events. Operational variability can impact both the actual time that a train takes to traverse a section while operating on its scheduled path, as well as the risk that a train may not be able to operate on its scheduled path, and may need to be diverted onto an alternate scheduled path. Operational variability can be caused by a wide range of factors, including above rail, below rail and other (e.g. weather) impacts, as noted by B&H.<sup>3</sup>

However, in its discussion of operational capacity, B&H has taken the view that only variability that results from below rail factors or external factors should be considered in assessing the operational capacity of the rail network. B&H considers that having regard to the expected variability caused by above rail factors is tantamount to reflecting above rail inefficiencies in the estimate of rail infrastructure capacity. B&H takes the perspective that any above rail variability

---

<sup>1</sup> B&H Strategic Services (2015), p67

<sup>2</sup> B&H Strategic Services (2015), p66

<sup>3</sup> B&H Strategic Services (2015), p66

effectively which causes the operator consume more than one infrastructure path, and that this should be reflected in the access agreement between Queensland Rail and the operator. In essence, B&H is suggesting that:

- Rail infrastructure operational capacity should be assessed on the assumption that no variability occurs due to above rail causes; and
- Rail operators should contract for additional paths to reflect their expected variability – given that some above rail variability is unavoidable, under this model rail operators will need to contract for more than one infrastructure path for every train service that they intend to operate.

Contrary to the views expressed by B&H, Queensland Rail considers that it is impractical to exclude reasonably expected above rail operational variability from an assessment of operational capacity of the network, and then to attempt to address this in the access agreement.

Queensland Rail considers that a realistic assessment of operational capacity must take into account the fact that a robust rail system:

- needs to have train paths scheduled with some margin above the average section run time of the longest section in order to have confidence that trains will be able to maintain the scheduled time; and
- will not operate train services on all theoretical scheduled paths, given the need to maintain some 'reserve paths' to recover from operational variability and unplanned events.

These factors are broadly taken into account by Queensland Rail's 35% 'reduction factor' which is applied to the theoretical saturated capacity of the West Moreton system (where saturated capacity is assessed assuming that the longest section is occupied 100% of the time, based on the average run time of trains on that section).

*Scheduling interval must reflect margin above average section run time*

Reflecting that the average run time of the longest section on the West Moreton Network is 26 minutes, Queensland Rail has adopted a scheduling interval of 30 minutes. This margin above the average section run time is intended to allow for variability in train and infrastructure performance, including variability in speed profiles of trains. For example:

- Where infrastructure problems arise, standard practice is to apply a temporary speed restriction in order to ensure the safe operation of train services in that area until rectification works are complete – this will result in the actual time taken to traverse a section being longer than the estimated average time;
- There can be variations in the time that a train takes to traverse the section due to differences in train performance. This can be due to either driver or mechanical reasons. However, over a 26 minute section, small variations in train performance can cause a material difference in the section running time.

In its 2014 report for the QCA's Consultation Paper, B&H considered this very issue and concluded that:<sup>4</sup>

*...coal trains display variable speed profiles related mainly to the fact that they are driven by humans and respond in a non-mechanical manner to signals and other situations. A probability of train running encircles the theoretically infinite width path. We agree with QR*

---

<sup>4</sup> B&H (2014), Appendix 3 (no page number provided)

