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14 September 2012

Mr EJ Hall  
Chief Executive  
Queensland Competition Authority  
GPO Box 2257  
Brisbane QLD 4001

Dear Mr Hall,

### **Stakeholder submissions on Queensland Rail's Draft Access Undertaking**

QR National (QRN) welcomes the opportunity to respond to the Queensland Competition Authority's (QCA) request for submissions on issues raised by stakeholders in relation to Queensland Rail's (QRail) voluntary draft access undertaking (the 2012 DAU).

In its submission dated 13 July 2012, QRN raised a number of issues with the 2012 DAU. QRN looks forward to further consultation with customers, QRail and the QCA in relation to the development of the 2012 DAU. QRN is supportive of further consultation prior to the issuing of a Draft Decision by the QCA and believes the process would benefit from an intermediary step that provides stakeholders with an opportunity to comment on the QCA's direction prior to the penultimate step of a draft decision.

The intent of this submission is to provide comment on issues and suggested resolutions raised by other stakeholders to assist in the timely development of a framework that balances the interests of all stakeholders. This submission is structured in three parts including an executive summary, a section that outlines QRN's support for stakeholder comments in relation to the 2012 DAU and a final section that provides comment on the provisions of the Standard Access Agreement. The comments raised in this submission should be considered as complementary to QRN's submission on 13 July 2012.

For any enquiries in relation to this submission please contact Rachel Martin on (07) 3019 5476.



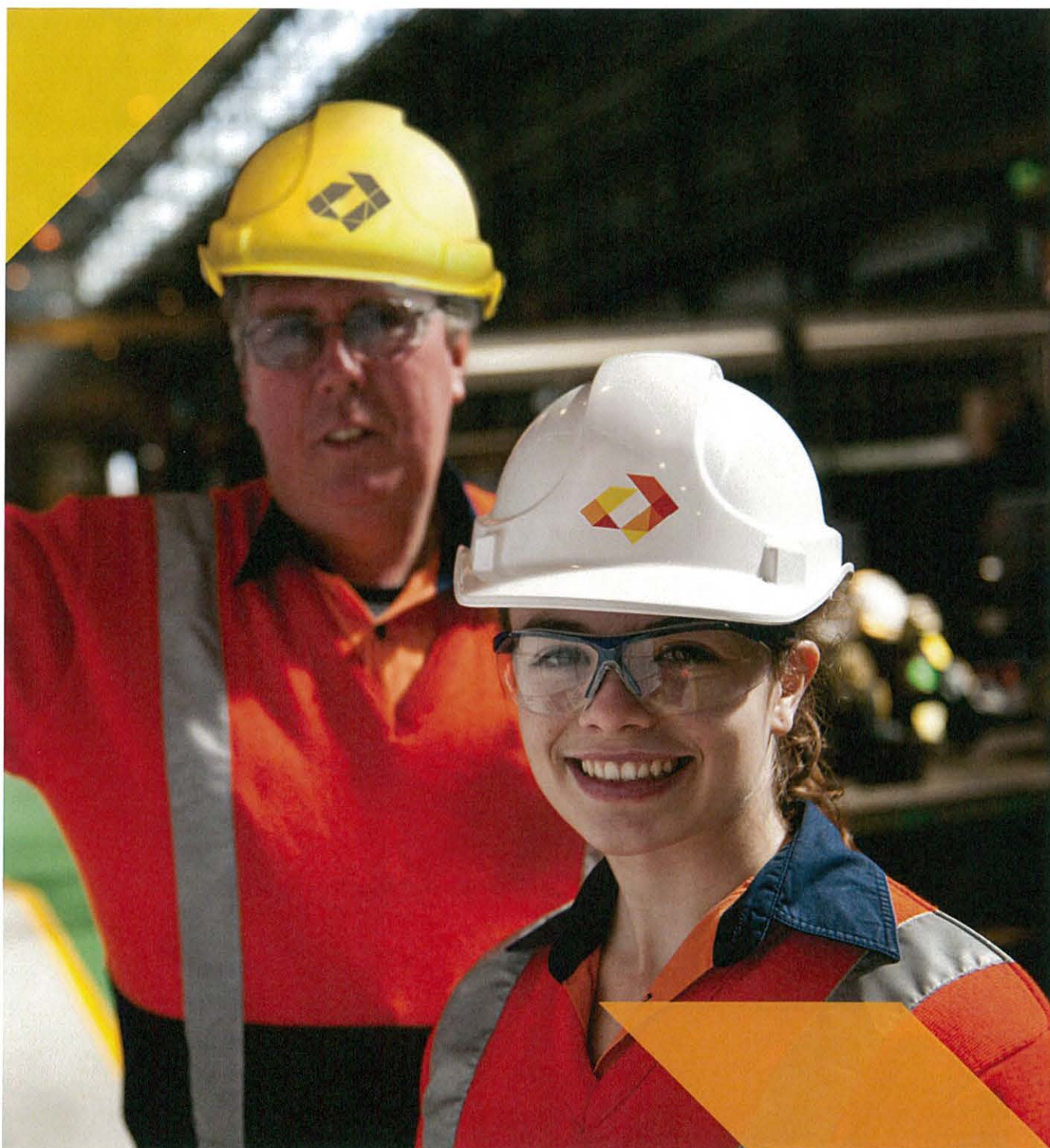
Mr Andrew MacDonald  
Senior Vice President



QR NATIONAL™

14 September 2012

## Supplementary Submission on Queensland Rail's Draft Access Undertaking



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# 1 Executive Summary

QRN together with six other stakeholders provided submissions to the QCA on QRail's 2012 DAU in July 2012. All stakeholders consistently have the view that the 2012 DAU, as currently drafted, should not be approved and that significant changes are required.

