

Mr John Hall  
Chief Executive Officer  
Queensland Competition Authority  
GPO Box 2257  
Brisbane Qld 4001

Dear John,

### **QR NETWORK's 2008 ACCESS UNDERTAKING**

I refer to my letter dated 9 May regarding QR Limited's (QR's) corporate restructure and its preliminary submission on QR Network's 2008 Access Undertaking (the 2008 Undertaking).

My letter indicated that:

- Substantially all of the assets associated with QR's below rail services would transfer from QR to a new subsidiary, QR Network Pty Ltd, on 1 July 2008;
- This transfer was conditional upon the formal approval by QR's shareholding ministers of the restructure including the creation of a number of operating subsidiaries of QR, including QR Network; and
- Upon QR Network's incorporation, it would formally submit the 2008 Undertaking to the Queensland Competition Authority (QCA) in accordance with section 136 of the *Queensland Competition Authority Act 1997* (QCA Act).

I confirm that on 9 July 2008 formal approval of the restructure was received from QR's shareholding ministers. On 11 July 2008, QR Network and the other QR subsidiary created as part of QR's corporate restructure were incorporated.

Unfortunately, due to the delay in this approval being received the transfer has now been deferred to 1 September 2008. The implication for this deferral is that, subject to the QCA's approval, QR's 2005 Access Undertaking (the 2005 Undertaking) will now be withdrawn with effect and from 1 September 2008 and the 2008 Undertaking will commence on 1 September 2008.

In view of the above, please find attached QR Network's formal submission on the 2008 Undertaking. This 2008 Undertaking is in the same form as for the preliminary submission, other than for a number of subsequent amendments relating to the creation of QR Network and specific issues discussed further with the QCA Secretariat, and some minor formatting and cross referencing corrections.

This formal submission comprises this letter, together with a disk containing the following documents:

- An explanatory document, including information on QR's revised corporate structure and the amendments to the 2005 Undertaking;
- A clean copy of the 2008 Undertaking;
- A copy of the 2008 Undertaking marked up against the 2005 Undertaking;
- Clean copies of the Operator and Access Holder Standard Access Agreements, together with copies of those Access Agreements marked up against the agreements included in the 2005 Undertaking; and
- QR Network's comments on issues raised by certain stakeholders in response to the QCA's consultation on the preliminary submission.

QR Network confirms that the information contained in this formal submission is suitable for publication by the QCA.

The disk also contains additional information requested during discussions with the QCA Secretariat, such as various draft agreements between QR and QR Network. This information does not form part of the formal submission, and accordingly QR Network requests that the information is not published.

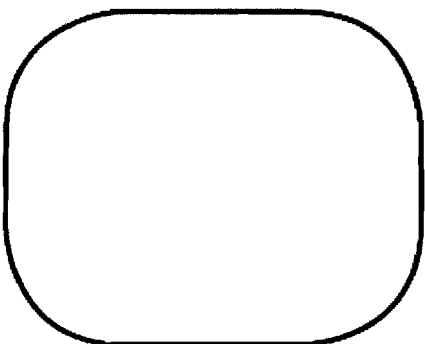
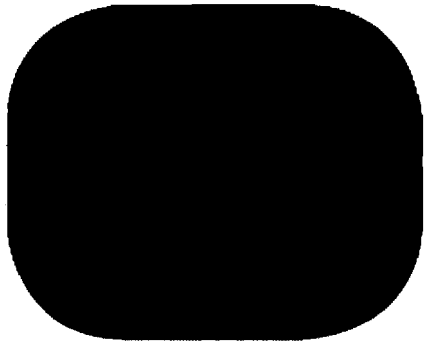
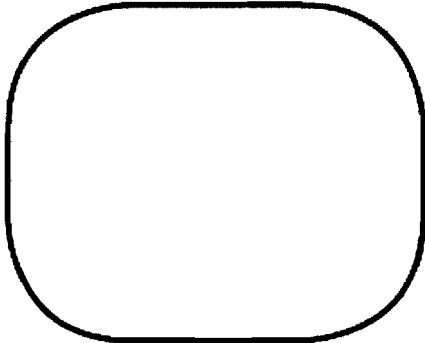
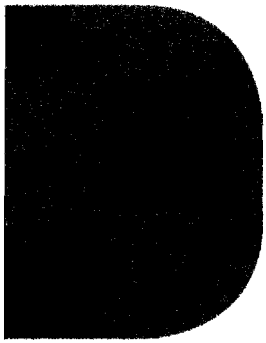
Please contact Gayle Andrews on 3235 5476 should you have any queries regarding the 2008 Undertaking.

Yours faithfully



Mike Carter  
Executive General Manager  
QR Network Pty Ltd

*MS* July 2008



QR Network  
Access  
Undertaking  
(2008)

*Submission to the  
Queensland Competition  
Authority*

*29 July 2008*



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## **1. INTRODUCTION**

### **1.1 BACKGROUND**

QR Network (previously QR Network Access) was formed in 1998 as a business group of Queensland Rail (now QR Limited – QR). QR Network operates independently of the other business groups within QR, and from 1 July 2008 will be run as a separately incorporated business within the QR portfolio.

QR Network's primary function is to manage rail transport infrastructure in Queensland. QR Network is responsible for negotiating access with parties seeking to use its rail network, for maintaining and managing rail transport infrastructure assets, and for managing operations on the network such as organising the manner in which Train Services utilise network capacity.

QR's 2005 Access Undertaking (the 2005 Undertaking) was developed by QR Network, on behalf of QR, to provide a framework to manage negotiations with Access Seekers for access to Rail Infrastructure for the purpose of operating Train Services. The 2005 Undertaking also provides a framework for the funding, operation and maintenance of the Below Rail network.

The 2005 Undertaking commenced on 30 June 2006 upon its approval by the QCA. Pricing arrangements were backdated to 1 July 2005. The 2005 Undertaking was to be effective for the period 1 July 2005 to 30 June 2009. The 2005 Undertaking includes a number of amendments which were approved by the QCA subsequent to 30 June 2006 and relate to the following:

- QR's Proposed Schedule F Amendment regarding the form of regulation to apply to coal carrying Train Services in the Central Queensland Coal Region (CQCR), approved by the QCA on 29 June 2007; and
- QR's draft amending undertaking (DAU) on maintenance costs for the CQCR, approved by the QCA on 17 December 2007.

