

QRC

submission

Working together for a shared future

A large, stylized graphic of a leaf or petal, composed of several overlapping shapes. The outlines are in shades of grey and green. The central text is positioned over the lower part of this graphic.

Submission in response to:
QR Network's 2010 Draft Access Undertaking

To the Queensland Competition Authority
28 May 2010

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INTRODUCTION.....	4
→ QRC’s Position on QR Network’s draft UT3.2 undertaking:.....	4
→ Will the regime be effective following the proposed IPO privatisation?	5
1. PROCESS, TIMING AND PROPOSED LEGISLATION RELEVANT TO UT3	6
2. INTENT AND SCOPE.....	8
→ Duration of Undertaking (clause 2.1).....	8
→ Non-discriminatory treatment (clause 2.2).....	8
→ WACC as approved by the QCA deemed appropriate (clause 2.3 – Intent).....	9
→ Recognition of Coal Producer Rights (clause 2.3 – Intent)	9
→ Provisions for development of Draft Incentive Mechanism are too prescriptive (clause 2.6)	10
3. RING-FENCING ARRANGEMENTS.....	12
→ The need for greater transparency and accountability.....	12
→ Costing Manual.....	14
4. NEGOTIATION FRAMEWORK.....	15
4.1. Transparency of Access Applications.....	15
→ Access Seekers should demonstrate “network entry capability” and customer support	15
→ QR should not excuse itself for future breaches.....	16
→ Clarity is required regarding Available Capacity and the Capacity Notification Register	17
→ QR should not refuse to negotiate access rights on basis of a two year delay.....	17
→ Access Seekers should understand where they sit in regard to securing access.....	18
5. ACCESS AGREEMENTS	19
→ Timeframe for development of new form of access agreement is too long	19
7. CAPACITY MANAGEMENT	20
7.1. Capacity Allocation	20
→ Competing Applications definition requires minor amendment	20
→ Reordering of the queue on basis of NPV should not apply to coal services	20
→ Application of the Capacity Resumption clause requires clarification.....	20
→ Capacity Resumption is too easily triggered.....	20
→ There should be no maximum notice period for relinquishment and transfers	20
→ Transfers: the limitation regarding effects on Access Seekers requires clarification	21
→ Relinquishment fees and transfer fees provisions require review	21
→ Improving transfers: QCA draft decision 7.9.....	22
→ Information flow is required to support Customer Initiated Transfers:	22
→ Customer Initiated Transfer clauses contain disincentive to adopt new form of agreement	22
→ Extension of expiring Access Rights requires amendment	22



8.	INTERFACE CONSIDERATIONS.....	23
→	Clarification of non-contestable services	23
→	Railway Manager and Train Control Services	24
→	QR Network's Application of Margins on the Provision of its Services	24
9.	REPORTING, INFORMATION PROVISION AND COMPLIANCE.....	25
→	Performance Reporting Indicators (PRI's).....	25
→	PRI's for coal traffic on for each coal system (provided weekly)	25
→	PRI's Six monthly reports – consolidation of historic weekly plus the following.....	26
→	QCA able to request selected performance reporting.....	26
→	Additional maintenance reporting requirements	26
→	Compliance measures – penalties and incentives.....	27
→	Compliance measures – responsibility statements to be signed by independent directors	27
11.	COORDINATION AND PLANNING	28
→	Coal Rail Infrastructure Master Planning Forum: Clause 11.2.1(c)(v) and (vi)	28
→	CRIMP Forum consultation plan: Clause 11.2.1(e)	28
→	Updating the CRIMP: Clause 11.2.1(f)	28
→	Basis of the CRIMP: Clause 11.2.2(a).....	28
	Contracting for Capacity (Clause 11.3).....	28
→	Scaling back Conditional Access Holders: Clause 11.3(b)-(e).....	28
→	Clause 11.3(d)	31
→	Clause 11.3: Proposed addition to 'Contracting for Capacity': Varying from agreed performance criteria.	31
→	No Fetter: Clause 11.4.....	31
→	Commitment to the timely implementation of agreed LTS proposals	32
	Feasibility Studies (including – concept, pre-feasibility, feasibility and early works)	32



INTRODUCTION

The Queensland Resources Council (QRC) is a non-government organisation representing companies that have an interest in exploration, mining, minerals processing, gas and energy production. It is the resource industry's key policy-making body in Queensland, working with all levels of Government, interest groups and the community.

As the peak industry body representing Queensland's mining and energy industries, QRC has been actively involved since the inception of the QCA and played a constructive role in the regulatory regime which regulates a number of key monopolies, including QR's below-rail operations, whose performance fundamentally shapes the efficiency of the Queensland resources industry. It is important to note that the QCA plays an essential role in managing the adverse consequences of monopoly excess which could effectively undermine the global competitiveness of Queensland's resource industries – QRC acknowledges the difficulty and significance of this task.

QRC provides this submission to the QCA in order to assist in the assessment of QR Network's 2010 voluntary draft access undertaking (UT3.2), which was submitted by QR Network on 15 April 2010. This submission should be read in conjunction with QRC's other submissions to the QCA relating to:

- Reference tariffs and Schedule F (7 May 2010);
- Securing investment in coal rail Infrastructure – Minimising Monopoly Power (28 May 2010); and
- proposed amendments to the QCA Act (which will be provided to the QCA following imminent discussions with the State Government).

These industry submissions have been developed in close consultation with QRC's membership. QRC has also engaged in consultation with QR Network on a range of specific issues – this approach is welcomed by industry and QRC appreciates the efforts of the QR Network personnel involved.

QRC is grateful to the QCA for providing an extension of time for submissions. However, even with the additional time provided to stakeholders, the timeframes for consultation have been a genuine constraint on industry's ability to propose comprehensive recommendations on QR's entire UT3.2 draft access undertaking. As such, QRC has sought to focus submissions to address the most significant matters from industry's perspective – specifically, matters associated with access, vertical integration and investment/abuse of monopoly power.

QRC continues to seek a thorough, and timely, consideration of QR Network's proposed UT3.2 replacement access undertaking. Industry acknowledges the considerable task of assessing the range of proposals and offers its assistance in order to achieve the timely finalisation of this process. As such, QRC anticipates further discussions between QR Network, QCA and other key stakeholders and considers that this will provide a useful means of accelerating the review process.

→ QRC's Position on QR Network's draft UT3.2 undertaking:

QRC Position

QRC strongly suggests that the QCA **not approve** the draft UT3.2 undertaking in its current form.

QRC's rationale for suggesting that the QCA not approve QR Network's draft UT3.2 undertaking as submitted is outlined in further in detail within QRC's submissions.



→ **Will the regime be effective following the proposed IPO privatisation?**

An overarching industry concern is the extent to which the regulatory framework will be effective following the proposed privatisation of QR's coal operations in central Queensland as a vertically integrated business. We note that the report, "*Additional observations on competition policy in the context of the Queensland coal systems*" (October 2009), which was commissioned by QR (to support a vertically integrated QR), in which Professor Allan Fels AO states:

I think that it is beyond contention that a vertically-integrated QR, in the absence of an access regime, would have an incentive to deny access to its downstream competitors. (page 5)

In particular, there is a question about whether the access regime is effective at preventing foreclosure, and a question about the intensity of the incentive to foreclose downstream competition. I am not in a position to answer these questions conclusively (page 5)

I have no particular experience with the regime in Queensland, so my comments here ought to be considered in that light (page 5)

The forthcoming privatisation process heightens QRC's long-held concerns regarding the vertically-integrated nature of QR's coal rail business – in that the perverse incentives afforded by a non-aligned ownership structure will no longer be constrained by majority Government ownership. It is within this context that industry has cautiously approached the proposed replacement access undertaking. As clearly recognised by Professor Allan Fels AO (October 2009):

In assessing the current access regime, the primary difficulty for the Government is that QR is still a public-owned corporation. It is thus somewhat difficult to predict how the access regime will interact with private ownership (page 6)

It is important to note that genuine separation of QR's above- and below-rail central Queensland operations, combined with a government and/or industry based ownership model (aligned ownership) of the monopoly below-rail network, would directly address a number of industry concerns.

QRC considers that the regulatory environment must:

- Ensure coal infrastructure assets maximise the efficiency of Queensland's rail-to-port coal supply chain and recognise the importance of aligning ownership interests and incentives across the supply chain.
- Maintain the international cost competitiveness of the State's export coal industry to promote the timely development of the State's coal resource – which generates royalties, employment and economic activity to the benefit of all Queenslanders.
- Enhance competition in the above-rail sector.
- Appropriately promote operational (ideally structural) separation of QR's above-rail operations (which are essentially contestable), from influencing the monopoly below-rail business or promote the extraction of inefficient monopoly rents.