QRN remains supportive of QRail's approach to develop a light handed regulatory arrangement that better reflects the market in which it operates. However QRN is of the view that greater disclosure requirements are needed to ensure the framework developed is effective and reflects the legitimate interests of all parties.

The combined submissions of stakeholders suggested the development of a number of standard agreements including:

- standard access agreements for intermodal traffic and bulk traffic on the Mt Isa line;
- a Standard User Funding Agreement;
- a Standard End User and Train Operation Agreements; and
- a Standard Connection Agreement.

QRN is of the view that the level of prescription required for the Central Queensland Coal Region is not required for QRail and that other less intrusive mechanisms are available to facilitate negotiations.

All stakeholders raised concerns with the balance of risk and control in the Standard Access Agreement (SAA). QRN is of the view that the risk position in the SAA should be consistent with that of the current agreement and should be clear and transparent with regard to the level of service QRail is providing. In addition, QRN is of the view that the SAA should include the provision of below rail service quality information.

## 2 QRN's Support for Industry Submissions

### 2.1 Overview of key issues

Whilst QRN supports the light handed approach taken in the 2012 DAU and the development of an Undertaking that more adequately reflects the market in which QRail operates, QRN and other stakeholders have significant concerns regarding the current drafting of the 2012 DAU. Of particular concern are:

1. the inclusion of provisions that favour QRail's passenger business;
2. that QRail have not addressed one of the fundamental elements of a light handed regime, that is, sufficient information disclosure. Whilst QRail have reduced the level of prescription in the 2012 DAU there are limited disclosure requirements, such as:
  - information will be provided to the Access Seeker only if the Access Seeker can demonstrate it is required and is ordinarily and freely available. The type of information that is ordinarily and freely available is not defined;
  - there is no requirement for a transparent approach to long term rail capacity planning and investment information;
  - pricing transparency is only available for coal on the West Moreton system;
  - the lack of auditing of performance and compliance reports; and
  - there are no provisions for information discovery;
3. the change in the definition of the access product which has resulted in uncertainty regarding what services are incorporated as part of access to the infrastructure and what are ancillary services;
4. there is limited transparency regarding the service level Access Seekers can expect with the removal of objective and measurable standards for the maintenance of infrastructure together with the ability of QRail to vary train services through the imposition of Operational Constraints with limited corresponding reduction in access charges; and

5. the obligations of QRail as a railway manager are limited with the requirement for the Operator to warrant the infrastructure is fit for train services and the liabilities and indemnities effectively resulting in QRail not being liable under any circumstances, or if they or liable, liability is limited to \$1 or capped.

It is QRN's view that there is little benefit in the substantial replication of the regulatory provisions for the Central Queensland Coal Network and that the ARTC's 2008 Interstate Access Undertaking (ARTC IAU) is a more relevant benchmark. That being said, given the complexities of the market in which QRail operates, the regulatory mechanisms need to be sufficiently sophisticated to target specific issues without a high level of regulatory intervention. There are significant changes required to ensure the 2012 DAU better reflects the legitimate interests of all stakeholders with the key objectives of the changes to give effect to:

1. the primacy of commercial outcomes;
2. greater consideration of freight users;
3. a non-discriminatory and more transparent negotiation framework;
4. greater contractual certainty to access holders;
5. planning that is consultative and inclusive;
6. the promotion of freight on rail; and
7. provide confidence in the efficiency (cost and use) of the infrastructure.

QRN's submission, dated 13 July 2012 (QRN's July Submission), raised a number of issues. This submission responds only to the issues raised by other stakeholders and should be read in conjunction with QRN's July Submission. The contents of this section align with the structure of the 2012 DAU.

## 2.2 Application and Scope

### 2.2.1 Duration

QRail have proposed extending the term of the Undertaking from a three year term to a five year term or less depending on when the 2012 DAU is approved. Stakeholders have nominated either a longer term of 10 years, maintenance of the status quo, i.e. the three year term, or agreed to the proposed term with the inclusion of a transparent review process to be undertaken jointly by the QCA and QRail in consultation with stakeholders. QRN is not supportive of a 10 year Undertaking given the substantial changes proposed by QRail and the less prescriptive approach that relies heavily on interpretation, information disclosure and the ability to access dispute resolution mechanisms. QRN notes that prior to the current 10 year term for ARTC's IAU, ARTC's first Undertaking approved in 2002, had a term of five years and was finalised after considerable consultation with stakeholders including two public forums facilitated by the ACCC<sup>1</sup>. In addition, the ARTC's IAU includes a provision for a review of the Undertaking in consultation with stakeholders as soon as practicable after the fifth anniversary of the Undertaking.

QRN considers that the debate over whether the term is three or five years may prove immaterial depending on when QRail's 2012 DAU is finalised. That being said, QRN does consider a review mechanism would be appropriate if it results in changes being made to QRail's Undertaking on a timely basis to address material issues raised. For example, stakeholders have requested the development of various standard agreements and the inclusion of a requirement on QRail to develop additional mechanisms or agreements during the term of the regulatory period (similar to the process adopted in QR Network's 2010 Undertaking). QRN does not consider the higher degree of regulatory prescription is warranted for QRail's market and does not support an approach that results in an incomplete Undertaking being approved by the QCA. In balancing the level of prescription with the concerns of stakeholders, it is reasonable for the 2012 DAU to have a shorter term e.g. three to five years, or an effective review mechanism in this regulatory period to ensure Access Seekers are not 'locked in' to an ineffective, or less effective regulatory process.

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<sup>1</sup> See publication of transcripts from public forums at ACCC website <http://www.accc.gov.au/content/index.php/itemId/770158>.