### **1.2 LEGISLATIVE PROVISIONS**

On 1 April 2008 QR announced the formation of a new corporate restructure which would involve the creation of a number of subsidiaries wholly owned by QR.

On 24 June 2008 QR made a further announcement confirming a revised corporate restructure. The revised restructure will still involve the creation of a number of subsidiaries wholly owned by QR, however the number of subsidiaries to be created will be less than those originally announced.

QR's shareholding ministers approved the restructure on 9 July 2008. On 11 July 2008 QR Network Pty Ltd was incorporated (ACN 132 181 116) as a wholly owned subsidiary of QR.

As part of the revised restructure, substantially all of the assets associated with QR's Below Rail services will transfer to QR Network on 1 September 2008. Ownership of rail transport infrastructure rail assets not transferring to QR Network (e.g. stations and platforms) will be retained by QR.

The existing declaration of services under section 6 of the *Queensland Competition Authority Regulation 2007* will not change as part of the restructure. The impact of this is that from 1 September 2008 QR will cease to be the owner and manager of those assets and QR Network will become the owner and manager. QR cannot comply with the 2005 Undertaking in relation to the network to be owned and managed by QR Network.

QR and QR Network believe that to maintain an effective access undertaking in relation to the declared service:

- In accordance with section 148 of the *Queensland Competition Authority Act 1997* (QCA Act), QR's 2005 Access Undertaking (the 2005 Undertaking) should be withdrawn; and
- In accordance with section 136 of the QCA Act, a new access undertaking must be submitted by QR Network in respect of the Below Rail assets it owns and manages, comprising the declared service.

QR has confirmed to QR Network that it will withdraw the 2005 Undertaking (with effect on and from 1 September 2008), subject to the QCA's written agreement to that withdrawal under section 148(3)(a) of the QCA Act.

In addition, QR Network's first Access Undertaking (the 2008 Undertaking) is being submitted to the QCA in accordance with Clause 136(1) of the *Queensland Competition Authority Act 1997* which provides that:

*"An owner or operator of a declared service may, without receiving an initial undertaking notice, give a draft access undertaking to the authority."*

In this regard, QR Network (as owner and manager of the declared service) submits this draft access undertaking (in the form of the 2008 Undertaking) to the authority (i.e. the QCA) on a voluntary basis.

### **1.3 QR's PRELIMINARY SUBMISSION**

In order to allow sufficient time for the QCA to properly consider the draft 2008 Undertaking prior to its originally proposed commencement date of 1 July 2008, a preliminary submission was made by QR, on behalf of QR Network, on the 2008 Undertaking to assist with the QCA's consultation process.

The preliminary submission was provided to the QCA on 9 May 2008. In response the QCA published the submission for stakeholder consultation on 12 May and issued a Position Paper on 22 May 2008.

The preliminary submission proposed that upon its incorporation, QR Network would formally submit the draft 2008 Undertaking for approval by the QCA in accordance with section 136. This draft Undertaking was to:

- Be in the same form as the preliminary submission, other than for a few minor consequential amendments relating to the creation of QR Network; and
- Cover the twelve (12) month period commencing 1 July 2009 and terminate on 30 June 2010.

The 2008 Undertaking in this formal submission is in the same form as the preliminary submission, other than for a number of subsequent amendments relating to the revised restructure and issues subsequently raised by the QCA Secretariat, and the correction of some minor formatting and cross referencing issues. These amendments relate to:

- The correction of a typographical error in Paragraph 2.1(h) relating to the supply of electric energy;
- The updating of the Line Diagrams to the most recent version published in accordance with Paragraph 2.2(b), being as at May 2008;
- The change to Paragraphs 2.2(f), (g) and (h) to require a change in ownership of, rather than responsibility for, Rail Infrastructure transferred to QR Network from QR on behalf of another QR business group;
- The change to the definitions of Private Facility in Subparagraph 2.2(g)(v) and Private Infrastructure in Clause 10.1 to address specific concerns raised by Asciano (refer Attachment F);
- The change in the Commencement Date, referred to in Paragraph 2.3(b), to 1 September 2008;
- The alignment of Paragraph 3.1(f) with other clauses relating to Yard Control services;
- The relocation of Subparagraph 3.1(c)(iv)(B) to Subparagraph 3.1(b)(viii) to reflect the transfer to QR Network on 1 July 2008 of scheduling and Train Control Services in the Metropolitan Region of QR's network;
- The amendment of Paragraph 3.3.2(i) to clarify that the Divisions permitted to have access to Confidential Information are within QR;
- The amendment of the part of the Clause 5.3 heading (from "QR Services" to "QR Train Services") to avoid any doubt associated with the creation of QR Services as a QR business group;
- The amendment to the definition of QR Services Australia in Clause 10.1 and the amendment of various references to "QR Services Australia" to "QR Services" to reflect the revised arrangements (as indicated in the preliminary submission, this business group will comprise the Infrastructure Services Group, Rollingstock & Component Services and Rollingstock Engineering divisions); and
- The inclusion of QR Network's ACN in:
  - The definition of QR Network in Clause 10.1; and
  - Schedule B and on page 1 of the Operator and Access Holder Standard Access Agreements, in the references to QR Network.

In addition, the 2008 Undertaking will now cover the ten (10) month period commencing 1 September 2009 and terminate on 30 June 2009.

#### **1.4 QR NETWORK'S APPROACH**

QR Network recognises that the provision of Access by QR Network, as a separate legal entity within the QR portfolio, has required a significant review of a number of elements of the 2005 Undertaking. However, QR Network acknowledges that:

- Such a review should not occur without consultation with key stakeholders.
- Both QR Network and key stakeholders are currently focused on the development of the 2009 Undertaking. The need to focus on the 2008 Undertaking dealing with the consequences of QR's restructure will divert attention from the 2009 Undertaking and risk the timing and quality of that document.
- QR has not intended its restructure to be a trigger for a review of the 2005 Undertaking.

