

Explanatory Submission - Queensland Rail's Draft Access Undertaking 1 (February 2013)

 QueenslandRail



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Glossary

ARTC	Australian Rail Track Corporation
AU1	Queensland Rail's "Draft Queensland Rail Access Undertaking 1" as given to the QCA with this document.
DBCT	Dalrymple Bay Coal Terminal
DTP	Daily Train Plan
MTP	Master Train Plan
NMP	Network Management Principles (as set out in AU1)
ORM	Operating Requirements Manual
QCA	Queensland Competition Authority
QCA Act	<i>Queensland Competition Authority Act 1997</i> (Qld)
QR National	QR National Limited now Aurizon Ltd
QR Network	QR Network Pty Ltd now Aurizon Network Pty Ltd
Queensland Rail	Queensland Rail Limited
SAA	The Standard Access Agreement for coal carrying train services as set out in Schedule F of AU1
SUFA	Standard User Funding Agreement
Temporary Undertaking	QR Network's 2008 Access Undertaking (as at 30 June 2010) to the extent that it was made to apply to Queensland Rail by a transfer notice and project direction dated 29 June 2010 under the <i>Infrastructure Investment (Asset Restructuring and Disposal) Act 2009</i> (Qld) from 30 June 2010.
TI Act	<i>Transport Infrastructure Act 1994</i> (Qld)

Executive Summary

On 30 March 2012, Queensland Rail submitted a voluntary draft access undertaking titled 'Queensland Rail's Access Undertaking 1' (AU1) under section 136(1) of the QCA Act to the QCA for its approval. AU1 is Queensland Rail's first draft access undertaking under the QCA Act in relation to the declared service for which Queensland Rail is the owner and manager.

On 30 April 2012, the QCA released an Issues Paper to assist stakeholders in preparing their submissions on AU1. The QCA initially received eight stakeholder submissions and, as some raised issues that other submissions had not addressed, the QCA sought further submissions on these additional matters. The QCA subsequently received a further six submissions.

Since submitting AU1 to the QCA for its approval, Queensland Rail has been meeting with the Authority and key stakeholders to discuss the matters raised by industry through their submissions. Queensland Rail has amended a number of key provisions within AU1 to address issues raised or, where relevant, provide greater clarification of Queensland Rail's positions. Key amendments to AU1 include:

- **User Funding** - High level principles that apply to user funded extensions and rebates (**clauses 1.4.2 & 1.4.3**) have been included in AU1. These principles provide a basis upon which Queensland Rail and its customers can agree the terms for user funded below rail infrastructure works. High level principles rather than a prescriptive approach will allow the flexibility to cater for the broad range of circumstances where a Funding Agreement may be employed.
- **Renewal Provisions** - Expanded renewal provisions have been included for reference tariff services (**clause 2.7.3**) including:
 - renewals based upon end mine life; and
 - the option for a mine to change operators at the end of an Access Agreement if desired.
- **ORM** – Part 4 of AU1 (**clause 4.2**) has been amended to set out the process to be applied to amendments to the ORM including customer consultation requirements and an appeal mechanism to the QCA.
- **CEO Responsibility Statement** – A requirement for a responsibility statement, signed by Queensland Rail's CEO, to be published with the quarterly and annual performance reports (**clauses 5.1.1(c) & 5.2.1(c)**) has been incorporated into AU1. This requirement compliments AU1's audit requirements in **clause 5.3.3** and has been developed to provide stakeholders with comfort that due diligence has been exercised by Queensland Rail in relation to the content of the performance reports

Audit Provisions - Audit provisions have been added which provide the QCA with a right to require Queensland Rail to obtain an audit of its quarterly and annual performance reports (which may be undertaken by an external party at the QCA's discretion). This may occur where the QCA believes (acting reasonably) that the information contained in a quarterly or annual report released by Queensland Rail is materially inaccurate (**Clause 5.3.3**).

- **Dangerous Goods** - The Access Agreement Principles have been expanded to include additional provisions in relation to the treatment of Dangerous Goods (**clause 8.1 of Schedule C**). If an incident occurs involving a Mixed Goods Train Service (a train service transporting more than one product type) that is carrying Dangerous Goods and Queensland Rail is negligent, then:
 - An Access Holder's indemnity relating to Dangerous Goods will exclude any part of a claim or loss that would have arisen whether or not the Train Service was carrying Dangerous Good; and
 - The Access Holder will indemnify Queensland Rail for the additional damage that is caused solely due to Dangerous Goods being involved.

AU1's treatment of Dangerous Goods liabilities is consistent with the principle that risk be attributable to the party best able to manage the risk.

- **SAA liability and indemnity provisions -**

Clause 10(1) General Liability of an Access Holder has been deleted. This was a general liability clause where the Access Holder assumes all risks and liabilities in relation to its rights under its Access Agreement and Train Services.

Clause 11.1 Cap on Liability has been amended. This clause provided for a cap on Queensland Rail's liability (except for personal injury/death caused by Queensland Rail negligence, and liability caused by a fraudulent action of Queensland Rail) of \$20 million in aggregate per year. The SAA did not provide for a cap on Access Holder liability. **Clause 11.1** has been deleted, returning to the previous, mutual uncapped position in the Temporary Undertaking's Standard Access Agreement.

- **SAA resumption provisions (clause 19.1 of SAA)** - This clause previously provided that Queensland Rail could resume train paths for West Moreton train services where an operator failed to operate a Scheduled Train Path for seven or more (not necessarily consecutive) occasions out of any 12 occasions. This is the test that is applicable to timetabled traffics in the Temporary Undertaking. While West Moreton coal traffics are timetabled, AU1 has been amended to be consistent with the Temporary Undertaking's test for the Central Queensland coal network.

Under the amendment, Queensland Rail may resume if an operator fails to operate a Scheduled Train Path for seven or more (not necessarily consecutive) weeks out of any 12 weeks. As all Operators will have more than one Scheduled Train Service each week, this amended test will be more difficult to satisfy.

Queensland Rail is withdrawing AU1 and resubmitting the revised AU1 to the QCA. Withdrawal and resubmission removes the necessity for the QCA to issue a Draft Decision on matters that Queensland Rail is no longer proposing, and this will save industry from responding to a Draft Decision on these matters.

Queensland Rail has sought to achieve an appropriate balance between Queensland Rail's legitimate business interests as well as the interests of Access Seekers and the wider public in having third party access to Queensland Rail's network.

Queensland Rail considers that a significant amount of consultation has been undertaken by the QCA and that the level of consultation carried out is likely to result in a streamlined process for the further review, and approval, of AU1.

Queensland Rail will continue to work closely with customers, the QCA and other stakeholders during the QCA process.

Introduction

This Explanatory Submission

This explanatory submission is written to support AU1, which has been submitted to the QCA as a voluntary draft access undertaking under section 136(1) of the QCA Act. AU1 is Queensland Rail's first draft access undertaking in relation to the declared service under the QCA Act for which Queensland Rail is the owner and rail manager.

This document should be read in conjunction with AU1 but does not form part of AU1 or affect its interpretation. The matters addressed in this document are intended to provide an outline of changes to key issues relevant to AU1. It is not intended that this document provide commentary on all aspects of, or amendments to, AU1. The numbering in this document aligns with the AU1 clauses.

For further explanation of Queensland Rail's positions not discussed in this document, please refer to Queensland Rail's prior submissions listed below which form a part of this submission and are available on Queensland Rail's website:

<http://www.queenslandrail.com.au/NetworkServices/AccessandRegulation/Pages/ProposedUndertaking.aspx>:

- 'Submission Accompanying and Explaining the Draft Queensland Rail Access Undertaking 1 - (March 2012)' (refer to Attachment 1 of this submission).
- 'Queensland Rail's response to the QCA Issues Paper on Queensland Rail's 2012 Draft Access Undertaking April 2012' (refer to Attachment 2 of this submission).
- 'Response to QCA Issues Paper on Queensland Rail's Draft Access Undertaking 1 – (Sept 2012)' (refer to Attachment 3 of this submission).

To the extent that there are inconsistencies between this document and the positions stated in Queensland Rail's prior submissions, then the positions stated in this document take precedence. Queensland Rail will provide further submissions, explanations and information as issues arise during the consideration of AU1 by the QCA.

Consultation

In developing AU1, Queensland Rail has engaged in extensive consultation with the QCA Secretariat and stakeholders including:

- public release of a working draft of AU1;
- two public consultation forums;
- written submissions to Queensland Rail from customers and stakeholders;
- consideration of customer and other stakeholder submissions to the QCA; and
- Individual meetings with the QCA, customers and other stakeholders.

Queensland Rail works closely with its customers and partners to develop effective whole of supply chain outcomes. This spirit of consultation has been the basis of the development of AU1.

1 Application and Scope

1.1 Duration

Queensland Rail proposed a Term of at least four years, but no more than five years, commencing on AU1's Approval Date.¹ Queensland Rail maintains that this is an appropriate Term as:

- it is consistent with relevant Australian rail regulatory precedent;
- there is a low risk of circumstances changing sufficiently during the proposed Term to render AU1 irrelevant or inappropriate; and
- material issues regarding costs to and lack of certainty for both Queensland Rail and stakeholders may arise from having a Term that is shorter or longer than the proposed Term.

Although stakeholders suggested varying terms from three to ten years in the first round of submissions to the QCA (July 2012), there was general consensus during the second round of submissions (September 2012) that AU1's proposed Term is appropriate.²

1.2 Scope

Clause 1.2.1(b)(i)(C) provides that AU1 will not apply to any rail transport infrastructure where Queensland Rail is the Railway Manager and:

- the rail transport infrastructure is not owned by Queensland Rail; or
- Queensland Rail is not entitled to grant rights of access.

This provision recognises that Queensland Rail is not in a position to provide access in the circumstances specified above. Notably, such infrastructure would remain under the provisions of the QCA Act.

1.4 Extensions

1.4.1 Obligation to Construct Extensions³

The object of clause 1.4.1 is to describe the circumstances in which Queensland Rail would be obliged to construct extension works, and also the requirements of an Access Seeker wishing to fund an extension.

Clause 1.4.1 was drafted having regard to the following provisions in the QCA Act which apply to Access Determinations by the Authority in relation to:

- The QCA must not make an access determination that would require an access **provider to pay some or all of the costs** of extending the facility.⁴
- The extension is to be **technically and economically feasible** and consistent with the **safe and reliable operation** of the facility.⁵
- The Authority must not make an access determination that will **reduce the amount of service** able to be obtained by the access provider.⁶

¹ Refer pp 19-20, "Submission Accompanying and Explaining the Draft Queensland Rail Access Undertaking 1 - (March 2012)" & p. 1, Item 1 in 'Response to QCA Issues Paper on Queensland Rail's Draft Access Undertaking 1 – (Sept 2012)."

² Refer pp 19-20, "Submission Accompanying and Explaining the Draft Queensland Rail Access Undertaking 1 - (March 2012)"; p. 5 of QR National's September 2012 submission to the QCA on AU1, p.12 of Asciano's September 2012 submission to the QCA on AU1 & p. 2 of New Hope's July 2012 submission to the QCA on AU1.

³ Refer also 'Submission Accompanying and Explaining the Draft Queensland Rail Access Undertaking 1 - (March 2012)', pp 29-31.

⁴ QCA Act, section 119(2)(c).

⁵ QCA Act, section 119(4B)(a).

- The Authority must not make an access determination that will result in **the access seeker, or someone else, becoming the owner**, or one of the owners, of the facility, without the existing owner's agreement.⁷

Section 119(4B)(b) and section 119(5) of the QCA Act provide that the Authority cannot make an access determination in relation to an extension where Queensland Rail's **legitimate business interests** are not protected.

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;⁸ and
- QR Network **must construct** all Expansions because of operational/safety concerns.⁹

The framework for extensions and user funding in AU1 are generally aligned with corresponding provisions in ARTC's Interstate Access Undertaking (2008).¹⁰

1.4.2 Funding Agreements

Queensland Rail has amended AU1 to introduce the concept of a Funding Agreement and Funding Agreement Register (see below), in part to address stakeholder feedback received during the development of AU1.

A Funding Agreement is a mechanism by which Queensland Rail and the relevant user would agree the terms for the user funded extension works.

Rather than prescribe in detail the form of this Agreement, clause 1.4.2 sets out a series of principles to inform the negotiation of a Funding Agreement. This allows for flexibility to cater for the broad range of circumstances in which a Funding Agreement may be employed, whilst ensuring the parties are clear on those matters which are fundamental to Queensland Rail. It also ensures the Funding Agreement aligns with the functioning of the access undertaking more generally – such as providing that disputes relating to the negotiation of a Funding Agreement are addressed through the dispute resolution process set out in the undertaking.

In developing the drafting, Queensland Rail had regard to the following five guiding principles as specified by the QCA in its 2010 Final Decision for QR Network, and which formed the basis for the more expansive Schedule J of the approved undertaking:

- QR Network cannot be forced to fund an expansion or extension of its network, but it can agree to fund these investments.*
- all expansions and extensions of the network should take place under the auspices of an undertaking to ensure fairness to all parties.*
- when investing in the network, QR Network should not be able to exploit its monopoly power to secure rates of return or access conditions more favourable than those approved by the QCA as commensurate with the risk of the investment.*
- negotiations on access conditions should be conducted within tight timeframes, with Access Seekers able to refer disputes to the QCA for arbitration at any time during negotiations; and*

⁶ QCA Act, section 119(2)(a).

⁷ QCA Act section 119(2)(b).

⁸ Refer to the QCA Final Decision on QR Network's 2010 Draft Access Undertaking (September 2010) pp. 32 & 225 Ownership clause 21.

⁹ Refer to the QCA Final Decision on QR Network's 2010 Draft Access Undertaking (September 2010) p. 225 Construction clause 24.

¹⁰ ARTC Interstate Access Undertaking, 15 July 2008, p 28.

6.2 Additional Capacity sought by Applicants

(a)..... ARTC will consent to the provision of Additional Capacity if:.....

(ii) the Applicant agrees to **meet the cost** of the Additional Capacity; and

(iii) the Additional Capacity of the Network is, in the opinion of ARTC, **technically and economically feasible**, consistent with **the safe and reliable operation** of the Network, will **not impact on the safety** of any user of the Network, **does not reduce Capacity**, meets **ARTC's engineering and operational standards** and does not compromise **ARTC's legitimate business interests.**"

e) *users should have the right to fund expansions at their own option.*

Queensland Rail thus has incentive to increase traffic and tonnage volumes on its rail network, as this improves revenues and the commercial robustness of the rail network. As such, Queensland Rail is motivated to facilitate commercially viable extensions to its network.

Queensland Rail is aware of the complexities in QR Network's 2010 Access Undertaking in relation to these issues. Queensland Rail considers that it would be better for all interested parties to avoid such complexities if possible – as they are not warranted in Queensland Rail's circumstances.

Queensland Rail does not believe that a SUFA is appropriate in Queensland Rail's circumstances due to the nature of Queensland Rail's structure and because foreseeable investments are likely to be on a significantly smaller scale than those in Aurizon's Central Queensland coal network.

1.4.3 Rebates

A Funding Agreement must include provisions setting out how Queensland Rail will determine a rebate in circumstances where a user has funded extension works and where Queensland Rail then receives Access Charges relating to those works. These provisions acknowledge stakeholder comments that additional detail was required to ensure parties were clear on Queensland Rail's expectations and the process by which rebates would be determined and applied.

Generally, the rebate provisions provide that the capital-related components of Access Charges, related to extension works funded by a user, will be returned to the contributing user.

Clause 1.4.3 also describes the circumstances in which a rebate would not be applied. Amongst these is where a non-contributing Access Holder uses the extension, but did not otherwise benefit from the additional capacity created by the extension (see **clause 1.4.3(b)(i)**).

In amending the draft undertaking to incorporate additional user funding and rebate principles Queensland Rail has sought to protect both the legitimate interests of users providing funding for extensions as well as protecting Queensland Rail's legitimate business interests.

1.4.6 Funding Agreement Register

Queensland Rail is now required to maintain a Funding Agreement Register. Effectively this is a commitment to maintain records of Funding Agreements entered into pursuant to the undertaking, and for these records to be accessible to the QCA.

2 Negotiation Process

2.1 Preparing and Submitting an Access Application

2.1.3 Preliminary Information

QR National sought a stronger obligation from Queensland Rail to provide preliminary information to Access Seekers.¹¹

Previous Queensland Rail undertakings have included prescriptive requirements in relation to the provision of information to ensure that an infrastructure provider in an integrated organisation that is operating Above Rail Services in competition with third party freight Operators cannot withhold information to hinder or slow down third party Access.

These prescriptive requirements are not necessary as Queensland Rail has no incentive to inhibit Access. Rather, it is in Queensland Rail's interest to assist to facilitate Access to its Network.

In addition to the information prescribed in the undertaking, Queensland Rail currently provides considerable information on its website and customer portal to assist Access Seekers and Access Holders.

Queensland Rail considers its drafting in relation to the provision of information is appropriate given Queensland Rail's structure.

2.6 Negotiation of an Access Agreement

2.6.3 Negotiation Cessation Notice

Queensland Rail has deleted **Clause 2.6.3(a)(ii)(C)**, which referred to Queensland Rail's ability to issue a Negotiation Cessation Notice to an Access Seeker where Queensland Rail (acting reasonably) was of the opinion that the Access Seeker was not reputable or of good financial standing.

2.6.5 Rail Safety and Other Considerations for Passengers

Clause 2.6.5 seeks to ensure that proposed train services for a new Access Seeker do not disrupt passenger services, or adversely affect safety, in the Brisbane Metropolitan Region. The efficient running of passenger services in the Metropolitan Region is both in the public interest and Queensland Rail's legitimate business interests.

Stakeholders advised Queensland Rail during consultation that the clause, as originally drafted, was too broad to achieve its purpose. To alleviate stakeholder concern, Queensland Rail has amended the clause to:

- more narrowly target the clause's purpose;
- require Queensland Rail to act reasonably and not to act arbitrarily;
- require both the Access Seeker and Queensland Rail to negotiate in good faith;
- require that Queensland Rail act in accordance with prudent practices; and
- require Queensland Rail and the Access Seeker to first seek to avoid or mitigate any adverse effects that have been identified in relation to the Access Application.

This targeted provision will assist to ensure the efficient operation of the Metropolitan Region, while providing appropriate protections for Access Seekers.

¹¹ QR National's submission to the QCA, July 2012, p. 19.

2.7 Access Agreement

2.7.2 Access Seekers Competing for Access Rights

Access Application – Date Received

Clause 2.7.2 has been amended to include a timestamp applicable where it is not possible to determine which of the proposed Access Agreements is the most favourable to Queensland Rail based on the criteria set out in **clause 2.7.2(a)(iv)** (i.e. where two or more access applications are determined to be of equal merit). In such circumstances, Queensland Rail will enter into an Access Agreement with the Access Seeker whose Access Application was received by Queensland Rail first.

Feedback – Unsuccessful Applicants

Clause 2.7.2(e) requires Queensland Rail to provide feedback to unsuccessful applicants where there are competing access requests.

Queensland Rail is committed to protecting customer's confidential information. In an effort to balance protecting customer confidentiality and competitiveness, and providing Access Seekers with high level information regarding their unsuccessful Access Application, Queensland Rail has developed a standardised feedback form for use in these circumstances (refer **Schedule D** of AU1).

Queensland Rail recognises that most information regarding the reason one Access Application is successful over another will be confidential to the successful applicant. It would not be appropriate for Queensland Rail to release a successful Access Seeker's confidential information to a competitor.

2.7.3 Renewals

Queensland Rail has amended AU1 to include renewal rights for reference tariff services.

AU1 contains an obligation for Queensland Rail to notify an existing Access Holder where an Access Seeker requests capacity which will become available after the expiry of an existing Access Agreement (for both reference tariff services and non-reference tariff services).

In relation to reference tariff services, AU1 provides that Queensland Rail will grant Access Rights to the existing Access Holder where the existing Access Holder matches the term of the Access Seeker.

Queensland Rail has amended its renewal provisions for reference tariff services where there are competing Access Applications so that:

- Where the mine life is less than the term offered by a competing Access Seeker, Queensland Rail will negotiate on the basis of the remaining mine life.
 - This option is only available on one occasion. As Queensland Rail will be negotiating for a lesser term under this provision and a 'one off' right will protect Queensland Rail's legitimate business interests, while allowing mines to see out their mine life. No further renewal will be provided under these provisions once this renewal option is used.
- The person who may seek a renewal is the person who is nominated by the Customer.
 - This provides the mine an option to change to another operator at the end of an Access Agreement, if so desired.
- The renewal application must be made at least two years prior to the expiry of the relevant Access Agreement in order for the renewal provisions to apply.
 - Two years is generally consistent with the Aurizon Network undertaking which is between two and three years¹² and provides enough time so that if negotiations cease after nine months Queensland Rail will have sufficient time to negotiate with the competing Access Seeker.

¹² Refer clause 7.4(d) & Part 12 Definitions – "Renewal Application" of "QR Network's 2010 Access Undertaking".

- Queensland Rail is not obliged to enter into an Access Agreement on the same terms as the existing Access Agreement.
 - Access Agreements are usually for an extended period of time (e.g. ten years). A new Standard Access Agreement is likely to be in operation with new terms and conditions. This provision will mean that any renewal Access Agreement will have the most relevant terms and conditions.

4 NMP & ORM

4.2 ORM

The ORM sets out operating requirements that Access Holders are required to follow including:

- safeworking procedures and safety standards;
- emergency and investigation procedures;
- environmental requirements; and
- various technical requirements including interface risk assessment and interface risk management plan requirements.

The ability to amend operational requirements is required by Railway Managers to ensure the efficiency and safety of the network. As operational requirements are currently specified in individual Access Agreements, where operational requirements are amended Queensland Rail is required to facilitate a variation to each individual contract. This approach is inefficient and unnecessarily time consuming.

Under AU1, amendments to operational requirements are facilitated through amendments to the ORM. The revised operational requirements will then flow through to the Access Holders without the need to vary contracts. This process will introduce greater efficiencies for all parties.¹³ While stakeholders were supportive of Queensland Rail's approach, some concern was raised because AU1 did not include a dispute mechanism to the QCA. This is discussed below.

4.2.2 Amending the ORM & 4.2.3 Disputes About Amendments to ORM

Queensland Rail has made various changes to AU1 in relation to the ORM after taking into consideration matters raised by stakeholders. AU1 has been amended to:

- include an obligation upon Queensland Rail to notify and consult with stakeholders who are materially affected by a change to the ORM, thereby providing a reasonable opportunity to discuss the amendment (**clause 4.2.2**);
- require Queensland Rail to allow a reasonable time period for Access Holders to implement any obligations arising out of amendments to the ORM (**clause 4.2.2(f)(ii)**); and
- include a dispute mechanism to the QCA for Access Holders (**clause 4.2.3**).

Where an Access Seeker is in the process of negotiating a new Access Agreement with Queensland Rail, Queensland Rail will also notify the Access Seeker of amendments to the ORM and the date that the amendment will take effect.

Dispute Mechanism to the QCA

A further amendment has been made to AU1 to include a dispute mechanism to the QCA. The dispute mechanism is triggered where an Access Holder considers that an amendment to the ORM "*Unfairly Differentiates*" between Access Holders. Unfairly Differentiates is defined as meaning "*unfairly differentiates between Access Holders in providing Access in a way that has a material adverse effect on the ability of one or more of the Access Holders to compete with other Access Holders.*"¹⁴ This requirement is consistent with Queensland Rail's obligations under the QCA Act.^{15 16}

¹³ Refer pp. 46 & 47 of the "Submission Accompanying and Explaining the Draft Queensland Rail Access Undertaking 1 – (March 2012)" & p. 9 of "Queensland Rail's Response to the "QCA Issues Paper on Queensland Rail's 2012 Draft Access Undertaking April 2012"" for a more detailed summary of Queensland Rail's approach to the ORM and Web documents.

¹⁴ Refer Part 7 Definitions in AU1.

¹⁵ Section 168(C)(1) of the QCA Act states, "In providing access to a declared service, an access provider must not unfairly differentiate between users of the service in a way that has a material adverse effect on the ability of 1 or more of the users to compete with other users."

¹⁶ Under the DBCT Access Undertaking (2010) an Access Holder or Access Seeker may only appeal to the QCA regarding an amendment to the Terminal Regulations where "a proposed amendment to the Terminal Regulations, as a whole, does not operate equitably among Access Holders and Access Seekers (should they become Access Holders)", refer clause 6(e). For accuracy Queensland Rail believes that it is more appropriate in its circumstances to refer to the specific provision in the QCA Act.

Exceptions

AU1 includes exceptions to the obligation to consult and to the appeal process where an amendment to the ORM relates to:

- safety;
- a Material Change; or
- a change to the assets, equipment, facilities, infrastructure, processes, procedures or systems used for the purposes of any train management system for the purpose of improving safety, network capabilities, network capacity or system reliability.

In these circumstances, Queensland Rail is required to:

- notify all Access Holders and Access Seekers of the amendment and specify the date on which the amendment will take effect; and
- in specifying the date on which the amendment will take effect, allow a reasonable period for each Access Holder who is reasonably likely to be affected by the amendment to amend its processes, procedures and plans as required.

Queensland Rail's approach is broadly consistent with the current Operator SAA where **Clause 5.10 of Schedule B** allows Queensland Rail to amend the system wide requirements due to Material Change and on safety grounds without the consent of the operator. This approach recognises the importance that a network manager be able to introduce amendments to operational requirements where they relate to safety, changes in law and other network critical matters.

Access Holders will have access to the dispute resolution process in Part 6 of AU1 if they consider, for example, that an amendment that has been introduced as relating to safety does not relate to safety.

Refer to Attachment 4 for Queensland Rail's ORM with marked up changes from the ORM previously submitted to the QCA.

5 Reporting

In developing AU1, Queensland Rail had regard to the reporting requirements in the Temporary Undertaking as well as other access regimes nationally. ARTC, for example, have a lighter handed access regime than that contained in the Temporary Undertaking. The ARTC Interstate Access Undertaking (2008) does not contain a requirement to report on the negotiation process. On the other hand the Temporary Undertaking has extensive reporting requirements.

Queensland Rail has moved away from drafting a prescribed undertaking to a light handed approach similar to that of ARTC's Interstate Access Undertaking (2008). Queensland Rail assessed KPIs reported on in various access regimes on their individual merits and selected only KPIs that are meaningful given Queensland Rail's business structure.

General Provisions

5.1.1(c) & 5.2.1(c) – CEO Responsibility Statements

Clauses 5.1.1(c) and 5.2.1(c) have been added to AU1 requiring Queensland Rail to provide a responsibility statement signed by Queensland Rail's Chief Executive Officer when publishing Quarterly and Annual Reports. This is to provide stakeholders comfort that due diligence has been exercised in relation to the content of the reports. This requirement compliments AU1's audit requirements in **clause 5.3.3**.

5.3.3 Audits

Clause 5.3.3 provides the QCA with a right to instruct Queensland Rail to obtain an audit of the performance reports (which may be by an external party at the QCA's discretion) where the QCA believes (acting reasonably) that the information contained in a quarterly or annual report released by Queensland Rail is inaccurate in a material way.¹⁷

Schedule E – Reporting Tables

Queensland Rail has included **Schedule E** to provide a tabular representation of the information that Queensland Rail is required to provide in its quarterly and annual performance reports. The aim of this schedule is to assist stakeholders to quickly and simply gain an understanding of Queensland Rail's reporting obligations without having to read all of the relevant clauses in AU1.

5.1 Quarterly Network Train Performance Reports

Queensland Rail has introduced geographical system-based operational reporting. **Clause 5.1.2(b)** of AU1 previously required most quarterly reporting to be segregated into the following two product categories:

- “transporting coal”; and
- “transporting freight products and bulk minerals (other than coal)”.

These categories have been replaced with the following system-based categories:

- the West Moreton Reporting Area;
- the Mt Isa Reporting Area;

¹⁷ Xstrata suggested that an audit be triggered in circumstances where the QCA or an Access Seeker/Access Holder has a concern about the accuracy of the information reported; refer to Xstrata's submission to the QCA, July 2012, p. 15. QR National suggested that AU1 include a right for the QCA to be able to request an audit, refer to QR National's submission to the QCA, September 2012, p. 14.

- the North Coast Reporting Area; and
- the Network outside the West Moreton Reporting Area, the Mt Isa Reporting Area, and the North Coast Line Reporting Area.

5.2 Annual Report on Negotiation Process

5.2.2(g) Average Length of Negotiation

Clause 5.2.2(g) in AU1 previously reported:

- the number and percentage of Access Applications in relation to which Queensland Rail has received a notice from an Access Seeker for a dispute in relation to the preparation of an Indicative Access Proposal.

Queensland Rail has amended this clause to report:

- the number of disputes that are referred to dispute resolution; and
- the number of disputes that were determined in favour of the Access Seeker.

5.2.2(j) Average Length of Negotiation

QR National sought that Queensland Rail report annually on the “average length of the negotiation period”.¹⁸ Queensland Rail believes that the “average length of negotiation” provides little value to Access Seekers.

The length of a negotiation is not dependent upon the actions of the access provider alone, but also depends on the Access Seeker being ready to progress towards an Access Agreement. Additionally, more complex Access Applications will result in a longer negotiation period and simpler Access Applications will result in a shorter negotiation period. A negotiation period can vary significantly from a few weeks to more than two years, with the time period not being a reliable indicator of below or above rail performance.

Queensland Rail has amended AU1 to include **clause 5.2.2(j)** which reports on the number of Access Agreements for which the negotiation period was:

- three months or less;
- more than three months but not more than six months;
- more than six months but not more than 12 months; and
- more than 12 months.

Cost Information

A number of stakeholders have sought that Queensland Rail include detailed reporting of its costs on the Mount Isa and North Coast lines. QR National, for example, in their July 2012 submission to the QCA¹⁹ pointed to section 101(2)(b) of the QCA Act which outlines the obligations on the access provider to satisfy an Access Seeker's requirements and contains a requirement in relation to the provision of cost information.²⁰

¹⁸ Refer p. 13 of QR National's “*Supplementary Submission on Queensland Rail's Draft Access Undertaking (14 September 2012)*”.

¹⁹ Refer to p. 22 of QR National's submission to the QCA on AU1, July 2012.

²⁰ Section 101(2)(b) of the QCA Act states “*101 Obligation of access provider to satisfy access seeker's requirements.....*”

(2) *Without limiting subsection (1), and subject to any relevant access code or approved access undertaking, the access provider must give the access seeker the following—*

(b) *information about the costs of providing the service, including the capital, operation and maintenance costs;*”

Section 101 of the QCA Act does not provide an ‘*absolute*’ obligation upon Queensland Rail to include provisions in AU1 for the release or publishing of costs on the Mount Isa or North Coast lines. Rather, the requirement to provide cost information is ‘*subject to any... approved access undertaking*’. In determining the level of cost information disclosure, if any, in an access undertaking, the Authority would be expected to consider the public benefit, the access provider’s legitimate business interests, the Access Seeker’s legitimate business interests and so on.

The Mount Isa and North Coast line traffics are currently priced well below ceiling. This was recognised by QR National in their July 2012 submission to the QCA:²¹

“3.7.4 Reference tariffs

The AU1 provides for a reference tariff for the West Moreton System, but for no other traffics. This approach is reasonable given that other traffics are unlikely to be near the revenue ceiling.”

Additionally, the traffics on the North Coast line and the majority of traffics on the Mount Isa line compete with intermodal traffic. Therefore, access pricing has not traditionally been ‘cost based’, but rather has been ‘market based’. Queensland Rail notes the QCA 2001 Draft Decision which states (p. 238):

“A number of submissions have indicated that stakeholders require a detailed decomposition of costs on a line section by line section basis to make transparent QR’s allocation of costs. However, the QCA agrees with QR that this level of disaggregation has the potential to compromise QR’s legitimate business interests and, in any event, is not necessary in order for stakeholders to have confidence in the access regime.

Cost data is unlikely to be relevant for systems where there is strong intermodal competition (that is road and/or sea transport are substitutes for rail). For these systems, transparency of pricing, especially between QR and third-party operators, is likely to be a more significant issue than cost transparency. This is because access charges for these traffics are unlikely to be cost based. Consequently, a detailed analysis of costs has little relevance for traffics which compete with intermodal providers, such as on the North Coast line.”

Queensland Rail has not amended AU1 to include detailed cost information on the Mount Isa or North Coast lines.

²¹ Refer to p. 21 of QR National’s submission to the QCA on AU1, July 2012.

6 Administrative Provisions

6.1 Dispute and Complaint Resolution Process

6.1.1 Alternative dispute process

“*Expert Determination*” has not been included in AU1’s dispute resolution process.²² Queensland Rail considers the QCA to be the expert on the Undertaking’s requirements, with AU1 disputes going to the QCA. However, nothing prevents an Access Seeker and Queensland Rail from agreeing to use an alternate dispute resolution process (or different timeframes) to the dispute resolution process (or timeframes) set out in AU1. For the sake of clarity, an additional clause has been included in AU1 to highlight this option.

6.3 Notices

6.3.3 Effect and Receipt of a Notice

Asciano advised of their concern that under **clause 6.3.3** a party is not entitled to object to a facsimile being illegible unless the party requests retransmission within a four hour period after the time when the facsimile was taken to have been given. Rather, Asciano believes that a party should be able to object to illegibility without reference to a timeframe and that this clause should be deleted as parties acting in good faith could be expected to resolve the issue of illegibility without reference to an access undertaking clause.²³ Queensland Rail has removed **clause 6.3.3(c)**. In addition, all references to facsimiles in AU1 have been removed.

²² Dispute resolution by expert determination has been included in the SAA as external parties rather than the QCA would be most appropriate to determine disputes under a signed Access Agreement.

²³ Refer to p. 15 of Asciano’s submission to the QCA on AU1, July 2012.

7 Definition and interpretation

7.1 Definitions

Definition of Access

QR National in their July 2012 submission to the QCA was concerned that AU1 “has not defined the rail infrastructure and services to which access may be sought with sufficient precision to support its commercial operations.”²⁴ Queensland Rail believes that the drafting AU1 is clear and consistent with the Declaration. Below is a summary of the Declaration and AU1’s definition of Access.

Table 1 – The Declaration of Queensland Rail’s Service

QCA Act - Declaration of Queensland Rail’s Service²⁵

Section 250 of the QCA Act defines the declared service as:

*“the use of **rail transport infrastructure** for providing transportation by rail if the infrastructure is used for operating a railway for which Queensland Rail Limited, or a successor, assign or subsidiary of Queensland Rail Limited, is the railway manager.”*

Section 249 of the QCA Act excludes the following from the declared service:

“the use of rail transport infrastructure for providing transportation by rail between Queensland and another State if – (a) the infrastructure is standard gauge track; and (b) the transportation is effected by using standard gauge rolling stock.

Refer to Table 3 for the definition of **rail transport infrastructure**.

Table 2 – AU1’s Definition of Access

AU1 Definitions

Access is defined in AU1 as meaning:

- (a) the non-exclusive right to use a specified section of the **Network**; and
- (b) for non-passenger Train Services, excludes the right to use those parts of the **Network** provided for the benefit of passengers or passenger Train Services including:²⁶
 - (i) stations and platforms used predominantly for passengers or passenger Train Services; and
 - (ii) yards and associated facilities used to stage, maintain or store Rolling Stock used for passenger Train Services, for the purposes of operating Train Services.

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).

Section 242 of the QCA Act excludes Queensland Rail’s Standard Gauge track from the Declaration (refer to Table 1 above).

Refer to Table 3 (below) for the definition of ‘**rail transport infrastructure**’

²⁴ Refer to p. 15 of QR National’s submission to the QCA on AU1, July 2012.

²⁵ Refer to Part 5, Division 2 & section 250(1)(b) of the QCA Act.

²⁶ Refer to “Part 3.4 Scope of Access Under AU1” in the “Submission Accompanying and Explaining the Draft Queensland Rail Access Undertaking 1 – (March 2012)” for a detailed explanation of the treatment of stations and platforms used for passenger train services.

Table 3 – Transport Infrastructure Act's Definition of Rail Transport Infrastructure

Transport Infrastructure Act

Rail transport infrastructure is defined as:²⁷

“facilities necessary for operating a railway, including –

- (a) railway track and works built for the railway including, for example – [cuttings, drainage works, excavations, land fill and track support earthworks]; and*
- (b) any of the following things that are associated with the railway's operation – [bridges, communication systems, machinery and other equipment, marshalling yards, notice boards, notice markers and signs, overhead electrical power supply systems, over-track structures, platforms, power and communication cables, service roads, signalling facilities and equipment, stations, survey stations, pegs and marks, train operation control facilities, tunnels, under-track structures]; and*
- (c) vehicle parking and set down facilities for intending passengers for a railway that are controlled or owned by a railway manager or the chief executive; and*
- (d) pedestrian facilities, including footpath paving, for the railway that are controlled or owned by a railway manager or the chief executive;*

*but does not include **other rail infrastructure**.”*

Other rail infrastructure is defined in the TI Act as:

- (a) freight centres or depots; or*
- (b) maintenance depots; or*
- (c) office buildings or housing; or*
- (d) rolling stock or other vehicles that operate on a railway; or*
- (e) workshops; or*
- (f) any railway track, works or other thing that is part of anything mentioned in paragraphs (a) to (e).”*

Queensland Rail believes that AU1's definition of Access is appropriate and consistent with the Declaration.

²⁷ Refer to “Schedule 6 Dictionary” of the TIA for the definition of Rail Transport Infrastructure and Other Rail Infrastructure.

Schedule A - West Moreton System Reference Tariff

AU1 retains the current reference tariff rates applying to the West Moreton System under the Temporary Undertaking (with CPI adjustments). This is subject to a reference tariff reset being submitted by Queensland Rail to the QCA no later than 30 June 2013 (or such longer time as agreed with the QCA).

Prior to submitting the reference tariff reset to the QCA, Queensland Rail will seek to work with end-users (Surat Basin mines) with the aim of reaching agreement on all key aspects of the tariff. To facilitate this, Queensland Rail will be distributing a paper to end-users for discussion in early March 2013.

Schedule C - Access Agreement Principles

Dangerous Goods

The Access Agreement Principles have been amended so that if an incident occurs involving a Mixed Goods Train Service (a train service transporting more than one product type) that is carrying Dangerous Goods and Queensland Rail is negligent, then:

- The Access Holder's indemnity relating to Dangerous Goods will exclude any part of a claim or loss that would have arisen whether or not the Train Service was carrying Dangerous Good;²⁸
 - this will provide Queensland Rail with a strong incentive to maintain the network to an appropriate standard; and
- The Access Holder will indemnify Queensland Rail for the additional damage that is caused solely due to Dangerous Goods being involved.

There are a number of limitations on Queensland Rail's ability to fully manage the risk associated with the transportation of Dangerous Goods on Mixed Goods Train Services. Queensland Rail is limited in its ability to manage the consequence of an incident involving Dangerous Goods (i.e. potential damage to people, property and the environment) as this is a function of the products being hauled by the above rail operator, and this is outside the control of Queensland Rail as an infrastructure provider.

Importantly, there are considerable information asymmetries in relation to Dangerous Goods on Mixed Goods Train Services. Queensland Rail will not have complete knowledge, at the time of negotiations, of the specific attributes of the Dangerous Goods (volume, type, frequency etc) being transported on its network at any time as this can vary by train. This is due to the nature of the business of carrying Dangerous Goods. End-users determine the specifics with the above rail operator on a case by case basis and the mix will vary.

Also, in most cases, Queensland Rail is only advised of the details of the Dangerous Goods travelling on Mixed Goods Train Services approximately fifteen minutes before they are loaded as per Access Agreement requirements. This timeframe provides Access Holders with the flexibility they require for their business operations. However, it also affects the ability of Queensland Rail to efficiently manage the risk associated with the transportation of these goods, as it inhibits the business's ability to determine the efficient level of insurance coverage.

While information asymmetries may still exist, Unit Train Services (a Train Service that carries a single commodity) are overall less problematic. This is because they tend to carry only one type of dangerous good, typically from the same origin and destination. Therefore, AU1 does not include a default Access Holder indemnity for Queensland Rail for the additional damage that is caused solely due to Dangerous Goods being involved where Dangerous Goods are being carried on a Unit train Service.

AU1's treatment of Dangerous Goods liabilities is consistent with the principle that risk be attributable to the party best able to manage the risk.²⁹

²⁸ The Access Agreement Principles in AU1 (Schedule C) provide that:

- The Access Holder is to indemnify Queensland Rail against claims concerning Dangerous Goods being carried on a Mixed Goods Train Service, but this excludes any part of the claim that would have arisen regardless of whether Dangerous Goods were carried (clause 11(a)(iv)). In relation to the latter part of the claim, the general indemnity in clause 11(a)(ii) applies; and
- The general indemnity provision applicable to Queensland Rail, clause 11(a)(ii), excludes indemnity for Queensland Rail where the damage/loss etc. is caused or contributed to by Queensland Rail's negligence.

Therefore, Queensland Rail receives no indemnity from the Access Holder where Queensland Rail is negligent, to the extent that the claim would have arisen regardless of whether Dangerous Goods were carried on a Mixed Goods Train Service.

²⁹ Refer to PwC paper in Attachment A of 'Queensland Rail's response to the QCA Issues Paper on Queensland Rail's 2012 Draft Access Undertaking' for detailed discussion on Dangerous Goods and who is best able to manage the risk.

Risks and Liabilities³⁰

10(a) - General Liability of an Access Holder

Clause 10(a)³¹ has been deleted. **Clause 10(a)** was a general liability clause where the Access Holder assumes all risks and liabilities in relation to its rights under its Access Agreement and Train Services.

11(e)(ii) – Liability and Delays

Clauses 11(e)(ii)³² provided that Queensland Rail was excluded (or limited to \$1.00 if it was not excluded) from all liability in relation to delays to train movements irrespective of how this delay was caused (including if due to Queensland Rail's negligence). This clause has been deleted. New **clause 12(f)**³³ provides that the "Access Agreement will specify the circumstances in which either party has a claim against the other party in respect of delays to Train Movements caused by a breach of the agreement by, or negligence of, the defaulting party."

11(h)&(i) – Time Limit for Lodging a Claim

Clauses 11 (h) and (i) required that all claims under an Access Agreement be made within 12 months of the occurrence of an event. Queensland Rail has amended this requirement³⁴ so a party must use best endeavours to provide the other party with notice and full details of any such claim within 12 months of the occurrence, and the claim must be made within 2 years of the event. Queensland Rail believes that this revised time limit is reasonable.

³⁰ Asciano's submission to the QCA, July 2012 p. 16; Queensland Resources Council submission to the QCA, July 2012, p. 11; QR National's submission to the QCA, July 2012, pp. 43-44.

³¹ The deleted clause 10(a) of AU1's Access Agreement Principles was "The Access Holder assumes all risks and liabilities relating to the Access Holder's rights under the Access Agreement and Train Services (including any wear, tear or damage to Rolling Stock relating to operation on the Network)."

³² Refer to clause 12(f) in the Access Agreement Principles in the current version of AU1.

³³ New clause 12(f) states "The Access Agreement will specify the circumstances in which either party has a claim against the other party in respect of delays to Train Movements caused by a breach of the agreement by, or negligence of, the defaulting party."

³⁴ For the new provision refer to clause 12(h) in the Access Agreement Principles in the current version of AU1.

Schedule D - SAA

Queensland Rail has received feedback from stakeholders seeking amendments to various matters in relation to the SAA. Queensland Rail has considered the matters raised by stakeholders and made the below amendments to the SAA.

Network Management

5.2 Train Control

Clause 5.2 specified Queensland Rail's rights in relation to Operational Constraints. This clause has been deleted and **clause 6.2(iv)** has been inserted. **Clause 6.2(iv)** requires the operator to observe and comply with the NMP. This removes the potential for a conflict to occur between an Access Agreement and the NMP contained in any future access undertakings.

5.2(e) Passenger Train Services

Clause 5.2(e)(iii) aims to assist with the efficient operation of the Metropolitan Region during the peak period. The efficient running of passenger services in the Metropolitan Region is both in the public interest and Queensland Rail's legitimate business interests. Queensland Rail has modified this clause so that it better reflects its intended purpose. The revised clause allows Queensland Rail to treat other train services preferentially to the Operator's Train Services for the purpose of seeking to avoid a passenger train service that is operating, is scheduled to operate, or will be scheduled to operate in the Metropolitan Region during any Peak Period becoming delayed.

Train Operations

6.8 Operating Requirements Manual

Previously, the clauses relating to operating requirements were included in SAA. These provisions have been moved to Part 4 in AU1. Due to this change, **Clause 6.8** of the SAA will not apply while:

- the relevant rail transport infrastructure is part of the declared service and access to that rail transport infrastructure is subject to an access undertaking; and
- Queensland Rail's access undertaking defines the term 'Operating Requirements Manual' and sets out provisions regarding the amendment of the Operating Requirements Manual.

As AU1 is only intended to have a Term of between four and five years and a West Moreton coal contract can have a Term of up to ten years or more, this clause ensures that if there is no access undertaking in place, the operating requirements will continue to apply.

Risk and Indemnities

10.1 - General Liability of an Access Holder

Clause 10(1)³⁵ has been deleted. **Clause 10(1)** was a general liability clause where the Access Holder assumes all risks and liabilities in relation to its rights under its Access Agreement and Train Services.

³⁵ The deleted clause 10(1) of the SAA was "The Operator acknowledges and agrees that, to the extent permitted by law, the Operator assumes all risks and liabilities arising out of or in any way connected with, directly or indirectly, the Operator's rights under this agreement and the Train

Limitations on Liability

11.1 - General Caps on Liability

Clause 11.1 in the SAA provided for a cap on Queensland Rail's liability (except for personal injury/death caused by Queensland Rail negligence, and liability caused by fraudulent action of Queensland Rail) of \$20 million in aggregate per year. The SAA did not provide for a cap on Access Holder liability. **Clause 11.1** has been deleted, returning to the previous, mutual uncapped position in the Temporary Undertaking's Standard Access Agreement.

11.3 Claims in Respect of Train Movements

Queensland Rail has amended the SAA's approach to Queensland Rail's liability in relation to delays to train movements. In the SAA submitted to the QCA in March 2012, Queensland Rail was excluded (or limited to \$1.00 if it could not be excluded) from all liability in relation to delays to train movements irrespective of how this delay was caused (including if due to Queensland Rail's negligence).

This position has been amended to reflect the current (Temporary Undertaking) Standard Access Agreement provisions. The SAA now provides that neither party has a claim against the other in respect of delays unless (and only to the extent that):

- the delay was as a result of breach/negligence by the defaulting party;
- the delay is not attributable to the other party, another access holder, a force majeure, a possession under the NMP, Rail Infrastructure Operations under the NMP or an emergency/safety risk; and
- the parties have not agreed on a regime to address the delays or, where the parties have agreed on a regime, the delays are of magnitude beyond scope of the regime.

11.4 Limitation of Claims

The period in which a party may lodge a claim under **clause 11.4** has been extended. In AU1 as submitted to the QCA in March 2012 a claim had to be made within 12 months of an event occurring. This period has been extended to within two years of the event occurring. An additional obligation has been inserted requiring that a party must use "*best endeavours*" to provide the other party with notice and full details of any claim within 12 months after the occurrence of the event.

Security

15.3(a)(ii) Review of Security

The word '*reasonably*' has been added to **clause 15.3(a)(ii)**. Queensland Rail must act reasonably in determining whether the Security Amount should be increased or decreased. As there is an obligation to act reasonably, the Operator will now have a right to dispute the increase or decrease on the basis that Queensland Rail's determination was not reasonable.

Reduction and Relinquishment of Access Rights

19.1 Reduction of Access Rights

AU1 as submitted to the QCA in March 2012 provided that if the Operator failed to operate a Train Service on a Scheduled Train Path for seven or more (not necessarily consecutive) **occasions** out of any 12 **occasions** when such a Train Service is scheduled, Queensland Rail may delete the relevant Train Path from the Operator's Train Service Description. This test is consistent with the Temporary Undertaking's provisions with the exception of the Central Queensland coal network.³⁶

After consultation with the Western System end-users, Queensland Rail has amended the resumption provisions for West Moreton coal carrying services to be consistent with the Temporary Undertaking's approach to Central Queensland coal carrying services.