Industry does not consider that these outcomes will be delivered under the proposed IPO of an integrated above- and below-rail coal business – nor do we consider that QR's proposed UT3.2, in its current form, will materially mitigate the genuine risks to achieving a competitive environment for third-party access and investment which is not subject to monopoly rents.

In the absence of appropriate ownership and structure, industry is reliant on a 'second best' policy response to mitigate the *worst* aspects of the proposed model. QRC is reliant on the QCA and Government's proposed measures to *minimise* the worst aspects of the non-aligned ownership model.



1. PROCESS, TIMING AND PROPOSED LEGISLATION RELEVANT TO UT3

QRC notes that the target date for finalisation of the UT3 regulatory process, provided by s147A(4) of the QCA Act as stated on the QCA's Notice of Time Periods, is 29 November 2010. In the event that the QCA proposes to adopt any earlier timeframes, QRC considers that the process adopted must consider the possible outcomes of a range of related processes which are proceeding in parallel, including:

- the State Government's foreshadowed amendments to the QCA Act. QRC anticipates that an exposure draft Bill will be available in the near future, which amongst other changes may include proposed amendments such as:

- Non-discrimination obligation – such that vertically-integrated access providers must not unfairly discriminate between access seekers in negotiating with access seekers, or between access holders in providing access.

QRC notes that amendments will be needed to QR Network's proposed non-discriminatory treatment clause (Clause 2.2) – refer section 2 of this submission.

- Access charges to only recover those costs reasonably attributable to the regulated service, to prevent anti-competitive cost-shifting, cross-subsidies and margin squeezing.
 - QRC considers that a transparent review process (including a stakeholder consultation) of the appropriateness of the derivation and subsequent use of any future costing manual (including allocators) should be specifically included within Part 3 of the undertaking. Indeed, this would be consistent with the QCA process employed during the development of the initial 2002 costing manual. This approach would be welcomed by the QRC and is outlined further in section 3 of this submission.
- Strengthening the ability of the QCA to impose financial penalties on an access provider in the event of a failure to provide information requested by the QCA.
 - This measure is consistent with QRC's previous submissions to the Queensland Government during previous reviews of the QCA Act. QRC considers that Part 9 should include various measures to address compliance, including provision of information. Section 9 of this submission outlines further reporting and compliance measures.

- the State Government's foreshadowed legislative amendments which will effect the corporate governance framework of the newly created QR National (given its proposed vertically integrate structure – including above- and below-rail operations for the central Queensland coal network). QRC anticipates that additional detail and an exposure draft Bill will be available in the near future. These amendments may provide for:

- the majority of directors of QR Network's Board to be independent directors.
 - QRC suggests that directors, including the chairperson, should be independent of the QR Group in order to be 'genuinely' independent. In addition, QRC considers that the constitution of QR Network must be amended such that directors of QR Network are explicitly required to make decisions in the interests of QR Network (not the QR Group) – refer to section 3 of this submission;



- a requirement that access agreements between QR Network and its related entities be approved in advance by the QR Network Board.
 - QRC suggests that the governance arrangements should provide that any decision which relates to a related QR party should be made solely by the genuinely independent directors of QR Network (with non-independent directors being automatically conflicted from decisions relating to above-rail or related party matters) – QRC's views are outlined in section 3 of this submission.
- independent directors to not approve an access agreement with a related party unless the directors are reasonably satisfied that the agreement is on an arm's length terms.
- Independent directors to not approve an investment decision unless they are satisfied that the decision does not discriminate between above-rail operators, or discriminate against coal producers that intend to contract with third-party above-rail operators. Section 3 proposes mechanisms to address incentives of a vertically integrated QR in regard to investment decisions.
- the State Government's announcement that it is considering a revision to the declaration under s97 of the QCA Act for central Queensland coal network rail infrastructure – specifically, amending the *Queensland Competition Authority Regulation 2007*. A consultation paper and exposure draft has been released. Consultation is scheduled to be completed by mid June with a formal Regulation to be implemented thereafter.
 - QRC notes that depending on the ultimate form and scope of the declaration, there may need to be corresponding amendments to QR Network's undertaking to ensure the intent of the access undertaking is maintained.
 - At this time, QRC has commenced a submission to the Queensland Government on the proposed declaration and will provide the Authority with a copy to assist in its assessment of UT3.
- the National Competition Council's assessment of the application for the central Queensland coal network to be declared under Part IIIA of the *Trade Practices Act*, and the foreshadowed application for certification of the State Access Regime that applies to the Queensland Rail Network under the QCA Act.
 - QRC notes that the timing of this process is unclear at this point in time – the National Competition Council may seek to undertake these assessments in parallel and finalisation may follow the QCA's approval of UT3.

The QCA will need to take these processes and proposed legislative amendments into consideration prior to the approval of QR Network's replacement undertaking, or, to the extent that processes are not finalised prior to the approval of UT3, develop formal review processes within the approved undertaking itself, to enable yet to be resolved matters to be given adequate consideration.

QRC considers that reliance on s139(2) may not deliver the intended policy outcome. For example, the proposed amendments to the QCA Act may not be inconsistent with the approved undertaking. QRC considers that the QCA needs to establish, through the undertaking, an ability to impose amendments related to the above processes. Alternatively, approval of the undertaking should be deferred until the outcomes of these important processes are known.



2. INTENT AND SCOPE

→ Duration of Undertaking (clause 2.1)

QRC supports QR Network's proposed termination date of 30 June 2013 for the central Queensland coal network access undertaking. QRC notes Queensland Government will seek to provide commercial and regulatory certainty during the transition (privatisation) period by use of Ministerial provisions contained in the *Infrastructure Investment (Asset Restructuring and Disposal) Act 2009*.

QRC supports the proposed approach of the new non-central Queensland coal network business (QR GOC), which is to submit an undertaking following the approval of UT3. QRC suggests that this process should be more than a mere extraction of existing provisions relating to this region into a new document. Rather, the process should be seen as an opportunity to fully assess the appropriate terms of an undertaking tailored to the needs of this region: a process which we would suggest has not previously been adequately undertaken.

In particular, if the final approved UT3 does not contain a robust and repeatable methodology to determine the Western System coal reference tariffs (and we strongly submit that it should) then such a methodology must be developed under the new GOC undertaking. QRC would appreciate if the QCA could verify these arrangements, within any forthcoming Decision, and ensure the transitional provisions outlined in clause 12.5 are appropriate.

→ Non-discriminatory treatment (clause 2.2)

Third-party above-rail operators must be confident that QR Network will not discriminate against them, as above-rail market participants (both current and future) will not invest nor will coal producers take the risk to enter into contracts with them unless there is sufficient confidence in the treatment of third-party operators. As such, the undertaking should:

- Promote a genuine competitive process in the above-rail market, rather than processes that protect individual above-rail competitors;
- avoid entrenching non-price barriers to entry or operation; and
- minimise transaction costs associated with obtaining access to the below-rail network through efficient and timely processes and arrangements for all operators.

QRC considers that it is necessary to undertake additional measures in the Undertaking that promote competition in the above-rail market by ensuring that the integrity of the competitive above-rail process is not compromised through QR's vertically integrated structure.

A particular concern in this context is the proposed provision which suggests that QR Network may not discriminate between Access Holders "except where there is an express provision to the contrary in the Undertaking or, in respect of an Access Holder, in an Access Agreement with that Access Holder". QRC is concerned that the current drafting could validate unfair discrimination in favour of a related party by virtue of the inclusion of such provisions in the related party Access Agreement. While it is accepted that QR Network may be bound to the provisions of a signed Access Agreement, QRC considers that QR Network should undertake not to enter into any Access Agreement with a related party which provides for discrimination in favour of that party (other than as allowed for under the undertaking).



QRC welcomes QR Network's acceptance of the principle that the Undertaking requires a general non-discriminatory clause. However, QRC is concerned with the limitations around the drafting as proposed by QR Network.