Accordingly, QR Network's approach to the 2008 Undertaking has been on the basis that the document should preserve, to the extent possible, the regulatory principles contained in the 2005 Undertaking for a term equivalent to the remainder of the 2005 Undertaking. This will allow a valid access undertaking to continue to apply in respect of the declared service immediately following QR's restructure, whilst providing an opportunity for comprehensive consideration of the implications of the change in legal structure as part of the consultation on the 2009 Undertaking.

The key aspects of approach are summarised below.

- References to QR and Network Access generally become references to QR Network. However, there are exceptions to this amendment, as in some instances the change may not be appropriate.
- Interpretative provisions have been included in circumstances where the transition from the 2005 Undertaking to the 2008 Undertaking results in some confusion regarding the working relationship between QR, QR Network and Access Seekers and Access Holders.
- As a last resort, specific amendments have been included where the interpretative provisions do not improve the application of specific provisions (for example, where obligations as drafted under the 2005 Undertaking do not carry forward to the 2008 Undertaking).

Where required, QR Network proposes to address these issues further as part of its submission to the QCA on the 2009 Undertaking.

## **1.5 STAKEHOLDER ENGAGEMENT**

### **1.5.1 Introduction**

Given the tight timeframes associated with the submission, QR Network held discussions in advance of the preliminary submission with a number of key industry stakeholders regarding QR's proposed corporate restructure and its implications for the 2005 Undertaking.

QR Network discussed the preliminary submission with the following stakeholders:

- The QCA Secretariat;
- Queensland Resources Council (QRC);
- Asciano Ltd, on behalf of Pacific National Pty Ltd (Asciano);
- QRNational Coal; and



- Queensland Government departments, including Treasury and Queensland Transport.

Drafts of the 2008 Undertaking were provided to the QCA Secretariat and the QRC for their review and comment prior to completion of the version contained in the preliminary submission.

QR Network believes that the amendments to the draft 2008 Undertaking provided in the preliminary submission are either immaterial or as a consequence of the revised restructure, and accordingly has not consulted further with stakeholders.

### **1.5.2 Issues raised by the QRC**

Following its receipt of a draft 2008 Undertaking and prior to the QCA's consultation on the preliminary submission, QRC raised a number of issues regarding the degree to which perceived problems with the 2005 Undertaking may be further complicated by QR's corporate restructure. The specific issues raised by the QRC included:

1. The transfer of Below Rail assets from QR Network to QRNational Coal (although the same concern would apply to transfers from QR Network to other QR business groups);
2. The replacement of the Internal Access Agreements between QR Network and QRNational Coal with new Access Agreements;
3. Uncertainty around the treatment of Access Rights where multiple Access Rights are contained within the same Access Agreement; and
4. Whether obligations under the 2001 Undertaking and 2005 Undertaking are correctly reflected in both the Internal Access Agreements and Standard Access Agreements.

QR Network's comments on the issues are provided below. QR Network's comments on the issues raised by the QRC as part of its formal response to the QCA's consultation on the preliminary submission are discussed at Section 1.5.4 below and at Attachment F.

In respect of the 1<sup>st</sup> issue, QR Network notes that the 2008 Undertaking rolls forward the 2005 Undertaking provisions in Part 2 which restrict such transfers without the QCA's consent in the form of an approved DAU. QR Network also notes that this issue is now less relevant in the context of QR's revised restructure as QRNational Coal will remain a QR business group.

In respect of the 2<sup>nd</sup> issue (and as confirmed at Section 2.4.2 below), the new Access Agreements will be:

- A necessary consequence of the corporate restructure in which separate legal entities are created;
- On the same terms and conditions as the existing Internal Access Agreements, other than consequential amendments which are required to give effect to the corporate restructure; and
- Consistent with the relevant Standard Access Agreement.

As stated in the preliminary submission and confirmed in the QCA's Position Paper, QR Network undertook to provide copies of the new Access Agreements to the QCA in support of these statements. In this regard, copies of these documents have been provided concurrently with this submission. QR Network acknowledges that the Access Agreement between QR Network and QRNational Coal may be published in accordance with Paragraph 5.4(a).

QR Network notes that the 3<sup>rd</sup> issue has existed since the 2001 Undertaking and relates to the following:

- Paragraphs 5.1(h) and 7.4.1(g);
- Subclauses 7.4.2 and 7.5.1; and
- Clause 10.1 in respect of the definition of "Evaluation Period".

QR Network's response has been to practically interpret the clauses on a case-by-case basis to ensure the management of access on an equitable basis consistent with the principles in the 2001 and 2005 Undertakings.

QR Network is not aware of any problems associated with its interpretation of these provisions. In addition, it is not clear to QR Network why the QRC believes that the conversion of Internal Access Agreements to Access Agreements should affect the practical application of these provisions, as QR Network has applied the Internal Access Agreements as if they were Access Agreements (notwithstanding their legal status).

QR Network believes that this issue is best addressed as part of its development of the 2009 Undertaking. Notwithstanding, QR Network has incorporated an amendment to clarify the interpretation of the 2008 Undertaking in the specific instances described above. The amendment also includes a specific exclusion in respect of Clause 5.2, Part B of Schedule F relating to QR Network's revenue cap arrangements.

With respect to the 4<sup>th</sup> issue, QR Network is not aware of any inconsistency between the 2001 and 2005 Undertakings and the relevant Internal Access Agreements.

### **1.5.3 Issues raised by the QCA Secretariat**

QR Network has consulted with the QCA Secretariat on an ongoing basis regarding suggested changes to the 2008 Undertaking to ensure that the principles underlying obligations in the 2005 Undertaking carry forward to the 2008 Undertaking.

To the extent that substantive amendments have been made as a result of these discussions, they are summarised at Section 2 below and discussed in further detail in Attachment B.

In addition, a number of amendments have been made to the Standard Access Agreements relating to access to infrastructure and land controlled by a QR business group other than QR Network. These amendments:

- Roll forward the principles associated with the 2005 Undertaking, for the duration of the 2008 Undertaking; and

- Align QR Network's obligations with any change resulting from the development of the 2009 Undertaking.

The amendments affect clauses 1.1, in respect of the definitions of "Infrastructure" and "Land", and 22.18 of Schedule B of both the Operator and Access Holder Standard Access Agreements.

#### **1.5.4 Issues raised in response to the QCA's consultation**

The due date for stakeholder responses to the QCA's Position Paper was 3 June 2008.