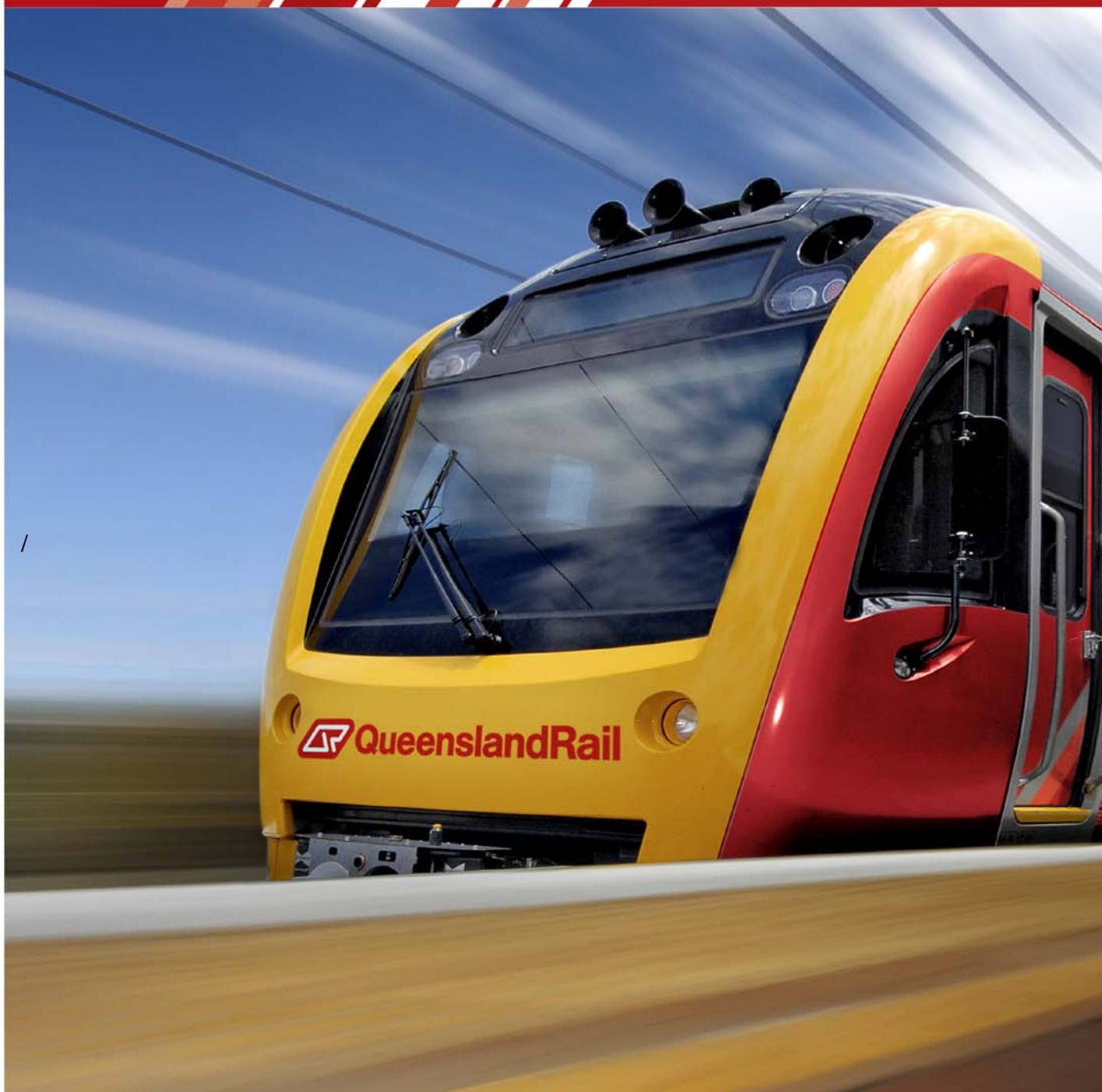
Under the amendment, if the Operator fails to operate all Train Services on Scheduled Train Paths for seven or more (not necessarily consecutive) **weeks** out of any 12 consecutive **weeks** when such Train Services are scheduled, Queensland Rail may delete the relevant Train Path from the Operator's Train Service Description. As all Operators will have more than one Scheduled Train Service each week, this amended test will be more difficult to satisfy.

³⁶ Refer to "clause 7.4.2 Capacity Resumption" in the Temporary Undertaking & clause 3.2 of the Temporary Undertaking's SAA.

Attachment 1 – Queensland Rail Submission (March 2012)

Submission Accompanying and Explaining the Draft Queensland Rail Access Undertaking 1 – (March 2012)

 QueenslandRail



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Attachment 1: PWC Supporting Analysis – Treatment of Passenger Services

Attachment 2: PWC Supporting Analysis – Ringfencing Arrangements

Attachment 3: PWC Supporting Analysis – Capacity Allocation

Attachment 4: PWC Supporting Analysis – Pricing Principles

Glossary

ACCC	Australian Competition and Consumer Commission
ARTC	Australian Rail Track Corporation
AU1	Queensland Rail's "Draft Queensland Rail Access Undertaking 1" as given to the QCA with this document.
DBCT	Dalrymple Bay Coal Terminal
DTMR	Queensland Department of Transport and Main Roads
DTP	Daily Train Plan
MTM	Metro Trains Melbourne
MTP	Master Train Plan
NMP	Network Management Principles (as set out in AU1)
PWC	PricewaterhouseCoopers
QCA	Queensland Competition Authority
QCA Act	<i>Queensland Competition Authority Act 1997 (Qld)</i>
QR National	QR National Limited
QR Network	QR Network Pty Ltd (a subsidiary of QR National)
Queensland Rail	Queensland Rail Limited
Rail Safety Act	<i>Transport (Rail Safety) Act 2010 (Qld)</i>
Standard Access Agreement	The Standard Access Agreement for coal carrying train services as set out in Schedule D of AU1.
Temporary Undertaking	QR Network's 2008 Access Undertaking (as at 30 June 2010) to the extent that it was made to apply to Queensland Rail by a transfer notice and project direction dated 29 June 2010 under the <i>Infrastructure Investment (Asset Restructuring and Disposal) Act 2009 (Qld)</i> from 30 June 2010.
TI Act	<i>Transport Infrastructure Act 1994 (Qld)</i>

Executive Summary

This document is in support of AU1 which has been given to the QCA as a voluntary draft access undertaking under section 136(1) of the QCA Act. AU1 is Queensland Rail's first draft access undertaking in relation to the declared service under the QCA Act for which Queensland Rail is the owner and operator.

Background information has been included in this submission in relation to various matters relevant to the formulation of AU1 to seek a shared understanding with stakeholders of important principles. Queensland Rail has, for example, included additional background information in relation to the declared service, passenger priority legislation (section 265 of the TI Act) and train path preservation legislation (section 266A of the TI Act).

The matters addressed in this document provide an outline of key issues relevant to AU1, and clarify questions raised by customers and stakeholders during Queensland Rail's consultation process. This document is not intended to provide commentary on all aspects of AU1.

The Queensland Rail Business

Queensland Rail operates passenger train services and provides access to its rail network to other rail haulage operators. Queensland Rail receives transport service payments from the Queensland Government for the operation of its passenger train services. All of Queensland Rail's passenger train services use either preserved train paths under section 266A of the TI Act or train paths necessary to satisfy the Director General of DTMR's passenger service requirements under section 266 of the TI Act.

While a vertically integrated business, Queensland Rail does not operate freight train services and its passenger train services are not in competition with third party train services. Third party operators are not expected to seek to operate passenger train services in competition with Queensland Rail during the regulatory period for AU1. As such, Queensland Rail should effectively be treated as if it were a non-vertically integrated access provider in respect of access to its rail network.

Term of Undertaking

AU1 should have a term of at least four years but no more than five years commencing on the approval date. This term is consistent with relevant Australian rail regulatory precedent. There is a low risk of circumstances changing sufficiently during the proposed term to render AU1 irrelevant or inappropriate.

Material issues regarding costs to, and lack of certainty for, Queensland Rail and stakeholders may arise from having a term that is shorter or longer than the proposed term.

Treatment of passenger train services

While a vertically integrated business, Queensland Rail's above rail activities in operating passenger train services are not in competition with third party train services.

Train paths for regularly scheduled Queensland Rail passenger services are allocated to Queensland Rail through sections 266 and 266A of the TI Act by the Director General of DTMR. As capacity is allocated to regularly scheduled Queensland Rail passenger services through the provisions of the TI Act, the requirements in AU1 for capacity allocation (i.e. the access application process) do not apply to Queensland Rail.

Requirements for internal access agreements are not included in AU1 as Queensland Rail's regularly scheduled passenger services do not compete with third party operators and Queensland Rail is not realistically likely to compete with third party operators during the proposed term of AU1.

Scope of access under AU1

AU1 applies to almost all of the declared service. However, it does not apply to providing access for a freight train services to those parts of the rail network provided for the benefit of passengers or passenger train services. It is unlikely that freight train service will require such access.

This approach is consistent with past QCA approved rail access undertakings.

Extending AU1 to these services will create unnecessary complexity in AU1. Such access is more efficiently addressed during the term of AU1 on a case by case basis through Queensland Rail's negotiations with an access seeker, or, if necessary, by an access determination of the QCA, in accordance with the QCA Act.

Extensions

AU1 includes provisions regarding the construction and funding of extensions that protect Queensland Rail's legitimate business interests, provide certainty as to when Queensland Rail will commit to construct extensions and preserve the ability to achieve negotiated outcomes for extensions.

Complex provisions relating to extensions are not warranted in Queensland Rail's circumstances.

Ringfencing and commercial-in-confidence

Ringfencing requirements are only relevant for a vertically integrated monopoly that is competing with third party operations in downstream competitive markets. While Queensland Rail is vertically integrated, it does not compete with third party operators of train services.

Ringfencing provisions are not appropriate for Queensland Rail's business. However, AU1 does set out confidentiality provisions to protect the confidential information of access seekers and access holders, and Queensland Rail will maintain separate accounting records in accordance with section 163 of the QCA Act.

Transfer, relinquishment and resumption

Queensland Rail has an incentive to maintain the efficient allocation of capacity in order to facilitate a commercially robust rail network. As such, AU1 includes appropriate transfer, relinquishment and resumption provisions.

Queuing of access applications

Queuing is appropriate where a vertically integrated monopoly competes with third party operators. Queensland Rail does not compete with third parties for access to its rail network. As such, queuing is not appropriate for Queensland Rail's business.

Queuing would impose unnecessary administrative costs upon Queensland Rail for no clear competitive benefit. Queensland Rail's proposed capacity management framework is consistent with those put in place by other below rail providers in Australia, which allow capacity to be allocated to the access seeker which in the below rail provider's opinion, is most favourable or will best utilise the available capacity.

Pricing principles

The pricing principles set out in AU1 are largely consistent with the Temporary Undertaking and overarching principles from current and past access undertakings for QR Network, QR Limited and ARTC.

Reference tariff reset

AU1 retains the current reference tariff rates applying to the West Moreton System under the Temporary Undertaking (with CPI adjustments) subject to a reference tariff reset to be submitted to the QCA no later than 30 June 2013 (or such longer time as agreed with the QCA). Prior to submitting a reference tariff

reset Queensland Rail intends to consult with its customers to seek to establish an agreed reference tariff.

Network Management Principles and Possessions

Various types of Possessions need to be provided for in the NMP including Planned Possessions, Urgent Possessions and Emergency Possessions. The safe running of the rail network and Queensland Rail's accreditation are dependent upon Queensland Rail being able to implement Possessions and other Operational Constraints as necessary. The NMP strike an appropriate balance between Queensland Rail's need to schedule Possessions and an access holder's interest in the operation of its train services.

Passenger priority legislation

Queensland Rail is obliged to endeavour to bring delayed passenger train services back on time ahead of non-passenger train services. This is due to the requirements of section 265 of the TI Act. AU1 and the Standard Access Agreement are consistent with section 265 of the TI Act.

Website material

The Temporary Undertaking includes prescriptive technical requirements due to the vertically integrated nature of the corporate group of which QR Network forms a part. As Queensland Rail does not compete with third party above rail operators, Queensland Rail has not included those prescriptive technical requirements from AU1 and will make technical requirements and information available as documents on its website.

Operating requirements

The Standard Access Agreement provides that various technical matters be set out in "Operating Requirements". These "Operating Requirements" will be updatable and are intended to be applicable generally to operators on Queensland Rail's network. Queensland Rail is preparing an Operating Requirements Manual and a draft of that manual will be made available to QCA as soon as practicable.

Dispute resolution process

An expert dispute resolution process is not required in AU1 for matters relating to the undertaking's provisions. The QCA should, if necessary, be able to resolve disputes or questions between Queensland Rail and an access seeker.

1 Introduction

This document is in support of AU1 which has been given to the QCA as a voluntary draft access undertaking under section 136(1) of the QCA Act. AU1 is Queensland Rail's first draft access undertaking in relation to the declared service under the QCA Act for which Queensland Rail is the owner and operator.

1.1 The Declaration and an access undertaking

The declaring of a service under Part 5, Division 2 of the QCA Act provides a party seeking access to that service with a right to negotiate with the access provider for that service, and recourse to arbitration for disputes relating to terms and conditions for access that cannot be resolved through negotiation. Put simply, the declaration of a service opens that service up to access by access seekers – the access provider cannot use monopoly power to, for example, refuse to negotiate or to prevent or hinder access to the service.

The QCA Act allows for the development of access undertakings in relation to services – in particular, declared services. While the QCA Act requires an access provider for a declared service to negotiate with a third party access to that service, an access undertaking sets out details of the terms on which an owner or operator of a service undertakes to provide access to that service (whether or not it sets out other information about the provision of access to the service). An access undertaking under the QCA Act must be in writing and approved by the QCA.

Queensland Rail, as the owner and operator of a declared service may submit a voluntary draft access undertaking to the QCA for approval in relation to that declared service. Alternatively, the QCA may require Queensland Rail to submit a draft access undertaking for the declared service.

An access undertaking has effect under the QCA Act once it is approved by the QCA. The QCA Act provides mechanisms for resolving disputes about third party access to a declared service whether or not there is an approved access undertaking.

Background information

The Declared Service applying to Queensland Rail

Under section 250(1)(b) of the QCA Act, the following service is taken to be declared under Part 5, Division 2 of the QCA Act:

“the use of rail transport infrastructure for providing transportation by rail if the infrastructure is used for operating a railway for which Queensland Rail Limited, or a successor, assign or subsidiary of Queensland Rail Limited, is the railway manager¹”.

However, section 249 of the QCA Act effectively excludes:

“the use of rail transport infrastructure for providing transportation by rail between Queensland and another State if – (a) the infrastructure is standard gauge track; and (b) the transportation is effected by using standard gauge rolling stock.”

The reference to rail transport infrastructure is defined by reference to the TI Act as:

“facilities necessary for operating a railway, including –

(a) railway track and works built for the railway including, for example – [cuttings, drainage works, excavations, land fill and track support earthworks]; and

(b) any of the following things that are associated with the railway's operation – [bridges, communication systems, machinery and other equipment, marshalling yards, notice boards, notice markers and signs,

¹ Queensland Rail is the rail manager for rail transport infrastructure if it is accredited under the Rail Safety Act as the rail infrastructure manager for “railway operations” relating to the railway of which the rail transport infrastructure forms a part.

overhead electrical power supply systems, over-track structures, platforms, power and communication cables, service roads, signalling facilities and equipment, stations, survey stations, pegs and marks, train operation control facilities, tunnels, under-track structures]; and

(c) vehicle parking and set down facilities for intending passengers for a railway that are controlled or owned by a railway manager or the chief executive; and

(d) pedestrian facilities, including footpath paving, for the railway that are controlled or owned by a railway manager or the chief executive;

but does not include other rail infrastructure.”

Other rail infrastructure is defined in the TI Act as:

“(a) freight centres or depots; or

(b) maintenance depots; or

(c) office buildings or housing; or

(d) rolling stock or other vehicles that operate on a railway; or

(e) workshops; or

(f) any railway track, works or other thing that is part of anything mentioned in paragraphs (a) to (e).”

1.1.1 The Temporary Undertaking

The Temporary Undertaking currently applies to Queensland Rail despite it originally being approved in relation to QR Network. The Temporary Undertaking has been made to apply to Queensland Rail by law as part of the restructure of QR Limited associated with the formation and privatisation of QR National. Once AU1 is approved by the QCA, it will replace the Temporary Undertaking.

1.1.2 AU1

AU1 sets out a regulatory framework for third party access to the declared service described in section 250(1)(b) of the QCA Act. AU1 addresses matters such as:

- the rail network to which it applies;
- the process for a person to seek access to use that rail network to operate train services;
- the pricing principles for access charges including reference tariffs for the West Moreton System;
- NMP for the scheduling and prioritisation of train services;
- reporting obligations;
- a dispute resolution process;
- a Standard Access Agreement for coal carrying train services on the West Moreton System;
- the principles that other access agreements must comply with; and
- reference tariffs for coal carrying train services on the West Moreton System.

1.2 Consultation

Queensland Rail believes consultation with its customers and stakeholders is an essential part of developing a successful access undertaking. Queensland Rail wishes to build on the relationship that it has with its customers and stakeholders, which is exemplified by the cooperative efforts by Queensland Rail, customers and stakeholders during the 2011 flood recovery efforts around the State. As part of its consultation with customers and stakeholders, Queensland Rail:

- publicly released a working draft of AU1;
- held two public consultation forums;

- sought written comments from customers and stakeholders; and
- held individual meetings with, and otherwise engaged with, customers and stakeholders and their representatives,

prior to lodging AU1 with the QCA.

During this process customers and stakeholders have provided significant feedback, including producing confidential written submissions. Many of the provisions of AU1 have been informed from this feedback and Queensland Rail values the commitment demonstrated by its customers and stakeholders in contributing to the development of AU1.

While discussions with customers and stakeholders have influenced the Standard Access Agreement, Queensland Rail was not able to release to customers and stakeholders a working draft of the proposed Standard Access Agreement prior to giving AU1 to the QCA. Queensland Rail would have preferred to do so, but considered that it was important to commence the formal processes under the QCA Act.

However, Queensland Rail will continue to work with customers, stakeholders and the QCA to seek to facilitate appropriate outcomes in connection with AU1 (including the Standard Access Agreement).

In the preparation of AU1, Queensland Rail has sought to:

- strike an appropriate balance between Queensland Rail's legitimate business interests, the interests of access seekers and the wider public interest in having third party access to Queensland Rail's rail network;
- achieve an access undertaking that is easy to read and understand; and
- achieve an access undertaking that is fit for purpose in respect of Queensland Rail's business and the needs of customers to seek access to its rail network.

Should customers, stakeholders or the QCA desire further clarification or information in relation to this document, or to matters relating to AU1, please contact:

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1.3 Submission explaining AU1

The purpose of this document is to provide an outline of some key issues relevant to AU1 and to clarify matters raised by customers and other stakeholders during Queensland Rail's consultation process. This document does not provide commentary or submissions on each provision and aspect of AU1.

This document should be read in conjunction with AU1 but does not form part of AU1 or affect its interpretation.

Queensland Rail will provide further submissions, explanations and information as issues arise during the consideration of AU1 by the QCA.

2 The Queensland Rail Business

AU1 is appropriate to Queensland Rail's business.

Key Points

- Queensland Rail is a wholly government owned corporation.
- Queensland Rail is not a part of the QR National group of companies.
- Queensland Rail's rail network serves a variety of train service types but is predominantly used by passenger and non-coal freight services.
- Queensland Rail's passenger train services and the majority of its rail network would not be commercially viable without transport service payments from the Queensland Government. Queensland Rail receives transport service payments for the provision of above rail passenger services and the provision of below rail infrastructure access.
- Competition exists between Queensland Rail's rail network and other modes of transport – although not, at present, in all instances, such as for coal carrying train services in the West Moreton System.
- Queensland Rail does not operate freight train services, has no intention of doing so and could not realistically be in a position to do so, within the regulatory period for AU1.
- All of Queensland Rail's passenger train services use either preserved train paths or train paths necessary to satisfy the Director General of DTMR's passenger service requirements under section 266 of the TI Act.
- Queensland Rail does not operate passenger train services in competition to third party operators and third party operators are not expected to seek to operate passenger train services in competition with Queensland Rail during the regulatory period for AU1.
- While a vertically integrated business with both above rail and below rail activities, Queensland Rail's above rail activities do not include freight train services and its passenger train services are not in competition with third party train services. As such, Queensland Rail is effectively acting as a non-vertically integrated access provider in respect of access to its rail network.

2.1 Corporate structure and business

Queensland Rail was registered as a corporation on 11 July 2008 and is a wholly government owned corporation. Queensland Rail was originally formed out of QR Limited's business that related to the operation of passenger train services. Queensland Rail was originally named QR Passenger Pty Ltd and was a subsidiary of QR Limited.

On 30 June 2010, as part of the restructure and privatisation process for QR National:

- Queensland Rail became an independent business – separate from the QR National corporate group; and
- the rail network previously managed by QR Network was divided between QR Network and Queensland Rail.

In simple terms, this resulted in QR Network (from the QR National group) continuing as the railway manager of the rail network in the Central Queensland Coal Region (including part of the North Coast Line) and Queensland Rail becoming the owner and railway manager of the remainder of the rail network previously managed by QR Network.

Therefore, from 30 June 2010, Queensland Rail changed from a business which principally operated passenger train services to a business that also manages a rail network comprised of approximately 8,000 km of Queensland freight and passenger railway track.

Queensland Rail's major businesses include passenger train services (including long distance trains), rail holidays, travel centres and the management of access to its rail network.

2.2 Scope of Queensland Rail's business activities and freight train services

Under Rule 2.1 of Queensland Rail's Constitution, Queensland Rail is limited to only undertaking activities that are within the scope of its objects under the Constitution² which are:

"...to undertake, either directly or through a subsidiary:

- (a) The provision of rail passenger transport services in Queensland for reward;*
- (b) The planning, development, construction, delivery and ongoing maintenance of rail transport infrastructure to be used for the provision of passenger rail and freight transport services in Queensland, and for the provision of access in (c);*
- (c) The provision of network rail services and access to rail networks owned or operated by the Company or its subsidiaries for reward;*
- (d) The provision of telecommunication services connected with the rail network infrastructure owned or operated by the Company or its subsidiaries;*
- (e) To do all other such acts as are necessary to fulfil the role of a railway manager and railway operator under the Transport Infrastructure Act 1994, and such other roles as may be conferred upon the Company by or under legislation, or under the Company's Statement of Corporate Intent or Corporate Plan, or as required to perform the functions mentioned in (a), (b) or (c); and*
- (f) Anything likely to complement or enhance the functions mentioned in (a), (b) or (c) or that is incidental to the objects set out in this rule 2.1.*

The Company must not undertake any activities which do not come within the scope of the objects contained in this rule."

The objects expressly include Queensland Rail's:

- provision of passenger train services;
- activities in relation to the planning, development, construction, delivery and ongoing maintenance of rail transport infrastructure for use by passenger and freight services; and
- provision of access to its rail network.

Queensland Rail is excluded from engaging in any activity that is not within the scope of its objects. For example, if Queensland Rail wishes to operate a train service (other than for passenger transport) and that activity is not within the scope of its objects, then Queensland Rail's Constitution would not permit Queensland Rail to engage in that activity.

Under rule 25 of Queensland Rail's Constitution, the Constitution can only be amended by Queensland Rail with the prior written consent of its Shareholding Ministers³. Such consent is unlikely to be given without Shareholding Ministers consulting with their respective Government Departments and the QCA to identify any significant implications for the regulatory regime applicable to Queensland Rail.

² A copy of Queensland Rail's Constitution is located at <http://www.queenslandrail.com.au/aboutus/documents/queensland-rail-approved-queensland-rail-limited-constitution%20final.pdf>.

³ Queensland Rail's Shareholding Ministers are currently Minister for Finance, Natural Resources and the Arts and Minister for Transport and Multicultural Affairs.

2.3 Transport service payments

Most of Queensland Rail's rail network is supported by, and is commercially viable only because Queensland Rail receives, transport service payments from the Queensland Government. The absence of these transport service payments would result in large parts of the rail network becoming commercially unviable, as providing customers with access to the rail network on a commercial basis would not generally be affordable for customers.

Queensland Rail (as well as some private operators – for example, the operator of The Savannahlander) receives substantial transport service payments for the operation of passenger train services. Again those passenger train services are commercially viable only because of those transport service payments.

2.4 Access charges

Queensland Rail receives access charges in payment for the use of its rail network for the operation of train services by third party rolling stock operators.

Access prices for coal carrying train services in the West Moreton System are governed by a reference tariff that is set by the QCA. However, the access prices for other train services – for example, non-coal freight train services – are typically set by commercial negotiation between Queensland Rail and each customer, within the boundaries set out in the access undertaking.

In accordance with the pricing principles set out in the Temporary Undertaking and proposed in AU1, non-coal train services are priced between floor and ceiling limits (after taking into account transport service payments), but are usually closer to the floor than the ceiling. This is consistent with a lesser ability of Queensland Rail's customers to pay for access to the rail network, having regard to the nature of the commodity and, in each case, potential competition from other transport modes.

2.5 Mix of train services using Queensland Rail's rail network

Queensland Rail facilitates access to its rail network for a wide variety of train services including agricultural products, passenger train services, intermodal and general freight and bulk minerals. The needs of the traffics vary greatly due to their different supply chain dynamics, geographic locations, rail corridor characteristics and interactions with other rail traffics.

2.6 Competition with alternative transport modes

Queensland Rail competes with road transport for most non-coal train services as well as coastal shipping, air transport, slurry pipelines and other transport options. In this sense, a large part of Queensland Rail's rail network business is not truly monopolistic as it is actively competing with other transport modes. Generally, alternative transport options are available to transport by rail if the rail offering is not competitive. To this extent, third party access to the rail network is largely self-regulating from an economic perspective.

Road is a key competitor to the vast majority of Queensland Rail's rail network. Access agreements and pricing are primarily formed through commercial negotiation. Road transport has relatively little economic regulation compared to rail, providing it with a competitive advantage.

However, Queensland Rail acknowledges that, at present, coal carrying train services in the West Moreton System do not currently compete with alternative transport providers to have coal transported to port facilities.

2.7 Above rail operations

2.7.1 Queensland Rail does not compete with third party freight train services

Queensland Rail's above rail business continues to be comprised solely of passenger train services and those passenger train services are ones which the Queensland Government requires Queensland Rail to operate. Queensland Rail's passenger train services do not operate in competition with third party passenger train services and Queensland Rail does not operate freight train services.

As discussed in section 2.2 of this document, Queensland Rail is only able to undertake activities that are within the scope of the objects under Queensland Rail's Constitution. Significant processes are required to amend Queensland Rail's Constitution. This restricts the types of activities in which Queensland Rail can engage.

Aside from needing to satisfy any governance requirements, if Queensland Rail was to seek to operate freight train services there would be significant impediments to it doing so as it currently does not have the capability or rolling stock necessary to do so. Queensland Rail would require significant lead time in order to undertake all of the necessary preparatory activities including:

- purchasing rolling stock;
- obtaining relevant approvals and accreditation;
- establishing operations and yard facilities;
- employing suitably qualified and experienced staff and/or contractors;
- negotiating and executing haulage contracts (in competition with established operators); and
- arranging associated administrative requirements.

These are significant barriers to Queensland Rail entering the freight train service market. The time taken to put all of these arrangements in place would likely extend beyond the regulatory period proposed in AU1.

2.7.2 New third party passenger services are unlikely to enter into the passenger train service market in competition with Queensland Rail

Queensland Rail does not compete against third party operators of passenger train services and does not expect to do so during the regulatory period for AU1.

Similar lead time issues would arise should a third party consider entry into the passenger train service market in competition with Queensland Rail. In addition, the characteristics of passenger train services are such that they are not commercial without significant Queensland Government support in the form of transport service payments.

If the Queensland Government was to consider such a proposition, then it would be expected to take into consideration the current access regime and any changes that might be required including in relation to AU1. If the Queensland Government chose to facilitate such a third party operator, it may decide to direct Queensland Rail to amend AU1.

Competition between Queensland Rail and third parties in relation to the provision of passenger services is also discussed in section 3.3.2 of this document – including in relation to commerciality and transport service payments.

2.8 Passenger priority and preserved train paths

2.8.1 Special legislative treatment of passenger trains services

Queensland Rail operates almost all passenger train services in Queensland. Passenger train services receive special treatment under the TI Act as follows:

- section 265 of the TI Act – sets out an obligation for a railway manager to bring a delayed passenger train service back to its scheduled running time (including where this may result in a freight train service being delayed);
- section 266 of the TI Act – sets out a right for the Director General of the DTMR to identify the requirements for regularly scheduled passenger train services (e.g. identify the capacity requirements) and obliges railway managers to allocate rail capacity that is available or will become available to meet those requirements; and
- section 266A of the TI Act – provides for the preservation of train paths for regularly scheduled passenger train services and for non-coal freight services.

All of Queensland Rail's passenger train services use either preserved train paths or train paths that are the subject of the Director General of DTMR's passenger train service requirements.

The effect of the above provisions of the TI Act and the matters referred to in sections 2.7 and 3.3.2 of this document is that while Queensland Rail is a vertically integrated business with both above rail and below rail activities, Queensland Rail's above rail activities in operating passenger train services are not in competition with third party train services. As such, Queensland Rail is effectively acting as a non-vertically integrated access provider in respect of third party access to its rail network.

Section 3.2 of this document provides a detailed explanation of the operation of sections 266 and 266A of the TI Act and their interaction with Queensland Rail's business. Section 6.3 of this document provides a detailed explanation of the operation of section 265 of the TI Act

3 Application and Scope

Overview – Part 1 of AU1

Part 1 of AU1 sets out:

- the duration of AU1;
- the scope and application of AU1;
- Queensland Rail's commitment:
 - to apply AU1 consistently between access seekers in the same circumstances; and
 - to not unfairly differentiate between access seeker or access holders;
- provisions regarding extensions to Queensland Rail's network; and
- the treatment of line diagrams.

3.1 Duration – AU1 term

AU1 should have a term of at least four years but no more than five years commencing on the Approval Date.

Key Points

- The proposed term for AU1 is consistent with relevant Australian rail regulatory precedent.
- There is a low risk of circumstances changing sufficiently during the proposed term to render AU1 irrelevant or inappropriate.
- Material issues regarding costs to, and lack of certainty for, Queensland Rail and stakeholders arise from having a term that is shorter or longer than the proposed term.

3.1.1 Proposed term

Section 137(1) of the QCA Act requires an access undertaking to state its expiry date. The QCA must therefore assess the suitability of the expiry date for AU1.

One function of an access undertaking is to give a degree of certainty to all parties as to what the process for obtaining access will be over the regulatory period of the access undertaking. Too short a term may provide only limited certainty and too long a term risks circumstances changing so the access undertaking is either no longer relevant or is inappropriate.

Queensland Rail proposes that AU1 will have a term of no less than four years and no more than 5 years. For example, if AU1 were approved in the 2012-13 financial year, then AU1 would expire on 30 June 2017⁴.

Importantly, the reference tariffs for coal carrying train services on the West Moreton System (as set out in the Temporary Undertaking) will be maintained, with adjustments for CPI, until the reference tariffs are reviewed and a reset is approved by the QCA with effect from 1 July 2013 (refer to Part 5.2 of this document for discussion on the proposed West Moreton reference tariff reset). The reference tariffs when reset will therefore have a shorter term than AU1 given that they are intended to take effect from 1 July 2013.

⁴ Depending upon the approval date, the term of AU1 may be less than five years but greater than four years to enable AU1 to terminate at the end of a financial year (i.e. 30 June)..

3.1.2 Regulatory precedent

AU1's proposed term is consistent with Australian rail regulatory precedent – for example:

- ARTC's first access undertaking in 2002 had a five year term⁵;
- ARTC's current access undertaking for interstate traffic has a ten year term with an annual price review⁶; and
- MTM's current access arrangement has a five year term⁷.

3.1.3 Queensland Rail's business environment

The nature of Queensland Rail's business means that there is little risk of circumstances changing to the extent of rendering AU1 irrelevant or inappropriate during the proposed term. In relation to most non-coal freight traffics, rail competes with road transport or other transport modes. This means that prices and conditions are competitively negotiated and if rail does not provide a competitive offering the traffic will transfer to an alternative transport solution (e.g. road).

As indicated in sections 2, 3.2 and 3.3.2 of this document, Queensland Rail does not directly compete with third parties as an operator of either passenger or freight train services and is not realistically likely to do so during the proposed term for AU1. As such, the complexity of past rail access undertakings by other Queensland rail access providers does not arise, and a lower risk exists of circumstances changing to the extent of rendering AU1 irrelevant or inappropriate.

In addition, the West Moreton reference tariff under the Temporary Undertaking is to be temporarily rolled over under AU1 (subject to CPI adjustments). AU1 proposes that this reference tariff will be reset early during the term of AU1. This proposal to reset the reference tariff also supports a longer term.

3.1.4 The cost of regulation

A shorter term would impose significant regulatory costs on Queensland Rail which would be passed through to train operators and their customers. The process for developing a new undertaking would need to begin within a relatively short time after the commencement of AU1. Regulatory processes tend to be costly and consume considerable resources from both the infrastructure provider and interested stakeholders. Queensland Rail is not aware of any overriding public interest that would justify Queensland Rail and customers bearing these additional costs.

The QCA and stakeholders have developed a considerable understanding of rail access issues in Queensland over the past 15 years. Queensland Rail submits that the experience and knowledge amassed in that time will assist in ensuring a robust regulatory assessment of AU1 with the consequential lowering of risks of potential unforeseen outcomes.

Queensland Rail considers that the proposed term for AU1:

- will provide the required commercial and regulatory certainty – without being either too long or too short; and
- is the most appropriate duration for Queensland Rail and its stakeholders.

⁵ ACCC 2002. *Decision: Australian Rail Track Corporation Access Undertaking*, May 2002, p. 61.

⁶ ACCC 2008. *Final Decision Australian Rail Track Corporation Access Undertaking – Interstate Rail Network*, July 2008, p. 22.

⁷ Metro Trains Melbourne Pty Ltd Access Arrangement, 24 August 2011, Part 1.2, p. 2.

3.2 Treatment of passenger train services

Queensland Rail should not be required to participate in AU1's access application process in relation to its above rail passenger business.

Queensland Rail's obligations under sections 266 and 266A of the TI Act will materially affect the allocation of capacity for regularly scheduled passenger train services (whether operated by Queensland Rail or a third party).

Key Points

- Train paths for regularly scheduled Queensland Rail passenger services are allocated to Queensland Rail through sections 266 and 266A of the TI Act.
- As capacity is allocated to regularly scheduled Queensland Rail passenger services through the provisions of the TI Act, the requirements in AU1 for capacity allocation (i.e. the access application process) do not apply to Queensland Rail.
- While a vertically integrated business with both above rail and below rail activities, Queensland Rail's above rail activities in operating passenger train services are not in competition with third party train services. As such, Queensland Rail is effectively acting as a non-vertically integrated access provider in respect of access to its rail network.
- Requirements for internal access agreements are not included in AU1 as Queensland Rail's regularly scheduled passenger services do not compete with regularly scheduled third party passenger services.
- Queensland Rail is obliged to give priority to the allocation of a train path to an operator of a regularly scheduled passenger train service if Queensland Rail is required to do so under section 266 of the TI Act to satisfy passenger service requirements.
- The effect of section 266A of the TI Act and the absence of competition in relation to regularly scheduled passenger train services will result in the operator of a relevant passenger train service having priority for the relevant preserved train path relating to that train service.
- The Director General of DTMR determines the passenger service requirements under section 266 of the TI Act and whether a preserved train path under section 266A of the TI Act can be allocated to a train service other than the type for which it was preserved.

3.2.1 Proposed position

AU1 relates to the negotiation of access by third party coal and non-coal freight access holders/seekers and third party passenger access holders/seekers. The access negotiation process under AU1 will not be artificially made to apply in relation to Queensland Rail's use of the rail network in respect of the operation of its own passenger services. That is, the internal arrangements within Queensland Rail for the allocation of capacity for the operation of Queensland Rail's passenger services on its network will not be determined in accordance with processes set out in AU1.

Clarification was sought from Queensland Rail during its consultation process in relation to the exclusion of Queensland Rail passenger train services from the access application process and whether Queensland Rail would be able to allocate capacity to itself at the expense of third parties. However, while Queensland Rail is both the railway manager of its network and an operator of passenger train services:

- Queensland Rail does not operate freight train services and can only undertake activities within the scope of its objects (see section 2.2 of this document);
- there are significant restrictions applying to Queensland Rail in competing with freight train services during the regulatory period for AU1 (see sections 2.7 and 3.3.2 of this document);

- it is unlikely that a third party would seek to compete with Queensland Rail in respect of the provision of passenger train services given the lack of commercial profitability and practical barriers (see sections 2.7 and 3.3.2 of this document);
- Queensland Rail is neither responsible for the identification of passenger service requirements (see section 3.2.2 of this document) nor the effects of the preserved train path obligations (see section 3.2.3 of this document) – these matters are prescribed by the TI Act and controlled by the Director General of DTMR; and
- Queensland Rail has statutory obligations with which it must comply for delayed passenger train services (see section 6.3 of this document).

In addition, there is no realistic prospect of the Queensland Government paying transport services payments to both Queensland Rail and a third party operator to establish competing passenger train services.

3.2.2 Passenger service requirements - section 266 of the TI Act

Section 266 of the TI Act provides, amongst other matters:

- A right for the Director General of DTMR to establish a process that regularly allows the Director General to identify “*passenger service requirements*” – that is, requirements for train paths for the following:
 - regularly scheduled passenger services on railway track in Queensland;
 - rolling stock that is to be used for a regularly scheduled passenger service and is being relocated for the purpose of providing the service.
- The Director General, by way of notice to a railway manager, may require the railway manager to provide information to enable the Director General to identify passenger service requirements.
- Once the Director General has identified the passenger service requirements, the Director General then notifies each rail transport operator, who is an accredited person under the Rail Safety Act, of the passenger service requirements relevant to the railway manager’s railway.
- Once notified of the Director General’s passenger service requirements, a railway manager **must** give priority to the passenger service requirements whenever a train path is, or will become, “available” for a railway manager to allocate. In complying with this obligation, the railway manager must not distinguish between different types of regularly scheduled passenger services.

Queensland Rail does not enter into an access agreement with the Director General for train paths that are to be allocated to satisfy passenger service requirements. Rather, Queensland Rail is obliged to give priority to the operator of the relevant passenger train service, which may be Queensland Rail itself or a third party, in respect of the allocation of the relevant train path. As such, Queensland Rail will, as applicable, either use the train path itself or offer the train path to the operator of the relevant passenger train service in preference to the operator of any other train service.

It is the Director General of DTMR rather than Queensland Rail who is entitled to determine the passenger service requirements. This is done under the TI Act and independently from the QCA Act or any access undertaking. Once those passenger service requirements have been determined by the Director General and notified to Queensland Rail, Queensland Rail must comply with section 266 of the TI Act and give priority to the allocation of train paths to satisfy those passenger service requirements.

The Director General will no doubt have substantial regard to the Government’s public transport objectives – particularly as the passenger train services referred to in the passenger service requirements will also require transport service payments (refer to section 2.3 of this document).

Train paths that have been identified by the Director General through section 266 of the TI Act (including train paths that will become available) must effectively be treated as committed. This means those train paths will not be available for allocation to access seekers unless the access seeker is the person who

will be providing the relevant passenger train service – as priority must be given to allocating those train paths to satisfy the Director General’s passenger service requirements.

Section 266 of the TI Act does not operate to strip existing access holders of their contracted train service entitlements under existing access agreements. However, from the time when an access agreement expires, priority must be given to allocating the train paths made available with that expiry to meet passenger service requirements, as applicable.

3.2.3 Preserved train paths – section 266A of the TI Act

The TI Act was amended in 2010 to include section 266A. Section 266A of the TI Act applies in respect of any train path that was, on 8 September 2010, allocated for the provision of:

- regularly scheduled passenger train services; or
- non-coal freight train services.

These train paths are known as “*preserved train paths*”.

If a preserved train path becomes available for allocation by Queensland Rail, Queensland Rail must only allocate that preserved train path to a train service that is the same type of train service as that which gave rise to the preserved train path. For example, a preserved train path arising from a regularly scheduled passenger train service must only be allocated to a train service that is a regularly scheduled passenger train service.

However, section 266A of the TI Act ceases to apply to a preserved train path if the Director General of DTMR has given:

- written notice that the train path is no longer subject to section 266A of the TI Act; or
- written consent to the allocation of that train path to a different type of train service.

Arguably, section 266A of the TI Act does not prevent Queensland Rail from allowing a preserved train path to be used for a different type of service when it is not being used for a train service of the type for which it has been preserved. For example, such a path could be used on an ‘ad hoc’ basis for a coal train service provided it remains available for a train service of the type for which it was preserved. However, the decision to allocate a preserved train path to a type of train service other than the type for which it was preserved is one for the Director General of DTMR and not Queensland Rail.

In relation to preserved train paths for regularly scheduled passenger train services, the preservation of those train paths when combined with the matters referred to in sections 2.3, 2.7 and 3.3.2 of this document will naturally result in an absence of competition for those train paths as practically there will be only one operator who is seeking to run the relevant passenger train service – whether Queensland Rail or a private operator – and that person will therefore have priority for the allocation of that train path.

3.3 Internal access agreements

Queensland Rail should not be required to have “internal access agreements”.

Queensland Rail’s operation of passenger train services does not necessitate additional special protective provisions in AU1 for third party access seekers.

Key Points

- Internal access agreements may be required where a vertically integrated monopoly controls a business that operates in direct competition with a third party business.
- Queensland Rail does not directly compete with third parties as an operator of either passenger or freight train services and is not realistically likely to do so during the proposed term of AU1.
- Internal access agreements are not appropriate for Queensland Rail’s business.

3.3.1 Internal access agreements in previous rail access undertakings in Queensland

On 1 September 2008, QR Limited underwent a restructure that resulted in the formation of two wholly owned subsidiaries – QR Network and Queensland Rail (previously named QR Passenger Pty Ltd).

Prior to the restructure, QR Limited was a vertically integrated rail service provider with above rail businesses that competed directly with third party above rail businesses. Due to this, a degree of operational separation was required within QR Limited as part of its access undertaking. This resulted in the establishment of relatively self-contained business units including:

- units responsible for the operation of train services; and
- a unit responsible for the negotiation and provision of access to the below rail network.

As part of this operational separation, the QCA required QR Limited to include in its access undertakings an obligation to negotiate and maintain “internal access agreements” between its above rail business units and its below rail business unit. These were arrangements between the below rail business unit and the above rail business units that were similar to access agreements – but which were not actual contracts as QR Limited could not contract with itself as it was one legal entity.

The requirement by the QCA for internal access agreements was aimed at QR Limited’s above rail business units, which were in direct competition with third party access seekers, being granted access on terms no more favourable than the terms on which third party access seekers were granted access rights.

Internal access agreements were first required by the QCA in QR Limited’s 2001 access undertaking. Relevantly, the QCA’s 2000 Draft Decision stated:

“As QR is vertically integrated, the nature of the terms and conditions on which its below-rail services are provided to its above-rail business groups is a significant issue for new third-party entrants. There is arguably considerable scope for QR to favour its own operation at the expense of third-party operators in the contestable market. This has the potential to distort the development of the above-rail market, including raising barriers to entry for new third-party operators, with associated implications for price levels and the quality of services provided to end-users...Consequently, the QCA considers that equivalence of the terms and conditions of internal and external access agreements should be a key objective of the framework established by the Undertaking.”⁸

This statement by the QCA highlights that internal access agreements are required specifically when an access provider has an above rail operator which is operating, or likely to be operating, in direct competition with a third party operator to ensure that the access provider does not favour its own above rail operations through its treatment of access arrangements.

Subsequent to the restructure, because QR Limited, Queensland Rail and QR Network became distinct legal entities, these internal access agreements were required to be converted to access agreements.⁹

3.3.2 Queensland Rail is not competing with third party access seekers

Queensland Rail does not compete with third parties as an operator of either passenger or freight train services and is not realistically likely to do so during the proposed term for AU1.¹⁰

There is no realistic prospect of the Queensland Government paying transport service payments to both Queensland Rail and a third party operator to establish competing passenger train services. Given the lack of commerciality of passenger train services in the absence of such payments, there will effectively be no competition as there will only be one operator for a passenger train service using a preserved train path or a train path allocated to satisfy a passenger service requirement – whether Queensland Rail or a

⁸ QCA’s Draft Decision on QR’s 2000 Draft Undertaking, December 2000, Volume 2 p. 119.

⁹ Refer to clause 2.5.2(e) & (f) of the QR Network 2008 Access Undertaking.

¹⁰ See: section 2.2 of this document regarding the scope of Queensland Rail’s business activities; section 2.7 of this document regarding practical restrictions on Queensland Rail competing with freight train services and on third parties competing with Queensland Rail’s passenger train services; section 3.2 of this document regarding Queensland Rail’s passenger service requirement and preserved train path obligations; and section 2.3 of this document regarding transport service payments.

third party – during the regulatory period for AU1. As Queensland Rail is not operating, and is unlikely to operate, in direct competition with other above rail operators during the regulatory period for AU1, a requirement for internal access agreements (and the resultant organisational restructuring and associated costs) is not required in AU1.

To impose requirements relating to internal access agreements without a reasonable prospect of competition with third party operators exposes Queensland Rail to significant costs and inefficiencies without any clear benefits to customers, the public interest or the furthering of competition in upstream or downstream markets. In addition, any such costs and inefficiencies would – given the nature of Queensland Rail’s business – ultimately be borne by customers or the Queensland Government through increased transport service payments.

Queensland Rail also submits that its approach is consistent with relevant rail regulatory precedent – for example, MTM.

Background information

MTM – Victoria

In Victoria, MTM is the metropolitan infrastructure manager and the above rail metropolitan passenger train service operator.

MTM’s metropolitan network consists of 15 train routes over 400 km of “broad gauge” track, which are used predominantly for passenger train services within Melbourne. Certain lines are also used by regional passenger train services terminating at the Southern Cross and Flinders Street Stations, and some lines are used by freight train services. MTM is not required to negotiate internal access agreements with itself.¹¹

3.3.3 NMP

All capacity for Queensland Rail’s regularly scheduled passenger train services becomes “committed” capacity through the provisions of sections 266 and 266A of the TI Act. Therefore, there is no requirement in AU1 for Queensland Rail passenger train services to participate with AU1’s access application process. This committed capacity will be entered into the MTP in accordance with AU1’s principles in the NMP.

AU1 does not require Queensland Rail to enter into internal access agreements as Queensland Rail is not operating, and is unlikely to operate, in direct competition with other above rail operators during the regulatory period for AU1.

The NMP are part of AU1 and will be approved by the QCA as part of the QCA’s approval of AU1. Consequently, an amendment to the NMP is an amendment to AU1 and requires the approval of the QCA.

The NMP provide certainty as to how operators are treated (including Queensland Rail) in scheduling train services for the MTP and DTP and also in relation to the prioritisation of train services on the day of operation. The NMP apply to both Queensland Rail and other train operators.

Attachment 1 contains a detailed analysis of Queensland Rail’s approach to the treatment of passenger services on its network.

¹¹ Section 2 of the Essential Services Commission’s Victorian Rail Access Regime Ring Fencing Rules sets out ringfencing requirements in relation to organisational separation including requirements that an access provider not arrange for its access activities business unit to provide services to an other activities business unit or a related body corporate of the access provider (other than shared services) unless the relevant service is provided pursuant to a written and executed agreement. However, the Essential Services Commission, in its February 2010 “Review of the Victorian Rail Access Regime Final Report: Volume II: Detailed Analysis and Discussion of Issues” (p.93) states: “Given that there is currently little vertical integration in the Victorian rail industry, the Ring Fencing Rules are not applied to any access providers. The regime could include a statutory requirement for access providers to maintain separate accounting records for access activities, and provide the ability for the Commission to make Ring Fencing Rules, but need not make the establishment of those rules mandatory.”

3.4 Scope of access under AU1

AU1's scope applies to approximately 98% of the declared service.

AU1's scope does not apply to providing access for a freight train services to those parts of the rail network provided for the benefit of passengers and passenger train services.

Key Points

- AU1 applies to the declared service with the exception of access by non-passenger train services to those parts of the rail network provided for the benefit of passengers or passenger train services including:
 - stations and platforms used for passengers or passenger train services; and
 - yards and associated facilities used to stage, maintain or store rolling stock used for passenger train services.
- Queensland Rail considers it unlikely that freight train services will require access to the excluded passenger infrastructure.
- The approach taken in AU1 is consistent with past QCA approved rail access undertakings in Queensland.
- Extending AU1 to providing an access seeker for a non-passenger train service with access to the parts of the rail network provided for the benefit of passengers and passenger train services will create unnecessary complexity in AU1 in respect of a scenario that is unlikely to arise. This is more efficiently addressed during the term of AU1 on a case by case basis through Queensland Rail's negotiations with an access seeker, or, if necessary, by an access determination of the QCA, in accordance with the QCA Act.
- A voluntary access undertaking in relation to a declared service is not required to apply to the whole of that declared service. Those parts of a declared service to which an undertaking does not apply may still be accessed by third parties through the QCA Act.
- The declared service does not necessarily extend to yards and associated facilities used to stage, maintain or store rolling stock.