## 2.2.2 Scope

### 2.2.2.1 Application of the Undertaking

QRN concurs with the concerns raised by stakeholders<sup>2</sup> with regard to the limited protections for access seekers of QRail unfairly favouring its above rail passenger business. Whilst the prescriptive ringfencing arrangements of the current Undertaking are not necessarily required, mechanisms are required to ensure access charges reflect efficient costs of providing the below rail service only. This will provide stakeholders with confidence that there is no cost shifting between the above rail passenger and network businesses. In addition, QRN considers it reasonable to have in place a number of mechanisms that restrict the ability of QRail to make operational decisions in favour of the above rail passenger business including:

- changing all references where assessments are in relation to QRail. For example, cl.3.3 of the Undertaking where the assessment in relation to price differentiation is the cost and risk to QRail rather than the performance of the below rail services - that the assessment should reflect the cost and risk of the below rail service;
- removal of provisions included in the 2012 DAU and SAA that go beyond the passenger priority legislation or are more in keeping with QRail's obligations under the Network TSC. For example, train control decisions should have regard to the Network Management Principles and should only reflect the obligation to endeavour to bring a delayed passenger service back to its scheduled running time (not to address *potential* delays to passenger services as contemplated in cl.5.3(e) of the SAA);
- with the removal of the requirements for internal access agreements, provide certainty that the Network Management Principles, standards, protocols and other operating requirements will apply equally to QRail's passenger business and to parties who have contracted access agreements. For example it is inappropriate that the internal passenger services would have a higher priority than external freight (or passenger) services when planning possessions and providing alternative paths;
- publication on QRail's website of ministerial directives under passenger priority legislation and the related MTP;
- an exhaustive list in the Operator Requirements Manual of the standards and protocols that Operators are required to comply with;
- reintroduction of provisions in relation to system wide changes;
- notification to Operators, together with bonafide consultation, of any changes to operating requirements, maintenance programmes and possession management with access to dispute resolution if parties cannot agree to the changes;
- include the ability to request information about traffic management decisions; and
- inclusion in the quarterly performance reporting information regarding the number of complaints in relation to traffic management decisions.

### 2.2.2.2 Stations and platforms

Greater transparency is required regarding the exclusion of stations, platforms, yards and associated facilities of the passenger business from the definition of Access. In particular, QRN is of the view that the line diagrams should identify private infrastructure, infrastructure that is declared but not included within the scope of the Undertaking and infrastructure that is declared and included within the scope of the Undertaking.

### 2.2.2.3 Removal of rail network from coverage

It was raised as a concern by stakeholders that the wording of cl.1.2.3 (b), which gives QRail the right to amend the line diagrams, may be read as providing QRail with the right to remove parts of its rail network from coverage under the AU without consent<sup>3</sup>. QRN concurs that this perceived right needs to be clarified, particularly given the provisions included in the SAA regarding the Sublease. That is, cl.25.18(f)

<sup>2</sup> See Asciano, July 2012, *Asciano Submission to the Queensland Competition Authority in relation to the Queensland Rail Ltd Draft Access Undertaking* (page 5), AMEC, 1 June 2012, *Queensland Rail 2012 Draft Access Undertaking (DAU)*, page 5, Peabody Energy Australia Pty Ltd, 13 July 2012, *Peabody Energy Australia Pty Ltd Submission to the Queensland Competition Authority – Queensland Rail Draft Access Undertaking 1*, (page 4), Xstrata Copper, Xstrata Zinc, *Submission on Queensland Rail's Draft Access Undertaking 1* (page 6)

<sup>3</sup> Xstrata (page 15)

where QRail may surrender all or part of any Land Tenure and will not be liable for any Claims or losses the Operator suffers as a result. QRN is particularly concerned that the provisions in relation to Land Tenure have been expanded to take into consideration the Sublease and effectively impose the risk of managing the corridor lease arrangements entirely on users of the network with QRail having no accountability for what is and should be wholly within the control of the railway manager. QRN notes that the provisions for Land Tenure included in the current SAA<sup>4</sup> were limited to land not owned or leased by the railway manager and therefore the railway manager did not have the control or authority with regard to third party access to the infrastructure<sup>5</sup>.

### 2.2.3 Extensions

The 2012 DAU provides that QRail may, in its absolute discretion, undertake any required extensions to the network and includes criteria to be met where QRail would undertake an extension. QRN, along with most stakeholders, has significant concerns that the obligations on QRail with regard to network expansions are not sufficiently developed. A number of measures have been proposed by stakeholders including:

- the development of a Standard User Funding Agreement (SUFA) or the ability for the QCA to require the development at a point in the future;
- the development of principles to be included in the 2012 DAU that a SUFA must contain;
- ensuring that the QCA is able to make a determination in relation to an extension under the *QCA Act* that is not unreasonably constrained by the provisions of the 2012 DAU; and
- developing long term, effective planning that provides stakeholders with sufficient information regarding capacity, capital expenditure and future trends regarding price to improve decision making.

QRN supports stronger obligations on QRail to not only examine expansion options but also to identify issues to be addressed in relation to funding by access seekers. QRN is not convinced that developing a SUFA is warranted given the value of prospective expansions during this regulatory period and the number of entities that would likely be party to the expansion. In QRN's view it is sufficient that QRail be required to use all reasonable endeavours and negotiate in good faith with a user in relation to the funding of an expansion. Practically the QR Network SUFA will become a precedent for users seeking to fund investment in the network which will assist in streamlining the negotiation. However, there are a large number of users of QRail's network who would not directly benefit from the development of a SUFA and should not be required to bear the cost of that development.

QRN acknowledges that stakeholders have sought greater transparency regarding the principles or approach that QRail will take in relation to the development of a SUFA. It is QRN's view that any provisions included in relation to extensions should not restrict the matters on which the QCA can make an access determination under the *QCA Act*. Of particular relevance to stakeholders is the certainty the user will have in relation to access to the capacity created, returns on investment and the confidence in the efficiency of the investment (that is, the prudence of scope, prudence in standard of works, prudence in cost). It is unreasonable that under cl.1.4.2 of the 2012 DAU QRail will construct, own, operate and manage the extension but under cl.1.4.3 QRail will not bear any cost or risk in relation to constructing, owning, operating or managing the extension.