QRC would expect that an effective non-discrimination clause should:

- be limited only to the extent that any discrimination has been endorsed by the QCA. That is, where specifically allowed for in the undertaking, for example, provisions relating to re-ordering of queues, price differentiation based on cost of risk, and allocation of train paths based on approved scheduling rules;
- Specifically include 'Extensions' within the scope of the clause (that is, cl. 2.2(a)(i));
- Empower the QCA to investigate and identify potential cases of discrimination, based on the QCA's assessment of the reasonableness of claims or evidence/information uncovered during QCA auditing processes. The scope of the audit should not be limited to a very narrow list of processes, nor where a complaint has been made by an Access Seeker/Holder, as the QCA may be better placed to uncover matters for further investigation in its own right.
- Provide for the QCA to undertake an audit into QR Network's decision making procedures, including selection (or non-selection) of preferred (non-preferred) investment options through the master planning process.
- Provide a level of accountability within QR's vertically-integrated structure that ensures wider confidence that decision-makers are operating within established processes and principles.

QRC is pleased that the State Government has indicated the need for a general non-discrimination obligation for vertically-integrated access providers to be included in the QCA Act.

→ **WACC as approved by the QCA deemed appropriate (clause 2.3 – Intent)**

QRC considers that there needs to be a clear statement within the intent that the rate of return commensurate with the commercial and regulatory risks is the WACC as determined by the QCA (including through the proposed assessment of access conditions) – and this rate is deemed commercially viable for QR Network investment. QRC notes that in the absence of this, there are limited protections in the Undertaking about the rate of return and the role of the QCA during negotiations for certain investments to expand the network.

→ **Recognition of Coal Producer Rights (clause 2.3 – Intent)**

QCA has, since the very first access undertaking process, made regulatory decisions which have explicitly recognised the importance of empowering end users. These include, but are not limited to:

- Customer Initiated Capacity Transfers;
- Rights of Customers to extend Access Rights on expiry;
- Queuing and contracting principles based on port capacity (which is held by Customers rather than Operators); and
- Master Plan endorsement of projects.

However, as currently drafted clause 2.3 does not provide any recognition of the importance of end customers within the overall context of the intent of the Undertaking. QRC considers that the intent of the Undertaking should explicitly include an additional item within clause 2.3, which clearly articulates



the rights of coal producers (which does not relate to the rights of the customer in their capacity as a direct Access Holder or Access Seeker).

QRC provides the following as a suggested provision within the Intent of the Undertaking:

- *“provide end customers with efficient processes to gain access to the network on fair terms and to provide a pathway through which end customers can promote timely and efficient investment in the network”.*

→ **Provisions for development of Draft Incentive Mechanism are too prescriptive (clause 2.6)**

The key elements of clause 2.6 are that:

- QR must submit draft amendments which provide an incentive to operate, and invest in, the Rail Infrastructure efficiently and to do so in a way that promotes efficiency of a coal supply chain.
- The proposed amendments must be confined to the revenue cap adjustment provisions within the undertaking.
- The mechanism must provide an equal probability that QR Network can obtain a positive or negative incentive.
- The mechanism must not have potential to reduce System Allowable Revenue by more than 5%.

QRC's key concern with this drafting is that it has the effect of constraining the QCA and forcing an outcome into limited boundaries. This is not appropriate given that the work of considering the incentive mechanism has not begun, so it is not practical to form any judgement regarding the appropriateness of the boundaries. More specifically:

- Confining the amendments to the revenue cap adjustment mechanism may not be appropriate. Some incentives may best be reflected in, or require consequential amendments to other sections of the undertaking (for example, the Pricing Principles).
- The requirement for an equal probability of a positive or negative increment is not appropriate for a number of reasons:
 - It requires subjective judgement, involves significant challenges in terms of evaluation, and is prone to creating a dispute as to whether the mechanism proposed by QR Network, or determined by the QCA, meets this explicit requirement within the Undertaking.
 - It requires an assessment of QR Network's expected performance, and would result in a perverse incentive for QR Network to seek to demonstrate a high likelihood of poor performance.
 - Some elements of an incentive package only logically relate to a negative adjustment (for example, failures to meet Part 4 timeframes) and others only relate to positive adjustments (for example, a bonus based on transfer requests processed).
- The 5% limit may not be appropriate in all cases. For example, if QR Network was to lose 7% of its revenue under Access Agreements due to breach or negligence of those agreements, we do not consider that the revenue cap adjustment mechanism should seek to reimburse some of that loss.



QRC does agree that the exposure to QR Network should have some reasonable limit, other than where revenue is lost under specific provisions contained within Access Agreements. The concept of symmetry in the arrangements is also supported. However, for the reasons discussed above, the current drafting is too prescriptive and binds the QCA prematurely.



3. RING-FENCING ARRANGEMENTS

→ The need for greater transparency and accountability

Based on the limited information available, QRC is concerned about the approach to the treatment of confidential information and the apparent failure of compliance systems to ensure that confidential information is being treated with the appropriate diligence that should be undertaken by a vertically integrated monopoly. QRC notes that:

- There have been at least two breaches relating to the inappropriate release of confidential information from within QR Network, although QRC is unaware of the outcomes of the investigations (including the extent to which this information has been accessed by QR's above-rail operations);
- The most recent Audit Report available (released during February 2009 – over 15 months ago) around QR Network's decision making and confidential information compliance found that over 13% of employees leaving QR Network to work in other areas of QR **did not** have exit certificates (required to highlight the responsibilities of disclosing confidential information after leaving QR Network); and
- the most recent Audit Report (released February 2009) notes that "*there was insufficient information to confirm that QR Network was fulfilling its obligation to debrief employees in relation to the management of confidential information*".

Effective ring-fencing arrangements need to address the reality and perception that QR's below-rail business could seek to make decisions that are detrimental to third-party operators. These arrangements also remind key employees of the obligations and relevant sanctions. Fundamentally, ringfencing is a top-down management issue starting at the QR Network Board, finishing at desk officers who have access to certain confidential information.

There are direct and indirect effects on competition in the absence of meaningful and transparent ringfencing arrangements.

- **Direct** – inappropriate disclosure of confidential information and decision making which limits the ability of third-party above-rail operators to effectively compete with QR's above-rail business.
- **Indirect** – perception that competition is not fair in the above-rail market, meaning that it is less likely that there will be new entrants willing to deal with such a skewed commercial operating environment.

QRC supports protecting confidential information, and proposes several improvements – these generally surround how QR Network is structured, makes and implements decisions, and publicises its policies:

- **Structure Matters** – to the extent that the QR Network Board and senior management have an obligation to maximise the profitability of the proposed IPO of QR National, there remains an intrinsic and clear conflict of interest. Indeed, there is a fiduciary obligation to maximise the value of the vertically integrated privatised QR business, rather than for the QR Network entity alone (as identified within QR Network's constitution). This arrangement would effectively create a significant 'hole' in even the best ringfencing arrangements created around QR Network.



As such, QRC considers that genuine separation must provide for the following arrangements:

- A genuinely independent QR Network Board, with a policy that no directors of other related QR businesses will participate in any decisions relating to business of the QR Group.
 - QRC welcomes the Government's recognition that the majority of directors of QR Network's Board should be independent directors (of course, these directors should be independent of the QR Group in order to be considered 'genuinely' independent).
- QRC considers that the constitution of QR Network must be amended such that directors of QR Network are explicitly required to make decisions in the interests of QR Network (not the QR Group).
- QR Network to be obligated to have an independent Investment Committee, again without influence from QR related parties or directors with an association with the QR Group, with a clear obligation to seek to invest in the network to promote the timely deployment of infrastructure, promote a least cost rail solution for coal customers, and promote competition. Naturally, these obligations would be subject to protections regarding QR Network's commercial interests (refer to QRC's submission *Securing investment in coal rail Infrastructure – Minimising Monopoly Power*).
- As noted by Allan Fels (October 2009, page 10), vertical integration combined with non-aligned shareholders can lead to investment strikes (selectively or otherwise)

One of the challenges for infrastructure investment in a regulated environment is that private shareholders demand growth and commercial returns from assets, whereas regulators are obligated to drive asset returns down to the WACC. When a business is integrated, these divergent views can result in a capital strike.

It is clear that the QCA will need to consider how the Undertaking will ensure that the QR Group is not able to selectively invest in expansion projects based on the level of QR's above-rail contractual participation (that is, investing at the regulated WACC to provide an incentive to QR's above-rail operations). Avoiding investing at the WACC could be misused to favour QR's above-rail negotiation position.