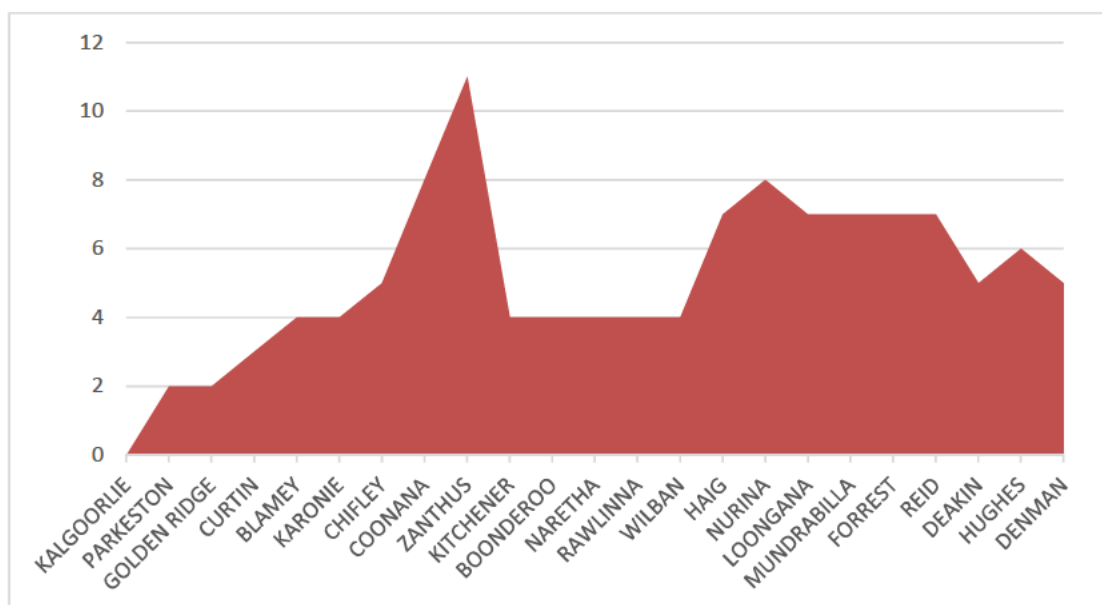
*that a train path is 6 to 8 minutes and that this results in latitude being applied to the possible interaction of trains and the risk of conflict.*

On this basis, B&H agreed that 30 minutes was an appropriate scheduling interval for the West Moreton Network.

If Queensland Rail were to adopt the approach suggested by B&H in its most recent report, this scheduling interval would presumably need to be reduced to exclude the impact of above rail factors, and only reflect the average section run time plus an allowance for below rail or external variability. Queensland Rail considers that such an approach is impractical, as it will simply mean that the established MTP schedule is unachievable once the inevitable above rail variability occurs. Establishing an MTP based on practically unachievable running times will increase the risk of train conflicts and the risk that trains will not operate on their scheduled paths. This lack of discipline in train operations will cause further loss of capacity, as likely train conflicts will not be effectively planned for in the scheduling environment – in other words, Queensland Rail would be ‘planning to fail’.

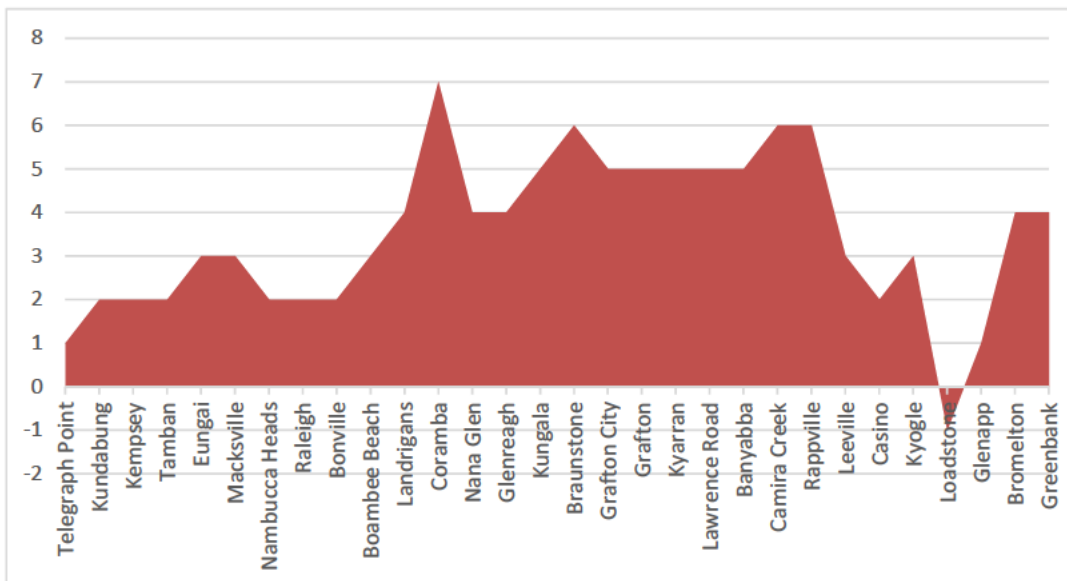
It is typical practice for railway managers to have some differences in running times over different sections of track based on operational factors. For instance, on the North-South interstate line operated by ARTC, there is a constant difference between the published section running times and the scheduled service running times. For instance, the graph below shows the accumulated extra scheduled time that the 2MB7 service between Melbourne and Brisbane would have to traverse each section, over and above the listed running times that are in the ARTC standard. These timings are also corroborated in other North-South intermodal train timetables. This extra scheduled time allowed in scheduling is also prevalent on the East-West corridor of the ARTC network, as seen in Figure 2. Some of the instances where the scheduled time is longer than the listed running time occurs on the longest leg of the route, which is evidenced between Coonana and Zanthus on the East-West corridor where the service is scheduled 49 minutes to traverse a section of track with a 46 minute running time.