QRN is of the view that the development of corridor strategies which include assessments of existing capacity, expansion options and estimates of cost will be of significant value to access seekers in assessing price and risk associated with potential transport solutions for projects. In addition, it is QRN's view that a process that provides stakeholders with an opportunity to express an interest in funding expansions is of value as it provides a mechanism for QRail to aggregate volumes necessary to underwrite the investment.

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<sup>4</sup> See cl.22.18 QR Network Pty Ltd Operator Access Agreement Transferred and applying to QRail through Queensland Government Transfer Notice Act No 21 of 2009 (Current Operator Access Agreement Coal)

<sup>5</sup> QCA, 2000, *Draft Decision on QR's Draft Undertaking Volume 2 – The Draft Undertaking December 2000* (page 60)

## 2.3 Negotiation process

### 2.3.1 Negotiation Cessation Notice – payment of QRail’s costs

QRN agrees with other stakeholder submissions that the provision in relation to cessation of negotiations, as currently proposed, is too broad. It is QRN’s view that the recovery of QRail’s costs should be limited to incremental costs and only in the event the Access Seeker has no genuine intention of obtaining or using the access sought.

### 2.3.2 Information published on QRail’s website

QRN is of the view that disclosure information relevant to the negotiation of access arrangements should be published on QRail’s website and considers the ARTC website as an appropriate benchmark. In particular QRN is of the view the following information should be freely and ordinarily available:

- to promote the rail industry:
  - o technical characteristics of the infrastructure together with the standards and protocols that apply;
  - o quarterly and annual below rail service quality information; and
  - o corridor strategies that provide long term rail capacity and planning information by corridor;
- to facilitate negotiation:
  - o information that gives transparency to pricing;
  - o standard terms and conditions of access; and
- to provide confidence in the regime:
  - o compliance reporting.

QRN is generally supportive of QRail’s removal of some information from the Undertaking and the publication of it on QRail’s website, providing there are sufficient safeguards for access seekers and holders in relation to consultation, notification of changes and ability to access dispute resolution.

### 2.3.3 Capacity Allocation

QRail have changed the provisions in relation to the prioritisation of mutually exclusive access applications. The test assessing the “contribution to commercial performance of Below Rail Services by comparing the NPV of contribution to Common Costs” and the inclusion of materiality triggers has been replaced with criteria to assess access applications that will be “most favourable to QRail”. In addition, QRail have not included any queuing mechanisms. Stakeholders have sought greater transparency and certainty on the assessment of capacity and the basis for allocating capacity for mutually exclusive applications.

#### 2.3.3.1 Capacity Analysis

It is QRN’s view that the development of corridor strategies by QRail with the objective of making transparent the efficient costs associated with maintaining or improving service levels and increasing available capacity would address a number of concerns raised by stakeholders in relation to capacity analysis and the need for long term planning. In addition, the provision of publicly available quarterly corridor performance reports would provide access holders with an understanding of the limitations of the network.

#### 2.3.3.2 Renewal rights

A significant issue for Operators and their customers is certainty of below rail capacity to minimise the risk of asset stranding. Whilst long term access agreements are the most effective mitigation of this risk, QRN acknowledges the concerns of stakeholders regarding the performance incentives of Operators holding long term access agreements and back to back rail haulage agreements. As such, QRN supports the availability of an option for the renewal rights included in the current SAA to be available to either the Operator holding the access agreement or where the access agreement is for the carriage of product for one end user, the end user. In addition, QRN supports the prioritisation of the renewal of access rights where the assessment of the competing access requests (as discussed in 2.1.7.3) results in no material difference to the commercial performance of below rail services. End user rights are discussed further in section 2.3.5.2 below.



### 2.3.3.3 Competing access requests

Whilst in QRN's view it is not necessary to maintain a queue for the capacity constrained or near capacity constrained corridors (i.e. Mt Isa line and West Moreton System), what is relevant to stakeholders is that the allocation of capacity does not unduly favour one access seeker over another, but is a reflection of a better commercial decision with regard to the performance of the declared service. Concerns have been raised with regard to the way in which the criteria provided by QRail will be used in assessing what is favourable to QRail. For example, that revenue from one origin/ destination will be considered more favourable by QRail than another<sup>6</sup>. A further consideration is that the contracting of ancillary or other services from QRail will influence the capacity allocation decision of the declared services. It is QRN's view that these concerns can be addressed by:

- linking the phrase "ready and willing" in cl.2.7.2(a)(iv) to the conditions in cl.2.6.3(b) namely:
  - o rights to enter and leave the Network have or are reasonably likely to be secured;
  - o a rail haulage agreement has or is reasonably likely to be secured; and
  - o the speed and timeliness of the Access Seeker in conducting negotiations;
- explicitly identifying that the criteria nominated by QRail will be used in a Net Present Value assessment of a proposal;
- ensuring the provisions in the Undertaking adequately address the principles of non-discrimination (for example in cl.1.3 Consistency and Differentiation and cl.3.1 Pricing Principles<sup>7</sup>);
- amending cl.2.7.2, such that "the most favourable to QRail" is replaced with "the commercial performance of the declared services";
- including a provision that requires QRail to assess competing access requests within a maximum timeframe in order to nominate the successful applicant;
- including a provision that prioritises Access Requests in the favour of renewing access rights where there is no material difference in the assessment of competing access requests; and
- including a provision similar to the current Undertaking<sup>8</sup> that requires QRail to provide Access Seekers with a copy of the reasons for an adverse assessment.