On 4 June 2008 QR Network received directly from the QRC and Asciano copies of each of their responses dated 3 June 2008. QR Network's detailed comments on the responses are provided at Attachment F. Other than in relation to the definitions of Private Infrastructure and Private Facility (refer Section 1.3 above) QR Network does not propose any amendments to the preliminary submission as a result of the responses.

On 16 July 2008 QR Network received from the QCA Secretariat a copy of a response dated 2 June 2008 from the Australian Rail Track Corporation (ARTC). QR Network has no comments on ARTC's response.

#### **1.6 FORM OF SUBMISSION**

This preliminary submission comprises an explanatory document together with a number of attachments including:

- A. QR's organisational structure effective 1 September 2008;
- B. List of amendments to the 2008 Undertaking relative to the 2005 Undertaking;
- C. A clean copy of the 2008 Undertaking;
- D. A copy of the 2008 Undertaking marked up to both the 2005 Undertaking and the 2008 Undertaking provided in the preliminary submission;
- E. Clean copies of Access Holder and Operator Standard Access Agreements, together with a mark-up only of those pages which are amended relative to the 2005 Undertaking; and
- F. QR Network's detailed comments on the responses by the QRC and Asciano to the preliminary submission and the QCA's Position Paper.

QR Network confirms that the information contained in this formal submission – including the new Attachment F - is suitable for publication by the QCA.

Provided concurrently with this submission is additional information requested during discussions with the QCA Secretariat. This information includes:

- Drafts of coal Access Agreements between QR Network and QR, on behalf of QR National Coal, to replace the Internal Access Agreements (refer discussion at Section 2.4.2); and
- Drafts of Train Operations Management (TOM) Agreements between QR Network and QR (on behalf of QR Freight), to replace the existing internal TOM Agreements (refer discussion at Section 2.4.3).

The draft Access Agreements contain information on the haulage arrangements between QRNational Coal and its Customers. Accordingly, QR requests that this information is not published. However, QR Network acknowledges that once executed, the below rail elements of the Access Agreements may be published in accordance with Paragraph 5.3(a) of the 2008 Undertaking.

The draft TOM Agreements contain information on arrangements which may, in the future, be contracted or sub-contracted to 3<sup>rd</sup> party suppliers. Accordingly, QR Network also requests that this information is not published.

In addition, QR Network will provide the following final drafts of the following documents to the QCA once they are available:

- Draft of the Regulation under the *Government Owned Corporations Act 1993* (GOC Act) authorising the transfer of employees, contracts and assets from QR to QR Network (refer discussion at Section 2.4); and
- Draft of the Confidentiality Deed between QR Network and QR covering QR Network's ringfencing obligations under Part 3 of the 2008 Undertaking (refer discussion at Section 2.4.4).

In addition, QR's letter to the QCA dated 28 July 2008 confirming its intention to withdraw the 2005 Undertaking (with effect on and from 1 September 2008), subject to the QCA's written agreement to that withdrawal, is provided concurrently with this submission.

In this submission:

- References to the 2001 and 2005 Undertakings are to QR's Access Undertakings effective 1 July 2001 and 1 July 2005, respectively;
- References to the 2008 and 2009 Undertakings are to QR Network's Access Undertakings which are expected to commence on 1 September 2008 and 1 July 2009, respectively; and
- Defined terms have the meaning given in the 2008 Undertaking.

## **2. QR'S CORPORATE RESTRUCTURE**

### **2.1 INTRODUCTION**

As previously discussed, QR has announced a new corporate restructure, effective 1 September 2008, which will involve the creation of a number subsidiaries wholly owned by QR.

### **2.2 CREATION OF NEW SUBSIDIARIES**

Two (2) subsidiaries have been created in accordance with Section 163 of the GOC Act and registered with the Australian Securities and Investment Commission. The subsidiaries are:

- QR Network Pty Ltd; and
- QR's Passenger Services Group, to become QR Passenger Pty Ltd (QR Passenger).

QR Network and QR Passenger will commence operation on 1 September 2008.

### **2.3 BOARD MEMBERSHIP**

The members of each of the subsidiary Boards will comprise QR's Chief Executive Officer (CEO), QR's Chief Financial Officer (CFO) and the Executive General Manager (EGM) of each of the QR business groups.

In respect of QR Network, the Board members are:

- Lance Hockridge (CEO, QR);
- Deborah O'Toole (CFO, QR); and
- Michael Carter (EGM, QR Network).

### **2.4 TRANSFER OF QR'S BELOW RAIL BUSINESS**

Substantially all of QR's Below Rail assets, together with employee liabilities, employees, contracts and other instruments will be transferred from QR to QR Network on 1 September 2008 under the GOC Act Regulation. A final draft copy of this document will be provided to the QCA as soon as possible following this submission.

#### **2.4.1 Transfer of assets to QR Network**

Following QR's 1 April 2008 announcement on its corporate restructure, the following arrangements were made with respect to the transfer of assets from QR to QR Network on 1 September 2008:

- That ownership of assets allocated to QR Network in QR's financial accounting system at 31 March 2008, rolled forward to include new Rail Infrastructure and assets associated with the Mayne Control Centre which transferred to QR Network on 1 July 2008, would automatically transfer from QR to QR Network;

- That QR Network would conduct a review of assets held by QR and not allocated to QR Network as at 31 March 2008, to determine whether those assets should be transferred to QR Network; and
- That the assets will transfer at accounting book value. In this regard, the GOC Regulation is expected to reflect the value of assets as at 31 July 2008, with the final value to be determined subsequently by rolling forward these assets to 31 August 2008.

QR Network has provided to the QCA Secretariat a detailed listing of the assets as at 31 March 2008. These assets include:

- Rail Infrastructure, being associated with the 'red roads' in the Line Diagrams, including the rail corridor sub-leased from Queensland Transport (QT), yards and sidings;
- Land holdings on which the Rail Infrastructure forms a substantial part of the holding (and which is not rail corridor); and
- QR's telecommunications backbone; and
- Assets required for management and control of all Train Services (assets associated with the Mayne Control Centre were transferred on 1 July 2008).