- **Commitment from the QR Group to protect confidential information**
 - Where confidential information is provided from QR Network to another part of the QR Group (senior management or Board), then the recipients should be required to sign additional statements demonstrating their understanding of the restrictions imposed on their dealing with the information and the consequences of their failing to adhere to these restrictions.
 - QR Network to commit to develop, and submit to the QCA for approval, a ringfencing and decision making response manual, which clearly outlines timeframes and specific actions when there is a breach of the ringfencing arrangements.
- **Demonstrating awareness**
 - QR Network should produce a document explaining the organisation's obligations under the Act and Undertaking, and list the circumstances in which it is appropriate to release confidential information, with specific examples. QCA should approve the document and it should be publicly available.



- All employees (or relevant contactors) involved in access-related functions (or likely to receive confidential third-party information) must be required to sign annual statements of responsibility which outline their obligations and possible sanctions. New employees should be required to sign upon commencement and those leaving to another QR business area should again sign prior to exiting QR Network.
 - Periodic compulsory information sessions or online modules would be useful to reinforce these obligations.
- **Importance of ongoing monitoring and transparency** – An independent and public audit is important to provide a higher degree of transparency to all participants (above-rail operators, Government – especially if no longer a shareholder – and coal companies).

QR Network's compliance with its obligations to maintain effective ringfencing arrangements should include:

- Audits of QR Network's compliance with its ringfencing conducted by an independent auditor appointed, paid for, and managed by the QCA. The audits should apply to the entire QR Group. QR Network (and the QR Group) should be obliged to comply with information requirements of the auditor in the timeframes specified by the auditor.
- An audit of the proposed independent QR Network Investment Committee is also essential; to ensure that investment decisions are being made in the interests of QR Network, rather than the favouring QR's above-rail operations.
- Furthermore, the results of the annual external audit should be made public, with an agreed timetable for implementation by QR Network to address any identified issues.

→ Costing Manual

QR Network's Costing Manual plays an important role in providing confidence to coal producers and third-party above-rail operators that the QR Group is not gaining an inappropriate commercial advantage over competitors through its vertically integrated structure – to the extent that the allocators are being used to determine inputs associated with cost components of the reference tariffs (that is, it helps to prevent cost shifting).

It is therefore important that the approach to cost determination and allocation is audited to verify both the methodology outlined in the costing manual and that QR Network is adhering to the methodology in its cost allocation and therefore pricing of services.

QRC considers that the Undertaking should contain an explicit review process, including stakeholder consultation, on the development of QR Network's Costing Manual. The process should examine the appropriateness of the derivation and subsequent use of any future costing manual (including allocators). Indeed, this would be consistent with the QCA process engaged during the development of the initial 2002 costing manual.



4. NEGOTIATION FRAMEWORK

4.1. Transparency of Access Applications

QRC's submission of 14 November 2008 raised a number of interrelated concerns regarding the transparency of the Access Application process and queuing. Improved transparency regarding the queue for capacity is important:

- for effective whole of coal chain planning.
- because the absence of effective, transparent and enforceable queuing provisions provides opportunities for a vertically integrated rail business to discriminate in favour of its above rail business.
- for planning, scheduling and financing new mine projects and mine expansions. The Indicative Access Proposal (IAP) alone does not provide sufficient information to enable an Access Seeker to make a reasonable assessment of the likelihood of securing access, of the likely timing, or of the key factors which may influence that timing. The "advice in respect of the existence of other Access Seekers" provided under Clause 4.3(c)(iv) does not contain sufficient information to enable an Access Seeker to understand its position in a queue or the likely timing of receiving access.
- for assessing the 'compression' risk faced by an Access Seeker as a result of the proposed new provisions of Clause 11.3(b)-(e).
- in order for an Access Seeker to have any basis on which to exercise the right given in Clause 4.6(d) regarding an Access Seeker higher in the queue taking an unreasonable amount of time to negotiate an Access Agreement.
- because there is simply no point in the Undertaking having pages of provisions regarding queuing rules if neither Access Seekers nor the QCA are in a position to determine whether the rules are being followed.

As was noted by the Authority in the draft decision, "the queuing mechanism was included in the 2006 undertaking to provide third party access seekers with some protections to ensure that QR Network did not give preference to related parties when negotiating access agreements in circumstances where capacity was constrained". As QR remains vertically integrated, and the network remains capacity constrained, the importance of the queuing mechanism has not diminished.

QRC proposes a number of changes to the undertaking to address this issue, some of which relate to Clause 4, and others which relate to Clause 7. As the issues first arise in the context of the IAP, they are discussed under this section.

→ Access Seekers should demonstrate "network entry capability" and customer support

QRC suggested previously that "Access Applications should be accompanied by written confirmation from the owner or owners of any loading facility involved in the Access Application that they have been informed of the existence of the application". This could be refined to allow confirmation to come from any one of the owners in the case of a shared loading facility (of which there is just one in Central Queensland).



If an Access Seeker does not have the support of the owner of a loading facility, there is a high likelihood that:

- the Access Application will later be withdrawn; or
- QR Network will ultimately reach a conclusion that the Access Seeker “has no reasonable likelihood of utilising Access at the level sought” (4.6(iii)); or
- the Customer, or its preferred Operator, will later lodge a Competing Application and the original application will not proceed.

In each case, progressing the application without determining the support of a Customer is a waste of resources for QR Network. In the same way as QR Network seeks to confirm “network exit capability”, it should confirm network entry capability, and a likely source of a product to transport.

The proposed amendment would also prevent an operator from contracting all available capacity on a section of a mainline in order to force mines/proposed mines in the relevant region to contract with that operator. While provisions regarding Competing Applications and Customer Initiated Transfers have been designed to protect mines from such behaviour and promote competition in above rail markets, these provisions cannot be accessed unless:

- in the case of Competing Applications, the origin of the train service is located at the minesite,
- in the case of the Customer Initiated Transfer, the Access Holder has already secured a haulage agreement or commenced services (as this is required in order to establish a Customer, as defined).

Requiring that an Access Application demonstrate the support of a Customer will also allow the Customer to either (i) lodge its own Access Application or (ii) seek the cooperation of the operator to provide information to the Customer regarding the progress of the application. This would mean that the new Clause 4.1(f), which places QR Network in the position of having to provide information directly to a Customer, could be deleted.

We note an alternative suggestion to QRC’s proposal, which is that Access Seekers be required to state in their Access Application that they have made the potential customer or owner of the loading facility aware of the application. This is clearly a second best option which is open to (i) communication failures and (ii) abuse by operators. A requirement that Access Applications be accompanied by a statement from the customer that it is aware of the Access Application is a simple step (particularly for an operator who has actually informed the customer of the application) and we do not understand why a less effective approach would be preferred.

→ **QR should not excuse itself for future breaches**

QRC also supports the QCA’s draft decision 4.4, regarding the deletion of the words in Clause 4.3(c)(iv): “*provided that a failure to do so is neither a default under this Undertaking nor does it invalidate or prejudice any Access Agreement entered into by QR Network provided that QR Network has acted in good faith*”. QRC does not consider it appropriate that QR should establish an obligation within the Undertaking, then excuse itself in advance for anticipated failure to comply with the obligation. As was noted by the Authority in the Draft Decision, “the proposed amendment would significantly weaken the effectiveness of the queuing mechanism by limiting the enforceability of the undertaking against QR Network”. We note QR’s suggestion that this clause simply brings together



clauses which existed in the previous undertaking and does not alter the position. We have not assessed whether this is correct but, in any case, suggest the deletion of this statement.

→ **Clarity is required regarding Available Capacity and the Capacity Notification Register**

The IAP includes an Initial Capacity Assessment. This assessment includes information regarding whether there is Available Capacity, and if there is not, provides an outline of the Infrastructure Enhancements required to provide the requested Access Rights (or of the studies required to determine this). For most IAP's prepared in the current environment, QRC expects that Available Capacity will not exist. Although Available Capacity is now defined as including Existing Capacity and Planned Capacity, Planned Capacity is limited to Infrastructure Enhancements which QR Network is committed to construct. This is far more limited than the amendment proposed in the draft decision. As QR Network does not generally 'commit to construct' Infrastructure Enhancements without first securing Access Agreements, it is likely that all Existing Capacity and Planned Capacity is currently contracted, and that this will remain the case. Therefore the inclusion of Planned Capacity does not extend the coverage of the term 'Available Capacity' in the way which QRC proposed and the draft decision supported.

This means that the capacity which is conditionally offered under IAPs will generally relate to Infrastructure Enhancements to which QR Network is not currently committed, and which is therefore not Available Capacity. In this context, QRC does not understand why Clauses 4.5.1(e)(v) and 4.5.1(f) are focused on Available Capacity only.