### 2.3.3.4 Notification of competing requests

Stakeholders support QRN's view that a greater obligation on QRail is required to notify parties where there are competing access requests (regardless of product or corridor) including where the access request competes with entitlements under an existing contract that is only available as a result of the expiry of the contract. In the absence of a queue, QRN considers that it is reasonable that:

- the notification provisions of cl.2.7.2 should have an option to be extended to Access Holders if an Access Request has been lodged for the capacity that becomes available as a result of the expiry of the Access Agreement (see further discussion in 2.3.5.2);
- the notification as per cl.2.7.2 should include minimum requirements the Access Seeker must accept. For example:
  - o terms and conditions of the standard access agreement;
  - o a 10 year access agreement; and
  - o access charge applicable for the train services and whether the Network Utilisation provisions (cl.3.1.2) have been relied upon;
- the Access Seekers are required to respond within a set timeframe regarding their acceptance of the conditions of access and any requested variations;
- QRail is obligated to assess the responses of the Access Seekers within a maximum timeframe as per the discussion in 2.3.3.2 above;
- QRail notify the successful applicant of the intent to execute an access agreement and the required timeframe for execution; and
- QRail notify unsuccessful applicants at the same time as notifying the successful applicant.

<sup>6</sup> New hope Group, 13 July 2012, *Queensland Rail's 2012 Draft Access Undertaking New Hope Corporation Submission*, (Page 2)

<sup>7</sup> Please refer to discussion on these provisions in QRN's July Submission

<sup>8</sup> See cl.7.4.1(f)(i) QR Network's Access Undertaking (2008) June 2010 (as last amended June 2012) applying to QRail (QRail's current Undertaking)

### 2.3.3.5 Reduction of Access Rights

In relation to the reduction of Access Rights, QRN proposed<sup>9</sup> that the provision:

- include a process for the Operator to show there is reasonable demand;
- include a process for QRail to demonstrate there is an alternative demand for the access rights; and
- exclude payment of relinquishment fee or any other fee on reduction of access rights.

In addition to the above issues, stakeholders have also expressed concerns about the threshold for the resumption of train paths suggesting that the 7/12 trigger is more appropriate for general freight services rather than for mining projects that have higher levels of production variability. In the Final Decision of QR Network's 2010 DAU, the QCA identified that the two main considerations in relation to the resumption provisions are to limit capacity hoarding and reduce the financial risks of the railway manager<sup>10</sup>. QRN also notes that the application of the 85% trigger for QR Network is to cyclic traffic whereas all of the traffic on QRail's network is timetabled traffic.

## 2.3.4 Interfaces with Private Infrastructure

### 2.3.4.1 Interfaces with QR Network

Both QRN<sup>11</sup> and Asciano<sup>12</sup> have raised concerns regarding the seamless operation of through running trains over the two railway networks in Queensland.

QRN has sought stronger obligations on QRail than those proposed by Asciano by requiring an Interface Agreement to be executed between QR Network and QRail. It is not the intention of QRN to derogate the responsibilities of the access seeker in ensuring they have the right to enter and exit QRail's network, but rather to provide greater certainty to Operators that through running trains will meet their scheduled times and that over the term of the access agreement divergences in the requirements of the two railway managers will not impose unnecessary (or uncompensated) costs on Operators. For example, it is reasonable that any proposed changes to system wide requirements give consideration to the impact on adjoining networks given the current standard access agreements of both railway managers have (and will likely continue to have) protections for Access Holders with regard to System Wide changes and the focus in the regulatory environment of supply chain efficiency.

QRN is not seeking to impose on either railway managers the increased risk associated with the separation of the networks, but rather to ensure that the cause of any cancellations or delays to Train Services is accurately recorded. That being said, it is QRN's view that where a train service originates and terminates on one railway manager's network but for part of the service uses a third party's network, Operators should be able to rely on the "co-ordinating" railway manager to bring together the planning and scheduling of the Train Service.

Whilst some of these measures are able to be addressed in the SAA, it is QRN's view that it is not efficient for Operators to become an intermediary to discussions between the railway managers. The inclusion in the Undertaking of a requirement for QRail to enter into an Interface Agreement with the adjoining railway manager and including in the SAA a requirement for QRail to comply with the Interface Agreement acknowledges that co-ordination of through running trains is an integral part of the below rail service.

### 2.3.4.2 Connecting Agreements

Stakeholders have raised concerns that the negotiation of a connecting agreement for private infrastructure will be a barrier to gaining access to QRail's network<sup>13</sup>. It is QRN's view that sufficient precedent exists in Queensland with regard to the terms and conditions of connecting agreements (through existing agreements with QRail and QR Network's Standard Connection Agreement), such that a less intrusive regulatory mechanism could be introduced to address stakeholder concerns. QRN

<sup>9</sup> See discussion at Item 68 page 57 of QRN's July Submission

<sup>10</sup> Queensland Competition Authority, September 2010, *Final Decision, QR Network's 2010 DAU* (page 132)

<sup>11</sup> See page 25-27 QRN's July Submission

<sup>12</sup> Asciano (Page 10)

<sup>13</sup> Xstrata (Page 4)

supports an obligation on QRail to negotiate a connection agreement that is consistent with the provisions of the Undertaking, providing the Undertaking includes:

- a limitation on price discrimination to differences in the cost and risk of the service;
- an ability to request independent confirmation that arrangements are consistent with both the Undertaking and other agreements; and
- publication of relevant unit cost information so that parties can evaluate the reasonableness of proposed prices.