3.4.1 The relationship between an access undertaking and the declared service

An access undertaking for a declared service outlines the process and requirements that an owner or operator of that declared service will comply with in providing third party access to that service.

There is no requirement in the QCA Act that a voluntary access undertaking must apply to all of a declared service. This is reflected in the QCA's 2000 Draft Decision on QR Limited's Draft Undertaking which stated:

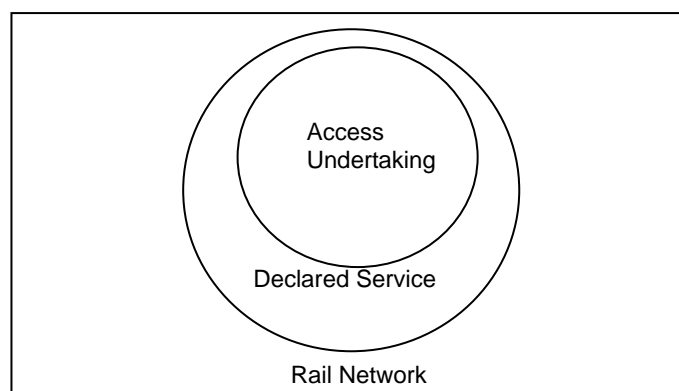
"It is clear that declared services need not be subject to an undertaking although the QCA is empowered under the QCA Act to request an undertaking from an access provider in relation to the provision of declared services. If access is sought to declared services not covered by an undertaking, the arbitration machinery contained in the QCA Act would be available."¹²

Where an access undertaking does not apply to part of the declared service, access may still be sought by an access seeker to that part of the declared service through the QCA Act.

Figure 1 below provides a hypothetical example of an interaction between a rail network, a declared service and an access undertaking. Figure 1 is not to scale and does not represent any existing declared service or access undertaking or AU1. Figure 1 is for indicative purposes only. Figure 1 shows diagrammatically how an access undertaking may be a subset of a declared service and a declared service may be a subset of the services provided by a particular rail network.

¹² The QCA Draft Decision on QR's Draft Undertaking – Volume 2, December 2000' p. 141 in footnote 61.

Figure 1 – An example of the possible interaction between a rail network, a declaration and an access undertaking



3.4.2 The scope of AU1

AU1 applies to the declared service with the exception of access by non-passenger train services to those parts of the rail network provided for the benefit of passengers or passenger train services including:

- stations and platforms used predominantly for passengers or passenger train services; and
- yards and associated facilities used to stage, maintain or store rolling stock used for passenger train services.

This approach is consistent with the approach in the QCA approved Temporary Undertaking (refer section 3.4.3 below).

Queensland Rail considers that it is unlikely that freight train services will require access to this passenger infrastructure. Queensland Rail believes that the operators of freight train services should be aware that this infrastructure was not built to meet their requirements and use by freight train services could cause unreasonable disruption to passenger operations. In general, freight train services already have established operational facilities such as crew change points, marshalling areas and designated areas to attach and detach wagons. AU1 aims to be 'fit for purpose' applying to those assets most likely to attract access seekers.

The exclusion of yards and associated facilities used to stage, maintain or store rolling stock is also intended to provide clarity. However, the use of those facilities does not necessarily form part of the declared service and AU1 is not intended to extend to services outside the declared service.

3.4.3 AU1's approach compared to previous QCA approved access undertakings

AU1's proposed approach is consistent, in principle, with the approach approved by the QCA in QR Network's 2008 Access Undertaking which was associated with QR Limited's corporate restructure (see section 2.1 of this document for further information regarding QR Limited's restructure).

As part of the restructure, Queensland Rail was allocated ownership of stations, platforms and the majority of Mayne Yard at Bowen Hills. The QCA Act provides that an access undertaking may only be submitted by the owner or operator of a service. Therefore, QR Network could only submit an access undertaking that related to rail transport infrastructure owned or operated by QR Network. Notably the QCA, when considering the implications of the corporate restructure on the access undertaking, did not seek to require stations and platforms to be owned or operated by QR Network. This resulted in that infrastructure not being included within the scope of QR Network's 2008 Access Undertaking.

The line diagrams in QR Network's 2008 Access Undertaking provided a delineation of the declared assets managed by QR Network and its related corporations. The most significant of the below rail

facilities that the line diagrams identified as remaining outside of QR Network's management responsibility were the majority of Mayne Yard and stations and platforms.

Additionally, QR Network's 2008 Access Undertaking stated that where an access seeker is reasonably of the opinion that part of the declared service not covered by the undertaking is required for the purpose of obtaining access to the declared service, the access seeker could seek that QR Network obtain ownership of the relevant rail transport infrastructure and amend the line diagrams accordingly.¹³

However, the explicit exception to this was in relation to stations and platforms. QR Network's 2008 Access Undertaking provided that the management of stations and platforms, including the provision or procurement of appropriate levels of maintenance and investment for stations and platforms, was to be the responsibility of a "QR Operational Business Group" rather than QR Network.¹⁴

QR Network's 2008 Access Undertaking was intended to essentially be on the same terms as QR Limited's 2006 Access Undertaking but for amendments arising out of the restructure of QR Limited. The approach of QR Network's 2008 Access Undertaking on this issue is a translation of the similar approach taken in QR Limited's 2006 Access Undertaking.

3.4.4 A 'fit for purpose' undertaking

A request by an access seeker for access to stations and platforms, which were predominantly designed for passenger train services, for a freight train service will be dealt with in accordance with the QCA Act rather than through AU1. This will result in the request being considered on its individual merits, without unduly complicating AU1 for access which may never, or only rarely, be sought.

As highlighted in section 3.4.2 of this document, freight train services already have established operational facilities such as crew change points, marshalling areas and designated areas to attach and detach wagons. Queensland Rail considers that it is unlikely that freight train services will require significant access to passenger rail infrastructure – such access may never, or only rarely, be required.

Expanding the scope of AU1 to incorporate access to passenger oriented stations and platforms would require Queensland Rail to seek to detail the circumstances where Queensland Rail was or was not obliged to provide access. For example, access may not be appropriate where:

- a passenger station or platform has not been built with the appropriate specifications for the purpose sought by a freight train service; or
- there are implications for safety.

This could potentially result in detailed and complex provisions being unnecessarily included in AU1 – as those provisions would need to be able to address all potential access requests and circumstances relating to various types of freight train services and stations, platforms and other passenger rail infrastructure. Provisions of that nature may also potentially result in either a risk of gaps or the need for general catch-all provisions. Queensland Rail does not consider that such provisions are likely to provide sufficient certainty for either itself or access seekers.

If an access seeker happens to request access to, for example, passenger stations and platforms for a freight train service and that request for access relates to the declared service, then the QCA Act requires Queensland Rail to negotiate with that access seeker in relation to providing access and, if the parties do not reach agreement, the matter may be referred to the QCA for arbitration. This approach allows the access seeker, Queensland Rail and, if necessary, the QCA to focus on the actual facts and circumstance of the request for access rather than AU1 attempting to set out a potentially complex process to address all potential requests for that type of access.

As highlighted in section 3.4.3 of this document, Queensland Rail's approach is consistent with previous Queensland regulatory precedent by the QCA.

¹³ Paragraph 2.1(f) of QR Network's 2008 Access Undertaking.

¹⁴ Subparagraphs 2.2(g)(i) and 3.1(c)(iii) of QR Network's 2008 Access Undertaking.

Therefore, it is reasonable that AU1 not apply to access for non-passenger train services to those parts of the rail network provided for the benefit of passengers or passenger train services including stations and platforms used predominantly for passengers or passenger train services and yards and associated facilities used to stage, maintain or store rolling stock used for passenger train services.

3.5 Extensions

AU1 includes provisions regarding the construction and funding of extensions that protect Queensland Rail's legitimate business interests, provide certainty as to when Queensland Rail will commit to construct extensions and preserve the ability to achieve negotiated outcomes for extensions.

Key Points

- It is in Queensland Rail's interest to increase traffic and tonnage volumes on its rail network.
- Queensland Rail substantially modified its initial working draft position regarding extensions in response to feedback from customers and other stakeholders.
- Queensland Rail cannot be obliged to fund extensions and has a right to own extensions.
- Complex provisions relating to extensions are not warranted in Queensland Rail's circumstances.
- Queensland Rail's preference is for parties to arrive at negotiated outcomes for extensions.

3.5.1 Outcomes from consultation

On 31 August 2011, Queensland Rail publicly released a working draft of AU1 for public comment. Clause 1.4 of that working draft stated that:

"Queensland Rail may in its absolute discretion undertake any Extensions necessary to provide the Additional Capacity required to grant Access Rights requested by an Access Seeker."

Customers and other stakeholders provided feedback to Queensland Rail on this drafting. In particular, customers and other stakeholders:

- advised that it would be beneficial for AU1 to set out criteria where Queensland Rail would undertake an extension; and
- acknowledged that under the QCA Act Queensland Rail could not be obliged to pay part or all of the cost of an expansion.

Queensland Rail has made significant amendments to AU1 in response to this feedback. Queensland Rail redrafted clause 1.4 of the working draft in response to customer and stakeholder feedback.

3.5.2 AU1's treatment of extensions

Clause 1.4 of AU1 provides clarity in relation to extensions to its rail network. AU1 specifies criteria that must be satisfied in order for Queensland Rail to commit to undertake an extension including that Queensland Rail is not obliged to pay part or all of the cost of an extension – although Queensland Rail may choose to fund an extension.

The provision ensures that Queensland Rail has sufficient power to only extend its network under specific conditions and in accordance with its legitimate business interests. The circumstances in which Queensland Rail will commit to construct extensions of its rail infrastructure include matters relating to:

- the financial capacity of the access seeker to fund the extension;

- the technical and operational feasibility of the extension, including its consistency with Queensland Rail's engineering and operational requirements and the safe and reliable provision of access; and
- contractual arrangements, including requirements with respect to the execution of access agreements and other contractual arrangements.

However, clause 1.4 is not intended to prevent or otherwise restrict Queensland Rail and an Access Seeker from negotiating arrangements relating to extensions that are commercially acceptable to each party.

Background information

QCA powers under the QCA Act relating to extensions

An access undertaking may include provisions "*relating to extending the facility*".¹⁵ 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;¹⁶
- 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;¹⁷
- that, in effect, requires an access provider to pay some or all of the costs of extending the facility;¹⁸
- 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;¹⁹
 - the QCA is satisfied that the extension will be technically and economically feasible and consistent with the safe and reliable operation of the facility;²⁰
 - the QCA is satisfied that the legitimate business interests of the owner and operator of the facility are protected;²¹ 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.²²

3.5.3 Queensland Rail is incentivised to facilitate extensions

Queensland Rail is incentivised to increase traffic and tonnage volumes on its rail network, as this improves revenues and the commercial robustness of the rail network. As such, Queensland Rail has incentives to facilitate commercially viable extensions to its network.

¹⁵ Section 137(2)(g) of the QCA Act.

¹⁶ Section 119(1)(a) of the QCA Act.

¹⁷ Section 119(2)(b) of the QCA Act. See also the QCA's Final Decision on QR Network's 2010 Draft Access Undertaking, September 2010, p.32.

¹⁸ Section 119(2)(c) of the QCA Act; see also the QCA's Final Decision on QR Network's 2010 DAU, September 2010, pp 25 & 28 where the QCA confirmed that it cannot oblige an infrastructure owner to include in an access undertaking an obligation to wholly or partly fund an extension to its network.

¹⁹ Section 119(4)(a) of the QCA Act.

²⁰ Sections 119(4B)(a) and 119(5)(b)(i) of the QCA Act.

²¹ Sections 119(4B)(b) and 119 (5)(b)(ii) and (iii) of the QCA Act.

²² Sections 119(4A) and 119(5)(c) of the QCA Act. See also the QCA's Final Decision on QR Network's 2010 Draft Access Undertaking, September 2010, pp 25 & 28.

3.5.4 Queensland Rail to own extensions

Section 119(2)(b) of the QCA Act states that any access determination by the QCA cannot result in an access seeker, or someone else, becoming the owner of a facility without the existing owner's agreement. This principle was affirmed by the QCA in its 2010 Final Decision on QR Network's 2010 Draft Access Undertaking.²³ On this basis, AU1 provides that all extensions will be owned and managed by Queensland Rail unless otherwise agreed by Queensland Rail.

3.5.5 Construction and funding of extensions

Queensland Rail considers clause 1.4 of AU1 provides sufficient certainty for customers and stakeholders regarding the circumstances when Queensland Rail will construct an extension, while at the same time protecting Queensland Rail's legitimate business interests.

AU1 does not deviate from the principle that Queensland Rail cannot be required to pay for the costs of an extension. However, AU1 does not preclude Queensland Rail from deciding to fund an extension.²⁴

Queensland Rail's preference is that the construction and funding of extensions to its rail network required by customers and stakeholders occurs as a result of negotiation. This may include instances where Queensland Rail is not able to fund extensions, and instead facilitates arrangements for customers to fund such extensions.

For example, Queensland Rail has been providing and continues to provide ongoing assistance to the Southern Surat User Group in relation to the Miles Wandoan upgrade where Queensland Rail has facilitated meetings, provided resources and expertise, as well as intellectual property, to assist all parties involved. Queensland Rail will continue to participate in such projects.

Queensland Rail is aware of the complexities in QR Network's 2010 Access Undertaking in relation to these issues. Queensland Rail considers that it would be better for all interested parties to avoid such complexities if possible – as they are not warranted in Queensland Rail's circumstances.

²³ QCA's Final Decision on QR Network's 2010 DAU, September 2010, p 32.

²⁴ Refer to clause 1.4.3(c) of AU1.

4 Negotiation Process

Overview – Part 3 of AU1

Part 3 of AU1, the 'Negotiation Process', sets out:

- access application process including:
 - acknowledgement of access requests;
 - procedures relating to indicative access proposals (IAPs);
 - negotiation process;
 - required timeframes;
- access agreement requirements including:
 - the granting of access rights where there are two or more parties competing for the same capacity;
 - the principles applying to access agreements (including for relinquishments, transfers and resumptions); and
 - the development of new standard access agreements;
- the prudential requirements for access seekers; and
- the confidentiality provisions.

4.1 Ringfencing and commercial-in-confidence

Ringfencing provisions are not appropriate for Queensland Rail's business.

Key Points

- Ringfencing requirements are only relevant for a vertically integrated monopoly that is competing with third party operations in downstream competitive markets.
- While a vertically integrated business with both above rail and below rail activities, Queensland Rail's above rail activities in operating passenger train services are not in competition with third party train services. As such, Queensland Rail is effectively acting as a non-vertically integrated access provider in respect of access to its rail network.
- Australian regulatory precedent demonstrates that ringfencing provisions are not appropriate where an integrated organisation is not operating in competition with third parties.
- Confidentiality provisions included in AU1 to protect the confidential information of access seekers and access holders.
- Queensland Rail will maintain separate accounting records in accordance with section 163 of the QCA Act.

Background information

A definition of ringfencing

An integrated rail provider will typically:

- provide below rail services by being the manager of the rail network infrastructure; and
- provide above rail service by being a rail haulage operator who participates in the above rail train market in competition with third party train services.

It is necessary for third parties to provide their confidential information to the infrastructure provider when, for example:

- applying for access to the below rail network; and
- operating as an access holder on the below rail network (e.g. the rail network infrastructure manager will collect data on third party train service performance).

Ringfencing aims to prevent an integrated rail provider, who is operating in competition with third party businesses, from the deliberate and discriminatory transfer of third party confidential information from the monopoly below rail business to its own competing, above rail business. From a competition perspective this transfer of information is undesirable, as the integrated rail provider's above rail business may then receive a competitive advantage gained through insights into the competing third party above rail business.

The QCA has referred to ringfencing in the context of the perception that a vertically integrated rail enterprise could pass information from its monopoly business to its above rail business providing its above rail business with a competitive advantage over third party above rail businesses:

*"Broadly, ring-fencing is the separation of business functions within an enterprise for organisational and accounting purposes, with management of information flows between the separated business functions. It is based on the premise that the operation and management of the monopoly assets are placed on a stand-alone basis to be managed independently of any other business arms, in particular the competitive arm, of the enterprise."*²⁵

The Independent Competition and Regulatory Commission of the ACT has referred to ringfencing as follows:

*"Ring fencing is the identification and separation of business activities, costs, and decision making within an integrated entity where part of the entity is providing monopoly services and another is providing services in a competitive market. Its purpose is to ensure that businesses operating in regulated monopoly industries do not use their monopoly power, or collude with associated businesses, to give associated businesses an unfair advantage over their market competitors. Ring fencing is intended to reduce or eliminate both incentives and opportunities for such anticompetitive behaviour. Specifically it aims at preventing the deliberate and discriminatory transfer of information and resources from a monopoly business to an associated business..."*²⁶

Ringfencing measures can typically be characterised as:

- restrictions on information flows and discriminatory decision-making to guard against:
 - confidential information being used for anti-competitive purposes, or
 - monopoly power being exercised through discriminatory or preferential treatment of associated business activities.
- legal separation – a requirement for monopoly services to be provided in a separate legal structure.
- ownership separation – as above, except the separate legal entities must not have common ownership.
- management separation – restrictions on personnel having dual management roles across ringfenced and non-ringfenced business.
- accounting separation – requirement for the provision of separate financial information, usually supported by cost allocation and various other financial guidelines.

What ringfencing measures are used in any given situation will be influenced by various matters including, for example:

- the nature and circumstance of the monopoly business and the associated business activities in

²⁵ QCA's Final Decision on QR's 2000 Draft Access Undertaking, July 2001. section 3.1 p. 58.

²⁶ Independent Competition and Regulatory Commission, "Ring Fencing Guidelines For Gas and Electricity Network Service Operators in the ACT", November 2002, p.2.

competitive markets;

- the potential competitive consequence of confidential information being used for anti-competitive purposes or of monopoly power being exercised to benefit associated business activities in competitive markets;
- the powers of the relevant economic regulator; and
- the consequences of applying those ringfencing measures on both the monopoly business and third parties.

4.1.1 Regulatory precedent

The ringfencing arrangements set for the former QR Limited, which operated above rail freight services, were integral to addressing the potential for that business to prevent or hinder access to competing third party access seekers to benefit its own operations. The QCA in its 2001 Final Decision on QR's Access Undertaking states:

*"As a vertically integrated enterprise, QR could potentially use its monopoly power in the below rail market to gain an unfair competitive advantage in the above-rail market. For example, QR's monopoly arm could pass confidential information about third-party operators to its competitive arm providing its above-rail business with an inappropriate competitive advantage."*²⁷

While a vertically integrated business with both above rail and below rail activities, Queensland Rail's above rail activities in operating passenger train services are not in competition with third party train services. As such, Queensland Rail is effectively acting as a non-vertically integrated access provider in respect of access to its rail network (see sections 2.8 and 3.2 of this document).

The nature and structure of Queensland Rail's business means there is no real scope for Queensland Rail to use its market power to limit competition in the above rail markets. Highly prescriptive ringfencing requirements would therefore impose significant costs on Queensland Rail without benefiting third party access seekers or access holders or promoting effective competition in downstream markets.

Australian regulatory precedent also supports the approach that ringfencing provisions are not appropriate where an integrated organisation is not operating in competition with third parties. For example, RailCorp in New South Wales and V/Line (regional network) in Victoria are integrated rail businesses with above and below rail functions and, similar to Queensland Rail, their above rail train services do not operate in competition with third party train services.

RailCorp is owned by the NSW Government and operates passenger rail services throughout the Sydney metropolitan, outer-urban, and regional areas. RailCorp also owns and maintains the metropolitan rail network and provides access to freight operators in the area, and is regulated by the Independent Pricing and Regulatory Tribunal. RailCorp's access undertaking:

- does not include specific ringfencing arrangements; and
- does include requirements regarding the separation of business accounts.

The Victorian Rail Access Regime, which came into effect in 2006, contains *Ring-Fencing Rules* (the Rules). While the Rules exist, they have never been applied to any access providers in Victoria. In February 2010, the Essential Services Commission (the regulator), under instruction from the Minister for Finance, conducted an independent review into the effectiveness and applicability of the Victorian Rail Access Regime considering the current and likely future structure of the industry.

The Essential Services Commission's review acknowledged that while the Rules are in place, they have not been applied to any access providers, as there is currently little vertical integration in the Victorian

²⁷ QCA's Final Decision on QR's 2000 Draft Access Undertaking, July 2001. section 3.1 p. 58. The Final Decision also states on p.57: "Ring-fencing - due to the vertically integrated structure, it is necessary for there to be appropriate ring-fencing arrangements that protect the legitimate business interests of all parties".

rail industry.²⁸ Further, it recommended that the Rules be less prescriptive and be replaced by ringfencing and account keeping guidelines.²⁹

4.1.2 Accounting separation

Queensland Rail is committed to the principles of accounting separation between its declared service and non-declared services. Section 163(1) of the QCA Act requires Queensland Rail to keep accounting records, in a form approved by the QCA, for the declared service separately from the accounting records of its other operations.

Also, the QCA may require a cost allocation manual under section 159 of the QCA Act. Queensland Rail submitted a revised cost allocation manual to the QCA in December 2011. The QCA has subsequently sought public consultation on the cost allocation manual.

The QCA Act enables the QCA to address both accounting separation and cost allocation. Queensland Rail acknowledges this and will work with the QCA to address these matters in accordance with the QCA Act. However, Queensland Rail does not consider it necessary to duplicate these requirements in AU1.

4.1.3 Confidential information

Queensland Rail is committed to protecting its customers' confidential information. Confidentiality provisions have been included in section 2.2 of AU1 in relation to the management of the confidential information of access seekers and access holders.

4.1.4 PWC Supporting Analysis

In determining Queensland Rail's approach to ringfencing, Queensland Rail commissioned PWC to analyse the appropriateness of ringfencing provisions, having regard to Queensland Rail's business model and considering past determinations by Australian rail regulators. Queensland Rail has attached the PWC supporting analysis to this document for the QCA's consideration (refer Attachment 2).

4.2 Transfer, relinquishment and resumption

AU1 includes appropriate transfer, relinquishment and resumption provisions.

Key Points

- Access holders can relinquish all or part of their access rights in accordance with the provisions in the Access Agreement Principles and Standard Access Agreement.
- Access holders can assign, novate or otherwise transfer their interest in an access agreement to a third party in accordance with the terms of that access agreement, with the prior written consent of Queensland Rail.
- The provisions in AU1 are consistent with rail access requirements in other States. For example, the prior written consent of the rail manager prior to a transfer taking place is required in relation to:
 - ARTC's Interstate Access Agreement (2008);
 - V/Line's Standard Access Agreement (Freight Services);

²⁸ Essential Services Commission. 2010. Review of the Victorian Rail Access Regime Final Report: Volume II Analysis and Discussion of Issues. February 2010. pg. 93.

²⁹ Essential Services Commission. 2010. Review of the Victorian Rail Access Regime Final Report: Volume II Analysis and Discussion of Issues. February 2010. pg. 94.

- MTM's Standard Access Agreement;
- DBCT's Standard User Agreement;
- ARTC's Indicative Access Holder Agreement (Hunter Valley) except where it is for a period of less than 12 months.

Queensland Rail competes with road and other forms of transport (i.e. coastal shipping, air transport, slurry pipelines and other transport modes). In this sense, a large part of Queensland Rail's rail network business is not truly monopolistic as it is actively competing with other transport modes.

Queensland Rail has an incentive to maintain the efficient allocation of capacity in order to facilitate a commercially robust rail network. As such, AU1 provides for the transfer, relinquishment and resumption of capacity.

4.2.1 Relinquishment

Queensland Rail's working draft of AU1 was released for comment on 31 August 2011. It did not include provision for relinquishment. Customers and stakeholders expressed a strong desire for relinquishment provisions to be included in AU1. Queensland Rail has included relinquishment provisions in AU1 in response to customer feedback, and these are referred to in the access agreement principles set out in Schedule C of AU1 and the Standard Access Agreement set out in Schedule D of AU1.

Queensland Rail has sought to simplify the calculation of relinquishment fees with adjustments where the relinquished capacity is used by Queensland Rail to grant access rights to a new access seeker (whether as a result of Queensland Rail's normal business operations or because of an arrangement that the access holder has to "transfer" that capacity to that access seeker).

4.2.2 Transfers

Access holders can assign, novate or otherwise transfer their interest in an access agreement to a third party in accordance with the terms of that access agreement, with the prior written consent of Queensland Rail (Clause 2.7.6 of AU1). These provisions allow access holders to transfer unwanted capacity rights, subject to the prior written consent of Queensland Rail. Queensland Rail's consent is subject to whether the assignee has the financial resources and capability to perform the obligations and the accreditation to operate the train service.

Queensland Rail is incentivised to be efficient due to market forces (refer section 2 of this document) and therefore, to allocate capacity efficiently. The provisions in AU1 are consistent with rail access requirements in other States. The prior written consent of the rail manager prior to a transfer taking place is required in relation to:

- ARTC's Interstate Access Agreement (2008);
- V/Line's Standard Access Agreement (Freight Services);
- MTM's Standard Access Agreement;
- DBCT's Standard User Agreement³⁰; and
- ARTC's Indicative Access Holder Agreement (Hunter Valley) except where it is for a period of less than 12 months.

Queensland Rail does not have a monopoly over most of its rail network and is incentivised to allocate capacity efficiently. Like other similar rail access regimes around Australia, it is reasonable that Queensland Rail's prior consent be required prior to a transfer.

³⁰ Both the 2006 and 2010 Draft Access Undertaking Standard User Agreements included provisions for transfers with the prior written agreement of the infrastructure provider.

The ACCC's comments in its 2002 Decision on ARTC's access undertaking support the approach taken by Queensland Rail in relation to transfers. The ACCC advised that:

*“ARTC has also proposed that an operator may cancel train paths or assign them to third parties (**subject to the approval of ARTC**).*

The Commission accepts these provisions of the Undertaking and considers that it satisfies the legislative criteria in section 44ZZA(3) (of the Trade Practices Act 1974³¹).³² (emphasis added)

4.3 Queuing of access applications

‘Queuing’ is not appropriate for Queensland Rail’s business.

Key Points

- Queuing is appropriate where an integrated organisation competes with third party operators. Queensland Rail does not compete with third parties for access to capacity in its rail network. Rather, capacity allocation to Queensland Rail’s regularly scheduled passenger services is determined through sections 266 and 266A of the TI Act. As such, queuing is not appropriate for Queensland Rail’s business.
- AU1 seeks to move away from a queue based capacity allocation to a principles-based approach to capacity allocation. Queuing imposes unnecessary administrative costs upon Queensland Rail for no clear competitive benefit.
- Queensland Rail’s proposed capacity management framework is consistent with those put in place by other below rail providers in Australia, which allow capacity to be allocated to the access seeker which in the below rail provider’s opinion, is most favourable or will best utilise the available capacity.

4.3.1 Capacity allocation under AU1

Under Part 7 of the Temporary Undertaking, access rights are required to be allocated to the first access seeker with whom Queensland Rail can negotiate and execute an acceptable Access Agreement (Clause 7.4.1(a)) – except in the case of mutually exclusive access applications, where the Temporary Undertaking sets out a process for the formation of a queue.

The Temporary Undertaking allows for the reordering of the queue under certain circumstances. The queuing arrangements were introduced in QR Limited’s 2006 Access Undertaking to provide access seekers with certainty in relation to obtaining access rights where capacity is scarce, particularly in light of the perception that QR Limited could, where capacity is scarce, potentially decide to allocate capacity to its own above rail business rather than to a third party operator.

4.3.2 Limited relevance to Queensland Rail’s operations

In its Final Decision of ARTC’s Access Undertaking (Interstate Rail Network) in 2008, the ACCC reviewed the capacity allocation arrangements in other jurisdictions. The ACCC noted that the QCA required a queuing system in the rail access regime in Queensland. Such a system was deemed to be most relevant when two or more access seekers were seeking mutually exclusive access rights and that such a mechanism would provide access seekers with some certainty over access rights under negotiation as well as assist with an access seeker’s forward planning.

While the ACCC acknowledged the merits of the queuing system adopted by QR Limited, it considered that the efficacy of a queuing system in the case of ARTC was questionable given that the underlying

³¹ On 1 January 2011 the *Trade Practices Act 1974* was renamed the *Competition and Consumer Act 2010*.

³² ACCC’s Decision on ARTC Access Undertaking (May 2002), p. xviii.

intention of the queuing system was to limit the market power of QR Limited (given that QR Limited could use the negotiating process as a means by which access applications from third parties could be stalled in favour of QR Limited's own above rail operations). As ARTC is not vertically integrated, the ACCC considered there were fewer concerns and a queuing system was not warranted.³³

Queensland Rail, however, is a significantly different business from the vertically integrated QR Limited, QR Network or the QR National company group. Similar to ARTC, Queensland Rail does not operate in competition with third party above rail businesses (refer sections 2.7, 3.2 and 3.3.2 of this document). While the queuing requirements may have merit for a vertically integrated organisation that is competing with third party above rail businesses for scarce capacity, it is not appropriate where this is not the case.

Additionally, a queue is more suitable where there is a single product type that is railed at a similar price, such as coal on the central Queensland coal region. Under such circumstances the time of lodgement of an access application may be important because, to a large extent, the service is homogenous – whereas, Queensland Rail provides access for a diverse mix of train services.

When considering the potential need for a queuing mechanism, it is also important to consider the potential costs or disadvantages of queuing including, for example, the additional regulatory burden on Queensland Rail, potential for delays in negotiating access and gaming by access seekers including to attempt to reserve capacity at the expense of other access seekers.

Despite the absence of queuing provisions, Queensland Rail has included in AU1 criteria upon which it will decide between competing access applications³⁴ in respect of which access application(s) will be the most favourable to Queensland Rail. A key feature of AU1 is the commercial negotiation of access. This is consistent with the QCA's Final Approval of QR Limited's 2006 Draft Access Undertaking where the QCA stated:

*"The QCA Act makes it clear that commercial negotiation is to play a central role when an access seeker is seeking access rights."*³⁵

Queensland Rail's proposed capacity management framework is consistent with those put in place by other below rail providers in Australia, which allow capacity to be allocated to the access seeker which in the business' opinion is most favourable or will best utilise the available capacity.

4.3.3 Queuing arrangements create unnecessary administrative costs

A guiding principle for AU1 is the reduction of complexity and unnecessary detail and the provision of greater flexibility for Queensland Rail and access seekers to negotiate on access terms appropriate for the particular circumstances.

The Temporary Undertaking's provisions require Queensland Rail to continuously adjust a queue resulting in unnecessary administrative costs. Under AU1 it is proposed that capacity will be allocated based on the most favourable outcome for the business, which includes consideration of various factors – for example, the likely access charges, cost and risk to the business and the term of the access agreement.

AU1 is also guided by the economic principle of ensuring the benefits of the access undertaking, in terms of the certainty and guidance it provides to access seekers, do not exceed the cost to Queensland Rail of administering the access arrangements.

³³ Australian Competition and Consumer Commission, *Final Decision – Australian Rail Track Corporation: Access Undertaking – Interstate Rail Network*, July 2008. p. 186.

³⁴ That is, access applications where the grant of access rights to one or more of those access seekers would result in access rights not being able to be granted to the other access seekers.

³⁵ QCA's Final Approval of QR Limited's draft 2006 access undertaking, p.16.

4.3.4 PWC analysis

Attachment 3 is PWC's supporting analysis regarding AU1's approach to capacity allocation where there are competing access requests for the same capacity.

5 Pricing Principles

Overview – Part 4 of AU1

Part 4 of AU1, the 'Pricing Principles', sets out AU1's:

- pricing objectives;
- pricing limits and price differentiation principles;
- reference tariffs;
- rate review provisions; and
- provisions regarding the QCA Levy

5.1 Pricing principles

The pricing principles set out in AU1 are appropriate to Queensland Rail's business and consistent with regulatory precedent.

Key Point

- The pricing principles are largely consistent with the Temporary Undertaking and overarching principles from current and past access undertakings for QR Network, QR Limited and ARTC.

AU1 pricing principles have been developed taking into consideration the overarching principles of the access undertakings of QR Network, QR Limited and ARTC. The proposed pricing provisions are largely consistent with the pricing principles in the Temporary Undertaking, which in turn are based on generally accepted regulatory principles. For the purposes of AU1, Queensland Rail has not sought to deviate substantially from the practical effect of the pricing principles in the Temporary Undertaking.

Some differences exist due to formatting and structural changes which seek to clarify and simplify existing arrangements and remove unnecessary detail and the need to better reflect Queensland Rail's commercial circumstances. However, Queensland Rail has sought to achieve this whilst retaining the general intent of the provisions from the Temporary Undertaking.

PWC has undertaken a detailed analysis of the AU1's Part 3 Pricing Principles. The PWC supporting analysis is attached to this document for the QCA's consideration (refer Attachment 4).

5.2 Reference tariff reset

AU1 temporarily rolls forward the reference tariff rates under the Temporary Undertaking with CPI adjustments subject to a review and reset of those reference tariffs being submitted to the QCA by 30 June 2013.

Key Points

- AU1 retains the current reference tariff rates applying to the West Moreton System under the Temporary Undertaking (with CPI adjustments) subject to a reference tariff reset to be submitted to the QCA no later than 30 June 2013 (or such longer time as agreed with the QCA).
- Queensland Rail intends to consult with its customers and stakeholders to seek to establish an agreed reference tariff.

AU1 retains the current reference tariff rates applying to the West Moreton System under the Temporary Undertaking (with CPI adjustments) subject to a reference tariff reset that is to be submitted by Queensland Rail to the QCA by 30 June 2013 (or such longer time as agreed with the QCA). The reference tariff rates applying to the West Moreton System under the Temporary Undertaking were developed based upon supporting information that was forecast out to June 2013.

Queensland Rail intends to consult with its customers and stakeholders to seek to establish an agreed reference tariff. The reset will facilitate this by providing the time needed to seek to resolve the many complex matters that arise around the development and approval of a reference tariff, including the development of the requisite regulatory building blocks. These regulatory building blocks will provide both Queensland Rail and its customers with certainty and transparency.

This approach will also mean that the approval of AU1 is not delayed by the development of new reference tariffs. It additionally benefits Queensland Rail, customers and stakeholders by giving them an opportunity to specifically focus on the issue of reference tariffs during the time period allocated to the development of the reference tariff reset.

To ensure that there is certainty that the reference tariffs will be reviewed and reset in a timely manner, if Queensland Rail does not submit proposed new reference tariffs on time, then it will be taken to have submitted the then current reference tariffs for review by the QCA. While Queensland Rail is not seeking to rely on this provision, it provides certainty that the review of reference tariffs will occur.

If the reference tariffs were reset as part of AU1, then the QCA would have had various powers under the QCA Act in connection with the approval or refusal to approve those reference tariffs. To maintain that position, any submission or deemed submission of new reference tariffs will be treated as if it were a draft access undertaking submitted by Queensland Rail under the QCA Act in response to an initial undertaking notice given by the QCA. It is proposed that Queensland Rail and the QCA will act in accordance with the provisions of the QCA Act as though this were the case.

This approach provides a simple means of preserving the QCA position under the QCA Act without detailing a specific approval process in AU1.

6 Network Management Principles

Overview – Part 5 and Schedule C of AU1

Part 5 and Schedule C of AU1 sets out the NMP including:

- Train planning principles and train control principles including:
 - the MTP principles:
 - the DTP principles: and
 - the traffic management decision making matrix.

6.1 NMP

The NMP specify the requirements applicable to the MTP, DTP and the train control principles. The NMP are intended to ensure that all operators are treated consistently and transparently in respect of scheduling and on the day of operation.

Queensland Rail's passenger train services and the train services of all third party access holders will be scheduled by Queensland Rail into the MTP and DTP and are subject to the NMP.

6.2 Scheduling of Possessions

The NMP include specific provisions relating to Possessions.

Possessions are necessary for the safe and efficient running of Queensland Rail's rail network.

Key Points

- Various types of Possessions need to be provided for in the NMP including Planned Possessions, Urgent Possessions and Emergency Possessions.
- The safe running of the rail network and Queensland Rail's accreditation are dependent upon Queensland Rail being able to implement Planned Possessions, Urgent Possessions, Emergency Possessions and other Operational Constraints as necessary.
- The NMP strike an appropriate balance between Queensland Rail's need to schedule Possessions and an access holder's interest in the operation of its train services.

During Queensland Rail's consultation with customers and stakeholders, Queensland Rail was asked for clarification in relation to the requirement for possessions on the rail network.

Possessions and operational constraints are important aspects of Queensland Rail's ability to maintain and enhance its rail network. Possessions and operational constraints are needed to manage safety and interface risks and are an essential part of managing the rail network. The safe running of the rail network is dependent upon Queensland Rail being able to implement planned possessions, urgent possessions, emergency possessions and other operational constraints as necessary.

Possessions are also an important part of Queensland Rail maintaining its accreditation under the Rail Safety Act, as that accreditation is focused on Queensland Rail's railway operations being undertaken safely. If Queensland Rail's accreditation was to be suspended or withdrawn for any part of the rail network, then Queensland Rail would not be able to allow train services to operate on that part of the rail network.

Background information

Possessions and operational constraints

AU1 defines various types of possessions as well as what is meant by “operational constraints”.

A **Possession** is a temporary closure or occupation by Queensland Rail of part of its rail network (including closure of track or isolation of any electrical overhead traction system) for the purpose of carrying out:

- the construction of any rail transport infrastructure to improve, upgrade, expand, extend, replace or vary the whole or any part of the rail network;
- any management, maintenance or operational activities relating to the rail network, including the improvement, maintenance, repair, modification, installation, removal, renewal or decommissioning of the whole or any part of the rail network;
- any inspections or investigations of the rail network; or
- other work or other activities on or in the proximity of the rail network;

An **Emergency Possession** is a Possession that is required to rectify a serious fault with the rail network:

- that is considered by Queensland Rail to be dangerous or potentially dangerous to any person; or
- where severe speed restrictions have been imposed that affect the scheduled train services of access holders,

and that Queensland Rail intends to carry out within less than five business days after the detection of the serious fault.

An **Urgent Possession** is a Possession that is required to correct problems in relation to the rail network that are considered by Queensland Rail to be potentially dangerous to persons or property and that Queensland Rail intends to carry out within less than three months after the detection of the problem (other than an Emergency Possession).

A **Planned Possession** is a Possession (other than an Urgent Possession or Emergency Possession) where that Possession is entered in the MTP or DTP and adversely affects the operation of train services.

An **Operational Constraint** means any temporary or permanent constraint on the operation or use of any part of the rail network imposed by Queensland Rail as it considers necessary in relation to the proper, efficient or safe operation or management of the rail network (including speed restrictions, load restrictions, Planned Possessions, Urgent Possessions, Emergency Possessions and signalling or overhead restrictions).

Provisions have been included in the NMP that specifically relate to Possessions – for example:

- a new or modified Planned Possession may be included in the MTP where the modification would result in an access holder’s scheduled train services not being met, if Queensland Rail:
 - has consulted with that access holder; and
 - to the extent that the modification is not within the scope of that access holder’s train service entitlement, has used reasonable endeavours to mitigate the adverse impacts on that access holder;
- any of the following:
 - a modification to an existing Planned Possession;
 - the creation of an Urgent Possession; or
 - any other Operational Constraint affecting the DTP,

may be included in a DTP (at least two business days prior to the day of operation, and prior to the DTP being scheduled) where this would result in an access holder’s scheduled train services not being met, if Queensland Rail:

- has consulted with that access holder; and

- to the extent that the modification is not within the scope of that access holder's train service entitlement, has agreed the modifications with the access holder (such agreement not to be unreasonably withheld);
- an Emergency Possession may be included in a DTP (at least two business days prior to the day of operation, and prior to the DTP being scheduled) provided that if the variation would result in an access holder's scheduled train services not being met then Queensland Rail must consult with the access holder; and
- an Emergency Possession may be included in a DTP (once it has been scheduled) without the need for Queensland Rail to consult with an access holder where, before the commencement of that access holder's train service, Queensland Rail notifies the access holder that an Emergency Possession is required.

As these examples illustrate the NMP strike an appropriate balance between the interests of access holders in operating train services in accordance with their train service entitlement and scheduled DTPs and Queensland Rail's business interests in relation to ensuring the safe operation of the rail network.

The ability for a rail infrastructure manager to establish network management principles in relation to the scheduling of possessions and operational constraints and restrictions is commonplace in rail access regimes. For example, both ARTC and QR Network have requirements in relation to possessions and network management principles. However, each rail infrastructure manager's network management principles will usually be tailored to the business circumstances of that rail infrastructure manager.

AU1's approach in the NMP in relation to Possessions is necessary for the safe and efficient running of Queensland Rail's rail network and as such is consistent with Queensland Rail's legitimate business interests, the public interest and the overarching interests of access seekers/holders.

In addition, it may also be relevant to consider that in the context of coal carrying train services on the West Moreton System to which a reference tariff applies, AU1 and the Standard Access Agreement provide that Queensland Rail is not entitled to take or pay charges for train services that do not operate because of Queensland Rail Cause. Queensland Rail Cause is defined as follows:

***"Queensland Rail Cause"** means Queensland Rail's inability to make the Network available for the operation of Train Services in accordance with a Train Service Entitlement as a result of:*

- (a) *a Planned Possession, Urgent Possession or Emergency Possession;*
- (b) *a Force Majeure Event affecting Queensland Rail; or*
- (c) *any other action by Queensland Rail other than Queensland Rail exercising a right or complying with an obligation in accordance with this Undertaking, any applicable Law or the relevant Access Agreement,*

*except where Queensland Rail's inability to do so is in any way attributable to the Operator, another Rail Transport Operator (other than Queensland Rail) or any other person."*³⁶

Despite Queensland Rail's underlying motivation to encourage the commercial use of its rail network, in the context of coal carrying train services on the West Moreton System to which a reference tariff applies, Queensland Rail also has a more explicit financial incentive to avoid being unable to make the rail network available because of a Possession. However, any motivation or incentive to avoid Possessions will always be subject to Queensland Rail's commitment to the safe operation of the rail network.

³⁶ See clause 7.1 of the AU1 and clause 26.1 of the Standard Access Agreement.

6.3 Passenger priority legislation

Key Points

- Queensland Rail is obliged to endeavour to bring delayed passenger train services back on time ahead of non-passenger train services. This is due to the requirements of section 265 of the TI Act.
- AU1 and the Standard Access Agreement are consistent with section 265 of the TI Act.

Queensland Rail's passenger priority obligations arise under the TI Act.

Section 265 of the TI Act states:

“265 Delayed passenger services

- (1) *A railway manager must endeavour to bring a passenger service that is delayed back to its scheduled running time.*
- (2) *In complying with subsection (1), a railway manager must not distinguish between different types of regularly scheduled passenger services.*
- (3) *Subsection (2) does not limit the matters that the railway manager may consider as relevant when complying with subsection (1).*

Examples of relevant matter—

1 a train transporting livestock

2 train service entitlements for services other than passenger services.”

Queensland Rail is obliged by statute to endeavour to bring delayed passenger train services back on time ahead of non-passenger train services.

In doing this, Queensland Rail may consider relevant matters such as whether livestock is being transported (e.g. Queensland Rail can prioritise a train service containing livestock ahead of a passenger train service to ensure the humane treatment of livestock) or may consider a train service entitlement and related matters. But Queensland Rail is not permitted to distinguish between different types of regularly scheduled passenger services.

AU1 and the Standard Access Agreement are consistent with the requirements of section 265 of the TI Act.

7 Other Provisions

7.1 Website material

Key Points

- Many of the Temporary Undertaking's more prescriptive technical requirements were due to the vertically integrated nature of the corporate group of which QR Network forms a part.
- As Queensland Rail does not compete with third party above rail operators, Queensland Rail has not included those prescriptive technical requirements from AU1 and will make technical requirements and information available as documents on its website.
- This will result in a more efficient, timely process for the updating of those requirements rather than being required to lodge a draft amending access undertaking.

AU1 sets out a process for access seekers to negotiate access terms and simplifies certain matters so they are clearer and easier to understand by comparison to the Temporary Undertaking.

Many of the Temporary Undertaking's more prescriptive requirements in relation to technical matters (for example, safety and interface requirements and environmental management requirements) arose out of QR Network being part of a vertically integrated corporate group that involved related parties of QR Network providing above rail services in competition with third parties. This is similar to the position originally taken when above and below rail services were being provided by a single vertically integrated entity as was the case for QR's 2000 Draft Access Undertaking. The QCA stated in its Draft Decision on QR's 2000 Draft Access Undertaking:

"QR's vertical integration gives rise to a conflict of interest because of its ability to use rolling stock, safety and environmental requirements in the Undertaking to hinder access to its below-rail services, thereby protecting its above-rail business groups."³⁷

and

"...the QCA is mindful that QR, as a vertically integrated provider, faces a conflict of interest in its ability to use the interface standards to hinder access to its below-rail services, thereby protecting the revenues of its above-rail operations. Consequently, in considering the interface provisions of QR's Draft Undertaking, the QCA has carefully balanced these competing interests."³⁸

As Queensland Rail effectively does not compete with third party above rail operators, Queensland Rail has chosen for AU1 either not to include some of those requirements or to refer to them as being made available by Queensland Rail to access seekers – for example, on its website.

This approach will also assist Queensland Rail to ensure that the information is up to date and readily available for customers.

For instance, Queensland Rail intends that various documents and information helpful to access seekers will be made available through Queensland Rail's website – for example:

- line diagrams for the rail network;
- information, standards and requirements with which an interface risk assessment and interface risk management plan must be consistent – including, for example, a sample interface risk management plan;
- information, standards and requirements for operating plans;

³⁷ QCA's Draft Decision on QR's 2000 Draft Access Undertaking, December 2000, Volume 2 p. 301.

³⁸ QCA's Draft Decision on QR's 2000 Draft Access Undertaking, December 2000, Volume 2 p. 302.

- CPI escalated inputs for reference tariffs; and
- application forms for access applications (i.e. conceptual operating plans).

Making information available in this way will enable Queensland Rail to update materials without having to go through a draft amending access undertaking process, thereby providing greater flexibility and efficiency. This is a reasonable position – particularly given that Queensland Rail is effectively not competing with third party above rail operators.

7.2 Operating requirements

Key Points

- The Standard Access Agreement provides that various technical matters be set out in “Operating Requirements”. These “Operating Requirements” will be updatable and are intended to be applicable generally to operators on Queensland Rail’s network.
- Queensland Rail intends that a draft of an Operating Requirements Manual will be made available to QCA as soon as practicable.

The Standard Access Agreement refers to Queensland Rail making “Operating Requirements” available to the operator. The “Operating Requirements” are practices, standards, systems, protocols, requirements, rules, policies and other information in relation to or in connection with train control and the access to and use of the network by operators – for example, interface management and coordination requirements, safeworking procedures, safety standards, emergency and investigation procedures, requirements for the management of network incidents and environmental requirements, as published by Queensland Rail from time to time. The Standard Access Agreement requires that Queensland Rail and the operator comply with the “Operating Requirements”.

The Standard Access Agreement sets out a process for Queensland Rail to amend “Operating Requirements”. If in Queensland Rail’s opinion (acting reasonably) a proposed amendment is likely to materially adversely affect the operator, then Queensland Rail will provide reasonable notice of the proposed amendment (including details of the proposed amendment, the proposed implementation date and advice on the period during which the operator can consult with Queensland Rail in relation to the proposed amendment).

If Queensland Rail amends the “Operating Requirements”, Queensland Rail will allow at least ten business days for the operator to amend its processes in order to comply, unless Queensland Rail reasonably requires immediate compliance for safety reasons.

Queensland Rail is currently developing an Operating Requirements Manual. The Operating Requirements Manual will set out various technical requirements including interface risk assessment and interface risk management plan requirements, safeworking procedures and safety standards, emergency and investigation procedures and environmental requirements. It will be placed on Queensland Rail’s website and updated by Queensland Rail from time to time.

Queensland Rail intends to release a draft of the Operating Requirements Manual as soon as practicable, so that the QCA and customers have an opportunity to consider the draft Operating Requirements Manual in the context of the Standard Access Agreement during the QCA’s consultation process.

7.3 AU1's dispute resolution process

An expert dispute resolution process is not required in AU1.

Key Points

- The Temporary Undertaking includes an expert dispute resolution process for disputes or questions arising between Queensland Rail and access seekers.
- The QCA should, if necessary, be able to resolve disputes or questions between Queensland Rail and an access seeker. AU1 does not need an expert dispute resolution process.

AU1 includes a dispute resolution process that applies to disputes concerning the application of the provisions of AU1. The Temporary Undertaking included a possible referral to an expert of a dispute or question arising between an access seeker and QR Network.