Similarly, in regard to the Capacity Notification Register (Clause 4.7), QRC does not understand why the mechanism to get on this register is limited to a reduction in Available Capacity. As was noted above, the capacity which is being negotiated following an IAP is unlikely to fit the definition of Available Capacity, therefore, it is difficult to understand the circumstances in which the Capacity Notification Register will be used. We note the comment of the Authority in the draft decision that "access seekers whose access requests cannot be met due to lack of available capacity will be placed on the CNR". This is sensible but we cannot see how this will occur under the current drafting, except in the limited and unlikely case where Available Capacity initially exists, then is no longer available.

→ **QR should not refuse to negotiate access rights on basis of a two year delay**

Clause 4.5.1(b)(i) specifies that QR Network will not be obliged to negotiate with an Access Seeker if QR Network cannot provide the requested Access Rights within the coming two years. This limit should be deleted or at least extended. Lead times of more than two years in providing additional capacity have been the norm in Central Queensland for nearly a decade. This is an unfortunate situation for the coal industry, the state and the nation. Refusing to negotiate for the next available capacity in these circumstances creates additional uncertainty and further delays for mine developments which are dependent on these access applications.

QRC is also concerned that this provision could be misused to put customers in a position in which they must accept QR Network's terms, or face delay to their mining projects. As the provision allows QR Network to delay engagement with customers, customers will have less time to assess QR Network's proposal and even less time to make the arrangements necessary to self-fund projects.

Also, it is not uncommon for mine development lead times to exceed two years. Clearly in this case, the inability of QR to provide access within the coming two years is irrelevant to the access application, yet, under Clause 4.5.1(b)(i), QR would not be obliged to negotiate access rights. Perversely, QR would only be obliged to negotiate with an access seeker whose mine development



has a lead time of more than two years if QR is able to offer access rights which the access seeker does not want.

QRC is not aware of cases of QR Network exercising this right and we see no reason why the undertaking should retain this provision.

A more appropriate provision may be to allow that, in cases where there is Available Capacity, QR Network may reorder the queue in favour of an Access Seeker who is able to utilise the Available Capacity significantly earlier than an Access Seeker higher in the queue.

→ **Access Seekers should understand where they sit in regard to securing access**

In regard to Clause 7, QRC previously proposed that limited details of the queue be made available to Access Seekers, and provided the following example:

Queue Position	Date of Access Application	Status (Access Application / Access Agreement)	Required capacity enhancement (excluding spurs)	Indicative access date
1	30 June 2008	Agreement	Blackwater – Bluff triplication	30 Mar 2010
2	30 July 2008	Application	Callemondah upgrade Phase 2	30 Mar 2011
3	30 Nov 2008	Agreement	Callemondah upgrade Phase 3	30 Mar 2012
4	30 Dec 2008	Application	Callemondah upgrade Phase 3	30 Mar 2012
5	etc			

Information such as the above should not raise concerns regarding confidentiality. The capacity enhancements list and the indicative access dates (which are the dates for completion of the enhancements) should already be available in the CRIMP, while the additional information regarding the dates of Access Applications which are in the queue to use that capacity, and the status of the application, do nothing to identify the Access Seeker or the customer. QRC sees no reason why a queue in the above format should not be available to Access Seekers, and considers this critical for the reasons set out at the beginning of this section.

In the draft decision, the Authority suggested that customers should seek information regarding the position in the queue from their train operator and “ensure that they are contracting with a train operator that is willing to pass the relevant information on to them”. QRC accepts this position. The intent of the amendments is to provide a basic level of transparency of the queue to the Access Seeker. If the Access Seeker is a train operator, the question of whether this information is passed to a customer is then a matter to be dealt with between those parties.



5. ACCESS AGREEMENTS

→ Timeframe for development of new form of access agreement is too long

QRC considers that the nine month timeframe allowed under Clause 5.2(n) for the development of new Standard Access Agreements which separates capacity issues and above rail operational issues is too long. QRC initially requested such agreements early in 2008. The nine month timeframe is likely to result in approval of these agreements in mid-2011, more than three years from when they were initially requested (and later if the submitted documents are rejected by the QCA or if final approval of UT3 occurs later than June 2010).

QRC suggests that:

- the date for submission of the agreements should not float with the final approval date for UT3.
- it is reasonable to expect that QR could prepare and submit these documents for approval by October 2010. This will result in final approval in December 2010 or, if the initial submission is rejected, by March 2011.



7. CAPACITY MANAGEMENT

7.1. Capacity Allocation

→ **Competing Applications definition requires minor amendment**

QRC welcomes the amendments to Clause 7.3.2 and to the definition of Competing Applications but suggests that the use of the term “mutually exclusive Access Rights” in the definition should be avoided as the Competing Applications may not be “mutually exclusive Access Rights” as that term is defined in the footnote to Clause 7.3.3.

→ **Reordering of the queue on basis of NPV should not apply to coal services**

QRC understands that the intent of Clause 7.3.4(d)(i)(B) is to ensure that access applications for coal carrying train services are not re-ordered against other access application for coal carrying train services on the basis of a differential NPV to QR. This is supported. However, the introductory words in Clause 7.3.4(d), “without limiting Clause 7.3.4(c)(iii)” have the effect of defeating this intention. QRC suggests that the condition in Clause 7.3.4(d)(i)(B) does need to limit Clause 7.3.4(c)(iii).

→ **Application of the Capacity Resumption clause requires clarification**

The inclusion of Capacity Resumption rules in the undertaking (Clause 7.3.5) is misleading as it suggests that QR Network has the power to apply these rules to all Access Agreements. In fact, this clause is ineffective as QR’s rights to resume capacity will be determined under each Access Agreement (and the terms do vary across generations of agreements). If the clause is to be retained, it should be reworded to reflect that it is simply a statement regarding the terms which QR Network undertakes to include in the UT3 standard Access Agreement.

→ **Capacity Resumption is too easily triggered**

In regard to the UT3 capacity resumption test itself, QRC maintains its view that threshold test should be reduced to no more than 85% over a twelve month period. QRC considers that the 90% threshold may be too easily triggered, particularly given that the experience of most coal producers in the period since ~2003 has been of coal supply chains which have been unable to deliver 90% of contracted tonnages. This arises from a combination of mine, above rail, below rail and port issues, which have been difficult to separate. Until whole of supply chain performance improves or identification of the causes of the shortfalls can be resolved, coal producers are understandably nervous about a 90% trigger level.

These concerns are heightened by the incentive which the integrated, soon to be privatised QR business may have to resume Access Rights. The resumption of Access Rights may trigger rights under haulage agreements for the above rail operator to reduce its obligations to the customer. To the extent that haulage agreements contain terms which are no longer attractive to the haulage operator, this creates an incentive to seek to have access rights resumed.

→ **There should be no maximum notice period for relinquishment and transfers**

QRC does not understand the purpose of clause 7.3.6(c) which specifies maximum, rather than minimum, notice periods for an intention to relinquish or transfer Access Rights. It would seem to be beneficial to the system, in terms of planning and coordination and, in the case of the transferee, mine development, if an Access Holder provided notice as soon as possible of an intention to relinquish or transfer, rather than withholding this information from QR Network. Clause 7.3.7(c) seems to discourage (in fact, prohibit) early notice. QRC suggests that these time limits should be removed entirely.



→ **Transfers: the limitation regarding effects on Access Seekers requires clarification**

Under clause 7.3.6(j)(vi), as currently drafted, it is possible that an Access Seeker may suggest that it has been adversely affected by a proposed transfer on the basis that, if the relevant capacity was not transferred, it may be relinquished and become available to the Access Seeker. Similarly, a current Access Holder may suggest that QR Network would be more able to satisfy its existing obligations if the capacity was not offered to the transferee. QRC understands that this is not intended. The addition of words such as “when compared to the capacity available for Access Seekers and QR Network’s ability to meet its obligations if the Access Rights had been retained by the transferor”.