## 2.3.5 Access Agreements

### 2.3.5.1 Coal Carrying Standard Access Agreement as Precedent

The 2012 DAU includes a SAA for coal carrying traffic with a mechanism to allow the QCA to request an SAA be submitted for other traffics as required. Stakeholders have sought varying levels of prescription in relation to the terms and conditions for non-coal traffic in order to address the needs of non-coal traffic and to streamline negotiations for non-coal traffic. That is:

- SAA's for bulk minerals on the Mt Isa line and Intermodal traffic on the NCL;
- An acknowledgement of SAA for coal as a precedent for other traffic; or
- The identification of variations from the SAA that would be applicable for non-coal traffic.

The current Undertaking acknowledged the role of the coal carrying SAA as a precedent for the application of the Access Agreement Principles when negotiating access agreements for different types of train services<sup>14</sup>. The SAA then provides protection to Access Seeker that if they are unable to commercially negotiate alternative terms and conditions that the base position of the SAA will apply. The QRail 2012 DAU does not explicitly address this and together with the uplift of provisions from the Undertaking to the SAA (for example, the relinquishment and resumption clauses) has created some uncertainty for stakeholders. It is QRN's view that there are mechanisms short of requiring the development of a number of SAAs that could address stakeholder concerns without imposing a significant regulatory burden. For example:

1. include a clause similar to 5.1(e) of the current Undertaking that acknowledges the role of the SAA as a precedent for other types of services;
2. include in the SAA clauses that would apply to other traffic, for example, Dangerous Goods;
3. identify clauses that are dependent on the circumstances with some guidance for variations to the standard, for example, the liability cap; and
4. require QRail to nominate and provide drafts in the Indicative Access Proposal of clauses that would vary from the SAA.

### 2.3.5.2 Rights of End Users

QRN is supportive of mechanisms in the 2012 DAU to address the rights of end users but is not supportive of an Undertaking that is not finalised when approved by the QCA, such as the circumstances that have arisen in QR Network's 2010 Undertaking. In balancing the need for the development of additional agreements by QRail and the need to finalise the 2012 DAU, QRN considers there is considerable precedent in the rail industry for end user agreements without requiring a standard form to be developed by QRail in this regulatory period. However, to address stakeholder concerns there is value in including:

1. an obligation to negotiate an end user and train operations agreement if requested;
2. if required, the option to identify:
  - o the end user;
  - o the party with renewal rights (see discussion in 2.3.3.2);
  - o end user notification requirements;
  - o end user rights to approve changes to access rights in the operator access agreement; and
  - o end user step in rights.

<sup>14</sup> See cl.5.1(e) of QRail's current Undertaking

Ultimately market forces will determine the specific terms and reflect the commercial negotiation between the Operator and the End User with regard to the degree of control and certainty the end user requires and the degree of risk of asset stranding the Operator is prepared to accept.

Contractual mechanisms to give effect to the rights of end users may include:

- optional clauses in the SAA;
- a tripartite agreement between QRail, the end user and the operator as a schedule to the access agreement; or
- split agreements.

## 2.4 Pricing Issues

### 2.4.1 West Moreton Coal Reference Tariff

QRN is supportive of direct engagement as the preferred approach put forward by the QRC<sup>15</sup> in relation to the development of the West Moreton Coal tariff. QRN considers Operators are able to provide considerable value in relation to the development of reference tariffs and considers the direct engagement approach should include all stakeholders and not be limited to end users.

Like other stakeholders, QRN is supportive of the revised West Moreton tariff taking effect from 1<sup>st</sup> July 2013. Whilst it was noted that a 'price cap' arrangement was preferred over a revenue cap form of regulation<sup>16</sup> it is QRN's view that QRail's risk position in relation to volumes should be considered in parallel with the approval of the reference tariff.

### 2.4.2 Development of Non Coal Reference Tariffs

QRN considers QRail's approach of only having a reference tariff for coal traffic on the West Moreton system as reasonable given the variety of commodities on QRail's network and, therefore, the limited application of a commodity specific reference tariff to all traffic. QRN considers the publication of floor and ceiling limits for the Mt Isa and North Coast lines of greater use to Access Seekers in negotiations and supports the inclusion of an obligation to develop a reference tariff during the regulatory period if a need is established.

### 2.4.3 Pricing/ Cost Information

QRN supports QRail's development of the 2012 DAU as an opportunity to better reflect the market in which QRail operates and considers the disclosure of sufficient information a key provision of the desired light handed Undertaking to facilitate commercial negotiations. Pricing transparency for non reference tariff traffic requires the publication of floor and ceiling prices, the regulated asset base, unit maintenance costs, forecast and actual capital expenditure. The provision of this information addresses information asymmetries between QRail and Access Seekers and allows Access Seekers to assess the risk to above rail investment, the reasonableness of access charges and the likely trends in access prices over time. Pricing/ cost information is only one type of information advocated by QRN as necessary for a light handed regime and is a less intrusive regulatory mechanism than the publication of a suite of reference tariffs for a number of corridors and commodities.

QRN notes comments by Asciano<sup>17</sup> regarding the methodology for calculating Access Charges as referred to in cl.2.4.2 of the 2012 DAU. It is QRN's understanding that the methodology referred to is the calculation of the rate by the unit of measure and is, therefore, only of benefit in estimating total access expense for the proposed operations rather than contributing to the assessment of the reasonableness of the access charge.

### 2.4.4 Access conditions

The removal of the Access Conditions from the 2012 DAU was raised as a concern by a number of stakeholders<sup>18</sup>. Access Conditions provide some clarity to Access Seekers in relation to the pricing of extensions by QRail (or modifications to existing rail infrastructure) where there will be no more than one

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<sup>15</sup> Queensland Resources Council, July 2012, *Submission in response to QCA's request for comments – Queensland Rail's 2012 Access Undertaking* (Page 6)

<sup>16</sup> New Hope Group (Page 2)

<sup>17</sup> Asciano (Pages 6 and 7)

<sup>18</sup> AMEC (Page 4), QRC (Page 10) and Xstrata (Page 3)

Customer using that additional infrastructure or modification. It is QRN's view the inclusion of a provision that addresses the rights of the "First Party" to a rebate or renegotiation of terms when a "Subsequent Party" is granted access to the infrastructure is of value to Access Seekers and user funders alike.