**Figure 1 North - South Cumulative difference between schedule time and listed running time**





**Figure 2 East - West Cumulative difference between schedule time and listed running time**



Reflecting these issues, Queensland Rail continues to be of the view that it is necessary to ensure that the MTP schedule reflects a realistic view of train operations taking into account typically expected above rail variability as well as typically expected below rail and other variability. On this basis, Queensland Rail continues to believe that a scheduling interval of 30 minutes is reasonable for establishing the MTP for the West Moreton Network.

The adoption of a 30 minute scheduling interval means that theoretical MTP capacity is 12.8% less than the theoretical capacity if assessed purely on the average section run time of the longest section (as contemplated by B&H). That is, the margin on section run time contributes approximately 1/3 of Queensland Rail’s proposed 35% reduction factor.

*Provision for ‘reserve paths’*

In addition to including a margin above the average section run time in the train schedule, it is necessary to also include an allowance for ‘reserve paths’, which enables the ongoing operation of trains in the event that the schedule is disrupted. Where operational variability exceeds the margin provided for in the train schedule for any reason (whether below rail, above rail or external), a train will be categorised as ‘late running’. Where a ‘late’ train conflicts with an ‘on time’ train, the on time train will usually be given preference (subject to various specified exceptions),<sup>5</sup> and the late train will effectively need to run on the next available path.

Queensland Rail again considers that it is essential that the reserve path allowance be set based on all reasonably expected operational variability, including variability arising from above rail causes. It also must take into account the extent to which paths are unable to operate through the Metropolitan Network due to the maintenance requirements of the passenger system (as discussed above) – even though that effect is not material. It is important to recognise that these affected paths may continue to be used as reserve paths within the West Moreton Network itself.

<sup>5</sup> See the train control matrix which is included in Queensland Rail’s Network Management Plan

Retention of a level of reserve capacity to manage reasonably expected operational variability is universally applied by railway managers, and reflects good industry practice in order to ensure that the railway has sufficient capacity to reliably meet contracted entitlements. This should not be seen as an inefficiency, either in Queensland Rail's capacity management, or in the above rail operations.

### 3.2 Implications of B&H approach

Based on its view that infrastructure capacity should be assessed excluding allowances for reasonably expected above rail variability, B&H has suggested that the 'reduction factor' applied to the theoretical saturated capacity of the West Moreton Network should be 21%, rather than 35%.

B&H has come to this conclusion through the analysis of information provided by Queensland Rail on train delays that have occurred on the West Moreton system due to various reasons. B&H has stated that 61% of these delays were the result of below rail and external, and drew the conclusion that the reasons for path unavailability would be similar. Queensland Rail:

- has previously advised B&H that train control data on time lost due to certain types of train delays is only a partial assessment of operational variability; and
- does not agree with the assessment methodology used by B&H.

Queensland Rail considers that it would be difficult to develop a robust estimate of the extent to which variability is caused by above rail, below rail and external (eg weather) factors. Further, these proportions will not be static over time. Queensland Rail stated in detail the problems related to this in its response to the QCA information request dated 28 July 2015 (QCA reference number 835501).