→ **Relinquishment fees and transfer fees provisions require review**

Clause 7.3.6(k) contains three pages of interlinked clauses and formulae. The time allowed for submissions on this draft undertaking is not sufficient to allow a considered review of these arrangements, and further comments will be provided after the submission date. Preliminary comments are:

- The relaxation of transfer fees for transfers of less than two years (in the form of a zero deemed relinquishment fee) in the Central Queensland Coal Region is strongly supported. As drafted, it appears that this relaxation will be made available under all Access Agreements, although the introductory words to Clause 7.3.6(a) place this in doubt. QRC considers that transfers should be encouraged in order to encourage efficient, aligned and highest value use of the Central Queensland Coal Region infrastructure. As was noted in the QRC’s 2008 submission:
 - UT2 and UT3 Access Agreements have strong take or pay: Access Holders need to be able to mitigate exposures.
 - Take or pay under UT1 Access Agreements provides little or no incentive to transfer ‘excess’ contracted capacity and make it available to the system. This excess capacity does become available as ad-hoc paths, but this does not assist in system planning, in creating Available Capacity for longer term contracting, or in maximising the use of the system.
 - Flexible arrangements will encourage the transfer of capacity to its highest value use, maximising export earnings and royalties.
 - A more accessible transfer mechanism would provide a new mine which is in a queue with an opportunity to accelerate its development, by encouraging an existing Access Holder to transfer capacity.
 - Efficient transfer mechanisms would promote the rationalisation of the existing misalignments between rail and port contracts.

Given the significant benefits of efficient transfer mechanisms, QRC strongly supports QR’s proposal to cease charging transfer fees for transfers of less than two years duration. QRC suggests that the undertaking should be amended to clarify that this is applied to all generations of Access Agreements. We note that the numerous references to the removal of these fees in the draft decision do not suggest that this reform would apply only to new access agreements.



It is important to note that achieving this clarification would not require the amendment or renegotiation of existing agreements. Rather, to give effect to this improvement:

- QR Network would commit (in the Undertaking) that it will not collect transfer fees in these circumstances, notwithstanding that it may be entitled to under the terms of Access Agreements.
- The revenue cap provisions would be amended to ensure that QR Network is not deemed to have collected this revenue.

QRC supports the principle that the undertaking should not seek to frustrate the terms of existing contracts. However, in this case, Access Holders and their customers can only benefit from the proposal, while QR Network will be no worse off due to the revenue cap mechanism.

→ **Improving transfers: QCA draft decision 7.9**

The QCA's draft decision 7.9 required a number of amendments to clarify how short term transfers would be accommodated under System Rules. QRC supports these requirements but is unable, in the time allowed for submissions, to assess whether QR has complied with this draft decision. We note that QR has indicated, in table 3.1 of Volume 1 of its April submission, that it has complied with this draft decision, however, the table describes this issue as being 'Customer Initiated Transfers', which is not the subject of the recommendations in draft decision 7.9.

→ **Information flow is required to support Customer Initiated Transfers:**

In order for the Customer Initiated Transfer provisions to be effective, it is necessary that customers actually know what Access Rights are held for which they are the Customer. QR should be required under the undertaking to provide this information to a Customer on request.

→ **Customer Initiated Transfer clauses contain disincentive to adopt new form of agreement**

Clause 7.3.7 allows (subject to conditions) a Customer to transfer Access Rights held for that Customer to an Access Seeker. Clause 7.3.7(a)(ii) ensures that, when such a transfer is made, the new Access Agreement will include the same take or pay and relinquishment fee provisions as the original agreement. The purpose of this is to ensure that Customers are not moved to the more onerous current take or pay provisions simply by virtue of transferring Access Rights.

QRC and its members are deeply concerned at QR's proposed new caveat within this clause, being "unless it is a Capacity Access Agreement". The effect of this would be to provide a strong disincentive against customers moving to this form of agreement, and largely frustrate the ability of customers to move to the new form of agreement which QR commits to prepare under Clause 5.3(n).

→ **Extension of expiring Access Rights requires amendment**

QRC welcomes the amendments to Clause 7.4 which clarify that the right to extend expiring Access Rights is available to the Access Holder, the Customer and an alternative railway operator. QRC also welcomes the clarification that this right applies to coal carrying train services in the Western System. In order for the amendment to have its intended effect, QRC suggests that exclusions in regard to coal carrying train services contained in Clauses 7.4(b) and (c) must also apply to the Western System.



8. INTERFACE CONSIDERATIONS

→ Clarification of non-contestable services

A critical requirement for the genuine ability for industry to engage in the construction, and possible ownership, of rail infrastructure which interconnects with the existing rail network is addressing potential barriers which QR Network could use to frustrate this process.

QRC considers that the following non-contestable services will be required to be included within the scope of the undertaking (including efficient cost, if any, and timing obligations) in order for there to be a genuine level-playing field for the interconnection of rail infrastructure to the existing network. Matters that will need to be considered as non-contestable services include:

- Access to information:
 - Access to all network standards and related information (including network management data);
 - Access to and provision of details of current versions of drawings and asset data information; and
 - Relevant information in relation to the existing network (including in-house design studies, site surveys and other geotechnical investigations).
- Participation in engineering strategies:
 - Acceptance of maintenance regime processes and strategies;
 - Providing advice on the details of relevant maintenance, performance and renewal strategies to assist in development process;
 - Acceptance of maintainability criteria, performance measures, acceptance criteria, and reliability criteria processes, both project specific and system-wide application;
 - Network integration and co-ordination services;
 - Compliance checking of statutory and regulatory obligations;
 - Operation, maintenance, renewal and performance input into design development;
 - Identification of issues related to coordination with other rail infrastructure projects; and
 - Network integration and co-ordination services.
- Railway Operations:
 - System scheduling – agreement of appropriateness of system assumptions in relation to proposed train service specifications;
 - Administration and co-ordination of possessions ;
 - Agreements for utilisation of existing operational land and possible rail infrastructure assets; and
 - Compliance checking of statutory and regulatory obligations (such as development approvals) as well as providing support during these approval processes.
- Safety services that are non-contestable in nature and are associated with protecting the integrity and safety of the coal network:



- Access to the network, including audit and compliance reviews of project safety management systems and arrangements; and
- Acceptance of proposed changes, including designs, drawings and operational layout safety, within engineering safety management processes.

→ **Railway Manager and Train Control Services**

QR Network is uniquely placed in its current role as the Railway Manager and operational provider of Train Control services, to potentially frustrate industry's ability to directly invest in the network. Both activities are considered fundamental to the effective, safe and streamlined operation of the Queensland coal network and both services are not considered to be economically duplicable within an operationally integrated to such a significant degrees that they are unable to be separated from QR Network's current operating and management role of the Queensland coal network. QRC would appreciate the QCA's views on how to best approach these services.

→ **QR Network's Application of Margins on the Provision of its Services**

QR Network's approach of seeking additional margins for simply performing its core business activities is a concern to QRC. The creation of margins for specific activities, which may already be included within efficient allocations for System Wide and Regional costs, needs to be carefully considered in terms of the incentive to reduce costs or otherwise improve productivity.



9. REPORTING, INFORMATION PROVISION AND COMPLIANCE

→ Performance Reporting Indicators (PRI's)

QRC proposes the following framework for the reporting of performance indicators which will enable coal producers, above-rail operators and future access seekers to evaluate the cost effectiveness of the below-rail service being delivered by QR Network – greater transparency will also increase QR Network's accountability.

The following table outlines the necessary reporting requirements (including appropriate timing) for various indicators.

→ PRI's for coal traffic on for each coal system (provided weekly)

Track and Asset Quality

- Percentage of each system of the network subject to temporary speed restrictions (reported by mainline and branchline)
 - Specific segments to be recorded on a temporary speed restriction register
 - Percentage of each region of the network subject to permanent speed restrictions (reported by mainline and branchline)
 - Specific segments to be recorded on a temporary speed restriction register
 - The impact of speed restrictions on sectional running times and transit times
 - Average impact on transit time of speed restrictions over the period as a % of expected transit time with no speed restrictions
 - Total number of train services in a system affected by speed restrictions
 - Track Quality Index for each system (and date of survey)
 - Average actual Below Rail transit Time for each system
 - Number of Signal Faults
 - Number of electric overhead faults
-
-

Track Availability

- Contracted coal train paths
 - Scheduled coal train paths
 - Used coal train paths
 - Theoretical train paths available to coal
 - Paths for planned maintenance
 - Paths for unplanned maintenance
 - Details of the unplanned events such as speed restrictions applied at short notice, unplanned track closures
 - Other paths lost
 - % if available paths not used
-
-

Train Cancellations

- Number and percentage of trains cancelled by mines
 - Number and percentage of trains cancelled owing to QR Network
 - Number and percentage of trains cancelled owing to operators
 - Number and percentage of train cancelled by unloading destinations
 - The number and percentage of Train Services scheduled in a Weekly Train Plan cancelled due to a reason which can be directly attributable to an access holder (which would include cancellations attributable to a Railway Operator appointed by the Access holder).
-



→ **PRI's Six monthly reports – consolidation of historic weekly plus the following**

Track and Asset Quality

- 4 X 6 monthly forecast of planned maintenance

Track Availability

- 4 X 6 monthly forecast of theoretical weekly train paths available to coal excluding maintenance
- 4 X 6 monthly forecast of weekly train paths available accounting for planned maintenance
- 4 X 6 monthly forecast of weekly train paths available but not used
- The number and percentage of Train Services scheduled in the MTP as a proportion of the total contracted Train Paths

Performance historic and forecast

- Report of performance against weekly forecast tonnes and train services for the previous six months
- 4 X 6 monthly weekly forecast of hauling capacity by tonnes and train services
-

→ **QCA able to request selected performance reporting**

QRC considers that the QCA should have the ability to require QR Network to produce geographic PRI's if requested by the Authority. Development based on every single individual line sections would appear to be unnecessary – however, if certain parts of the network are considered to be 'at risk' or have appear to be underperforming for no apparent reason, then it would be prudent for the QCA to be able to require improve performance reporting to understand what is driving unusual performance observations.