Queensland Rail believes the need for expert referral, in relation to application of AU1, is redundant given that the QCA should be able to resolve access-related issues – as provided by the QCA Act. Consequently expert determination does not form part of the dispute resolution process under AU1.

Queensland Rail has used a more typical dispute resolution provision in the Standard Access Agreement which includes an expert dispute resolution process.

Attachment 1: PWC Supporting Analysis – Treatment of Passenger Services

Queensland Rail

Treatment of passenger services

Queensland Rail

*Supporting analysis for
submission to the QCA*

28 March 2012



*What would
you like to grow?*

1.1 Introduction

Queensland Rail commenced business independently from the QR National corporate group on 1 July 2010. Queensland Rail's primary business activities are the delivery of public transport through the provision of passenger rail services and supporting private freight services through the provision of rail infrastructure.

Since 1 July 2010, Queensland Rail has been providing access to its below-rail network under QR Network's 2008 Access Undertaking (as at 30 June 2010) to the extent that it was made to apply to Queensland Rail by a transfer notice and project direction (Transfer Notice) dated 29 June 2010 under the *Infrastructure Investment (Asset Restructuring and Disposal) Act 2009* (Qld) (Temporary Undertaking).

In light of the new structure of the business and the approaching expiry of the Temporary Undertaking, Queensland Rail is preparing a draft access undertaking (Queensland Rail Access Undertaking 1 (AU1)) to submit to the Queensland Competition Authority (QCA). With AU1 Queensland Rail seeks to provide an access undertaking that better suits the operations and requirements of Queensland Rail, whilst preserving the basic process for access seekers to negotiate access terms, and simplifying the Temporary Undertaking to be better understood by all parties.

Queensland Rail is proposing that the internal arrangements for its own use of its rail network for passenger services will not be determined according to the processes and terms set out in AU1. Rather, AU1 will apply only to external operators of freight services and, should future circumstances require, external operators of passenger services.

This documents sets out the reasons and justification for this proposal.

1.2 Background

1.2.1 *The Declared Service*

Section 250 (1) (b) of the *Queensland Competition Act 1997* (QCA Act) sets out the following service as a declared service under Part 5 of the QCA Act:

the use of rail transport infrastructure for providing transportation by rail if the infrastructure is used for operating a railway for which Queensland Rail Limited, or a successor, assign or subsidiary of Queensland Rail Limited, is the railway manager

However, the use of rail transport infrastructure for providing transportation by rail between Queensland and another State on standard gauge track and using standard gauge rolling stock is effectively not treated as part of that declared service (Section 249).

The declared service determines the scope of the service that is legislated for regulated third party access with respect to Queensland Rail's infrastructure including, to the extent applicable, passenger dedicated assets, such as platforms, stations and related infrastructure. This declared service is consistent with the declaration by regulation that previously applied under the *Queensland Competition Authority Regulation 2007* prior to the insertion of section 250 of the QCA Act.

1.2.2 Past treatment of passenger services

Prior to 2008, QR Limited comprised below and above-rail business units, including above-rail freight operations. In 2008, the business was separated into a number of legally separate subsidiaries, including QR Network Pty Ltd (QR Network) which operated the below-rail infrastructure, QR Passenger Pty Ltd (QR Passenger) which operated the passenger business and QR National which provided above-rail freight and haulage services, particularly to Queensland coal mines. The business structure was implemented to facilitate the separation of the management of below-rail assets from the operation of train services.

Under QR Network's 2008 Access Undertaking (2008AU) all of QR Limited's above-rail services, including QR Passenger, were required to negotiate access in accordance with the access undertaking. These arrangements also included requirements for the negotiation of access agreements between the business' below-rail business (QR Network) and the other QR business groups (e.g. QR National and QR Passenger).

1.2.3 Proposed treatment of passenger services

The scope of the proposed AU1 relates to third-parties for coal and non-coal freight train services and third-party passenger train services, including long-distance services, seeking access to the declared service from Queensland Rail. Access is defined as:

- (a) The non-exclusive right to use a specified section of the Network; and*
- (b) For non-passenger Train Services, excludes the right to use those parts of the Network provided for the benefit of passengers or passenger Train Services including:*
 - (i) stations and platforms used predominantly for passengers or passenger Train Services; and*
 - (ii) yards and associated facilities used to stage, maintain or store Rolling Stock used for passenger Train Services,*

for the purposes of operating Train Services.

This approach is generally consistent with the scope of the 2008AU. However, unlike the 2008AU, AU1 will also allow for the negotiation of access to facilities such as stations and platforms by third-party passenger operators. The 2008AU did not extend to stations and platforms.

Queensland Rail proposes that AU1 will not require Queensland Rail's above-rail business to "negotiate" with its below-rail business for access to use the rail network for passenger services. That is, the internal arrangements within Queensland Rail for the operation of Queensland Rail's passenger services on its Network are not required to be determined in accordance with the processes and terms of AU1. However some aspects of AU1, such as the Network Management Principles, will still apply to Queensland Rail's passenger services.

1.3 Reasons and justification

An access undertaking is a document which establishes the terms and conditions under which an infrastructure provider is willing to offer or negotiate access with access seekers. An access undertaking seeks to clearly specify the terms and conditions on which access will be made available to parties and provides for the equitable treatment of all access seekers. This is particularly important for infrastructure providers which are vertically-integrated and may be competing with third-party above-rail operators for access, or likely to compete with third-party above-rail operators for access in the future.

While there may be in-principle grounds for requiring Queensland Rail's above-rail services, which only include passenger services, to negotiate access in accordance with the access undertaking, in practice this is not justified in the particular circumstances of Queensland Rail because:

- there is no likelihood that Queensland Rail will operate above-rail freight train services in competition with other providers of these services;
- there is no material likelihood of the emergence of a competing third-party passenger provider in the medium term;
- the allocation of capacity allocation to Queensland Rail's passenger services is determined outside the formal access undertaking process, via the provisions of the *Transport Infrastructure Act 1994* (TIA); and
- the process for determining an access agreement under the undertaking would create additional administrative cost for Queensland Rail, while generating very minimal competitive benefits to users.

The proposed arrangements for Queensland Rail's passenger services are consistent with the arrangements for similar rail business in other Australian jurisdictions, such as Metro Train Melbourne in Victoria, and RailCorp in New South Wales (NSW).

Each of these matters is discussed in further detail below.

1.3.1 *No likelihood of operating above-rail freight train services*

The access arrangements for QR Network, under the 2008AU, required that all QR business groups operating above-rail services negotiate access through the formal access undertaking process. These arrangements were required to address the potential for the business to use its market power to favour its own above-rail operations through access conditions, particularly as this related to its above-rail coal and freight operations.

Queensland Rail is a significantly different business from QR Limited and its related subsidiaries. Queensland Rail is a single legal entity and its primary business activity is the delivery of government services in the form of passenger rail services, rather than the for-profit above-rail services for haulage of coal and bulk freight.

Under Rule 2.1 of Queensland Rail's Constitution, Queensland Rail is limited to only undertaking activities that are within the scope of its objects under the Constitution which are:

'to undertake, either directly or through a subsidiary:

- (a) The provision of rail passenger transport services in Queensland for reward;*
- (b) The planning, development, construction, delivery and ongoing maintenance of rail transport infrastructure to be used for the provision of passenger rail and freight transport services in Queensland, and for the provision of access in (c);*
- (c) The provision of network rail services and access to rail networks owned or operated by the Company or its subsidiaries for reward;*
- (d) The provision of telecommunication services connected with the rail network infrastructure owned or operated by the Company or its subsidiaries;*
- (e) To do all other such acts as are necessary to fulfil the role of a railway manager and railway operator under the Transport Infrastructure Act 1994, and such other roles as may be conferred upon the Company by or under legislation, or under the Company's Statement of Corporate Intent or Corporate Plan, or as required to perform the functions mentioned in (a), (b) or (c); and*
- (f) Anything likely to complement or enhance the functions mentioned in (a), (b) or (c) or that is incidental to the objects set out in this rule 2.1.'*

Queensland Rail is excluded from engaging in any activity that is not within the scope of its objects.

While Queensland Rail can amend its Constitution, in accordance with rule 25 of the Constitution, this requires the prior written consent of its Shareholding Ministers.¹ Any consent is unlikely to be given by Shareholding Ministers without consulting with their respective Government Departments and the QCA.

Beyond the limits to Queensland Rail's objects, even if the business was successful in amending its Constitution to increase the scope of its objects to include above-rail freight services, there are a number of operational impediments. For example, Queensland Rail does not have the capability or rolling stock necessary to operate these services. Queensland Rail would require significant lead time in order to undertake all of the necessary preparatory activities, which amongst other things could include, purchasing rolling stock, obtaining relevant approvals and accreditation, establishing operations and yard facilities, employing suitability qualified and experience staff and contractors, negotiating and executing haulage contracts (in competition with established operators) and arranging associated administrative requirements. The time required to implement these arrangements would likely extend beyond the regulatory period proposed in AU1.

¹ Queensland Rail's Shareholding Ministers are currently Minister for Finance, Natural Resources and the Arts and Minister for Transport and Multicultural Affairs.

1.3.2 No material likelihood of a competing provider of passenger services

There is currently no competing above-rail passenger services operating in Queensland in either the metropolitan or long-distance systems. Queensland Rail provides metropolitan and long-distance passenger services via transport services contracts (TSCs) negotiated between the business and the Queensland Department of Transport and Main Roads. While there are some passenger services provided by third-party providers, including Savannahlander, which operates between Cairns and Forsyth, this service does not directly compete with any of Queensland Rail's existing services.

There also is no significant likelihood of a competing third-party passenger services emerging in the future. This is due to the loss-making character of passenger services and their reliance on significant government support (e.g. via TSC payments). Accordingly the emergence of a third-party passenger operator would be contingent on the operator securing government support and, particularly in respect to the metropolitan network, this would require a significant policy change by the Queensland Government.

1.3.3 Major access parameters for passenger service access are subject to external control

The principal parameters of Queensland Rail's use of its own railway network by its passenger services, with respect to train paths and timetables, are determined outside the access undertaking process. Indeed, Queensland Rail's metropolitan and long-distance passenger train paths and timetables are either priority reserved or preserved by the Department of Transport and Main Road (DTMR) through the TIA.

Under the TIA, Section 266, amongst other matters:

- allows for the Chief Executive (the Director General of DTMR) to identify passenger services requirements for regularly scheduled passenger services (Sections 266 (1) to (3));
- after a railway manager is notified of those passenger service requirements, the railway manager must, when a train path is available to allocate, give priority to the passenger service requirements (Section 266 (4)); and
- in certain instances, the Chief Executive may require a train path that is or will become available to be allocated to a stated passenger service (Section 266 (5C)).

This process of identifying and giving priority to regularly passenger services occurs outside the formal access undertaking process and decision making responsibility for this resides with the Chief Executive, rather than Queensland Rail.

In addition, section 266A of the TIA identifies "preserved train paths" in respect of regularly scheduled passenger services and effectively prevents these train paths from being allocated to non-passenger services, unless agreed to by the Chief Executive (Section 266A (2) and (3)).

With the allocation and preservation of passenger services occurring outside the access undertaking process, the allocation of capacity is reflective of the Government's public transport objectives, rather an exercise of market power by Queensland Rail.

1.3.4 Costly to administer

A requirement for the Queensland Rail's passenger services to gain access through the formal access undertaking process, including the negotiation of internal access agreements, would impose significant administrative costs on the business.

Where (internal) access agreement have been required by the business in the past this required the establishment of separate contract managers and legal advisers for the above-rail and below-rail teams respectively, to negotiate arrangements. The regulatory arrangements also created significant costs associated with the on-going maintenance of these contracts. For example, where changes to passenger timetables were required (e.g. associated with operating additional services during significant events, such as New Years Eve or sporting events), it was necessary for the above and below-rail teams to negotiate a contract variation. In some years as many as 400 variations were required to be negotiated and agreed.

There also are systems which must be maintained to facilitate (internal) access agreement, such as maintaining a billing system to enable the below-rail business to levy access charges to the above-rail passenger services team.

While there may have been clear competitive grounds for requiring QR Limited's above-rail businesses to negotiate access in accordance with the access undertaking, particularly in respect to its above-rail freight services, this is no longer the case. Queensland Rail does not operate above-rail freight services and it is unlikely that a competing third-party above-rail passenger operator will emerge in the future. Accordingly, the potential competitive benefits from applying the formal access undertaking process to Queensland Rail's passenger services is unlikely to outweigh the administrative costs of regulatory compliance.

1.3.5 Precedent in other jurisdictions

The approach proposed by Queensland Rail with respect to its passenger services is consistent with similar rail business in other Australian states.

For example, Metro Trains Melbourne (MTM), which is responsible for operating the below-rail infrastructure for the metropolitan network, along with providing above-rail metropolitan passenger services in Melbourne, is not required to enter into access agreements through its access undertaking for passenger services. This process instead is managed outside the formal access undertaking process.

Indeed, MTM's Franchise Agreement is administered by the Victorian Department of Transport, and provides for access rights to passenger services, with passenger service timetables and service standards determined by the Director of Public Transport. An access agreement, under MTM's Access Arrangement, is therefore only required for access by freight operators and MTM would only be required to enter into (internal) access agreements if it commenced above-rail freight services.

This is also similar to the arrangements for RailCorp in New South Wales (NSW), which provides passenger services through CityRail and access to the below-rail network. While the NSW Rail Access Undertaking, under which RailCorp provides access to its network, does not include specific provisions regarding access agreement for passenger services, in practice access arrangements for CityRail are negotiated outside the formal access undertaking process. Accordingly, it is not necessary for the RailCorp's passenger services to negotiate internal access agreements.

1.4 Fair treatment of third-party access holders

Where a business has assets which are shared across a number of different users, such as below-rail infrastructure used by both passenger and coal and bulk freight operators, it is necessary to be able to demonstrate that costs are managed and allocated appropriately. This is to ensure that some services/customers are not cross-subsidising other services/customers.

As Queensland Rail operates a network which services both passenger services and third-party coal and freight operators, it has developed a Costing Manual which details the approach for determining the below-rail cost base, and further identifying:

- below-rail costs attributable directly to specified line sections;
- below-rail costs not attributable to specified line sections but attributable to specified geographic regions; and
- below-rail costs not attributable to specified line sections or geographic region; and the methodology for allocating these costs to regions.

The boundaries of geographic regions have been developed to generally reflect changes in predominant traffic type, including urban passenger, bulk coal, and containerised freight. However, this is not intended to be related to operator or individual services.

Where the allocation of capacity is provided under different terms and conditions, such as the proposed arrangements for Queensland Rail's passenger services, this can create potential or perceived conflicts regarding fair treatment. This is particularly important for many freight operators moving product to port, where train delays or cancellations can lead to down-stream costs (e.g. demurrage costs).

Queensland Rail's Network Management Principles (NMP) are designed to ensure that operators are treated consistently and transparently in respect of scheduling and on the day of operations. These Principles apply to both Queensland Rail and third-party operators. The NMP includes requirements applicable to the Master Train Plan (MTP) which details the scheduled times for all Train Services and any planned possessions and the Daily Train Plan (DTP) which details the scheduled times for all Train Services operating and any planned, urgent or emergency possessions on a particular day.

Under the NMP, Queensland Rail may modify the MTP, schedule a DTP in variation from the MTP or modify a DTP once it is scheduled in certain circumstances. Generally, where such modifications or variations would result in an access holder's train services not being met, Queensland Rail must either consult with the access holder or seek the agreement of the access holder, subject to certain exceptions – for example, where an Emergency Possession is required after the DTP is scheduled.

In addition to the NMP, Queensland Rail is required to operate in accordance with the Passenger Priority Obligation specified in Section 265 of the TIA. It states that a railway manager must endeavour to bring a passenger service that is delayed back to its scheduled running time, taking into consideration any matters that the railway manager considers relevant.

1.5 Conclusion

Queensland Rail's proposed arrangements with respect to the treatment of the business' passenger services are appropriate in light of the current structure and operations of Queensland Rail.

While there may have been clear competitive grounds for requiring QR Limited's above-rail businesses to negotiate access in accordance with the access undertaking, particularly in respect to its above-rail freight services, this is no longer the case. Queensland Rail does not operate above-rail freight services and in the absence of a third-party competitor, the potential competitive benefits from applying the formal access undertaking process to passenger services is unlikely to outweigh the administrative costs of regulatory compliance. The proposed approach is also consistent with the treatment of passenger services for similar rail businesses in Victoria and NSW.

Attachment 2: PWC Supporting Analysis – Ringfencing Arrangements

Queensland Rail

Ringfencing arrangements

Queensland Rail

*Supporting analysis for
submission to the QCA*

27 March 2012



*What would
you like to grow?*

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1 Introduction

1.1 Background

Queensland Rail commenced business independently from the QR National corporate group on 1 July 2010. Queensland Rail's primary business is the delivery of public transport through the provision of passenger rail services and supporting private freight services through the provision of rail infrastructure.

Since 1 July 2010, Queensland Rail has provided access to its below rail network under QR Network's 2008 Access Undertaking (as at 30 June 2010) to the extent that it was made to apply to Queensland Rail by a transfer notice and project direction (Transfer Notice) dated 29 June 2010 under the *Infrastructure Investment (Asset Restructuring and Disposal) Act 2009* (Qld) (Temporary Undertaking).

In light of the new structure of the business and the approaching expiry of the Temporary Undertaking, Queensland Rail is preparing a draft access undertaking (Queensland Rail Access Undertaking 1 (AU1)) to submit to the Queensland Competition Authority (QCA). AU1 seeks to provide an access undertaking that better suits the operations and requirements of Queensland Rail, whilst preserving the basic process for access seekers to negotiate access terms, and that simplifies the Temporary Undertaking to be better understood by all parties.

1.2 Purpose and approach

Under AU1, Queensland Rail is proposing changes to the ringfencing arrangements of the Temporary Undertaking, adopting a less prescriptive approach. This approach seeks to limit the tangible and intangible costs incurred in complying with ringfencing obligations and is a response to the diminished benefits of stringent ringfencing given changes to the business structure.

The purpose of this paper is to present justification for a more light-handed approach to ringfencing in view of the recent corporate restructure of Queensland Rail, having regard to:

- the nature of Queensland Rail's business; and
- consistency of the proposed arrangements with the ringfencing requirements imposed on similar rail businesses in other Australian jurisdictions.

2 Ringfencing

2.1 What is ringfencing?

Ringfencing refers to the separation of component activities of a vertically integrated business. Ringfencing commonly forms part of the regulatory framework for a business where a part of the business provides a monopoly service to itself and to competing third-party business for the purposes of providing contestable services. This is the case where a vertically integrated rail business provides below-rail services (the monopoly service) both for its own train services as well as competing providers of train services (the contestable services).

Ringfencing requirements are commonly imposed as an element of regulation to reduce the potential for anticompetitive behaviour of the vertically integrated business that may arise from:

- the business providing the monopoly service to other third-party businesses on unfavourable terms so as to limit the ability of these other businesses to compete; and
- the business providing the monopoly service having access to commercial information from the other businesses (such as information on end customers) that it can use for competitive advantage.

Ringfencing requirements are applied with the objective of establishing transparency in the terms of provision of the monopoly service to both internal and competing users of the service and to limit potential for the service provider to gain a competitive advantage through access to commercial information of competitors. Requirements can include some or all of the following:

- *Legal separation* – a requirement for the monopoly service to be provided by a legally-separate entity.
- *Ownership separation* – prohibition of a business providing the monopoly service from also providing the contestable service.
- *Management separation* – restrictions on personnel having management roles across both monopoly and contestable services.
- *Accounting separation* – requirement for the separate financial accounts to be maintained for the parts of the business providing monopoly and contestable services.
- *Restriction on information flows* – Protocols and restrictions for the handling of information relating to competing users of the monopoly service and their customers.

2.2 Determining the appropriate level of ringfencing requirements

The extent and scope of ringfencing requirements depends greatly on the nature of the industry, regulatory requirements and the organisational structure of the business. Ringfencing arrangements should seek to balance competitive benefits against compliance costs for the regulated entity. Indeed, as acknowledged by the QCA:

'while ringfencing can provide benefits in terms of removing potential barriers to competition, it also imposes costs. In particular, it constrains the commercial behaviour of a firm by requiring particular forms of conduct. As such, it is an inherently intrusive activity. Monitoring compliance with ring-fencing arrangements will mean the regulator will require ongoing information about the business'.¹

The degree of prescription in the form of regulation, including how it applies to ringfencing, is typically related to the structure of industry, the degree of market power and the scope for enhancement in competition over time.

For example, a vertically integrated business with significant market power may require a more heavy-handed approach to regulation and ringfencing. A good example of this was the formerly integrated electricity distribution and retail businesses in Queensland, Energex and Ergon. With the introduction of retail competition, these businesses were both vertically and horizontally integrated in the network and retail levels of the industry.

The QCA developed detailed and prescriptive accounting and operational separation rules, which required electricity distribution businesses to be legally separate entities and operate at arm's length from the commonly-owned downstream retail service provider.² This included requirements for accounting separation and the requirement that marketing staff involved in the distribution business are not involved in any other business.³ Energex also established separate Boards, CEOs, management teams and office for the retailing and distribution arms of the business.

The Australian Energy Regulator (AER), which from 1 July 2010 became responsible for ringfencing compliance of participating jurisdictions in accordance with the guidelines developed by the respective jurisdictional regulators, is currently reviewing the appropriateness of these ringfencing guidelines. As part of this review the AER is assessing a range of factors including whether changes to the structure of the National Energy Market mean that ringfencing guidelines are no longer necessary.⁴

¹ Queensland Competition Authority. 2000. *Electricity distribution: ring-fencing guidelines*. September 2000. Pg. 8

² Queensland Competition Authority. 2000. *Electricity distribution: ring-fencing guidelines*. September 2000. Pg. 20

³ Queensland Competition Authority. 2000. *Electricity distribution: ring-fencing guidelines*. September 2000. Pg. 20

⁴ Australian Energy Regulator. 2011. *Electricity Distribution Ring Fencing Guidelines Review: Discussion Paper*. December 2011. Pg. 19-20

3 Temporary and proposed undertaking

3.1 Previous ringfencing arrangements

In 2008 QR Limited undertook a corporate restructure to facilitate the separation of the business' rail infrastructure management from the operation of train services. This included the creation of QR Network Pty Ltd (QR Network), responsible for managing the provision of below-rail services, as a subsidiary of QR Limited and separate from the other QR Limited Operational Business Groups.

As part of that restructure, QR Network's 2008 Access Undertaking (2008AU) was approved by the QCA and QR Limited's access undertaking was withdrawn. QR Network's 2008AU included detailed ringfencing arrangements, including obligations and procedures governing the treatment and disclosure of access seeker/holder confidential information. These arrangements were based on the former structure of the business, and sought to minimise the potential for anti-competitive outcomes that may otherwise be enabled by the vertically-integrated nature of the business.

The ringfencing provisions in the 2008AU specify the following requirements:

- Responsibilities for the different business groups (subsidiaries) and the process for adjusting the business structure (e.g. such as winding up the operations of QR Network, or assigning any below rail functions to another part of the business) (Clause 3.1).
- Requirements for the appropriate treatment of confidential information (Clause 3.3), including provisions regarding the external and internal flows of confidential information, including with respect to:
 - External flows of confidential information – QR Network will avoid a conflict of interest by, for instance, avoiding the appointment of an external advisor/consultant where the same advisor is providing services to the Queensland Rail operational business groups.
 - Internal flows of confidential information – Confidential information may be disclosed to some of the executives, the board and the support staff of the respective entities. With approval from the access seeker/holder, confidential information may be passed on to Queensland Rail services in the areas of property and/or engineering and to QR Services employees in management levels 2, 3 and 4 in relation to Rail Infrastructure issues. A ringfencing register is required to be established to assist in monitoring the flow of information and the parties involved.
- Principles regarding decision making by QR Network when making decisions that could materially or adversely affect a third party access holder/seeker (Clause 3.4). The principles include requirements to ensure that the decision is made by an identified decision maker, the decision is made in a manner that is consistent between access seekers/holders in the same circumstances and either that the decision was required to comply with law, direction by the QCA, QR Network's policies and procedures or the reasons for the decision are documented by QR Network.
- Obligations regarding compliance and enforcement (Clause 3.5), including requirements to notify the QCA when an access seeker/holder lodges a complaint in relation to ringfencing obligations in writing to QR Network,

requirements for the initiation of an investigation, and requirements to audit how confidential information and decision making is treated.

- Requirements for accounting separation (Clause 3.2), including the preparation of financial statements (either consolidated financial statements from QR Network or audited general purpose financial statements) in accordance with the Costing Manual (as approved by the QCA from time to time), which includes:
 - the process for identifying, from QR's audited general purpose financial statements, the cost base for Below Rail Services, separate from other services provided by QR or Related Parties of QR to which those "Financial Statements" relate; and
 - within the cost base for "Below Rail Services", the process for identifying costs attributable to specified line sections (line section costs), costs not attributable to specified line sections but attributable to specified geographic regions (regional costs), and costs not attributable to specified line sections or any specified geographic region (network costs); and
 - the format of "Financial Statements".

Queensland Rail is currently providing access in accordance with the Temporary Undertaking, via the Transfer Notice dated 29 June 2010. Under the Transfer Notice, Clauses 3.1 (relating to organisation structure) and Clause 3.3 (relating to the management of confidential information) of the 2008AU do not apply to Queensland Rail. The ringfencing provisions, which include provisions regarding accounting separation, the preparation of financial statements, decision making and compliance and enforcement, continue to apply to Queensland Rail.

The Transfer Notice also specifies confidentiality requirements with which Queensland Rail is required to comply to protect the confidentiality of information disclosed by access seekers and access holders for the purpose of negotiating an access agreement or under an access agreement.

3.2 Proposed AU1

Under the proposed AU1, detailed ringfencing requirements on the business have not been included.

However, Queensland Rail will maintain separate accounting records in a form approved by QCA for the declared service and in accordance with section 163 of the *Queensland Competition Authority Act 1997* (QCA Act). AU1 also includes provisions for the treatment of confidential information (Clause 2.2). A full extract of the confidentiality provisions of AU1 is provided in Appendix A.

4 Justification for a lower level of ringfencing requirements

4.1 The costs of stringent ringfencing requirements are not warranted

While ringfencing may provide benefits in terms of addressing potential barriers to competition, it also imposes costs. This can include generating administrative costs for the business associated with duplicating systems and personnel and constraining the commercial behaviour of the business by requiring particular forms of conduct.

For example, the ringfencing arrangements under the Temporary Undertaking were based on legal separation, accounting separation and restricted information flows. The introduction of similar arrangements in Queensland Rail would generate substantial and tangible costs for the business, such as accounting and information technology system duplication, with the need for Queensland Rail's below rail activities to have separate systems from the rest of the business. This could also require physical separation of the access team from the business' other functions and the requirement for appropriate security arrangements regarding physical access between the different parts of the business.

Stringent ringfencing could lead to duplication of management and staff, such as requiring separate support staff, management staff or even a separate Board to oversee the business activities as they relate to the below rail activities of the business. Such requirements would create significant additional staffing costs for the business.

Highly prescriptive ringfencing requirements may also slow decision making. Where unnecessary constraints on information flows are imposed, particularly for Queensland Rail's management this may limit opportunities for cooperation between management personnel and impede the ability of the business to operate as a flexible, dynamic and integrated organisation.

Certain aspects of ringfencing may also impose monitoring and compliance requirements, compelling the business to provide on-going information regarding the operations of the business to the regulator. Further, the imposition of redundant ringfencing arrangements may also generate administrative costs for the business associated with meeting these requirements, or applying to the regulator for waivers regarding ringfencing conditions that may be inappropriate for the business.

In considering the extent of ringfencing requirements, it is necessary to balance the potential for administrative costs and disruption to the business against the expected competition benefits.

The ringfencing arrangements that previously applied to QR Limited, which operated above-rail freight services, and which have been expanded for QR Network were intended to address the potential for that business to prevent or

hinder access⁵ to competing third party access seekers to benefit its own (or related party) above rail freight operations.

Queensland Rail, however, is a vertically-integrated *passenger* business. The business does not directly compete with third-parties as an operator of either passenger or freight train services and is not realistically likely to do so during the proposed term of AU1. In particular, Queensland Rail can only undertake activities within the scope of its objects defined by the business' constitution. The business also does not currently compete with any third-party passenger services and there is no material likelihood of a competing provider of passenger services emerging due to the lack of commercial profitability of these types of services and their reliance of government support via transport service contracts.

This substantive change to the nature and structure of the business means there is no incentive for the business to use its market power to limit competition in related markets. Highly prescriptive ringfencing requirements would impose significant costs with very little benefit to users and the State in terms of enhanced potential for competition.

While acknowledging the significant differences in objectives and structure of the current Queensland Rail, as the business operating a network which services both above rail passenger services and third-party below rail freight operators, the business will retain some aspects of ringfencing. These proposed arrangements tailor the ringfencing requirements in accordance with essential elements of transparency with respect to costs and accounting and the handling of commercially sensitive information.

4.2 Consistency with ringfencing arrangements in other jurisdictions

The ringfencing arrangements proposed by Queensland Rail are also consistent with similar rail business in other Australian states.

For example, in Victoria, *Ring Fencing Rules* (the Rules) have been developed under the Victorian Rail Access Regime (VRAR), in accordance with the Victorian *Rail Management Act 1996* (RMA). However, while the Rules are in place they have not been applied to any Victorian access provider as there is currently little vertical integration in the Victorian rail industry.⁶

Metro Train Melbourne (MTM) and V/Line, which are responsible for the operating below rail infrastructure for the metropolitan network and regional networks respectively, along with the provision passenger services, however are still subject to some ringfencing requirements. For instance, MTM's access arrangement includes requirements for Information Handling Protocols. Further, at the commencement of V/Line's access arrangement, the Essential Services Commission (the Commission) decided that ringfencing rules would not apply to V/Line. However, the Commission is able to impose ringfencing obligations after the Commencement Date of the access arrangement, but has not done so to date.

⁵ Where this includes sharing commercial information regarding access seekers with other QR business units, or imposing access charges or access conditions which disadvantage competing third party operators.

⁶ Essential Services Commission. 2010. *Review of the Victorian Rail Access Regime Final Report: Volume II: Detailed Analysis and Discussion of Issues*. February 2010. Pg. 93

In New South Wales (NSW), there are no legislative requirements regarding ringfencing obligations. However, while RailCorp's access undertaking does not include specific ringfencing arrangements, it does impose requirements for the separation of business accounts.

Finally, in Western Australia, ringfencing arrangements⁷ are required under the Western Australian *Railways (Access) Act 1998*. The ringfencing requirements under the Act include:

- protection of confidential information;
- avoidance of conflict of interest;
- duty of fairness; and
- maintenance of separate accounts and records.

The former Western Australian Government Railways Commission (WAGR), now under the control of the Public Transport Authority, is responsible for the provision of urban passenger and also access to the below rail suburban network. While ringfencing obligations still apply to WAGR, these were less restrictive than arrangements which apply to other vertically integrated rail businesses, such as the former WestNet Rail (now Brookfield Rail). In determining the appropriate ringfencing arrangements for the former WAGR, the regulator acknowledged:

- a one-size-fits-all approach to segregation rules, while simpler, may impose undue compliance costs on WAGR, without any likelihood of encouraging other operators to enter the urban passenger transport market; and
- WAGR has a different business focus, and it is unlikely that an operator will enter the Western Australian rail passenger market in the foreseeable future.⁸

Further details regarding the ringfencing requirement for rail businesses in Victoria, NSW and Western Australia is provided in Appendix B.

4.3 Conclusion

Queensland Rail's proposed arrangements with respect to ringfencing are appropriate based on the current structure and operations of Queensland Rail. The business does not directly compete with third-parties as an operator of either passenger or freight train services and is not realistically likely to do so during the proposed term of AU1. Accordingly, highly prescriptive ringfencing requirements, similar to those previously imposed on QR Limited and which have been expanded for QR Network, would not be warranted; such arrangements would impose significant costs with no benefit in terms of increased competition.

⁷ In Western Australia, ringfencing is referred to as segregation. Section 28 of the *Railways (Access) Act 1998* includes requirements for railway owners to make arrangements to segregate its access-related function from its other functions.

⁸ Office of the Rail Access Regulator. 2002. *Segregation arrangements to apply to the Western Australian Government Railways Commission: Determination of the Western Australian Independent Rail Access Regulator*. 6 June 2002. Pg. 9.

However, some elements of ringfencing will continue to apply to Queensland Rail including preparing separate accounting records in accordance with the QCA Act, and provisions in AU1 which detail requirements for the treatment of confidential information. These arrangements are also consistent with the arrangements in place for similar rail business in Victoria, NSW and Western Australia.

Appendix A AU1 Confidentiality provisions

2.2 Confidentiality

2.2.1 Obligation to keep Confidential Information confidential

- (a) Subject to clause **2.2.1(b)**, Queensland Rail and each Access Seeker (by submitting an Access Application) acknowledge, as a Recipient, that Confidential Information disclosed to it must:
 - (i) be treated as and kept confidential;
 - (ii) only be used for the purpose for which it was disclosed;
 - (iii) be treated as the property of the Disclosing Party; and
 - (iv) only be disclosed in accordance with this Undertaking or a confidentiality agreement between the parties.
- (b) A Recipient of Confidential Information is not required to comply with clause **2.2.1(a)** in relation to a disclosure or use of Confidential Information to the extent that:
 - (i) the Disclosing Party has given its written consent (which must not be unreasonably withheld) to that disclosure or use; or
 - (ii) another Confidentiality Exception applies to that disclosure or use.

2.2.2 Requirement for confidentiality agreement

- (a) Either of Queensland Rail or the relevant Access Seeker may require the other to enter into a confidentiality agreement and, if so, the parties must act reasonably and promptly to negotiate and execute such an agreement.
- (b) Neither Queensland Rail nor an Access Seeker is obliged to disclose Confidential Information to the other unless a confidentiality agreement on terms satisfactory to it (acting reasonably) has been executed.

2.2.3 Responsibility for disclosure

If a Recipient of Confidential Information discloses all or part of that Confidential Information to:

- (a) the directors, company secretary, officers or employees of the Recipient or a Related Party of the Recipient; or
- (b) the Recipient's solicitors, barristers, accountants, technical consultants or other advisers;

under a Confidentiality Exception, then the Recipient:

- (c) must use its best endeavours to ensure that person keeps the Confidential Information confidential; and
- (d) is responsible for the actions and omissions of that person in relation to the Confidential Information as though those actions and omissions were the Recipient's.

Definitions

Confidential Information means any information, data or other matter (in this definition, information) disclosed to a Recipient by, or on behalf of, a Disclosing Party where:

- (a) the Recipient knows or ought to know that the information is confidential;
- (b) the information is by its nature confidential; or
- (c) at the time of the disclosure to the Recipient, the information is marked or otherwise indicated as confidential when disclosed,

excluding information that:

- (d) was in the Recipient's lawful possession prior to the disclosure; or
- (e) whether before or after the disclosure:
 - (i) 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
 - (ii) 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 2.2.1(b)(i); or
- (b) any disclosure or use of Confidential Information:
 - (i) to the extent necessary to:
 - (A) the Recipient's directors, officers or employees; or
 - (B) the directors, officers or employees of a Related Party of the Recipient;
 - (ii) to the extent required or compelled by any Law;
 - (iii) to the extent necessary for the conduct of any legal proceedings (including any dispute resolution process under this Undertaking or the QCA Act);
 - (iv) to the extent required under any stock exchange listing requirement or rule;
 - (v) to the Rail Safety Regulator or the QCA;
 - (vi) 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);
 - (vii) 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);
 - (viii) 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;

- (ix) if Queensland Rail is the Recipient, to the shareholding Ministers (as defined in the *Government Owned Corporations Act 1993* (Qld)) of Queensland Rail;
- (x) for the purpose of facilitating Train Control Directions where the disclosure of information is by Queensland Rail in the usual course of undertaking Train Control; or
- (xi) by any person involved in clearing an incident or emergency that is preventing or affecting the operation of Train Services on the Network;

Appendix B Ringfencing provisions of other Australian below rail businesses

Victoria

The Essential Services Commission (the Commission) is the regulator of the Victorian rail industry under the *Rail Management Act 1996* (RMA).⁹ Part 2A of the RMA establishes the *Victorian Rail Access Regime* (VRAR), which came into effect in 1 January 2006.¹⁰

The RMA contains specific provisions relating to the role of the Commission in establishing ringfencing rules, including Section 38S that states:

The Commission must make rules for or with respect to-

- (a) *requiring an access provider to separate its access activities from its other activities as if the access activities are being carried out by a different entity; and*
- (b) *the manner in which the access provider is to effect the separation of its access activities from its other activities as provided for by paragraph (a); and*
- (c) *requiring an access provider that provides declared rail transport services to itself or related bodies corporate, to provide those services on an arm's length basis.*

The Commission has also developed the VRAR *Ring Fencing Rules* (the Rules) in accordance with RMA to facilitate competitively neutral access to regulated-below rail services. The Rules allow for the Commission to require an access provider to:

- (a) *establish an internal organisational structure in which the business unit responsible for providing regulated below rail services is separate from the access provider's above rail business and other activities; and*
- (b) *ensure that the below rail business unit conducts its business activities at arm's length to the above rail businesses, including with respect to the provision of services to the above rail businesses.*

The Rules specify ringfencing obligations in respect of:

- the separation of access activities from other activities
- the provision of declared rail transport services by an access provider to itself or a related body corporate
- the establishment and maintenance of policies, procedures and systems to ensure compliance with the Rules

⁹ The *Rail Corporations Act 1996* was changed to the *Rail Management Act 1996* by section 200(1) of the *Transport Integration Act 2010*.

¹⁰ Essential Services Commission 2010, *Review of the Victorian Rail Access Regime Final Report: Volume I Findings and Recommendations*, February.

- the manner in which separation of access activities from other activities is to be effected.

In February 2010, the Commission, under instruction from the Minister for Finance, conducted an independent review into the effectiveness and applicability of VRAR considering the current and likely future structure of the industry.

In this review the Commission acknowledged that while the Rules are in place, they have not been applied to any access providers as there is currently little vertical integration in the Victorian rail industry. The Commission considered that the regime could include a statutory requirement for access providers to maintain separate accounting records for access activities, and provide the ability for the Commission to make Ring Fencing Rules, but need not make the establishment of those rules mandatory.¹¹

The Commission recommended that:

The current statutory requirement for the Commission to issue Account Keeping Rules and Ring Fencing Rules should be replaced by:

- *statutory obligations for access providers to maintain separate accounting records for access activities*
- *an ability for the Commission to make record keeping guidelines including specifying appropriate cost allocation principles and the form of annual regulatory accounts (or Ring Fencing Rules if an access provider were to become a vertically integrated freight rail operator), and*
- *statutory obligations for access providers to provide financial records to the Commission in accordance with the Guideline.*

To date there has been no formal response by the Victorian Government to the review's findings and recommendations.

The application of ringfencing arrangements to V/Line and Metro Train Melbourne (MTM) is summarised in Table 1 below. V/Line is the below rail provider for the Victoria regional network, which also operates regional passenger services, while MTM is the below-rail access provider for the Victorian metropolitan rail network, which also operates above rail passengers services.

¹¹ Essential Services Commission. 2010. *Review of the Victorian Rail Access Regime Final Report: Volume II Analysis and Discussion of Issues*. February 2010. pg. 93

Table 1 – Ringfencing arrangements by rail businesses in Victoria

Rail Entity	Ringfencing provision
V/Line (Vic)	<p>At the commencement date of V/Line’s access arrangement, the Commission decided that the ringfencing rules would not apply to V/Line. However, Part 8 of the access agreement includes provisions regarding the treatment of access seeker information, training for staff regarding ringfencing and a dispute resolution process where the business does comply with the V/Line’s obligations under the RMA regarding confidential information.</p> <p>The Commission is also able to impose ringfencing obligations on the V/Line after the Commencement Date of the access arrangement (Subclause 8.1.b, Part 8), but has not done so.</p>
Metro Trains Melbourne (Vic)	<p>MTM's 2011 access arrangement does not include provisions relating specifically to ringfencing arrangements.</p> <p>Clause 4.2 requires that any proposed variation to access arrangements should be consistent with account keeping rules, ringfencing rules and other associated rules and guidelines. However, there are no specific rules regarding ringfencing specified in the access arrangements.</p> <p>While the access arrangement does not include specific requirement regarding ringfencing, Attachment H of MTM's 2011 access arrangement contains an Information Handling Protocol.</p> <p>The Information Handling Protocol, developed in accordance with the requirements of the RMA and VRAR instruments, describes the system and business rules regarding the use and disclosure of confidential information (Clause 4.2 and 4.3)</p>

New South Wales

Schedule 6AA of the *Transport Administration Act 1988* (NSW) provides for a rail infrastructure owner in New South Wales to establish an access undertaking, subject to the approval of the relevant Minister according to a broad criterion of the “public benefit” of the undertaking..

The Act does not include specific requirements for ringfencing.

RailCorp is owned by the NSW Government and operates passenger rail services throughout the Sydney metropolitan, outer-urban, and regional areas. RailCorp also owns and maintains the metropolitan rail network and provide access to freight operators in the area and is regulated by IPART.

RailCorp’s Access undertaking does not include specific ringfencing arrangements. However, it does impose requirements for the separation of business accounts. For example, clause 7.5 stipulates the need to maintain separate business accounts for any elements of the business which do not relate to:

- (a) *The holding, management and establishment of the NSW Rail Network for Rail Operations; or*
- (b) *The provision of access pursuant to this Access Undertaking.*

Western Australia

The Rail Access Regime in Western Australia comprises the *Railways (Access) Act 1998* and the *Railways (Access) Code 2000*. The *Railways (Access) Act 1998* was enacted to establish a rail access regime that would encourage the efficient use of, and investment in, railway facilities by facilitating a contestable market for rail operations within Western Australia. The Act confers on the regulator, currently the Economic Regulation Authority, monitoring, enforcement and administration functions for the implementation of the Rail Access Regime. The development of the *Railways (Access) Code 2000* was a requirement of the Act.

Section 28 of the *Railways (Access) Act 1998* requires that railway owners to make arrangements to segregate (ringfence) its access-related functions from its other functions and to have appropriate controls and procedures to ensure that the arrangements in place operate effectively and are being complied with. Further under Section 29 of the Act, these arrangements must be approved by the regulator.

The *Railways (Access) Act 1998* also detailed those matters to be covered as part of a duty to segregate, and include:

- protection of confidential information – to protect access seeker’s confidential information and prevent its improper use or disclosure (Section 31);
- avoidance of conflict of interest – to ensure no conflicts in duties between the performance of access-related functions and other business activities by the rail owner (Section 32);
- duty of fairness – to ensure that officers must not have regard to the interests of the railway owner in a way that is unfair to access seekers or other rail operators (Section 33); and
- maintenance of separate accounts and records – to ensure that all accounts and records regarding access related functions are properly recorded and distinguished from the railway owner’s other accounts and records (Section 34).

In Western Australia, the former Western Australian Government Railways Commission (WAGR), now under the control of the Public Transport Authority, was responsible for the provision of urban passenger services. The business was also the railway owner for the Western Australian suburban rail infrastructure and had management and control over the use of that railway infrastructure.

In 2002, in accordance with Section 28 of the *Railways (Access) Act 1998*, the then WAGR submitted its proposed segregation rules to the regulator.

In considering WAGR proposed segregation rules, the regulator acknowledged:

- a one-size-fits-all approach to segregation rules which applies to other rail infrastructure providers, such as WestNet Rail, now Brookfield Rail,¹² while simpler, may impose undue compliance costs on WAGR, without any likelihood

¹² WestNet Rail, now Brookfield Rail, is the railway owner of around 5,000 kilometres of track in the south-west of Western Australia. In accordance with the Rail (Access) Code 2000, certain parts of WestNet’s rail network are to be made available for access by third party rail operators.

of encouraging other operators to enter the urban passenger transport market;¹³

- WAGR has a different business focus, and it is unlikely that an operator will enter the rail passenger market in the foreseeable future.¹⁴

The regulator, while determining that some segmentation conditions were necessary to comply with the requirement under the Act, was more lenient regarding certain segmentation arrangements, including allowing for staff from rail operating divisions to be seconded to the network team, and not requiring the Network team to commit to being self sufficient for regulatory accounting, access pricing and revenue management.¹⁵

¹³ Office of the Rail Access Regulator. 2002. *Segregation arrangements to apply to the Western Australian Government Railways Commission: Determination of the Western Australian Independent Rail Access Regulator*. 6 June 2002. Pg. 8.

¹⁴ Office of the Rail Access Regulator. 2002. *Segregation arrangements to apply to the Western Australian Government Railways Commission: Determination of the Western Australian Independent Rail Access Regulator*. 6 June 2002. Pg. 9.

¹⁵ Office of the Rail Access Regulator. 2002. *Segregation arrangements to apply to the Western Australian Government Railways Commission: Determination of the Western Australian Independent Rail Access Regulator*. 6 June 2002. Pg. 7.

Attachment 3: PWC Supporting Analysis – Capacity Allocation

Queensland Rail

Capacity allocation

Queensland Rail

*Supporting analysis for
submission to the QCA*

28 March 2012



*What would
you like to grow?*

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1 Introduction

1.1 Background

Queensland Rail commenced business independently from the QR National corporate group on 1 July 2010. Queensland Rail's primary business is the delivery of public transport through the provision of passenger rail services and supporting private freight services through the provision of rail infrastructure.

Since 1 July 2010, Queensland Rail has provided access to its below rail network under QR Network Pty Ltd's (QR Network) 2008 Access Undertaking (as at 30 June 2010) to the extent that it was made to apply to Queensland Rail by a transfer notice and project direction (Transfer Notice) dated 29 June 2010 under the *Infrastructure Investment (Asset Restructuring and Disposal) Act 2009* (Qld) (Temporary Undertaking).

In light of the new structure of the business and the approaching expiry of the Temporary Undertaking, Queensland Rail is preparing a draft access undertaking (Queensland Rail Access Undertaking 1 (AU1)) to submit to the Queensland Competition Authority (QCA). AU1 seeks to provide an access undertaking that better suits the operations and requirements of Queensland Rail, whilst preserving the basic process for access seekers to negotiate access terms. AU1 also seeks to provide a simplified undertaking that can be better understood by all parties.

1.2 Purpose and approach

Under AU1, Queensland Rail has removed the queuing provisions of the Temporary Undertaking and replaced these provisions with a light-handed, principles-based approach to capacity allocation. This approach seeks to reduce the administrative processes of managing a formal queue, while still providing access seekers with guiding principles for how applications for competing access rights will be assessed.

The purpose of this paper is to review Queensland Rail's approach in AU1 having regard to:

- the nature of Queensland Rail's business;
- the likely impact the proposed approach will have on Queensland Rail and access seekers; and
- consistency of the proposed approach with mechanisms of capacity allocation applied by similar below rail providers.

2 Current and proposed provisions for capacity allocation

2.1 Temporary Undertaking

2.1.1 Background

Prior to 2008, QR Limited provided below and above rail services, including above rail freight operations. In 2008, the business was separated into a number of legally separate subsidiaries, including QR Network Pty Ltd (QR Network) which operated the below rail infrastructure, QR Passenger Pty Ltd (QR Passenger) which operated the passenger business and QR National which provided above rail freight and haulage services, particularly to Queensland coal mines. The business structure was implemented to facilitate the separation of the management of below rail assets from the operation of train services.

QR Network's 2008 Access Undertaking (2008AU) was approved by the QCA in 2008. The 2008AU was developed based on the structure of QR Network, and in light of the overall operations of QR Limited, which included the provision of above rail freight services.

Queensland Rail commenced business as a vertically integrated business, independent from the QR National corporate group on 1 July 2010. Since 1 July 2010, the business has provided access to its below rail network in accordance with the Temporary Undertaking. Many of the provisions of the 2008AU developed for QR Network, including the arrangements for capacity allocation, therefore have continued to apply to the business.¹

2.1.2 Capacity allocation provisions

Part 4 and Part 7 of the Temporary Undertaking include provisions for the allocation of capacity via a queuing mechanism.

The queuing mechanism is used as a method for managing negotiations for access when two or more parties seek mutually exclusive access rights.

Under Part 7, access rights will be allocated to the first access seeker with whom Queensland Rail can negotiate and execute an acceptable Access Agreement (clause 7.4.1(a)). However, where competing access applications are received, Queensland Rail is required to negotiate with each of the competing access seekers to see if any are willing to modify their requirements in order to allow all access applications to be accommodated (clause 7.4.1(c)).

¹ The Transfer Notice, dated 29 June 2010, provides for the 2008AU to apply to Queensland Rail. However, the Transfer Notice has detailed specific provisions of the 2008AU which do not apply to Queensland Rail, such as clauses 2.2(d), 2.2(f) to (i), 2.5, 3.1 and 3.3.