In any event, the point of this analysis is unclear. It is important to recognise that B&H does not appear to be actually suggesting that the total 35% allowance for variability is inappropriate, rather that Queensland Rail should define the proportion of the reduction factor that relates to below rail and external variability (and reflect this in its assessment of the operational capacity of the rail infrastructure) and that rail operators should contract for additional infrastructure paths to accommodate above rail variability. This does not actually change the maximum number of train services that are able to run on the network – it simply reflects different model for defining and contracting infrastructure capacity.

This contracting model would create additional contracting complexity, and is likely to ultimately overstate the level of reserve capacity required, as it requires each operator to assess the reserve paths required to manage their expected variability, and doesn't contemplate a socialised allowance of reserve paths being available for multiple operators.

Importantly, if the QCA were to accept B&H's views on the contracting capacity of the West Moreton Network (which are based on the assumption that allowances for above rail variability are excluded from the assessed contracting capacity), the QCA would also need to form a view on how many infrastructure paths the operators would need to contract for each planned train service.

Queensland Rail rejects the B&H assessment of capacity on the West Moreton Network. B&H has not demonstrated its case. The West Moreton capacity is 112 paths. To treat the system otherwise would have serious operational adverse effect and would require capacity expansions funded by stakeholders to facilitate the additional train services.

---

## What this advice covers

This advice focuses on the following issues:

Power to give Ministerial Directions.....	2
Is the relevant correspondence a Ministerial Direction?.....	2

---

## Power to give Ministerial Directions

### There is a power to give Ministerial Directions but not directly to Queensland Rail

- 1 Before turning to your specific question it is worth noting the source and express limit of the power to give a ministerial direction.
- 2 The source of the relevant Ministers' power is found in Section 12 of the *Queensland Rail Transit Authority Act 2013 (RTA Act)*. That section provides:
  - (1) *The responsible Ministers may give the Authority a written direction in relation to the Authority and its subsidiaries.*
  - (2) *The Authority must comply with the direction.*
  - (3) *The board must ensure the direction is complied with in relation to the Authority and must, as far as practicable, ensure it is complied with in relation to its subsidiaries.*
- 3 It is clear from this provision that the responsible Ministers can provide directions to the Queensland Rail Transit Authority (**Authority**). There is no express right for the responsible Ministers to direct Queensland Rail Ltd.
- 4 If the Ministerial Direction relates to Queensland Rail Ltd, a subsidiary of the Authority, the Board of the Authority must, as far as practicable, ensure that Queensland Rail complies with the direction.

---

## Is the relevant correspondence a Ministerial Direction?

### The relevant correspondence is not a Ministerial Direction

- 5 We are instructed that Queensland Rail has never received any correspondence from either the Authority or a relevant Minister relating to the so-called 87 train path constraint.
- 6 Queensland Rail has however received various items of correspondence from the Department of Transport and Main Roads (**DTMR**) which refer to, or which might arguably be seen to impliedly refer to, the number of train paths available for coal trains in the Metropolitan Network. You have provided us with copies of that correspondence.
- 7 None of the letters was sent by a Minister, or purported to be sent on behalf of a Minister, or as a Ministerial Direction.
- 8 None of those letters constitutes a Ministerial Direction or provides any evidence that a Ministerial Direction has been given which would have the effect of creating an 87 train path constraint.

- 9 For all these reasons, Queensland Rail is not subject to a legally binding 87 train path constraint.
  - 10 It follows that in its capacity as an access provider to a declared service, Queensland Rail is legally obliged under the *Queensland Competition Authority Act 1997* to negotiate with access seekers for the provision of access without regard to the purported 87 train path constraint.

---

**Reliance**

- 11 This advice is for the benefit of the addressee. It is not to be disclosed to any other person without our prior written consent, nor relied upon by any other person for any purpose.

---

**Please call to discuss any aspects of this advice**

**Eddie Scuderi**  
Partner  
+61 7 3228 9319  
eddie.scuderi@corrs.com.au

## Annexure 9

### Response to B&H Alternative Assessment of Capacity