→ **Additional maintenance reporting requirements**

Furthermore, QRC considers that there is considerable merit in the QCA's own consultant recommendations to include specific public reporting measures to address due to the condition of the network in terms of ballast maintenance – the GHD Report (2009, 62-63) states that:

This situation should not be permitted to continue and we recommend that QR be required to report input and output measures related to individual activities as well as overall performance of the infrastructure.

Measures to be reported publicly include:

- *The impact of speed restrictions on sectional running times and transit times*
- *Kilometres of completed work and the costs in the activities of ballast cleaning, stone blowing, shoulder cleaning and resurfacing*
- *Details of the unplanned events such as speed restrictions applied at short notice, unplanned track closures*

We have sought to include these abovementioned indicators due to their obvious importance to monitoring the condition of the network.

QRC has included certain speed restriction and the impact of planned and unplanned maintenance within the above tables. Clause 9.2.4 (a) should be amended to include a breakdown of activities of ballast cleaning, stone blowing, shoulder cleaning and resurfacing. Moreover, QRC's submission on reference tariffs outlines QRC's approach to maintaining the condition of the network (which may require additional reporting requirements and ongoing monitoring).



→ **Compliance measures – penalties and incentives**

In terms of providing penalties to address perverse incentives of a vertically integrated monopoly, Professor Allan Fels (October 2009) correctly notes that:

The stronger the incentive, the more draconian the regulatory remedy must be to prevent foreclosure (Page 9)

QRC maintains that the QCA needs some realistic powers to compel regulated entities to provide information. QRC suggests that the QCA needs a careful gradation of powers of compulsion over a regulated entity, where that entity appears to be trying to frustrate the Authority's analysis. A series of appropriate corporate fines, penalties and deadlines would help to focus executive management within regulated entities on the importance of getting undertaking processes, including compliance, right.

The current framework provided by the QCA Act of overbearing personal penalties, while appropriate in very limited circumstances, are unlikely to promote a co-operative compliance approach by regulated service-providers.

QRC looks for the QCA to outline its preferred approach to this proposal, although industry considers that in principle, the penalties should operate to:

- *Penalise QR Network's profit* – that is, revenue from financial penalties should be included within any revenue-cap process thereby reducing the allowable revenue to be recovered from access charges.
- *Reward QR Network personnel* – such that, individual QR Network personnel are financially rewarded for the identification of certain breaches of the Undertaking (in particular, those relating to ringfencing obligations). Similarly, the undertaking should include a requirement that QR Network will protect staff from any formal, or informal, retribution that relates to notification of breaches of the undertaking.

→ **Compliance measures – responsibility statements to be signed by independent directors**

QRC considers there should be a greater emphasis placed on compliance by means of a general requirement that certain information provided to the QCA should be co-signed by an independent director of QR Network to be a true and accurate. Clause 9.6(c) is insufficient as currently drafted because:

- it materially limits the scope of matters that require responsibility statements (for example, it excludes breach reports to the QCA (clause 9.4) and does not include investment decisions made by QR Network); and
- there is no proposed role for the independent QR Network Board members to ensure that compliance is given suitable priority within the organisation.



11. COORDINATION AND PLANNING

QRC welcomes the initiatives reflected in Clause 11 regarding coordination of supply chain planning and development. However, the QRC's suggests the following improvements:

→ **Coal Rail Infrastructure Master Planning Forum: Clause 11.2.1(c)(v) and (vi)**

As the Coal Rail Infrastructure Master Planning Forum has no decision making authority, there is no need to specify that the QRC and the QCA attend "as an observer only". Also, the QRC is just one example of an industry representative group: customers may also wish for a representative of the Gladstone Coal Exporters Executive, or of a Supply Chain Group, or other industry representative groups, to attend, subject to reasonable limits on numbers. The undertaking should not preclude representatives from such groups being invited to attend the Coal Rail Infrastructure Master Planning Forum. There is a risk that, by being too prescriptive, the Undertaking may unnecessarily prevent attendance by relevant industry representative groups.

→ **CRIMP Forum consultation plan: Clause 11.2.1(e)**

Drafting only: The term "Coal System Master Planning Forum" is incorrectly used: should be "Coal Rail Infrastructure Master Planning Forum".

→ **Updating the CRIMP: Clause 11.2.1(f)**

Under the current draft, the requirement to provide an updated CRIMP is triggered if "that plan has substantially changed". Therefore if QR Network fails to update the CRIMP, the CRIMP will not have "substantially changed" and there will be no obligation to provide an updated CRIMP.

QRC's suggested drafting will reflect an obligation to update the CRIMP where changes in Supply Chain Operating Assumptions or other factors relevant to the development of a CRIMP would reasonably be expected to result in any material change to the CRIMP.

→ **Basis of the CRIMP: Clause 11.2.2(a)**

The QRC proposes including a requirement that QR Network must "ensure that the Coal Rail Infrastructure Master Plan is based on and is consistent with the Supply Chain Operating Assumptions, including any Supply Chain Operating Assumptions determined pursuant to 11.1.3(c)." This drafting provides clarity and comfort that the Supply Chain Operating Assumptions will be carried into the CRIMP and that the dispute resolution process referred to in Clause 11.1.3(c) has a meaningful purpose.

Contracting for Capacity (Clause 11.3)

→ **Scaling back Conditional Access Holders: Clause 11.3(b)-(e)**

These sections have the effect of limiting or scaling back the Access Rights of a Conditional Access Holder in cases where the change in Capacity provided by Infrastructure Enhancements is less than was expected. QRC members have differing views regarding the appropriateness of this provision. The provision seeks to protect existing users of the infrastructure from the effect of poor decision making by QR and to place an onus on QR and Conditional Access Holders to ensure that sufficient infrastructure enhancements are completed to accommodate new contracts. An alternative view is that Access Seekers are not in a strong position to assess QR's decision making and do not control approval of projects, which existing users will assess through the customer endorsement process.

However, QRC members do agree that, in the event that the Authority determines that the concept is appropriate, amendments to the current draft provisions are required in order to clarify the processes,



provide some protections to Conditional Access Holders and provide incentives for QR to avoid putting customers in this position. The importance of these amendments is clear when the potential impacts of the provisions on Conditional Access Holders are considered. In the worst case, a Conditional Access Holder may have constructed a new mine which is uneconomic at the reduced level of capacity which is provided after application of these clauses.

The process for 'scaling back', and the process for providing the Conditional Access Holder with Access Rights following the scaling back, must be very clear. QRC suggests that the following issues must be addressed in order to protect the interests of the Conditional Access Holder:

- More clarity is required regarding the measurement of the change in Capacity:
 - The references to 'change in Capacity' should be replaced with 'change in Existing Capacity'. The current drafting refers to the change in 'Capacity' arising from completion of the project, but because the definition of Capacity includes Existing Capacity AND Planned Capacity, the completion of a planned Infrastructure Enhancement cannot increase Capacity (as Capacity already includes the Planned Capacity arising from the planned Infrastructure Enhancement). Therefore the reference should be to the change in Existing Capacity resulting from the completion of the Infrastructure Enhancement.
 - The appropriate measure of capacity provided by a project is the capacity of the system after completion of the project (specifically, the Existing Capacity at that time), less the Existing Capacity which the system would have had if assessed in the absence of the completed Infrastructure Enhancement, using consistent Supply Chain Operating Assumptions. This is not the same as simply assessing the increase in the capacity of the system, because changes in Supply Chain Operating Assumptions may have consumed capacity during the construction phase. For example, in the following scenario (table below), there is an additional 10mt of capacity on completion of a project (C-A) but the project itself added 13mt of capacity (C-D) while changes to system assumptions reduced capacity by 3mt (A-D). In this case the Infrastructure Enhancement should be assessed as having provided 13mt of capacity out of the planned 15mt. Where there is a shortfall in the change in capacity against the Planned Capacity relating to the Infrastructure Enhancement, a Conditional Access Holder should not have its Access Rights scaled back to also accommodate a reduction in Existing Capacity caused by a change in Supply Chain Operating Assumptions.