If this is not possible:

- a queue will form when two or more access seekers seeking to negotiate mutually exclusive access rights notify Queensland Rail of their intention to progress their applications as outlined in clause 7.4.1(c)
- the initial order of the queue will be determined taking into account whether the application was made before, or after 30 June 2006. In particular, clause 7.4.1(d) states:
 - (i) *where the Access Application was lodged prior to 30 June 2006, application by [Queensland Rail] of the principles for allocation of capacity specified in Subclause 7.4.1 of the 2001 Undertaking (with the initial order of priority in the queue of such Access Applications being determined in accordance with how favourable each Access Application is in terms of the commercial performance of Below Rail Services such that, for example, the first queue position is given to the Access Application most favourable in terms of the commercial performance of Below Rail Services); and*
 - (ii) *where the Access Application was lodged on or after 30 June 2006, the date on which [Queensland Rail] received the relevant Access Applications, so that the Access Application received by [Queensland Rail] at the earliest time is first in the queue, and the Access Application received next by QR Network is second in the queue, and so on, provided that any such Access Applications will be placed after any Access Applications referred to in Subparagraph 7.4.1(d)(i).*

Once the queue is established Queensland Rail may change the order of the queue in accordance with the circumstance specified in clause 7.4.1(e) including, for example, where:

- Queensland Rail reasonably considers an access seeker has no genuine intention of obtaining access rights (clause 7.4.1(e)(ii));
- Queensland Rail reasonably considers the commercial performance of below-rail service (e.g. the net present value of the contribution to common costs) is better served by allocating access to an access seeker who is not necessarily first in the queue (clause 7.4.1(e)(iii));
- it is acting in accordance with specific principles contained in the Temporary Undertaking that relate to the allocation of capacity for two or more access applications of the same traffic type (clause 7.4.1(e)(iv)); or
- a new Access Application is added to the queue (clause 7.4.1(e)(v)).

Part 4 also includes provisions for how disputes, where parties are unable to determine mutually satisfactory outcomes, will be treated should any arise during the negotiation period (clause 4.5.2(i) and clause 4.7).

2.2 Proposed AU1

Part 2 of the proposed AU1 establishes the negotiation process for access seekers, including the provisions for access seekers competing for access rights.

Clause 2.7.2 of the proposed AU1 states:

(a) *If:*

- (i) two or more Access Seekers are seeking Access Rights; and*
- (ii) the grant of Access Rights to one or more of those Access Seekers would result in Access Rights not being able to be granted to the other Access Seekers,*

then Queensland Rail will:

- (iii) notify each of those Access Seekers as soon as practicable after it becomes aware of that circumstance; and*
- (iv) subject to clauses 2.7.2(b) and (c) and clause 2.7.3 enter into an Access Agreement with the Access Seeker who is ready and willing to execute an Access Agreement with Queensland Rail which, in the opinion of Queensland Rail (in its absolute discretion), is the most favourable to Queensland Rail based on:*
 - (A) the Access Charges that are expected to arise from the Access Agreement;*
 - (B) the cost and risk to Queensland Rail of providing Access Rights in accordance with the Access Agreement;*
 - (C) the ability of the Access Seeker to satisfy and to continue to satisfy the prudential requirements set out in clause 2.9.1;*
 - (D) the term of the Access Agreement; and*
 - (E) any other effects that entering into the Access Agreement may have on Queensland Rail's financial and risk position.*

The proposed capacity allocation provisions remove the requirement for the business to manage a formal queue, and associated administrative tasks, such as notifications to access seekers, adjustments to the queue following changes in the circumstances of access seekers, and providing justification regarding changes to the queue where requested by access seekers.

The proposed provisions also allow for the business to execute an access agreement with an access seeker that is most favourable to Queensland Rail, having regard to a number of factors, including the access charges which are expected to arise for the access agreement.

3 Reasons and justification

Capacity allocation frameworks in access undertakings are designed to allocate scarce capacity amongst competing users. The overriding principle for capacity allocation is to provide access seekers with certainty regarding the process and criteria for the allocation of capacity, and ensure that all access seekers are treated fairly and in a non-discriminatory fashion. This is particularly important for vertically-integrated infrastructure providers that may be competing with third-party above rail operators for capacity or likely to compete with above rail operators for capacity in the future. Where this exists, there may be incentive for the business to discriminate in favour of its own operator.

The structure and operation of Queensland Rail is different from QR Limited and its related subsidiaries, which operated above rail freight services as well as below-rail infrastructure. Accordingly, while the queuing provisions of the AU2008 were arguably required to ensure transparency regarding capacity allocation by QR Network, this is no longer relevant as Queensland Rail is not competing directly with any above-rail operator and the allocation of capacity to Queensland Rail's passenger services is managed in accordance with the requirements under the *Transport Infrastructure Act 1994* (TIA).

The queuing mechanism also is not relevant to Queensland Rail given the nature of its customers, which less homogenous than the customers the QR Network. The absence of capacity on certain systems also significantly limits the conditions under which capacity is likely to become available.

In the absence of this anti-competitive risk and due to the limited relevance of a time-based queue to Queensland Rail, there are grounds for a simpler and less administratively costly approach which still achieves the principles of capacity allocation; that is, certainty regarding the process and criteria for capacity allocation, and equitable treatment of all access seekers.

The proposed arrangements for Queensland Rail's capacity allocation processes are also consistent with similar rail business in other Australian jurisdictions.

These matters are discussed in further detail below.

3.1 No anti-competitive risk

The Temporary Undertaking of Queensland Rail sets out detailed queuing provisions that allow Queensland Rail, under certain circumstances, to reorder the queue. The queuing arrangements in the Temporary Undertaking were first introduced by QR Limited in their 2006 Access Undertaking to provide access seekers with certainty regarding obtaining access rights, particularly in light of the potential conflict of interest where the business operated its own above rail operations and may have to decide whether to allocate capacity to its own above rail operator or a competing third-party operator.²

² QCA. 2005. *Decision – QR's 2005 Draft Access Undertaking*. December 2005. Pg. 169.

Queensland Rail, however, is a vertically-integrated passenger business. The business does not directly compete with third-parties operating above rail freight train services and is not realistically able to do so during the proposed term of AU1. Queensland Rail can only undertake activities within the scope of its objects defined by the business' constitution.³

There also are no competing above-rail passenger services currently operating in Queensland in either the metropolitan or long-distance systems and there is no significant likelihood of a competing third-party passenger services emerging in the future. This is due to the loss-making character of passenger services and their reliance on significant government support (e.g. via transport service contract payments). Accordingly the emergence of a third-party passenger operator would be contingent on the operator securing government support and, particularly in respect to the metropolitan network, this would require a significant policy change by the Queensland Government.

Further, Queensland Rail operates above rail passenger services in accordance with the transport service contract arrangements negotiated between the Queensland Government and Queensland Rail. The train paths and timetables for passenger services are either given priority as a passenger service requirement as determined by the Director General of the Department of Transport and Main Roads (DTMR) under the *Transport Infrastructure Act 1994* (TIA) or use preserved train paths as defined by the TIA. Queensland Rail, therefore, does not allocate spare rail network capacity to its passenger services in competition with third party operators.

In particular, Section 266 of the TIA allows for the "Chief Executive" (the Director General of DTMR) to identify "passenger service requirements" in relation to regularly scheduled passenger services. Once those passenger service requirements are notified to Queensland Rail, Queensland Rail is required to give priority to the allocation of available train paths to satisfy those passenger service requirements (Section 266 (4)). In certain circumstances, Queensland Rail may be required by the Chief Executive, where a train path used by regularly scheduled passenger services is or becomes available, to allocate that train path to a stated passenger service (Sections 266 (5C)). This process of identifying and reserving capacity for passenger services occurs outside the formal access undertaking process and decision making responsibility resides with DTMR, rather than Queensland Rail.

In addition, section 266A of the TIA identifies "preserved train paths" relating to regularly scheduled passenger services and prevents these train paths from being allocated to non-passenger services, unless agreed to by the Chief Executive (Sections 266A (2) and (3)).

In the instance that a competing above rail third-party passenger operator entered the market, and such a scenario was contingent on the receipt of transport services contract payments, it would be expected that arrangements for the allocation of capacity would also be determined in accordance with the provisions of the TIA.

³ Under Rule 2.1 of Queensland Rail's Constitution, Queensland Rail is limited to only undertaking activities that are within the scope of its objects.

The allocation of rail capacity to Queensland Rail's passenger services, therefore, reflects the Government's public transport objectives, rather than any commercial decision of Queensland Rail. The effect of these arrangements with respect to capacity for passenger services is that while Queensland Rail technically is a vertically integrated business with both above rail and below rail activities, the business is effectively acting as a non-vertically integrated access provider in respect to third party access to its rail network.

3.2 Limited relevance to Queensland Rail's operations

The relevance of any queuing framework is also linked to capacity availability. The nature of appropriate queuing arrangements may differ based on whether there is available capacity, but competing request for access, or where there is no capacity available, and additional capacity is subject to the expansion of the rail network.

These matters are discussed further below.

3.2.1 *Competing requests for access*

There is no basis for applying a queuing framework to the systems on Queensland Rail's network where capacity exists as access is available to those users willing and able to negotiate access in accordance with the existing commercial terms.

In the event that more than one access seeker contemporaneously seeks access to capacity which is insufficient to meet both (or more) parties' requirement, a time-based queue does not provide the most efficient mechanism for managing this situation. This is due mainly to the diverse mix of general freight customers and coal customers serviced by Queensland Rail, compared to QR Network (which predominately serviced coal customers, with very similar commercial characteristics in terms of cost and risk). For Queensland Rail's customers, there is a much greater likelihood of differences in commercial outcomes, associated with cost and risk, particularly for non-reference train services.

Under the capacity allocation arrangement of the Temporary Undertaking, the business would be required to constantly adjust the queue in accordance with circumstances specified in clause 7.4.1(e) of the Temporary Undertaking.

AU1 therefore takes a principles-based approach which allocates capacity to access seekers based on a number of factors including the access charges which are expected to arise and the cost and risk associated with providing access (clause 2.7.2(a)(iv)).

3.2.2 *No capacity availability*

For systems where there is no available capacity, the arrangements for creating more capacity can be costly and complex, and link to how the costs of expanding capacity are distributed across users.

Queuing frameworks are particularly relevant where there is a clear process around making additional capacity available through infrastructure expansions and this is linked directly to the establishment of reference tariffs/access charges.

Dalrymple Bay Coal Terminal (DBCT), for instance, has a formal queue mechanism in place, generally consistent with the principle of first-in-time, first-in-right, though subject to certain conditions.⁴ Under the applicable access undertaking as the costs of access are the same for all users, including new/potential users, expansion costs are socialised across the total terminal customer base. A formal queue mechanism provides a transparent way to allocate capacity between different users with otherwise equal commercial terms (i.e. there is no way to meaningfully contrast the 'cost' or 'risk' of providing access to different access seekers).

In the case of Queensland Rail, the costs associated with rail capacity expansions are managed differently. For example, there is currently no available capacity on the West Moreton system, and any increase in rail capacity would require significant capital expenditure to fund mainline expansions. The reference tariff for the West Moreton system does not support significant expansions to the system, associated with the duplication of certain segments of the system.

Accordingly, where Queensland Rail is not willing to fund a capacity expansion of the system, this would only occur if an access seeker, or group of access seekers, proposed to fund the expansion. In this situation a queue is not relevant to how capacity is allocated and provides little additional certainty to the access seekers, as the allocation of capacity relates to the user(s) willingness to pay to expand capacity, rather than their position in the queue. That is, under the current arrangement if an access seekers was at the start of the queue, but was unwilling to fund the expansions and there was another access seeker further back in the queue who was willing to fund the expansion, capacity would be allocated to the user willing and able to fund the expansion rather than the user at the front of the queue. A queuing mechanism in this scenario is therefore irrelevant.

3.3 Remove the cost and complexity of managing queues

AU1 is guided by a principle of ensuring the benefits of the access undertaking, in terms of the certainty and guidance it provides to access seekers, do not exceed the cost to Queensland Rail of administering the access arrangements. It also is guided by the principle of reducing the complexity of, and unnecessary detail in the access undertaking, and seeks to provide greater flexibility for Queensland Rail and access seekers to negotiate access terms appropriate for the particular circumstances of each system and access seeker.

Under the queuing provisions of the Temporary Undertaking, the management of the queue encompasses a number steps:

- Establishment of the queue:
 - For applications lodged prior to 30 June 2006, the first queue position is given to the access application most favourable in terms of the commercial performance of below rail services.

⁴ For example, in the 2010 Draft Access Undertaking for DBCT, the queuing arrangements included the condition that where access seekers agree to provide feasibility funding for expansions, they will take priority in the queue at that point in time (however the overall sequence of the queue does not change). (Queensland Competition Authority, 2010. *Final Decision – Dalrymple Bay Coal Terminal: 2010 Draft Access Undertaking*. September 2010. Pg. 22.)

- For applications lodged on or after 30 June 2006, the queue order is initially based on the lodgement date of the application.
- Maintenance of the queue – Once the queue is established, there are a range of circumstances which if satisfied permit the business to re-order the queue. This could, for example, occur where the business considers the commercial performance of below rail services is better served by allocating access to an access seeker who is in the queue but not currently first in the queue, or where a new access application is added to the queue.
- Where the commercial performance of below rail services is relevant to the re-ordering of the queue, assessing the ability of an access seeker to contribute to the commercial performance of below rail services – This process involves comparing the net present value (NPV) contribution to the common costs of providing rail infrastructure for the total haul for the different traffics subject to the different access applications in the queue. In certain instances, where differences in the NPV contribution to common costs between different traffics exceed a threshold amount, the business may alter the ordering of the queue.
- Notification process – where the business changes the order of the queue it is necessary for the business to notify each access seeker in the queue of any change to the position of their access application in the queue and advise on the reasons for the change.

For QR Limited, these queuing arrangements were more suitable as the majority of access seekers reflected one major freight type (i.e. coal), particularly for the central Queensland coal network, and there were minimal differences in commercial characteristic of access arrangements, thereby removing the requirement to constantly reorder of the queue.

Queensland Rail, however, services a diverse mix of general freight customers and coal customers. Continuing to be subject to the queuing arrangements under the Temporary Undertaking would result in the business continuously reviewing and, potentially, adjusting the queue; creating unnecessary administrative activities and costs for the business, which do not provide any real benefits for access seekers.

AU1 therefore takes a principles-based approach, which will remove the requirement and associated costs of managing a queue. These costs are no longer warranted in the absence of anti-competitive risk and due to limited relevance of the queue given the current circumstances of Queensland Rail with respect to capacity availability.

3.4 Consistency with capacity allocation arrangements in other jurisdictions

Queensland Rail's proposed capacity management framework are consistent with the capacity allocation frameworks in place by other below rail providers in Australia, which allow capacity to be allocated to the freight access seeker which in the business' opinion, is most favourable, or will best utilise the available capacity.

For example, Metro Train Melbourne (MTM)⁵ does not have a formal queuing mechanism in place and access requests for competing freight services are determined on the basis of whether the access seeker provides the greatest utilisation of the network. V/Line⁶ also allocates capacity on the basis of which access seeker provide the greatest utilisation of the network.

There are also no queuing provisions in Australian Rail Track Corporation's (ARTC's) 2008 Interstate Access Undertaking. ARTC has the ability to allocate capacity to the Access Seeker that, in ARTC's opinion, is most favourable to ARTC and subject to commercial criteria.

Further details regarding the capacity allocation provisions for MTM, V/Line and ARTC is provided in Appendix A.

3.5 Conclusion

The capacity allocation provisions proposed by Queensland Rail for AU1 are appropriate for the purposes of their new access arrangements, on the basis that proposed the arrangements continue to provide certainty for the access seeker regarding the factors which will be considered in allocating capacity between competing access seekers, while removing the administrative costs to Queensland Rail associated with managing a queue, which has little relevance, or benefits in terms of competition, under the new business structure.

⁵ Metro Train Melbourne is an access provider for the Victorian metropolitan rail network. It also provides suburban/metropolitan above rail passenger services.

⁶ V/line is a provider of rail access for the Victorian regional rail network. It also operates above rail passenger services across regional Victoria.

Appendix A Capacity management provisions of other below rail infrastructure providers

Metro Trains Melbourne

Metro Trains Melbourne (MTM) is an access provider for the Victorian metropolitan rail network. The business is regulated by the Essential Services Commission (ESC) and is currently operating under an access arrangement approved by the ESC which commenced 24 August 2011 and will expire on 1 July 2016.

The Capacity Allocation Protocol (Attachment F of the MTM Access Arrangement⁷) outlines MTM's approach to the allocation of available Train Paths. There are no queuing provisions in the protocol. Competing access requests are assessed on the basis of providing access to an operator a passenger service in priority to a freight service and, for competing freight services, to the access seeker that provides the greatest utilisation of the network. Specifically, Section 5 (Assessment of a request to provide a declared rail transport service) states:

- 5.3 *Where there is more than one application for an Unscheduled Train Path the Access Provider must make a determination as follows:*
- a) *Determine whether an alternative Unscheduled Train Path would satisfy the access requirements of any of the applications, consistent with the concept of passenger priority; then*
 - b) *Secondly, should an alternative Unscheduled Train Path not be available, allocate the Unscheduled Train Path to a Third Party Operator wishing to run Passenger Trains; then*
 - c) *Thirdly, allocate the Unscheduled Train Path to the future Third Party Operator or Operator wishing to run freight Trains with the greatest utilisation of the Network.*
- 5.4 *In determining "greatest utilisation" the Access Provider will consider relevant factors including:*
- a) *The duration of use of the Train Path;*
 - b) *The frequency of use of the Train Path;*
 - c) *The aggregate tonnage of the freight services; and*
 - d) *In the event that there is more than one application for the same Unscheduled Train Path where each application is associated with servicing the same freight task, any contractual commitment that the Operator seeking access can demonstrate.*

These provisions seek to ensure that no Train Path will be allocated to a freight operator that conflicts with the concept of passenger priority. It also allows the access provider the ability to allocate capacity to the freight operator that will

⁷ Metro Trains Melbourne, 2011. *Access Arrangement – 24 August 2011.*

provide the greatest utilisation of the Train Path. Section 6 of the MTM Access Arrangement provides a description of the required degree of utilisation and further requirements of the access provider in this process.

V/Line

V/Line Passenger Pty Ltd (V/Line) is a provider of rail access services in regional Victoria. V/Line's access arrangements are regulated by the ESC. V/Line's current access arrangement was approved by the ESC in June 2009 and expires on the third anniversary of the commencement date.

Under clause 5.3(c) of the V/Line Access Arrangement⁸, if two Operators require the same Available Path, priority will be determined in accordance with the Operating Handbook.

The Operating Handbook⁹ sets out the Network Services Department (NSD) capacity allocation principles and network management protocols for Access Seekers/Train Operators to access the NSD network. There are no queuing provisions for Access Seekers. Part 3 (NSD capacity allocation and network management) provides that capacity allocation is carried out in a manner that is consistent with the principle of passenger priority and in a way that will encourage maximum use of the network. Specifically:

If the NSD assessment determines that there is insufficient Available Capacity to satisfy the Access application NSD shall:

- a) attempt to find an alternative Train Path that satisfies the requirements of the Access Seeker; and*
- b) make an assessment of whether part of the Access Seeker's request can be satisfied with Available Capacity; and*
- c) provide a written explanation to the Access Seeker within 24 hours of the receipt of the Access application as to why the Access Seeker's request could not be satisfied in full showing the Available Capacity of the Line and the existing Scheduled Train Paths on the Line which conflict with the Access application.*

If two or more Access Seekers request the same available Freight Train Path and if it is not possible to satisfy all requests by using alternative similar Train Paths, NSD will be obliged to allocate the available Train Path to the Access Seeker from which the greatest Utilisation of the Network is achieved by operating the freight service. NSD's judgment of greatest Utilisation will consider the following aspects that are listed in order of importance:

- a) frequency of Train Path usage;*
- b) aggregate tonnage comparison;*
- c) duration of Train Path usage.*

⁸ V/Line Passenger Pty Ltd, 2009. *Access Arrangement*, 17 June 2009.

⁹ V/Line, 2009. *Network Services Department- Track Access Operating Handbook*, Revision 08, 5 August 2009.

NSD will not require Access Seekers to identify consignees as part of the assessment process. NSD will provide written advice to the Access Seekers outlining the judgment made based on the assessment of the Utilisation benefits.

This approach is similar to the approach of MTM, in that the access provider is required to allocate capacity first to a passenger operator and, then for competing freight operators, to the freight operator (Access Seeker) that will provide the greatest utilisation of the Train Path.

Australian Rail Track Corporation Limited

The Australian Rail Track Corporation Limited (ARTC) was established as the entity to manage the granting of access to rail operators to the Interstate Rail Network. It is regulated by the Australian Competition and Consumer Commission (ACCC). The current access undertaking for the interstate network was approved by the ACCC in July 2008 and applies for a 10 year term.

Clause 5.2 provides for the allocation of capacity where competing access applications for access exist.¹⁰ The clause states:

- (a) *In the event of multiple Applicants and subject to clause 5.2(b), Access Rights will be allocated to the Applicant with whom ARTC can negotiate and execute an Access Agreement which, in the opinion of ARTC, is most favourable to it.*
- (b) *As previously stated in this Undertaking (Clause 3.10(b)(d)), if, at any time, two or more Applicants are seeking access with respect to mutually exclusive Access Rights, each of the Applicants who have received an Indicative Access Proposal with respect to those mutually exclusive Access Rights will be so advised. In such circumstances, ARTC is entitled to seek to finalise an Access Agreement in respect of such Access with the Applicant with whom ARTC can agree terms and conditions, including Charges, which are considered in the opinion of ARTC, to be most favourable to it. Ordinarily, but without limiting ARTC's discretion in this regard, ARTC would make such a decision based on the Access Agreement that represented the highest present value of future returns to ARTC after considering all risks associated with the Access Agreement.*

ARTC does not have a queuing arrangement for capacity allocation in its Interstate Access Undertaking. ARTC has the ability to allocate capacity to the Access Seeker that, in ARTC's opinion, is most favourable to ARTC – presumably on commercial criteria.

¹⁰ ARTC, 2008. *ARTC Interstate Access Undertaking*, 15 July 2008.

In the ACCC Final Decision of ARTC's Access Undertaking (Interstate Rail Network) in 2008 the ACCC reviewed the capacity allocation arrangements in other jurisdictions. In this assessment the ACCC observed that the QCA considered the capacity reservation fee to be inappropriate, and required QR Limited (QR Network) to incorporate a queuing system for rail access that provided an alternative mechanism by which capacity would be reserved. Such a system was considered to be most relevant when two or more access seekers were seeking mutually exclusive access rights and that such a mechanism would provide access seekers with some surety over access rights under negotiation as well as assist with an access seeker's forward planning.

While the ACCC acknowledged the merits of the queuing system adopted by QR Network, it argued that the efficacy of a queuing system in the case of ARTC was questionable given that the underlying intention of the queuing system was to limit the market power of QR Network (given that QR Network could use the negotiating process as a means by which access applications could be stalled in favour of QR Network's own above-rail operations). As ARTC is not vertically integrated, the ACCC considered there are fewer concerns to warrant the adoption of a queuing system.¹¹

Brookfield Rail (WestNet Rail)

Brookfield Rail (formerly WestNet Rail (WNR)) is a provider of below rail freight infrastructure, covering approximately 5,000 kilometres of track in Western Australia. The Train Path Policy¹² (TPP) sets out the policy for allocation of Train Paths and the provision of access to Train Paths. Section 5 discusses the approach to competition for the same train path and embodies a first-in-time, first-in-right principle for competing requests. Specifically,

If two Operators request the same available Train Path and it is not possible to satisfy both requests by using alternative but similar Train Paths, the available Train Path will be provided to the Operator who first requested the Train Path and can establish that it has a requirement for the Train Path. Whether a requirement exists will be determined on the basis of the criteria set out in 2.2.1 of the T.P.P.

Clause 2.2.1 specifies the guidelines for assessing whether a request is warranted for a train path.

The Pilbara Infrastructure Pty Ltd

The Pilbara Infrastructure Pty Ltd (TPI), a wholly-owned subsidiary of Fortescue Metals Group (FMG), owns and operates a rail network and port terminal in the Pilbara region in Western Australia.

¹¹ ARTC. 2008. *Final Decision – Australian Rail Track Corporation: Access Undertaking – Interstate Rail*. July 2008. Pg. 186

¹² WNR, 2009, *Train Path Policy*, April 2009.

The Train Path Policy¹³ (TPP) sets out TPI's policy for the allocation of Train Paths. The clauses relating to capacity allocation are similar to Brookfield Rail in that if two operators request the same available Train Path and it is not possible to satisfy both requests by using alternative but similar Train Paths, the available Train Path will be provided to the Operator who first requested the Train Path and can establish that it has a requirement for the Train Path (Section 2.3).

¹³ The Pilbara Infrastructure Pty Ltd, 2010, *The Train Path Policy*, 22 February 2010.

Attachment 4: PWC Supporting Analysis – Pricing Principles

Queensland Rail

Pricing principles

Queensland Rail

*Supporting analysis for
submission to the QCA*

28 March 2012



*What would
you like to grow?*

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1 Introduction

1.1 Background

Queensland Rail commenced business independently from the QR National corporate group on 1 July 2010. Queensland Rail's primary business is the delivery of public transport through the provision of passenger rail services and supporting private freight services through the provision of rail infrastructure.

Since 1 July 2010, Queensland Rail has provided access to its below rail network under QR Network's 2008 Access Undertaking (as at 30 June 2010) to the extent that it was made to apply to Queensland Rail by a transfer notice and project direction (Transfer Notice) dated 29 June 2010 under the *Infrastructure Investment (Asset Restructuring and Disposal) Act 2009* (Qld) (Temporary Undertaking).

In light of the new structure of the business and the approaching expiry of the Temporary Undertaking, Queensland Rail is preparing a draft access undertaking (Queensland Rail Access Undertaking 1 (AU1)) to submit to the Queensland Competition Authority (QCA). AU1 seeks to provide an access undertaking that better suits the operations and requirements of Queensland Rail, whilst preserving the basic process for access seekers to negotiate access terms, and simplifying the Temporary Undertaking to be better understood by all parties.

1.2 Purpose and approach

Part 3 of the proposed AU1 describes the pricing principles that Queensland Rail will apply in the negotiation of access charges with access seekers and includes provisions regarding pricing objectives, revenue adequacy, limits on price differentiation, reference tariffs and rate review provisions.

The purpose of this paper is to describe the differences between the pricing principles proposed for AU1 and the Temporary Undertaking and to discuss the appropriateness of these differences. This paper considers the current operations of the business as well as the consistency of the pricing principles with economic first principles. This paper also reviews the pricing principles applied by other below rail access providers where relevant.

2 Pricing principles for AU1

Queensland Rail is seeking to develop an access undertaking that reflects the current requirements of the business. The current business' primary activities relate to the delivery of public transport services through the provision of passenger rail services, and below rail infrastructure services for coal and freight train operators, which it does in accordance with the transport services contracts in place with the Queensland Government. The business does not operate, and has no intention of operating its own above rail freight trains, as this is inconsistent with the business' constitution and its customer charter.

The guiding principle for AU1 is to develop an access undertaking that provides greater flexibility for Queensland Rail and access seekers to negotiate access terms appropriate for the particular circumstances of each system and access seeker. While Queensland Rail has been operating in accordance with the Temporary Undertaking, that document is essentially QR Network's 2008 Access Undertaking (2008AU) which was developed for a completely different business, with different operational and competitive characteristics. While Queensland Rail's AU1 has been developed taking into consideration the overarching regulatory principles of the access undertakings of QR Network, the proposed AU1 should be viewed as a new document for a new business.

Accordingly, a number of differences are apparent between the Temporary Undertaking and the proposed AU1, including for Part 3 of AU1, which details the provisions regarding the pricing principles that Queensland Rail will apply in the negotiation of access charges with access seekers.

The proposed pricing principles provisions are largely consistent with the pricing principles in the Temporary Undertaking, which in turn are based on generally accepted regulatory principles. There is however some differences due to general formatting and structural changes which seek to clarify existing arrangements and remove unnecessary detail from the access undertaking whilst retaining the overall intent of the provisions.

Some differences in the AU1 pricing principles from the Temporary Undertaking seek to ensure that the pricing principles do not impose unnecessary and costly regulatory compliance on the business, while providing little additional benefit or certainty for access seekers. The inclusion of more prescriptive and detailed provisions in the Temporary Undertaking was to mitigate any potential anti-competitive risk in relation to QR Limited, which operated above rail coal and freight services. Queensland Rail is a very different business and as its primary business activity is not operating in a competitive market, hence the potential for the business to use its market power to advantage its own operations has been removed.

The following sections provide a detailed discussion of these differences.

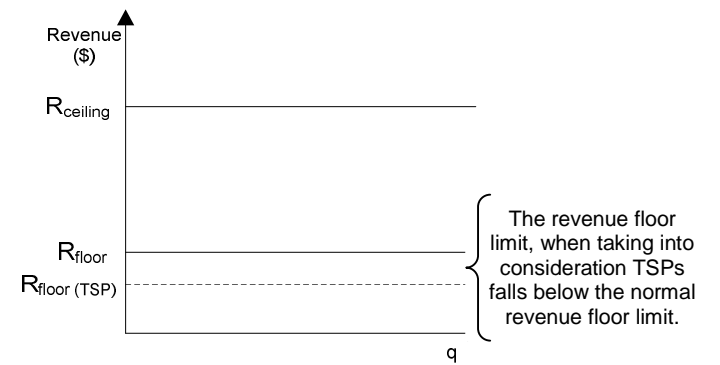
3 Pricing principles

Temporary Undertaking	Proposed amendment to AU1	Discussion
<p>Revenue Adequacy</p> <p>The Temporary Undertaking allows Queensland Rail to earn revenue from access provision sufficient to achieve full recovery of efficient costs, including an adequate rate of return on assets (Subclause 6.3.2), provided Queensland Rail complies with the pricing constraints in:</p> <p>Subclause 6.1.1 – Limits on Price Differentiation; Subclause 6.1.2 – Establishment of access charges for QR Train Services; and Clause 6.2 – Pricing Limits.</p> <p>Further, where the business earns revenue in excess of this, the first objective of the business will be to reduce the Transport Service Payments (TSPs)¹.</p>	<p>Under Clause 3.1.1 of the proposed AU1:</p> <p><i>Queensland Rail is entitled to earn revenue from providing Access, including from Access Charges and Transport Service Payments, that is at least enough to:</i></p> <p>(a) <i>fully recover all Efficient Costs; and</i> (b) <i>provide a return on the value of assets and investment commensurate with the regulatory and commercial risks involved.</i></p> <p><i>If Queensland Rail earns revenue in excess of this, then Queensland Rail may seek to reduce Transport Service Payment rather than Access Charges.</i></p>	<p>The proposed provisions regarding revenue adequacy are largely unchanged from the Temporary Undertaking. The reference to pricing limits and limits on price differentiation are not included as specific provisions regarding these matters have been included elsewhere in Part 3 of AU1 (including Clause 3.2, addressing pricing limits and the application of ceiling and floor revenue limit, and Clause 3.3, regarding limits on price differentiation).</p> <p>Moreover, unlike the vertically-integrated QR Limited, Queensland Rail does not operate competing above rail services such that there is no incentive for the business to use price differentiation, higher access charges, and access conditions to prevent or hinder access to third party access seekers.</p> <p>The proposed drafting of the clause also maintains the provisions which allow the business to reduce TSPs where revenue is greater than specified in this provision. This is consistent with earlier QCA decisions that TSPs rather than access charges should be reduced to ensure that QR Limited does not exceed its allowable revenue.²</p>

¹ Transport Service Payments are payments to Queensland Rail from the Department of Transport and Main Roads for specified below rail services for nominated sections of the network.

² QCA. 2005. Decision: *QR's 2005 Draft Access Undertaking*. December 2005.

Temporary Undertaking	Proposed amendment to AU1	Discussion
Pricing Limits		
<i>Ceiling revenue limit</i>		
<p>Subclause 6.2.2 and 6.2.3 of the Temporary Undertaking requires that access charges be set such that they do not, over an evaluation period, exceed the expected stand alone cost of providing access (after giving consideration to the level of contribution provided by TSPs towards the relevant rail infrastructure) to an individual train service or combination of train services (as applicable).</p> <p>Further, where it is necessary to determine whether access charges are consistent with this limit, a revenue limit will be established for the individual train service or combination of train services (as applicable).</p> <p>The revenue limit is defined in Subclause 6.2.4 as:</p> <p>(a) <i>the Revenue Limit will be determined as the maximum amount of expected revenue, including:</i></p> <p>(i) <i>Access Revenue (determined consistent with Paragraph 6.2.3(c)) that may be earned from Access Charges; and</i></p> <p>(ii) <i>where the Individual Train Service or combination of Train Services (as appropriate) includes all of the Train Services using a section of the Rail Infrastructure, any Transport Services Payments towards the relevant section of Rail Infrastructure,</i></p> <p><i>over the Evaluation Period, measured such that the net present value of the cashflows associated with providing Access for the Individual Train Service or combination of Train Services (as appropriate) over the Evaluation Period is zero.</i></p> <p>The formula which describes this calculation is provided in Appendix A.</p>	<p>Clause 3.2.1 requires that Queensland Rail set the methodology, rates and other inputs for calculating access charges such that the expected revenue from an individual train service or combination of train services (as applicable) does not, over an evaluation period, exceed the relevant ceiling revenue limit.</p> <p>The ceiling revenue limit is the aggregate of the following (Clause 3.2.3):</p> <p>(i) <i>the maximum amount of Expected Access Revenue; and</i></p> <p>(ii) <i>where the Access Seeker's proposed Train Services comprise all of the Train Services using the relevant part of the Network, the Transport Services Payments (if any) that are reasonably expected to be received by Queensland Rail in respect of that part of the Network (on a pro rata basis for that individual Train Service or combination of Train Services, as applicable),</i></p> <p><i>over the Evaluation Period where the Ceiling Revenue Limit is measured such that the net present value of the cashflows associated with providing Access for the relevant Train Service(s) over the Evaluation Period is zero.</i></p> <p>The formula which describes this calculation is provided in Appendix A.</p>	<p>The provisions regarding the ceiling revenue limit, including the relevant formula for the calculation of the ceiling revenue limit, are consistent with the Temporary Undertaking. There are however, minor changes to the wording to clarify the intent of the provisions, and to reduce unnecessary repetition.</p>

Temporary Undertaking	Proposed amendment to AU1	Discussion
<p>Floor Revenue Limit</p> <p>Subclause 6.2.2 and 6.2.3 of the Temporary Undertaking requires that access charges be calculated such that they do not, over an evaluation period, fall below the expected incremental costs of providing access to an individual train service or combination of train services (as applicable).</p> <p>In determining the expected incremental costs of providing access to a combination of train services consideration must be given to the level of contribution provided by TSPs towards the relevant rail infrastructure.</p>	<p>Clause 3.2.2 gives Queensland Rail a discretion to set the methodology, rates and other inputs for access charges such that the expected revenue from an individual train service or combination of train services (as applicable) does not, over an evaluation period, fall below the floor revenue limit (Clause 3.2.2(a)).</p> <p>However, Queensland Rail must, under Clause 3.2.2(b), only exercise this discretion where:</p> <ul style="list-style-type: none"> • TSPs are applied to that part of the network used by the relevant train services; • once TSPs are taken into account, the Expected Access Revenue would not fall below the Floor Revenue Limit; and • the methodology, rates and inputs for calculating the relevant access charges includes a mechanism that allows Queensland Rail to vary the access charges from time to time in response to any decrease in the relevant TSPs. <p>The floor revenue limit is defined as:</p> <p><i>...the level of revenue that will recover the expected Incremental Cost of providing Access to the individual Train Service or combination of Train Services, as applicable.</i></p> <p>Incremental costs are defined as the costs of providing Access that:</p> <p>(a) <i>would not be incurred by Queensland Rail if the individual Train Service or combination of Train Services (as applicable) did not operate on the basis of the assets reasonably required for the provision of Access, including:</i></p> <ul style="list-style-type: none"> (i) <i>capital (renewal and expansion) costs; and</i> (ii) <i>the cost of bringing expenditure forward in time; and</i> <p>(b) <i>are assessed as Efficient Costs.</i></p>	<p>The proposed differences seek to clearly state the business' ability to set the methodology, rates and other inputs for access charges such that the expected revenue from an individual train service or combination of train services (as applicable) may fall below the floor revenue where TSPs exist.</p> <p>As illustrated in Figure 1, it may be possible for the business to set access charges at a level such that the expected access revenue from those train services or combination of train services fall below the floor revenue limit (R_{floor})/incremental cost. This situation however, is limited to instances where TSPs are received for that part of the network, and accordingly these payments will cover any revenue shortfall (i.e. while charges are set below the floor revenue, the business will still recover the expected incremental cost of providing access).</p> <p>Figure 1 – Pricing below the Floor revenue limit</p>  <p>The revenue floor limit, when taking into consideration TSPs falls below the normal revenue floor limit.</p>

Temporary Undertaking	Proposed amendment to AU1	Discussion
<p><i>Cross subsidy</i></p> <p>In the Temporary Undertaking, Subclause 6.2.1 requires Queensland Rail to, in determining access charges for both individual train services and combinations of train services (as applicable), observe upper and lower limits for access charges established at levels which ensure there is no cross-subsidy between individual train services or combinations of train services (as applicable).</p> <p>In particular, Subclause 6.2.1 states:</p> <p><i>In determining Access Charges, [Queensland Rail] will observe price limits in respect of the following elements:</i></p> <ul style="list-style-type: none"> <i>(i) upper and lower limits for Access Charges for individual Train Services, established at levels which ensure there is no Cross Subsidy between Individual Train Services and determined in accordance with Subclause 6.2.2; and</i> <i>(ii) upper and lower limits for Access Charges in respect of combinations of Train Services, established at levels which ensure that there is no Cross Subsidy between combinations of Train Services and determined in accordance with Subclause 6.2.3.</i> <p>(Where subclause 6.2.2 and 6.2.3 define the price limits for individual train services and train service combinations respectively.)</p>	<p>The proposed drafting of AU1 does not include specific provisions which expressly seek to ensure there is no cross-subsidisation between individual train services or a combination of train services.</p> <p>However, it is important to note that under AU1 access charges are set subject to a ceiling revenue limit and floor revenue limit, as discussed above.</p>	<p>Cross-subsidisation is defined as a situation where at least one service pays above stand alone costs and another service pays below incremental cost.³ Cross-subsidisation requires both conditions to be met. Hence, while Queensland Rail can, in certain circumstances, set access charges such that the expected revenue from access charges may fall below the floor revenue limit (taking into consideration TSPs), cross-subsidisation will only exist where this shortfall is met by another service paying more than stand-alone cost – a condition which is precluded by Clause 3.2.1 of AU1, and commercially unrealistic given the nature of the traffic using Queensland Rail's network.</p> <p>In the ACCC's assessment of the 2008 ARTC Interstate Access Undertaking, it considered the potential for cross-subsidisation where the business can set access charges below incremental costs. Its assessment found that charging below incremental cost is not an issue unless at least one access seeker or group of access seekers pays above their stand alone costs; a situation which is prohibited under ARTC's Access Undertaking. The ACCC also considered that cross-subsidisation was unlikely to be an issue because the forecast revenue of all ARTC's segments during the term of the undertaking was expected to be well below the respective revenue ceiling for all segments.⁴</p> <p>The objective of the pricing limit clauses included in the 2008AU (which are present in the Temporary Undertaking) were to ensure that QR Network was not able to use price differentiation to advantage other QR business groups or to disadvantage/hinder access to competing above rail operators. However, as Queensland Rail does not operate above rail freight services and is not in direct competition with any above rail operator, there is no scope for the business to use price differentiation to benefit its own operators in a related market.</p> <p>There is no necessity for an equivalent to Subclause 6.2.1 of the Temporary Undertaking in AU1. Clauses 3.2.1 and 3.2.2 of AU1 stipulate the requirements for setting access charges in accordance with a ceiling revenue limit and a floor revenue limit and this mitigates</p>

³ Faulhaber, G.R. 1975 'Cross-Subsidization: Pricing in Public Enterprises,' *The American Economic Review*, 65(5), pp. 966-977.

⁴ ACCC. 2008. *Final Decision Australian Rail Track Corporation: Access Undertaking – Interstate Rail Network*. July 2008.

Temporary Undertaking	Proposed amendment to AU1	Discussion
		<p>the potential for cross-subsidisation.</p> <p>In addition, in relation to regularly scheduled passenger services, Queensland Rail must also comply with its obligations under section 266(6) of the <i>Transport Infrastructure Act 1994</i> (Qld) which states that:</p> <p><i>In charging for access to regularly scheduled passenger services (an access charge), a railway manager must not—</i></p> <ul style="list-style-type: none"> <i>(a) differentiate between similar regularly scheduled passenger services operating or proposed to operate over the same route at different times of the day; or</i> <i>(b) set an access charge for a train path that is greater than the access charge set for similar train paths.</i>

Temporary Undertaking	Proposed amendment to AU1	Discussion
<p><i>Limits on price differentiation</i></p> <p>Under the Temporary Undertaking, where a reference tariff is applicable for a train service type, the access charge may only vary from the reference tariff to reflect differences in the cost and risk to Queensland Rail of providing access for the train service compared to the reference train service.</p> <p>Where there is no reference tariff applicable for a train service type, the access charge may only vary from the access charge for other train services transporting the same commodity in the same geographic area, on a unit rate basis:</p> <ul style="list-style-type: none"> • to reflect differences in the cost and risk to Queensland Rail of providing access for the train service compared to other train services of that type; or • over time, to reflect: <ul style="list-style-type: none"> ○ changes in the cost or risk to Queensland Rail of providing access; ○ changes in relevant TSPs (where the change has the result that Queensland Rail can no longer commercially provide access in that specified geographic area at the current access charges); ○ “Changes in Market Circumstances”; or ○ limitations on available capacity. <p>Further, subclause 6.1.2 prohibits the business from setting access charges for Queensland Rail train services for the purpose of preventing or hindering access by third party access seekers into any market in competition with Queensland Rail.</p>	<p>Under AU1, Queensland Rail may vary the methodology, rates and other inputs for calculating access charges from an applicable reference tariff to reflect differences in the cost and risk to Queensland Rail of providing access to an access seeker compared to the basis on which the reference tariff was determined (Clause 3.3(b)(i)).</p> <p>If there is no applicable reference tariff for a train service, Queensland Rail may vary the methodology, rates and other inputs for calculating access charges for an access seeker's train service from another train service with similar characteristics:</p> <ul style="list-style-type: none"> • on a unit rate basis to reflect differences in the cost and risk to Queensland Rail of providing access compared to other access seekers or access holders (Clause 3.3(b)(ii)(A))⁵, and • to reflect: <ul style="list-style-type: none"> ○ changes that result in Queensland Rail no longer being able to commercially provide access to train services in that geographical area at the current access charges (Clause 3.3(b)(ii)(B)(1)); ○ changes in the cost and risk to Queensland Rail of providing access (Clause 3.3(b)(ii)(A)(2)); ○ changes in circumstances which have had, or may have, a material effect on ability or willingness of access holders/seekers to pay access charges (Clause 3.3(b)(ii)(B)(3)); or ○ limitations on available capacity (Clause 3.3(b)(ii)(B)(4)), <p>over time.</p>	<p>Price differentiation is supported under the <i>Queensland Competition Authority Act 1997</i> where it aids efficiency (Section 168A(b)).</p> <p>The proposed clauses regarding Limits on Price Differentiation in AU1 allow for price differentiation in accordance with the circumstances specified in Clause 3.3. These clauses are similar to the limits imposed in the Temporary Undertaking; though clarify the circumstances in which Queensland Rail may differentiate prices between access seekers/holders to include changes that might impact on the business' ability to commercially provide access to train services in a particular geographical area at the current charges. Such changes may include variations to relevant TSPs (which is also included in Subparagraph 6.1.1(c)(ii)(B) of the Temporary Undertaking), or broader factors such as changes in operating and maintenance costs and changes to the utilisation of the network (e.g. a reduction in users may impact on how charges are set for remaining users).</p> <p>The proposed drafting also removes the prohibition on Queensland Rail from establishing access charges for QR Train Services for the purposes of preventing or hindering access by a third-party access seeker. These provisions are no longer necessary following the restructure of the business.</p> <p>Provisions to impose limits on price differentiation were introduced in QR Limited's 2001 Access Undertaking to ensure the business did not differentiate access charges between access seekers and/or access holders for the purpose of adversely affecting competition within a relevant market. This potential for adversely affecting competition was deemed by the QCA as a likely risk for the vertically integrated QR Limited.</p> <p>The structure and nature of the current Queensland Rail business is very different from QR Limited. The business no longer operates above rail freight services and hence there is no scope for the business to use price differentiation to prevent or hinder access by competing third party access seekers to benefit its own operations.</p>

⁵ For the calculation of access charges for non-reference tariff services, Queensland Rail will determine whether the characteristics of Train Services are similar having regard to all relevant matters including, but not limited to, geography, the origin and destination, duration and quality of the Train Path including arrival and departure times of the day and week, nature of rolling stock and train configuration, characteristics of the train services, the commodity transported or transport service and the duration and terms of the relevant access agreement.