QR Network confirms that no assets will be transferred from the listing as at 31 March, other than a number of selected footbridges and subways which are managed by QR Passenger and were included in the listing in error. In addition, other than the Mayne Control Centre a number of immaterial assets currently not on this list (i.e. which are managed by other QR business groups) will be transferred to QR Network including selected rolling stock and a small number of land holdings adjacent to the Rail Infrastructure. QR Network has sought these land holdings from QR as it considers them to be reasonably required to provide flexibility for future network enhancements.

With respect to Rail Infrastructure, the following asset categories are included:

- The permanent way on which the rail corridor is located;
- Electrification infrastructure such as overhead power distribution and supply systems;
- Signalling on the rail corridor and within yards and sidings;
- Buildings and other facilities including at yards and sidings (including yards managed by other QR business groups); and
- Plant such as wayside fault detection equipment, weighbridges, rolling stock and office equipment.

With respect to land holdings, QR Network confirms that holdings on which Rail Infrastructure is located but which does not form a substantial part of the holding will not be transferred to QR Network. In principles, the holdings will be retained by QR and managed by another Related Party of QR.

QR Network has identified that this situation exists at only one yard, being Willowburn (coal and freight) on the Western System. At this yard the land is owned by QR and managed by QR Freight, and the Rail Infrastructure is managed on QR

Network's behalf pursuant to a TOM Agreement. In addition, QR Network will ensure that it continues to facilitate access for any Third Party operator at this facility, if requested, consistent with Clause 2.2(c) and (f) of the 2008 Undertaking.

Ownership of stations and platforms (including footbridges, subways and station car parks) will not transfer to QR Network. However, QR Network proposes that for the 2008 Undertaking and consistent with Subparagraph 3.1(b)(i) it will continue to negotiate for Access to these facilities as agent for QR Passenger.

In addition, consistent with QR Network's objective to retain the same regulatory policy outcomes as the 2005 Undertaking, the 2008 Undertaking will substantially roll forward the provisions in clause 2.2 of the 2005 Undertaking relating to the review of Rail Infrastructure (other than to update the Line Diagrams to the most recent version, being at May 2008). The effect of this proposal is that, until the expiry of the 2008 Undertaking, assets which are currently classified as 'blue roads' in the Line Diagrams (i.e. which are not managed by QR Network) may be transferred following a written request by an Access Seeker.

#### **2.4.2 Access Agreements**

To make the existing Internal Access Agreements legally binding, new Access Agreements are being prepared and when executed will be effective from 1 September 2008. The new Access Agreements are a necessary consequence of the corporate restructure in which separate legal entities are created.

The new Access Agreements will be between:

- QR Network and QR Passenger in respect of metropolitan and regional passenger Train Services;
- QR Network and QR in respect of coal and freight Train Services operated by QR Operational Business Groups; and
- QR Network and QR in respect of infrastructure Train Services operated by QR Services.

These new Access Agreements are intended to be on the same terms and conditions as the existing Internal Access Agreements, other than consequential amendments which are required to give effect to the corporate restructure.

Final drafts of the new coal agreements have been provided to the QCA concurrently with this submission.

#### **2.4.3 Train Operations Management (TOM) Agreements**

In principle and as discussed further at Section 3.4.1 below, QR Network has delegated responsibility for Yard Control services at all but the largest yards to that QR business group which is the largest operator in the yard. QR Network has determined that these responsibilities are most efficiently discharged by the QR business group pursuant to a TOM agreement.

QR Network confirms that the following arrangements will apply with respect to the TOM agreements as a result of QR's corporate restructure:

- All Rail Infrastructure in yards in the CQCR (including Pring which is not a Major Yard) is now controlled by QR Network. Accordingly, the TOM agreements previously in existence between QR Network and QRNational Coal are no longer required; and
- Rail Infrastructure in a number of yards outside the CQCR is managed by QR Freight on behalf of QR. In this regard, two new TOM agreements will be created, one for the Mount Isa Line and one for the rest of the Queensland network.

The TOM agreements are intended to be on the same terms and conditions as the existing agreements, other than consequential amendments which are required to give effect to the corporate restructure. Final drafts of these agreements have been provided to the QCA concurrently with this submission.

#### **2.4.4 Other arrangements**

Other key instruments that will transfer to QR Network include:

- As indicated at Section 2.4.1 above, the rail corridor sublease from QT; and
- Contracts for the supply of electric energy for traction.

As indicated above, these instruments will transfer from QR to QR Network in accordance with the GOC Act Regulation.

In addition, the preliminary submission indicated that:

- Service agreements between QR Network and other QR subsidiaries would be entered into for services provided; and
- A deed of cross guarantee, governance agreement and management agreement between QR and QR Network would be entered into to govern the relationships between the entities.

Where applicable, these arrangements were to include reference to QR Network's obligations under Parts 2 and 3 regarding the review of Rail Infrastructure and Confidential Information, respectively.

In this regard, QR Network notes the QCA's Position Paper which included a number of the following statements:

*"However, the effectiveness of these arrangements rely not only on the terms of the proposed arrangements but also on the terms of the agreements between QR Network and its related parties. To date, the Authority has not been provided with drafts of these agreements."*

QR Network confirms that, with respect to the agreements above, the following arrangements are proposed for the duration of the 2008 Undertaking.

- As the number of new subsidiaries is being reduced to two (being QR Network and QR Passenger) service agreements with QR Network will not include a reference to QR Network's obligations under Parts 2 and 3.



- Rather, a new Confidentiality Deed will be entered into between QR and QR Network covering QR Network's ringfencing obligations under Part 3. The Confidentiality Deed will cover the handling of Confidential Information between QR Network and QR business groups (but not QR Passenger or any other QR subsidiary). A final draft copy of this document will be provided to the QCA as soon as possible following this submission.
- In addition, QR's CEO will provide an undertaking to the QCA that QR will take all reasonable steps, as necessary, to ensure QR (including QR business groups) and QR's subsidiaries' compliance with QR Network's obligations under Parts 2 and 3 such that QR Network is able to comply with the 2008 Undertaking. This undertaking is contained in QR's letter to the QCA seeking its consent to the withdrawal of the 2005 Undertaking, which is provided concurrently with this submission.
- A deed of cross guarantee will be entered into, but only between QR and QR's subsidiaries.

QR Network's proposals for the 2009 Undertaking to address these issues will be contained in the relevant submission to the QCA.