## 2.5 Administrative Provisions

### 2.5.1 Performance Reporting

It is QRN's view that the Service Quality Performance Reporting by ARTC in the IAU is the appropriate benchmark for quarterly performance reporting. The ARTC quarterly performance reports provide key information on the performance of the below rail manager, providing Access Seekers with valuable information on the potential risks to the design of operations.

In order to address the specific market in which QRail operates, the minimum level of aggregation of value to users is from a corridor perspective. In addition, given the competition for capacity with QRail's own passenger services, it is QRN's view that information regarding treatment by Train Control in the current Undertaking (cl.9.1(k)) should also be included in the quarterly performance reports.

In the quarterly performance reporting proposed, QRail will provide information on the number and percentage of Train Services that reach their destination within the Allotted Time Threshold<sup>19</sup> replacing the Agreed Deterioration Threshold and Agreed Exit Threshold in the current Undertaking. The definition of Allotted Time Threshold is the threshold within which a Train Service is considered to be on time and is differentiated by coal (30 minutes), bulk minerals (60 minutes) and freight products (60 minutes). The difference between the current and proposed thresholds relate to the application of the Network Management Principles. The Agreed Deterioration Threshold and Agreed Exit Threshold are included in the Train Service Entitlement and, therefore, whilst a Train Service is within either of these thresholds it is considered on time and will be treated accordingly. The Allotted Time Threshold is purely a reporting threshold. For example, Train Services may be classified as late if 15 minutes after the scheduled time and treated accordingly in the traffic management matrix, but will be reported as on time in the quarterly performance reports. It is QRN's view that it is appropriate for the definition of on-time services to include a buffer applicable to all services (or like services) and that performance reporting should align with the definition of on-time service.

With regard to the reporting of speed restrictions, ARTC reports the actual number of kilometres and percent of track under speed restrictions at the end of the quarter whereas, historically, QRail has reported the average. It is QRN's view that the average information currently reported by QRail is of more relevance to users as it provides some transparency of the operating conditions throughout the period.

Like Asciano<sup>20</sup>, QRN is supportive of the provision of confidential reports to access holders relating to their services.

### 2.5.2 Compliance Reporting

Whilst in general the compliance reporting outlined in cl.5.2.2 of the 2012 DAU aligns with cl.9.2.2 of the current Undertaking there are a number of observations QRN would like to make:

1. the public availability of information on QRail's website would reduce the number of items QRail would be required to report on;
2. the removal of the information regarding the average length of the Negotiation Period is a material omission by QRail, as it provides guidance to Access Seekers of the likely timeframe to execute an agreement; and
3. the limiting of the reporting of disputes to the preparation of an Indicative Access Proposal is disingenuous given what is relevant to the assessment of the effectiveness of the framework is the number of disputes in relation to the Undertaking as a whole. It is QRN's view that QRail should be required to report on the number of issues referred to the dispute and complaint resolution process (cl.6.1 of the 2012 DAU).

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<sup>19</sup> cl. 5.1.2 the 2012 DAU

<sup>20</sup> Asciano (Page 14)

### 2.5.3 Auditing Provisions

A number of stakeholders raised concerns about the removal of the auditing provisions from the 2012 DAU. The auditing provisions in the current Undertaking provide Access Seekers with confidence in the information provided by QRail and, therefore, the efficiency and effectiveness of the framework in providing access to below rail services. QRN notes that in the recent publication of the Draft Determinations on Brookfield Rail's Train Management Guidelines and Train Path Policy the ERA stated:

*"In view of recent Parliamentary criticism of internally-managed performance audits...the Authority considers that all necessary audits should be managed by the Authority, including scoping of audit requirements and appointment of the auditor."<sup>21</sup>*

At a minimum, it is QRN's view that the QCA should have the ability to require an external independent audit of information provided similar to the existing provisions. A full external audit on QRail's compliance with the Undertaking (rather than audited compliance reports) is a more costly and, therefore, less desirable alternative to provide the required level of confidence to Access Seekers.

In relation to the removal of the reporting to the QCA provisions (cl.9.3 of current Undertaking), in the event QRail does not publish capital expenditure, regulated asset base and maintenance cost information as part of the public availability of cost/ price information, cl. 9.3(c) should be retained to reduce the timeframes required to resolve disputes referred to the QCA under cl.6.1 of the 2012 DAU.

It is QRN's view that cl.9.3 (a) and (b) reflect the legislative obligations under ss105, 126 and 150AA of the QCA Act that give the QCA power to request the production of information regarding compliance with the Undertaking and, therefore, are not required.

### 2.5.4 Dispute Resolution

Like other stakeholders<sup>22</sup>, QRN is particularly concerned that QRail have removed the ability to have a dispute resolved by expert determination. It is QRN's view that the requirement for all disputes to be resolved by the QCA potentially adds significant time to the resolution of a dispute. This is particularly so in cases where the QCA does not have either the expertise or the capacity to resolve the issue and would invariably outsource to an expert.

QRN believes that the application of the complaint and dispute resolution provision (cl.6.1) as currently drafted by QRail means that any dispute regarding the provisions of the Undertaking will be resolved in accordance with the process set out in cl.6.1 of the 2012 DAU. That being said, QRN agrees with the QRC<sup>23</sup> that there is value in explicitly stating in the Undertaking, whether in the scope as suggested by the QRC or in cl.6.1 itself, the provisions to which cl.6.1 applies.