Temporary Undertaking	Proposed amendment to AU1	Discussion
<p>Subclause 6.1.2 states:</p> <p><i>In developing Access Agreements with QR or a Related Party of QR in accordance with Subclause 5.3, [Queensland Rail] will not establish Access Charges for QR Train Services for the purpose of preventing or hindering Access by a Third Party Access Seeker into any market in competition with the QR Operational Business Group.</i></p>	<p>AU1 does not include an express requirement that Queensland Rail will not establish access charges for the purposes of preventing or hindering access by a third-party access seeker who is in competition with Queensland Rail.</p>	<p>The amendments to the limits on price differentiation provisions therefore achieves the balance of imposing appropriate restrictions on the business, while still allowing the business to differentiate access charges under set circumstance to ensure the efficient utilisation of its below rail network.</p> <p>In addition, in relation to regularly scheduled passenger services, Queensland Rail must also comply with its obligations under section 266(6) of the <i>Transport Infrastructure Act 1994</i> (Qld) which includes requirement regarding how access charges must be set. A full extract of this provision is provided in the above section (Cross Subsidy).</p>

Temporary Undertaking	Proposed amendment to AU1	Discussion
<p><i>Hierarchy of pricing principles</i></p> <p>Clause 6.1 of the Temporary Undertaking addresses circumstances where a conflict between pricing principles occurs. The clause states:</p> <p><i>In developing Access Charges [Queensland Rail] will apply the pricing principles set out in this Part 6. In the event of a conflict between these pricing principles, [Queensland Rail] will apply the pricing principles in the following order of precedence (from highest to lowest):</i></p> <ul style="list-style-type: none"> <i>(a) Limits on Price Differentiation (Subclause 6.1.2)</i> <i>(b) Pricing limits (Clause 6.2)</i> <i>(c) Rail Infrastructure Utilisation (Subclause 6.3.1)</i> <i>(d) Revenue Adequacy (Subclause 6.3.2).</i> <p>This hierarchy refers to the potential for a conflict between pricing principles. Under Clause 6.1, the business would not, for example, be able to fail to comply with the Limits on Price Differentiation in order to comply with Revenue Adequacy. Similarly, complying with Limits on Price Differentiation also take precedence over complying with floor or ceiling price limits, irrespective of whether the resulting access charges cover the incremental costs of the individual train services.</p>	<p>AU1 does not include a hierarchy of pricing principles.</p>	<p>The QCA determined during its consideration of the QR Limited's 2005 Draft Access Undertaking that the access undertaking should include a priority order for the application of pricing principles.⁶ The provisions were also included in the 2008AU, and therefore are included in the Pricing Principles in the Temporary Undertaking.</p> <p>Queensland Rail has not included equivalent provisions in AU1 as the access undertaking contains provisions regarding the requirement to set charges in accordance with the ceiling revenue limit and the limits on price differentiation.</p> <p>Moreover, unlike the former vertically-integrated QR Limited, there is no scope for the business to use price differentiation or higher access charges to prevent or hinder access to competing third party access seekers. Accordingly, the guidance offered by a hierarchy provision is unnecessary and has therefore not been included in AU1.</p>

⁶ QCA. 2005. *Draft Decision: QR's 2005 Draft Access Undertaking*. July 2005

Temporary Undertaking	Proposed amendment to AU1	Discussion
Structure of access charges and conditions of access		
<p><i>Structure of access charges</i></p> <p>Under subclause 6.5.1, where a reference tariff applies for a train service type, the structure of access charges for that train service type will be in accordance with the documentation for that reference tariff. If no reference tariff applies for the train service type, the structure of access charges for that train service type will be negotiated on a case-by-case basis and Paragraph 6.5.1(b) details the structure that these access charges may take. Access charges for any train service type may also include a QCA levy component to be collected by Queensland Rail for the QCA.</p>	<p>The proposed AU1 does not include provisions detailing arrangements for the structure of access charges. However, clause 3.6 states, consistent with Paragraph 6.5.1(c) of the Temporary Undertaking, that an access charge may include a QCA levy component collected for the QCA by Queensland Rail.</p>	<p>The provisions regarding the structure of access charges are not included in AU1 on the basis that these provisions provided little additional certainty for users regarding the structure of access charges (the provisions only indicated, in the case of access charges where no reference tariff applies, the structure that access charges <i>may</i> take).</p> <p>Details regarding the arrangements for access charges are provided for in Clause 4.1 of the Standard Access Agreement and Section 4 of the Access Agreement Principles. For example, Section 4 of the Access Agreement Principles indicates that the access agreement must set out the access charges agreed between the parties. These arrangements allow for Queensland Rail and the access seeker to negotiate access charges and the access charges structure in accordance with the specific requirements of the train services being operated and the system on which it is operating.</p> <p>Accordingly, AU1 does not include provisions for the structure of access charges and this is consistent with the overarching objective to reduce the complexity of the access undertaking and to remove unnecessary detail.</p>

Temporary Undertaking	Proposed amendment to AU1	Discussion
<p><i>Conditions of access</i></p> <p>Paragraph 6.5.2(a) gives Queensland Rail the ability to require an access seeker to agree to conditions (in addition to those in the relevant Standard Access Agreement) before being granted access rights – that is, access conditions – to the extent that this is reasonably required to mitigate the business’ exposure to financial risks associated with providing access for the access seekers proposed train services.</p> <p>Paragraphs 6.5.2(b) and (c) refer to specified circumstances where access conditions are deemed to be either reasonably required or not reasonably required.</p> <p>The form of access condition may include, among other things, an upfront contribution, prepayment of all or part of an access facilitation charge or an additional take or pay arrangement (Paragraph 6.5.2(e)).</p> <p>The provisions also detail the requirements that Queensland Rail must comply with where additional revenue is earned as a result of applying access conditions, or if a new party comes to use the infrastructure built specifically for the original access seeker where Queensland Rail sought access conditions from that original access seeker in relation to that construction (Paragraphs 6.5.2(f) and (g)).</p> <p>Finally, subclause 6.5.3 states that the business will maintain an ‘Access Conditions Register’, of which the QCA may require an audit in accordance with a process agreed to by both Queensland Rail and the QCA.</p>	<p>The proposed AU1 does not include provisions equivalent to those in the Temporary Undertaking regarding “access conditions”.</p>	<p>The guiding principle for AU1 is to reduce the complexity of, and unnecessary detail in the Access Undertaking, and provide greater flexibility for Queensland Rail and access seekers to negotiate access terms and conditions appropriate for the particular circumstances of each system and access seeker.</p> <p>AU1 therefore does not include provisions regarding “access conditions” on the basis that such arrangements should be open to negotiation on a case-by-case basis with access seekers according to the specific requirements of the extension.</p>

Temporary Undertaking	Proposed amendment to AU1	Discussion
Reference Tariffs		
<i>Summary</i>		
Reference tariffs are indicative access charges which apply to a reference train service. A reference train service is defined in an access undertaking by specific characteristics, including commodity carried, geographical scope (i.e. rail corridor of operation), and other features such as train length, axle load, speed and related factors. A reference tariff is typically established as part of the access undertaking process and applies only to reference train services.		
For the former QR Limited, reference tariffs were applied to defined reference train services operating in the Central Queensland Coal Network (CQCN) (referred to as the Central Queensland Coal Region in the Temporary Undertaking) and the West Moreton System (referred to as the Western System in the Temporary Undertaking). Following the re-structure of QR Limited, the West Moreton System is the only part of Queensland Rail's rail network to which a reference tariff for coal carrying train services applies. Otherwise, train services on Queensland Rail's network are not train services to which a reference tariff applies, and access charges for these services are determined through negotiation in accordance with the pricing principles.		
All clauses which relate specifically to the CQCN have therefore been removed from the proposed AU1. The following discussion regarding reference tariffs only considers proposed changes to reference tariff provisions which relate specifically to the West Moreton System.		
<i>Application and review of reference tariffs</i> Schedule F of the Temporary Undertaking includes details regarding the application of reference tariffs, including its period of effectiveness and how it may be reviewed (subclause 6.4.1 and 6.4.3).	The application and review of reference tariffs is provided in clause 3.4 of AU1. Clause 3.4.2(a) provides that the details regarding the effective period of the reference tariff and how the reference tariff may be reviewed are provided in Schedule A of AU1. This Schedule specifies a reference tariff will apply to reference train services on the West Moreton System. Clause 3.4.2(b) provides for Queensland Rail to review the existing reference tariffs and submit to the QCA a proposed new reference tariff prior to 30 June 2013 or such later date as approved by the QCA. Once approved by the QCA, the new reference tariffs are to take effect on and from 1 July 2013. Further, where Queensland Rail does not submit a proposed new reference tariffs prior to 30 June 2013 (or such later date as approved by the QCA), the reference tariff in Schedule A of AU1, as adjusted in line with escalation parameters, will be taken to be submitted for the QCA's consideration under clause 3.4.2(b).	Queensland Rail is proposing to initially postpone resetting the reference tariff for the West Moreton System. This has been proposed on the basis that this process, including the determination of an approved regulatory asset base (RAB) is complex, and the business would prefer to work with industry to agree the methodology and reference tariff, rather than seek QCA arbitration. It is proposed that the existing reference tariff, set under the Temporary Undertaking, will continue to apply (adjusted in line with escalation parameters) for the purposes of submitting AU1 (the reference tariffs for AU1 are specified in Schedule A). Queensland Rail will then submit a new reference tariff for the West Moreton System prior to 30 June 2013 (or at a later date where approved by the QCA) for the QCA's approval.

Temporary Undertaking	Proposed amendment to AU1	Discussion
<p><i>Establishment of new reference tariffs</i></p> <p>The Temporary Undertaking includes provisions for the establishment of new reference tariffs.</p> <p>For example, in accordance with Paragraph 6.4.2(a), Queensland Rail must submit a proposed reference tariff for a new reference train service to the QCA:</p> <ul style="list-style-type: none"> if requested by the QCA where the QCA has a reasonable expectation that there is sufficient interest from access seekers to warrant the development of a reference tariff for a new reference tariff service (Paragraph 6.4.2(c)); or where a new coal mine is developed and Train Services serving that mine will utilise Rail Infrastructure in the Western System (Paragraph 6.4.2(b)). 	<p>The proposed AU1 does not include provisions allowing for the establishment of reference tariffs for new reference train services.</p>	<p>Queensland Rail has a reference tariff in place for its West Moreton System, and currently there are no proposals to introduce a reference tariff for other systems.</p> <p>In past assessments of QR Limited's access undertakings the QCA determined an access undertaking should detail circumstances in which both QR Limited and the Authority can develop new reference tariffs and the processes to be followed.⁷</p> <p>However, Queensland Rail has indicated that its customers have not called for the establishment of a reference tariff for other systems. It is also the case that the volume of throughput on these systems is currently below the tonnage threshold, and based on future projections over the proposed access period term this is unlikely to change over the term of AU1. Queensland Rail therefore considers that provisions for the establishment of new reference tariffs are not warranted. Accordingly, these provisions have not been included in AU1.</p> <p>Moreover, if during the term of the access undertaking Queensland Rail determines that a new reference tariff is required for a particular service or group of access seekers, it would be possible for the business to submit a draft amending access undertaking to seek QCA's approval of the proposed new reference tariff.</p> <p>This approach is consistent with the overriding objective of the access undertaking to remove unnecessary detail and reduce the overall complexity of the document for access seekers.</p>

⁷ QCA. 2005. *Draft Decision: QR's 2005 Draft Access Undertaking July 2005*. Pg. 154

Temporary Undertaking	Proposed amendment to AU1	Discussion
<p><i>Variation of reference tariffs</i></p> <p>Part A, Schedule F (Reference Tariff Schedules) of the Temporary Undertaking specifies the characteristics of the reference trains (e.g. commodity type, geographical scope, length, loading and unloading time). Part A also includes:</p> <ul style="list-style-type: none"> provisions which allow reference tariffs to be varied following , among other things, an endorsed variation event, or at the written request of the QCA in specified circumstances; and a process for gaining QCA approval for such a variation. <p>In addition, the Temporary Undertaking, under subclause 2.2.13 (Schedule F) requires that:</p> <p>(a) <i>a variation of a Reference Tariff submitted by [Queensland Rail] or developed by the QCA in accordance with this Clause 2.2 must include a review of System Allowable Revenue⁸ and System Forecast⁹ to the extent applicable to that variation; and</i></p> <p>(b) <i>the QCA in approving a variation of a Reference Tariff must also approve the corresponding variation of the applicable System Allowable Revenue and System Forecast.</i></p>	<p>The provisions regarding the variation of reference tariffs are largely consistent with the Temporary Undertaking. AU1 however does not include subclause 2.2.13 of the Temporary Undertaking.</p>	<p>The provisions regarding the variation of reference tariffs are largely consistent with the Temporary Undertaking, with the exception of subclause 2.2.13 (Schedule F), which has not been included.</p> <p>In line with the definition of System Allowable Revenue and System Forecast, subclause 2.2.13 in Part A of Schedule F in the Temporary Undertaking only applied to reference tariffs for the CQCN and did not apply to West Moreton System. Accordingly, these provisions are no longer relevant for the purpose of AU1.</p>

⁸ Where System Allowable Revenue means (i) for AT₂₋₄ in relation to an individual Coal System Infrastructure, the total revenue from AT₂₋₄ arising from all Access Agreements in relation to that Individual Coal System Infrastructure that QR Network is entitled to earn over the relevant Year, as specified in Clauses 5.3, 6.3, 7.3 and 8.3, Part B of Schedule F; and (ii) for the AT₅ component of Access Charges for the Central Queensland Coal Region, the total revenue from the AT₅ component of Access Charges arising from all Access Agreements in relation to the Central Queensland Coal Region that QR Network is entitled to earn over the relevant Year, as specified in either Clause 5.3 or 6.3, Part B of Schedule F.

⁹ Where System Forecast means the gtk [gross tonne kilometres] for the relevant Individual Coal System Infrastructure that is specified for the relevant Reference Train Service in part B of Schedule F.

Temporary Undertaking	Proposed amendment to AU1	Discussion
<p><i>Take or pay (TOP) provisions</i></p> <p>On 20 July 2011, Queensland Rail submitted a draft amending access undertaking (DAAU) to the QCA for the purpose of amending the TOP provisions in the Temporary Undertaking.</p> <p>This amendment was required to address two oversights which occurred following the introduction of the two-part tariff for the West Moreton System.</p> <p>The DAAU amended the Temporary Undertaking to include the AT₂ component of the reference tariff into the TOP calculation, which was initially not captured by the TOP calculation, and to amend the section of the formula applicable to the AT₁ (by dividing the gtk by 1000); a calculation which was omitted.</p> <p>On 27 October 2011, the Authority approved the DAAU. The amended provisions for calculating the TOP revenue (Subclause 5.3, Part C of Schedule F) states:</p> <p><i>The amount of Take or Pay invoiced in respect of a Year will be 80% of the amount calculated for that Year as follows:</i></p> $\left(\left(AT_1 \times \frac{gtk}{1000} \right) + AT_2 \right) * NTNO$ <p>where:</p> <p>(a) AT₁ and AT₂ are the values of the relevant Reference Tariff inputs applicable on the last day of the subject Year;</p> <p>(b) gtk is the nominal gtk for the relevant Train Service calculated using a nominal payload as determined by [Queensland Rail]; and</p> <p>(c) NTNO is the number of relevant individual Train Services that were entitled to operate during the subject Year in accordance with the relevant Train Service Entitlement, and did not operate (excluding Train Services that did not operate due to QR Network Cause),</p> <p><i>provided always that the amount of Take or Pay for the subject Year shall not be less than zero.</i></p>	<p>The proposed TOP provisions for AU1 (Clause 4(c), Schedule A) state:</p> <p>(c) The amount of the Take or Pay Charges for a Take or Pay Period will be the amount which is 80% of the amount calculated for that Take or Pay Period as follows:</p> $\left(\left(AT_1 \times \frac{gtk}{1000} \right) + AT_2 \right) * NTNO$ <p>where:</p> <p>(i) AT₁ and AT₂ are the Reference Tariff inputs applicable on the last day of that TOP Period;</p> <p>(ii) gtk is the average gtk for the relevant Train Services calculated using a nominal payload as determined by Queensland Rail (acting reasonably); and</p> <p>(iii) NTNO means the number of relevant individual Train Services that were entitled to be operated for the Take or Pay Period in accordance with the relevant Train Service Entitlement and did not operate (excluding Train Services that did not operate due to Queensland Rail Cause),</p> <p><i>provided always that the amount of Take or Pay Charges for a Take or Pay Period shall not be less than zero.</i></p>	<p>The proposed drafting of the TOP provisions for the proposed AU1 is materially the same as that approved by the QCA in October 2011, with only minor drafting variations.</p>

Temporary Undertaking	Proposed amendment to AU1	Discussion
<p><i>Regulatory Asset Base</i></p> <p>Schedule FB of the Temporary Undertaking include provisions regarding the maintenance of the regulatory asset base (RAB) for the CQCN, including roll forward provisions and the process for the approval of the business's asset management plan. These RAB provisions are linked to the determination of the reference tariff for the CQCN and are not related to the determination of the reference tariff for the West Moreton system.</p>	<p>For the proposed AU1, the provisions relating to the RAB, including the separate schedule, have been removed.</p>	<p>For the purposes of the proposed AU1, Queensland Rail is proposing to remove those sections which relate to the RAB on the basis that these provisions have no direct relationship to the reference tariff in place for the West Moreton system. The West Moreton System does not currently have a QCA endorsed RAB.</p> <p>Queensland Rail is proposing to re-set the reference tariff for the West Moreton system in 2013. This process may include determining an appropriate RAB for the system, along with determining a suitable WACC that is in line with the risk profile of the business. In line with this process, it is reasonable to defer any consideration of the RAB, including provisions regarding RAB maintenance and roll-forward to such time that a RAB has been set for the West Moreton system.</p>

4 Conclusion

A guiding principle for AU1 is to develop an access undertaking that provides greater flexibility for Queensland Rail and access seekers to negotiate access terms appropriate for the particular circumstances of each system and access seeker.

Queensland Rail's proposed pricing principles provisions are largely consistent with the pricing principles in the Temporary Undertaking, which in turn are based on generally accepted regulatory principles. While there are differences between the pricing principles in the Temporary Undertaking and AU1, these differences reflect removal of redundant provisions or the simplification of detailed provisions which are no longer appropriate following changes to the business' structure and operations.

Appendix A Ceiling revenue limit

Temporary Undertaking

The Revenue Limit is defined by the Temporary Undertaking as (Paragraph 6.2.4(a)):

- (a) *The Revenue Limit will be determined as the maximum amount of expected revenue, including:*
- (i) *Access revenue (determined consistent with Paragraph 6.2.3(c)) that may be earned from Access Charges; and*
 - (ii) *where the Individual Train Service or combination of Train Services (as appropriate) includes all of the Train Services using a section of the Rail Infrastructure, any Transport Services Payments towards the relevant section of Rail Infrastructure,*

over the Evaluation Period, measured such that the net present value of the cashflows associated with providing Access for the Individual Train Service or the combination of Train Services (as appropriate) over the Evaluation Period is zero. This measurement can be expressed as:

$$0 = -AV_0 + \sum_{t=1}^n \frac{(RL_t - C_t - M_t - T_t)}{(1+ROA)^t} + \frac{AV_n}{(1+ROA)^n}$$

where:

AV₀ *is the value of assets reasonably expected to be required for the Stand Alone provision of Access for the Train Service(s), assessed in accordance with Paragraph 6.2.4(c), at the commencement of the Evaluation Period;*

n *is the number of years in the Evaluation Period;*

t *is each year within the Evaluation Period from 1 to n;*

RL_t *is the Revenue Limit for the Train Service(s) expressed as revenue that may be earned in each year of the Evaluation Period;*

C_t *is the capital expenditure for assets reasonably expected to be required for the Stand Alone provision of Access for the Train Service(s) in each year of the Evaluation Period;*

M_t *is the Efficient Cost, including operating and maintenance costs, business and corporate overheads and QCA Levy, reasonably expected to be incurred for the Stand Alone provision of Access for the Train Service(s) in each year of the Evaluation Period;*

ROA *is the maximum allowable rate of return expressed in nominal post tax terms (with the cost of debt expressed on a before tax basis), as agreed by [Queensland Rail] and the QCA or, failing such agreement, as determined by the QCA;*

T *is the tax expense assessed through the application of the statutory tax rate for corporations to the taxable income reasonably expected to be earned through the Stand Alone provision of Access for the Train Service(s) in each*

year of the Evaluation Period, where such tax expense is reduced in each year by the application of the gamma factor, reflecting the market value of dividend imputation, as agreed by [Queensland Rail] and the QCA or, failing such agreement, as determined by the QCA; and

AV_n is the value of assets reasonably expected to be required for the Stand Alone provision of Access for the Train Service(s), assessed in accordance with Paragraph 6.2.4(c), at the end of the Evaluation Period.

Proposed AU1

The Ceiling Revenue Limit is defined by AU1 as (Clause 3.2.3(a)):

- (i) the maximum amount of Expected Access Revenue; and
- (ii) where the Access Seeker's proposed Train Services comprise all of the Train Services using the relevant part of the Network, the Transport Services Payments (if any) that are reasonably expected to be received by Queensland Rail in respect of that part of the Network (on a pro rata basis for that individual Train Service or combination of Train Services, as applicable),

over the Evaluation Period where the Ceiling Revenue Limit is measured such that the net present value of the cashflows associated with providing Access for the relevant Train Service(s) over the Evaluation Period is zero. This measurement can be expressed as:

$$0 = -AV_o + \sum_{t=1}^n \frac{(CRL_t - C_t - M_t - T_t)}{(1 + WACC)^t} + \frac{AV_n}{(1 + WACC)^n}$$

where:

AV_o is the value of assets reasonably expected to be required for the Stand Alone provision of Access for the Train Service(s), assessed in accordance with clause 3.2.3(c), at the commencement of the Evaluation Period;

n is the number of years in the Evaluation Period from one to n ;

t is each year within the Evaluation Period;

CRL_t is the Ceiling Revenue Limit for the Train Service(s) expressed as revenue that may be earned in each year of the Evaluation Period;

C_t is the capital expenditure for assets reasonably expected to be required for Stand Alone provision of Access for the Train Service(s) in each year of the Evaluation Period;

M_t is the Efficient Costs for the Stand Alone provision of Access for the Train Service(s) in each year of the Evaluation Period;

T is the tax expense assessed through the application of the statutory tax rate for corporations to the taxable income reasonably expected to be earned through the Stand Alone provision of Access for the Train Service(s) in each year of

the Evaluation Period, where such tax expense is reduced in each year by the application of the gamma factor, reflecting the market value of dividend imputation, as agreed by Queensland Rail and the QCA or, failing such agreement, as determined by the QCA; and

AV_n *is the value of assets reasonably expected to be required for the Stand Alone provision of Access for the Train Service(s) assessed in accordance with clause 3.2.3(c), at the end of the Evaluation Period.*

WACC *has the meaning given to that term in clause 7.1*

Relevant definitions from AU1 include:

Margin *means a rate of 4.77%, being the difference between the WACC as at the Approval Date and the risk free rate component of the WACC, expressed as a positive value;*

Undertaking Risk Free Rate *means the rate calculated:*

- (a) *by averaging the yield on a five year Commonwealth Government Bond over a 20 trading day period ending as close as practicable to but not later than the date that Queensland Rail offers an Access Agreement to an Access Seeker; and*
- (b) *in accordance with:*
 - (i) *the methodology used by the QCA to determine the yield on such a Commonwealth Government Bond; or*
 - (ii) *where paragraph (b)(i) of this definition does not apply, the methodology agreed between Queensland Rail and the QCA (acting reasonably) from time to time for the purpose of this definition;*

WACC *means the weighted average cost of capital which:*

- (a) *as at the Approval Date, means a rate of 9.96% nominal post-tax; and*
- (b) *after the Approval Date, means a rate equivalent to the Undertaking Risk Free Rate plus the Margin.*

Attachment 2 – Queensland Rail Submission (July 2012)

Queensland Rail's response to the
*“QCA Issues Paper on Queensland
Rail's 2012 Draft Access Undertaking
April 2012”*

 QueenslandRail



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Introduction

On 30 March 2012 Queensland Rail Limited (Queensland Rail) submitted to the Queensland Competition Authority (QCA) a voluntary draft access undertaking (AU1) under section 136(1) of the *Queensland Competition Authority Act 1997* (Qld) (QCA Act). AU1 is Queensland Rail's first draft access undertaking in relation to the declared service under the QCA Act for which Queensland Rail is the owner and operator.

On 30 April 2012 the QCA released an issues paper seeking stakeholder responses to specific questions regarding AU1. Comments are due with the QCA no later than Friday 13 July 2012.

The QCA's issues paper poses a list of "Questions for comment". Following is Queensland Rail's response to those "Questions for comment".

Question 1 - Western System Reference Tariff Reset

Is Queensland Rail's proposal to extend the existing western system tariff until June 2013 reasonable? Is the proposed mechanism for putting in place a new tariff effective?

Queensland Rail has proposed to retain the current reference tariffs (with CPI adjustments) applying to the West Moreton System under *QR Network's Access Undertaking (2008) June 2010* (the Temporary Undertaking) subject to a reference tariff reset that is to be submitted by Queensland Rail to the QCA by 30 June 2013 (or such longer time as agreed with the QCA). Queensland Rail believes this to be a reasonable and effective approach for the following reasons:

- The reference tariffs applying to the West Moreton System under the Temporary Undertaking were developed based upon supporting information that was forecast out to June 2013.
- The approval of AU1 can progress while Queensland Rail consults with its customers and stakeholders to seek to establish an agreed new reference tariff.
- The reset will provide the time needed to seek to resolve the many complex matters that arise around the development and approval of a reference tariff, including the development of the requisite regulatory building blocks. These regulatory building blocks will provide both Queensland Rail and its customers with certainty and transparency.
- If Queensland Rail does not submit the proposed new reference tariff on time, then it will be taken to have submitted the current reference tariff (with escalations for CPI) for review by the QCA. While Queensland Rail is not seeking to rely on this provision, it provides certainty that the reference tariff review will occur.
- If the reference tariff was reset as part of AU1, then the QCA would have various powers under the QCA Act in connection with the approval or refusal to approve the reference tariff. To maintain that position, any submission or deemed submission of a new reference tariff will be treated as if it was a draft access undertaking submitted by Queensland Rail under the QCA Act in response to an initial undertaking notice given by the QCA. It is proposed that Queensland Rail and the QCA will act in accordance with the provisions of the QCA Act as though this were the case.
- Queensland Rail considers that it is desirable that Queensland Rail submits a new reference tariff to the QCA that has been agreed with its customers.

Question 2 - Ringfencing Trigger

Is it necessary to have a trigger in the undertaking for Queensland Rail to introduce ringfencing if competitors enter the market for above-rail passenger services?

It is not necessary to have a trigger in AU1 to introduce ringfencing if competitors enter the market for above-rail passenger services for the following reasons:

- Queensland Rail does not compete against third party operators of passenger train services and does not expect to do so during the regulatory period for AU1.¹ Practically, the lead time required for a third party to enter into the passenger train service market in competition with Queensland Rail precludes this occurring during the term of AU1.
- The characteristics of passenger train services are such that the business is not commercially viable without significant Queensland Government support in the form of transport service payments.
- There is no realistic prospect of the Queensland Government paying transport service payments to both Queensland Rail and a third party operator to establish competing passenger train services.
- Given the lack of commerciality of passenger train services in the absence of transport service payments, there will effectively be no competition as there will only be one operator for a passenger train service – whether Queensland Rail or a third party – during the regulatory period for AU1.
- Even if, despite it not being realistic, the Queensland Government was to consider facilitating a third party operator to establish passenger train services that competed with Queensland Rail, then the Queensland Government would be expected to take into consideration the current access regime and any changes that might be required including those in relation to AU1. If the Queensland Government chose to facilitate such a third party operator, it may decide to direct Queensland Rail to amend AU1.
- Queensland Rail also submits that its approach is consistent with relevant rail regulatory precedent.

¹ For more detail see sections 2.7, 2.8 and 3.3.2 of Queensland Rail's *Submission Accompanying and Explaining the Draft Queensland Rail Access Undertaking 1 – (March 2012)*.

Question 3 - Pricing Principles and NMP

Do the amended network management principles and pricing principles retain the necessary protections for access seekers and access holders?

A. Pricing Principles:

Queensland Rail has chosen to keep the proposed pricing principles in clauses 3.1 to 3.3 of AU1 largely consistent with those in the Temporary Undertaking. Queensland Rail has taken this approach with AU1 as a transitional measure given the complex economic and competition arguments that may arise if substantial amendments were made to those pricing principles. Queensland Rail may review and submit amended or different pricing principles in future access undertakings.

Despite this, the proposed pricing principles do include some variations from those in the Temporary Undertaking based on Queensland Rail's intention to reflect the changed structure of Queensland Rail's business, and its desire to simplify and reduce unnecessary prescription and detail in the access undertaking, where this provides no real benefit to access holders/seekers.

Core elements of the pricing principles in AU1 are *fundamentally unchanged* from the Temporary Undertaking.

Pricing principles which have been changed by Queensland Rail in AU1 include:

1. Removing the hierarchy of pricing principles

Queensland Rail has removed the hierarchy of pricing principles on the basis that the changed structure and nature of Queensland Rail's business means that there is little scope for direct conflict between the pricing principles. In any event, to the extent that there is no hierarchy of pricing principles, Queensland Rail would be obliged to comply with all of the pricing principles.

The hierarchy of pricing principles set out in QR Limited's 2005 Draft Access Undertaking was introduced to remove uncertainty regarding which pricing principles should take precedence in the event that a conflict arises.² For example, the QCA reaffirmed the view that limits on price differentiation within a market should take precedence over revenue adequacy as a pricing principle and noted that "*limits on price differentiation within a market are critical to avoid distorting competition in above-rail or end-user markets.*"³ The QCA had previously stated that:

*"The QCA accepted revenue adequacy as a legitimate pricing objective for QR to adopt, so long as it was to be pursued in a manner that minimises distortions to commercial activity in the above-rail market. Consequently, the QCA proposed revenue adequacy should be subject to the overriding requirement that in the event there is a conflict between QR pursuing revenue adequacy and non-discriminatory pricing in a particular market, then the latter objective would prevail, unless QR could justify the price difference to the QCA."*⁴

The changes to the current business arrangements, including no longer operating above-rail freight trains, means there is now no incentive for the business to use price differentiation or higher access charges to prevent or hinder access to competing third party access seekers.

2. Re-ordering the principles to place revenue adequacy first

Queensland Rail has not included a hierarchy of pricing principles in AU1. However, Australian regulators' primary focus tends to be the setting of a cost-based revenue/price cap, which is grounded in the concept of revenue adequacy. Revenue adequacy is a core and accepted

² QCA (July 2005) *Draft Decision – QR's 2005 Draft Access Undertaking*, p138.

³ QCA (July 2005) *Draft Decision- QR's 2005 Draft Access Undertaking*, p135.

⁴ QCA (July 2001) *Final Decision – QR's 1999 Draft Access Undertaking*, Volume 2 p126.

component of every cost-based regulatory framework in Australia, including those administered by the QCA for rail and other regulated services.

While the design of pricing frameworks, in particular, and other measures are informed by a desire to limit price discrimination and avoid cross-subsidisation, functionally these objectives are pursued *after* the objective of revenue adequacy has been addressed. In particular, with the changed business structure of Queensland Rail, the primacy given to price differentiation over revenue adequacy in the Temporary Undertaking is not appropriate. The core focus should be on ensuring that charges do not generate revenue in excess of the ceiling revenue limit.

A QCA-specific example where there is a listing of pricing objectives, but no hierarchy, is the Dalrymple Bay Coal Terminal Access Undertaking as approved by the QCA on 23 September 2010 (DBCT 2010AU). Clause 11.1 of the DBCT 2010AU details DBCT Management Pty Ltd's pricing objectives for the development of access charges, which are to:

- “(a) **(Achieve ARR)** achieve the ARR in each Financial year in accordance with this Undertaking, by way of the Revenue Cap plus any applicable Additional Tonnage Amount;
- (b) **(Efficient utilisation)** provide incentives for efficient utilisation of Terminal Capacity by Access Holders;
- (c) **(Equity)** ensure equitable treatment of Access Holders and Access Seekers;
- (d) **(Efficient investment)** encourage efficient future investment in the Terminal;
- (e) **(Recovery of Operating Costs)** ensure full recovery (but not over-recovery) from Access Holders of Terminal Operating Costs; and
- (f) **(Efficient Operating Costs)** ensure efficient Terminal Operating Costs.”

In addition, clause 11.10 of the DBCT 2010AU set out limits on price differentiation that apply to DBCT Management Pty Ltd in the setting of access charges.

There is no hierarchy or merit order of these objectives, nor any guidance on how to deal with conflicts between the objectives.

This is similar to Queensland Rail's approach, where the pricing principles are now applied without a hierarchy, and with revenue sufficiency, equivalent to DBCT's "Achieve ARR" objective, presented first.

3. *Removing those provisions which preclude price differentiation as a basis for preventing or hindering access by a third party.*

The approach taken in AU1 recognises that Queensland Rail no longer has any capacity to benefit from such strategies. The provisions referred to in the Temporary Undertaking relate to the establishment of access charges for “QR Train Services” for the purpose of preventing or hindering access by a third party access seeker into any market for the provision of such “QR Train Services”.

Queensland Rail does not compete against third party operators of passenger train services and does not expect to do so during the regulatory period for AU1.⁵

B. Network Management Principles:

See sections 2.8, 3.2, 3.3.3 and 6 of *Queensland Rail's Submission Accompanying and Explaining the Draft Queensland Rail Access Undertaking 1 – (March 2012)* for details relating to the Network Management Principles.

⁵ For more detail see sections 2.7, 2.8 and 3.3.2 of *Queensland Rail's Submission Accompanying and Explaining the Draft Queensland Rail Access Undertaking 1 – (March 2012)*.

Question 4 - Approach to Operating Requirements

Are access seekers'/holders' rights adversely affected by moving the network diagrams, interface risk management plan, environmental investigation and risk management process, operating plan template and operating requirements manual from the undertaking to Queensland Rail's website? If so, why and what should be done to protect access seekers' and access holders' rights?

Queensland Rail made the decision to move many of the Temporary Undertaking's technical operational requirements to the website for the following reasons:

- The inclusion of such technical operational requirements in the Temporary Undertaking was due to the vertically integrated nature of the corporate group of which QR Network Pty Ltd forms a part. The QCA required that many operational requirements be prescribed in the Temporary Undertaking to avoid the perception that QR Network Pty Ltd or its related companies might use operational processes to hinder third party access to its network. It is not necessary to include those prescriptive technical requirements in AU1, as Queensland Rail does not compete with third party above rail operators and has no incentive to use the technical requirements to improperly prevent or hinder third party access to its network.
- Moving the documentation to the website rather than including it in AU1 will result in a more efficient, timely process for the updating of those requirements rather than Queensland Rail being required to lodge a draft amending access undertaking each time an operational change is required.
- This approach will assist Queensland Rail to ensure that the information is readily available for customers and remains up to date.
- The technical operational requirements will apply to all access seekers and access holders.

Question 5 - Investment Framework

Does the investment framework proposed by Queensland Rail in section 1.4 of the DAU offer sufficient protection for access seekers and access holders? Does it adequately set out the rights of users who fund or underwrite infrastructure required to provide their access? Is it reasonable and efficient that Queensland Rail construct, own, operate and manage all user-funded infrastructure? Why?

At this time Queensland Rail does not intend to provide further comments in relation to this matter in addition to those contained in *Queensland Rail's Submission Accompanying and Explaining the Draft Queensland Rail Access Undertaking 1 – (March 2012)*.⁶ Queensland Rail will provide further submissions on this matter once Queensland Rail has a better understanding of any specific issues that the QCA or stakeholders may have.

⁶ For details see section 3.5 of Queensland Rail's *Submission Accompanying and Explaining the Draft Queensland Rail Access Undertaking 1 – (March 2012)*.

Question 6 - Access Conditions and Pricing Limits

Is it reasonable for Queensland Rail to remove from its undertaking the provisions governing the use of access conditions? Are the pricing limits sufficient to protect access seekers/holders, or should the undertaking include some restrictions on access conditions? Why?

Queensland Rail does not intend to provide comments in relation to this matter at this time. Queensland Rail will provide submissions on this matter once Queensland Rail has a better understanding of any specific issues that the QCA or stakeholders may have.

Question 7 - Relinquishment and Transfers

Does the mechanism for relinquishing and transferring capacity provide sufficient safeguards of access holders'/seekers' rights?

Access holders can assign, novate or otherwise transfer their interest in an access agreement to a third party in accordance with the terms of that access agreement, with the prior written consent of Queensland Rail.⁷ These provisions allow access holders to transfer surplus capacity rights, subject to the prior written consent of Queensland Rail. Under clause 20.2 of the Standard Access Agreement (SAA) in Schedule D of AU1, Queensland Rail's consent is not to be unreasonably withheld if Queensland Rail is satisfied that the assignee has the financial resources and capability to perform the obligations and the accreditation to operate the train services.

This position provides sufficient safeguards of access holders'/seekers' rights for the following reasons:

- Queensland Rail does not have a monopoly over transport services in relation to most of its rail network and competes with other modes of transport. Therefore, Queensland Rail is incentivised to allocate capacity efficiently.
- Like other similar rail access regimes around Australia, it is reasonable that Queensland Rail's prior consent be required prior to a transfer. The provisions in AU1 are consistent with rail access requirements in other States. The prior written consent of the rail manager prior to a transfer taking place is required in relation to:
 - Australian Rail Track Corporation's (ARTC) Interstate Access Agreement (2008);
 - V/Line's Standard Access Agreement (Freight Services);
 - Metro Trains Melbourne's (MTM) Standard Access Agreement;
 - DBCT's Standard User Agreement;⁸ and
 - ARTC's Indicative Access Holder Agreement (Hunter Valley) except where it is for a period of less than 12 months.
- The ACCC's comments in its 2002 Decision on ARTC's access undertaking support the approach taken by Queensland Rail in relation to transfers. The ACCC advised that:

"ARTC has also proposed that an operator may cancel train paths or assign them to third parties (subject to the approval of ARTC).

*The Commission accepts these provisions of the Undertaking and considers that it satisfies the legislative criteria in section 44ZZA(3) [of the Trade Practices Act 1974 (Cth)]."*⁹ (emphasis added)
- The requirements in clause 20.2 of the Standard Access Agreement in Schedule D of AU1 are not unusual in the context of a commercial transaction.

In addition to the above, Queensland Rail has also set out:

- in clause 18.2, Schedule C of AU1 principles in relation to relinquishments (including where an access holder wishes to relinquish access rights so that the capacity created by that relinquishment can be used to grant access rights to an access seeker nominated by the relevant access holder); and
- in clause 19.2 of the Standard Access Agreement in Schedule D of AU1 a relinquishment provision consistent with the principle in clause 18.2, Schedule C of AU1.

⁷ Clause 2.7.6 of AU1; clause 20.2 of the Standard Access Agreement in Schedule D of AU1.

⁸ Both the 2006 and 2010 Draft Access Undertaking Standard User Agreements included provisions for transfers with the prior written agreement of the infrastructure provider.

⁹ ACCC's Decision on ARTC Access Undertaking (May 2002), p. xviii. On 1 January 2011 the *Trade Practices Act 1974* (Cth) was renamed the *Competition and Consumer Act 2010* (Cth).

Question 8 - Competing Capacity Requests (e.g. Queuing)

Would it be prudent to provide certainty to access seekers and protection to Queensland Rail, for the undertaking to indicate how Queensland Rail would select between multiple access seekers offering the same terms for capacity on Queensland Rail's network? Should this take the form of principles for selecting between those users, or a formal queuing mechanism? Why?

- Queensland Rail discusses matters relevant to the QCA's queries in section 4.3 of its *Submission Accompanying and Explaining the Draft Queensland Rail Access Undertaking 1 – (March 2012)*.
- Queensland Rail has included in AU1 criteria upon which it will decide between competing access applications to determine the most favourable to Queensland Rail – subject to specific rights that AU1 sets out in favour of any existing access holder, i.e. where an access seeker seeks access rights that can only be granted on the expiry of that existing access holder's access agreement.¹⁰
- A key feature of AU1 is the commercial negotiation of access. This is consistent with the QCA's Final Approval of QR Limited's 2006 Draft Access Undertaking where the QCA stated:

*"The QCA Act makes it clear that commercial negotiation is to play a central role when an access seeker is seeking access rights."*¹¹

- The introduction of queuing into QR Limited's 2006 Access Undertaking was a result of concerns by Pacific National that QR Limited may have been intentionally delaying the progress of access negotiations to protect QR Limited's above rail freight operations. Pacific National proposed a queuing mechanism as a remedy for this.¹² In response, the QCA considered in both its draft and final decisions for QR Limited's Draft 2005 Access Undertaking that to give some certainty for access seekers a queuing framework was needed to allow access seekers to effectively 'reserve' specific train paths during negotiations.
- Queensland Rail does not compete with third parties for access to capacity in its rail network. Rather, capacity allocation to Queensland Rail's regularly scheduled passenger services is determined through sections 266 and 266A of the *Transport Infrastructure Act 1994 (Qld)* (TIA).¹³
- AU1 moves away from a queue-based to a principles-based approach to capacity allocation. Queuing imposes unnecessary administrative costs upon Queensland Rail for no clear competitive benefit.
- Queensland Rail's proposed capacity management framework is consistent with those put in place by other below rail providers in Australia, which allow capacity to be allocated to the access seeker which in the below rail provider's opinion, is most favourable or will best utilise the available capacity.¹⁴
- Underlying capacity allocation principles are to provide access seekers with certainty regarding the process and criteria for the allocation of capacity, and to ensure that all access seekers are treated fairly.
- The QCA issues paper made reference to the DBCT and Brookfield Rail queuing mechanisms where it stated:

".....it is noted that Brookfield Rail, operator of a mixed-use rail network in Western Australia, specifies in its train path policy that, where two operators are competing for

¹⁰ See section 4.3 of Queensland Rail's *Submission Accompanying and Explaining the Draft Queensland Rail Access Undertaking 1 – (March 2012)* and clause 2.7.2 of AU1, for details.

¹¹ QCA's Final Approval of QR Limited's Draft 2006 Access Undertaking, p.16 (June 2006).

¹² QCA's Draft Decision of QR Limited's Draft 2005 Access Undertaking, p.109 (July 2005).

¹³ For more detail on the application of sections 266 and 266A of the TIA see section 3.2 of Queensland Rail's *Submission Accompanying and Explaining the Draft Queensland Rail Access Undertaking 1 – (March 2012)*.

¹⁴ See Queensland Rail's *Submission Accompanying and Explaining the Draft Queensland Rail Access Undertaking 1 – (March 2012)*, section 3.4 and Appendix A of Attachment 3 PWC Supporting Analysis – Capacity Allocation.

a train path, the path will be provided to the operator which first requested the path. Similar arrangements are included in the 2010 access undertaking for the Dalrymple Bay Coal Terminal.”

However, PricewaterhouseCoopers (PwC) note in their analysis that MTM, V/Line and ARTC, all of which share significant characteristics with Queensland Rail, do not have queuing in their access regimes.¹⁵

DBCT

DBCT has a formal queue mechanism in place, generally consistent with the principle of first-in-time, first-in-right, though subject to certain conditions.¹⁶ Under the applicable access undertaking as the costs of access are the same for all users, including new/potential users, expansion costs are socialised across the total terminal customer base. A formal queue mechanism provides a transparent way to allocate capacity between different users with otherwise equal commercial terms (i.e. there is no way to meaningfully contrast the ‘cost’ or ‘risk’ of providing access to different access seekers as all access seekers face the same access charge).

Queensland Rail, by comparison, services a diverse mix of general freight and coal customers as well as varied commodities, origins and destinations. As such, there are material differences in commercial outcomes associated with cost and risk between customers. Being subject to time-based queuing arrangements would:

- not be in the best interests of Queensland Rail’s business;
- not provide the most or a more efficient mechanism for managing and allocating capacity;
- result in the business continuously reviewing and, potentially, adjusting queues; and
- create an unnecessary administrative burden and cost for the business, whilst not providing any benefits for access seekers.

Brookfield Rail

WestNetRail’s approved April 2009 Train Path Policy (TPP) relating to Brookfield Rail, specifies that:

“If two Operators request the same available Train Path and it is not possible to satisfy both requests by using alternative but similar Train Paths, the available Train Path will be provided to the Operator who first requested the Train Path and can establish that it has a requirement for the Train Path.

Whether a requirement exists will be determined on the basis of the criteria set out in 2.2.1 of the T.P.P.”¹⁷

In approving this position, which was submitted by WestNetRail, the Economic Regulation Authority – Western Australia recognised that: *“that [WestNetRail], as the railway owner, should have some discretion to determine what is in its best interests in running the network as long as the policies it proposes are not anti-competitive and treat all parties equally”.*

¹⁵ See Queensland Rail’s *Submission Accompanying and Explaining the Draft Queensland Rail Access Undertaking 1 – (March 2012)*, section 3.4 and Appendix A of Attachment 3 PWC Supporting Analysis – Capacity Allocation.

¹⁶ For example, in the 2010 Draft Access Undertaking for DBCT, the queuing arrangements included the condition that where access seekers agree to provide feasibility funding for expansions, they will take priority in the queue at that point in time (however the overall sequence of the queue does not change). (Queensland Competition Authority. 2010. *Final Decision – Dalrymple Bay Coal Terminal: 2010 Draft Access Undertaking*. September 2010. p.22.)

¹⁷ WestNetRail, 2009, *Train Path Policy*, April 2009, p.9. Available at: <http://www.erawa.com.au/cproot/7522/2/20090430%20WestNet%20Rail%20Proposed%20Revised%20Train%20Path%20Policy.pdf>. Accessed on: 6 July 2012.

However, subsequent to the publication of the QCA Issues Paper, Brookfield Rail has submitted a Proposed Revised TPP to the Economic Regulation Authority – Western Australia that does not include the abovementioned provision and instead sets out criteria for allocating train paths between competing access seekers. Specifically, Clauses 12 and 13 of the Proposed Revised TPP state that:

- “12. *If there is a competing demand for Network capacity at the time of proposal and negotiation, then in order to determine which entity receives an entitlement to Train Paths, Brookfield Rail will compare the relative compliance of the entities to the requirements in the Code with regard to the proposal and negotiation process and will determine the allocation of Train Paths to entities in such a way that:*
- a) is fair, given the competing demand for limited Network capacity;*
 - b) maximises use of the Network; and*
 - c) satisfies Brookfield Rail’s commercial objectives.*
13. *In addition, Brookfield Rail may also consider the following aspects of each proposal/entity:*
- a) arrangements or planned arrangements for the operation of freight or passenger Services;*
 - b) details of anticipated increased demand (which justifies the operations detailed in the proposal), including because of:*
 - i. an upgrade or expansion of production capacity with confirmation that it will progress (e.g. funding approved, public announcements etc);*
 - ii. estimated market growth based; or*
 - iii. committed new projects with agreed funding;*
 - c) historical use of the Train Paths;*
 - d) seasonal demand for a seasonal path based on the production or market characteristics of the freight;*
 - e) need for surge capacity based on demand or other constraints such as shipping;*
 - f) other relevant information as it is made available to Brookfield Rail.”¹⁸*

The approach taken with these proposed clauses is broadly similar to that of Queensland Rail in AU1’s proposed capacity allocation provisions, in that it reflects a departure from the time-based criteria, and Brookfield Rail is able to execute an agreement that is most favourable to the business, having regard to a number of specified factors. Such an approach provides flexibility and avoids unnecessary administrative and regulatory costs to the business.

This approach has not yet been approved by the Economic Regulation Authority – Western Australia. Although, it is notable that Brookfield Rail is seeking to move towards a capacity allocation methodology that is more consistent to the MTM, V/Line and ARTC access regimes by not including a formal queuing mechanism.

¹⁸ Brookfield Rail, 2012. *Proposed Revised Train Path Policy*. May 2012. p.4 and 5. Available at: <http://www.erawa.com.au/cproot/10345/2/20120305%20Brookfield%20Rail%20Train%20Path%20Policy.pdf>. Accessed on: 27 June 2012.

Question 9 - Standard Access Agreements

Is the proposed standard access agreement for western system coal services consistent with the proposed undertaking and the QCA Act? Is it reasonable to provide standard access agreements for rolling stock operators, but not for end users?

The Standard Access Agreement (SAA) for Coal Carrying Train Services on the West Moreton System and the QCA Act

- Queensland Rail has subjected the SAA and AU1 to extensive internal and external regulatory and legal review prior to submission of those documents to the QCA.
- Queensland Rail considers that the proposed SAA is consistent with both AU1's provisions and the QCA Act.

End User Pro Forma Access Agreement for Coal Carrying Train Services on the West Moreton System

- Section 99 of the QCA Act requires Queensland Rail to negotiate with an access seeker for access to the declared service. Section 100(1) of the QCA Act requires that Queensland Rail and an access seeker negotiate in good faith.
- The absence of a QCA approved pro forma access agreement for end users does not impede the ability of Queensland Rail and an end user to negotiate an access agreement.
- In such circumstances Queensland Rail would negotiate an access agreement with the end user through the negotiation provisions specified in AU1. Ultimately, if the parties could not reach agreement, then the end user could refer the matter to the QCA for an access determination.
- Under the Temporary Undertaking there are no standard access agreements that apply to Queensland Rail's network.
- If there were sufficient demand for such an end user pro forma access agreement, then Queensland Rail should be engaged, or regularly engaged, in negotiations with end users in relation to such access agreements or there should be a reasonable expectation that it will be – but this is not the case. Indeed, the fact that none of the past rail access undertakings even included a standard access agreement for the Western System (now the West Moreton System) indicates that previously there wasn't a sufficient basis for a standard access agreement for operators, let alone for end users.
- All access agreements on Queensland Rail's network have been with rail operators not with end users. Queensland Rail is not aware of any reasonable expectation of there being sufficient demand from end users to warrant the development of a QCA approved pro forma access agreement for end users for coal carrying train services on the West Moreton System.
- Operators are the only access holders on the West Moreton System for coal carrying train services and there is not a realistic prospect that the predominance of such operators as access holders will change in the foreseeable future.
- Given the lack of sufficient demand for an end user access agreement and the considerable resources that would likely be required to develop such a pro forma access agreement, the development of an end user pro forma access agreement is not warranted.
- Despite there not having been a standard access agreement for the Western System (now the West Moreton System) in the past, Queensland Rail has voluntarily developed, as part of AU1, the SAA for the operators of coal carrying train services on the West Moreton System. Queensland Rail has done so in recognition of the operators being the only access holders on the West Moreton System for coal carrying trains services and the expected future demand by operators for access rights.

Question 10 - Liability of Dangerous Goods

Does Queensland Rail's proposed treatment of liability for dangerous goods in the access agreement principles place the costs and liability in the hands of the party best able to manage the risks?

Attachment A contains the PwC analysis of Queensland Rail's approach to the treatment of liability for dangerous goods in AU1.

Question 11 - Queensland Rail's Structure

Will access seekers/holders be adequately protected, given Queensland Rail is vertically integrated with an above-rail passenger business (but not an above-rail freight business)?

- The level of prescription required in QR Limited and QR Network Pty Ltd past undertakings was largely a consequence of these undertakings having application to an integrated above-rail freight business, or a group of related companies that provided integrated rail services including both below and above rail functions.
- While Queensland Rail is a vertically integrated business with both above rail and below rail activities, Queensland Rail's above rail activities do not include freight train services,¹⁹ and its passenger train services do not operate in competition with third party train services.²⁰
- In relation to train path allocation, train paths for regularly scheduled Queensland Rail passenger services are allocated to Queensland Rail through sections 266 and 266A of the *Transport Infrastructure Act 1994* (Qld) (TIA) by the Director General of the Department of Transport and Main Roads (DTMR).²¹ This means that there is no conflict of interest in the allocation of capacity by Queensland Rail to third party access holders through the negotiation or scheduling process.
- Queensland Rail is effectively acting as a non-vertically integrated access provider in respect of access to its rail network. The structure and operation of Queensland Rail's business means that many of the prescriptive provisions in previous undertakings for QR Limited and QR Network Pty Ltd that were aimed at an integrated rail business are not required in AU1.
- It is also important to note that AU1 does not replace the QCA Act and should be considered in the context of the protections in the QCA Act for access seekers (and access holders).