A	'Existing Capacity' prior to project based on system assumptions at the time of project commitment	80mt
B	Capacity planned upon completion of project	95mt
C	'Existing Capacity' upon completion of project (reflecting current system assumptions plus the enhancement)	90mt
D	Existing Capacity at time of completion of project (assessed using current system assumptions at time of completion of project, but excluding the enhancement itself)	77mt

We note that QR Network could adopt the methodology suggested above under QR Network's proposed drafting, but we suggest additional clarity to ensure that this is the intention.



- Timeframes should be defined for carrying out the assessment of the Change in Capacity in order to provide some certainty to the Conditional Access Holder. In the absence of a demonstrable shortfall in capacity within the defined timeframe, there should be a presumption that the expected capacity has been provided and the Conditional Access Holder should then have certainty of its Access Rights.
- The means by which the Conditional Access Seeker gains the Access Rights which were scaled back requires more clarity. Specifically:
 - The capacity assessment should result in a portion of the Conditional Access Rights becoming unconditional and the remainder continuing as Conditional Access Rights (rather than simply cancelling the Conditional Access Rights which were not satisfied). The holder of the Conditional Access Rights should then have the option of cancelling the remaining Conditional Access Rights without penalty, or retaining the rights.
 - The holder of Conditional Access Rights which are not satisfied as planned should not need to return to a queue or become subject to issues such as queue reordering, but instead should receive access to the next increment of relevant capacity which becomes available in the system (whether resulting from completion of further enhancements or otherwise). As this may impact on later Conditional Access Holders, all Conditional Access Rights need to be conditional:
 - on the capacity delivered by the enhancement which is expected to be relevant to those rights (as proposed by QR) AND
 - On QR Network first 'making good' its obligations to prior holders of Conditional Access Rights to the extent of shortfalls on previous enhancements.
 - The standard access agreement should provide that QR Network will immediately (upon becoming aware that any enhancement has not delivered the expected increase in capacity) take action to provide further Capacity to deliver the Conditional Access Rights, including undertaking a further Capacity Analysis to determine the projects which must be undertaken, submitting such projects to customers for approval and, if approved, undertaking the projects. This 'catch up' expansion should be part of QR Network's 'obligation to invest' (Clause 7.5.2). Access Conditions (Clause 6.5.2) should not be sought for such projects even if they were sought for the original enhancements – that is, the capacity shortfall should be remedied by projects undertaken at the WACC, included in the RAB and not underwritten by specific customers). In the context of a situation where an Access Seeker has gone through all of the necessary process to gain access, has potentially invested in a mining project which will utilise that access, and now finds itself in a position of having reduced Access Rights due to a failure of QR Network to assess the additional capacity which will be provided by an Infrastructure Enhancement, it is unreasonable to expect the Access Seeker to rejoin a queue or to face a further process of negotiation with QR Network.
 - The purpose and effect of Clause 11.3(e) is unclear and potentially inconsistent with clause 11.3(b). This statement should not be required if it is accepted that Conditional Access Holders do not return to the queue after an Access Rights Reduction. At least it should be amended to read "subject to clause 11.3(b)(D) and 11.3(b)(E)".



QRC also suggests that QR Network should face financial incentives to avoid creating situations in which these clauses are applied. This will be addressed in QRC's submissions in regard to the deferred process set out in Part 2 of the undertaking.

→ **Clause 11.3(d)**

This item appears intended to allow QR Network to enter into new Access Agreements on terms which would result in QR Network being unable to comply with its obligations under Clause 11.3(b). QRC sees no reason why QR Network should need to retain such a right, except in regard to Access Agreements signed prior to the effective date of the Undertaking.

→ **Clause 11.3: Proposed addition to 'Contracting for Capacity': Varying from agreed performance criteria.**

QRC considers that Access Agreements should document the areas in which a coal producer and its above rail operator could impact on system capacity, and should set out the agreed performance requirements of the coal producer and above rail operator in regard to these parameters. These standards would be negotiable for individual agreements. Access Agreements should then contain provisions which allow QR Network to adjust Access Rights in the event that an Access Holder departs from the contracted performance indicators and impacts on system capacity (particularly on a sustained basis and where the departure has a material impact on system capacity). The intention would be to ensure that no Access Holder can impact negatively on QR Network's ability to meet its commitments to other Access Holders by departing from the contracted performance standards.

QRC suggests that QR Network should reflect this principle in Clause 11.3 and should include provisions dealing with this issue in the Standard Access Agreements.

→ **No Fetter: Clause 11.4**

The 'No Fetter' clause appears to have the effect of relieving QR Network of its obligations under Clauses 11.1 and 11.3. This could mean, for example, that QR Network may choose, on the basis of its commercial objectives, to:

- Ignore the outcome of the Clause 11.1.3(c) dispute resolution regarding Supply Chain Operating Assumptions (when preparing the CRIMP or when contracting).
- Fail to meet its reasonable endeavours obligation in Clause 11.3(a) regarding contracting with parties who have network exit capability.
- Fail to perform any of the steps in Clause 11.3 (including failing to assess the Change in Capacity, failing to reduce Access Rights, failing to give the first position in the queue to a Conditional Access Holder whose rights are reduced).

QRC considers that clause 11.4 should be deleted as QR Network has retained adequate protections and discretions (including the reasonable endeavours obligation in 11.3(a)) within Clauses 11.1 and 11.3.



→ **Commitment to the timely implementation of agreed LTS proposals**

Following the completion of the Long-Term Solution, if all affected stakeholders (including QR Network) agree to a course of action which requires an amendment to QR Network's Undertaking, QR Network should commit in the Undertaking to promptly submit to the QCA for approval a draft amending undertaking incorporating in appropriate detail all relevant amendments to this Undertaking which are reasonably necessary to implement the agreed position as is relevant to the QR Network's Access Undertaking.

Feasibility Studies (including – concept, pre-feasibility, feasibility and early works)

QRC considers that industry participants should have the have a right to conduct (fund and control) feasibility studies and that this should be reflected within the access undertaking. Any replacement access undertaking should provide for QR Network to be required to facilitate these arrangements via a new standard agreement (Feasibility Study Facilitation Agreement).

This will provide access to certain information and services (a number of these may be relevant to those identified within section 8 of this submission – refer *Clarification of non-contestable services*) and will deal with confidentiality requirements to consult with QR Network and the sharing of outputs. Ideally:

- QR Network should be a party to consultant's contracts even if not funding (so that QR Network is entitled to rely on the consultant's work).
- The Undertaking should provide some recognition of funding of such studies in the context of queuing arrangements. In general terms, those who fund studies will be given priority (subject to other relevant considerations such as port capacity) provided that the opportunity to fund was make available to all other coal producers in a queue (or if no queue exists, to all other companies holding mining tenure of potential relevance to the project).

QR Network may fund and control a study (the below all reflect current arrangements used by QR Network):

- Without any form of underwriting.
- With a prior Master Plan vote to include the cost the Regulated Asset Base. In this case, the Undertaking should set out an industry consultation process in regard to the scope and outputs of the study.
- With other forms of underwriting by industry. In this case, a Feasibility Study Funding Agreement should set out the funding mechanism, priority rights, scope, control of the study, access to outputs.

The outputs of Feasibility Studies should be available:

- To QR Network in all cases.
- To industry where industry participants have controlled and funded the study, or where QR Network has proceeded with industry underwriting (that is, with a prior Master Plan vote to include the cost the Regulated Asset Base or with other forms of underwriting by industry as outlined above).



Parties contracting for Feasibility Studies (industry or QR Network) should be required to contract on a basis which ensures that potential developers of the projects (industry or QR Network) are entitled to rely on the output of the studies.

The following diagram outlines industry's preferred approach to feasibility studies.