## 3 Provisions of the Standard Access Agreement

QRN is looking forward to further detailed explanatory material in relation to the Standard Access Agreement (SAA) to gain a better understanding of QRail's approach in relation to a number of items. Given the significant changes in the Standard Access Agreement, QRN considers it would be of significant value to Access Seekers should QRail provide a comparison of the position taken in the current SAA with that in the proposed SAA and the rationale.

In reviewing stakeholder submissions, it is QRN's view that generally stakeholders have not raised any additional issues to those proposed by QRN and the discussion on issues raised is not dissimilar to QRN's position. Specifically, stakeholders seem to be aligned with regard to:

- lack of renewal rights (discussed further above);
- reduction of access rights (discussed further above);
- recognition of rights of customers/ end users (discussed further above);

<sup>21</sup> Economic Regulatory Authority, August 2012, *Brookfield Rail Draft Determination on Proposed Revised Train Management Guidelines*, (Page 25)

<sup>22</sup> Asciano (Pages 15 and 21) and QRC (Page 8)

<sup>23</sup> QRC (Page 8)

- maintenance obligations and rail availability;
- liability and indemnities;
- rights of suspension;
- rights of termination;
- costs of compliance with operating requirements;
- changes to software, hardware and communications requirements;
- insurance requirements and disclosure; and
- dispute resolution by QRail.

However, there were a few issues raised that QRN had not considered, or would like to comment further, namely:

- definition of intellectual property;
- CPI escalation of access charges; and
- Dangerous Goods.

QRN agrees with Asciano's request<sup>24</sup> to limit Intellectual Property rights to specific train services rather than the "operator's business" (cl.6.6) and New Hope's requirement for clarification in Schedule 3 of the application of CPI escalation to reference tariffs<sup>25</sup>.

QRail, in responding to the QCA's Issues Paper, provided an analysis of the treatment of liability for Dangerous Goods prepared by PWC (PWC paper) that raises some concerns for QRN and is discussed further in section 3.1.

### 3.1 Dangerous Goods

In principle, QRN supports a position where the liability of the parties in relation to Dangerous Goods is commercially negotiated. This is particularly relevant given the risk associated with transporting Dangerous Goods is relative to not only the class and type of Dangerous Good but also the way in which it is transported. Therefore, for a party to assume any risk, they need sufficient information to assess and then manage that risk.

What is relevant to the assessment of risk in relation to the carriage of Dangerous Goods is the probability of an incident and the likely consequence. QRN notes that PWC infer that if QRail was liable for the remediation costs, the maintenance expenditure would increase to reduce the risk of an incident<sup>26</sup>. For the Rail Operator and End User the probability of an incident is extremely relevant in mitigating the risk, and an information asymmetry exists in terms of the risk of a below rail caused incident. It is QRN's view that greater commitment and transparency of minimum service levels is required.

PWC have stated that information regarding dangerous goods is not typically available at the time of negotiating access terms<sup>27</sup>. QRN notes that QRail has the ability to request additional information under the negotiation framework and particularly in the case of dedicated trains (and to a lesser extent mixed trains) the volume of dangerous goods is fairly consistent with the maximum contracted volumes. QRN accepts that for Intermodal trains, the volume of dangerous goods on any train service can vary significantly.

PWC have indicated in the Attachment to QRail's submission on the QCA's issue paper that the intention of cl.10(c) in Schedule C – Principles of Access Agreements, is to "*enable the business to negotiate an indemnity which limits the business' risk and liability.*"<sup>28</sup> The paper then goes on to outline the minimum liability QRail would be prepared to accept, that is, that the Operator provide an "indemnity for the incremental liability relating to the carriage of dangerous goods"<sup>29</sup>. Noting stakeholders significant

<sup>24</sup> Asciano (Page 18)

<sup>25</sup> New Hope Group (Page 5)

<sup>26</sup> PWC paper (Page 6)

<sup>27</sup> PWC paper (Page 9)

<sup>28</sup> PWC paper (page 2)

<sup>29</sup> PWC paper (page 10)

concerns that as currently drafted the proposed SAA actually results in QRail having either no liability or significantly limited liability in relation to most matters, it is QRN's view that the position put forward by PWC is aligned with what is in the current approved SAA (and QR Network's SAA) but is not reflected in the proposed SAA. Therefore, it is QRN's view that the SAA should be amended to reflect the current SAA. Access Seekers then have transparency of the base risk position of QRail in relation to Dangerous Goods and are able to negotiate different terms relative to the assessment of the likelihood and potential consequence of an incident involving Dangerous Goods (see discussion above in relation to the role of the Coal Carrying SAA as a precedent for other agreements).

In summary, the base risk position in the current SAA has QRail liable for the standard of infrastructure only to the extent they fail to carry out Maintenance Work in accordance with the Network Management Principles and maintain the infrastructure to a standard consistent with both the Rollingstock Interface Standards and the operation of the Train Services in accordance with the Scheduled Time (cl. 14.4 and 14.2). Otherwise, QRail is liable for personal injury and property damage where it is a result of, or contributed to by, QRail's wilful default or negligence (cl.14.2). In relation to the spillage of Contaminating Material, cl.8.5 imposes the cost of any clean up on the Operator (whether conducted by the Operator or QRail); cl.8.3 then provides protections to both the railway manager and the Operator by ensuring that there is sufficient information to manage an incident involving Dangerous Goods.

Of additional concern to QRN is cl.2.2 of the Operator Requirements Manual which states the Operator will provide QRail with:

“(C) details of any environmentally sensitive areas (including waterways) that may potentially be affected by the Operator's activities on the Network; and

(D) the locations of any waterways”.

It is QRN's view that whilst it is the Operators obligation, in conjunction with the Railway Manager, to consider the impact of proposed operations, the Railway Manager is better placed to provide the information required in (C) and (D) given their role as the corridor manager and the information they maintain in relation to their corridor.