¹⁹ For more detail see section 2.2 of Queensland Rail's *Submission Accompanying and Explaining the Draft Queensland Rail Access Undertaking 1 – (March 2012)*.

²⁰ For more detail see sections 2.7, 2.8 and 3.3.2 of Queensland Rail's *Submission Accompanying and Explaining the Draft Queensland Rail Access Undertaking 1 – (March 2012)*.

²¹ For more detail on the application of sections 266 and 266A of the TIA see section 3.2 of Queensland Rail's *Submission Accompanying and Explaining the Draft Queensland Rail Access Undertaking 1 – (March 2012)*.

Question 12 - Access to the Declared Service – Passenger Assets

Is it reasonable that parties seeking access to passenger stations and platforms for freight services apply through the provisions in the QCA Act, and not through a process detailed in an undertaking?

- Queensland Rail considers it unlikely that freight train services will require access to passenger related infrastructure.²²
- There is no requirement in the QCA Act that a voluntary access undertaking must apply to all of a declared service. This is reflected in the QCA's 2000 Draft Decision on QR Limited's Draft Undertaking which stated:

*"It is clear that declared services need not be subject to an undertaking although the QCA is empowered under the QCA Act to request an undertaking from an access provider in relation to the provision of declared services. If access is sought to declared services not covered by an undertaking, the arbitration machinery contained in the QCA Act would be available."*²³

- The approach taken in AU1 is consistent with past QCA approved rail access undertakings in Queensland.²⁴
- Extending AU1 to providing an access seeker for a non-passenger train service with access to the parts of the rail network provided for the benefit of passengers and passenger train services and that are fit for purpose for passenger services will create unnecessary complexity in AU1 in respect of a scenario that is unlikely to arise.²⁵
- This is more efficiently addressed during the term of AU1 on a case by case basis through Queensland Rail's negotiations with an access seeker, or, if necessary, by an access determination of the QCA, in accordance with the QCA Act.

²² For more detail see section 3.4.2 of Queensland Rail's *Submission Accompanying and Explaining the Draft Queensland Rail Access Undertaking 1 – (March 2012)*.

²³ The QCA Draft Decision on QR's Draft Undertaking – Volume 2, December 2000' p. 141 in footnote 61.

²⁴ For more detail see section 3.4.3 of Queensland Rail's *Submission Accompanying and Explaining the Draft Queensland Rail Access Undertaking 1 – (March 2012)*.

²⁵ For more detail see section 3.4.4 of Queensland Rail's *Submission Accompanying and Explaining the Draft Queensland Rail Access Undertaking 1 – (March 2012)*.

Attachment A - PwC Analysis of the Treatment of Liability for Dangerous Goods in AU1

Queensland Rail

Treatment of dangerous goods

Queensland Rail

*Supporting analysis for
submission to the QCA*

10 July 2012



*What would
you like to grow?*

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1 Introduction

1.1 Purpose and approach

Queensland Rail submitted its proposed Draft Access Undertaking 1 (Queensland Rail Access Undertaking 1 (AU1)) to the Queensland Competition Authority (QCA) in March 2012. AU1 seeks to provide an access undertaking that better suits the operations and requirements of Queensland Rail, while preserving the basic process for access seekers to negotiate access terms. AU1 also seeks to simplify the business' current access arrangements to be better understood by all parties.¹

In April 2012, the QCA released an Issues Paper on Queensland Rail's AU1. The purpose of the paper was to assist stakeholders in preparing submissions on the proposed AU1.

One of the questions posed by the QCA in the Issues Paper was:

Does [Queensland Rail's] proposed treatment of liability for dangerous goods in the access agreement principles place the costs and liability in the hands of the party best able to manage the risks?

This paper considers this question in light of Queensland Rail's intention with respect to a proposed indemnity regarding dangerous goods.

¹ Since separation from QR Limited on 1 July 2010, Queensland Rail has provided access to its below rail network under QR Network's (2008) June 2010 Access Undertaking (Temporary Undertaking) which applies to Queensland Rail in the manner, and for the period, set out in a transfer notice under the *Infrastructure Investment (Asset Restructuring and Disposal) Act 2009* (Qld).

2 Queensland Rail's proposed arrangements

The transportation of dangerous goods on Queensland Rail's network creates risk for the business and this risk is directly related to the consequence, or potential costs, associated with an incident involving these goods.

Queensland Rail's proposed Access Agreement Principles include the following principle (Clause 10(c)) with respect to dangerous goods:

The Access Agreement must include specific provisions regarding the Access Holder's indemnity relating to the carrying of Dangerous Goods, if applicable.

Queensland Rail's intent through the inclusion of this principle is to enable the business to negotiate an indemnity which limits the business' risk and liability, should there be an incident involving dangerous goods on Queensland Rail's network (including where Queensland Rail is at fault).

Specifically, the business proposes to limit its liability in such a situation to the amount the business would incur if the transported goods were not classified as dangerous goods. On this basis, an indemnity from the operator in relation to dangerous goods would extend to claims or losses where Queensland Rail is at fault other than claims or losses that would have arisen anyway if only non-dangerous goods were being carried.

For example, the consequence of train derailment where the goods being carried are inert products such as grain, or even coal, is very different to the consequence of a train derailment where the train was carrying dangerous goods, such as cyanide or explosives, in terms of the harm this can cause people, property and the environment.

An incident involving dangerous goods will typically result in higher remediation costs than an incident involving non-dangerous goods. The business is therefore proposing that for incidents where Queensland Rail is deemed to be at fault, responsibility for the additional or *incremental costs* that arises because the incident involves a dangerous good should fall with the access seeker or train operator on the basis that they are best able to manage this risk.

There is limited regulatory precedent for the treatment of liability relating to dangerous goods. Our review has not identified any definitive regulatory guidance on the matter. However, the QCA responded to a dangerous goods related proposal by QR Network in their 2009 voluntary draft access undertaking (2009 DAU) which does provide some relevant albeit limited guidance.

In 2008, as part of QR Network's 2009 DAU process, QR Network proposed a broader limitation with respect to dangerous goods. Clause 14, Schedule E (Principles for inclusion in the Standard Access Agreement) stated:

Each party is liable for, and is required to release and indemnify each other for, all claims in respect of personal injury, death or property damage caused or contributed to (to the extent of the contribution) by the wilful default or negligent act or omission of that party or its staff save and except that the Access Holder will be liable for, and is required to release and indemnify QR Network for, claims brought against QR Network relating to the carriage of dangerous goods (including explosives and radioactive material).

The QCA's Draft Decision on the 2009 DAU did not agree with QR Network's proposal regarding the dangerous goods provisions. The QCA was of the view the allocation of risk is efficient when the risk is borne by the party that is in the best position to manage that risk and that the access holder was not in a position to manage risks associated with QR Network's negligence or wilful default.²

Further the QCA was of the view that these are risks that road transport operators do not bear and limiting QR Network's liability in this area would result in the transfer of dangerous goods from railways to roads, which would not be in the public interest.³

Importantly, Queensland Rail's current position is different to the 2009 QR Network position. Unlike QR Network, Queensland Rail proposes that it still be liable for the costs of an incident involving dangerous goods where the business is at fault; however, liability would be limited to the costs associated with carrying non-dangerous goods. Liability for any additional costs resulting due to the fact that the goods are 'dangerous goods' will remain with the access seekers/train operator.

² Queensland Competition Authority. 2009. *Draft Decision: QR Network 2009 Draft Access Undertaking*. Available online at: <http://www.qca.org.au/files/R-2009DAU-QCA-QRN09DAU-DraftDec-1209.pdf>. [Accessed on: 27 June 2012]. Pg. 138.

³ Queensland Competition Authority. 2009. *Draft Decision: QR Network 2009 Draft Access Undertaking*. Available online at: <http://www.qca.org.au/files/R-2009DAU-QCA-QRN09DAU-DraftDec-1209.pdf>. [Accessed on: 27 June 2012]. Pg. 138.

3 Discussion and findings

Managing risk and liability efficiently is a core part of operating any business. For regulated businesses, which deliver essential community services, it also is necessary that these businesses are not exposed to a level of risk, such that if an event occurred it would threaten the continuity and financial viability of the businesses, or impact on their ability to raise finance and deliver new infrastructure.

Regulated businesses also should have an incentive to invest efficiently to decrease risk. However, where risk mitigation activities generate costs or result in businesses bearing additional risk, they should be compensated for this. This includes passing costs through to access holders via access charges in accordance with each access holder's contribution to generating these additional costs.

Queensland Rail's proposed Access Agreement Principle regarding dangerous goods seeks to allow the business to effectively manage its risk exposure with respect to the carriage of dangerous goods.

For incidents involving dangerous goods where Queensland Rail is deemed to be at fault the business is proposing that it will still be liable for a portion of the costs of an incident. However, responsibility for the additional or incremental costs that arise because the incident involves the carriage of dangerous goods will fall with the access seeker or train operator on the basis that they are best able to manage this risk.

There are a number of limitations on Queensland Rail's ability to fully manage the risk associated with the transportation of dangerous goods. Queensland Rail is limited in its ability to manage the consequence of an incident involving dangerous goods (i.e. potential damage to people, property and the environment) as this is a function of the products being hauled by the above-rail operator, and this is outside the control of Queensland Rail as an infrastructure provider.

There are also information asymmetries which exist at the time of negotiating access arrangements with access seekers/train operators. These mean that the business may not have complete knowledge, at the time of negotiations, of the specific attributes of the dangerous goods (volume, type, frequency etc) being transported on its network at any time as this can vary by train.

The business has limited efficient options to manage this risk. For example, Queensland Rail currently maintains its network to the standard required for the carriage of goods on its network, and while in theory maintenance expenditure could be increased to further reduce the likelihood of an incident this may not be efficient, and may be questioned by the QCA.

Alternatively, the business could seek to manage the risk associated with the transportation of dangerous goods through insurance. Where this activity generates additional costs, these costs should be passed through to users in accordance with their contribution to the generation of these costs, assuming that as a regulated business these costs are allowed to be passed through. However, in light of the information asymmetries the business may be limited in its ability to effectively price this risk into access charges and this may have equity implications.

3.1 Managing Queensland Rail's risk exposure

As a general principle the consequences of an incident on Queensland Rail's network involving dangerous goods will typically be higher than an equivalent incident involving other types of goods.

A key business objective of Queensland Rail is to manage all risk, including the risk associated with the transportation of dangerous goods, having regard to consequence and likelihood of an incident for which Queensland Rail is deemed to be at fault. Queensland Rail, however, is limited in its ability to manage the consequence of an incident involving dangerous goods as this is a function of the products being hauled by the above-rail operator, decisions on which sit outside the control of Queensland Rail as an infrastructure provider.

Accordingly, with respect to the carriage of dangerous goods, potential risk mitigation options for the business include:

- reducing the likelihood of occurrence, such as by increasing track maintenance expenditure on Queensland Rail's network
- reducing the impact of an incident on the business, such as through insuring externally or self-insuring against potential damage caused by dangerous goods.

Both risk mitigation options will involve additional costs for the business, and these costs should be passed on to customers in accordance with their contribution to generating these costs.

Alternatively, if the business is not able to be adequately compensated for bearing the risk of carrying these goods, a business may reasonably seek to avoid this activity, particularly where the impact of the risk is seen to be material. In a commercial environment this could involve introducing a prohibition on the transportation of dangerous goods on Queensland Rail's network. However, this is not a realistic option for Queensland Rail under the provisions of the *Queensland Competition Authority Act 1997* (QCA Act).⁴

3.1.1 Efficient maintenance expenditure

Queensland Rail undertakes on-going maintenance of its below-rail network, and as a regulated business, it is necessary to ensure that this maintenance expenditure is efficient and appropriate for meeting the requirements of Queensland Rail's operations and customers.

Maintenance activities can provide a method for managing, but not completely eliminating, the risk of an incident. The business, therefore, may be able to increase its maintenance expenditure in order to reduce the potential likelihood of an incident for which Queensland Rail is deemed to be at fault.

⁴ Sections 99 and 100(1) of the QCA Act oblige Queensland Rail to negotiate with access seekers in good faith and this is likely to restrict Queensland Rail's ability to refuse to negotiate for access.

For each additional dollar the business spends on maintenance this is likely to provide a proportional (or more than proportional) reduction in the likelihood of an incident. Over time, however, due to diminishing returns, for each additional dollar there is expected to be a less than proportional reduction in the likelihood of an incident. This indicates that there is an efficient maintenance expenditure point. This efficient maintenance expenditure point should balance the cost of undertaking additional maintenance to reduce the likelihood of an incident against the benefit in avoided incident costs (subject to the regulatory and commercial ability of the business to pass through these costs).

It is not feasible to completely eliminate the likelihood of an incident on Queensland Rail's network as the costs of doing so would be prohibitive. This is consistent with the findings of recent research paper prepared for the QCA.⁵ This paper found that the socially optimal level of supply security of infrastructure services is unlikely to be a standard of perfect reliability and that while there are benefits to the community from reducing the probability of an interruption to zero, it is recognised that doing this would entail prohibitively high costs.⁶

Queensland Rail currently maintains its network to a standard which it considers is appropriate for the carriage of goods on its network, including dangerous goods. Queensland Rail believes that increasing maintenance expenditures from current levels, as a mechanism to reduce the likelihood of an incident involving dangerous goods and therefore the risk to Queensland Rail under current liability allocation arrangements, is unlikely to be the most efficient strategy. Each incremental unit of maintenance expenditure would deliver a disproportionately smaller reduction in risk.

Further, for systems which carry a mix of both dangerous and non-dangerous goods, the requirement to expend on a 'whole of system' strategy, where the benefit accrues to only a fraction of total cargoes carried, is unlikely to be efficient.

There also are equity considerations with respect to the allocation of efficient maintenance expenditure. As the level of maintenance expenditure is a consequence of the carriage of dangerous goods on Queensland Rail's network, this additional expenditure should be reflected only in access charges paid by users transporting dangerous goods. The access charges paid by customers transporting non-dangerous goods should be determined based on the level of maintenance expenditure that would be required for non-dangerous goods.

There are limitations, however, for accurately determining these amounts and to effectively passing these costs through to the relevant access seekers. Accurately pricing this risk depends on the attributes of the dangerous goods carried on Queensland Rail's network. This information is not typically available at the time of negotiating access terms, particularly for mixed trains which carry a range of goods, including differing volumes and types of dangerous goods, which can vary by train.

Further discussion regarding pricing and risk is provided in Section 3.2 below.

⁵ Gans, J and King, S. 2003. *Pricing Principles for Investment Made Under Extraordinary Circumstances. A report on behalf of the Queensland Competition Authority.*

⁶ Gans, J and King, S. 2003. *Pricing Principles for Investment Made Under Extraordinary Circumstances. A report on behalf of the Queensland Competition Authority.*

3.1.2 Insuring against potential damage involving dangerous goods

Queensland Rail has limited capacity to reduce the consequence of an incident as this is directly related to the nature of goods being transported on its network. Accordingly, to limit any potential liability arising due to an incident involving dangerous goods where the business is deemed to be at fault, the business could secure appropriate insurance.

Determining the appropriate level of insurance to protect the business from the risk of transporting dangerous goods, however, is complex. For example, mixed freight trains carry a range of goods, both dangerous and non-dangerous. At any time these trains could be carrying any combination of dangerous goods, from a single drum of chlorine, to a number of carriages containing drums of chlorine. As the type, quantity and frequency of dangerous goods varies, this also varies the potential risk exposure to Queensland Rail.

Queensland Rail, therefore, is not well positioned to understand the level of risk associated with the transportation of dangerous goods on its network at the time of negotiating access. This is because Queensland Rail is only made aware of the types of goods, including the attributes of any dangerous goods, carried on its network fifteen minutes prior to departure of the operator's train. Short lead times are integral to the competitiveness of rail over alternative transport modes.

Using these efficient lead times means that the business is not able to determine the appropriate level of insurance to manage this risk or price this risk effectively in an access charge. Further, while the business could still insure for this risk, this could lead to a situation where the business over-insures (or under-insures), resulting in increased costs (or potentially exposing the business to uninsured loss should an incident occur where Queensland Rail is at fault, which it may have limited capacity to manage).

Some access seekers/train operators, by comparison, would have a better understanding of the attributes of dangerous goods (type, quantity, frequency) to be carried on Queensland Rail's network and could ensure that insurance arrangements were specifically tailored to their requirements. This would, arguably, lead to a more efficient outcome than assigning this responsibility to Queensland Rail and would address the potential for Queensland Rail to over-insure (or under-insure) in the absence of sufficient information.

Further, similar to efficient maintenance expenditure, where the business does incur additional insurance costs or carry an additional level of risk, it should be adequately compensated for this risk. Any additional costs should be passed on to network users in accordance with their contribution to generating these costs. In practice, however, this process is complex due to information asymmetries regarding the attributes of goods transported by above-rail operators. Further discussion regarding pricing and risk is provided in Section 3.2 below.

3.1.3 Prohibiting the transportation of dangerous goods

Risk associated with the transportation of dangerous goods could be managed through introducing a prohibition regarding certain goods. This would provide the most effective means for the business to manage the risk associated with transporting dangerous goods, particularly in the instance that it is not sufficiently compensated for the additional level of risk associated with the transportation of dangerous goods.

The introduction of a dangerous goods prohibition on Queensland Rail's network would lead to an increase in the volume of dangerous goods carried by road transport providers, which may not be in the public's best interests. This change of transportation mode may also impact on economic efficiency, by leading to higher transportation costs for these goods. It could also harm the competitiveness of Queensland Rail's non-dangerous goods traffic, by requiring a higher share of fixed network costs to be recovered from these users.

Further, while this may be possible in a purely competitive environment, it may not be possible under the QCA Act. In particular:

- the declared service under section 250(1)(b) does not exclude the transportation of dangerous goods
- sections 99 and 100(1) of the QCA Act require an access provider to negotiate with an access seeker and to do so in good faith.

An outright prohibition on the carriage of certain products could be deemed to be inconsistent with the declared service and Queensland Rail's obligation to negotiate in good faith obligation.

3.2 Reflecting risk in access charges

The QCA indicated in its Draft Decision regarding QR Network's 2009 DAU that the allocation of risk in relation to dangerous goods is efficient when the risk is borne by the party that is in the best position to manage that risk.⁷ There should also be incentive for the business to invest efficiently to decrease risk, and where risk mitigation activities generate costs or results in the business bearing additional risk, the business should be compensated for this.

Queensland Rail's options for managing its risk with respect to the carriage of dangerous goods, as discussed above, are likely to generate additional costs for the business (with the exception of the dangerous goods prohibition). Queensland Rail should be able to pass these costs through to access holders via the access charge in accordance with each access holder's contribution to generating these additional costs.

However, effectively reflecting risk in access charges is highly complex. This is because the level of investment in maintenance expenditure and the risk exposure of the business (as managed through appropriate insurance/self-insurance arrangements), would require detailed information from the train operator and access seeker/holder regarding:

- the nature/type of the dangerous good being carried
- the quantity of the dangerous good being carried
- the level of risk or potential damage associated with an incident involving the dangerous goods (people, property and environment)

⁷ Queensland Competition Authority. 2009. Draft Decision: QR Network 2009 Draft Access Undertaking. Available online at: <http://www.qca.org.au/files/R-2009DAU-QCA-QRN09DAU-DraftDec-1209.pdf>. [Accessed on: 27 June 2012]. Pg. 138.

- the frequency of the transportation of the dangerous goods on Queensland Rail's network.

This information is not always available at the time of negotiating access arrangements, particularly as Queensland Rail provides access to a number of mixed freight trains, transporting both dangerous and non-dangerous goods in varying volumes and frequencies.

If the business is not able to pass on the increased costs associated with managing this risk of transporting dangerous goods in accordance with each access holder's contribution to generating these costs, the business may be left in a situation where it must socialise these costs by increasing access charges for all users. This approach is unlikely to be acceptable by access seekers/holders which are highly price sensitive and have a limited capacity to pay.

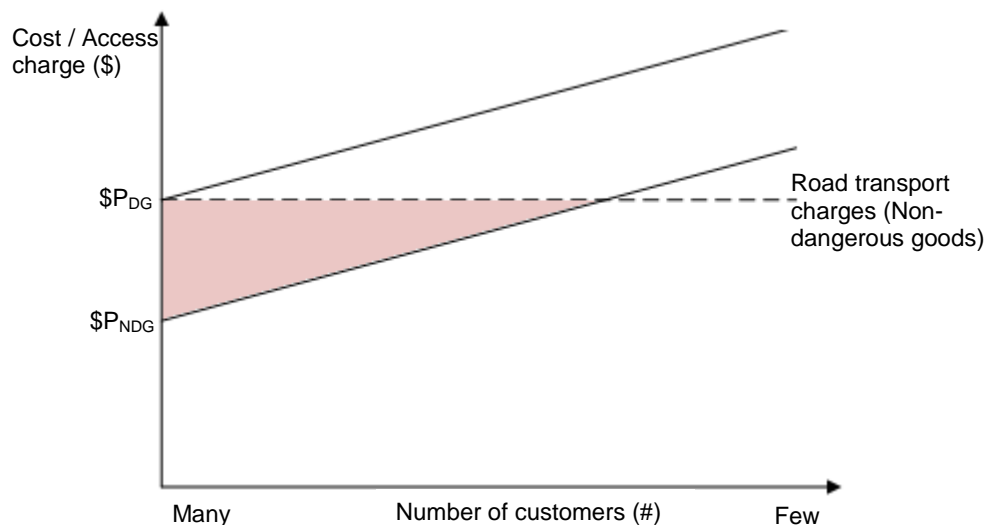
Further, if all access seekers are required to pay a higher access charge, due to increased expenditure required to manage the risk associated with the carriage of dangerous goods, this may have unintended consequences.

Figure 1 provides a graphical representation of the potential access charge where the business is required to incur additional costs for managing the risk associated with the carriage of dangerous goods ($\$P_{DG}$) compared to the potential access charge where the network only carried non-dangerous goods ($\$P_{NDG}$). It illustrates that access charges increase where there are fewer users on the network, each carrying a higher share of fixed network costs. Provided there are sufficient network users, access charges for non-dangerous goods are favourable in comparison to competing transport modes, as indicated by the shaded area.

There would also be a corresponding road transport charge for dangerous goods (which is not depicted in Figure 1) that is expected to be higher than that relating to non-dangerous goods.

If the business is unable to differentiate charges between access seekers, this would mean that all access seekers would incur the higher access charge, reflecting the cost of Queensland Rail carrying liability for dangerous goods. This could directly impede the competitiveness of Queensland Rail, as higher charges for all access seekers could compel some non-dangerous goods customers to switch to road freight transport where this is less expensive.

Figure 1 – Passing through costs to access holders/seekers



3.3 Conclusion

The proposed Access Agreement Principle allowing for an indemnity for the incremental liability relating to the carriage of dangerous goods provides a reasonable means for Queensland Rail to manage its risk exposure.

There are a number of limitations on Queensland Rail's ability to fully manage its risk exposure with respect to the carriage of dangerous goods.

Information asymmetries which exist at the time of negotiating access impact on the ability of Queensland Rail to efficiently manage the risk associated with the transportation of these goods, as this can impact on the business' ability to determine the efficient level of insurance coverage.

Without a clear understanding of the attributes of the dangerous goods carried on its network at the time of negotiating access, the business is unable to pass these costs through to customers in accordance with their contribution to generating these costs. This could lead to the socialisation of these costs across all users, which would impact the competitiveness of rail transport relative to road transport.

Where there are information asymmetries, therefore, regarding the attributes of dangerous goods carried on Queensland Rail's network, there may be instances where the access seeker is better placed to manage this risk and the proposed Access Agreement Principle allows for this to occur.

The proposed Access Agreement Principle provides a means for the business to negotiate an indemnity for the carriage of dangerous goods, but it still provides scope for the access seeker and the business to negotiate an alternative risk allocation where this is appropriate.

Disclaimer

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Attachment 3 – Queensland Rail Submission (September 2012)

Response to QCA Issues Paper on Queensland Rail's Draft Access Undertaking 1 – (Sept 2012)

 QueenslandRail



Introduction

On 30 March 2012 Queensland Rail Limited (Queensland Rail) submitted to the Queensland Competition Authority (QCA) a voluntary draft access undertaking (AU1) under section 136(1) of the *Queensland Competition Authority Act 1997* (Qld) (QCA Act). AU1 is Queensland Rail's first draft access undertaking in relation to the declared service under the QCA Act for which Queensland Rail is the owner and operator.

On 30 April 2012 the QCA released an issues paper seeking stakeholder responses to specific questions regarding AU1. Comments were due with the QCA no later than Friday 13 July 2012. The QCA considered that stakeholders had raised a number of issues in their submissions on which other stakeholders would want to comment. On this basis the QCA sought further comments in respect of submissions by Friday 14 September 2012. This document is in response to the QCA's request for further comments.

Due to the complexities involved and the variety of views from stakeholders, Queensland Rail has not provided responses in relation to all comments at this time nor addressed all matters that may relate to AU1. Where Queensland Rail has not responded to a matter raised by a stakeholder in its submission, this does not indicate Queensland Rail's agreement with the stakeholder/issue.

Queensland Rail will undertake further consultation and subsequently make further submissions in the near future including, for example, in respect of the following matters:

- the investment framework (Extensions) including user funding and Access Conditions;
- the West Moreton coal Standard Access Agreement;
- the provision of additional cost information through reporting, the setting of Floor/Ceiling Revenue Limits or the introduction of Reference Tariffs on the Mount Isa and/or North Coast Line; and
- the Operating Requirements Manual.

Queensland Rail appreciates the opportunity afforded by the QCA to provide comments on stakeholder submissions. Attachment 1 contains Queensland Rail's comments. Queensland Rail continues to consider key points raised by stakeholders and intends to work closely with the QCA and industry to further develop AU1.

Attachment 1: Queensland Rail's response to stakeholder submissions relating to AU1

Item No.	AU1 Section	Clause	Stakeholder Comments	Queensland Rail Responses
1	Term of Undertaking	1.1	Stakeholders responded with varying views on the Term of the Undertaking, proposing Terms from between 3 and 10 years.	Queensland Rail maintains that the current proposed Term is appropriate. That is, "Queensland Rail's Draft Access Undertaking 1 (AU1) should have a Term of at least four years but no more than five years commencing on the Approval Date. This Term is consistent with relevant Australian rail regulatory precedent. There is a low risk of circumstances changing sufficiently during the proposed Term to render AU1 irrelevant or inappropriate. Material issues regarding costs to, and lack of certainty for, Queensland Rail and stakeholders may arise from having a Term that is shorter or longer than the proposed Term.
2	Scope	1.2	The Queensland Resources Council (QRC) considers there is merit in specifically including an upfront reference within the Scope section that recognises any Dispute with respect to AU1 will be resolved by the QCA (in accordance with Part 6.1 provisions). This would provide clarity to Access Seekers and Customers as to the process to resolve Disputes associated with AU1.	AU1 has been drafted to be an easy to understand document that has intentionally avoided unnecessary repetition. Queensland Rail, therefore, considers the inclusion of an upfront reference within the Scope section to items already specified in Part 6.1 of AU1 adequately addresses this issue.
3	Scope	1.2.3 (b)	Xstrata considers that under AU1 Queensland Rail has the ability to remove parts of its Network without consultation or QCA approval. QR National is seeking the introduction of a dispute mechanism to the QCA for amendment to the line diagrams.	The line diagrams will be placed on the internet as information for Access Seekers. However, Queensland Rail's service that is available for third party Access is determined through AU1's definitions (e.g. definition of "Access", "Network"), rather than through the line diagrams. The dispute resolution process in AU1 is available if an Access Seeker considers it is being denied Access to a part of the service covered by AU1. In any event, Queensland Rail has an incentive to keep any viable track open for Access in order to generate Access Charges.
4	Scope	1.3	QR National considers Clause 1.3(a) should be amended to remove the requirement for AU1 to be applied consistently between Access Seekers in the same circumstances, to reflect that the principles included in AU1 already address the circumstances for differentiation. That is, Clause 1.3(a) should state that AU1 will be applied in a manner that is consistent between Access Seekers.	Clause 1.3(a) provides comfort to Access Seekers that AU1 will be applied in a manner that is consistent between Access Seekers in the same circumstances. Queensland Rail considers that the Clause is appropriate as drafted. It is reasonable that the provision be restricted to Access Seekers in the same circumstances, which is consistent with the requirements of the QCA Act.
5	Scope	1.3	QR National acknowledges that the reference to section 100 in the QCA Act obligates the parties to negotiate in good faith. QR National believes that AU1 would benefit, from a transparency perspective, if the obligation was explicitly stated in AU1 (with or without specific reference to the legislation).	Section 100(1) of the QCA Act contains the obligation that the access provider and Access Seeker must negotiate in good faith. This obligation under the QCA Act is binding upon Queensland Rail and an Access Seeker. AU1 has been drafted to be a simplified document that, to the extent practical, avoids repetition. On this basis Queensland Rail believes that the AU1 drafting is sufficient.
6	Preparing and Submitting an Access Application	2.1 & 7.1	Two stakeholders sought clarification as to whether the confidentiality provisions of AU1 include, in the definition of Confidential Information: <ul style="list-style-type: none"> o Access Applications (Asciano); and o information that might reasonably be expected to affect the commercial affairs of the owner (presumably this is meant to refer to the 'Access Seeker'), including information relating directly to the Access Seeker's future markets and business strategies (QR National). 	Queensland Rail confirms that the definition of Confidential Information (Clause 7.1) in AU1 is a standard definition of Confidential Information and that it extends to Access Applications and other strategic information from Access Seekers. In any event, Queensland Rail notes that if at any time an Access Seeker has any doubt as to whether any information is Confidential Information, then the Access Seeker is able to indicate to Queensland Rail at the time of disclosure that the information is confidential.
7	Ability to depart from AU1	2.1.1(c)	AU1 makes it clear that the Access Seeker must unconditionally agree to comply with the requirements of the undertaking, with failure to do so grounds for Queensland Rail to reject the Access Application. QR National stated that this is overly restrictive, and should be qualified by a materiality threshold.	Clause 2.1.1(c) acts so that if an Access Seeker does not agree to comply with the requirements, obligations and processes in AU1, then Queensland Rail may refuse to accept the Access Application. Such a refusal, if it occurs, will take place at the beginning of the Access Application process. Clause 2.6.3(a)(i) gives Queensland Rail the right to give a Negotiation Cessation Notice where the Access Seeker fails to comply with AU1 but Queensland Rail may only do so if Queensland Rail (acting reasonably) is of the opinion that the non-compliance is material. Queensland Rail considers that this Clause is appropriate.
8	Preliminary Information	2.1.3	QR National suggested there should be a stronger obligation on Queensland Rail to provide preliminary information for Access Seekers, with the type of information to be included specified upfront and published on the Queensland Rail website. It is QR National's view that Schedule D of the Temporary Undertaking should be reinstated with the information provided at no charge. QR National is also of the view that, for transparency, the documents referred to in the definition of the Operating Requirements, that is the standards, systems, procedures, protocols, should also be publicly available on the Queensland Rail website.	Previous Queensland rail undertakings have included prescriptive requirements in relation to the provision of information to ensure that an infrastructure provider in an integrated organisation that is operating Above Rail Services in competition with third party freight Operators cannot withhold information to hinder or slow down third party Access. These prescriptive requirements are not necessary in AU1 as Queensland Rail has no incentive to inhibit Access. Rather, it is in Queensland Rail's interest to assist to facilitate Access to its Network. In relation to the statement on the Operating Requirements and associated standards, Queensland Rail currently makes available relevant documents required by Access Seekers and Access Holders via the Queensland Rail website portal.

Item No.	AU1 Section	Clause	Stakeholder Comments	Queensland Rail Responses
9	IAP	2.4.1	QR National stated that there should be a greater commitment by Queensland Rail to provide an Indicative Access Proposal (IAP) within the nominated 20 day timeframe. The option to take longer than 20 days should only be under exceptional circumstances. In addition, compliance reporting should include the number of IAPs provided outside the 20 day timeframe.	<p>Queensland Rail believes that the timeframe is consistent with provisions of rail access undertakings in Queensland over the past 12 years. Queensland Rail will always endeavour to respond as soon as possible, however, does not believe that further drafting is required and that the current timeframes are appropriate. Queensland Rail needs to have the ability to extend the time period for complex IAP responses.</p> <p>Under Clauses 5.2.2(d) to (f), various information must be included in annual reports relating to Queensland Rail's compliance with the timeframes for IAPs.</p>
10	IAP	2.4.2	Given the relationship between price and terms and conditions, in order to assess an IAP, Access Seekers require an understanding of the terms and conditions that would apply. QR National believes, for clarity and transparency, Clause 2.4.2 should identify the material divergences from the Standard Access Agreement (SAA). This is relevant for both coal and non-coal freight given that the SAA is directly related to coal services and is a precedent for non coal services.	<p>The terms & conditions will be dependant on knowing all the characteristics of the haul which is typically not known and/or provided at the Access Application/IAP stage. Additionally, while many aspects of the SAA might be informative in negotiations for a non-coal Access Agreement, the SAA is not a precedent non-coal access agreement. As such, Queensland Rail considers the current approach to be appropriate.</p>
11	Negotiation Cessation	2.6.1	QR National requested that a greater obligation be placed on Queensland Rail to continue negotiations where the parties agree to extend the Negotiation Period, rather than the current provision that Queensland Rail has no obligation to continue the negotiations beyond the Negotiation Period.	<p>Queensland Rail considers that the current provisions are effective. AU1 provides for the negotiation to continue beyond 9 months. A 9 month period is considered to be a reasonable time period for negotiations as it has been included in Queensland rail access undertakings since 2001.</p> <p>An extension to this period will occur where it is agreed by both parties. If the parties agree to extend the 9 month period then under AU1 that extended period will apply (not the 9 month period) and Queensland Rail will be obliged to continue to negotiate despite the expiry of the 9 month period.</p> <p>It is in Queensland Rail's commercial interest to encourage commercially viable Access to its Network. Therefore, Queensland Rail has an inherent interest to continue negotiations with genuine Access Seekers that go beyond 9 months. An access undertaking is intended to provide certainty for all parties.</p>
12	Issues addressed during negotiations	2.6.2	QR National states that there should be additional flexibility in the process to facilitate negotiations. For example, there should be the ability for an Access Seeker to revise its application (to some extent) as well as stronger obligations on Queensland Rail to provide additional information as required by an Access Seeker during the negotiation process. In addition, at this stage of the negotiation, Queensland Rail should have stronger obligations in terms of providing an indicative Access Charge and more detailed Capacity Analysis. In particular, there should be a clearer obligation on Queensland Rail to investigate capacity expansions, where required, to accommodate the Access Seeker.	<p>AU1 aims to provide certainty to all parties. It is necessary to define an Access Application to provide such certainty. Queensland Rail notes that there is nothing in AU1 that prevents the parties from agreeing to take the negotiations in a direction that results in an outcome different from the original Access Application and IAP.</p> <p>Clause 2.6.2(a)(i) contains an obligation for Queensland Rail to provide additional information to an Access Seeker. Queensland Rail considers that this Clause is sufficient protection for an Access Seeker and places a reasonable obligation on an access provider. Queensland Rail additionally considers that Clauses 2.6.2(a)(v) and (vi) are sufficient with regard to obligations to provide an indicative Access Charge and Capacity Analysis. In reading Clause 2.6.2(a)(vi), the definition of Capacity Analysis should also be referred to for full context.</p>
13	Negotiation of an Access Agreement	2.6.1(b)(ii) & 2.7.2 (d)	Asciano states that negotiation time lines in AU1 (i.e. Clause 2.6.1(b)(ii) where 9 months is identified as a maximum timeframe for negotiations & the 1 year requirement in Clause 2.7.2 d) are inconsistent. Asciano believes that the timeframe to apply in 2.7.2 (d) should be 6 months (or less).	<p>Queensland Rail notes Asciano's concern and advises that the two time periods relate to two separate and distinct processes.</p> <p>The first time period under Clause 2.6 (b)(ii) is in relation to the Negotiation Period as a whole, which is to be completed within 9 months. The second time period of 1 year under Clause 2.7.2 (d) is in relation to circumstances where there is an existing Access Holder and a new Access Seeker lodges an Access Application for the first Access Holder's Capacity seeking it upon expiry of the existing Access Holder's Access Agreement. The Clause provides that the right to renewal process provided for in Clause 2.7.2(c) where a Reference Tariff applies will not be applicable where the existing Access Agreement has less than 1 year to expire. Therefore, there is no inconsistency with regard to the timeframes.</p> <p>Clauses 2.7.2(b) to (d) recognise industry's desire for a preference to be given to renewals. Queensland Rail also needs certainty that it will have trains running on the Network. AU1</p>

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				provides a preference to existing Access Holders who wish to extend their Access Rights, but that preferential treatment needs to end at a point that is early enough for Queensland Rail to contract with another Access Seeker. Queensland Rail believes that it is arguable the time frame in Clause 2.7.2(d) should be longer to achieve that purpose, but considers that it represents a compromise between Access Holders desire for a renewal preference and Queensland Rail desire to maximise the use of the Network.
14	Negotiation of an Access Agreement	2.6.3 (c)	Some stakeholders considered that it is commercially inappropriate that in the event of an unsuccessful negotiation the Access Seeker must pay Queensland Rail's negotiation costs and that each party should be responsible for their own costs.	This only applies if Queensland Rail issues a Negotiation Cessation Notice. Queensland Rail can only issue a notice in certain circumstances that, in summary, reflect that a party is a "non-genuine" Access Seeker. In such a case, it is reasonable that Queensland Rail should be reimbursed as there is no other avenue for cost recovery (i.e. via Access Charges).
15	Frivolous access request	2.6.3(a)(ii)(D) and 2.6.4	Queensland Rail is able to reject an Access Application or cease negotiations if they determine the request is frivolous in nature. QR National suggested the references to Frivolous Access Requests be removed for a number of reasons including that it is QR National's view that it would be difficult for Queensland Rail to assess whether an Access Request is frivolous or not prior to the Negotiation Period.	<p>It is in Queensland Rail's legitimate business interest to reject Frivolous Access Applications. It is not in Queensland Rail's legitimate business interest to reject non-Frivolous Access Applications and Queensland Rail would not do so. Queensland Rail should have an ability to reject frivolous Access Applications.</p> <p>It is not normally in Queensland Rail's commercial interests to reject Access Applications but where the Access Application is frivolous this will result in Queensland Rail allocating resources to that Access Application potentially to the detriment of genuine Access Seekers and Queensland Rail's other business activities. Therefore, Queensland Rail needs to be able to short circuit the Access Application process before substantial resources need to be committed. Access Seekers are protected through the dispute and complaint resolution process contained in Part 6 of AU1 and Queensland Rail is only likely to use the right under clause 2.6.4 where the Access Application is clearly frivolous.</p>
16	Access Agreement	2.7	The QRC states that Queensland Rail should notify a Customer, within a reasonable time ahead of expiry, of the requirement to renew Access Rights (regardless if these are currently held by another party on the Customer's behalf).	<p>Queensland Rail understands the QRC's concern, but notes that this would be in contradiction to commercial-in-confidence provisions. Queensland Rail is unable to notify a third party of Renewal Rights relating to an Access Agreement which the third party is not a party to the contract.</p> <p>However, Queensland Rail also notes that the Customer could put in place arrangements with its Operator through its rail haulage agreement to achieve the outcomes that the QRC is seeking in their submission. This is because the Operator will be aware of when their Access Rights will expire. Queensland Rail considers this to be the most appropriate approach for resolving this request.</p>
17	Access Agreement	2.7	<p>Stakeholders made the following requests in relation to Access Rights:</p> <ul style="list-style-type: none"> o that the renewal right applies to the nominee of the Customer rather than to the current Access Holder; o that the transfer of Access Rights to a different origin/destination cannot proceed without consent of the Customer; o that the Customer may itself, without the consent of the Access Holder, trigger a transfer of Access Rights to an alternative Access Holder (e.g. change above rail Operators); and o Customers should have the ability to require the transfer of their existing Access Rights from the current nominated Access Holder. 	<p>Currently, Queensland Rail holds Access Agreements with Operators. Queensland Rail believes that for the rights highlighted by the QRC to be provided to end users that the end users would be required to negotiate an Access Agreement with Queensland Rail.</p> <p>There is nothing to preclude Queensland Rail and an end user from entering into an Access Agreement or a Capacity Deed. In addition, if the Customer's Operator is the Access Holder, then the matters raised can all be addressed in the rail haulage agreement with that Operator. The existing provisions in AU1, and more particularly the SAA, are adequate to address transfers.</p>
18	Access Agreement	2.7	While AU1 includes a general right for Train Services with an applicable Reference Tariff to renew Access Rights, the QRC contends that this right should be extended beyond this narrow group of services (that is, only some coal mines operating on the West Moreton System).	Non-Reference Tariff services are generally priced lower than the ceiling limit due to an Access Seeker's ability to pay. Non-Reference Tariff services vary greatly in all aspects including different traffics having very different prices. Under these circumstances Queensland Rail does not consider that renewal rights are applicable for these types of non-reference tariff traffics. If, for example, there is a traffic with a low Access Charge and, subsequent to the Access Agreement being signed, a more profitable traffic is seeking Access then Queensland Rail should not be required to re-sign an Access Agreement with the lower value traffic at expiry. Where Access Charges are below ceiling Queensland Rail should have the right to seek the best commercial outcome upon the expiry of the Access Agreement.
19	Access Agreement	2.7	Some stakeholders requested that the Access Agreement should be amended to ensure	The absence of a QCA approved SAA for end users does not prevent Queensland Rail and

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			that Access can be held by an end user (without having to contract in relation to above rail operational matters).	an end user from negotiating an Access Agreement. In such circumstances, Queensland Rail would negotiate an Access Agreement with the end user in good faith through the negotiation provisions specified in AU1. Ultimately, if the parties could not reach agreement, then the end user could refer the matter to the QCA for an access determination. Queensland Rail is yet to receive an Access Application from an end user for Available Capacity. Queensland Rail considers that a QCA approved SAA should only be required where there is both a Reference Tariff and a demonstrated material demand for Access Rights from Access Seekers.
20	Access Agreement	2.7	The QRC has sought that Customers be provided the first right to execute replacement Access Agreements in the event that an existing Access Holder defaults and their Access Agreement is terminated due to no fault of the Customer.	Queensland Rail believes that the most efficient way to achieve the outcome sought by the QRC is for end users to enter into Access Agreements with Queensland Rail. Only parties to an Access Agreement should be afforded rights under that Access Agreement. Additionally: <ul style="list-style-type: none"> the end user could mitigate risks associated with an Operator defaulting under its Access Agreement, and that Access Agreement being terminated, by seeking provisions in its arrangement with the Operator to ensure the Operator is liable for any damage caused to the end user. the end user could include requirements in its rail haulage agreement that the Operator must notify the end user of any non-compliance by the Operator with the Access Agreement, and to provide any notices or other communications with Queensland Rail regarding any purported failure by the Operator to comply with the Access Agreement. With such provisions, the end user will be aware of whether Queensland Rail may be considering terminating the Access Agreement and could consider what steps it might take to protect its commercial activities. Indeed, in the unlikely event of a potential termination, the end user could also include provisions in the rail haulage agreement requiring the Operator to comply with its directions to remedy the non-compliance or, potentially, for the transfer of the Access Rights to the end user.
21	Access Agreement	2.7.2	Stakeholders questioned what would happen where there are mutually exclusive competing capacity requests with no material difference to Queensland Rail. AU1 does not specify how Queensland Rail will determine which Access Seeker will be allocated the Capacity in this circumstance.	Queensland Rail believes that queuing is appropriate where a vertically integrated monopoly competes with third party Operators. Queensland Rail does not compete with third parties for Access to its Network. As such, queuing is not appropriate for Queensland Rail's business. Queuing would impose unnecessary administrative costs upon Queensland Rail for no clear competitive benefit. Queensland Rail's proposed capacity management framework is consistent with those put in place by other below rail providers in Australia that are similar in structure to Queensland Rail, which allow Capacity to be allocated to the Access Seeker which in the below rail provider's opinion, is most favourable or will best utilise the Available Capacity. <p>In circumstances where 'identical' applications are received, or where it is not possible to determine which of two or more Access Applications are the most favourable to Queensland Rail, then Queensland Rail will use the time of lodgement as the determining factor. Queensland Rail will consider redrafting this provision to reflect this outcome.</p>
22	Access Agreement		In assessing the cost and risk to Queensland Rail of providing Access Rights under Clause 2.7.2(a)(iv)(B), QR National states that it is necessary to take into consideration the impact of Transport Service Payments (TSPs) received by Queensland Rail from the State Government.	The TSPs received by Queensland Rail from the State Government are irrelevant when assessing the cost and risk to Queensland Rail of providing Access Rights under Clause 2.7.2(a)(iv)(B).
23	Access Agreement		Access Seekers require a capacity commitment relatively early in order to proceed with negotiations. The present obligation on Queensland Rail to inform Access Seekers if there are mutually exclusive Access Applications does not provide sufficient certainty.	Capacity is only granted upon execution of an Access Agreement as this provides incentive for all parties to finalise genuine negotiations. There would be significant difficulties to be overcome in the negotiation process if capacity was to be reserved on the basis of Access Applications. Queensland Rail believes that it should be sufficient that the Access Seekers know whether there is Available Capacity, whether Extensions are needed and whether there are competing Access Applications.
24	Access Agreement	2.7.2 (c)	Xstrata made the following comments in relation to Clause 2.7.2 (c):- <ul style="list-style-type: none"> the requirement that an existing Access Holder commit to the period of Access which the new Access Seeker is proposing is potentially unworkable for the owner for an existing mine which may have a shorter remaining mine life than the term sought by 	<ul style="list-style-type: none"> Queensland Rail needs to protect its commercial interests in relation to the renewal of existing and new Access Seekers. An Access Seeker (including the mine) can contract Access for longer terms to match the mine life. AU1 does not prevent an Access Holder lodging an Access Application for an