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### **3. AMENDMENTS TO THE 2005 UNDERTAKING**

#### **3.1 INTRODUCTION**

As indicated above, the key objective for QR Network's 2008 Undertaking is to ensure the regulatory principles underlying QR's 2005 Undertaking are preserved for the short period until a new QR Network access undertaking (the 2009 Undertaking) can be approved by the QCA.

Accordingly, the 2008 Undertaking is in the same structure as the 2005 Undertaking in that:

- Parts 1 to 10 of, and the schedules to, the 2005 Undertaking carry forward to the 2008 Undertaking subject to the amendments summarised below; and
- The Standard Access Agreements for Access Holders and Operators have been retained subject only to very minor amendments to reflect QR Network as the contracting party and to ensure that QR Network retains a consistent legal exposure under both agreements.

Sections 3.2 to 3.14 summarise the substantive amendments to the 2008 Undertaking (including Standard Access Agreements) relative to the 2005 Undertaking. A detailed list of these amendments is provided at Attachment B.

The submission does not provide information on a number of consequential amendments which have been made to the 2005 Undertaking and the Standard Access Agreements. These amendments are set out in the marked-up versions of the 2008 Undertaking and Standard Access Agreements and are summarised below.

- References to QR and Network Access in the 2005 Undertaking have generally become references to QR Network;
- In respect of the ringfencing arrangements in Part 3, references to QR have generally been revised to a "Related Party of QR Network";
- References to specific QR business groups and positions within and arrangements between QR, QR Network and the QR business groups have been updated to reflect their current status;
- References to QR's Chief Executive Officer have generally been amended to QR Network's Executive General Manager; and
- In some places, the "Commencing Date" has been amended to "30 June 2006" for arrangements which should carry forward from the beginning of the regulatory period covered by the 2005 Undertaking, rather than the Commencing Date for the 2008 Undertaking.

#### **3.2 PART 1 - PREAMBLE**

No substantive amendments have been made to this Part.

### **3.3 PART 2 – SCOPE AND ADMINISTRATION**

The main amendments to the 2008 Undertaking, relative to the 2005 Undertaking, have been made to this Part and are summarised below.

#### **3.3.1 Scope – Clause 2.1**

##### Access to land not owned by QR Network – 2.1(c) and (f)

References to Third Party Access Seekers have been amended to include all Access Seekers (i.e. to include a Related Party of QR Network).

The change affects only QR Operational Business Groups (including those within QR) and requires of them the same arrangements for Access to land not owned by QR Network (including land owned by QR Operational Business Groups other than the Access Seeker).

In addition and consistent with the provisions of the 2005 Undertaking, the 2008 Undertaking provides a right for Third Parties to access land essential for the operation of rail services, even if this land is held by a QR business other than QR Network.

##### QR Network to provide electricity supply if requested – 2.1(h)

As indicated at section 2.4.3 above, QR Network will be responsible for the supply of electric energy to all Access Holders. Notwithstanding, QR Network recognises that some stakeholders may have a concern regarding the supply of electric energy to Third Parties in the circumstance where the supply contract is held by another QR business group.

Accordingly and for the avoidance of doubt, QR Network has included an amendment to this clause to deal with the circumstance where another QR business group holds the supply contract.

#### **3.3.2 Review of Rail Infrastructure – Clause 2.2**

A number of amendments have been made to ensure the operation of this clause consistent with the 2005 Undertaking under QR's new corporate structure. The amendments:

- Clarify that assignments of assets between QR Network and a Related Party of QR Network effectively represent a transfer of those assets;
- Recognise that under QR's new corporate structure responsibility for certain assets may be assigned to another QR business group. These assignments will be subject to arrangements whereby QR Network's compliance with the 2008 Undertaking will be recognised; and
- Clarify the operation of provisions relating to Private Infrastructure and Private Facilities connected to Rail Transport Infrastructure.

QR Network notes (and accepts) that the effect of the drafting is to hold QR Network accountable for the transfers of Rail Transport Infrastructure from QR (being the only

other owner of QR's Below Rail assets) to QR Network where such transfers are required to allow QR Network to provide the declared service.

### **3.3.3 Duration of Undertaking – Clause 2.3**

This clause has been amended to ensure that, if necessary, Reference Tariffs can be retrospectively applied should the QCA's approval of the 2008 Undertaking occur on or after 1 September 2008.

### **3.3.4 Contractual Arrangements – Clause 2.4**

This clause has been amended to reflect that QR Network is not a party to any rail haulage agreement.

### **3.3.5 Transitional provisions – Clause 2.5**

As indicated at Section 1.3 above, interpretative provisions have been included as a new Subclause 2.5.2 (the original clause has been renumbered as Clause 2.5.1) in circumstances where the transition from the 2005 Undertaking to the 2008 Undertaking results in some confusion regarding the working relationship between QR, QR Network and Access Seekers and Access Holders.

A detailed explanation of each of the amended paragraphs is provided at Attachment B.

## **3.4 PART 3 – RINGFENCING**

### **3.4.1 Organisational Structure – Clause 3.1**

#### Yard Control services – 3.1(b)(iv) and 3.1(c)(iv)

This clause has been amended to reflect the revised management arrangements for Yard Control services. As indicated at Section 2.4.3 above, QR Network has delegated responsibility for Yard Control services at all but the largest yards to that QR Operational Business Group which is the largest operator in the yard, pursuant to the TOM agreement.

At the commencing date of the 2005 Undertaking, Yard Control services had been delegated to the appropriate QR Operational Business Group at all locations except Callemondah. Since 1 July 2005 QR Network has resumed control of a number of other yards including:

- Acacia Ridge (intermodal);
- Fisherman Islands (coal and intermodal);
- Jilalan and Coppabella (coal);
- Paget, Townsville and Portsmith (freight); and
- Rockhampton (coal, passenger, freight and intermodal).

Rather than list these yards in the relevant sections within Clause 3.1, a new definition ("Major Yards") has been inserted in Part 10.

### Structural changes – 3.1(e)

Amendments have been made to reflect the type of arrangements which would occur under QR's new corporate structure.

#### **3.4.2 Accounting Separation – Clause 3.2**

As indicated at Section 2.4.3 above, QR and certain QR subsidiaries (including QR Network) will enter into a deed of cross guarantee.