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			<ul style="list-style-type: none"> the new Access Seeker. that to obtain protection, an existing Access Holder can be required to apply for new Access at any time during the term of their Access Agreement other than the last 12 months. it does not provide a right of renewal on the existing terms of the Access Holder's Access Agreement, making it possible that a failure to reach agreement on an extension prior to the time periods noted in Clause 2.7.2 (c) and the resulting potential inability to extend Access Rights, can arise from Queensland Rail requesting onerous terms for an extension rather than the Access Holder failing to promptly seek an extended term. 	<ul style="list-style-type: none"> extension of its Access Agreement. Clause 2.7.2 only comes into effect when an Access Seeker is seeking rights that will only be available on the expiry of the Access Holder's Access Application. If Queensland Rail is believed to be requesting onerous terms, then the matter could ultimately be referred to the QCA for an access determination.
25	Access Agreement	2.7.3 & 7	<ul style="list-style-type: none"> AU1's definition of Available Capacity excludes capacity required to comply with Passenger Priority Obligation. In AU1, the definition of Available Capacity has additionally been amended to also exclude capacity: <ul style="list-style-type: none"> "(b)for the purposes of: ...attending to and performing activities associated with safety matters or the management of safety risks; and (c) Capacity that is not available as a result of: an operational constraint from time to time; or restrictions imposed or required from time to time in accordance with any Law". 	<ul style="list-style-type: none"> Where Capacity is preserved under AU1's Passenger Priority Obligation, then it will not be available to be contracted by third party Access Seekers. As such, it is excluded from the definition of Available Capacity. However, the exclusion of Capacity required to comply with a Passenger Priority Obligation or a Preserved Train Path Obligation is only excluded to the extent that it cannot be allocated by Queensland Rail to the relevant Access Application. Queensland Rail needs to be able to put in place Operational Constraints to allow normal operation of a safe network. Where Capacity is allocated for this purpose it will not be available to be contracted. Therefore, it has been excluded from the definition of Available Capacity.
26	New Standard Access Agreements	2.8	New Hope submits that Clause 2.8 of the AU1 should be widened to allow the QCA to require Queensland Rail to submit a proposed form of Access Agreement in which the rights and obligations of above-rail Operators are separated from those relating to Capacity and payment obligations e.g. an end user agreement. Several other stakeholders have also requested that Queensland Rail develop a standard end user agreement.	<p>AU1 contains provision for the QCA to require Queensland Rail to submit additional SAAs. Under Clause 2.8(a), the QCA could require Queensland Rail to submit a proposed SAA for a different type of Train Service - that is, one not currently covered by the SAA in Schedule D. This could, potentially, include a Train Service of the type mentioned by New Hope - one which separates the rights and obligations of above-rail Operators from those relating to capacity and payment obligations; or any other variation of structure.</p> <p>AU1, including Schedule C, do not contain anything inconsistent with using such an alternative structure. The lack of a standard end user agreement does not in any way preclude Queensland Rail and an end user from negotiating an Access Agreement.</p> <p>SAAs should only be required by the QCA where there is sufficient demand from Access Seekers to warrant this. Queensland Rail notes that it is yet to receive an Access Application from a Western System end user for available Capacity. Therefore, Queensland Rail does not consider that there is material demand to use an end user agreement at this time.</p>
27	Prudential Requirements	2.9	<ul style="list-style-type: none"> QR National has sought clarification as to whether the Material Default provisions of AU1 (Clause 2.9.1(b) of AU1) could result in a default in a signed Access Agreement or whether it is only applicable to the Access Application Process. In relation to the Prudential Requirements, Queensland Rail has not provided Access Seekers with the right to an explanation of the grounds for the refusal to negotiate. This hinders the ability of the Access Seeker to redress the noncompliance and continue negotiations or access the dispute resolution provisions. 	<ul style="list-style-type: none"> Queensland Rail confirms that Clause 2.9.1 of AU1 only relates to Access Seekers. Clause 2.9.1 of AU1 does not override the terms of Access Agreements. Clause 2.6.3(a)(iii) provides that if Queensland Rail (acting reasonably) is not satisfied that an Access Seeker meets the prudential requirements in Clause 2.9.1 of AU1, then Queensland Rail may give a Negotiation Cessation Notice. A Negotiation Cessation Notice will need to include the reasons why it is being given.
28			AU1 requires Access Seekers to meet prudential requirements and to demonstrate that they do so within a reasonable time period of no more than 10 Business Days. QR National considers that it is in the interests of the Access Seeker to demonstrate compliance in a timely manner, and so it should be at the discretion of the Access Seeker to determine a reasonable time.	It is in Queensland Rail's legitimate business interest for AU1 to include prudential requirements and that reasonable time periods be included in which an Access Seeker is to demonstrate their satisfaction of these requirements.
29	Structure of Access Charge	General comment	QR National suggests that s.168A(b) of the QCA Act, the pricing principles requires AU1 to have multi-part pricing.	<p>Queensland Rail's pricing principles are consistent with this provision and allow for multi-part pricing consistent with 168A(b) of the QCA Act. Additionally, by way of clarification Queensland Rail notes that the QCA Act states that an undertaking is required to allow multi-part pricing "where it aids efficiency" rather than containing an open ended obligation.</p> <p>AU1 does not include provisions for the structure of Access Charges and this is consistent</p>

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				with the overarching objective to reduce the complexity of AU1 and to remove unnecessary detail. Moreover, the provisions regarding the structure of Access Charges included in the Temporary Undertaking provided little additional certainty for users regarding the structure of Access Charges (the provisions only indicated, in the case of Access Charges where no Reference Tariff applies, the structure that Access Charges may take).
30	Price Differentiation	3.3(b)(ii)(B)(1)	In the Temporary Undertaking, it is the change in TSPs which is the trigger for price differentiation, whereas in AU1 it is a change to the ability to commercially provide Access which may include changes to TSPs. It is QR National's view that changes to the ability to commercially provide Access is already addressed in Clause 3.3(b)(ii)(B)(2) and the rewording of Clause 3.3(b)(ii)(B)(1) creates unnecessary uncertainty regarding the circumstances in which there may be price differentiation. Queensland Rail should be able to differentiate Access Charges where it is no longer able to commercially provide Access to Train Services at the current Access Charges. A change to the TSPs is the mostly likely situation where this circumstance might arise. QR National advise that it is their understanding that Queensland Rail considered that the broader principle should be reflected even if this is only likely to be satisfied where the TSPs change over time.	Clause 3.3(b)(ii)(B)(1) of draft AU1 includes the principle that Queensland Rail should be able to differentiate Access Charges where it is no longer able to commercially provide Access to non-Reference Tariff Train Services at the current Access Charges for Access Holders. A change to the TSPs is the most likely situation where this circumstance might arise. It is reasonable that Queensland Rail includes this provision, particularly as it applies to traffics that are charged below the ceiling pricing limit. While Queensland Rail understands that Clauses 3.3(b)(ii)(B)(1) and (2) are likely to overlap, they are different criteria and could apply differently in different circumstances - for example, where TSPs change over time.
31	Rate review provisions	General comment	The circumstances in which a contracted Access Charge (where there is no Reference Tariff) can change should be limited to a Material Change as per the SAA. In addition, rate review provisions should be limited to agreements that have a term longer than 5 years.	This issue relates to Clause 3.5 of AU1 and in particular Paragraph (a) which refers to rate review provisions for changes over time in the cost and risk to Queensland Rail of providing Access. Clause 3.5 of AU1 allows Queensland Rail to negotiate a review provision to provide a pass-through of changes in cost or risk. Importantly, Clause 3.5 also works the other way. If Queensland Rail's cost or risk of providing Access decreases, this could potentially result in a corresponding decrease in Access Charges – depending upon the review clause drafted for the relevant Access Agreement. QR National proposes that Queensland Rail only be able to include rate review provisions for Material Change in Access Agreements with a term greater than 5 years. However, the time restriction does not make sense in Queensland Rail's particular circumstances. If there is a Material Change – for example, all TSPs are removed, then Queensland Rail should have the ability to review Access Charges. Inclusion of a rate review provision in an Access Agreement should not depend upon the term of the Access Agreement.
32	Reporting	5	Several stakeholders have requested that AU1 include audit provisions.	Queensland Rail has not included specific audit clauses as the QCA already has very broad information gathering powers under the QCA Act.
33	Reporting	5	Xstrata stated that in the absence of a Reference Tariff, the proposed negotiate-arbitrate model provides limited protections for Access Seekers in respect of pricing... To aid pricing negotiations it would be appropriate to require at least financial separation of the below rail business and the passenger business, and meaningful and transparent reporting of the costs relating to the below rail business. Such financial separation and reporting would have the dual benefits of going some way to addressing the asymmetric information issue and reducing the potential for cost shifting or cross-subsidisation between the regulated and unregulated businesses.	Queensland Rail operates under a QCA approved cost allocation manual (Costing Manual) and is required to produce audited annual below rail financial statements (refer to part 4.1.2 "Accounting Separation" in Queensland Rail's 'Submission Accompanying and Explaining the Draft Queensland Rail Access Undertaking 1'). Queensland Rail believes these existing arrangements are sufficient to address any potential for cost-shifting or cross-subsidisation between the regulated and unregulated business. Moreover, from a cost-benefit perspective, Queensland Rail is of the view that any further financial separation would not be warranted.
34	Reporting	5.3.2 (a)	Xstrata suggested that the purpose for which the QCA can obtain documents should presumably be similar to Clause 9.5 of the QR National AU. It currently would not allow the QCA to gain information to determine whether to exercise its powers under AU1 and the reference to "complying with this undertaking" should be to "performing its obligations or functions in accordance with this undertaking or an Access Agreement".	Queensland Rail notes Xstrata's comment and for the sake of clarity, Queensland Rail will consider redrafting this clause.
35	Dispute resolution	6.1	Two stakeholders requested resolution by expert determination be included in AU1.	AU1 includes a Dispute resolution process that applies to the application of the provisions of AU1. The Temporary Undertaking included a possible referral to an expert of a Dispute or question arising between an Access Seeker and QR Network. Queensland Rail believes the need for expert referral, in relation to application of AU1, is redundant given that the QCA should be able to resolve Access-related issues – as provided by the QCA Act. It should also be noted that despite expert determination not specifically forming part of the Dispute resolution process under AU1, this does not preclude the two parties from referring the Dispute to an expert if both parties agree. To alleviate stakeholder concerns Queensland Rail will consider including drafting in AU1 to highlight that Access Seekers and Queensland Rail may agree to undertake a different Dispute process to that provided

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36	Definitions	7	Asciano has requested clarification regarding whether the definition of Extension in AU1 should include asset replacement.	for in AU1. The definition of Extension in AU1 already includes an enhancement, expansion, augmentation, duplication or replacement of all or part of the Network (excluding Private Infrastructure). As such, it encompasses asset replacement. The definition of Extension in AU1 is consistent with the definition in the QCA Act.
37	Definitions	7.1	Asciano questions in their submission whether it should be clarified that Paragraph (b) of the WACC definition also provides a nominal post-tax rate (consistent with paragraph (a)).	Queensland Rail notes Asciano's comment and for the sake of clarity, Queensland Rail will consider redrafting this Clause.
38	Definitions	General comment	QR National stated that AU1 requires greater clarity regarding what is 'Access' including the drafting of the definition and that there should be upfront statements.	Queensland Rail has reviewed the definition of 'Access' in the AU1. Queensland Rail believes that the definition of Access in AU1 is applicable for all of the declared service, except to the extent that the scope of AU1 does not apply to Access to passenger assets by non-passenger Train Services.
39	Capacity	Schedule C	Xstrata is concerned that critical issues such as resumption, relinquishment and transfer of Access Rights have been removed from AU1 and placed in the SAA.	Clauses 18 and 19 of AU1's Access Agreement Principles (Schedule C) provide AU1's provisions relating to resumption, relinquishment and transfers for non-Reference Tariff services.
40	Dangerous goods	Schedule C	Xstrata and Asciano raised concerns that there are no principles provided in Schedule C in relation to Dangerous Goods - other than that they cannot be transported except as provided in the Access Agreement.	Queensland Rail clarified its approach to Dangerous Goods in its submission in response to the April 2012 QCA request for comments paper.
41	Operational Requirements	Schedule C	The principles in Schedule C suffer from often being so high level they provide no protections for Access Seekers. For example, the ability to impose Operational Constraints is completely unlimited in Schedule C, and does not include the obligation to use reasonable endeavours to minimise disruption which exists in the SAA.	Queensland Rail considers that the Schedule C Access Agreement Principles strike the appropriate balance between providing appropriate guiding principles for negotiations while leaving sufficient discretion to negotiate fit for purpose Access Agreements.
42	Security deposit	Schedule C 14	A security deposit should only be required if the Access Holder cannot meet certain financial criteria (credit rating etc).	Queensland Rail's Access Agreement Principles establish a default or baseline position for negotiations. If the parties wish to negotiate a varied position from the Access Agreement Principles, then that is available to the parties. If Queensland Rail inserted a specific creditworthiness threshold for the security requirement, the defined threshold would apply in all circumstances for Access Agreements. Queensland Rail's traffics vary greatly and so a "one size fits all" is not appropriate in this case. Queensland Rail notes that QR Network's SAA and Access Agreement Principles do not include a specific creditworthiness threshold.
43	Dispute resolution	Schedule C 16 (c)	This Clause allows Queensland Rail to determine Disputes in some instances even where Queensland Rail may be a party to the Dispute. This is not an appropriate principle.	Clause 16(c) of the Access Agreement Principles only applies in limited circumstances. Clause 17.5 of the SAA reflects this provision. It is only intended to operate in specific circumstances where Queensland Rail considers that it needs to be the person who determines the Dispute as those matters may affect the safe operation of its rail network or could adversely affect its rail accreditation or tenure. Queensland Rail is not willing to accept a decision by a third party where its ability to commercially operate its business may be adversely affected. Importantly, the provision only applies where a Dispute is not resolved by agreement between the parties, by an expert or by the Rail Safety Regulator.
44	FM Event	Schedule C 17 (b)	This Clause allows Queensland Rail to elect not to replace infrastructure damaged by a Force Majeure (FM) Event until the funding of the repairs is agreed with the other parties. This poses additional fundamental risks on Operators and shippers and is unfair. Asciano accepts that Operators and / or end users may have to fund infrastructure improvements but it is inappropriate to require them to fund repairs to existing infrastructure which results from an FM Event. Asciano believes that the risk of such events and the repair costs is implicit in the rate of return received by Queensland Rail. Xstrata considers that: <ul style="list-style-type: none"> o Queensland Rail should be obliged to fund all repairs and reinstate below an appropriate materiality threshold and also apply recoveries under any insurance policies relating to the relevant FM Event to fund the repair or reinstatement works; o user funding arrangements will need to be provided for where Queensland Rail elects not to proceed with repairs or replacement of parts of the rail network in the event of damage or destruction through a FM Event (which Queensland Rail proposes to have a right to do, see clause 17(b) of Schedule C AU1 and 18.1(D) of the SAA); and o the principles in Schedule C suffer from often being so high level they provide no 	Queensland Rail should only be required to replace infrastructure damaged in a FM Event where it is fully compensated to do so through Access Charges. Where a FM Event damages part of the Network, and it is not economic for the business to replace that part of the network (due to factors such as current and projected utilisation of that part of the network), the business should not be obliged to repair/replace damaged infrastructure. These proposed arrangements are consistent with similar provisions included in the former QR Network Coal SAA (Clause 18.5). Moreover, there are limits to Queensland Rail's ability to make ex-post adjustments to increase Access Charges in response to certain event. Queensland Rail's access charges do not have a formulaic link between access charges and the costs the businesses incurs. Without this direct link, the business has no mechanism to adjust charges to recover any additional costs associated with repairing/replacing a part of the network. The highly price sensitive nature of Queensland Rail's customers and their limited ability or willingness to pay also means that accounting for a major risk event after the fact is unlikely to be feasible. Where the business recovers an insurance payout for the damaged infrastructure in the FM

Item No.	AU1 Section	Clause	Stakeholder Comments	Queensland Rail Responses
			protections for Access Seekers. For example, the length of a FM Event gives rise to a right to terminate is only described as being "prolonged".	<p>event, and it has determined that even with this payout that it is not economic to replace/repair the damaged part of the Network, the business should be able to re-direct any monies received as deemed to be appropriate by the business.</p> <p>FM Clauses are designed to provide for events which are outside the parties' control and which delay or prevent the carrying out of contractual obligations. A FM Clause may provide that, if a FM Event makes it impossible for a party to provide the contracted services under the agreement, then the agreement terminates. This would be the effect of the force majeure Clause in the draft SAA, had it only included Clauses 17(a) and (c). Clause 17(b), however, provides an option which may allow the agreement to continue in a particular circumstance, if the parties can reach agreement as to the funding of the cost of necessary repair work. This might be seen as analogous to the situation where the network operator agrees to extend the Network where there is a funding arrangement in place with the rolling stock Operator.</p> <p>Queensland Rail notes that in relation to the comments on Insurance that insurance may not be available for a variety of FM Events.</p>
45	Reduction and Relinquishment of Access Rights	Schedule C 18.2 (b)	Asciano considers that AU1 should not provide for a detailed and prescriptive process for the determination of the fee payable when an Access Holder relinquishes their Access Rights. Rather Asciano considers that for the purposes of a broad set of Access Agreement principles which are intended to form the basis of a commercial negotiation across a range of traffics, a relinquishment fee as outlined in Clause 18.2b is inappropriate and should be removed. If any relinquishment fee is required it should be determined in negotiation with reference to the nature of the traffics and access sought.	Queensland Rail notes that the working draft of AU1, which was released by Queensland Rail for stakeholder comment on 30 August 2011, incorporated the approach suggested by Asciano in their submission to the QCA. Queensland Rail amended AU1 to include a more prescriptive approach, which is similar in principle to the approach taken in the Temporary Undertaking, as the majority of stakeholders sought this amendment.
46	Tariff		The QRC, New Hope and Peabody expressed support for the proposed tariff reset for 30 June 2013.	Queensland Rail is working toward this outcome and will present an industry paper shortly.
47	Access Agreement	General comment	Various stakeholders sought that Queensland Rail develop SAAs for non-Reference Tariff traffics.	<p>Queensland Rail does not support the development of a freight SAA. A SAA should only be applicable where there is a Reference Tariff in place. Additionally, a SAA is more appropriate where there is a single product involved such as coal. Queensland Rail's non-coal freight traffics vary greatly in price, attributes and risk.</p> <p>Queensland Rail notes that Clause 2.8 in AU1 allows the QCA to require a new SAA where there is sufficient demand.</p>

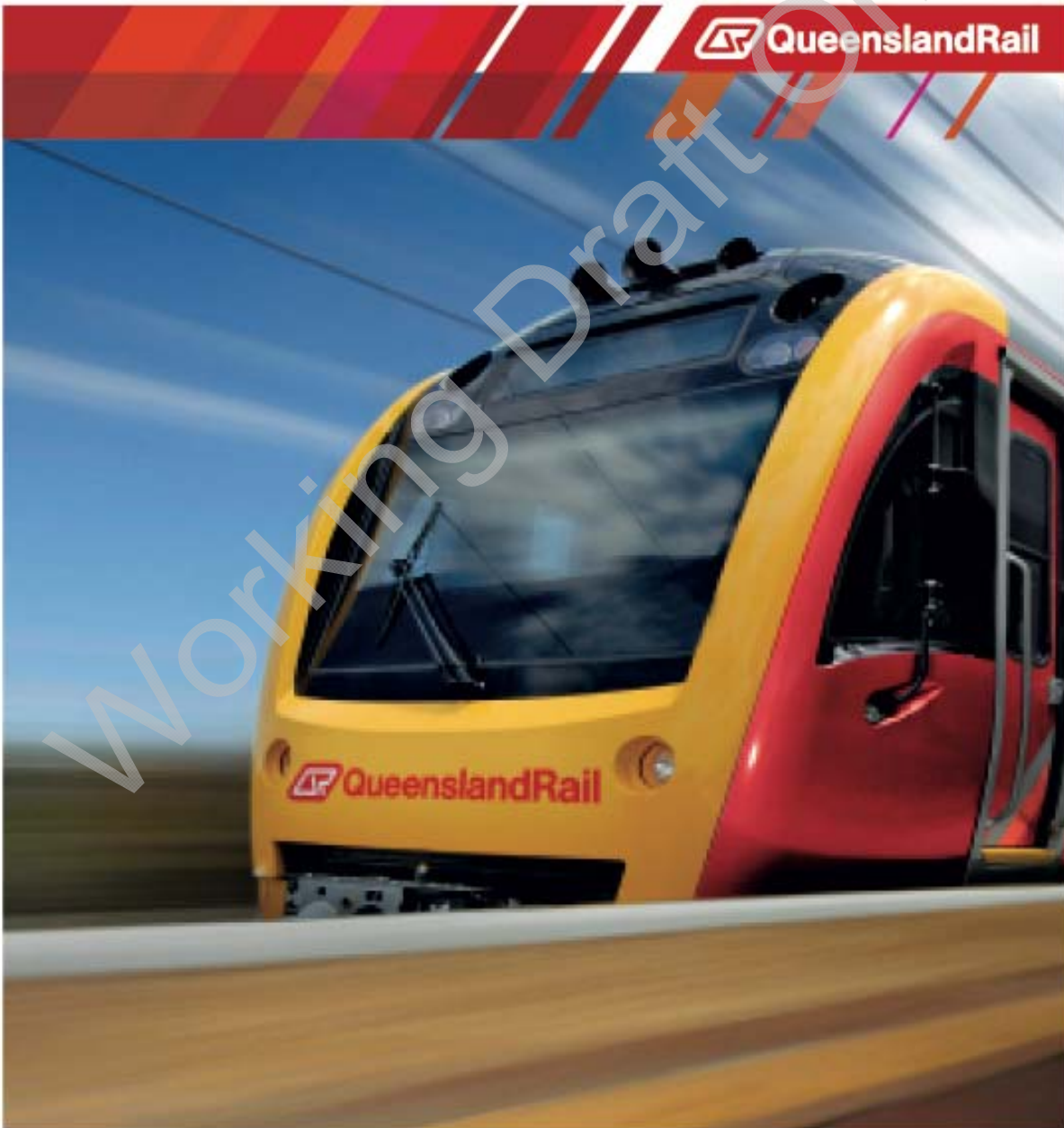
Attachment 4 – Operating Requirements Manual

Operating Requirements Manual February 2013

Version 1

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1 Introduction

This document sets out practices, standards, systems, protocols, requirements, rules, policies and other information in relation to or in connection with Train Control and the access to and use of the Network by Operators (including interface management and coordination requirements, safeworking procedures, safety standards, 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 Plan

An **IRMP**, in relation to an Operator, is an interface risk management plan. An IRMP typically:

- (a) identifies the Interface Risks associated with the Operator's proposed operations;
- (b) specifies the control measures agreed between Queensland Rail and the Operator to manage those Interface Risks to an acceptable level, including:
 - (i) the standards, procedures and systems relevant to the management of the Interface Risks;
 - (ii) the relevant Interface Standards;
 - (iii) requirements for monitoring, awareness, competence and complaint handling; and
 - (iv) the audit, inspection and review regime;
- (c) identifies the party responsible for implementing each control measure under the IRMP; and
- (d) addresses requirements relevant to an interface agreement between Rail Transport Operators under the TRSA and the requirements under all other Laws relevant to the management of Interface Risks.

A reference above to "operations" includes "railway operations" as defined in the TRSA.

Typically, 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.

2.2 Interface Risk Management Process

For the purposes of any review or amendment (or, if applicable, any undertaking or development) of an Interface Risk Assessment or an IRMP:

- (a) Queensland Rail and the Operator must:
 - (i) each nominate appropriately qualified and experienced representatives;
 - (ii) make all relevant information available to the other on a timely basis; and
 - (iii) use best endeavours to ensure that the information is accurate; and
- (b) Queensland Rail and the Operator will each provide relevant information to the other to assist with the identification of risks, for example:
 - (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) a copy of Queensland Rail's Code of Practice for Railway Noise Management;
 - (D) any currently applicable noise levels or limits;

- (E) particulars of noise complaints and enforcement actions; and
- (F) any other information from Queensland Rail's Environmental Management System that Queensland Rail considers relevant to the management of environmental risks; and
- (ii) the Operator will provide Queensland Rail with:
 - (A) details of any additional hazards, risks and non-compliances;
 - (B) the types of products or commodities to be transported;
 - (C) details of any effects that the Operator's activities on the Network may have on environmentally sensitive areas (including waterways);
 - (D) the locations of any waterways;
 - (E) the anticipated environmental impact of the Operator's proposed activities;
 - (F) any approved or proposed environmentally relevant activities (as defined under the *Environmental Protection Act 1994* (Qld)); and
 - (G) any information in relation to anything referred to in section 4.

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2.3 Risks to the environment

Without limitation to the matters that must be considered and addressed in any Interface Risk Assessment and any IRMP, an Interface Risk Assessment and an IRMP must, in relation to risks to the environment:

- (a) comply with Queensland Rail's Code of Practice for Railway Noise Management and all other relevant noise management standards, regulations and 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 measures that the Operator must comply with to prevent that occurring and, if applicable, other relevant measures agreed to by Queensland Rail;
- (c) include provisions requiring the Operator to comply with any community liaison requirements of any Law or Authority or of Queensland Rail;
- (d) where the IRMP requires community meetings, include a provision requiring the Operator to invite Queensland Rail to be represented at those meetings;
- (e) include provisions requiring each of Queensland Rail and the Operator:
 - (i) to notify the 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; and
 - (ii) to cooperate in investigating and responding to such complaints;
- (f) include provisions requiring the Operator to address Contamination, including:
 - (i) an assessment of the impact of the Operator's operations on Contamination;
 - (ii) detailed control measures to prevent Contamination; and

- (iii) a requirement to comply with all relevant Contamination standards, regulations and other relevant Laws; and
- (g) include provisions requiring the Operator to have an Environmental Management System in place prior to commencing Train Services, that:
 - (i) addresses the issues raised in the IRMP and contains procedures for implementing the control measures set out in the IRMP;
 - (ii) addresses all relevant Laws including the requirements of all Authorisations held by Queensland Rail that are relevant to the Operator's Train Services; and
 - (iii) identifies systems (including audit systems) and procedures to address all relevant risks to the environment and compliance with all relevant Laws.
 - (iv) include provisions requiring the Operator:
 - (A) to consider the likelihood of its Train Services causing or contributing to Environmental Harm or nuisance, setting out measures and processes to prevent such Environmental Harm and nuisance and to comply with all relevant environmental Laws (including the *Environmental Protection Act 1994* (Qld); and
 - (B) to conduct baseline monitoring where it is necessary to establish benchmarks that will allow for a comparison of environmental values pre and post access to the Network by the Operator.

Where Queensland Rail has baseline data available:

- (a) Queensland Rail may provide the baseline data to the Operator; and
- (b) if no further baseline monitoring is undertaken by the Operator, Queensland Rail's baseline data will be taken to be accurate baseline data.

To the extent that no baseline data is available, the Network will be taken to currently meet all environmental standards for the purpose of determining cause of any future environmental affects.

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 applicable to an 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 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 (see section 7.3).

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 website.

3.3 High Visibility Clothing

The Operator must ensure that the Operator's Associates and its visitors comply with Queensland Rail Standard MD-12-129 High Visibility Clothing.

3.4 Access to the Rail Corridor

- (a) An Operator must, and must ensure that the Operator's Associates and its visitors, comply with Accessing the Rail Corridor – SAF/STD/0144/SWK.
- (b) For clarity, and without limitation to the requirements set out in Accessing the Rail Corridor – SAF/STD/0144/SWK, the Operator must not allow any person to access the "Rail Corridor" unless:
 - (i) the CASF submitted by the Operator in accordance with Accessing the Rail Corridor– SAF/STD/0144/SWK is approved by Queensland Rail's Network Planning section; and
 - (ii) the Operator conducts a worksite safety briefing, which communicates the approved controls from the CASF to all of the Operator's Associates.

3.5 En Route Locomotive Provisioning

An Operator must ensure that no En Route Locomotive Provisioning occurs in respect of the Operator's Trains except as otherwise agreed between Queensland Rail and the Operator.

3.6 Competence of Workers

- (a) The Operator must ensure that each of the Operator's Associates holds and maintains all qualifications, accreditations and competencies required under any Law or under an IRMP in relation to any entry on any railway corridor managed or controlled by Queensland Rail.

- (b) On request by Queensland Rail, the Operator must provide to Queensland Rail the names and position titles of all of the Operator's Associates who, from time to time, enter on any railway corridor managed or controlled by the Queensland Rail.

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4 Incident and Emergency Response

4.1 Incident/Emergency Management

- (a) 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, Emergency Management Standard – MD-12-208.
- (b) The Operator's Emergency Management Plan must be consistent with Emergency Management Standard – MD-12-208 and must include:
 - (i) detailed procedures for the management of Incidents and emergencies, including all actions that must be taken to prevent, minimise or mitigate any threat or danger to any person, property or the environment;
 - (ii) specific action plans for preventing or, if not preventable, minimising and mitigating Environmental Harm caused or contributed to by an Incident;
 - (iii) requirements for immediate and appropriate action to prevent or, if not preventable, minimise and mitigate the adverse affects caused or contributed to by any Incident;
 - (iv) requirements for relevant Authorities to be informed immediately of any Incident;
 - (v) the method for the clean up of any substance or thing the release of which is caused or contributed to by an Incident and may have adverse affects on any person, property or the environment; and
 - (vi) requirements for all Incidents and all measures taken in response to Incidents to be recorded on a central register.

4.2 Incident/Emergency Response

- (a) Queensland Rail is responsible for the overall coordination and management of the response to a Network Incident (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.
- (b) Without limitation to the terms of the Operator's Access Agreement, in relation to an Incident, the Operator:
 - (i) must ensure a timely Recovery in accordance with the Operator's Emergency Management Plan; and
 - (ii) must assist Queensland Rail with Restoration.
- (c) During Recovery and Restoration, the Operator must do everything necessary to prevent or, if not preventable, minimise and mitigate any property damage or delays to the recommencement of Train Movements.

4.3 Assistance in investigations

If Queensland Rail undertakes an investigation in respect of a Major Incident or a General Incident (as defined in the Incident Investigation Standard – MD-12-135), then the relevant

Operators must provide Queensland Rail with information and assistance as is reasonably required by Queensland Rail for the purpose of that investigation.

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5 Authorisation of Rolling Stock and Train Configurations

- (a) The Operator must ensure that any Certification provided to Queensland Rail complies with the requirements set out in Rolling Stock Authorisation for the Queensland Rail Network – NBOI/INF/001.
- (b) Queensland Rail may take into account any matters referred to in Rolling Stock Authorisation for the Queensland Rail Network – NBOI/INF/001 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.

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6 Train 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 section 6.

6.2 Operator Requirements

6.2.1 Operator's Controller

- (a) The Operator must provide to Queensland Rail (and keep current at all times) the details for the Operator's Controller including name, position and contact details. The contact details:
 - (i) must include primary, mobile and after hours contact details; and
 - (ii) may 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 Train Controllers; and
 - (ii) able to fully comply with this section 6,

at all times when any of the Operator's Trains are on the Network and at least 2 hours prior to any such Train entering the Network.

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6.2.2 Consultation between Queensland Rail Train Controller and the Operator's Train crew

- (a) The relevant Queensland Rail Train Controller and the Operator's Train crew must consult and seek to agree upon the location of meal breaks and personal needs breaks for the Train crew.
- (b) If the Operator's Train crew requires relief, 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 Train 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";¹ or
- (ii) need to change during a Train Service,

then the Train crew must notify the relevant Queensland Rail Train Controller of this requirement prior to the Train entering the Network. The Queensland Rail Train 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 Train Controller may (but is not obliged) to relay a message from one to the other.

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6.2.3 Procedures for entering and exiting the Network

- (a) The Operator's Controller must notify the relevant Queensland Rail Train 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 Train Controller of the revised anticipated departure time.
- (b) The Operator's Train crew must notify the relevant Queensland Rail Train 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.

6.2.4 Radio Procedures

- (a) Queensland Rail will make the Train 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>;
 - (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>.

¹ 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.

- (b) For the purposes of the Operator ensuring that its Train drivers are contactable by Queensland Rail Train 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.

6.3 Operator's notifications to Queensland Rail Train 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 Train Controller of the event or circumstance, including the following details:
 - (i) the Train number;
 - (ii) the nature of the event or circumstance;
 - (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 Train 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;
 - (C) if the Train will be in Direct Traffic Control Territory, the start-up code² of the leading locomotive; and
 - (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 Rolling Stock 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 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;

² 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.

- (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 section 6.3(b)(ii) 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 Train Controller of at least the following information:
 - (A) the Rolling Stock 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
 - (ii) 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 Train 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.

6.4 Provision of information by Queensland Rail Train Controller

- (a) If a Queensland Rail Train Controller becomes aware of any event or circumstance that will materially adversely affect the performance of the Operator's Train, the Queensland Rail Train 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 Train Controllers located in Brisbane and Townsville must provide the Operator's Controller with a current ETA, for each of the Operator's Train Services, at the relevant Operator's depot station or destination, as applicable, in that Queensland Rail Train 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 6.4(b), the relevant Queensland Rail Train 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 Train 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 Train Controller.

6.5 Train Control Centres

Queensland Rail will provide Train 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>

6.6 Network Interface Points between QR National and Queensland Rail

A map showing the Network Interface Points between the QR National and the Queensland Rail rail networks can be viewed at:

<https://portal.qr.com.au/ResourceCentre/BusinessProcess/NetworkSystems/Maps%20%20Schema/Network%20Management/Network%20Information%20Booklet.pdf>

6.7 Train Control Boards - Rail Centre 1 Network Control Centre and Townsville Network Control Centre

(a) Train Operations, Traffic Management or Incident Management

Enquiries by Operators regarding train operations, traffic management or Network Incident management in relation to line sections that are controlled by Rail Centre 1 Network Control Centre must be directed to:

Regional Transit Manager Brisbane Railcentre 1

Phone: 81-1662 (Rail)

External: (07) 3235 1662

Emergency Mobile Contact: 0409 499 829

Enquiries by Operators regarding train operations, traffic management or Network Incident management in relation to line sections 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

(b) Scheduling & Infrastructure Planning

Scheduling and infrastructure planning requirements for line sections that are controlled by Rail Centre 1 Network Control Centre or Townsville Network Control Centre are set out in the following documents:

- (i) Network Business Master Train Plan Protocols NA-PRO-001;
- (ii) Network Business Daily Train Plan Protocols NA-PRO-002; and
- (iii) Network Business Possession Planning Protocols NA-PRO-003.

The Operator must comply with the above documents.

Enquiries by Operators regarding scheduling or infrastructure planning in relation to line sections that are controlled by Rail Centre 1 Network Control Centre must be directed to:

Manager Freight Planning

Freight Business, Queensland Rail

5th floor, Rail Centre 1, Brisbane

Phone: (07) 3235 1613

Enquiries by Operators regarding scheduling or infrastructure planning in relation to line sections that are controlled by Townsville Network Control Centre must be directed to:

Manager Freight Planning

Network Business, Queensland Rail

5th floor, Rail Centre 1, Brisbane

Phone: (07) 3235 1613

6.8 Train Control Boards - Mayne Network Control Centre

- (a) Train Operations, Traffic Management or Incident Management

Enquiries by Operator regarding train operations, traffic management or Network Incident management in relation to line sections that are controlled by Mayne Network Control Centre should be directed to:

Network Control and Service Delivery Supervisor Mayne

Phone: (07) 3606 5970

Emergency Mobile Contact: 0408 703 227

- (b) Scheduling

Scheduling requirements for line sections that are controlled by Mayne Network Control Centre are described in the following documents:

- (i) Network Business Master Train Plan Protocols NA-PRO-001; and
- (ii) Network Business Daily Train Plan Protocols NA-PRO-002.

The Operator must comply with the above documents.

Enquiries by Operators regarding scheduling in relation to line sections that are controlled by Mayne Network Control Centre must be directed to:

- (i) for scheduling enquiries relating to MTPs:

Manager Service Planning

A Block Mayne Rail Complex

33 Lanham Street, Bowen Hills

Phone: (07) 3606 5125

- (ii) for scheduling enquiries relating to DTPs:

Senior Train Planner

A Block Mayne Rail Complex

33 Lanham Street, Bowen Hills

Phone: (07) 3606 5178

- (iii) for scheduling enquiries relating to infrastructure maintenance:

Manager Possession Planning Unit

D Block Mayne Rail Complex

33 Lanham Street, Bowen Hills

Phone: (07) 3606 5111

- (iv) for all other scheduling enquiries:
Manager Freight Planning
Network Business, Queensland Rail
5th floor, Rail Centre 1, Brisbane
Phone: (07) 3235 1613

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7 Commercial Consideration

7.1 Forecasts

- (a) Within 30 days after receiving a written request from Queensland Rail, the Operator must provide Queensland Rail with a forecast of the Train Services that the Operator proposes to run on the Network in addition to its current contracted services, representing the Operator's best estimate, on a monthly basis for the 12 month period specified by Queensland Rail in its request, of:
 - (i) the number and frequency of those Train Services;
 - (ii) the gross tonnage that the Operator will transport;
 - (iii) the average number of gross tonnes per Train that the Operator will transport; and
 - (iv) any changes in Rolling Stock or Train Configuration that may vary one or more of the above estimates.
- (b) Queensland Rail must not make a request referred to in section 7.1(a) more than once in any six month period.
- (c) Within 30 days after receiving a request from the Operator, Queensland Rail must use reasonable endeavours to provide the Operator with a forecast of any construction or maintenance work proposed to be carried out on the Network in the next 12 months that may, in Queensland Rail's opinion, materially adversely affect the Operator's operations.
- (d) The Operator must not make a request referred to in section 7.1(c) more than once in any six month period.

7.2 Safety Notices

7.2.1 Safety Alerts

- (a) 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**).
- (b) A Safety Alert will provide details of the relevant safety incident and indicate any requirements that must be complied with by the Operator(s).
- (c) On receipt of a Safety Alert, the Operator must ensure that the relevant Operator's Associates are aware of the contents of the Safety Alert.

7.2.2 Weekly Notices

- (a) 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 matters). Such a change is published in a Weekly Notice prior to the date on which the change takes effect.
- (b) 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) and will subsequently publish the change in the next Weekly Notice.

- (c) 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).
- (d) 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.

7.2.3 Train Notices

- (a) 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.
- (b) The Operator must ensure 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.

7.3 Document Control Procedures

- (a) 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.
- (b) The Operator must ensure the ongoing distribution of this document, and all documents referred to in this document, to the relevant Operator's Associates.

7.4 Cooperation between Parties

7.4.1 Operational Meetings

- (a) 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.
- (b) The Queensland Rail representative for an operational meeting is either or both of the following persons, as applicable:
 - GM Customer Service South
Ph: (07) 3235 7679
Fax: (07) 3235 7634
 - GM Customer Service North
Ph: (07) 4772 8872
Fax: (07) 4772 8495
- (c) 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:
 - (i) reviewing matters relating to the performance of the Operator's Train Services to identify any remedial actions to prevent, minimise or mitigate any problems;
 - (ii) reviewing the reliability of the Operator's Trains;

- (iii) reviewing any relevant Operational Constraints;
 - (iv) investigating or reviewing breaches of any relevant safeworking procedures or safety standards (including those referred to in either the relevant IRMP or section 3); and
 - (v) reviewing any other relevant operational matters in relation to the exercise of rights or compliance with obligations under the Operator's Access Agreement.
- (d) 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.

7.4.2 Contractual Meetings

- (a) 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.
- (b) The Queensland Rail representative for contractual meetings is:
 - Network Business Commercial Manager
 - Ph: (07) 3235 3609
 - Fax: (07) 3235 7634
- (c) 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.
- (d) 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.

7.5 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:

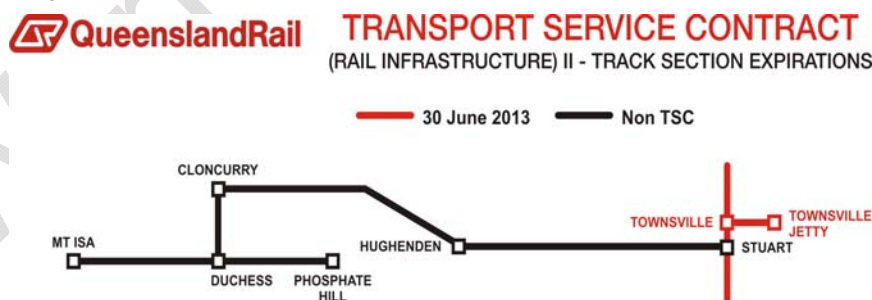
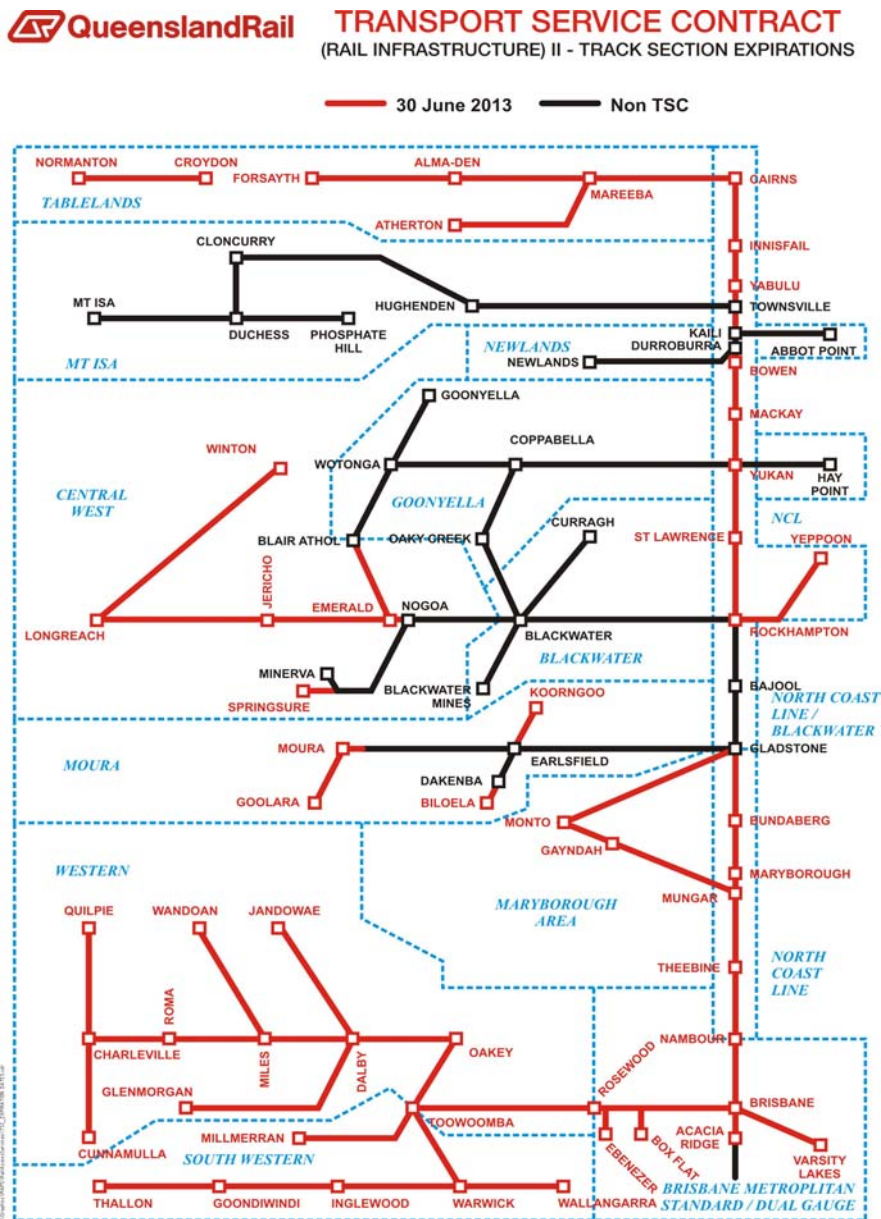


Diagram 2:



8 Further information

If you would like further information on, or have queries regarding the information in, this manual, please contact Queensland Rail, Network Business Commercial Manager on ph. 07-3235 3609.

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9 Glossary

Access Agreement	An agreement between Queensland Rail and an Operator for the provision of a right to use a specified section of the Network for the purposes of operating Train Services.
Access Undertaking	Queensland Rail's access undertaking as approved by the Queensland Competition Authority under the <i>Queensland Competition Authority Act 1997</i> (Qld) from time to time.
ATT	Authority to Travel
Authority	<ul style="list-style-type: none"> (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, <p>including any officer or agent of the foregoing acting in that capacity.</p>
Authorisation	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.
BSA	Brisbane Suburban Area
CASF	Corridor Access Safety Form
Certification	<ul style="list-style-type: none"> (a) A certificate by a suitably qualified person, who is approved by Queensland Rail and appointed by and at the cost of the relevant Operator, that the Operator's Rolling Stock and Train Configurations comply with the IRMP; accompanied by (b) relevant documentation (including reports on trials and/or commissioning tests) demonstrating to the satisfaction of Queensland Rail that the Operator's Rolling Stock and Train Configurations comply with the IRMP.
Contamination	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).

Dangerous Goods	<p>Any substance or thing defined as dangerous goods, explosives or radioactive material under:</p> <ul style="list-style-type: none"> (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, <p>as published from time to time, including any substance or thing specifically identified as such in the Access Agreement entered into between Queensland Rail and the relevant Operator.</p>
Direct Traffic Control Territory	That part of the Network for which Direct Traffic Control – SAF/STD/0041/SWK applies as set out in Operational Route Manual – SAF/STD/0071/INF.
DTMR	Queensland Department of Transport and Main Roads
DTP	Daily Train Plan
Emergency Management Plan	<p>A plan (including any amendments from time to time) developed and maintained by the relevant Operator which:</p> <ul style="list-style-type: none"> (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: <ul style="list-style-type: none"> (i) the matters outlined in this document that are relevant to the management of Network Incidents; and (ii) any matters otherwise referred to in the Access Agreement for inclusion in a plan that details procedures to manage an Incident (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, <p>for which the Operator has received a notice from Queensland Rail that Queensland Rail has no objection to the plan (including any amendments).</p>
En Route Locomotive Provisioning	The provisioning of a Train on the Network.
Environmental Harm	Environmental harm as defined in the <i>Environmental Protection Act 1994</i> (Qld).
Environmental Management System	A management system that addresses all environmental risks and ensures compliance with all environmental Laws.
ETA	Estimated Time of Arrival

Incident	Any Network Incident involving the activities of the Operator.
Interface Risk Assessment	<p>An assessment to:</p> <ul style="list-style-type: none"> (a) identify, to the extent reasonably practicable, all Interface Risks; (b) assess the likelihood and consequences of those Interface Risks occurring and any factors relevant to the management of those Interface Risks; and (c) nominate suitable control mechanisms to manage the Interface Risks within a risk management framework.
Interface Risk	<p>All risks to the safety of persons or property or to the environment arising from the interaction between the Operator's proposed operations and any one or more of:</p> <ul style="list-style-type: none"> (a) the Network; (b) operations on the Network (including those of other Operators 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), <p>provided that a reference to operations in this definition includes railway operations as defined in the TRSA.</p>
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. This includes the Interface Standards (SAF/STD/0145/INF), unless otherwise agreed or specified by Queensland Rail.
IRMP	Interface Risk Management Plan (see section 2.1 for a general description of such a plan)
Law	<p>Includes:</p> <ul style="list-style-type: none"> (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, <p>whether now, or at any time in the future, in effect.</p>
MTP	Master Train Plan

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Network	The rail transport infrastructure (as defined in the TIA) for which Queensland Rail is the accredited rail infrastructure manager (as defined in the TRSA).	
Network Incident	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.	
Notifiable Occurrence	A notifiable occurrence as defined in the TRSA.	
Obstruction	Any circumstance relating to the whole or any part of the Network or private siding, including debris or other objects 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.	
Operational Constraints	<p>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:</p> <ul style="list-style-type: none"> (a) speed restrictions; (b) load restrictions; (c) signalling or overhead restrictions; (d) Planned Possessions (as defined in the Access Undertaking); (e) Urgent Possessions (as defined in the Access Undertaking); and (f) Emergency Possessions (as defined in the Access Undertaking). 	
Operator	<p>A person:</p> <ul style="list-style-type: none"> (a) to whom Queensland Rail has granted the right to use a specific section of the Network for the purposes of operating Train Services; or (b) who operates or manages, or will operate or manage, Train Services for or on behalf of a person referred to in paragraph (a) above or who has been granted a right to do so by Queensland Rail. 	
Operator's Associate	Any director, officer, employee, contractor, agent or consultant of the Operator and any other person under the control or supervision of, or acting for or on behalf of, the Operator.	
Operator's Controller	The person nominated in compliance with section 6.2.1(a) from time to time.	
Queensland Rail Train Controller	A person appointed by Queensland Rail from time to time to perform Train Control for a relevant part of the Network.	

Recovery	Action to be taken in respect of any derailed, malfunctioning or immobilised Rolling Stock for which a relevant Operator is responsible to enable prompt recommencement of Train Movements, including the subsequent retrieval of any such Rolling Stock.	← Formatted Table
Restoration	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 does not include Recovery.	
Rolling Stock	Locomotives, carriages, wagons, rail cars, rail motors, light rail vehicles, light inspection vehicles, rail/road vehicles, trolleys and any other vehicle that operates on or uses Track.	
Standard Access Agreement	The pro forma access agreement attached to the Access Undertaking.	
TIA	<i>Transport Infrastructure Act 1994 (Qld)</i>	
TOR	Terms of Reference	
TPO	Track Protection Officer	
TRA	Train Route Acceptance	
Track	That part of the Network comprising the rail, ballast, sleepers and associated fittings.	
Train	A self-propelled configuration of Rolling Stock operating as a unit on Track.	
Train Configuration	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 Control	The control, management and monitoring (including, as applicable, scheduling) of: <ul style="list-style-type: none"> (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. 	
Train Movement	The operation of a Train on the Network by any Operator.	
Train Notice	A notice referred to in section 7.2.3.	
Train Service	The operation of a Train in accordance with a relevant Access Agreement.	
TRSA	<i>Transport (Rail Safety) Act 2010 (Qld)</i>	

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.

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10 Queensland Rail Documents

The following Queensland Rail documents are referred to in this document:

- Accessing the Rail Corridor – SAF/STD/0144/SWK
- Emergency Management Standard – MD-12-208
- Incident Investigation Standard – MD-12-135
- Interface Standards – SAF/STD/0145/INF
- Network Business Master Train Plan Protocols NA-PRO-001
- Network Business Daily Train Plan Protocols NA-PRO-002
- Network Business Possession Planning Protocols NA-PRO-003
- Operational Route Manual – SAF/STD/0071/INF
- Queensland Rail Standard MD-12-129 High Visibility Clothing
- Queensland Rail's Code of Practice for Railway Noise Management
- Queensland Rail's Environmental Management System
- Rolling Stock Authorisation for the Queensland Rail Network – NBOI/INF/001

For clarity, a reference to any of the above documents in this document includes a reference to that document as varied or replaced from time to time.