Concurrent with this arrangement, the subsidiaries will apply for a class order relieving eligible subsidiaries from preparing and lodging audited financial statements under Chapter 2M of the *Corporations Act* (Class order 98/1418).

If the order is granted, QR Network will not be required to prepare audited general purpose financial reports. As the granting of the order is yet to occur, QR Network has reflected the following arrangements in the 2008 Undertaking:

- If the order is not granted, QR Network will prepare audited general purpose financial statements and a set of audited ringfenced accounts (Financial Statements) which provide information on the Central Queensland Coal Region separate to the rest of the network, and which reconcile to the general purpose financial statements. Both the general purpose financial statements and Financial Statements will be published.
- If the order is granted, the existing arrangements will continue to apply.

#### **3.4.3 Management of Confidential Information and Compliance and Enforcement – Clauses 3.3 and 3.5**

QR Network has made a number of amendments to this clause to give effect to the ringfencing obligations under the 2005 Undertaking under the revised corporate structure. In principle:

- QR and its subsidiaries will be obliged to comply with the ringfencing provisions;
- QR Network, rather than QR, will be accountable for QR's compliance with the provisions;
- QR Network will enforce the obligations on the other QR entities by way of a Confidentiality Deed between QR and QR Network and supported by an undertaking to the QCA from the QR CEO;
- QR Network will advise the QCA of any breach of these provisions (including by another QR entity) and the actions taken, or to be taken, to remedy the breach; and
- QR Network will maintain one ringfencing register recording those employees of QR subsidiaries to which it has provided Confidential Information.

QR Network confirms that the effect of the last principle is that ringfencing registers will not be maintained by other QR business groups.

A detailed explanation of each of the amended paragraphs is provided at Attachment B.

Where required, equivalent amendments have been made to the standard Confidentiality Deed (Schedule B).

### **3.5 PART 4 – NEGOTIATION FRAMEWORK**

No substantive amendments have been made to Part 4 and to Schedule C (Summary of Information Requirements).

An amendment to Schedule D (Preliminary and Additional Information) has been made to reflect the revised arrangements for access to land, per the discussion at Section 3.3.1 above.

### **3.6 PART 5 – ACCESS AGREEMENTS**

No substantive amendments have been made to Part 5, including Schedule E (Principles for Inclusion in Standard Access Agreement), other than to Clauses 5.3 and 5.4 to reflect the execution of new Access Agreements to replace Internal Access Agreements between QR Network and the QR Operational Business Groups.

### **3.7 PART 6 – PRICING**

The only amendment in relation to Part 6 relates to a matter which, as at the commencement date for the 2005 Undertaking was yet to be resolved in discussions between QR Network and the QCA.

QR Network confirms that the matter was referred for expert determination and resolved. Accordingly, Subclause 6.4.4 has been amended to:

- No longer require the matter to be referred for expert determination; and
- For the relevant drafting to reflect the interpretation of the expert.

A discussion of amendments to Schedule F is provided below.

### **3.8 PART 7 – CAPACITY MANAGEMENT**

No substantive amendments have been made to this Part, including to Schedules G (Network Management Principles) and M (Transfer Fee – Worked Example).

### **3.9 PART 8 – INTERFACE CONSIDERATIONS**

No substantive amendments have been made to Part 8, including to Schedules HA (Sample IRMP), J (Issues for EIRMR) and K (Operating Plan).

### **3.10 PART 9 – PERFORMANCE REPORTING**

No substantive amendments have been made to this Part, other than to:

- Subclause 9.2.1 to require that should audited general purpose financial statements be required for QR Network then they are published together with the Financial Statements. This amendment is discussed in further detail at Section 3.4.2 above.

- To recognise the appointment of QR's Compliance Officer in accordance with Paragraph 9.4(a) of the 2005 Undertaking.

No substantive amendment has been made to Schedule MB (Reporting to the QCA).

### **3.11 PART 10 - DEFINITIONS**

Consequential amendments have been made to the following:

- Access Agreement, per Section 1.4.2 and 3.6 above;
- Authority, to confirm for the avoidance of doubt that QR is not an authority that can lawfully exercise jurisdiction over QR Network (consistent with the relevant provisions); and
- Compliance Officer, per the discussion at Section 3.10 above.

New definitions have been included for the following terms:

- 2005 Undertaking;
- Internal Access Agreement;
- QR Network; and
- QR Train Services.

The definition for Network Access in the 2005 Undertaking has been removed.

### **3.12 SCHEDULE F – REFERENCE TARIFF SCHEDULES**

A number of amendments have been made to Schedule F:

- To remove Paragraphs 3.1(b) and (c) of Part B relating to the QCA's approval of QR's DAU on maintenance costs. This process has been completed, the relevant amendments have been incorporated in the 2005 Undertaking and the associated obligations have been discharged.
- To remove Clauses 3.2 to 3.19 of Part B relating to QR's Proposed Schedule F Amendment, as this process has been completed and the relevant amendments have been incorporated in the 2005 Undertaking.

### **3.13 SCHEDULE FB – MAINTENANCE OF REGULATORY ASSET BASE FOR THE CQCR**

A minor amendment has been made to Paragraph 2.3.4(c) to reflect the fact that QR Network is currently in breach of the provision in the 2005 Undertaking regarding provision to the QCA of a Procurement Policy document.

The revised drafting ensures that the breach is carried forward to the 2008 Undertaking and reported in accordance with Part 9. QR proposes to address this issue as part of its development of the 2009 Undertaking.



### **3.14 STANDARD ACCESS AGREEMENTS**

QR Network has made only one substantive amendment to the Standard Access Agreements, in respect of the liability of QR Network to Customers. The amendment is restricted to clauses 14 to 17 of Schedule B of the Operator Standard Access Agreement.

The general purpose of this amendment is to ensure that, in an environment where access and rail operations will be undertaken by separate legal entities, QR Network is subject to a consistent liability exposure under either the Operator Standard Access Agreement or the Access Holder Standard Access Agreement.

A detailed discussion of the reasons for the amendment is provided below. Further comments on specific issues raised by Asciano as part of the QCA's consultation process are provided at Attachment F.

#### **3.14.1 Background**

Until 1 September 2008 QR National Coal and QR Network are part of a single legal entity (QR Limited). Accordingly, internal 'contracts' such as the Internal Access Agreements between the two QR business groups are not legally enforceable.

Currently, QR's contractual relationship with Customers is via the haulage agreement. It is the haulage agreement, rather than the Internal Access Agreement, which sets out the contractual liabilities and entitlements of QR vis-à-vis the Customer.

Under the new arrangements, QR is creating new and separate agreements between QR Network and QR (on behalf of QR National Coal) in which the Access Agreement becomes a legally enforceable document and QR Network is separated from the entity with the contractual relationship with the Customer (i.e. QR). Of interest in these circumstances is any change in the risk profile of QR Network, and particularly the extent to which QR Network is liable to the Customer for non-performance of access obligations or as a result of negligence.

#### **3.14.2 Regulatory Arrangements**

Under the existing regulatory arrangements, if QR Network has not provided access in accordance with the Access Agreement (for example as a result of breach or negligence) then it is liable for the direct costs of the counterparty to the Access Agreement, but it will not be liable for consequential and other economic losses such as loss of revenue. This is a standard approach for contracts for this type of service. In arriving at this approach, the issue of whether or not QR Network should be liable for consequential losses was debated at length during the UT1 process.

Under the approach:

- Liability for lost coal would be limited to the cost of production; and
- In the case of the goods carried, QR Network is afforded any protections that the operator receives from the customer such as requirements for insurance of the goods under the conditions of carriage (this is targeted at intermodal traffic where value of goods carried is less certain).

The 2005 Undertaking contemplates both Access Holder and Operator Standard Access Agreements with almost identical risk positions between the contracting parties.

### **3.14.3 The Coal Supply Chain**

In recent times, significant emphasis has been placed on how the coal supply chain operates and how the different parties within the supply chain directly impact upon supply chain performance. These parties include the operator, rail infrastructure provider, mine load-outs and the ports.

Coal industry stakeholders (such as in the Goonyella supply chain) have publicly highlighted the cost implications of supply chain performance and in correspondence to QR (and subsequently made public) have highlighted the magnitude of damages arising from non-performance of the supply chain in terms of lost revenue, lost profit and demurrage costs.

In response to these issues, there are several forums or activities that are occurring by agreement or otherwise in the supply chain which further emphasise the interdependencies that exist, including the link between below rail performance and coal throughput. These include the forums such as Integrated Planning Groups for the Goonyella and Capricornia coal chains and the Coal Master Plan.

The recent O'Donnell review into the Goonyella supply chain has further highlighted these interdependencies and has driven stakeholders to establish a central coordinating role aimed at the different supply chain members.

### **3.14.4 Exposure at Common Law**

Examples of instances where there may be a potential exposure to QR Network under the corporate restructure include:

- A derailment that occurs through the negligence of QR Network; and
- A lack of throughput due to insufficient capacity being installed by QR Network due to negligence in its assessment of capacity.

The Access Agreement already provides a consequence for such negligence in these (and other) situations, which is limited to the direct costs borne by the counterparty. Where the counterparty is an operator, this would include both their own direct costs and any costs that are borne by them as a result of the application of their haulage contract (again, likely to include direct costs but exclude consequential loss). Depending on the particular example, these direct costs could be quite significant. QR Network accepts the reasonableness of these consequences.

However, to the extent that QR Network does not have a contractual relationship with the Customer in terms of its performance as Access provider, as will be the case where QR Network is a separate legal entity, then QR Network will have a potential *additional* exposure in tort for negligence.

Where damages or injury occur to another party (e.g. the Customer) then the exposure in tort is likely to be not just for the direct costs, but also include economic loss (i.e. include consequential losses). This may be the case for a derailment

situation where the Customer's product is lost and there is a subsequent impact of further throughput causing lost revenue.

However, whilst ordinarily it is viewed in tort that in other circumstances, such as a general inadequacy in capacity, the creation of a successful claim would be more problematic, it is a concern that the linkages would be significantly strengthened by the nature of the supply chain and the proactive activities occurring to manage the supply chain interdependencies. In addition, QR National Coal's proposed new haulage agreement puts greater focus on how the Customer is able to get recourse for the Access provider's non-performance.

In view of the above, there is a potential that QR Network has a specific exposure to damage claims including economic loss under current arrangements that was not fully appreciated at the time the Operator Standard Access Agreement was prepared.

### ***3.14.5 Differential Treatment in Operator and Access Holder Agreements***

When the Access Holder Standard Access Agreement was created, it was recognised by both QR Network and the QCA that while QR Network would not have a direct contract with the operator, QR Network's actions could:

- Have a clear and direct impact on the operator; and
- That as a result, QR Network had an exposure for claims under common law from the operator in the event of negligence.

In recognition of the view that the Access Agreement was intended to be the vehicle for assessing consequences of such actions, specific provisions were included in the Access Holder Access Agreement for the Customer (as Access Holder) to indemnify QR Network against such claims. The effect of this indemnity is that in order for this indemnity to be accepted by the Customer, they must first address this issue in their haulage agreement.

However, similar provisions were not included in the Operator Standard Access Agreement as QR Network's potential exposure for claims under common law from the customer mine was not fully appreciated.

In view of the more clearly apparent links between QR Network's performance and consequences for the Customer, QR Network proposes 'mirror' provisions in the Operator Standard Access Agreement. The inclusion of such an indemnity would have the similar outcome of ensuring that the operator addresses this issue in its rail haulage agreement with the Customer.

To this extent, QR Network believes that the amendment is required to ensure that the originally contemplated risk position is maintained in QR's new corporate environment.

### ***3.14.6 Application for Transfer of Internal Access Agreements to External Access Agreements***

As indicated above, QR Network is not proposing to amend the new Access Agreements that are being transferred from the existing Internal Access Agreements. The purpose of the amendment is to ensure that the liability issue is addressed in an operator's new rail haulage agreements with Customers. If this issue were to be

adequately dealt with in the existing QRNational Coal rail haulage agreements it would have no effect on the total QR risk but would simply transfer this risk between the various entities.

As a result, QR Network is not seeking to retrospectively apply this provision in the creation of the new Access Agreements with QR that replace the existing Internal Access Agreements. However, this provision will apply to all future Access Agreements, including with QR on behalf of QRNational Coal.